THE FUTURE OF CUNY

THE LESLIE H. ARPS MEMORIAL LECTURE
A Whitewater Legacy: Running the Rapids of Constitutional Law
PATRICIA M. WALD

The Pataki Administration’s Proposals to Expand the Death Penalty

January/February 2000
Contents

OF NOTE.................................................3

ANNUAL MEETING OF THE ASSOCIATION: PRESIDENT'S ADDRESS
by Michael A. Cooper..........................6

PORTRAIT UNVEILING: MICHAEL A. CARDOZO........13

THE LESLIE H. ARPS MEMORIAL LECTURE:
A WHITENWATER LEGACY:
RUNNING THE RAPIDS OF CONSTITUTIONAL LAW
by Hon. Patricia M. Wald.........................20

The Committee on Professional and Judicial Ethics
FORMAL OPINION 1999-5: LAWYER'S Obligations
REGARDING DISPOSITION OF ORIGINAL WILLS........42

FORMAL OPINION 1999-6: DUTY OF LOYALTY........47

FORMAL OPINION 1999-7: JOINT REPRESENTATION; DUTY OF LOYALTY;
CLIENT CONFIDENCES AND SECRETS..................51

UNPARTNERING: AN OVERVIEW OF THE LEGAL AND ETHICAL ISSUES
by The Committee on Professional Responsibility....61

THE FUTURE OF CUNY, PART 1
REMEDIATION AND ACCESS:
TO EDUCATE THE "CHILDREN OF THE WHOLE PEOPLE"
by The Commission on the Future of CUNY........72

THE PATAKI ADMINISTRATION’S PROPOSALS TO EXPAND THE DEATH PENALTY
by The Committee on Capital Punishment........129

REVISITING THE CODIFICATION OF PRIVILEGES UNDER THE
FEDERAL RULES OF EVIDENCE
by The Committee on Federal Courts.............148

NEW MEMBERS........................................155

THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
THE ASSOCIATION SUBMITTED AN AMICUS BRIEF IN THE UNITED STATES Supreme Court in United States v. Morrison. Prepared by the Committees on Civil Rights (Ronald Tabak, Chair), Federal Legislation (Gregory Harris, Chair), Sex and Law (Kimberly Hawkins, Chair) and the Domestic Violence Task Force (Julie Domonkos, Chair), the brief urged the court to uphold Congressional power to pass legislation in the national interest to protect the civil rights of women against private acts of violence, especially given Congressional findings that state enforcement of laws against such acts of violence is inadequate and affects interstate commerce.

The brief argued that the civil remedy provisions of the Violence Against Women Act were properly enacted pursuant to a valid constitutional source of Congressional power and that the lower court’s decision represents a constricted view of national power that has been repeatedly rejected by the Supreme Court in upholding Congress’ exercise of power with respect to both purely economic matters and civil rights. Congress concluded, based on data compiled over four years, that violence against women is an economic and social problem that is national in scope and that requires a civil remedy on behalf of female victims. Specifically, Congress found that such violence has a major impact on the national economy, concluding that women who are raped or beaten by strangers or battered and abused by their domestic partners are impeded from going to work and do not earn to their full potential. It is estimated that domestic violence costs employers and the government billions in absenteeism, health care and social programs. Congress therefore concluded that the effect on interstate commerce was significant enough to require federal civil remedies in addition to those already existing on the state level.

The brief went on to argue that the Fourth Circuit erroneously interpreted the court’s decision in United States v. Lopez as holding that if intrastate activity is to be constitutionally regulated by Congress, the conduct itself must be economic in nature, no matter how substantial the conduct’s effect on interstate commerce. The Fourth Circuit therefore held that even if a non-economic activity substantially affects interstate commerce, it is beyond Congress’ reach.

The brief also argued that the analysis in the Fourth Circuit decision
also threatens to undermine the national commitment to civil rights protection exemplified by the Civil Rights Act of 1964. In enacting the civil remedy provisions of the Violence Against Women Act, Congress acted in accordance with the national interest and a national consensus pursuant to a valid grant of power under the Commerce Clause of the Constitution.

THE ASSOCIATION SUBMITTED AN AMICUS BRIEF TO THE NEW YORK State Court of Appeals in The People of the State of New York v. The Museum of Modern Art. Drafted by the Committee on Art Law (Herbert Hirsch, Chair), the brief is similar to an earlier version submitted to the Appellate Division, First Department in the spring of 1998. The case involves the attempt by the Manhattan District Attorney to subpoena works by Egon Schiele, on loan to the Museum of Modern Art, based on an investigation into ownership claims. The brief argued that Arts and Cultural Affairs Law Section 12.03 provides full and complete immunity from any legal process, civil or criminal, to works of art meeting the statutory requirement where a nonresident loan a work of art to a nonprofit organization for nonprofit exhibition in New York.

THE ASSOCIATION AND THE NEW YORK LAW JOURNAL HAVE EMBARKED upon a series of presentations by heads of federal agencies of great importance to New York City’s legal and business communities. The first two speakers were Securities and Exchange Commission Chair Arthur Levit (on November 15) and Federal Trade Commission Chair Robert Pitofsky (on December 15). Both Chairs made presentations and engaged in lively and informative question-and-answer sessions with audience members.
Recent Committee Reports

Banking Law
Report on S.3649, an Act to Amend the Banking Law in Relation to Certain Powers of State-Chartered Credit Unions

Report on S3552, an Act to Amend the Banking Law in Relation to the Submission of Fingerprints for Processing

Civil Courts/State Courts of Superior Jurisdiction
Comments on the Simplified Case Resolution Proposal

Federal Legislation
Amicus Brief: United States and Brzonkala v. Morrison, et. al

Legal Issues Pertaining to Animals
Report on S. 345/H.R. 1275, a Bill to Amend the Animal Welfare Act to Prohibit Interstate Movement of Live Birds for the Purpose of Fighting

President
Letter to the Editor Re: Response to “Some Lawyers Try and Make Nice” (NYTimes, Nov. 28, 1999)

Professional & Judicial Ethics
Formal Opinion 1999-05: Lawyer’s Obligations Regarding Disposition of Original Wills Held for Safekeeping where Testator Cannot be Located and the Lawyer is Retiring or the Firm is Dissolving

Formal Opinion 1999-06: Duty of Loyalty

Formal Opinion 1999-07: Joint Representation; Duty of Loyalty; Client Confidences and Secrets

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

Annual Meeting of the Association

Michael A. Cooper

I do not know why the framers of this Association’s Constitution provided for a stated meeting in November in addition to an annual meeting in May, but I am thankful they did, for the activities within the Association are so numerous and protean that waiting a full year to report on them at a meeting of the membership would pose an impossible task. It is hard enough to do so after six months. There is an additional reason for holding a meeting more frequently than once a year to which all 21,000 members of the Association are invited. The officers and the Executive Committee are stewards of the Association; we are accountable to the members, and one year is too long to wait to render that accounting.

Perhaps the most significant step taken since last May in the internal affairs of the Association has been the creation of a new law student membership category; the necessary by-law amendments were approved at the Annual Meeting in May. As Carol Sherman, Chair of the Executive Committee, has told you, we have already enrolled more than 300 law
student members, and I have talked to the entire first-year class at Cardozo Law School about our profession and the importance of becoming active in bar association affairs. The benefits of law student membership are mutual. The law students can learn about the legal profession and issues confronting the profession that either are not addressed at law school or are addressed from a limited, academic perspective. The Association benefits from law student membership for the same reason: they bring a fresh perspective. Moreover, law students can contribute significantly to committee work and, we hope, will continue as members after graduation, whichever path in the law they choose and wherever they pursue it.

Since I last addressed you, we have signed a lease for 12,000 square feet of rentable space in the Bar Building next door, which will give us sorely needed office space and permit us to relocate staff so that people who work closely together will have offices in close proximity to one another. The new space will also contain a much needed meeting room with a 130-seat capacity and modern audio-visual equipment that can be used in our expanding CLE programs.

Another step that is of enormous, though not visible, significance has been the installation of two new software systems, one for accounting and related financial functions and the other for membership, committees, catering and CLE programs. We will be able for the first time to capture information regarding members that will permit targeted mailings. Too many questions about member categories, interests and participation have heretofore either gone unanswered or required large amounts of staff time to compile.

We continue to work closely with the courts, both state and federal. Let me give you two examples. Everyone acknowledges the need for a simplified judicial procedure to resolve uncomplicated cases, and there has been a call for a procedure that, unlike arbitration and other forms of ADR, will permit a judicial disposition and that, unlike much litigation, will not be excessively costly and seemingly endless. A New York State Bar task force, working with Steven Crane, Administrative Justice of the Supreme Court, New York County, proposed such a simplified procedure. Our Committee on State Courts of Superior Jurisdiction and our Committee on the Civil Court recently collaborated in writing a report that noted some omissions and unintended risks in the proposal. The Chair of the State Bar Task Force and Justice Crane have both gone out of their way to thank the Association for our suggestions for improving the proposed procedure.

The other example relates to the federal courts. Practitioners in those
courts in the Southern and Eastern Districts of New York occasionally encounter judicial misconduct, such as abusive behavior or serious and chronic tardiness, that does not rise to the level of an impeachable offense, yet cries out for redress. An Ad Hoc Committee on Judicial Conduct appointed three years ago has proposed the creation of a small select committee that would receive in confidence complaints of judicial misbehavior, investigate the merits of those complaints and report those found meritorious to the relevant chief judge. I have met with Chief Judge Winter of the Second Circuit and Chief Judges Griesa and Sifton of the Southern and Eastern Districts, respectively, and they are supportive of our proposal, which we plan to implement for those courts in the next few months.

The committees of the Association continue to be active, sponsoring stimulating programs and issuing informative reports. Over the summer months I reviewed no fewer than 35 reports and comment letters on such diverse subjects as professional ethics, the Uniform Commercial Code, the State's superfund legislation and corporate tax shelters, and since Labor Day I've reviewed another 20 reports and letters.

Two committee projects deserve special mention. When the Mayor, for the second year in a row, convened a charter revision commission to achieve a transparently political objective, the Committee on New York City Affairs, chaired by the Association's man for all seasons, Alan Rothstein, issued a report decrying the process and critiquing the Commission's proposals. This year the electorate saw the so-called charter reform for what it was: a hasty effort by an unrepresentative body to modify the City's constitution for political ends, and the voters resoundingly defeated the Commission's ballot proposal.

The second committee project I wish to mention is a striking example of the very best of what this Association can do. The City University of New York has a long and proud history but has become the subject of controversy in recent years. Following a report by a mayoral task force, the CUNY Board of Trustees proposed an Amendment to the University's Master Plan that would make sweeping changes in governance, admissions and curriculum, including the elimination of remedial coursework in the University's senior colleges. I appointed a commission chaired by Stanley Grossman, a member of the Association and alumnus of City College, to study the proposed changes. The Commission included prominent educators and civic leaders, and it retained as reporter a former high-ranking Department of Justice official. The Commission conducted research, interviewed members of CUNY's administration and other educa-
tors, and in five months issued a report highly critical of the proposals to end remediation at the senior colleges. The report was the subject of a feature article in the New York Times and has been received with interest by the Board of Regents, which must approve the proposed Amendment. I encourage you to look at the report on our web site; I believe you will agree with me that it is insightful, measured and persuasive. The Commission expects to issue a second report before the end of the year addressing governance and financial issues.

I continue to be astonished by the high regard in which this Association is held in other countries. When a Justice of the Supreme Court of Canada to whom I was introduced last month was told that I was President of The Association of the Bar of the City of New York, he immediately observed that the Association is one of the “great legal institutions of the world.” We have earned that regard by reaching out to political, judicial and bar leaders in other countries and conducting comprehensive and thoughtful reviews of momentous changes in their legal and political institutions. One year ago a mission headed by former President Barbara Paul Robinson and including United States District Judges Sidney Stein and Barbara Jones journeyed to Northern Ireland to examine conditions in that country following the Good Friday peace accord. Their report on that mission was published in the July-August issue of The Record. Earlier this year a separate mission, headed by District Judge Leonard Sand, a former Vice-President of the Association, traveled to Hong Kong to study the constitutional and other legal consequences of the 1997 turnover of the government of Hong Kong by Great Britain to the People’s Republic of China. Judge Sand and his fellow mission members were able to compare what they saw post-turnover with a pre-turnover visit some of them had made in 1995. Hong Kong’s constitutional structure, called “One Country, Two Systems,” is unique, as are the legal issues it poses. The mission to Hong Kong has just finished drafting a lengthy report, which we will make available as soon as possible.

In recent years we have conferred with the organized Bar of other countries to compare our respective legal systems and the roles played therein by bar associations. Last month I was invited to the ceremonial opening of the Montreal courts, and the head of the Montreal Bar, known as the Batonnier, will visit us next month. Tomorrow evening I leave for France to attend a similar ceremony at the Palais de Justice in Paris. (The annual invitation to that ceremony, the Rentree Solonelle, is one of the more enjoyable duties of the presidency of this Association.) Just last week we received and spent two days with a six-member delegation of the Shanghai
Bar Association, which (it may surprise you to learn) has more than four thousand members. The Shanghai delegation was eager to learn about our pro bono programs and how we deal with issues of professional malpractice. Our Committee on Asian Affairs arranged the visit and introduced the delegation to the Chairs of relevant Association committees.

I want to turn now to four great issues affecting our profession. The first, already mentioned by Carol Sherman, is the spreading phenomenon of multidisciplinary practice, or “MDP” as it is commonly called. The term applies to the affiliation of lawyers and other professionals to render multiple professional services by a single firm or affiliated firms. Until last year MDP was a European phenomenon; one of the Big Five accounting firms acquired the largest law firm in Madrid, and another Big Five firm affiliated with a leading Paris law firm. MDP has now reached our shores: PricewaterhouseCoopers formed an alliance with Miller & Chevalier, a Washington D.C. tax firm, and within the past month Ernst & Young has announced the creation of a law firm in Washington, D.C. with two tax partners of an Atlanta-based firm. The very name of that law firm—McKee Nelson Ernst & Young—has an odd and almost discordant sound. MDP poses thorny ethical issues, and resolving them—even addressing them with the clear-headed, thorough and reasoned analysis expected of lawyers—is complicated by MDP’s threatened incursion into our profession. I frequently wonder how much of the hyperbole that characterizes discussion of MDP is rooted in the economic self-interest of both friends and foes of MDP. As you probably know, the ABA House of Delegates rejected recommendations by a task force that was created last year to study MDP-related issues and chose instead to pass a resolution quite hostile to MDP, as did the New York State Bar House of Delegates.

The Statement of Position issued by this Association steered a middle path, calling for further consideration and discussion with the other professions involved. A committee chaired by Michael Gerrard is closely monitoring developments regarding MDP, and you will no doubt receive future reports on the subject.

The second major issue, really a cluster of related issues, facing our profession was crystallized this past July by President Clinton, when he summoned bar leaders from around the country to the White House, where he exhorted us to do more to promote diversity in the legal profession and attack the persistent social and economic consequences of our segregated past. These matters are not new ones for this Association, but the President has spurred us to new and greater efforts. I have relayed the President’s challenge to our committee chairs, several of whom have al-
THE RECORD

PRESIDENT’S ADDRESS

ready reported back to me new initiatives their committees propose to take to further the twin objectives of the presidential Call to Action.

The third challenge confronting our profession is to open the courts to people lacking the means to retain a lawyer. There are several vexing access issues. In the arena of the criminal and family courts, the Legislature must be persuaded to raise the intolerably low fees paid to assigned counsel, who are paid less per hour to defend an individual charged with a serious felony or to act as guardian ad litem for an infant or incompetent than a plumber is paid to fix a leaky faucet. The right to counsel is more than the right to a poorly paid lawyer who will inevitably tempted to cut corners because he is inadequately compensated. In the civil courts, we must persuade the Legislature to place funding for civil legal services on a secure footing. A bill that would have done so was passed by the Assembly in the Spring but languished in the Senate. Justice Juanita Bing Newton, the recently appointed Deputy Chief Administrative Judge for Justice Initiatives, has appointed me to a small steering committee to advance this search for funding, and I will enlist relevant committees in the effort.

The last of the major professional challenges I want to mention concerns the integrity of our profession. This Association has been in the forefront of the fight to extirpate pay-to-play, the practice engaged in by some lawyers of making contributions to political officials and judges to secure legal work. The crusade against pay-to-play suffered a setback in August when the ABA House of Delegates unexpectedly rejected by a narrow vote a proposed Model Rule condemning pay-to-play. We intend to persevere. We have called on the New York State Administrative Board of the Courts to promulgate a rule banning pay-to-play, and we will join with at least two ABA sections in urging the ABA House of Delegates to revisit pay-to-play at its meeting in Dallas this coming February.

I could have devoted this entire report to telling you of the accomplishments and new initiatives of the City Bar Fund. With an eye to the clock, I think I will invoke the parliamentary procedure of incorporating by reference my column in the December issue of 44th Street Notes, which is devoted entirely to City Bar Fund programs. To the information in that column and on the Association’s web site, I want to add notice of two conferences we will host in coming months. In January all of the major legal services providers in New York City will convene in this House to discuss steps they can take to improve cooperation and coordination. One such step is LawHelp, a database we and other organizations are developing that will facilitate prompt, well-directed referrals by intake units.

THE RECORD
to relevant service providers in all five boroughs. In April, in collaboration with Columbia, NYU and Fordham Law Schools, we will host a conference of legal services advocates and pro bono providers from all corners of the globe, so that we may learn from the experiences of other countries and they may learn from us.

There is one other glimpse into the future I can give you. The Association's Nominating Committee, chaired by Barbara Paul Robinson, has completed its work. They have nominated Evan Davis to become the next President of the Association. Evan, as most of you know, has a long history of public service and has been very active in the Association. The Nominating Committee has selected as vice-presidents Zachary Carter, who recently resigned as United States Attorney for the Eastern District of New York to join Dorsey & Whitney; Leo Milonas, formerly an Associate Justice of the Appellate Division, First Department, now a partner at Winthrop, Stimson, Putnam & Roberts, and the leader of our CLE efforts; and Carol Sherman, who has so capably chaired the Executive Committee this year. Michael Iovenko, the ever watchful guardian of the Association's finances, has been renominated as Treasurer, and Jim Herschlein, a former Chair of the Young Lawyers Committee, will succeed Judge Michael Sonberg as Secretary. We are indebted to Michael for his past service to the association and look forward to still other contributions he will make here in the future. The Nominating Committee has chosen Nancy Chang, Beth Kaufman, Mark Cunha and Timothy Rogers as the members of the Executive Committee Class of 2004. We all thank you, Barbara, and the other Nominating Committee members for a job well done.

It is difficult to believe, and even more difficult to accept, that my term as President is drawing to a close. I don't intend to spend much time reflecting on the future—or the past—for there is much to be done today to elevate the standards and reputation of our profession, improve the administration of justice by our courts and move our legislative and executive leaders to create a more just society.
We are gathered to celebrate a biennial rite at the Association, the unveiling of the portrait of the Immediate Past President, Michael A. Cardozo, or, in the vernacular of the Association, the “hanging” of a “former living.” “Former living” is one of many quaint usages in our profession. When a lawyer is engaged in the courtroom as advocate, we say that he or she is “on trial,” even though we know that isn’t true unless the proceeding is for sanctions or contempt. When a law student graduates, joins a law firm and thereafter throughout his or her career until retirement, we say that the individual is “practicing” law. A client might wish that the lawyer would “practice” on somebody else. But back to the business at hand.

I am pleased that so many members of the Association’s extended family have turned out for this tribute to Michael Cardozo. Two members of that family who are not here have written to me expressing their regret at their inability to be present. They are Chief Judge Judith Kaye and former President John Feerick.

I have spoken of my admiration of Michael Cardozo’s leadership of this Association so frequently in public that I am reluctant to do so again for fear that he will begin to believe what I say. So this evening I will

Portrait Unveiling:
Michael A. Cardozo

Following the Stated Meeting on November 16, 1999, a portrait of former Association President Michael A. Cardozo was unveiled. Mr. Cardozo, the Association’s 59th President, served from 1996-1998.
confine myself to two points. The first is that I inherited from Michael the presidency of an organization of truly extraordinary energy and productivity. Since I have succeeded Michael, committee reports have been coming in over the transom and under the door in prodigious numbers and of high quality. And committee reports are just one of many manifestations of that energy and productivity. While Michael was President, the Association took public positions on important issues such as “pay to play” and greatly expanded its CLE programs. I have sometimes felt that I was riding a wave that Michael had generated.

The other thing I want to say is that Michael has viewed the Association from every perspective. He has respect for the traditions and values that have evolved over the decades; he has seen with clarity and responded to the issues and problems of the day; and he has had an eye to the challenges the Association will face in the years to come. Clarity of vision from all of those perspectives in one individual is very rare indeed.

It is part of the tradition we are celebrating tonight that the head of the honoree’s firm present the portrait to the Association, and Alan Jaffe, the Chair of Proskauer Rose, has graciously agreed to play that role this evening. Before I turn the proceedings over to him, however, I want to say a word about Proskauer Rose. In the past five years, five lawyers in that firm have served as presidents of important professional organizations. Michael is one of those five; the others are Ed Brodsky, who led the American College of Trial Lawyers; Betsy Plevan, who was President of the Federal Bar Council; Klaus Eppler, who headed the New York County Lawyers’ Association; and Meg Gifford, who was President of the New York City Women’s Bar Association. And that remarkable chain of leadership continues: ten days ago Steve Krane became the designated President-Elect of the New York State Bar Association.

That series of bar presidencies, unparalleled to my knowledge, tells us two things about the Proskauer firm. The first is that the firm has a deep and abiding interest in the legal profession and the administration of justice. And the second is that the firm is prepared, to borrow a slang phrase, to put its money where its mouth is, by generously permitting these bar leaders to devote one or two years to labors that do not add to the firm’s coffers. We should all congratulate the Proskauer firm.

Alan, the floor is yours.

ALAN S. JAFFE

On behalf of the attorneys of Proskauer Rose, I am honored to join in tonight’s tribute to my good friend and partner, Michael Cardozo. It is
a great pleasure publicly to acknowledge what many of us back at the office have known for over thirty years, that Michael is a tireless and tenacious leader dedicated to his clients, to his causes and to the overall improvement of the legal community.

This incredible drive goes back many years—as far back as law school, where he excelled as a Harlan Fiske Stone Scholar and editor of the Columbia Law Review.

After serving as a law clerk for Judge Edward McLean in the Southern District, Michael joined Proskauer in 1967 and was a member of what he likes to call “the best class ever,” which included his good friends Bob Batterman, Howard Ganz, Bob Kafin, and David Stern. I joined the firm a year earlier so I, of course, disagree with this moniker.

But that was when I met Michael—he a litigator and I a labor lawyer. We all grew up together—learning to be lawyers, practicing in an exciting environment, moving to the suburbs and pushing baby carriages together. Within a few years after we all became partners, Michael set his sights on improving the operation of our firm. His efforts led to a more participatory and open style of management which has since evolved into the very strength of our partnership. Michael went on to be one of the youngest members of our newly structured Executive Committee and then to become again one of the youngest chairs of our litigation department. Following his Bar Association Presidency—now, no longer so young—Michael again was elected by his partners to the firm’s six-person executive committee, where I continually turn to him for counsel and advice and, most important, a reality check—for Michael’s judgment is so very sound.

In addition to serving in this capacity, Michael also acts as co-chair of our Sports Law Group, as well as a very active litigator—a job to which he has returned with his usual energy and commitment and verve.

Indeed, Michael’s energy and commitment level is the envy of all of us. He never does anything at less than 200%. You all know the ambitious agenda that he undertook during his term as President of the Association.

He advanced the retention and promotion of Minorities and Women in the Profession, and the examination of quality of life issues affecting our junior lawyers. He stood strong in his beliefs for an independent judiciary and was and continues to be a staunch advocate of the Bar’s obligation to engage in pro bono activities. And who can forget the active role Michael and the Bar Association took in assisting families of victims of TWA flight 800.

Michael has long pursued a number of law-related public interest activities. He currently is Chair of the Fund and Committee for Modern
Courts and the Board of Visitors of Columbia Law School. He has also served, by appointment of the Governor and Chief Judge, as Chair of both the Task Force on the Appellate Divisions and the Joint Committee on Judicial Administration. He is a Fellow of the American College of Trial Lawyers, a member of the American Law Institute, the Board of Directors of the Federal Bar Council Foundation and the Board of Trustees of the Lawyers Committee for Civil Rights Under Law.

We at Proskauer are particularly proud that Michael’s portrait joins that of past Bar Association President and fellow partner, Bob Kaufman. They are monuments to our firm tradition of bar leadership and service.

Boxing great Muhammed Ali once said: “Service to others is the rent which you pay for your room here on earth.”

If that is the case then, Michael, your lease is paid for several lifetimes to come. Congratulations!
This is a very very special night for me. Standing here, looking at myself, at all of you, and at all of the portraits in this building, highlights how different this portrait exhibit is from the three other portrait exhibitions being held in New York this very week; the John Singer Sargent exhibit at the Jewish Museum; the Ingres exhibit at the Met and the Valesquez exhibit at the Frick. While I haven’t been to the Met or the Frick, last week I did visit the Sargent exhibit at the Jewish Museum. Believe me, the portraits in this building are certainly very different, and evoke in me far different and stronger emotions, than all of those other exhibits combined.

It is truly unbelievable to me that I am standing here in this building in my capacity as a former living—a former president—of what I believe is the greatest bar association in the country, if not the world. And this elegant House, which houses all these portraits, which now includes my own, was my professional home for two years, a period of time when I had the privilege of holding the best job any lawyer could ever have.

I am truly humbled by the recognition that my picture will join the portraits that hang in this building—pictures of the people who led this Association in the past. How can it be that I will hang on the same walls
as someone like Cyrus Vance, whose portrait is in the next room, who had such an influence on our country, on our Bar Association and on me personally? And I frankly find it unbelievable that my portrait will be in the same room as that of my more recent predecessors, each a great lawyer in his or her own right.

Knowing as I do these former livings I am sure that, as they gaze out on me, their most junior member, they will keep me in my place. I am also confident that my immediate predecessor and good friend Barbara Paul Robinson, who will now be looking at me from across the way, will advise me on how to behave as the rookie among these giants of the bar. I also know that I will be kept on my toes by another former president, my partner Bob Kaufman, whose portrait hangs over there and who will continually be looking over his left shoulder at me.

The mention of Bob brings me to another emotion I feel tonight—enormous gratitude.

I want to thank not only Bob, who thirty years ago persuaded me to become involved in this Association, and my partner George Gallantz, who guided me throughout my bar association and professional career, but all of my partners, who supported my bar presidency in every conceivable way, who allowed me to take on this wonderful job for two years, and who have generously defrayed the cost of this painting. I am enormously proud of my firm and its members and all that they have accomplished in both the public and private sector. The fact that so many past, present, and indeed future bar presidents come from Proskauer is surely a testament of our commitment to the public good.

I want to thank Bob Anderson who painted this wonderful portrait of me. Many people have asked how I had the patience to sit while my portrait was being painted. While the process Bob successfully followed in painting me is undoubtedly a trade secret that I dare not reveal, I can say it was a joy working with and getting to know Bob and his wife Margo while this portrait process went forward.

My special thanks to my family who supported me throughout the extraordinary two years I enjoyed as President. My daughter Hedy and her fiancée Michael are here tonight. Also here is my wife Nancy who served as my invaluable confidante throughout my presidency. If truth be told, Nancy did pass up some of the opportunities I had as bar president to join me in visiting Brooklyn, the Bronx, Queens and Albany, but she did manage to accompany me on my trips to Hong Kong and Paris. I also want to acknowledge with pride the presence of my mother, who I am sure never thought she would see the day when her son would be hung.
My thanks also go to the very special staff of this Association who work so hard and so well in making this place work. Particular thanks to Alan Rothstein, our truly outstanding General Counsel, who is responsible for so much of the extraordinary high quality work product of this Association, and to Barbara Berger Opotowsky, who took over so ably as Executive Director in the middle of my presidency. And Barbara, I hope my portrait and particularly the picture of the computer, will only occasionally remind you of the sometimes excessive demands made by one former living that the Association increase its efforts to move more rapidly into the 21st century. Thanks also to my assistant Monique La-Touche, Allen Charne, Mark Lutin and all the other members of the Association’s truly outstanding staff.

Most of all I owe thanks to all of you—my friends and the members of the Association—who supported me in, to use the words of most of my predecessors, the best job any lawyer could ever have.

People often ask me why being president is such a wonderful job. The answer I think lies in the Association’s mission and how we discharge it. According to our Constitution our purpose is to improve the administration of justice, promote reforms in the law, and help those less fortunate. During the 126 years that preceded my presidency, and the more recent 18 months when the Association has been led by my able successor Michael Cooper, we have tried to carry out our mission and we have usually done so very well. While people sometimes don’t agree with us they always listen, and as a result we have had, and continue to have, an enormous impact on public policy. Whether the issue is stopping pay to play among lawyers, protesting the politicalization of the judiciary, advocating increased diversity in the profession, urging more pro bono efforts, or calling for the maintenance of the Rule of Law in Hong Kong, we truly make a difference.

In the years ahead, as I observe the works of the Association through my portrait hanging on the wall above me, I look forward to watching the Association’s continued efforts to improve the public good. We will succeed in our mission if, as has been true since the Association’s founding in 1870, we study the issues carefully and on the merits, and then call vigorously for adoption of our position. It is that approach that has made us the great institution that we have been and are today, and will ensure our greatness and importance in the future.

Thank you again for the portrait, for your support, and for allowing me to lead this great institution.
BARRY H. GARFINKEL

I am indeed pleased to present to you this evening the Honorable Patricia McGowan Wald. She is the 7th Arps Lecturer.

I first met Judge Wald—then Pat McGowan—nearly 50 years ago at the Yale Law School. She was two classes ahead of me. But, as we know, Yale is a small school.

At Yale, Judge Wald was Case Editor of the Yale Law Journal. Upon graduation, she clerked for Judge Jerome Frank on the Second Circuit who reportedly called her the best law clerk he ever had.

For a period of some years thereafter she was a full-time mother to her five children with occasional consulting positions on various task forces and commissions dealing with such topics as bail reform, law and poverty and drug abuse.

In a career of astonishing variety, in 1970 she served as co-director of Ford Foundation’s Drug Abuse Research Project and for 5 years in the mid-70s she was an attorney and then Litigation Director at the Mental Health Project in Washington.
In the late 1970s she became the Assistant Attorney General for Legislative Affairs in the Department of Justice. In 1979, President Carter appointed her to U.S. Court of Appeals for the District of Columbia Circuit. And, from 1986 to 1991 she served as the Chief Judge for that Court, where currently she still sits.

During her years on the Court and prior thereto, Judge Wald has served on numerous Court and Bar Committees. For example, since 1984 she has been on the Executive Committee of the American Law Institute and has served as the First Vice-President of the Institute. She has devoted countless hours to ABA and other committees studying standards for improving criminal Justice. Her contributions on this score have been widely applauded.

Her vast flow of scholarly writings—and I don’t include over 800 judicial opinions—have encompassed criminal justice, juvenile law, mental disability law, poverty and public interest law, administrative law, statutory interpretation, constitutional law and judicial process. This cornucopia of articles and studies would fill this entire table—end to end.

On the Circuit Court for 20 years, Judge Wald has been a class act. Indeed, I want to share with you some of the comments about her, as published in the Almanac of the Federal Judiciary:

- Lawyers uniformly rave about Judge Wald’s legal skills.
- One commented “She is one of the Court’s greatest assets.”
- Another: “She certainly is Supreme Court caliber, even if she doesn’t want one of the slots.”
- And third: “She is the most impressive member of the Court.”

I could go on until the reception—reiterating the splendid comments about her.

Earlier this year President Clinton appointed Judge Wald to the international war crimes tribunal in the Hague—more formally known as the International Criminal Tribunal for the Former Yugoslavia. Judge Wald is no stranger to that part of the world, having made at least 18 trips to the region, many under the auspices of the ABA’s Central and Eastern European Law Initiative, and some for the U.S. State Department, where she monitored elections, advised on new court systems and reviewed new constitutions.

We are most fortunate to have Judge Wald back with us in the Second Circuit and on this rostrum this evening. She will be speaking to us about a timely subject indeed: “A Whitewater Legacy: Running the Rapids of Constitutional Law”—Judge Wald.
I. THE RULINGS

For a tumultuous year in 1998, spilling over into 1999, the nation was consumed in the furor over the relationship between the President of the United States and a White House intern. I think it fair to say that few among us lament the passage of these doleful events into history.

Much of that history was played out in the U.S. Courthouse in Washington, D.C. where a grand jury heard evidence brought by Independent Counsel, Kenneth Starr, and the District Court and the Court of Appeals rendered judgments on a number of matters arising out of the grand jury investigation.

Those of us with chambers on the third floor of the courthouse grew accustomed over the year to security guards and fenced-off areas outside the grand jury room where newspeople stood watch all day to see who went in and came out, and how they looked before and after their inquisitions. We all grew resigned to tripping over the cable wires on the access sidewalks and running the blockade of reporters, photographers, and capital pundits posted on the courthouse steps.

Yet beyond the barricades, important legal and constitutional decisions were being made, their importance transcending the immediate ef-
fects on the course of the grand jury investigations and vitally impacting
the privileges of, and restraints on, future Presidents. In 1997, as the saga
began, there were virtually no legal precedents, aside from the Supreme
Court’s 1974 decision in United States v. Nixon,¹ and a few related cases in
our circuit, that dealt with the scope of executive privilege, the applica-
tion of attorney-client privilege to White House attorneys advising the
President, the immunity of the President himself from appearing or test-
ifying in a civil suit brought against him personally, the obligation of his
Secret Service protectors to testify about what they saw or heard in the vicin-
ity of the Oval Office, or, of all things, the survival of the attorney-client
privilege after death. By the end of 1998 these questions, mercifully left
unsettled for the preceding 200 years, had all been decided by our own (and
one other) circuit court of appeals and, in two cases, by the Supreme Court.

Unless the Supreme Court in some future crisis overrules this body of
1998 precedent, later Presidents will be bound by its constraints. For that
reason it is both a matter of historical interest and a caution for the
future to retrace these cases, how they arose, what accidents of luck or
procedure may have influenced their outcome, how decisions concerning
different Independent Counsel investigations intersected with one an-
other, and how the Supreme Court’s action, or in most cases, its purpose-
ful inaction, contributed to the final outcome. It is not my intent to
grade the decisions, especially those in my own court, which include a
few I participated in myself. Rather, my purpose is to add a footnote to
the record describing how a court works and what influences its processes
when it must decide in a hurry cases in which the constitutional stakes
are high and the atmosphere is supercharged.

THE PRELUDE

Several early warnings of the impending legal drama came in 1996,
one from the Eighth Circuit, one from the D.C. Circuit, and a third from
the Supreme Court. None of the three seemed that momentous at the
time; few, if any, commentators predicted their ominous consequences.

1. Clinton v. Jones²

In 1996, the district court in Arkansas decided in the Paula Jones sexual
harassment suit against the President that pretrial discovery, but not trial,

could proceed while the President was still in office. The trial judge reasoned that while a “thin majority” in an earlier Supreme Court case, *Nixon v. Fitzgerald*, had held that the President had absolute immunity while in office from any civil damages claim based on the execution of his official duties, she could find no credible support in “the Constitution, congressional actions, or the writings of any judge or scholar” that this immunity carried over to claims based on events that happened before he became President. Subsequently, a divided panel of the Eighth Circuit not only upheld the district court’s denial of the President’s immunity from pretrial discovery, but extended the denial to the trial as well—“The President,” the panel majority said, “like all other government officials, is subject to the same laws that apply to all other members of our society.” A lone dissenting judge argued that the potential that litigation would distract the President required the extension of immunity for official acts to any civil action brought during his tenure. The majority called that concern “greatly overstated”—this, they said, was “relatively uncomplicated civil litigation” and prior experience of Presidents with such civil suits suggested no real risk of disruption. The Solicitor General of the United States sought *certiorari* on the ground that the Eighth Circuit’s decision was “fundamentally mistaken,” and created “serious risks for the institution of the Presidency.” The Supreme Court granted *certiorari*, then proceeded unanimously to uphold the Eighth Circuit’s denial of immunity. Justice Stevens, writing for a unanimous Court, found no precedent supporting the Solicitor General’s argument that the Constitution afforded the President temporary immunity from civil actions arising from events that preceded his Presidency. Immunity for official acts was designed to prevent the President from being “unduly cautious in the discharge of his official duties,” and that motive did not spill over to unofficial conduct.

Despite recognition of the President’s “unique position in the constitutional scheme,” the Court, in what has come to be viewed as a towering monument to the fallibility of Article III judges, found that separation-of-powers principles would not be violated by allowing the civil suit to proceed, for “the litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power.”

Only Justice Stephen Breyer expressed a doubt: If the President could show a credible conflict between his participation in judicial proceedings

---

and his official duties, the Court should accede to his priority, he said. But that time, Justice Breyer, agreed, had not yet come.

The curtain had rung down on Act I. Let me pause here and note a few ironies. First, insofar as the Court worried at all about distraction of the President, it focused on the multiplicity of suits that might be inspired by allowing the case to proceed, not on the amount of time the one case would take. “[I]t appears to us unlikely to occupy any substantial amounts of petitioner’s time,” the Court said. Second, although the Eighth Circuit, with Supreme Court assent, went beyond the district court in refusing to postpone trial as well as discovery, the real pitfall for the President turned out to be the pretrial depositions. The trial itself never occurred; the case was dismissed on summary judgment. Finally, the Supreme Court’s decision has been much criticized in hindsight for its obliviousness to reality. In the Court’s defense, however, it should be noted that at that time there was no history to back the grim speculations of the President’s defenders. In the preceding twenty years only three Presidents had been sued civilly for private actions and none of the cases had provoked national interest. One last aside on the Jones case relates to the distinction between private grievances and official grievances against the President. That difference was the decisive one in the Supreme Court’s decision to let private suits go ahead during his presidency. That distinction reappeared in virtually every legal decision about presidential privilege and immunity that followed, and as in the Jones case the distinction generally worked against the President.

2. In Re Grand Jury Subpoena Duces Tecum (Eighth Circuit)4

In the same month that the Supreme Court’s Jones decision came down, May 1997, the Court of Appeals for the Eighth Circuit reversed a district court order denying the Independent Counsel’s motion to compel production of notes taken during meetings between White House attorneys and First Lady Hillary Rodham Clinton pertaining to (1) billing records from her former law firm which had not been produced under the original subpoena but were later found in the White House private quarters, and (2) activities undertaken in the environs of White House Deputy Counsel Vincent Foster’s office immediately following his death. White House Counsel had refused to produce any records of these meetings citing executive privilege, attorney-client privilege and the attorney work product doctrine. The Eighth Circuit held that White House Counsel could not invoke an attorney-

4. 112 F.3d 910 (8th Cir. 1997).
client privilege to withhold potentially relevant information from a federal grand jury, citing United States v. Nixon, the 1974 Supreme Court decision requiring President Nixon to turn over tapes from the Oval Office of potential relevance in the criminal trials of his aides. Acknowledging that Nixon dealt with executive privilege, not attorney-client privilege, the Eighth Circuit nevertheless viewed it as "indicative of the general principle that the government’s need for confidentiality may be subordinated to the needs of the government’s own criminal justice processes." Any analogy to private attorney-client privilege or corporate counsel-employee privilege was inapposite to government attorneys, the Court said, and, for good measure, it cited a statute requiring every federal employee to report criminal actions by another employee to the Attorney General.

Many were surprised when the Supreme Court denied certiorari in this high-profile case, leaving in place a potentially formidable obstacle to broad presidential immunity from regular criminal processes. Thus, by the time Monica Lewinsky burst on the public scene, two critical judicial checkpoints had been passed: it had already been decided that the President could be deposed in a civil case based on his private conduct and most probably that he had no attorney-client privilege vis-a-vis his White House staff lawyers as to nonofficial matters. This was all new law. There was, finally, one more significant precedent in 1997 on executive privilege which would bear heavily on the critical confrontations of 1998.

3. In Re Sealed Case (Espy)\(^5\)

In June 1997, the D.C. Circuit was confronted with a claim of executive privilege in another Independent Counsel investigation, involving Mike Espy, the former Secretary of Agriculture (charged with and subsequently acquitted of improperly taking gifts from companies regulated by his department). There, the Independent Counsel had served a broad subpoena duces tecum on White House Counsel for documents and notes of meetings held to discuss an internal White House investigation of Espy, which, ultimately, found no legal or disciplinary action necessary. The subpoena sought all documents “relating in any way to, or considered in any fashion by those persons who were consulted and/or contributed directly or indirectly to all drafts and/or versions” of the White House public report on Espy. White House Counsel, on behalf of the President, invoked executive privilege and a common law deliberative privilege for 84 of the documents sought by the subpoena, again relying principally

---

5. 121 F.3d 729 (D.C. Cir. 1997).
on United States v. Nixon where the Supreme Court found a generalized privilege for presidential conversations or communications that could be overcome only by showing a paramount need in criminal proceedings. After reviewing the disputed documents in camera, the district court in Espy upheld the claim of executive privilege as to all 84. The Independent Counsel appealed to our court opposing the privilege on the ground that none of the documents sought had been sent to or came from the President himself or included any record of his comments as had been the case in Nixon. The White House countered that it was enough that the documents were generated in response to the President’s request for advice on the exercise of one of his core functions under Article II, the retention or dismissal of a Cabinet officer.

The Espy opinion, which I wrote for a unanimous panel of the court (JJ. Ginsburg and Rogers), reviewed the several privileges available to the White House to resist disclosure of information whose confidentiality it thought crucial to the unique constitutional role of the President. The opinion recognized the existence of a deliberative privilege with origins in the common law which protected advisory opinions, recommendations and deliberations that are part of the process by which governmental decisions and policies are formulated, but, we pointed out, the deliberative privilege covered opinions, not facts, and could be overcome by a showing of grand jury need for the documents. This privilege would require an ad hoc balancing to be performed by the judge on a case-by-case basis.

As to presidential or executive privilege, precedent was scarce. The Supreme Court had ruled on the legitimacy and scope of executive privilege only once in the Watergate investigation when Special Prosecutor Jaworski subpoenaed the tapes of Oval Office conversations between President Nixon and his aides for use in the criminal investigation of the Watergate break-in and its resultant coverup. In Espy, we said Nixon stood for the following proposition:

The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. . . . However, the privilege is qualified, not absolute, and can be overcome by an adequate showing of need.

But the Nixon cases did not answer two key issues in Espy: “How far down the line of command from the President does the presidential privilege
extend, and what kind of demonstration of need must be shown to justify release to a grand jury of materials that qualify for such a privilege?”

Our court then forged new ground holding that the presidential privilege, properly invoked, could cover meetings, conversations, and written exchanges among the President’s aides regardless of whether the President was present or ever saw the documents that emanated from such discussions or meetings. Past rulings had been vague and erratic on this issue. In Espy, we found the arguments for a limited extension of the privilege beyond the President to his immediate advisors convincing because of the critical role that confidentiality plays in ensuring an adequate exploration of alternatives. The most valuable advisors, we pointed out, discuss alternatives and their implications with others before coming to closure on direct recommendations to the President. Few of the documents they generate will ever see the light of the Oval Office, but if these materials are not protected, the President’s access to candid and informed advice will be unduly circumscribed.

Because the documents in Espy clearly pertained to an official investigation of a Cabinet member, the court’s entire discussion assumed that the presidential privilege would apply only when official presidential matters were being discussed. Later on, as the threat of impeachment closed in, a crucial question arose whether executive privilege could apply to discussions of otherwise private matters on which an impeachment might be based. The issue, however, was never squarely joined. After Espy the White House relied mainly not on executive privilege but attorney-client privilege to fight grand jury subpoenas addressed to presidential aides.

Neither side asked for en banc review or for certiorari in Espy. Both sides gained something. The Espy Independent Counsel got a second and improved chance to obtain the documents he sought; the White House got an extension of the presidential privilege to aides working on official matters. Espy was ultimately acquitted at trial on all counts.

4. The Survival of the Attorney-Client Privilege (Swidler & Berlin)

A fourth decision of note emerged from the Whitewater Independent Counsel’s investigation in 1998 though it did not involve the President directly. In Swidler & Berlin v. United States, the Supreme Court dealt with the question whether notes made by Vincent Foster’s lawyer in a conference with his client nine days before Foster’s death were privileged and therefore not subject to subpoena after his death. The notes were

sought by the Independent Counsel for what they might reveal about possible false statements made during early phases of the Independent Counsel’s investigation involving the firing of White House Travel Office personnel. No one contested that the lawyer-client privilege applied at the time of the conversation between Foster and the lawyer whom he had consulted in his private capacity; the issue was whether the rule survived the death of the client. Strangely enough, so fundamental an issue had never been definitively decided by a federal court. The district court upheld the privilege; but a divided panel of our court of appeals (I was a member of the majority) reversed, finding that there should be an exception from the common law privilege after death in cases where it could be shown that the grand jury could not obtain the needed information elsewhere. On certiorari the Supreme Court heard argument in a specially expedited session—months after its normal argument calendar was finished. It decided the case just two and a half weeks later, reversing our court in an opinion by Chief Justice Rehnquist. The case law was scanty, but, the Court said:

While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation, nonetheless.

Justices O’Connor, Scalia and Thomas dissented, asserting that “a criminal defendant’s right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client’s posthumous interest in confidentiality.” Were the client living the prosecutor could compel disclosure by a grant of immunity. And “the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the fact finder, and undermine the central truth-seeking function of the courts.” Interestingly, the Supreme Court seemed particularly unhappy about the “balancing” test we in the circuit had applied to the “dead man’s privilege”; grand jury need versus injury to client was too uncertain, the Court said, to guide ordinary people in managing their legal affairs. They needed the certainty of an absolute guarantee of confidentiality even after death. Yet, ironically, that is the same kind of balance that our court applied to the executive privilege in Espy and that the Supreme Court itself applied to presidential immunity from litigation in the Jones case.

Nevertheless the matter was now resolved and the stage for 1998’s
A constitutional crisis was set. In just over one year, executive privilege had been expanded horizontally to include discussions and reports between presidential aides, though implicitly limited to matters of official business; it had been decided that the President was not automatically immune from the normal progress of civil litigation stemming from his private behavior; and one decision (with the Supreme Court refusing to intervene) had declared that no attorney-client privilege existed to cover White House attorneys’ discussions with officials (in that case, the First Lady) that were relevant and necessary to a grand jury investigation. These decisions had come from three different courts, in each case forcing into glaring spotlight issues that had idled in history and myth for over 200 years.

The Main Event
In January 1998, the mandate of the Independent Counsel’s Whitewater investigation was extended to encompass obstruction of justice by the President or others arising out of allegedly false affidavits or depositions filed in the Paula Jones case. Almost immediately the Independent Counsel began issuing grand jury subpoenas and the press, consumed with the sudden story of the President and the intern, speculated broadly about which, if any, privileges the White House might raise to prevent unwelcome disclosures by the President or his aids.7

1. Special Court Procedures
Initially, all invocations of privilege to resist subpoenas issued by the Whitewater grand jury came before Chief Judge Norma Holloway Johnson of the District Court who by local court tradition handles such matters. Appeals from her rulings in turn come on an expedited basis to the Court of Appeals; two special aspects of that process in the D.C. Circuit should be noted.

a. Sealing
Trial court hearings and decisions on enforcement of grand jury subpoenas and appeals therefrom normally proceed under seal. Rule 6 of the Federal Rules of Criminal Procedure protects the secrecy of all matters “occurring before the grand jury.” But in the Lewinsky matter, keeping

7. See, e.g., Stephen Labaton, President’s Legal Advisers Argue Executive Privilege Before Judge, N.Y. Times, Feb. 20, 1998 (“White House officials said . . . issues surrounding privilege had not been reached and that the lawyers were continuing to negotiate with Mr. Starr’s office.”); Glenn R. Simpson, White House Girding for Privilege Fight, WALL ST. J., Feb. 20, 1998.
the proceedings and their outcomes secret from the press turned out to be virtually impossible. Reporters literally inhabited the courthouse and its environs for most of 1998; they watched hawklike who came and went into the grand jury, and into Judge Johnson’s courtroom. The press filed batteries of motions to gain access to the briefs, oral arguments, and opinions of both courts. For the most part, decisions in 1998 on grand jury witnesses’ immunities and privileges were made in secret proceedings; the opinions were almost invariably rendered under seal in the district court, but unfortunately leaks were endemic. To the extent feasible, in the Court of Appeals we tried to write our opinions so that, except for a few redacted sentences or paragraphs, they could be made public immediately. As a result we ended up issuing two separate opinions in most of the Independent Counsel grand jury cases—the first timely but redacted, the second, in full, weeks or even months later. This meant that publication of an opinion on important legal or constitutional issues might occur months after the original decision was rendered; during the interim it did not exist in the public domain for comment or use as precedent by counsel or other courts in related matters.

We did establish some ground rules for access to our rulings early on, in the Dow Jones lawsuit brought by the Associated Press, the Los Angeles Times, the New York Times, USA Today, the Washington Post (and others) seeking access to docket entries, district court hearings, and pleadings relating to the grand jury proceedings. Judge Johnson refused. The Court of Appeals upheld her ruling in the main finding that initially closing all hearings on quashing subpoenas or immunizing witnesses “makes good sense.” But on the specific proceeding involved in Dow Jones, the appeals court told the district judge to reconsider whether withholding even a redacted version of the proceeding was necessary. The Court noted, “by the time of the Chief Judge’s order it was no longer a secret that the grand jury had subpoenaed [the witness in question] whose attorney virtually proclaimed from the rooftops that his client has been subpoenaed.”

b. Leaking

In a second Sealed Case proceeding involving the press, brought in mid-1998, aides of the President petitioned the court to sanction the Independent Counsel for alleged leaks to the press of “matters occurring before the grand jury,” listing twenty-four press allusions to allegedly se-
cret grand jury material reportedly obtained from “sources close to the Independent Counsel” or similar characterizations. On the basis of this showing the district court announced that the petitioners had made a prima facie case of Independent Counsel leaks and ordered the Independent Counsel to make himself and his staff available to petitioners’ counsel for depositions and documentary requests concerning the twenty-four articles. The decision was widely but wrongly hailed as validating charges of persistent leaking from the Independent Counsel’s office.

In fact, under prior circuit law, a petitioner alleging grand jury leaks makes out a prima facie case simply by producing the printed article which states or even implies that its source is in the prosecutor’s office. The burden then falls on the prosecutor to rebut the allegation that he or his agents leaked the material. In this instance, the district judge proposed to allow the private parties and White House Counsel to conduct depositions of Independent Counsel staff and to obtain any documents relative to these alleged press contacts. The Independent Counsel objected strenuously to the process on the ground that it would paradoxically but inevitably result in even greater disclosure of secret grand jury material to the private parties, some of them possibly objects of grand jury investigations themselves. The Independent Counsel called for an in camera inquiry before the judge herself or a master instead so that further leaks would not occur. No prior case in our circuit had elucidated the procedures under which a “leak” hearing should be held. On emergency appeal, a panel (of which I was a member) decided that “the essential nature of the proceeding as one designed to guard the sanctity of the grand jury process itself” meant that normal civil discovery rules could not apply. We told the district court (or any master she appointed) to listen to the Independent Counsel’s responses to the twenty-four “leaks” alleged, to investigate further if necessary, and ultimately to decide if violations of the grand jury secrecy rule had occurred. Any violations would be made known to the petitioners who could then participate in the remedial phase of the proceedings. A transcript of the in camera hearings would be kept for the use of any individual subsequently indicted.

On remand the district court appointed a distinguished retired judge as master, whose investigation, over a year later, has not yet been made public. Ironically, within a month or so of the panel opinion’s issuance, much of the grand jury material cited in the articles had been made public in the Independent Counsel impeachment report to the House of Representatives itself.

In the Dow Jones case, the panel had defined “matters occurring be-
fore the grand jury” very broadly to encompass “not only what has occurred and what is occurring, but also what is likely to occur” before that body including the “identities of witnesses or jurors, the substance of testimony as well as actual transcripts, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.” In the Starr Leak case months later, a different panel worried about “the problematic nature of applying so broad a definition, especially as it relates to the strategy or direction of the investigation” but made no rulings as to whether the 24 articles involved in that case met Rule 6(e) criteria. But a year later, just a few months ago in fact, the same Sealed Case panel confronted another contempt action filed against the Independent Counsel’s Office by the White House for contributing to a New York Times article disclosing that some prosecutors in Starr’s office wanted to bring a perjury indictment against the President after the impeachment was ended. In this most recent case we held that that kind of disclosure alone, relating only to the view of some members of the prosecutor’s staff, did not meet Rule 6(e) criteria as a matter “occurring before the grand jury.”10 Thus in slightly over one year three separate panels interpreted the scope of Rule 6(e)’s secrecy ban in somewhat varying ways, ricocheting from a very broad to an arguably much narrower reading.

c. The Special Panel Phenomenon

Unlike the earlier Espy and Foster decisions, which were randomly assigned on the regular calendar to a regular merits panel, all of the grand jury appeals in 1998 were expedited and went directly to a so-called “special panel” of our court, which under circuit practice consists of three active judges sitting for several months at a time who normally decide all motions, emergency appeals, and summary dispositions. All of the grand jury appeals involved in this episode were decided in record time, usually within a few weeks. This is in marked contrast to the 14 months that normally elapse between the time an appeal is docketed and the time it is decided in a published opinion in our court. Interestingly, in none of them was en banc or certiorari granted.

One of the most fascinating facts about these pathbreaking cases was the relative lack of conflict among panel members. These panels were composed of judges appointed by four different Presidents and of markedly different ideological and political backgrounds. Indeed, every time a deci-

10. In re Sealed Case, 192 F.3d 995 (D.C. Cir. 1999). A petition for rehearing en banc was denied on November 9, 1999.
sion was issued, the newspapers, predictably, identified the participating judges as “conservative” or “liberal” according to their appointing President. Yet in all of the seven major D.C. Circuit decisions I discuss, there were dissents in only two cases and by only a single judge. In one case the judge was vindicated by the Supreme Court on appeal; in the other certiorari was denied. In several of the cases, judges tagged “liberal” voted to sustain the Independent Counsel’s position. Two judges regularly recused themselves from any participation in these appeals. Judge Sentelle, who was a member of the special panel that appoints all Independent Counsel, was disqualified by statute from sitting on any of their cases; another judge had come on the court only recently from a high Administration post. Other judges were recused in particular cases because of prior relationships with counsel.

2. Presidential Aides and the Attorney-Client Privilege

In the second half of 1998 two significant new decisions on presidential privileges were handed down by our court. In this stage of the Independent Counsel’s investigation, a steady stream of presidential aides were called to the grand jury as key witnesses to probe conversations they may have had with the President about Monica Lewinsky’s or the President’s own testimony in the Paula Jones deposition. Bruce Lindsey, long-time friend and legal adviser to the President, now a member of the White House Counsel staff, was one of the first aides subpoenaed. Lindsey had worked on the President’s defense in the Jones sexual harassment suit, and had been prominently mentioned in tapes of recorded conversations between Ms. Lewinsky and Ms. Tripp. The press reported that the White House had asserted that many of his discussions with the President were confidential communications covered by both the lawyer-client privilege and executive privilege, but that White House lawyers were trying to resolve the matter without formal invocation of executive privilege. Several pundits pointed out that Presidents Ford, Carter and Bush each had invoked the privilege only once and President Reagan three times.11

As revealed sometime later upon the unsealing of one of Judge Johnson’s earlier opinions in the year, a claim of executive privilege was in fact raised on behalf of the President along with a claim of attorney-client privilege by Lindsey. Both privileges were denied by Judge Johnson.12 No appeal

from the denial of executive privilege was taken, however, but an appeal was taken from her denial of attorney-client privilege. The Supreme Court had—you will recall—six months earlier in the Swidler & Berlin case reaffirmed the unqualified nature of that privilege, ruling that it trumped any claim of need by the grand jury. The Lindsey appeal was argued in our Court of Appeals in late June 1998 and a quite lengthy opinion deciding the case issued in late July, less than a month later.13

Parenthetically, prior to our court’s consideration of the Lindsey appeal, the Independent Counsel had sought unsuccessfully to invoke a special statutory procedure to obtain direct review from the Supreme Court for the ruling by Judge Johnson recognizing an attorney-client relationship between Lindsey and the President but deeming it a qualified privilege which could be and was overcome by a showing of grand jury need. The White House and the Justice Department characterized the Independent Counsel’s attempt to sidestep our court as “gamesmanship.” The Supreme Court refused to hear any direct appeal from the trial court’s ruling—as it did later in the Secret Service privilege case—and instructed our court to give the case expedited consideration. A few weeks later our appeals court held that the attorney-client privilege did not cover political, strategic, or policy advice by a government attorney to the President concerning a private suit brought against the President in his personal capacity. Furthermore, the attorney-client privilege did not “permit a government lawyer to withhold from a grand jury information relating to the commission of possible crimes by government officials and others.” In short, our circuit rejected outright any privilege for government lawyers as to information relevant to possible federal criminal offenses. It determinedly refused to endorse the balancing approach of the relative needs of the grand jury and presidential confidentiality used in Espy-type executive privilege cases, an approach that had been adopted in the Lindsey case by Judge Johnson and advocated by the Justice Department.

The court also distinguished the Supreme Court’s absolutist approach toward the attorney-client privilege in Swidler. That case, our court said, involved an attempt by the Independent Counsel to narrow the pre-existing status of the privilege whereas here the White House was seeking to extend the privilege beyond existing law. While a private attorney called to the grand jury should not provide evidence about possible crimes of his client, government attorneys stand in a “far different position from members of the private bar.” “The Executive Branch is to take care that

the laws be faithfully executed,” the Court said. “Unlike a private practitioner the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency.”

The court dealt only briefly with the possible need of the President for lawyerly advice on how to prepare for future impeachment proceedings that his offensive private conduct might provoke. The White House Counsel, in preparing for impeachment, the court said, would likely be acting as a political not a legal adviser. “Thus,” it said, “information gathered in preparation for impeachment proceedings and conversations regarding strategy are presumably covered by executive, not attorney-client privilege”; prior precedents like Espy and Nixon recognized only a qualified privilege for confidential communications between the President and his aides. And, “[o]nly a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics or why a President’s conversation with the most junior lawyer in the White House Counsel’s office is deserving of more protection from disclosure in a grand jury investigation than a President’s discussions with his Vice President or a Cabinet Secretary.”

Rehearing en banc was sought but denied by the court without dissent. White House Counsel then sought a stay from the Chief Justice who denied the relief stating that he believed a majority of the Supreme Court would not vote to hear the case on certiorari. It turned out to be a self-fulfilling prophecy.

3. The Secret Service Privilege

A second critical legal test in the Independent Counsel’s investigation emerged during the same summer of 1998: whether Secret Service officers guarding the President could refuse to disclose information gleaned in the course of their duty under a “protective function privilege.” The Attorney General, representing subpoenaed Secret Service officers, resisted a motion to compel their grand jury testimony, and the Secretary of the Treasury who officially oversees the Secret Service invoked the novel privilege. The district court rejected the privilege and an appeal was taken to our court by the Attorney General.

The newly-asserted protective function privilege, never before raised in any court, was described by its proponents as covering “information obtained by Secret Service personnel while performing their protective function in physical proximity to the President.” Affirming the district court, the Court of Appeals held that the Secret Service had not “shown with the compelling clarity required . . . that failure to recognize the raised
privilege will jeopardize the ability of the Secret Service effectively to protect the President.”

Quoting Chief Justice Rehnquist in the Swidler case, the appeals court found the arguments of the Secret Service based on “speculation—thoughtful speculation—but speculation nonetheless.” The court accepted the Independent Counsel’s argument that the greatest danger to the President occurs when he is in public areas, yet the privilege would have its greatest impact when he is in the confines of the White House or other secure areas. Holding that privileges are “not lightly created nor expansively constructed,” the court found the empirical data on the President’s need scant and inconclusive, leaving “to Congress the question whether a protective function privilege is appropriate in order to ensure the safety of the President and, if so, what the contours of that privilege should be.”

After the customary denial of en banc petitions by the court of appeals, the Chief Justice declined to intervene or grant a stay. Five months later, the Supreme Court denied certiorari, with spirited dissents from Justices Breyer and Ginsburg.

Justice Breyer thought the President’s unique role as “the sole indispensable man in government” entitled him to special consideration in order to avoid the calamity that physical harm to him would mean for the nation. Nine Presidents had been the targets of would-be assassins, four had been killed. The federal courts, he said, had the authority to develop an evidentiary privilege to insure his safety.

There was an interesting little coda to the Secret Service case in our court. When the petition for rehearing en banc was denied, Judge Silberman questioned the authority of the Attorney General to represent the Secret Service witnesses:

... It seems clear to me then that no one in the United States Government, speaking for the government, has standing to oppose the Independent Counsel in this proceeding, and, therefore, neither we nor the district court have jurisdiction over this case. ... The Attorney General is, in effect, acting as the President’s counsel under the false guise of representing the United States, contrary to the whole purpose and structure of the Ethics in Government Act. ...

Now, plainly, the Justice Department had a continuing interest in the precedents that courts laid down in Independent Counsel cases, since these precedents would govern the Department’s own future prosecutions. But the ambiguity of the relationship between the Independent Counsel and the Department of Justice surfaced again and again in Independent Counsel cases. Earlier, the Department of Justice filed an amicus brief in the Oliver North prosecution in the Iran-Contra affair supporting North as to the sufficiency of the evidence on the conspiracy charges. The Attorney General in that same case refused to declassify information sought by the Independent Counsel, and as a result certain counts were dismissed. In United States v. Nixon, the President’s counsel had argued in contradiction to Special Counsel Jaworski that the court had no jurisdiction to order the Oval Office tapes turned over since it was an intra-governmental dispute. There was definitely a conceptual untidiness about these cases, the court often being asked to act as referee between different parts of the same government. Presumably, with the demise of the Independent Counsel statute, that dilemma will lessen, but may not disappear so long as the Department is required to seek any kind of outside prosecutors in conflict situations.

II. AN APPRAISAL

A. The Importance of the Compelled Testimony to the Investigation

The immediate effects of the last two privilege cases were seen in the consequent testimony given by the President’s aide and by eleven Secret Service agents. Both sources were frequently referred to in the Independent Counsel’s Report to the House Judiciary Committee and were prominent in the House Managers’ case during the impeachment hearings. It is not apparent, however, that had Lindsey’s and the Secret Service’s testimony not been compelled, the Independent Counsel’s Report or the House’s and Senate’s reaction to it would have been much different.

B. The Role of the Supreme Court

Both the government attorney-client and Secret Service privilege cases were decided finally by our court, the Chief Justice first and later the Court as a whole having rejected stays and eventually certiorari. The two cases that the Supreme Court did take up, Jones and Swidler, had populist themes: in Swidler, every citizen’s attorney-client privilege, not just the President’s, and, in Jones, whether the President was to be treated differently from other citizens so far as being sued for his personal conduct was concerned.
Why did the Supreme Court stay its hand on the most critical decisions? The prevalent theories are: (1) The Supreme Court believed that the Courts of Appeals decisions were right, or (2) (more likely) by not itself deciding these cases the Court believed it would be in a better position in any future proceeding to look at the questions anew without having to overrule or modify its own decisions, or (3) it was unwilling to slow down the momentum of the political branches by causing an interruption of up to a year while it considered the privilege issues, or (4) it was motivated by rough approval of the results in the appeals decisions and reluctance to decide profound constitutional principles at the same breakneck speed as we in the lower courts were told we had to. I leave it to you to pick and choose among these theories.

III. FUTURE LEGACIES

Finally, what to make of it all? Certainly the Lindsey case’s denial of an attorney-client privilege between government officials and government counsel in criminal investigations has critical implications for how the White House and perhaps the entire government operates. The ruling has already come in for its share of criticism, one former Deputy White House Counsel declaring:

As a result of these decisions, the president has to rely on his private lawyers for candid and confidential advice on matters that may implicate both personal and official interests.... I think that’s bad policy. 17

Others have pointed out that the Lindsey court could have followed Nixon and Espy, formulating a balancing test for the privilege rather than an absolute bar and they say that even though the Independent Counsel statute has gone away, the problem has not, since even Department of Justice investigations of other high government officials often seek to subpoena attorney-client material from government lawyers. 18

A few last observations on the legal and constitutional legacy of these decisions. First: the critical legal dispute in the Swidler, Lindsey, and Secret Service cases turned out to be deciding just what the existing law was.

18. Id. at 37 (statement of Brett Kavanaugh, Associate Independent Counsel).
since in each case the courts said they could not see sufficient reason to depart from existing law. On that question, Swidler and Lindsey, I think, could have gone either way, given the checkered history of past practice and the paucity of real precedent. In Swidler there was a subliminal assumption that the privilege survived death but there were also several exceptions; in Lindsey there was no settled law and commentary about the applicability of the attorney-client privilege to government attorneys in criminal investigations. In the Secret Service case it was clearer; no protective function privilege had ever been recognized by any court.

Second: the court’s somewhat summary dismissal of the White House’s argument in Lindsey, that any private activity of the President could fuel the impeachment process and so threaten the institution of the presidency, seems a bit ironic in light of later events. The Independent Counsel’s Report and grand jury testimony about the President’s private behavior were the only bases on which the House brought impeachment charges, so it turned out that all relevant testimony about that private matter became intensely relevant to the impeachment process. Future Presidents and their counsel will have to look hard at this potential link. And the court’s comment that impeachment is a political process so that advice rendered on how to avoid or control it would not likely be a “legal” matter seems in retrospect much too compartmentalized.

Third: the demise of the attorney-client privilege as it relates to advice to Presidents from government attorneys leaves them much more heavily reliant on executive privilege, which incidentally covers non-lawyers as well as lawyers’ communications, but—so far at least—only in pursuit of official presidential tasks. To what degree that privilege may shield impeachment discussions rooted in private behavior remains still undecided.

Fourth: a final note on the public/private distinction that figured so prominently, legally and politically, from beginning to end of this saga. In the Jones case, the Supreme Court denied deposition and trial immunity to the President because the civil suit was based on a private not a public grievance. In Espy executive privilege was implicitly restricted to public not private matters. In Swidler, Chief Justice Rehnquist refused to distinguish between civil and criminal cases in the after-death application of the attorney-client privilege—but the Lindsey court made the public/private distinction key in its holding that government attorneys could invoke the attorney-client privilege only for official matters in civil suits.

The public—and in this case the Senate as its proxy—had the last word of course: it presumably thought that private matters like the Lewinsky episode were not grist for the impeachment mill, at least not for this
President. That signal seems clear. But the import of the legal doctrines
the 1996-1998 years spawned is infinitely more murky, and future Presi-
dents will seemingly proceed at greater risk than their predecessors so far
as the integrity of the Oval Office communications is concerned. For judges
like myself the experience raises another serious question. Is there a better
way to make law in crises than on the run? No one has suggested an
alternative path for lower courts; the Supreme Court in its wisdom can
step back and wait for another day as it did here. We had no such choice.
And so, for the present, we have laid down a large number of discernible,
if not always finely-chiseled, markers for Presidents and White Houses in
the future, hopefully not to be resurrected until the very remote future.

Perhaps the most humbling lesson for the judiciary in all of this is
our proven inability to predict the unintended consequences of our deci-
sions. The Supreme Court predicted there would be no fallout for Presi-
dents from being held to stand trial in a civil suit based on private claims.
Our court thought that preparing for impeachment would require mainly
political not legal advice. Courts in these situations are catapulted into
uncharted territory; in the course of making new law we confront close
choices and must guess at the consequences. But when we err, it is not just
the immediate President nor political players on center stage now who
pay. We inevitably influence the course of future Presidents and Adminis-
trations. The legacy of our court’s reactions to the constitutional torrent
that rained down in 1996-98 still awaits history’s judgment.
Formal Opinion 1999-5

Lawyer’s Obligations Regarding Disposition of Original Wills

The Committee on Professional and Judicial Ethics

**TOPIC:** Lawyer’s obligations regarding disposition of original Wills held for safekeeping where the testator cannot be located and the lawyer is retiring or the firm is dissolving.

**DIGEST:** A lawyer who is retiring or whose firm is dissolving may not dispose of the original Will of a missing client, except by assuring its continued safekeeping indefinitely or in accordance with law.

**CODE:** EC 4-6; EC 6-1; DR 9-102(C), 9-102(F).

**QUESTION**

A lawyer’s files or safe deposit box may contain copies of original Wills of clients that were left with the lawyer for safekeeping when the Will was executed. When anticipating retirement or planning for law firm dissolution, what are the lawyer’s obligations with regard to disposition of original Wills in the lawyer’s possession if the testator cannot be located?
OPINION

It is a fairly common practice for a client to leave an executed original Will in the custody of the drafting lawyer for safekeeping. The issue addressed by this Opinion is the lawyer’s duty regarding the disposition of such original Wills upon retirement or law firm dissolution if the testator cannot be located.

The Code of Professional Responsibility contains several provisions of relevance to the lawyer’s duty with regard to property held for safekeeping. When the lawyer has custody of client “property,” DR 9-102(C)(2) requires the lawyer to place that property in “a safe deposit box or other place of safekeeping as soon as practicable” and “[m]aintain complete records” of that property. Of course, if a client asks for the return of an original Will, the lawyer must return it “promptly.” DR 9-102(C)(4).

Clearly, the lawyer may notify the client of the lawyer’s impending retirement or law firm dissolution and request instructions for disposition of the original Will. See N.Y. State 460 (1977) (“Circumstances under which lawyers may dispose of closed files”). With regard to retiring lawyers, EC 4-6 suggests that the lawyer “might provide for the personal papers of the client to be returned to the client.” The lawyer choosing to return Wills or request client instructions for disposition should make reasonable efforts to locate the client or the client’s representative. Cf., e.g., Fla. 81-8 (1981) (lawyer intending to dispose of clients’ files can send “a letter to each client’s last known address or, if there is no address available, by publication in the local newspaper, requesting the client either to pick up his files or to give permission for their destruction”).

Although DR 9-102(F) covers those situations in which a client cannot be located and the property held is “money,” the Code does not address directly the lawyer’s obligations when other types of property of missing clients, such as original Wills or documents, are held.

Massachusetts 76-7 (1976) considers the obligations of a successor lawyer who is acting as custodian of the predecessor’s records and holds original Wills for clients who cannot be located. Viewing the matter as governed by EC 6-1 ("[T]he lawyer should act with competence and proper care in..."

---

1. DR 9-102(F) provides that: "Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers’ Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto."
representing clients”), that Opinion states that an attorney who accepts a Will for safekeeping is obligated to “use reasonable care to keep it secure” and, if returning the Will to testator, must make sure it reaches the client safely. The Opinion refers to the attorney’s alternative under Massachusetts law of depositing the will with the appropriate court. It adds that:

If the lawyer cannot find the testator and does not wish to deposit the will with the court, he remains obligated to use reasonable care to keep it secure. While he need not watch the obituary columns, if he does learn of the testator’s death, [Massachusetts law] requires him either to deliver the will to the executors named therein, or to file it, within 30 days after he receives notice of the testator’s death, in the probate court having jurisdiction over the proceedings.

Other published Opinions on a lawyer’s responsibilities regarding the disposition of ordinary closed files recognize that certain types of documents may require special treatment, such as “documents contained in the file that either the lawyer or the client is required by law to maintain or any documents that the client would foreseeably need to establish substantial or property rights . . . .” (N.Y. State 623 (1991) (“What procedures should a lawyer undertake when disposing of closed files and to what extent are those procedures affected by dissolution of the lawyer’s firm?”). Absent instructions from the client, such material “should be further maintained by the lawyer according to law and/or the reasonably foreseeable needs of the client.” Id.

In addressing lawyer obligations with respect to closed files in general, N.Y. State 460 (1977) concluded that:

In the final analysis, whether and to what extent the closed files of a client must be preserved will be determined by applicable rules of law, the legitimate interests of the client in the preservation of his files and such instructions as he may issue in connection therewith, as well as the sound judgment of the lawyer who is duty bound to take into account both the mandate of the law and the foreseeable needs of his client.

See also ABA Informal Opinion 1384 (Mar. 14, 1977) (an attorney should not destroy or discard original documents, the return of which “could reasonably be expected by the client,” without the client’s consent; reten-
tion of files is a matter of the lawyer’s discretion, taking into account the nature of the file).

We agree with the principles set out in those authorities and believe that the lawyer—whether the original drafter, her firm, or a successor lawyer or firm—must keep the original Will of a missing testator secure, comply with any obligations of law regarding the original Will, or, if appropriate, employ procedures provided by law to deposit the Will with the court. However, this Committee does not opine on statutory or decisional law regarding the obligations of one in possession of an original Will or pertaining to the filing of Wills with the court and, therefore, does not address the legal requirements that may apply.\(^2\) We note that to the extent that such legal—as opposed to ethical—issues are implicated by the disposition of a testator’s original Will, those issues are beyond the scope of this Committee’s jurisdiction.

Upon retirement or dissolution, then, the lawyer should index the Wills of missing clients and place them in storage or turn them over to a successor lawyer who is assuming control of the lawyer’s or firm’s active files, while preserving the confidences and secrets of the testator/client. Cf. ABA Formal Opinion 92-369 (1992) (discussing the obligations of the sole practitioner to make arrangements for such indexing and turnover following the lawyer’s death); DR 4-101 (regarding client confidences and secrets); DR 2-111(b) (preserving confidences in the context of sale of a law practice).

We note that the Nassau County Bar Association Opinion 89-43 (1989) addressed the potential burdensomeness to a successor law firm holding a client’s original documents and concluded:

> It is no answer to the discharge of the custodial counsels’ obligations under the Code of Professional Responsibility to complain that the benefits of their passive custody of the documents are not commensurate with the present burdens. Such burdens do not flow solely from an attorney-client relationship, and are not dependent on the payment of fees; rather, the burdens of custody as prescribed by the Code are inherent

\(^2\) See, e.g., Section 2507 of the Surrogate’s Court Procedure Act concerning the filing of original Wills; 1 Harris, New York Estates: Probate, Administration and Litigation ¶ 1:27-28 (1996); see also In re Reiss, 107 N.Y.S.2d 168 (Sup. Ct. Queens Co. 1951) (with respect to original wills, attorney’s retaining lien applies before testator’s death but not after); N.Y. Penal Law § 190.30 (felony if, with intent to defraud, a person “conceals, secretes, suppresses, mutilates or destroys a will”).
in the lawyer’s enjoyment of his professional status, and his concomitant obligations to the public generally. Once the burden is assumed, by actively (or passively) taking custody of funds or property belonging to any “client,” those burdens must be fully discharged even if the benefits of the custody were minimal or non-existent.

CONCLUSION

For the foregoing reasons, we conclude that a retiring lawyer—or one whose firm is dissolving—may communicate with clients to arrange the return of original Wills to them or to obtain consent to dispose of those Wills. However, as to those clients who cannot be located, the lawyer’s obligation to retain the Wills in safekeeping continues indefinitely or in accordance with law. The original Wills remaining in the lawyer’s possession could be placed in storage or in the custody of a successor attorney (indexed and stored in a manner that will protect client secrets and confidences), unless it is appropriate to use available procedures for filing original Wills with a court for safekeeping.

August 1999

The Committee on Professional and Judicial Ethics

Mary C. Daly, Chair
William J. Sushon, Secretary

John Q. Barrett
Carole Lillian Basri
Edwin Mark Baum
Stuart M. Bernstein
Joel L. Blumenfeld
Susan Brotman
Patricia J. Clarke
Ernest John Collazo
James L. Cott
Richard E. Donovan
Jeffrey A. Fuisz
Barbara S. Gillers
Melanie F. Griffith
Arthur M. Handler
Gary W. Kubek
Mark Landau
Richard Levy, Jr.
Thomas M. Madden
Daniel Markewich
Richard L. Mattiaccio
Sarah D. McShea
Victor M. Metsch
James A. Mitchell
Mary C. Mone
John W. Moscow
Joseph E. Neuhaus
Michael C. Nicolai
James W. Paul
Stephen L. Ratner
Gerald E. Ross
Lucantonio N. Salvi
Laurence E. Wiseman
Frank H. Wohl
Formal Opinion 1999-6

Duty of Loyalty

The Committee on Professional and Judicial Ethics

**TOPIC:** Duty of loyalty

**DIGEST:** Firm may represent clients in matters directly adverse to the State of New York, including litigation against it, while concurrently acting as special counsel to the Manhattan District Attorney's Office on a pro bono basis.

**CODE:** DR 5-105(a); DR 5-105(c)

**QUESTION**

Whether a law firm may continue to represent clients in matters directly adverse to the State of New York, including litigation against it, while an attorney at the firm concurrently provides pro bono representation as special counsel to the Manhattan District Attorney’s Office.

**OPINION**

The applicable sections of the Disciplinary Rules of the Code of Professional Responsibility as enacted in New York are:

DR 5-105(a):

A lawyer shall decline proffered employment if the exercise of
independent professional judgment on behalf of the client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it is likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision (c) of this section.

DR 5-105(c):

In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

Under these rules, absent informed consent, a lawyer seeking to accept an engagement adverse to a current client must meet a heavy burden: “Where the [attorney-client] relationship is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation.” Cinema 5 Ltd. Cinerama, 528 F.2d 1384, 1387 (2d Cir. 1976).

In New York, therefore, absent informed consent, a lawyer is ordinarily precluded from representing either a plaintiff or a defendant in a lawsuit where the adverse party is a current client, even where the matters are wholly unrelated. Nevertheless, we believe that the law firm may continue to represent clients directly adverse to New York State while concurrently acting as Special Counsel to the Manhattan District Attorney’s Office. In reaching this conclusion, we rely on the Committee’s prior opinion in N.Y. City 1990-4 in which we addressed the ethical considerations surrounding the creation of a pro bono assistance program for the New York City Commission on Human Rights, including concerns that service as a mediator or administrative law judge or representation of complainants by an attorney might create a conflict with concurrent representation of other City agencies by other attorneys in the same firm. N.Y. City 1990-4 at *5. We determined that:

If the City is a litigant, it is important to determine which agency of the City is involved. Where a governmental body is organized into a number of different departments or agencies, each department or agency should be treated as a distinct person for purposes of the rule which forbids the concurrent representation of one client against another.
Id.; accord N.Y. City 894 (Ethical Guidelines for Pro Bono Legal Services to City) (1978); N.Y. State 447 (1976). This principle was reaffirmed in N.Y. City 1996-4, in which we opined that it was not improper for a law firm to simultaneously participate in two different pro bono programs in which the firm would represent the State (through the District Attorney's Office) and criminal defendants (through the Legal Aid Society) in criminal appeals. As this opinion makes clear, while there is no per se bar on concurrent representation of agencies of the City and interests adverse to City agencies, the lawyer undertaking the concurrent representation must still assure herself that her firm can adequately represent the interests of all clients concerned. See also N.Y. City 894 (1978) (Ethical Guidelines for Pro Bono Legal Services to New York City). Such an inquiry would necessarily require that she ensure each client's confidences are protected in the concurrent representations.

We note that treating different governmental departments or agencies as separate clients for the application of conflicts rules is in keeping with recent opinions treating separate corporate entities in the private sector as distinct clients for conflicts purposes. See N.Y. County 684 (1991) and N.Y. State 580 (1987). This outcome is also consistent with the Appellate Division, Third Department's holding in Aerojet Properties, Inc. v. State of New York, 138 A.D.2d 39, 530 N.Y.S.2d 624 (3d Dep't 1988). To be sure, Aerojet does not strictly apply to the issue presented here, as it involved the legal question of disqualifying counsel. Nevertheless, we believe that the holding fortifies our conclusion, especially given the similarity of the issues involved. In Aerojet, the court allowed a firm simultaneously to represent a plaintiff in an action against a department of New York State for unpaid rent while acting as defense counsel for New York State in numerous personal injury actions. In Aerojet the Appellate Division held that a lawyer could oppose the state while concurrently representing it so long as there is no substantial nexus between the lawsuits, no likelihood of disclosure of client confidences or any appearance of impropriety. There, the law firm satisfied this burden and was not disqualified.

As the inquiry makes clear, the dual representations at issue involve entirely separate agencies of New York State. Accordingly, the pro bono representation as special counsel to the Manhattan District Attorney's Office would not conflict with the representation of other clients of the firm simultaneously litigating against other New York State agencies.

CONCLUSION

It is our opinion that simultaneous representation as special counsel
to the Manhattan District Attorney's Office in criminal matters and representation of interests directly adverse to the State of New York in unrelated litigation and other matters is permissible under the ethical rules provided that the lawyer undertaking the concurrent representation assures herself that her firm can adequately represent the interests of all clients concerned and that each client's confidences would be protected.

December 1999

The Committee on Professional and Judicial Ethics

Jonathan J. Lerner, Chair
William J. Sushon, Secretary

Emery E. Adoradio
John Q. Barrett
Carole Lillian Basri
Edwin Mark Baum
Stephen J. Blauner
Susan Brotman
Ernest John Collazo
James L. Cott
Paul Dutka
Anne G. Feldman
James L. Fuchs
Jeffrey A. Fuisz
Barbara S. Gillers
Melanie F. Griffith
Arthur M. Handler
Mark Landau

Hal. R. Lieberman
Richard Levy, Jr.
Richard I. Mattiaccio
Sarah D. McShea
Victor M. Metsch
James A. Mitchell
John W. Moscow
Joseph E. Neuhaus
James W. Paul
Stephen L. Ratner
Philip H. Schaeffer
Marjorie A. Silver
Margaret L. Watson
Paul D. Wexler
Frank H. Wohl
Formal Opinion 1999-7

Joint Representation; Duty of Loyalty; Client Confidences and Secrets

The Committee on Professional and Judicial Ethics

**TOPIC:** Joint representation; duty of loyalty; client confidences and secrets

**DIGEST:** Attorney who represented jointly two clients who subsequently became adversaries should not provide documents or disclose information to one of the clients which could reveal sensitive and confidential personal matters about the other client unless and until (i) the attorney has the informed consent for such disclosure from both clients or (ii) such disclosure is required by the Disciplinary Rules, the applicable law or an order of a court of competent jurisdiction.

**CODE:** DR 4-101; EC 5-1

**QUESTIONS**

Where an attorney represented two clients jointly who subsequently have become adversaries, must the attorney accede to a request by one
of the clients to provide documents or disclose information that could reveal sensitive and confidential personal matters about the other client?

May the attorney provide redacted versions of the documents requested by one client, so as to protect sensitive and confidential information relating to the other client, while still meeting the attorney’s obligations under the Disciplinary Rules?

OPINION

Factual Background

An attorney has requested an opinion of the Committee concerning his law firm’s obligations arising out of the lawyer’s representation of joint clients. According to the inquiry, the attorney’s law firm was contacted by a Korean citizen ("Wife"), who engaged the attorney to render professional services in connection with her immigration to the United States and pursuit of permanent resident status. The attorney’s firm prepared and submitted the requisite forms to the office of the United States Immigration and Naturalization Service ("INS") located in New Jersey, where both the Wife and her husband, a United States citizen ("Husband") reside. One form, signed by the Husband on behalf of the Wife, sought authorization for her immigration as an alien relative. A second application, signed by the Wife alone, sought permanent resident status. Significantly, both applications were accompanied by the INS form by which the attorney’s firm entered its appearance as "their attorney of record." Both the Wife and Husband executed the notice of appearance.

Thereafter, the relationship between the Wife and Husband deteriorated, and they traded allegations of physical abuse, assault, battery and domestic violence. Litigation ensued between them. As a result, the attorney, in his inquiry to the Committee, described the marriage as over for all intents and purposes.

Several months later, the Husband contacted the attorney’s firm to request copies of the entire file concerning Wife’s immigration and alien status. Because of the allegations of domestic violence, the attorney’s office provided him with copies only of “documents that were directly pertinent to him,” such as forms that he signed and supporting documentation that related directly to him (such as his birth certificate, tax returns, and employment verification letter). The firm declined to provide copies of the Wife’s INS application or any other documents or information pertaining to the Wife because of what the attorney characterized as fear
of compromising the Wife’s confidential information that can be found on her birth certificate/family register and other documents.¹

DISCUSSION

The Identity of the Clients

Although the attorney and the law firm were initially contacted by the Wife, it appears that the immigration law services were rendered jointly for the benefit of both the Wife and Husband. This conclusion is fortified by the notice of appearance filed by the law firm in which it appears on behalf of both the Wife and Husband. Although each INS application was signed by only one spouse, as required by the particular form, they jointly executed, and the law firm filed with INS, a single notice of appearance on behalf of both.² Accordingly, based on the limited facts presented in the inquiry, absent any facts suggesting that the Wife and Husband were not joint clients of the law firm, the Committee construes the attorney-client relationship to be between the attorney’s firm as counsel and the Wife and Husband as co-clients. It bears emphasis that the nature of the attorney’s professional responsibilities may vary based on a determination by the attorney, as a matter of fact, whether the law firm represented the Wife and Husband, as co-clients, or represented only the Wife as an individual client.³

¹. From the letterhead of the inquiring attorney, it appears that the attorney’s firm maintains its practice of law in the State of New York. From the inquiry letter, it appears that all services rendered by the firm in this engagement were performed in or from New York, although the INS forms on behalf of the couple, and Wife, in particular, were submitted to the INS office in New Jersey. Accordingly, the Committee believes that the professional activities are governed by the Lawyers’ Code of Professional Responsibility (the “Code”) promulgated in New York, that state in which the firm maintains its practice and in which we assume the attorney and any others in the firm who worked on the engagement are admitted to practice. Under DR 1-105(B)(2), because the lawyer principally practices in New York, the New York rules would apply to his conduct in this instance. We address the attorney’s responsibilities under the Code as amended by the four Appellate Divisions of the Supreme Court of the State of New York, effective June 30, 1999.

². Additional facts not known to us, however, could lead to a different conclusion. See, e.g., Restatement of the Law Governing Lawyers § 125, cmt. c, Proposed Final Draft No. 1 (March 29, 1996) (“Clients of the same lawyer who share a common interest are necessarily co-clients. Whether individuals have jointly consulted a lawyer or have merely entered concurrent but separate representations is determined by the understanding of the parties.”).

³. The Committee also has insufficient information to indicate whether the engagement was or was not concluded, although it appears from the inquiry that the matter has been closed.
The Applicable Rules

DR 4-101 prescribes the lawyer’s paramount duties in preserving the confidences and secrets of a client. Under DR 4-101(A), “confidences” consist of “information protected by the attorney-client privilege under applicable law.” “Secrets” consist of “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client” (emphasis added). DR 4-101(B)(1) prohibits a lawyer from “knowingly … reveal[ing] a confidence or secret of a client” unless disclosure is permitted under DR 4-101(C).

Under DR 4-101(C)(1), a lawyer may reveal confidences or secrets “with the consent of the client or clients affected, but only after a full disclosure to them.”4 Although the rule does not specifically address the responsibilities of an attorney, such as the one in this case, who is faced with a request by one of two former co-clients for disclosure of information, EC 4-2 indicates that “[i]f the obligation [to protect confidences and secrets] extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information.”5 EC 4-4 emphasizes the lawyer’s obligation to protect the client’s secrets without regard to the nature or source of the information, or the fact that others may share the knowledge. EC 4-5 then provides that the lawyer “should not use information acquired in the course of the representation of a client to the disadvantage of the client.”

A lawyer also has an overriding duty of loyalty to her client or clients. As explained by EC 5-1, “[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer’s personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer’s loyalty to the client.”

The duty of loyalty in a specific matter and the duty to protect confidences and secrets, among other professional responsibilities, survive the conclusion of the engagement or the termination of the lawyer’s employment. EC 4-6; Nassau Co. 90-15 (1990).

4. DR 4-101(C)(2)-(5) enumerate other limited instances in which a lawyer may disclose confidences or secrets without client consent, which are not applicable to this opinion.

5. Unlike the Disciplinary Rules, which are mandatory, the Ethical Considerations under the Code are “aspirational in character,” although they are instructive as to the scope of the lawyer’s responsibilities.
The Evidentiary Rules Relating to Co-Clients Are Not Dispositive

As a threshold matter, the Committee recognizes that, under longstanding New York jurisprudence, confidential information imparted to an attorney representing two or more co-clients is generally privileged against disclosure to third persons, but it loses its protected status in litigation between the clients arising from, or involving, the matters for which the attorney was engaged. It does not follow, however, that because a claim of privilege would not be sustained, and the lawyer therefore would be required to testify to the confidences of the joint clients, the attorney also would be obligated to disclose “secrets” to the Husband outside the litigation context. Accord, N.Y. State 555 (1984) (the Code “make[s] clear that the evidentiary privilege is more limited than the ethical obligation of the lawyer to guard confidences and secrets.... And there certainly are times when matters as to which the lawyer may be required to testify (i.e., that are non-privileged in litigation), still probably must be kept in confidence by the lawyer until he is required to testify.”); Fla. 95-4 (1997).

The sharp differences that exist between testimony compelled by a court, which has overruled a claim of privilege, and extrajudicial disclosure of information a lawyer received in the course of representing a client, mandate extreme caution before automatically extending the evidentiary rule to require disclosure outside the judicial arena. Although the assertion of an evidentiary privilege in litigation between joint clients, such as the Wife and Husband, may be overruled by a court, the judicial process includes procedural safeguards otherwise lacking for non-judicial

---

6. See Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 137, 674 N.E.2d 663, 651 N.Y.S.2d 954, 961-62 (1996) (“Generally, where the same lawyer jointly represents two clients with respect to the same matter the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients.”), citing C. Wolfram, MODERN LEGAL ETHICS § 6.4.8, at 274-75 (West 1986). Accord, e.g., Wallace v. Wallace, 216 N.Y. 28, 35-36, 109 N.E. 872 (1915); Old Homestead Enters. of Saratoga, Inc. v. William R. Hall Jr. Enters., Inc., 102 A.D.2d 935, 477 N.Y.S.2d 519 (3d Dep't 1984); Tierney v. Flower, 32 A.D.2d 392, 302 N.Y.S.2d 640 (2d Dep't 1969). This doctrine flows from the rationale that the communications to the attorney by one or both clients were made on behalf of both clients, and that they therefore could not have intended what each said would be kept secret from the other. 9 J. Weinstein, H. Korn & A. Miller, NEW YORK CIVIL PRACTICE-CPLR ¶ 4503.07, at p. 45-150 (rev. 1999). Notwithstanding this evidentiary treatment of communications made by clients to counsel in a joint representation, a co-client who also utilizes the common lawyer for his or her separate personal legal matters “does not surrender the attorney-client protection with respect to the personal matters.” C. Wolfram, supra, § 6.4.8, at 275.
disclosures. Indeed, the courts may not be used by a lawyer to vex or harass (DR 7-102(A)(1)), any information required to be revealed must be relevant to the issues in the case, and the disclosure would be subject to court supervision. In this same vein, the court may also condition the disclosure of relevant information on compliance with a protective order. None of these protections apply to extrajudicial disclosure of client information.

The Duties of Confidentiality and Loyalty Mandate that the Lawyer Refuse to Provide Information to One Former Co-Client to the Detriment of the Other Former Co-Client

The Committee believes that the lawyer's professional duties and responsibilities to preserve client confidences and secrets and to remain loyal to the client, rather than the existence of the evidentiary privilege between joint clients, dictate the conclusion here. Where co-clients of a lawyer subsequently square off against each other, the Committee concludes that the evidentiary doctrine does not vitiate the protection accorded under the Disciplinary Rules to information acquired by the attorney in the course of the engagement. Under the Code, “[t]he attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of the client.” EC 4-4. See NCK Organization, Ltd. v. Greene, 542 F.2d 128, 133-34 (2d Cir. 1976). See also Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979) (“[t]he use of the word ‘information’ in [EC 4-4 and 4-5, which address the attorney's ethical obligation to protect information acquired in the course of the representation of a client, and to avoid using information to the detriment of a client] as opposed to ‘confidence’ or ‘secret’ is particularly revealing of the drafters’ intent to protect all knowledge acquired from a client, since the latter two are defined terms.... The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys.”).

The absence of any evidentiary privilege between co-clients in a dispute between them derives from the lack of any expectation by joint clients that their confidences concerning the joint representation will re-

7. See also Fla. 92-5 (1993) (where federal law purported to require an attorney to disclose client information that was a confidence within the meaning of the Florida Rules, the lawyer was prohibited from disclosing that information without the client’s consent, even if the information was not protected by the attorney-client privilege, until compelled to disclose by legal process).
main secret from each other. C. Wolfram, MODERN LEGAL ETHICS § 6.4.8 (West 1986); Hurliburt v. Hurliburt, 128 N.Y. 420 (1891). But the lawyer owes both clients a duty of loyalty in the specific matter, and we conclude that one co-client may not enlist the lawyer to aid the co-client in a subsequent dispute with the other co-client, because this would undermine the duty of loyalty owed by the lawyer to the other co-client in the specific matter. Some courts have allowed an attorney who represented co-clients to appear on behalf of one former co-client against the second former co-client in the same or a substantially related matter under limited circumstances, see Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977) (allowing attorney to represent primary co-client against secondary co-client in matter related to co-representation), while others have determined that such an adverse representation should not be allowed, e.g., E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 396-97 (S.D. Tex. 1969). Professor Wolfram states that the latter is the better view: “At the very least, when the co-client relationship is dissolved and disputes arise from precisely the same matter, the lawyer’s representation of a former co-client against a former client who is now an adversary, should not be permitted”. C. Wolfram, MODERN LEGAL ETHICS, § 2.4, at 373-74 (West 1986)(emphasis added).

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the

8. In Allegaert, the Second Circuit found that there was no conflict requiring disqualification where, after a dispute arose between joint clients, the firm continued to represent one co-client. The decision in Allegaert was based on the understanding by the joint clients that the law firm would continue to represent the primary client if a dispute arose. Allegaert v. Perot, 565 F.2d at 251. Here, the attorney’s inquiry contains no indication that he advised the Wife, or that the clients otherwise understood, prior to the attorney’s accepting the engagement, that either Husband or Wife was the “primary” client. The Committee cautions that at the outset of counsel’s retention, an attorney should be careful to warn co-clients and joint clients of the issues raised for the attorney and for them, as clients, by such an engagement, especially the dangers that may arise if the relationship between the clients deteriorates or becomes adversarial. See DR 5-105; EC 5-14 to -16; Levine v. Levine, 56 N.Y.2d 42, 48, 436 N.E.2d 476, 451 N.Y.S.2d 26, 29 (1982) (although the potential conflict of interest “inherent in joint representation suggests that husband and wife use separate counsel, the parties have an absolute right to be represented by the same attorney provided “there has been full disclosure, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which may [affect the representation].””), quoting Christian v. Christian, 42 N.Y.2d 63, 73, 365 N.E.2d 849, 396 N.Y.S.2d 817, 823 (1977).

9. As explained by the Comment 5 to Rule 1.6 of the ABA Model Rules of Professional Conduct (1995):

The principle of confidentiality is given effect in two related bodies of law, the

The Record

58
of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Although the Model Rules are not in force in New York, the reasoning behind them is persuasive here.

The Committee concludes that the lawyer’s duty of loyalty to each client means that a lawyer representing joint clients may not switch sides in the same matter, even if no confidences were imparted to the lawyer. Accordingly, a lawyer representing co-clients may not represent one against the other in the event a dispute arises between them even though there is no privilege as between them as adversaries. Where, as here, joint clients’ interests “differ and become antagonistic, the lawyer must be absolutely impartial between them, and may not represent any of them. ‘Any other holding would undermine the loyalty and trust upon which the attorney-client relationship is based.’” Rosman v. Shapiro, 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987), quoting H. Drinker, LEGAL ETHICS 112 (1953).

As an ethical matter, if the Husband were able to compel the lawyer to provide him on request with personal information about the former co-client Wife under circumstances where it would be used against the Wife simply because the information was no longer subject to the attor-
ney-client privilege, it would enable one co-client to utilize the lawyer as a weapon against the other former co-client. In the Committee's opinion, this would violate not only the lawyer's duties to protect and preserve “secrets” of the client but would also involve the lawyer in violating the duty to remain loyal to the client in the matter for which he was retained.

CONCLUSION

Under the circumstances, the Committee concludes that the attorney is required to protect the confidentiality of the information, subject to the limited circumstances in which disclosure is permitted by the Code. The Committee concludes that the attorney may not make the requested disclosure unless and until: (i) the lawyer has obtained the informed consent of both co-clients (see DR 4-101(C)(1)); or (ii) the lawyer is permitted to make disclosure pursuant to the Disciplinary Rules, or required to do so by other applicable law or an order of a court of competent jurisdiction (see DR 4-101(C)(2)-(5), 7-102(B)). In seeking the co-client's informed consent to the disclosure, however, the lawyer must be careful not to disclose facts or information to the requesting co-client that would be tantamount to disclosing the confidence or secret itself.

Finally, as a former client, the Husband is entitled to any information or documents that he provided to the lawyer, and to other information that pertains solely to Husband. Accordingly, the lawyer may provide information which was supplied by, and which relates exclusively to, the Husband (so long as it is not supplied by the Wife). The lawyer also may provide, in redacted form, the portions of documents that contain or reflect information which pertains exclusively to the Husband. In doing so, however, it is incumbent on the lawyer to assure that no confidential or sensitive information is revealed which could possibly relate to Wife or operate to her disadvantage.

December 1999
The Committee on Professional and Judicial Ethics

Jonathan J. Lerner, Chair
William J. Sushon, Secretary

Emery E. Adoradio
John Q. Barrett
Carole Lillian Basri
Edwin Mark Baum
Stephen J. Blauner
Susan Brotman
Ernest John Collazo
James L. Cott
Paul Dutka
Anne G. Feldman
James L. Fuchs
Jeffrey A. Fuisz
Barbara S. Gillers
Melanie F. Griffith
Arthur M. Handler
Mark Landau

Hal. R. Lieberman
Richard Levy, Jr.
Richard I. Mattiaccio
Sarah D. McShea
Victor M. Metsch
James A. Mitchell
John W. Moscow
Joseph E. Neuhaus
James W. Paul
Stephen L. Ratner
Philip H. Schaeffer
Marjorie A. Silver
Margaret L. Watson
Paul D. Wexler
Frank H. Wohl
INTRODUCTION

This report provides an overview of the legal and related ethical issues surrounding the expulsion of partners from law firm partnerships. The recent Florida decision in Beasley v. Cadwalader, Wickersham & Taft and other decisions have highlighted the tension between the traditional, fiduciary relationships among partners and the desire of many law firms to maximize their profits, shut down unproductive offices, and remove partners who are not perceived to be pulling their weight financially. The issues presented in these cases give rise to the question of whether a law firm should be viewed as properly engaged in the realities of modern commercial life, where both profit maximization and economic survival are paramount, or whether, instead, these business goals run counter to the tradition of strict fiduciary duty among partners, as well as to the obligation of good faith and fair dealing in all business aspects of the partnership, including expulsions of partners.

I. GENERAL PRINCIPLES OF UNPARTNERING

Under New York law, partners have no common law or statutory right to dismiss another partner from the partnership. A partnership may, however, provide terms in its partnership agreement for expulsion under prescribed conditions which must be strictly applied. The Uniform Partnership Act (UPA), dating back to 1914 and the Revised Uniform Partnership Act, (RUPA), issued in 1994, lay out some basic good faith requirements for these agreements, but both Acts defer to the specific terms of the expulsion provisions as contained in partnership agreements.

Expulsion provisions need not include any particular requirement of cause for expulsion although, of course, an agreement may include such terms. Inclusion of for cause requirements presents three potential problems. First, the expelled partner will likely complain that the actions specified as a basis for the expulsion did not meet the requirement of the partnership agreement. Second, by articulating the “cause,” the partnership agreement opens the door to litigation as to whether the cause was a bona fide justification for expulsion. Third, if the partnership agreement enumerates the grounds for expulsion, it may unwittingly preclude a subsequent expulsion based on grounds not specifically identified in the expulsion clause.

In order to insure that the expulsion clause in the partnership agreement is sufficient to support an expulsion, a leading commentator has suggested that the clause should state:

1. who within the partnership has the power to expel; (2) the percentage approval required to effect an expulsion; (3) whether cause for expulsion must exist; (4) the availability of procedural protections; (5) the method by which the account of the expelled partner will be settled; (6) the manner in which the expelled partner will be protected from subsequently asserted third-party claims against the firm; and (7) the effective date of the expulsion.

If a partnership agreement fails to contain an expulsion clause, ever.
pulsion still can be successfully instituted in a few limited circumstances. First, the partners may unanimously consent to the expulsion, which is legally akin to amending the partnership agreement to allow expulsions. This strategy is of limited use, however, because the target of the expulsion, also a partner, would need to approve the amendment. Alternatively, a partnership agreement may provide for amendment by a vote of fewer than all the partners. If the requisite number of partners amend the partnership agreement under these terms to include an expulsion provision, the newly created expulsion authority may then successfully be exercised.

The Revised Uniform Partnership Act allows expulsion without an agreement, but only in the following limited circumstances:

(1) expulsion by unanimous vote of partners if it is unlawful to carry on the partnership business with the partner, the partner’s interest has been transferred, or (in the case of a corporate partner) the partner has filed for dissolution or its charter has been revoked; and (2) judicial expulsion of a partner.

A solid exclusion clause is critical to the partnership agreement because the “firing” of a partner without such a clause may be considered a dissolution by express will of the partners. In this case, a partner fired without a valid expulsion clause may successfully demand a liquidation and winding up of the partnership. However, inclusion of a no-cause expulsion clause in a partnership agreement does not guarantee conflict-free expulsions. In fact, many partners expelled pursuant to a no-cause expulsion provision have litigated the matter, complaining of breach of fiduciary duty and breach of contract, or arguing that the expulsion clause was unenforceable, or was exercised in bad faith.

2. GOOD FAITH AND BREACH OF FIDUCIARY DUTY

Both the UPA and the RUPA require good faith and fair dealing in the context of expulsions. Under the UPA the main statutory provision regarding expulsions is Section 31, which lists among the causes for disso-

---

6. Id.
7. See, e.g., Winston & Strawn v. Nosal, 279 Ill. App. 3d 231, 664 N.E.2d 239 (1996); Beasley v. Cockalader, Wickersham & Taft, 1996 WL 438777 (suggesting that it would be proper for partners to amend the partnership agreement to include an expulsion provision and then act on the basis of their newly created power); Aztec Petroleum Corp. v. MM Co., 703 S.W.2d 290 (Tex. Civ. App. 1985).
8. Hillman on Lawyer Mobility at §5.3.2.
olution an “expulsion of any partner...bona fide in accordance with such a power conferred by the agreement among the partners.” Section 31 of the UPA also makes clear that expulsions are proper only if they are bona fide under the partnership agreement or in good faith or by agreement.9

Case law also establishes that a fiduciary relationship exists between partners and that with this relationship comes the obligation of each partner to act in good faith in business dealings with other partnership members.10 In fact, unless the expelled partner’s conduct is so egregious as to obviate any need for detailed inspection of the partnership’s motives, an inquiry into whether the partnership breached its fiduciary duties to the expelled partner is usually deemed necessary by the court.11 In the seminal case, Meinhard v. Salmon,12 Justice Cardozo set forth the oft-quoted guiding principle for duties among partners: “Co-partners, owe to one another, while the enterprise continues, the duty of finest loyalty . . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard behavior.”13

Courts have held that partners owe each other a duty of good faith no less in the context of expulsion, even where the partnership agreement permits expulsion without cause.14 The principle of good faith should not be confused with fairness. In the context of a no-cause expulsion clause, a partnership’s dismissal of a partner without explanation will remain intact under the good faith standard even if that expulsion would result in harsh consequences to the expelled partner.15

Because partners must exercise good faith in their dealings with each other, an expelled partner’s claim usually will depend on whether the decision to expel was tainted by bad faith or breach of fiduciary duty.16

---

9. See Hillman at § 5.3.1.
11. See id. at *5.
16. A no-cause expulsion provision places the burden of demonstrating bad faith on the expelled partner. To require otherwise “would nullify the right to expel without cause and frustrate the obvious intention of the agreement to avoid bitter and protracted litigation over
These claims are limited to matters having economic significance because “the personal relationships between partners to which the terms ‘bona fide’ and ‘good faith’ relate are those that have a bearing upon the business aspects or property of the partnership and prohibit a partner, to-wit, a fiduciary, from taking any personal advantage touching those subjects.”

Thus, in general, a partnership may not expel a partner solely to increase its per partner profit, but may be free to do so for virtually any other reason in the context of a no-cause expulsion clause.

### 3. CASE LAW

The recent decision in Beasley v. Cadwalader, Wickersham & Taft, clearly illustrates these principles. Beasley was hired as a lateral partner in the firm’s Palm Beach office; he had previously practiced in Florida for almost twenty years. Soon after he joined Cadwalader’s Palm Beach office, the firm’s management committee, responding to complaints of declining compensation for senior partners, conducted a study to determine how the remaining partners’ return would be affected if the Palm Beach office was closed. The committee concluded that closing the Palm Beach office would improve diminishing return on partnership equity and decided to close the office, thereby eliminating its partners.

The court noted that because the firm’s partnership agreement did not include an expulsion clause, the expulsion of Beasley would breach the partnership agreement. On the other hand, if he voluntarily withdrew from the firm, there was no breach of the agreement or of fiduciary duty. The management committee decided to offer Beasley the opportunity to transfer to New York or Washington—an alternative they knew Beasley would reject given his twenty years of practice in the Palm Beach area. Beasley did indeed reject the transfer offer and filed suit against the firm for wrongful expulsion and breach of fiduciary duty. Cadwalader claimed that because Beasley refused the transfer offer he voluntarily withdrew from the partnership. The court found that this transfer offer was made

17. Gelder at 870.
in bad-faith because the nature of the offer (far from Beasley's home and clientele for the past 20 years) was unreasonable and therefore precluded any rational person from considering it anything but an expulsion.\textsuperscript{20}

The Beasley court could have based its decision solely on the absence of any expulsion provision in the partnership agreement, or even on Cadwalader's bad-faith offer of a transfer option. Instead, the court choose to expand its opinion to address Cadwalader's breach of fiduciary duty to Beasley. The court noted that the dismissal of Beasley and the other partners was done for the express purpose of producing greater profits for the remaining partners, as justified in the following explanation by Cadwalader's Co-chair Fritts: "There was a fear, there is a fear, there always will be a fear, that highly productive partners . . . can leave, go to another place and get more money. And life is not made up of love, it is made up of fear and greed and money . . . ."\textsuperscript{21} Ruling that Cadwalader's behavior contravened the very essence of Justice Cardozo's view of fiduciary duties between partners, the court stated that:

While life in the marketplace may well be made up of fear, greed and money, life in a partnership is not so composed . . . . When the partnership encounters foul weather, the partners must either all stay the course or abandon it. Under the facts of this case, it was a gross breach of fiduciary duty for some partners to throw others overboard for the expediency of increased profits.\textsuperscript{22}

The court determined that these facts established conduct reckless enough to be considered conscious disregard for the rights of Beasley and accordingly rendered a final judgment awarding punitive damages as well as return of capital, interest, profits and attorney fees.\textsuperscript{23}

Cadwalader appealed all aspects of the award. The Court of Appeal of Florida affirmed on liability, stating that the lower court "authored a meticulous, and ... well-reasoned final judgement" but reversed as to the award of profits, attorney's fees and costs while affirming all other awards.

\textsuperscript{20} See Beasley, 1996 WL 438777, at *4--*6.

\textsuperscript{21} Beasley, 1996 WL 438777, at *7 (quoting Fritts deposition page 95, lines 10 through 25, docket # 132).

\textsuperscript{22} Id. at WL 438777, *6 (Fla.Cir.Ct.).

\textsuperscript{23} Id at 1996 WL 438777, *9 (Fla. Cir. Ct.).
including punitive damages. Both Cadwalader and Beasley made motions for rehearing; Cadwalader on the award of punitive damages and Beasley on the reversal of the attorney fees. On rehearing, the Court of Appeal affirmed the award of punitive damages to Beasley, but again denied an award of attorney’s fees and costs to Beasley. The case was settled following the rendering of the rehearing opinion.

Plaintiffs in other partnership expulsion cases have advanced similar claims and the courts have used similar analysis, albeit with differing results. In 

Heller v. Pillsbury Madison, a former law partner sued his law firm claiming that he was improperly expelled. Heller argued that his former partners acted in bad faith and in breach of fiduciary duty by dismissing him in order to enrich themselves at his expense. The court acknowledged that partners owe each other these duties but reminded that bad faith in this context means only that partners cannot expel another partner for self-gain. The court found that although Heller’s expulsion did increase all of Pillsbury’s partners’ profit shares, the evidence did not establish that defendants expelled Heller in order to enrich themselves. Rather the court found that Heller was expelled due to a loss of trust in him brought about by a series of inappropriate actions directed at one of the firm’s important clients. The court wrote:

The foundation of a professional relationship is personal confidence and trust. Once a schism develops, its magnitude may be exaggerated rightfully or wrongfully to the point of destroying a harmonious accord. When such occurs, an expeditious severance is desirable.

The Court of Appeals affirmed the lower court’s ruling dismissing Heller’s claims and declaring nonsuit on others.

Likewise, in Bohatch v. Butler, the plaintiff, a law partner expelled from the firm, claimed that her partners expelled her in bad faith—partly to acquire her partnership interest. The court found, however, that Bohatch’s

26. See, Heller at 21. Heller sent offensive letters to the Executive Vice-President and General Counsel of Bank of America and to the bank’s chief executive officer and later sent an unauthorized apology letter to the same individuals.
partnership share was so small that the jury could not have reasonably concluded that the partners’ expulsion of Bohatch was motivated by their desire to acquire her partnership share.

In Bohatch, the plaintiff, a partner in the firm, reported to the Management Committee her suspicions that another partner was overbilling Penzoil, an important client. The committee undertook an investigation and determined that the partner in question had not overbilled the client. Shortly thereafter Bohatch was told that Penzoil had problems with her work and was asked to look for alternative employment. Eventually the firm gave Bohatch notice that she needed to vacate her office and Bohatch filed suit against the firm. The firm then formally expelled Bohatch. Once the court dispatched with the claim that Bohatch was expelled in bad faith due to the partners’ desire for her partnership interest, the court went on to note that a law firm may expel a partner to protect relationships both within the firm and with clients, writing: “Just as a partner can be expelled, without a breach of any common law duty, over disagreements about firm policy or to resolve some other fundamental schism, a partner can be expelled for accusing another . . . [producing] a profound effect on the personal confidence and trust essential to the partner relationship. Once such charges are made, partners may find it impossible to continue to work together to their mutual benefit . . . .” 29 The Texas Court of Appeals did find that the firm violated certain other provisions of the partnership agreement, namely by reducing Bohatch’s tentative partnership distribution to zero without notice and by terminating her draw three months before she left. However, she was awarded only lost earnings and no mental anguish damages.30

Bohatch applied for a writ of error to the Supreme Court of Texas, arguing that permitting a law firm to retaliate against a partner who in good faith reports suspected overbilling would discourage compliance with rules of professional conduct and thereby hurt clients. The Supreme Court of Texas, while recognizing the force of this argument, rejected it, writing that once a partner accuses another partner of wrongdoing, there may be a profound effect on the personal confidence and trust necessary to the partner relationship. Partners may then find it impossible to continue to work together to their mutual benefit and for the benefit of their clients.31 The court affirmed the court of appeals judgment.

29. Id. at 7.
30. Id. at 6.
Other courts have held that a law firm can indeed expel a partner to protect relationships both within the firm and with clients. In Lawlis v. Kightlinger & Gray the court held that a law firm did not breach its fiduciary duty by expelling a partner, pursuant to a expulsion clause, after the partner’s successful battle with alcoholism because “if a partner’s propensity toward alcohol has the potential to damage his firm’s good will or reputation...simple prudence dictates the exercise of corrective action...since the survival of the partnership is potentially at stake.”\textsuperscript{32} Again in Holman v. Coie, the court found no breach of fiduciary duty where the law firm expelled two partners because of their contentious behavior during board meetings and because one, a state senator, made a speech which was offensive to a major client.\textsuperscript{33}

In another instructive case, Winston & Strawn v. Chester W. Nosal,\textsuperscript{34} the expelled partner argued that he was expelled due to his request to view Winston & Strawn’s financial records. The court, applying Illinois partnership law, reversed a grant of summary judgment for the expelling firm and concluded that the firm could not use expulsion in response to a partner’s exercise of rights under the partnership agreement or the UPA. In that case, the expelled partner, Nosal, complained that in direct response to his request to view Winston & Strawn’s financial records, he was expelled. His request was related to his belief that an executive committee member had committed massive fraud on the partnership. Nosal argued that his expulsion was in bad faith because he was legally entitled to the records under the partnership agreement under Illinois law, and because his expulsion occurred immediately after he handed the suspected executive committee member a draft complaint related to his document request. In holding that the trial court erred in granting summary judgment for Winston & Strawn, the court noted that “regardless of the discretion conferred upon partners under a partnership agreement, this does not abrogate their high duty to exercise good faith and fair dealing in the execution of such discretion. The court found that Nosal had sufficiently raised a triable issue, and the case was reversed and remanded.

4. CONCLUSION

Claims for breach of contract and breach of fiduciary duty remain


\textsuperscript{34} 279 Ill.App.3d 231, 664 N.E. 2d 239, appeal denied, 169 Ill. 2d 629, 671 N.E. 3d 745 (1997).

THE RECORD

70
the most frequent complaints challenging a partner's expulsion. Punitive damages may be awarded where the partnership's conduct is particularly egregious, as in Cadwalader, although there is a pending motion by Cadwalader to reverse this award.

The underlying theme present in all expulsion cases has been the need for an explicit clause in the partnership agreement regarding expulsions as well as the duty of partners to act in good faith and without breach of fiduciary duty. Satisfying these conditions, a partnership may freely remove any of its partners unless the predominant motivation for doing so is to increase compensation for other partners, as demonstrated clearly in the Beasley case. This rule distinguishes law firm partnerships from other business partnerships which commonly downsize to allow for increased revenue.

This restriction on law firm partnerships may well be both impractical and unreasonable, causing more frequent dissolution of law partnerships and inflicting financial hardship on firms that remain intact. Courts have accepted certain difficult realities of law partnership in other realms, at times with holdings running counter to long held principles of public policy. In Bohatch, for instance, the court permitted the firm to retaliate against a “whistleblower” by expelling a partner who in good faith reported suspected overbilling by another partner. The Bohatch court acknowledged that from a public policy standpoint its holding raised valid concerns about principles mandating retention of whistle blowers as well as concerns about future compliance with Rules of Professional Responsibility. But in the end, the court allowed the expulsion because it found compelling the practical argument that partners may simply find it impossible to work together once charges are made by one partner against another. We believe courts should give the same practical considerations to the financial realities of law firm partnership.

While Beasley may have been rightly decided in the absence of an expulsion clause in the partnership agreement, we believe that, at the very least, law partners should be able to include, and courts should defer to, explicit language in partnership agreements allowing for expulsion due to financial considerations such as lack of productivity, declining revenues, or desire to increase partner compensation.

August 1999
The Committee on Professional Responsibility

John B. Harris, Chair
Sean T. Haran, Secretary

Fritz W. Alexander, II
William D. Anderson, Jr.
Robert J. Anello
Mitchell Bloch
Angelo T. Cometa
Kirsten L. Cristophe
Wayne A. Cross
Anthony E. Davis
Karen Dippold
Charles A. Ehren, Jr.
Michael S. Feldberg
Eugene M. Gelernter
Ellen F. Gesmer
Rosalind M. Gordon
A. Rene Hollyer
Mark Kaplan
Jerome I. Katz
Alan M. Klinger

Donald J. Kravet
Raymond A. Levites
Jeanne M. Luboja
John M. McEnany
Richard Maltz
Lisa H. Nicholson
Guy T. Petrillo
Morton L. Price
James P. Rouhandeh
David M. Rubin
Emily J. Sack
Robert M. Simels
Peter L. Simmons
Beverly F. Sowande
William A. St. Louis
James P. Tallon
Edward E. Vassallo
Jean Warshaw
The Future of CUNY, Part I

Remediation and Access:
To Educate the “Children of the Whole People”

The Commission on the Future of CUNY

CONTENTS

<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td></td>
</tr>
<tr>
<td>Background</td>
<td>74</td>
</tr>
<tr>
<td>The Role of the Commission on the Future of CUNY</td>
<td>76</td>
</tr>
<tr>
<td>MAJOR FINDINGS OF THE COMMISSION ON THE FUTURE OF CUNY: REMEDIATION</td>
<td>79</td>
</tr>
<tr>
<td>TRUSTEES PROPOSAL TO ELIMINATE REMEDIAL COURSES AT THE SENIOR COLLEGES</td>
<td>81</td>
</tr>
<tr>
<td>Remediation Is An Integral Part of Higher Education</td>
<td>88</td>
</tr>
<tr>
<td>The Quality of Remedial Programs</td>
<td>88</td>
</tr>
<tr>
<td>THE NUMBERS GAME: IMPACT ON THE STUDENTS</td>
<td>89</td>
</tr>
<tr>
<td>Analysis of CUNY Projections of Impact</td>
<td>90</td>
</tr>
</tbody>
</table>
An Alternative Assessment of the Amendment’s Impact 92
Impact on Students at Particular Colleges 94
Racial and Economic Stratification 96

EDUCATIONAL IMPACT: FOCUS ON WHAT REALLY MATTERS 98
Impact on SEEK and ESL Students: A Prelude to Failure? 98
A Word About the Community Colleges 100
The Likelihood of Completing a Bachelor’s Degree 101
When Beginning at a Community College 101
The Benefits of Taking Remediation at a Senior College 103

IMPACT ON COLLEGES’ INSTITUTIONAL MISSIONS 105
The Problem of Inflexibility 106
Impact at the College of Staten Island 108
The Budgetary Impact of Relocating Remediation 109

ATTEMPTS TO MITIGATE THE ADVERSE EFFECTS 112
OF THE NEW POLICY
Prelude to Success 112
CUNY-Based Summer Programs 115
CUNY-Based Year-Round Immersion Programs 115
College Now 115
Other CUNY Initiatives 116
Other Ameliorative Proposals: Paying for Remediation 117

THE TESTS—REMEDIATION 118
AND ADMISSIONS—A “MOVING TARGET”
Use of a Test as a Sole Criterion for a High Stakes Decision 120
Fairness and Standardized Tests 122
Realistic Cut Scores 122

CONCLUSIONS AND RECOMMENDATIONS ON REMEDIATION 126
The Future of CUNY, Part I

Remediation and Access: To Educate the “Children of the Whole People”*

The Commission on the Future of CUNY

“The experiment is to be tried, whether the children of the people, the children of the whole people, can be educated; and whether an institution of the highest grade can be successfully controlled by the popular will, not by the privileged few.”

Dr. Horace Webster, first president of the Free Academy (later City College) on the occasion of its formal opening January 21, 1849

INTRODUCTION

Background

The City University of New York (“CUNY”) has a long and proud history. The third largest university system in the country, CUNY enrolls nearly 144,000 students in its 11 senior colleges and approximately 69,000 students in its six community colleges. Traditionally, CUNY has demon-

* The report also contains appendices comprising a discussion of the legal analysis and standard of review pertaining to the Board of Regents decision on remediation, a discussion regarding measurement of the quality of a CUNY education, many exhibits containing data, and a bibliography. Copies of these appendices are available, along with the full text of the report, on the Association’s website (www.abcny.org) and from the Association’s Executive Director’s office, 212-382-6658.
THE FUTURE OF CUNY

strated a strong commitment to serving a diverse and non-traditional urban constituency that includes large numbers of working students, recent immigrants, single mothers, and adult learners. Because CUNY has found ways to accommodate these students’ needs, it has emerged as a vehicle for the upward mobility of the disadvantaged in the City of New York. The system’s significance in training the City’s professional workforce makes it essential to the economy of one of the world’s most important cities.

CUNY’s importance to the lives of individual New Yorkers cannot be overestimated. Fifty-three percent of CUNY students are first-generation college students; twenty-eight percent are the first in their immediate family to attend college. The boost CUNY gives these students is difficult to quantify, but studies have repeatedly shown that higher education increases the earning capacity, productivity and entrepreneurial ability of New Yorkers. Current census data indicate that having a bachelor’s degree increases a person’s average lifetime earnings by about $700,000, compared to having only a high school diploma. Post-secondary education is also a major service industry in New York City. CUNY’s direct impact on New York’s economy and tax base is estimated to be $13.7 billion annually.¹

CUNY is at a turning point. The system is the focus of controversy and its funding is grossly inadequate. External controversy and internal schisms have been exacerbated by the recent proposal by the CUNY Board of Trustees to eliminate remedial coursework at CUNY’s senior colleges.² Against this background, the Mayor’s Advisory Task Force on the City University of New York, headed by Benno Schmidt, (now a Trustee of CUNY and Vice Chairman of the Board) issued its Report, The City University of New York: An Institution Adrift, (the “Schmidt Report”) on June 7, 1999. Herman Badillo, now Chairman of the Board of Trustees of CUNY, was also a member of the Mayor’s Task Force. The Report was accompanied by a number of underlying reports, some written by Task Force staff and some by consultants from the Rand Corporation and PricewaterhouseCoopers.³ Most recently, on September 30, 1999, the group of consultants engaged by the Board of Regents issued its Review (“Consultants’ Review”) of CUNY’s proposal to end remedial coursework at the senior colleges.

². Amendment to the Master Plan of the City University of New York, filed with the Board of Regents, June 28, 1999, (“Amendment”).
³. Both the Schmidt Report and its underlying reports will be referred to throughout this document. The PricewaterhouseCoopers Reports will be referred to as “PwC I,” “PwC II,” and “PwC III,” respectively.
The Role of the Commission on the Future of CUNY

The Association of the Bar of the City of New York believes that it can serve a constructive role in the public policy debate over CUNY. Over the course of its 129-year history, the Association has developed a reputation for providing broad, comprehensive, in-depth and non-partisan analysis of major policy issues. The Association has applied this approach to topics as varied as development of a Congressional code of ethics, creation of the City's first Family Court, strategic arms control and, currently, campaign finance reform. To accomplish its goal, the Association has established a Commission on the Future of CUNY. The Commission consists of eminent educators, former public officials, lawyers, as well as business, civic and community leaders representing a balance of perspectives. The commission's members include past and present members of the CUNY community.

The Commission takes its lead from CUNY's mission as enunciated in its enabling statute. Pursuant to New York Education Law, CUNY is obligated to provide broad access and opportunity for students from all backgrounds, to maintain a commitment to academic excellence, to remain responsive to the needs of its urban constituencies and to operate an integrated educational system that fosters student access to all system resources. Within that framework the Commission has examined the issues concerning the future of CUNY.

Over the past two years, CUNY has been the focal point of a vigorous debate over its standards and its remediation and admissions policies. The proposal to eliminate remedial coursework at the senior colleges has been accompanied by a high degree of rhetoric, creating tension among CUNY faculty, administrators and students, as well as civic and government leaders. In the course of the debate, the public has been led to believe that the senior colleges are filled with students who are unable to read or write. As the Consultants' Review noted:

4. The work of the Commission was funded by a grant from the New York Community Trust.
5. §6201. 3: "The legislature's intent is that the city university be supported as an independent and integrated system of higher education on the assumption that the university will continue to maintain and expand its commitment to academic excellence and to the provision of equal access and opportunity for students, faculty and staff from all ethnic and racial groups and from both sexes."
§6201. 5: "Only the strongest commitment to the special needs of an urban constituency justifies the legislature's support of an independent and unique structure for the university."
the process of considering the strategic strengthening of the University has given way to an invasive political theater in which outrageous claims are the norm, policy comes to reflect anecdote rather than analysis, and almost everyone is free to talk without restraint—about lines drawn in the sand, about the fundamental negation of the institution’s basic mission, about an institution being adrift.7

At this moment, as the New York State Board of Regents considers the Trustees’ proposed Amendment and the CUNY Board of Trustees continues to redefine the system’s methods of testing, assessment, and admissions, the proper role of remediation in the CUNY system is the most immediate question facing the system. It is only fitting, then, that the Commission should turn its attention, first, to the proposed Amendment to the Master Plan. It will be the primary focus of Part I of this Report. Part II (to be issued at a later date) will focus its recommendations for the future of CUNY on the two aspects of the system we view as primarily responsible for setting it “adrift”: chronic under-funding and flawed governance practices.

Governance problems are legion. For example: Because of the system of appointment of Trustees and absence of conflict of interest rules to prevent either the fact or the appearance of political interference in the making of educational policy decisions, these decisions may be considered suspect. The decision-making process in the case of the changes in remediation and access is particularly vulnerable to criticism for its haste and the absence of careful deliberation or any meaningful consideration of less drastic alternatives than the one adopted. Courts have overturned Trustee decisions because of their failure to follow applicable procedures. This in turn has led to further confusion on the part of both the colleges and their prospective students.

The lack of sufficient financial support is another constant theme. CUNY is in a precarious position financially and it can hardly be gainsaid that it is grossly underfunded. Its state appropriations have dropped by 40% since 1980 in constant dollars, and its City funding has plunged 90% in constant dollars.8 Meanwhile, costs have increased for the system, forcing it to rely more and more on tuition revenues to stay afloat. As a result, tuition levels at CUNY are currently significantly higher than at peer col-

leges.\textsuperscript{9} New York State funding for the operating costs of public higher education is almost at the bottom of the national scale.\textsuperscript{10} Since 1990, New York State's constant dollar appropriation for CUNY community colleges has fallen by 55%, while enrollments have remained constant. State funding now makes up just 34% of community college budgets.\textsuperscript{11} Meanwhile, the state legislature and courts have recently reduced New York City's responsibility for CUNY appropriations.

In an effort to be of greater assistance to the Board of Regents in making the decision whether to approve the Amendment, we have prepared a brief analysis of controlling law and the standard of review to be applied by the Regents in determining whether to approve the proposed Amendment to the Master Plan. Suffice it to say here, the Trustees' Resolution and proposed Amendments are, by statute, only recommendations to the Regents. The Regents have the responsibility to assure that the changes comport with the mission of CUNY to serve its urban constituency and to maintain academic excellence. In their consideration, the Regents may take into account that the Board of Trustees neither discussed nor debated the potential impact that the proposals would have, nor did they have the necessary documentation before them when they acted. Moreover, the Trustees ignored their own by-laws, which require that the faculty be involved in the formulation of policy relating to admissions and changes in curriculum (§8.6). Further, the Regents must take into account the implications of the federal Civil Rights laws.

Somehow in this discussion, the provision of remedial coursework has been equated with a diminution in academic excellence. Whether or not the provision of remediation relates to academic excellence is a debatable issue. Remedial coursework at CUNY senior colleges at present must be satisfied within one or at most two semesters. Academic excellence, on the other hand, involves the provision of faculty, scholarly research, and facilities to enrich and develop students over the period from admission to graduation. CUNY's great successes in this area have been overlooked in this debate.

\textsuperscript{9} PwC III, p. 46.
\textsuperscript{10} New York State ranks 42 and 46 in rankings of state higher education appropriations per capita and per $1000 income, respectively, according to Grapevine: The National Database of Tax Support for Higher Education. In 1998-99, the state spent $166.91 per person on higher education, compared to California's $223.36 and New Mexico's $297.79. (pp. 13,16)
\textsuperscript{11} For constant dollar appropriations see PwC III pp. 48-52. For appropriations as a percentage of revenue see CUNY Funding Summary, Community Colleges (undated.)
Excellence should be measured by the achievements of the graduates of an institution, not by its entrants—an excellent university with CUNY’s mission should raise the levels of achievement. It is relatively easy to take high-achieving incoming students and then graduate them with high achievement. It is much more difficult, but also important, to take students who are ill-prepared and to graduate them with high levels of achievement. This has been CUNY’s unique contribution to this city.

CUNY is far too important to the future of this City and its residents, particularly the poor and poorly served, to “rush to judgement” on such vital matters as continued access for the City’s economically and educationally disadvantaged to what is likely the only chance they will have to get an education and thereby to gain a toehold in the economy of the twenty-first century. The Commission finds the expressed need to move quickly extremely disturbing and can discern no need for such great, even unseemly, haste in making whatever changes may ultimately be deemed advisable. The future students of CUNY are entitled to have the same opportunity of social and economic upward mobility afforded to their counterparts in earlier generations of “the children of the whole people” of New York.

These are difficult issues. Broad vision, clear and objective information, meaningful assessments of academic excellence and careful consensus-building are needed in this debate, rather than polarized rhetoric and simplistic solutions.

MAJOR FINDINGS OF THE COMMISSION ON THE FUTURE OF CUNY: REMEDIATION

The Commission submits that there are compelling reasons not to approve the proposed Amendment on remediation in its current form and on the proposed timetable.

- The proposed changes will have an unacceptably disproportionate effect on those very low-income, minority and immigrant groups who are most dependent on CUNY to provide a leg up onto the economic ladder.

- The proposed Amendment is too rigid. In regard to remedial coursework, it does not allow for the necessary flexibility and discretion at individual campuses having different missions and appealing to the needs and interests of different segments of
the CUNY student population. We agree with the observation of the Consultants’ Review that one “would expect that the natural complement to such differentiation would be a practice of flexibility, in which individual colleges would be allowed to develop their own pathways toward adopting an integrated, more rigorous, set of standards...[rather than] a strong centralized cast in which basic rules are being applied unilaterally and everyone is expected to march to the beat of the same drummer.”

- Like the Regents’ Consultants, the Commission believes that an accurate understanding of the Amendment’s impact is necessary to a reasonable analysis of its merit. The Consultants’ Review premises its endorsement of the proposed Amendment on its acceptance of the accuracy of CUNY’s “set of projections stating that only a relatively small number of students will be impacted.” We, however, have questions regarding the validity of CUNY’s projections for the following reasons:

  - This number is based upon several assumptions about improvements in readiness of future CUNY freshmen for college work. These improvements may or may not materialize as envisioned and their timing is uncertain.
  - CUNY has not yet made available the data reflecting the effect of proposed changes on the racial and ethnic makeup of incoming classes, the impact on particular colleges, and other statistics vital to analysis.
  - CUNY projections of impact do not reflect the students who may be most profoundly harmed by the policy: the SEEK and ESL students who will be admitted to the senior colleges but denied remedial courses which are very often needed in order to have a chance of success in college.
  - The elimination of remedial coursework will occur prior to the funding or implementation of programs planned to miti-
igate its impact. Programs which are being planned or expanded to help prepare high school graduates for the challenges of college life are not yet fully developed or in place. Support services intended to replace remedial coursework are neither in place nor funded. Questions regarding the nature and the funding for such programs remain unanswered.

- Elimination of remedial coursework at the senior colleges should not be approved unless there is adequate understanding of its impact. The consultants to the Regents recognize this and have noted their concerns about its implementation (pp.7-8) and its potential disproportionate impact on students from low socio-economic backgrounds (p. 5). The Commission shares these concerns. But we cannot agree with the endorsement of implementation of the first phase of the plan with a “wait and see” approach to its impact. Reliable factual information is first needed with respect to the success of various new programs and their impact.

- The Amendment is based on an incomplete definition of excellence. Excellence should not be measured only by the standardized test scores of incoming students, which are frequently a reflection of their socio-economic status, but by the “value added” by the process of higher education. A definition of excellence and standards that focuses too heavily on the qualifications of incoming students is especially inappropriate for a large urban university with a diverse student body having diverse levels of preparation.

TRUSTEES’ PROPOSAL TO ELIMINATE REMEDIAL COURSES AT THE SENIOR COLLEGES

Admission standards at CUNY senior colleges are currently established separately by each of those colleges but centrally administered by CUNY. Each school has a sliding scale using several variables: high school grade point average, educational background (as measured by the number of college preparatory courses on a student’s high school transcript), and SAT performance (though until now the SAT has not been required by CUNY). Those standards have been pegged upward in recent years and

15. Baruch, Brooklyn, City, Hunter, Lehman, Queens and York and bachelor’s programs at John Jay, Medgar Evers, New York City Technical, and the College of Staten Island.
in some cases are as high as, or higher than, they were prior to the implement-
mentation of open admission in 1970.16

Until the most recent change in policy on September 27, 1999,17 upon
acceptance, students were given three placement tests—the College Skills
Assessment Tests (“CSAT’s”)18—to determine their proficiency in reading,
writing and mathematics. Students who failed one or more of these tests
were placed in the appropriate remedial courses. As we understand it, the
new tests, currently scheduled to be inaugurated in the Spring semester of
the current (1999-2000) academic year, will be used in the same way as the
CSAT’s have been used in the past.

Concurrent with their remedial work, until now, students have been
offered full-credit coursework in other subjects and access to the college’s
full resources. Since 1995 students have been required to complete their
remedial work in one or two semesters, depending on the college. There is
not a great difference in the graduation rate of CUNY students who en-
roll in one or two remedial courses and their peers who required no
remediation. (The eight-year graduation rate for CUNY baccalaureate
students who enrolled in 1988 with no remedial needs was 48.2%; for stu-
dents who took and passed one remedial course, 44.9%; and for those
who took and passed two remedial courses, 41.4%19). Students who enroll
in one remedial course perform nearly as well as other students in their
remaining coursework.20

16. Admissions standards at CUNY colleges have varied a great deal over the years. In 1924,
the Free Academy and the municipal college system agreed to base admission solely on a
minimum high school GPA. Between 1924 and the implementation of open admissions in
1970, that minimum varied from 75 to the low 90s, according to Sally Rentfro and Allison
Armour-Garb’s “Open Admissions and Remedial Education at the City University of New
York” (prepared for the Mayor’s Task Force, April, 1999, pp. 13-14.) Currently at Queens
College, one of the system’s most selective schools, the base high school grade point average
for admissions purposes is 85 (Approved Queens College Freshman Admissions Criteria,
December 15, 1998.)

17. Under the newly adopted policy, CUNY will replace its own reading and writing tests
with “objective tests reflecting national norms, and other assessments as deemed necessary”
for the purpose of deciding placement in and exit from remedial coursework, Resolution of
the Board of Trustees, passed September 27, 1999. In other respects the proposed Amend-
ment apparently maintains the status quo.

18. These tests were severely criticized by the Schmidt Report and others (See below at pp.
118 et seq.)

19. “Basic Skills and ESL at the City University of New York,” CUNY Office of Institutional
Research and Analysis, February 1998, Table 13.

20. Clifford Adelman, presentation before the Board of Regents, October 19, 1999, Table 5.
THE FUTURE OF CUNY

Under the proposed Amendment, which provides details for the January 1999 Board of Trustees resolution, all remedial coursework is to be phased out of all the senior colleges by 2001. Analysis of the proposed Amendment has proven to be surprisingly difficult given that it is based on a relatively simple proposition, i.e., no more remedial courses at the senior colleges. But interpretations, re-interpretations, exceptions, exemptions and explications, as well as outright changes in the proposed policy have continued unabated from the time the proposed Amendment was submitted to the Board of Regents on July 1, 1999 through October and up to this writing.

We believe, however, that this is how the proposed Amendment will work:

• Senior college admissions criteria will continue to be specified separately by each college within a minimum set by the central administration and subject to its approval. Those standards will be based upon a combination of high school grades, SAT scores, Regents test scores, the number of college preparatory courses, and class rank.21 Admissions based on these factors, however, will in some cases be “conditional.” We do not know at this time what proportion of these preliminary acceptances will ultimately be suspended. Nor do we know the proportions at various colleges by race and ethnicity.

• Some students may be exempted from the requirement of taking placement tests “on the basis of SAT or Regents test scores.”22 The proposed Amendment set the threshold for this exemption at 500 on the SAT Verbal and 500 on the SAT Math as cut off scores, with the equivalent ACT scores, or a score of at least 75 on the relevant Regents exams as alternative criteria. What “other admission criteria” referred to in the Amendment might mean remains to be seen.

21. In the past, CUNY has not required that prospective students submit SAT scores to be considered for admission. Thus, 86.6% of the first-time baccalaureate freshmen enrolling in CUNY’s senior colleges submitted SAT scores in 1998 (Patricia Hassett, “Scholastic Aptitude Test (SAT) Scores Fall 1998 v. Fall 1997,” August 17, 1999 Memo to Interim Chancellor Kimich.) CUNY has arranged for the College Board to administer the SAT without cost at four CUNY institutions with the scores to be reported only to CUNY.

22. “Proposed Admissions Process: CUNY’s Baccalaureate Programs.” This is a flow chart distributed to the Board of Trustees by Chancellor Goldstein on September 27, 1999 in support of the resolution changing the remediation placement and exit tests. Hereinafter “Admissions Flow Chart.”
• SEEK\(^{23}\) students, and ESL\(^{24}\) students “educated abroad and not otherwise in need of remediation will be admitted even if they are not exempt on the basis of the SAT or Regents.”\(^{25}\) Thus SEEK and ESL students will be admitted to the senior colleges regardless of whether they are deemed to need remediation pursuant to these or any other measures, but they will not be afforded any remedial courses. In lieu of remedial courses, SEEK and ESL students will be required to enroll in full course schedules and seek remediation on the side. CUNY plans to seek funding for additional support services for these and other students.\(^ {26}\)

• Other than SEEK or ESL, students who fail one or more placement tests even after a summer immersion program will not be admitted to a baccalaureate program. If they “high fail” only one placement test, they will be enrolled in a Prelude to Success program.\(^ {27}\) Otherwise, their “conditional acceptance” will be revoked, and they will be allowed to enroll in a community college rather than a senior college.

• Although the Regents’ consultants speak of monitoring and modifying the phase-out of remedial courses, the Amendment as written would require that remedial coursework in baccalaureate programs be phased out according to the timetable’s specifications. Changes, if any, would be limited to adjustments in

---

23. The SEEK program (“Search for Education, Elevation and Knowledge”) is mandated at CUNY by Education Law § 6452. CUNY is required to provide (and receives separate specifically earmarked funding for) special programs for students who, inter alia, are “economically and educationally disadvantaged.” The legislation requires that these students receive screening, testing, counseling, tutoring, and other assistance and contemplates that they will, but does not require that they do, receive “remedial courses, developmental and compensatory courses, and summer classes.” § 6452(c)(a)(ii). By definition, therefore, these are students who would not normally qualify for admission to a senior college but are to be admitted nonetheless.

24. For a discussion of the definition of ESL students in this context, see p. 98, below.

25. Admissions Flow Chart, n. 2. The SEEK (Search for Education, Elevation and Knowledge) program was established by the New York State Legislature in 1966. Under the statute (N.Y. Education Law $6452), CUNY is required to provide admissions and special assistance for “economically and educationally disadvantaged” students.


27. Described below at pp. 112, et seq.
the Prelude to Success-type programs, delivery of support services, and other ancillary matters.

Thus, although the proposed Amendment and its preceding Trustees’ Resolution are nominally addressed largely to the issue of remediation, they are, of course, very much concerned with admissions as well. Stated briefly, the net effect of the resolution and the Amendment is: 1) to deny, or make conditional, baccalaureate program admission to students who demonstrate any level of skills deficiencies and need to complete remedial work, 2) as a result, to raise significantly the bar for admissions at the senior colleges to the exclusion of unknown numbers of students, and 3) to nevertheless admit to senior college some students (SEEK and ESL) who may need remediation, but to deny them remedial coursework. Since the national average combined SAT score is 1017, the 500/500 SAT score exemption means that the practical effect of the Amendment is that only students with above national average SAT scores are presumptively eligible for CUNY senior colleges.28

Chancellor Goldstein stresses, as do the Regents’ consultants, that the proposal envisions the provision of various academic support services in lieu of formal remedial coursework. Many supporters of the change believe that it can lay “the foundation for a new emphasis on quality.”29 and that it is “the natural outgrowth of a set of policies ... aimed at raising standards for baccalaureate degree students.”30 This approach to raising standards is based, at least in part, on the observation that the presence of less prepared students in classes with better prepared students pulls down the standards of instruction as the teacher is forced to aim to the lowest common denominator.

This is a problem which is frequently identified by faculty and students alike, and is, of course, not unique to CUNY or to institutions having students who need remedial coursework. Schools which deal with students with a range of abilities and preparation have tried different approaches. The Brooklyn College SEEK program uses block programming for students with similar remedial needs. (See below, p. 89) The experience of the College of Staten Island (See below, p. 108) is instructive in this

28. We do not know the basis of the 75 Regents score, i.e., whether it was calculated to be in any way comparable to 500’s on the relevant SAT or was simply an arbitrary number.


30. Ibid.
regard. Other creative solutions might be tried at other campuses if they are giving the flexibility to experiment.

But, this Amendment proposes a profound change in the structure, availability, and organization of remedial education at CUNY. While its stated intentions are similar to those embodied in several recent initiatives undertaken by the University or by some of its individual campuses, it is different in kind from the earlier innovations in several important respects.

First, it allows the central administration to set standards unilaterally. Like the April, 1992 College Preparatory Initiative ("CPI"), the proposed Amendment aims to improve the skills background of students entering into the CUNY system before they enroll. The CPI was a constructive and collaborative undertaking that paired CUNY faculty and administrators with peers in the New York City Public Schools to jointly evaluate course offerings in the public schools, formulate standards, and develop strategies to help students meet them. The Amendment, however, sets standards by fiat, and denies admission to those students who fail to meet them.

Second, like the policies contained in the June, 1995 University Budget Planning and Policy Options, the Amendment is an attempt to minimize the responsibility for remediation at CUNY's senior colleges. These 1995 policies limited remedial and ESL offerings at senior colleges to one year, allowed senior colleges to further limit remedial coursework to one semester, and prohibited senior college students who had twice failed remedial or ESL courses from repeating the course in question. The Amendment, on the other hand, takes ultimate control over admissions standards and remedial curricula from the senior colleges, and prohibits almost all students with shortcomings in basic skills from enrolling at the senior college level.

Finally, several college-level initiatives, such as Baruch's policy on remediation, the tightening of admissions standards at several senior colleges, and the development of block programs for entering freshmen


32. Prior to the Board of Trustees action, Baruch had already stopped offering remedial classes per se, but continued to admit students who met their relatively stringent admissions criteria but who nevertheless were deemed to require some remediation. Instead of formal classes, Baruch provided a privately funded tutoring center to help these students with their college level work.
with and without remedial needs, have made strides toward improving standards and educational quality at CUNY—for students who are well prepared for college and those who have educational shortcomings alike. These policies, however, were initiated and developed by the particular colleges, not by the CUNY Board or administration. They were allowed to evolve independent of any system-wide requirements. These reforms were not formulated to prepare the system for the elimination of remedial coursework; in that respect, the Trustees’ Amendment does not flow naturally from them.

The Amendment takes much of the responsibility and power to make reforms from CUNY’s colleges, undermining the college-level efforts that have come before and limiting opportunities for many incoming students to demonstrate and improve their abilities. In a public multi-campus system like CUNY—particularly in a system subject to powerful political influences and serving a distinctive, diverse, and urban constituency—these governance distinctions are crucial.

The Commission is also profoundly concerned about the timing of the changes. Improvements envisioned by the new Regents’ exam requirements have not yet been fully realized and their ultimate extent is unknown, particularly for New York City high school students. The academic support services envisioned by the Amendment and CUNY’s budget requests have not yet been funded or put into place. The recent debacle in the New York City public schools, where there was an effort to raise the standards of promotion without careful implementation of critical steps such as the administration of tests, shows the damage that can occur when well-intentioned programs are implemented without adequate preparation. With respect to the elimination of remedial coursework at senior colleges, Florida, the sole university system in the country to have already implemented such a program, did so gradually over a period of more than 15 years after the passage of the enabling legislation. 33 It should also be noted that Florida’s remedial education model differs substantially from the model CUNY has proposed.34

34. Students accepted to a Florida senior college, but placed in remedial courses, can enroll in the senior college, even as they take remedial courses from community colleges. These students are not removed from the senior college, they are not required to change their enrollment status, and they are not required to transfer from community college to senior college once they have completed their remedial work. Ibid.
Remediation Is An Integral Part of Higher Education

The need to help under-prepared students—commonly referred to as remediation—has been an integral part of higher education in this country for over 300 years. As we have moved from an industrial to a highly technical and service oriented economy, higher education continues to educate an ever growing proportion of the population. Particularly in areas such as New York City, where there have been problems in the public school system which feeds the University and high numbers of immigrants from a wide range of educational backgrounds, there is every reason to believe that remediation will continue to be necessary.

The debate on elevating academic standards in CUNY senior colleges has focused almost exclusively on the elimination of remedial coursework as if that would be the panacea. Academic excellence, of course, is related to the ability of incoming students. But remedial courses at CUNY senior colleges must be completed within one or at most two semesters. Indeed, CUNY students who now require some level of remediation have already met the regular admission requirements which in some cases are as high or higher than they were prior to the implementation of open admissions in 1970.

Academic excellence is judged by a broader set of criteria than the grade scores of students upon entry into college. It is measured by the full sweep of resources provided by the institution, including the reputation of the faculty, the number of full time professors as compared to adjuncts, the ratio of faculty to students, libraries, computers and the vast basket of services expected to be provided by top quality universities. The perception that eliminating remedial coursework will directly elevate academic excellence undoubtedly has made it an easy target for those looking for quick fixes to an educational system that has come under serious fire. But the victims of these changes will be in any case the students who have been denied the proper preparation in the public school system. Students who have done well enough to satisfy admissions standards for many public baccalaureate programs in the country will have an inflexible barricade placed before them in their quest to advance in society.

The Quality of Remedial Programs

Undoubtedly, some institutions do a better job than others of preparing students for baccalaureate programs even apart from financial resources and other benefits less easily quantified. The Schmidt Report criticized CUNY for failure to keep sufficient data to make any adequate conclusions about which of its remedial programs are effective and which are not, either at the senior or the community colleges.
CUNY has made little effort to determine which approaches work well or badly for particular student populations. Neither we nor CUNY knows whether and how many remediation students are in fact mastering basic academic skills sufficient for college readiness. Moreover, there has been little analysis to determine which of CUNY’s various institutions and programs are best suited to provide which types of remediation, based on their academic mission and their track records. Remediation is an obvious case for a coherent system to commit itself to careful institutional mission differentiation, based on which institutions and programs succeed and are most productive, and which institutions and faculties should be given responsibility and support. The information that does exist tends to be anecdotal or unreliable.35

Thus it is entirely possible that the automatic removal of all remedial coursework from the senior colleges will result in the abandonment of some of the most creative and successful programs along with some which may be failures. The Brooklyn College SEEK program, for example, received a Fund for the Improvement of Post Secondary Education (“FIPSE”) grant in 1995 for curriculum improvement and faculty development to better prepare disadvantaged, remedial students for Brooklyn’s core curriculum. This program includes classroom instruction as well as counseling, tutoring, etc. Remedial classes are taught in blocks along with related courses in the College’s core curriculum, and this approach has had notable success.36 In 1999, on the strength of its students’ skills improvements, Brooklyn’s SEEK program received a second FIPSE grant—to replicate its pedagogical model at Queens College and John Jay College.37 Under the proposed Amendment, Brooklyn College will no longer be able to offer the remedial classes.

THE NUMBERS GAME: IMPACT ON STUDENTS

It is a disservice to CUNY, the students it serves, and the City of New York to allow debates over projections and statistics to replace a reasoned discussion of the pedagogical and policy merits of the proposed Amendment. As the Regents’ consultants explain, “the push-pull of a conflict in which one group says thousands of students will be affected while others

35. pp. 31-32.
36. Interview with Martha Bell, Chair of the SEEK program at Brooklyn College, July 8, 1999.
37. Brooklyn College Self-Study, FIPSE grant application package.
project less than 200 students will be affected is an exercise in numbers and not in learning.”

At the same time, one must understand the Amendment’s scale to judge it. If the Amendment did, as some argue, affect just 152 students a year, then the reasons to block its implementation are less powerful, though by no means without merit. The fact is, however, that its impact is likely to be much broader.

Analysis of CUNY Projections of Impact

Projecting policy impact is, even in the best case, largely a matter of educated guesswork. In the case of the recent Trustees’ Amendment, the effort is made even more difficult by gaps in the available data and shifting interpretations of the policy. During the debate over the proposed Amendment, CUNY has issued no fewer than four different projections of its impact on enrolling students: In response to the Trustees’ original resolution to eliminate remedial courses, the central administration circulated a report in May, 1998 that outlined a “worse case scenario,” in which the elimination at the senior college level would force 46% of CUNY’s senior college bachelor’s entrants into community colleges. The text of the Amendment, however, revised that estimate, maintaining that “approximately 10% of students will complete their remediation at a community college.” In response to a request by the Board of Regents for more detailed projections, CUNY’s Office of Institutional Research projected this July that the Amendment would send just 220 students to community colleges for remediation. Even more recently, that projection has again been revised, and CUNY maintains that the Amendment will send just 152 senior college students to community colleges. CUNY now argues that its most recent projection is the most accurate.

38. Consultants’ Review, p. 11.
40. “Amendment to the Master Plan, p. 3.
41. “Projected Outcomes of First-time Freshmen Admitted to CUNY Senior Colleges In Fall of First Year Under the January 25 Policy on Remediation.” CUNY Office of Institutional Research, July 4, 1999.
42. “Projected Outcomes of First-time Freshmen Admitted to CUNY Senior Colleges In Fall of First Year Under the January 25 Policy on Remediation (Revised Estimate).” CUNY Office of Institutional Research, September 1, 1999.
43. “Performance of First-time Freshmen on the CUNY Skills Assessment Tests: First-time
TABLE 1
Four CUNY Projections of the Proposed Amendment’s Impact on
Senior College Enrollment, by Percent and Number of Students

<table>
<thead>
<tr>
<th>DATE</th>
<th>SOURCE</th>
<th>IMPACT (%)</th>
<th>IMPACT (#)</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 3, 1998</td>
<td>CUNY Administration</td>
<td>46%</td>
<td>6717</td>
</tr>
<tr>
<td>June 28, 1999</td>
<td>Board of Trustees Amendment</td>
<td>10%</td>
<td>1460</td>
</tr>
<tr>
<td>July 4, 1999</td>
<td>CUNY Office of Institutional Research</td>
<td>1.5%</td>
<td>220*</td>
</tr>
<tr>
<td>Sept. 1, 1999</td>
<td>CUNY Office of Institutional Research</td>
<td>1.0%</td>
<td>152*</td>
</tr>
</tbody>
</table>

*projections exclude students bound for Prelude to Success or year-round immersion programs.

It is important, then, to take a careful look at the assumptions and methods that underlie this most recent projection. This projection, dated September 1, 1999, attempts to predict the Amendment’s impact on the Fall, 2000 class of entering first-time freshmen.

Two elements of the projection’s construction limit its effectiveness: First, it implies that the only students affected by the Amendment are those who are sent to community college after having gained senior college acceptance. This implication, which is embedded in the document’s flow-chart movement from “projected successful first-time freshman Fall applicants to CUNY senior colleges” to “remediation at a community college,” is incomplete. Students accepted to senior colleges but then required to transfer enrollment to a community college for remedial courses—the 152 students in CUNY’s revised projection—will be affected by the resolution, but they are not the only ones: SEEK and ESL students allowed to enroll in senior college will be denied remedial coursework that is imperative to their successful college careers. Students placed into the pilot Prelude to Success and proposed year-round immersion programs will certainly feel the Amendment’s impact as well. (For a discussion of Prelude to Success, see p. 112, et seq.)

Second, the projection appears to make implausible assumptions about the improvement in entering student preparedness. As of the start of the Fall 1998 semester, 56.2% of incoming first-time freshmen to CUNY bachelor’s programs had passed all three CSAT’s. CUNY’s most recent projection of the Amendment’s impact assumes that 84.6% of its incoming non-SEEK

---

Freshmen Regularly Admitted to Baccalaureate Programs, Fall 1999." CUNY Office of Institutional Research, October 6, 1999.
and non-ESL students will have satisfied the system’s remedial requirements by the start of the Fall 2000 semester. This is an improvement of 28.4% in just two years. To explain this marked improvement, CUNY officials speak of increased recruitment efforts, the introduction of SAT and Regents’ exam exemptions from remediation, an upward trend in student preparedness, improved performance in summer immersion programs, and the introduction of new, more accurate, assessment measures. These improvements, however, are only projected. In implementing the Amendment, CUNY should be prepared for the distinct possibility that the projected improvement in student preparedness may not materialize. And in considering the Amendment, all parties involved should be aware of the Amendment’s potential impact if these projected gains in student preparedness do not materialize.

An Alternative Assessment of the Amendment’s Impact
Fortunately, the shortcomings in CUNY’s most recent projection are relatively easy to remedy. To avoid the implication that SEEK and ESL student are untouched by the Amendment, one simply has to count their numbers among those impacted. And to project more realistically incoming student preparedness, one can replace CUNY’s projected pass rate with the rate at which CUNY students passed out of remedial courses before the beginning of the Fall 1998 semester, the most recent semester for which complete and reliable figures have been made available outside of CUNY. Table 2 makes these two corrections to CUNY’s most recent projection.

We believe that Table 2 more realistically projects the Amendment’s impact.

This diagram relies exclusively on the experience of CUNY’s Fall 1998 entering freshman cohort. These numbers differ substantially from the numbers presented in CUNY’s most recent projection of the Amendment’s impact in several regards: Where CUNY predicts a significant increase in first-time freshmen enrollments, our projection starts with actual 1998

TABLE 2: Impact of the Trustees' Amendment, had it been implemented Fall 1998

- Successful first-time freshman applicants to CUNY senior colleges: 13,776
- Freshman entering associate programs at the senior colleges: 5,603
- Senior college bachelor's entrants: 8,173
- Senior college bachelor's entrants, non-SEEK and non-ESL: 5,433
- Pass all three CSAT’s on 1st attempt, or exempt on basis of Regents or SAT: 2,744
- Failed 1 + CSAT and not otherwise exempt: 2,689
- No summer remediation: 1,573
- Attend summer remediation: 1,116
- Pass all three CSATs after summer remediation: 358
- Need additional remediation after participating in summer remediation: 758
- SEEK students requiring remediation: 1,521
- ESL: 450
- Need remediation as of beginning of Fall term: 2,331
- Total number of students affected: 4,302

enrollments. Rather than relying on CUNY's projected decrease in SEEK student enrollment for which no explanation is offered, we used 1998 enrollments as a baseline. In place of CUNY's estimate of students who will pass the CSAT's on the first attempt or will be exempt by virtue of

45. This estimate will be further complicated by the subsequent resolution to use a new test for reading and writing placement.
their SAT or Regents scores we substituted the Fall 1998 incoming CUNY student CSAT pass rate. Rather than accepting CUNY's assumption of increased enrollment and success rates in summer immersion programs, we used the historical data. Finally, CUNY's most recent projection assigns some of the students who still have remedial needs at the beginning of the fall semester to year-round immersion programs. Such programs are not mandated by the proposed Amendment and do not yet exist anywhere in the CUNY system. We have no way of knowing whether or not they will exist by the time the proposed Amendment is implemented.

The Commission recognizes the possibility that incoming CUNY student performance may improve by the Fall 2000 semester and we hope that it will be as dramatic as CUNY suggests. We find it unlikely, however, that it will improve as considerably as CUNY assumes it will, especially if the system is to enjoy the sort of enrollment growth that it projects over the next two years. We also believe that our figures provide a realistic and reliable, if not optimistic, projection of the Amendment's impact. If CUNY's June 3, 1998 projection was a worse-case scenario and its September 1, 1999 projection is a best-case scenario, we intend ours to be a likely-case scenario.

Impact on Students at Particular Colleges

Because all of the projections circulated to date, including our own, are system-wide, they miss the Amendment's potential effect on individual senior colleges. This is an important oversight for two reasons: First, rapid changes in enrollment can have deleterious effects on college budgets and operations. Second, remedial courses and remedial needs are not spread equally throughout CUNY. For some of CUNY's senior colleges, implementing the proposed Amendment will require relatively minor adjustments; for others, the Amendment represents a sudden change that could be very harmful to their long-term health and to their traditional student bodies.

In light of the projected losses in incoming student populations, it should come as no surprise that CUNY is projecting declining undergraduate enrollments at several of its senior colleges between Fall 1998 and Fall

---

46. According to CUNY's Office of Institutional Research and Analysis's "Performance of First-time Freshmen on the CUNY Skills Assessment Tests: First-time Freshmen Regularly Admitted to Baccalaureate Programs, Fall 1999," October 6, 1999, 79.3% of CUNY's first-time freshmen are projected to have passed all three CSAT's by the beginning of the current semester. This document is, however, still a projection informed by many of the assumptions that underlie CUNY's early projections, and using preliminary data that is not yet reliable.
2003: Baruch, Brooklyn, City, Lehman, Queens, and York. For some CUNY institutions, declines in enrollment could be dire. In preparing the Amendment to the Master Plan, CUNY asked each of its institutions to project the Amendment’s impact on their enrollments. Brooklyn College predicted an 11.8% decline in incoming freshman, City College predicted an initial drop of as much as 33% in new students, and Lehman predicted a cumulative drop in undergraduate enrollment of 31.1% by the 2003-2004 school year.

### TABLE 3
Proposed Amendment’s Projected Impact in First-Year of Implementation

<table>
<thead>
<tr>
<th>College</th>
<th>CSAT Failure Rate*</th>
<th>First-time Freshmen</th>
<th>Students Lost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baruch</td>
<td>21.4%</td>
<td>981</td>
<td>210</td>
</tr>
<tr>
<td>Brooklyn</td>
<td>35.6%</td>
<td>1,100</td>
<td>392</td>
</tr>
<tr>
<td>City</td>
<td>56.6%</td>
<td>967</td>
<td>547</td>
</tr>
<tr>
<td>Hunter</td>
<td>30.1%</td>
<td>1,573</td>
<td>473</td>
</tr>
<tr>
<td>Lehman</td>
<td>64.8%</td>
<td>621</td>
<td>402</td>
</tr>
<tr>
<td>Queens</td>
<td>31.6%</td>
<td>1,249</td>
<td>395</td>
</tr>
<tr>
<td>York</td>
<td>58.3%</td>
<td>409</td>
<td>238</td>
</tr>
</tbody>
</table>

*As of October 1, 1998

**Source:** CUNY Office of Institutional Research “Performance on the CUNY Skills Assessment Tests: Percent Passing Reading, Writing and Math Skills Tests Regular Fall 1997 and Fall 1998 First-time Freshmen” and CUNY Student Data Book: Fall 1998 (Draft), Table 13B. Students lost figure includes students bound for Prelude to Success and year-round immersion programs and equal failure rate times first-time freshmen.

Given the uncertainty of enrollment projections for the senior colleges, the impact of these changes on the senior colleges could be severe. On top of that, the senior colleges will be expected to absorb the costs of many student services for students enrolled in Prelude to Success programs on their campuses even though their FTE allotments will be going to the community colleges where they are officially registered.

---

47. CUNY Office of Institutional Research and Analysis projections included in the Trustee’s Amendment to the Master Plan, prepared June 24, 1999.

48. Institution Projections, Brooklyn, City College, and Lehman, April, 1999.
Racial and Economic Stratification

Another of the Amendment’s implications necessarily overlooked in system-wide projections is its disparate impact on low income and minority students. According to CUNY’s Office of Institutional Research and Analysis, 85% of remedial students at the bachelor’s level and 80% of remedial students at the associate’s level are racial and ethnic minorities. Further, the mean family income for entering non-remedial students is $13,000 higher than for entering remedial students at the bachelor’s level. It is clear, then, that the Amendment will be more likely to affect the educational careers of low income and minority students. Indeed, while the Amendment itself never addresses its potential effect on minority enrollments, the statistical appendices attached to the Amendment predict a sizeable decline in minority enrollments at the senior college level over the next five years, while enrollments of white students remain relatively constant.

Further, it is important to note the correlation between institutions most affected by the Amendment and those with the largest proportion of racial and ethnic minority students. As Table 4 indicates, three senior colleges are likely to be particularly profoundly impacted by the proposed Amendment: City College, Lehman, and York. First-time freshmen at these three schools have been considerably more likely to fail the CSAT’s than their peers at Baruch, Brooklyn, Hunter, and Queens. At the same time, City, Lehman and York have considerably higher proportions of students of color than Baruch, Brooklyn, Hunter, and Queens. It is disturbing to consider the fate of City, Lehman, and York under the proposed Amendment. Either these schools with particularly large minority populations will shrink substantially under the pressure of rising admissions standards, or their student compositions will change dramatically as students of color and low income students seek further education at community colleges, or perhaps not at all.

As Table 5 indicates, minority students are considerably more likely to require remediation. Black, Hispanic, and Asian students are dramatically over-represented in CUNY’s remedial classrooms and SEEK programs. It seems overwhelmingly likely, then, that the Trustees’ Amendment will disproportionately impact CUNY’s minority population. It is difficult to see how CUNY will be able to maintain its commitment to serving a di-

50. CUNY Office of Institutional Research and Analysis, “Projected Enrollment by Racial/Ethnicity Status and Borough of Residence: Senior Colleges, Fall 1998 to Fall 2003.” July 24, 1999. Attached as Table 3c to the Trustees’ Amendment.
TABLE 4
Percentage of Fall 1998 First-time Freshmen Requiring Remediation, by Race

<table>
<thead>
<tr>
<th>CSAT Failure Rate</th>
<th>% Hispanic</th>
<th>% Black</th>
<th>% Asian</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lehman</td>
<td>71.9%</td>
<td>71.1%</td>
<td>18.9%</td>
</tr>
<tr>
<td>City</td>
<td>66.4%</td>
<td>58.5%</td>
<td>25.5%</td>
</tr>
<tr>
<td>York</td>
<td>59.9%</td>
<td>35.5%</td>
<td>42.7%</td>
</tr>
<tr>
<td>Queens</td>
<td>40.3%</td>
<td>28.0%</td>
<td>6.6%</td>
</tr>
<tr>
<td>Brooklyn</td>
<td>39.8%</td>
<td>26.1%</td>
<td>26.9%</td>
</tr>
<tr>
<td>Hunter</td>
<td>30.6%</td>
<td>40.1%</td>
<td>20.4%</td>
</tr>
<tr>
<td>Baruch</td>
<td>22.3%</td>
<td>25.0%</td>
<td>23.3%</td>
</tr>
</tbody>
</table>

SOURCE: CUNY Office of Institutional Research “Performance on the CUNY Skills Assessment Tests: Percent Passing Reading, Writing, and Math Skills Tests Total Fall 1997 and Fall 1998 First-time Freshmen” and CUNY Student Data Book: Fall 1998 (Draft), Table 37B.

TABLE 5
Percentage of Fall 1998 First-time Freshmen Enrolling in SEEK or Requiring Remediation, by Race

verse urban population and providing access to the disenfranchised under a policy likely to have a particularly adverse impact on poor and minority students.

**EDUCATIONAL IMPACT: FOCUS ON WHAT REALLY MATTERS**

The discussion of numerical impact obscures the effect that the proposed Amendment will have on good educational practices and the provision of a quality education to CUNY students. The proposal is inherently inflexible in its insistence on a “one size fits all” approach to implementation and the Trustees seem intent on rushing it into operation before properly assessing its full impact, studying the efficacy of those programs intended to ameliorate that impact, or identifying and validating new selection devices that are to be an integral part of it. The Commission has identified a number of aspects of the proposal that significantly undermine its credibility.

**Impact on SEEK and ESL Students: A Prelude to Failure?**

Up to this point the public debate has focused on the impact on the students who will be turned away from the senior colleges as a result of the proposed Amendment. But we should also consider what might happen to the exceptions to the rule, i.e., SEEK and ESL students. Although these students will continue to be admitted to the senior colleges, it will no longer be permissible to give them remedial classes on the senior college campuses during the academic year. At Baruch College in the recent past, such students, as well as others needing remediation despite meeting the relatively high admissions standards, were given tutoring in the basics at the same time that they took their regular college level courses. But Baruch has comparatively few such students, and Baruch has a privately funded tutoring center available for all their students in need of such services. 51 What will happen to the much larger number of SEEK and ESL students who have traditionally attended Brooklyn, City, Lehman, and other senior colleges that may not have the resources to give individual or even small group tutoring? Will they be tossed into the deep waters of the college curriculum to sink or swim? Or will CUNY be able to make available the kinds of academic support which would allow them to prosper?

SEEK, in particular, is a legislatively mandated program. 52 Denying

---

51. Interview with Lois Cronholm, former interim President, Baruch College. August 10, 1999.
52. See n. 23, above.
these students the remedial courses they need subverts the legislative intent of the program and will effectively read it out of existence. CUNY officials have talked a great deal about their Prelude to Success program. It would give remedial coursework under the auspices of a community college to regularly admitted senior college students who need some remediation. Their brother and sister students who are considered economically and educationally disadvantaged, or who are immigrants with limited facility in English, however, will not have the benefit of any remedial coursework under the proposal as it is currently conceived. That, we suggest, is a likely “prelude to failure.”

As for ESL, we must be frank in stating that we do not understand how the ESL exception will work in practice. It is unclear to us whether students admitted to baccalaureate programs under this exemption (projected to be 450 in number) will be permitted to take ESL courses or whether they, like the SEEK students will be dependent upon tutoring or other support services that may or may not materialize in a timely fashion. In order to be qualified for the classification of ESL as defined by CUNY, a student must have taken at least one semester of high school abroad. 53

We assume that this is meant to refer only to foreign born non-English speakers since it could otherwise arguably include even native English speakers taking a semester abroad or individuals coming from other English speaking countries. In the past, students were permitted to self-identify as either “native- or non-native speaker” apparently without regard to whether or not they were foreign born. 54 Thus, it is unclear as to students from Puerto Rico. Indeed, the Consultants’ Review states that the proposed Amendment “establishes a dichotomy between foreign—and native-born students who require ESL programs. We believe that dichotomy is a false one—one that should not be embedded in the proposed Amendment.” 55

The Consultants go on to note that “we cannot help but wonder whether this false dichotomy reflects the inappropriate conflation of ESL programs with remediation.” 56 We wonder about that too. Moreover, we are concerned that this definition may fail to include in the ESL exemption immigrants who took their entire secondary education abroad and, therefore, do not have a diploma from a Regents certified high school.

53. Interview with Vice Chancellor Louise Mirrer, August 13, 1999.
55. p. 7.
56. Ibid.
and cannot otherwise qualify for regular admission to a CUNY senior college.

A Word About the Community Colleges

The Commission has great respect for the mission of community colleges and for their vital dual functions which involve technological and career education, on the one hand, and liberal arts and sciences, including preparation for transfer to a baccalaureate program, on the other. The discussion of the education philosophy (or philosophies) behind the community colleges as a distinct type of institution of higher education is complex and beyond the scope of this Report. Suffice it to say, however, that when we express concern for the fact that students affected by the policy change would be assigned to community colleges instead of senior colleges, and interpret that result as a diminution of access, we certainly intend no disrespect for community colleges. As the Consultants’ Review points out, the proposed Amendment will not reduce access to the CUNY system, (p. 5), and this is accurate as far as it goes. We are aware that, at least at this stage, access to the system, as a whole, remains. But, as we discuss below, for students with aspirations for a baccalaureate degree there are substantial disadvantages to starting at a community college. There is simply no getting around the fact that the proposed Amendment will diminish access to the senior colleges and that enrollment at a senior college has distinct advantages.

Also, we are concerned that the CUNY community colleges may not be equipped to handle a large influx of new remedial students. As discussed in detail below, the community colleges do not have as many full-time faculty members as do the senior colleges, nor as much funding per student FTE. They currently enroll less than one-third of the CUNY students (by headcount) while the senior and hybrid colleges enroll two-thirds. Although the proposed Amendment will likely increase community college enrollment, it is unclear that they are prepared in terms of space and personnel to deal with it. According to one veteran community


58. Any out-sourcing of remediation to private providers would, of course, dramatically reduce access to the system.
college professor, the community colleges will be “drained by efforts expended on remedial instruction of masses of resentful, demoralized and anxious students, overwhelmed by the arrival of new students in facilities and classrooms already unequipped to handle the student loads they have now, [and] pressured by continuing budget constraints to hire more adjuncts to respond to increased populations.” Required to “teach to the tests,” the community colleges would become “the assembly line remedial mills they are accused of being.”59

At least equally important is the question of what effect the shift of resources to remedial instruction will have on the community colleges’ missions: college level academic preparation and technological and career education. Workforce development, in particular, is likely to be an increasingly important role for the community colleges in the future60 and they should not be seen simply as some sort of remedial dumping ground.

The Likelihood of Completing a Bachelor’s Degree When Beginning at a Community College

Studies show that bachelor’s degree aspirants who begin their higher education at a community college are about half as likely to achieve a bachelor’s degree as otherwise identical students beginning at senior colleges.61 Further, the number of students transferring from community to senior colleges is rapidly declining nationwide.62 The Center for the Study of Community Colleges (“CSCC”) conducts an annual study of community college to senior college transfer rates, analyzing students who enroll as first-time freshmen in community colleges and have acquired twelve or more college credits within 4 years. In 1984, the first year the CSCC reported its findings, the transfer rate to senior colleges and universities was 23.7%. In 1991, the most recent year for which findings are available, the rate was 22.1%. The picture is even more bleak for students of color. “[N]ational research shows that for minority students any delay in atten-

59. Interview with Lenore Beaky, Professor of English, LaGuardia Community College, September 14, 1999.


dance at four-year campuses following high school graduation greatly reduces the probability that they will complete a bachelor's degree."^63

At CUNY, as a whole, only 17.5% of the students who entered CUNY community colleges in 1991 transferred to a CUNY senior college within 6 years. This figure includes the much higher transfer rates for the hybrid colleges that offer both associate and baccalaureate degrees. John Jay and the College of Staten Island ("CSI") have transfer rates of 33% and 29.8% respectively with the vast majority “transferring” to the senior division of the same college. At the stand alone community colleges the average transfer rate is approximately 16.1%. Bronx Community College students have a transfer rate of only 11.5%^64.

In discussing a 1973 policy enacted by the Trustees to ensure the transfer of credits between the community colleges and the senior colleges, the Schmidt Report noted:

Although 26 years have passed, CUNY has not yet fully implemented this policy. Because the 17 colleges view themselves as self-contained institutions, many of their practices, while in technical compliance with the Trustees' policy, violate its spirit. Transfer agreements must be negotiated one-by-one between individual departments, because the faculty fiercely protect their right to withhold credit for courses taken in other colleges. In addition, the colleges have bickered over who should shoulder the responsibility for administering the required certification tests to students wishing to transfer; some of the senior colleges have even insisted on placing incoming transfers into remediation even though those students had already completed remediation and achieved certification at the community college level.^65

We often heard senior college faculty and administrators euphemistically characterize the quality of community college instruction, including remedial instruction, as “uneven.” For example, the PwC II Report^66

[^63]: "Report to the Faculty, Administration, Trustees, Students of Lehman College" Commission on Higher Education of the Middle States Association of Colleges and Schools, 1999, pp.1-2.

[^64]: CUNY Student Data Book, Table 39

[^65]: Schmidt Report, p. 82. See also the underlying Rand Corporation report, Gill, Brian P. Governance of the City University of New York: A System at Odds with Itself, which states that "In some cases it is easier for a CUNY community college graduate to transfer to a 4-year college outside of CUNY than to another CUNY college." (pp. 14-15.)

found that “there are differences of opinion among the campuses around .... [t]he quality of the overall education at CUNY, particularly at the community college level versus the senior college level. This has led to difficulty in establishing articulation agreements and the acceptance of transfer students among the campuses.”67 For any significant number of students with senior college aspirations to enroll at community college could simply expand the scope of the problem.

The proposed Amendment does not specify whether or not students sent to community colleges solely because they require some remedial classes will be permitted to transfer back to a senior college immediately upon successful completion of the remediation or whether having started at a community college they will be required to complete their first two years there. Either way, we are concerned that the poor prospects for transfer of college level course credits will present a stumbling block that they would not have encountered had they been permitted to do their remedial work at a senior college for which they were otherwise qualified.

The Benefits of Taking Remediation at a Senior College

In addition to avoiding the need to confront the barriers to transferring back to a senior college, there are distinct benefits to students in taking their remedial courses at a senior college. First, the senior colleges have greater financial resources than do the community colleges and the quality of instruction cannot be wholly unrelated to the amount of money spent on it. The CUNY system spends nearly 30% less per full-time equivalent student (“FTE”) on remediation at the community college level than at the senior college level. In the 1996-97 school year, for example, senior colleges spent $6,350 per remedial education FTE; meanwhile, the community colleges spent $4,660.68 According to the Schmidt Report supporting document, PricewaterhouseCoopers I, this disparity in costs-per-FTE results from two factors: “(1) economies of scale at the community colleges..., and (2) use of lower-paid faculty, including more adjunct faculty, at the community colleges.”69 To this list, remedial instructors add a third factor: remedial classes tend to be considerably larger at community colleges.70

---

69. PwC I, p. 31.
70. Interview with an adjunct writing instructor who has taught at both senior and community colleges.
The resource gap between community colleges and senior colleges extends beyond remedial instruction. At CUNY senior colleges (excluding hybrids), 51.0% of the faculty are full-time while only 32.9% of the community college faculty are full-time.\textsuperscript{71} Senior colleges have a 21.9 student to full-time faculty member ratio while at the community colleges the student-faculty ratio is 36.3.\textsuperscript{72} CUNY senior colleges spent $8,463 per FTE on “Student/Instruction-Related Expenditures” (“S/I”) (which include instruction, academic support, student services, institutional support, and plant operation and management)\textsuperscript{73} during the 1997-98 school year, while the community colleges spent $6,553. System-wide, the S/I cost per FTE has fallen 16% since 1988. This decline has been more drastic at the senior college level, however, than at the community college level (25% and 10%, respectively.)\textsuperscript{74}

These per-FTE costs, however, include a combination of all expenses such as plant operation and maintenance. More revealing is a comparison of expenditures spent exclusively on instruction and program delivery for basic skill remediation in CUNY’s community and senior colleges. This is an area in which it is difficult to enjoy an economy of scale, since a single teacher can effectively teach only so many students. In the 1996 Fall semester, CUNY’s senior colleges spent $4,545,000 on direct instruction and program delivery for basic skills remedial education and community colleges spent $17,091,000. In the same year, the senior colleges had 2,096 FTEs in Basic Skills classes, and the community colleges had 10,468. The senior colleges, then, spent $2168 on instruction and delivery for basic skills remediation per FTE; the community colleges spent $1,632.\textsuperscript{75} Thus, CUNY’s community colleges spend 25\% less on remedial instruction than CUNY senior colleges—savings that are realized in crowded classrooms, overworked adjunct professors, and lowered expectations for community college students.

Second, there are, of course, also intangible benefits to attending a senior college. Marlene Springer, the President of the College of Staten Island told us that the senior college environment gives students hope and broadens their horizons.\textsuperscript{76} This observation comports with the find-

\textsuperscript{71} CUNY Statistical Profile, appendix D. (Data is from 1997.)
\textsuperscript{72} Ibid.
\textsuperscript{73} As defined by Mary Kim, “CUNY Statistical Profile, 1980-1998,” RAND, April 1999, p. 7.
\textsuperscript{74} Kim, p. 9.
\textsuperscript{75} PwC I, pp.16, 25.
\textsuperscript{76} Interview with Marlene Springer, President, and Mirella Affron, Vice President for Academic Affairs and Provost, College of Staten Island, August 25, 1999.
ings of Dr. Alexander W. Astin in his seminal study, What Matters in College?77 He found that:

Viewed as a whole, the many empirical findings from this study seem to warrant the following general conclusion: the student’s peer group is the single most potent source of influence on growth and development during the undergraduate years. When it comes to the student’s affective development, one generalization seems clear: students’ values, beliefs, and aspirations tend to change in the direction of the dominant values, beliefs and aspirations of the peer group.78

The peer group at the community colleges is very often quite different than that at the senior colleges. In addition to having a major contingent in vocational and terminal occupational programs, the students at community colleges,79 including CUNY community colleges, tend to be older80 and to have more family responsibilities. Serving these students both at community and senior colleges is, of course, a vitally important function for CUNY. But Astin’s work indicates that traditional first-time freshmen with senior college aspirations may benefit from having critical mass of a peer group more like themselves. Indeed, students have told us that because of perceptions that community colleges have less prestige or family pressure, they would have been less likely to attend CUNY if they had been required to fulfill their remedial needs at a community college.81 Presumably the Prelude to Success program recognizes these factors and accordingly is provided at the senior colleges (See pp. 112, et seq. below).

IMPACT ON COLLEGES’ INSTITUTIONAL MISSIONS

One of the more troubling aspects of the proposed changes in remediation at CUNY is the fact that they run roughshod over the institutional missions and individuality of the constituent colleges of the sys-

78. Ibid. at p. 398 (Emphasis in the original.)
80. CUNY Student Data Book, Fall 1997, Table 20.
81. Interviews held at Brooklyn College, July 8, 1999 with Brooklyn College SEEK students.
The campuses have been given no choice in whether or when to implement the change and little, if any, flexibility in how to implement it.

The Problem of Inflexibility

The proposed Amendment is too rigid. In regard to remedial coursework, it does not allow for the necessary flexibility and discretion at individual campuses having different missions and appealing to the needs and interests of different segments of the CUNY student population. It does not allow for different types of remedial needs, such as the student who only needs one remedial course in algebra.82

We agree with the observation of the Consultants' Review that one, would expect that the natural complement to such differentiation would be a practice of flexibility, in which individual colleges would be allowed to develop their own pathways toward adopting an integrated, more rigorous, set of standards...[rather than] a strong centralized cast in which basic rules are being applied unilaterally and everyone is expected to march to the beat of the same drummer.83

The changes also have important implications for the basic mission of the different colleges. For example, some senior colleges are not interested in providing formal remedial coursework (Baruch), while others may wish to minimize it as much as possible (Hunter, Queens). But the campuses are not being permitted to adjust the implementation of the changes in the manner most suited to the needs of their very different student bodies.84

Some senior colleges, however, have embraced the role of providing remedial coursework, which is so often needed by their diverse urban working class student bodies. They are proud to be able to take the students who

---

82. In this regard, the findings presented by Clifford Adelman, Senior Research Analyst at the U.S. Department of Education, to the Board of Regents on October 19, 1999 are particularly relevant. In studying transcripts of students from urban areas in the Mid-Atlantic region, Dr. Adelman found that students with remedial reading needs are more likely to graduate if they take remedial courses at community colleges, but other students, particularly those who are not English language dominant and have remedial writing needs, are better served by senior colleges. In its one-size-fits-all approach, the proposed Amendment makes it impossible for individual colleges to tailor its remedial treatments to students' unique needs.


84. The Consultants' Review, despite its endorsement of the first phase of the proposed Amendment is quite critical of this aspect of the plan, pp.12-13.
through no fault of their own would be otherwise unable to attend college and educate them so that they will have at least the opportunity to better themselves economically. This has been the objective of City College and Lehman College, for example, and CUNY as a whole, for the last 30 years.

According to the Middle States Association Team that reviewed Lehman College's accreditation,

Lehman's traditional mission [is] serving as broad a segment of the Bronx population as is educationally prudent. Without a campus such as Lehman, the vast majority of residents of the Bronx seeking a college education would not have an opportunity to complete a four-year degree while at the same time contending with the family and financial responsibilities many face outside of the education environment. Budget reductions, however, have reduced the number of teaching faculty and reduced essential support programs to a far lower level than is possible to justify. Policy makers have determined that less prepared students should begin college at two-year campuses and that four-year campuses need not offer the remedial work many students from disadvantaged backgrounds need.... Public officials also have determined that students should pay for a larger share of their education costs, a significant handicap for individual and families already struggling to meet day-to-day living expenses. All of these trends have converged to call into question how long Lehman can continue to carry out its urban mission in a manner than can be considered relevant to the needs of the community it serves.”

As we have said, the community colleges, in turn, have traditionally had a dual mission of both remediation for those who seek to go on to a baccalaureate program and vocational training for those seeking a certificate or an associate degree. Without knowing the numbers of students who may ultimately be diverted into their remedial programs, it is difficult to measure the impact on their ability to carry out their critically important vocational education functions.

New York State Education Law §6201, of course, does place a limit on the mission autonomy of the constituent institutions of CUNY. We were, therefore, somewhat surprised to hear Dr. Allen Lee Sessoms, the President of Queens College, say that Queens is really more of a SUNY college, a

“regional” university, than a part of CUNY, with almost half of its graduate student body coming from Nassau and Suffolk Counties rather than from the City of New York.\textsuperscript{86} Indeed, Queens College draws more heavily from Long Island than from the four boroughs other than Queens. Whatever the merits such an institution might have, this clearly does not fit within the statutory mission of CUNY to serve the New York City urban community and to give access to those who might otherwise be denied a higher education.\textsuperscript{87} Dr. Sessoms, however, believes that the key to increased funding is to build a strong connection with the middle class. He said that “the only people who benefit from open admissions are poor people—and poor people don’t vote.”

With respect to raising standards, Dr. Sessoms was quite blunt in stating his view that excellence is largely to be measured by the achievement levels of the incoming students rather than a value added measure of raising the achievement of those less prepared at the outset: “[Expletive] in, [expletive] out. If you take in [expletive] and turn out [expletive] that is slightly more literate, you’re still left with [expletive].”\textsuperscript{88} He said that he was out to build Queens into a great University and the concept of “value-added” as a measure of excellence would not indicate to him that Queens is a great University. Dr. Sessoms has thus made explicit what may well be a large part of the unspoken reasoning behind the proposed Amendment, at least by some of its more vocal proponents in the political arena, i.e., that standards and excellence can only be raised by reducing access to the urban population for whom CUNY was created and maintained.

\textbf{Impact at the College of Staten Island}

The College of Staten Island (“CSI”) is unique. It is the only CUNY institution in the borough, it is geographically isolated compared to others and less accessible by public transportation; has a different racial and ethnic profile (more whites); and relatively wealthier students. Most important in this context, it has a truly comprehensive liberal arts program,

\begin{flushright}
\textsuperscript{86} Interview with Allen Lee Sessoms, September 21, 1999. Also present were Dr. David H. Spiedel, Provost and Senior Vice President for Academic Affairs; Dr. Patricia O’Connor, Acting Associate Provost; Lori Cohen Gordon, Associate Director of Admissions; and Jane Denkensohn, Assistant Vice President for Labor Relations and Special Counsel to the President. Sessoms made the same assertions at the Regents hearing on September 8, 1999.

\textsuperscript{87} “Only the strongest commitment to the special needs of an urban constituency justified the legislature’s support of an independent and unique structure for the university.” New York State Education Law § 6201. 5.

\textsuperscript{88} Ibid.
\end{flushright}
in which AA and BA students are fully integrated. According to its president, Marlene Springer, CSI is the result of a “shotgun marriage” in 1976 between Staten Island Community College and Richmond College (an upper-level institution.) For many years the two institutions remained on two separate campuses with two very different cultures. However, at least since they have come together geographically at the new Willowbrook campus, the two have melded into one institution with one faculty and one set of liberal arts courses. BA candidates and AA candidates attend the same classes, including remedial classes where necessary, and the corresponding core college level courses.

The proposed change in remediation will have virtually no effect on CSI. It is merely a question of bookkeeping. The students taking remedial coursework have all the benefits of being in a baccalaureate program. The high transfer rate may perhaps be explained by the fact that these students may remain at the same institution when they complete their remedial coursework and move formally over to the baccalaureate program, they need have no concern about transferring their credits. President Springer estimates that 80% of their baccalaureate graduates started out in the associate degree program as “open admission” students. The college also provides both a graduate degree program and some of the classic vocational education and certificate programs of a community college. To the extent that the proposed Amendment is predicated on the theory that the presence of students with remedial needs reduces the quality of education for the non-remedial students, continuing the arrangement at CSI would appear to contradict that reasoning.

The Budgetary Impact of Relocating Remediation

The proposed Amendment and the Schmidt Report each contain several very ambitious and praiseworthy programs, that have a number of unstated, but significant, costs. Under any circumstances, most of these programs would add tremendously to the quality of education at CUNY,

---

89. CUNY’s other hybrid institutions, John Jay College, Medgar Evers College, and New York City Technical College, also integrate AA and BA students but, unlike CSI, neither John Jay nor New York Tech is primarily a general liberal arts college.

90. In this regard, it is interesting to note that Deena New, the CSI student who testified in favor of the Amendment at the Regents’ hearing on October 19, 1999, stated that she had never been in a class with remedial students. This seems unlikely, given the high number of students at CSI who enter with some type of remedial needs. She also noted that her classes were very challenging. This may indicate that the issue of having students with mixed abilities and preparation levels was dealt with in some satisfactory way.
and the Commission fully supports them. If, however, the major changes proposed by the Trustees are approved, it will become necessary to establish and nurture them prior to implementing changes in entrance requirements. Because the success or failure of changes in access to, and remediation at, the senior colleges is dependent upon the ability to put these programs into place, it is, therefore, incumbent upon us to note that many of them, if properly executed, can be quite costly.

We count no fewer than 20 program initiatives in the proposed Amendment—e.g., “Early identification of and intervention for students in academic difficulty,” “New and Intensified System Initiatives,” computer programs, outreach and recruitment efforts, etc. Each of these is highly resource-intensive. “Availability of faculty for academic and career counseling,” for example, is a particularly excellent suggestion, but one that requires full-time faculty, rather than the adjunct staff which is so highly prevalent at CUNY. It is unclear what these initiatives will cost or how they will be funded.

As noted earlier, the costs of remediation at CUNY’s community colleges are lower than at the senior colleges. But remediation at the community college level is also more highly subsidized by state and local funds than remediation at the senior college level. Further, 53% of the expenses currently associated with remediation at the senior college level are not direct instructional costs, but rather administrative, facilities, and testing expenses. Presumably, senior colleges will continue to be responsible for many of these expenses, even as they lose the students associated with these expenses. It is unclear to us at this time whether removing remedial coursework from senior colleges would create a net gain or loss for them from state higher education budgets. A careful analysis is needed of the financial and budgetary consequences to the senior colleges as a result of the loss of the students who will now be attending community colleges instead and who may not subsequently transfer at the completion of their remedial requirements. It is also important to consider the long-term implications for the City and State of fewer students in the senior colleges. Fewer potential graduates translates into fewer future human resources for economic stability and growth.

91. Amendment, pp. 4, 5, 12-14, respectively.
92. State aid accounts for 28% of remedial revenues at senior colleges. At community colleges, the state funds 24% of the remedial budget and the city funds 12%, for a total of 36% of remedial funding from government aid. PwC I, p. 33.
93. PwC I, p. 22.
Contrary to common belief, even at CUNY’s senior colleges remedial courses tend to garner more in revenues than they cost to deliver. In 1996-97, CUNY senior colleges spent an average of $9,754 per full-time equivalent (“FTE”), but just $6,350 per FTE in remediation. Arthur Hauptman of the Mayor’s Task Force interprets these numbers to suggest that:

remediation may be generating substantial net revenue for the following reason: To the extent that overall revenues essentially equal overall costs within a system, if one type of education costs significantly less than another, it is reasonable to assume that the lower cost activity is subsidizing the higher cost activity.94

Of course, such cross-subsidies are commonplace in academic administration: high-enrollment introductory sociology courses subsidize low-enrollment physics labs, law programs frequently subsidize medical education. The loss of remedial revenues may well hurt senior college budgets and thus the ability to fund their college level programs. It is unclear how senior colleges would make up for this revenue loss or whether the community colleges would enjoy substantial revenue gains under the proposed amendment.

By state law, CUNY community colleges and senior colleges receive government appropriations according to distinct formulas. While New York City has no responsibility for funding CUNY senior colleges, it is responsible for a portion of community college operating and capital costs. By statute, the City is responsible for one-third of operating costs, unless the community colleges implement “a program of full opportunity for local residents,” in which case the city is responsible for four-fifteenths of operating costs. Further, state statute maintains that tuition and fees are not to exceed one-third of operating costs.95 Recently, however, the legislature has modified the funding scheme, waiving the tuition cap and allowing the city’s responsibilities to shrink, as long as the city maintains effort.96 It is possible that these funding differences might hamper efforts to improve articulation and cooperation between senior and community colleges.

95. Education Law,§ 6304.
In addition to questions regarding funding mechanisms, there remains the perennial problem of inadequate funding of public higher education in the State of New York. So much of the success of CUNY’s plan depends on continued availability of free summer immersion programs, the proposed but as yet undefined tutoring and support programs (cited in Chancellor Goldstein’s budget requests) that we remain extremely cautious of reducing revenue generating support mechanisms (i.e., remedial courses) that currently exist in favor of undefined and as yet unfunded programs (i.e., tutoring centers and support services) that are in any event more costly to provide. We must ask: When push comes to shove, which programs will be prioritized in times of fiscal crisis?

ATTEMPTS TO MITIGATE THE ADVERSE EFFECTS OF THE NEW POLICY

The impact of the Amendment will depend upon the success of programs newly designed, some fully in place but others not yet adequately funded.

With so much at stake, the Commission suggests that the Regents not approve the implementation of the Amendment until there has been an adequate opportunity to assess the results of the various programs intended to mitigate the adverse impact from any elimination of remedial coursework. The Regents’ consultants recognize that the accuracy of the projections upon which they have based their recommendations cannot be fully assessed until implementation has actually begun. They recommend that the first phase of the plan be carefully monitored and that CUNY make appropriate adjustments if the projections “prove to understate the number of students affected” (p. 3). With all due respect, the Commission suggests that the Regents’ responsibility for what in effect will be a change in admission standards requires them to have sufficient information on which to act. Approving the plan and then putting some type of monitoring in place does not satisfy this charge.

Prelude to Success

Among the other programs the Trustees believe will ease the transition to the new policy on remediation is the so-called Prelude to Success, as proposed by Hunter College and the Borough of Manhattan Community College (“BMCC”). According to the Hunter/BMCC proposal, Prelude to Success would allow students with minimal remedial needs to be admitted to Hunter on a conditional basis and fulfill their remedial requirements in BMCC courses administered on the Hunter campus. The
Trustees cite the Prelude to Success program as a model. In fact, although the Amendment itself does not mandate that any of the colleges establish a Prelude to Success program, over the course of this past summer the program became the centerpiece of CUNY's argument in the Gomes litigation and elsewhere, that the proposed Amendment will actually affect very few students. CUNY administrators have predicted that at least some of the students who have 1) met the relatively stiff admissions requirements at the first four senior colleges implementing the changes in January, 2000, and 2) nevertheless have not passed all three placement tests even after an immersion program, will enter a Prelude to Success program or some similar program currently being negotiated among CUNY and the relevant senior and community colleges. Thus, the argument goes, the change in remedial education policy would have little real impact on them.

Allowing students who are deemed likely to complete their remedial coursework in one semester to do so on the campus of a senior college, this program is designed to give students with light remedial needs an opportunity to satisfy requirements, hopefully without sacrificing eventual senior college environment. The program would place students in blocks of courses designed to integrate remedial and college-level material. Further, it is intended to help students form study skills and social relationships that will help them learn after they enter into the senior college community.

In effect, the Prelude to Success consists of a community college operating an extension program on the campus of a senior college. Unlike associate degree candidates at the hybrid colleges such as the College of Staten Island, discussed above, the students in Prelude to Success will have community college faculty and community college courses and course numbers. Because the community college faculty who teach these courses will have to travel to a different campus, it seems likely that they will consist mostly, if not exclusively of adjuncts, rather than full-time tenured faculty. A student who, for example, chose City College for its engi-

97. Amendment, Section IV. A. (p. 12).
98. Gomes v. Board of Trustees of CUNY (Supreme Court of New York, County of New York, Index No. 121848/98 IAS Part 6, Wilk, J.).
99. In his statement to the Board of Regents on October 19, 1999, Chancellor Goldstein made this argument, saying that the Prelude to Success is a "creative and inspiring program" and "nothing more than the strict enforcement of an articulation agreement between community and senior colleges."
neering program would not be able to enroll in any of City's engineering courses, even if her remedial needs were confined to writing, not math. This program appears to be largely a matter of the location of classrooms. Unfortunately, the problems with articulation between the community and senior colleges still remain. Thus although the Prelude to Success students would receive some special attention, only time will tell whether they will have an easier time transferring their community college credits to the senior college than would the students who took the same courses in classrooms at the community college.

It is important to remember that the Prelude to Success program has never actually been tried. First proposed by Hunter and BMCC in response to the Trustees' January, 1999 Resolution, the program will accept its first class this spring semester. We find it disturbing that under the Trustees' resolution and proposed Amendment, this new untried concept will be imported into the next five senior colleges in the fall semester 2000 and the next two in the Fall 2001. The change in policy will then affect the far greater numbers who traditionally start in the fall and it will be imposed upon senior colleges (City, Lehman and York) which currently accept higher numbers and proportions of remedial students, including students with greater remedial needs, all without first assessing the impact and the success or failure of ending remedial coursework at the first four colleges in general, or of the Prelude to Success program in particular. The first few cohorts of students in the Prelude to Success will, if nothing else, be affected by being the subjects of an experiment. There is nothing inherently wrong with experimentation; no innovations would ever be tried without it. Nevertheless, it is only good educational practice to run the experiment more than once, and monitor and evaluate the results, before replicating it widely and with different populations.

100. The program in Florida is similar in that it has community college faculty teaching remedial courses at senior college campuses. However, the students enrolled in these courses take senior college non-remedial courses taught by senior college faculty at the same time. Florida Department of Education, Readiness for Postsecondary Education 1997-98. April 1999.

101. Amendment, Appendix #2, telephone interview with Eija Ayravainen, Assistant Provost of Academic Affairs and director of block programs, Hunter College.

102. Since three of the five second phase colleges, College of Staten Island, John Jay College, and New York City Technical College, are hybrids the major impact will be felt at the City College and Lehman College which have only baccalaureate programs. The final phase involves one hybrid, Medgar Evers (which actually has had very few baccalaureate students to begin with) and one senior college, York.
CUNY-Based Summer Programs
The Amendment calls for the expansion of summer and inter-session programs, designed to help incoming students satisfy their remedial needs before enrolling. These programs are tuition-free, have been popular and, according to CUNY, quite successful. This summer, 17,000 students attended free University Summer Immersion Program (“USIP”) courses, now offered at all 17 undergraduate campuses. CUNY notes that 95% of USIP students either complete their remedial work or advance to the next higher level in the subject for which they took summer classes. But, it is estimated, by CUNY, that only about 53% of the students who attend this program will satisfy all three CSAT's (or presumably the new tests) in time to actually enroll at the senior colleges at the end of the program. Since these are the only free remedial programs that we are aware of, it must also be noted that these immersion programs require full-time attendance, making them less accessible to students who need to work full-time, raise a family, or take care of other external responsibilities. Full-time attendance may be especially problematic for women. Fulfillment of CUNY’s mission to serve New York City’s urban population should not ignore those realities.

CUNY-Based Year-Round Immersion Programs
We do not know what the “year-round” immersion programs are. We only know that CUNY projects that 283 students in need of remedial coursework (after summer immersion or being exempted from taking the placement tests) will be enrolled in them instead of Prelude to Success or a community college. These programs do not currently exist, details regarding these programs have not yet been publicly disclosed.

College Now
CUNY and a number of its component institutions are justifiably proud of various programs that they have initiated in high schools; e.g., College Now. These programs are designed to prepare students for college.

103. “Record-Breaking Number of Students Sign Up This Year for CUNY’s Summer Skills Immersion Program.” CUNY Office of University Relations, July 13, 1999.
104. Amendment, p. 8.
105. CUNY Office of Institutional Research and Analysis, “Performance of First-time Freshmen on the CUNY Skills Assessment Tests: First-time Freshmen Regularly Admitted to Baccalaureate Programs, Fall 1999.”
work and to help them pass the placement tests before they arrive at the campuses. CUNY central administrators indicated to us that they are particularly eager to expand the funding for this program.\textsuperscript{107} Under College Now, the colleges provide outreach to the public high schools, identifying and testing students in their junior year of high school who may not pass the CUNY college assessment tests and would therefore require remediation. Those who fail one or more of the placement tests can work with CUNY faculty members, on the college campuses, to prepare them to pass these tests. Started at Kingsborough Community College in 1980 with a $2.9 million grant from the State, this program now operates at all the community colleges and 56 of the high schools with a $2 million budget, including $1.2 million appropriated by the City Council specifically for it, plus FTE funding based on the number of high school students who attend the program.\textsuperscript{108} Dr. Louise Mirrer, CUNY Vice Chancellor told us that if CUNY had $10 million, they could expand the program to all 230 City high schools and reach down to the junior high schools and educate students even earlier. The Commission fully supports this funding. There is, however, no indication that this amount of new money is being made available from any of CUNY’s funding sources.

**Other CUNY Initiatives**

The proposed Amendment to the Master Plan provides a list of other programs and initiatives which are proffered as substitutes for remedial classes in the senior colleges. Some are not really new, having existed to some extent prior to now, e.g. “expanded collaborative programs with the New York City Public Schools” and “intensified instruction for SEEK and ESL students.” Others require greater expenditures of already scarce financial resources, e.g. “improved counseling, advising, and student support services.” Some of these programs both theoretically already exist and are underfunded, e.g. expanded Writing-Across-the-Curriculum programs. The Trustees also list some initiatives that may improve enrollment statistics—e.g. “intensified recruitment efforts,” and “greater provision for adult and continuing education students”—but these will be of no benefit to those recent high school graduates who will require some remediation. In other words, the programs may help the CUNY institutions to maintain enrollment, but they will be of little comfort to many of the students those institutions have traditionally served.

\textsuperscript{107} Interview with Dr. Louise Mirrer and Jay Hershenson, August 12, 1999.
\textsuperscript{108} “College Now” Program Summary, CUNY, June 30, 1999.
The Amendment also speaks of recruiting students from the top 10% of their classes and from the specialized high schools. CUNY’s long term enrollment projections may very well hinge to some extent upon the assumption that this recruitment effort will be successful. It is unclear, however, what the cost of a heavy recruitment push will be or how CUNY will fund it. We are concerned about what might be the Amendment’s net effect on system enrollments and funding, particularly at the senior colleges which for the last 30 years have attracted students in need of extra help to prepare for college level work, should the recruitment efforts prove to be less than totally successful.

Finally, the Amendment calls for—but does not indicate how it will enforce—improved articulation between senior colleges and community colleges, in the hopes of easing the transition for those students required to take remedial courses at community colleges. The problem of articulation between community and senior colleges is not unique to CUNY. It is rather a pervasive and persistent problem nationally. Attempts to resolve it by fiat would undermine the autonomy of the faculty to set graduation requirements, but CUNY’s track record for articulation agreements is not encouraging. Without identifying and implementing new transfer provisions, the Trustees’ proposed changes to CUNY’s remediation policy would certainly cause greater damage to the educational opportunities of many students, hoping to enroll in the CUNY senior colleges. (See pp. 100 et seq. above.)

In sum, it is not clear whether these various ameliorative initiatives will be adequately funded or the extent to which any of them will in fact relieve the impact on students of the changes in remediation.

Other Ameliorative Proposals: Paying for Remediation
The Schmidt Report helpfully discusses how students pay for remediation (and the rest of their college educations). The two largest sources of financial aid for CUNY students are the New York State Tuition Assistance Plan (“TAP”) and federal Pell grants. In addition, students can and often do take out loans to pay tuition. The Schmidt Report points out that although the Pell legislation allows students to receive federal aid for up to one year of purely remedial coursework, TAP regulations have several requirements that make it difficult for post-secondary students to finance remedial courses. Students are generally limited to four academic years of study and only full-time, degree students who are taking at least three college-level credits during the first semester and at least six college-level credits during each subsequent semester are eligible for TAP. Students must also maintain a certain level of academic progress as measured by the
successively greater number of courses taken, credits earned and minimum 
GPA. The drawbacks for the CUNY student population are obvious: The 
most economically disadvantaged students also tend to be those most in 
need of pre-college remedial work.

The Task Force goes on to recommend review and revision of the TAP 
rules to make TAP available for remedial courses as well as college-level 
coursework. This aid used to be available and was known as Supplemental 
TAP. The Report also argues that “New York City and New York State must 
recognize that remedial education is an unfortunate necessity that is not 
going to disappear in the short run, and the Mayor and the Governor 
must work together to identify funds that can be used to finance it.” This 
Commission fully supports those recommendations.

As noted above, the Schmidt Report had a number of component 
reports done by staff or consultants. One of the underlying Rand Corpora-
tion reports goes beyond the main Schmidt Report to recommend that 
all remedial courses should be provided free, pointing out that students 
are currently required to pay and sometimes take out loans for “services 
they should have received for free in K-12 education.” This recommen-
dation also seems eminently reasonable to us.

THE TESTS—REMEDICATION AND ADMISSIONS—A “MOVING TARGET”

Up to and including the Fall semester of 1999, CUNY has adminis-
tered three tests to its incoming students: the Writing Assessment Test 
(“WAT”), the Reading Assessment Test (“RAT”), and the Mathematics As-
sessment Test (“MAT”). Collectively these exams were known as the Col-
lege Skills Assessment Tests (“CSAT’s”) or sometimes known as Freshman Skills Assessment Tests (“FSAT’s”)—the latter is a particular misnomer since 
the tests were given at various stages in a student’s career, both for place-
ment and exit purposes. These tests were used by CUNY colleges to deter-
mine the remedial needs of incoming students. Under terms of the pro-
posed Amendment as submitted to the Board of Regents, these assessment 
examinations would assume a new responsibility. Since the Amendment 
would deny senior college admissions to students placed in remedial courses, 
the Amendment would reposition the CSAT’s as admissions tests.

110. Ibid. at p. 40 (emphasis added.)
111. Arthur M. Hauptman, “Financing Remediation at CUNY on Performance Basis: A 
Proposal,” May, 1999, p. 3.
On September 8, 1999, while the Regents were holding their first public hearing on the proposed Amendment, the Committee on Academic Policy, Program, and Research (“CAPPR”) of the CUNY Board of Trustees voted to recommend a change in the testing program. On September 27, the full Board voted to require that “all colleges use common objective tests reflecting national norms, and other assessments as deemed necessary, to determine when students who have been placed in remedial coursework qualify for exit from remediation,...”\(^\text{112}\) The Chancellor, in consultation with others, is to designate suitable tests to be fully implemented by the Spring 2000 semester. At the Board meeting, Chancellor Goldstein reported that the administration had decided to continue to use the CUNY CMAT for math, but had issued a request for proposals to major test companies to get bids for a reading and writing test.

Although the testing resolution speaks exclusively in terms of “exit” from remediation, it is apparent that the yet to be identified tests will be used for at least two additional purposes: 1) placement in remedial coursework and, as a consequence of such placement, 2) denial of admission to a senior college. Once again, because of the requirement of the proposed Amendment to eliminate remedial coursework from the senior colleges, CUNY has conflated two functions, admissions and remediation placement, which ought to be separate and distinct and for which no single test can properly serve. In discussing the new “exit” tests, the chancellor was thus obliged to explain how these tests will work as part of the admissions process. All applicants will henceforth be required to take the SAT. Admissions decisions will be based on a combination (to be specified by each senior college) of high school grades, SAT scores, Regents’ test scores, the number of college preparatory courses completed, class rank, and possibly AP courses.\(^\text{113}\) This is an excellent plan. It uses multiple criteria and apparently gives at least some flexibility to the individual senior colleges. But there is a catch: In order to be relieved of the requirement of taking and passing the new exit/placement tests, a student will still be required to score at least 500 each on the Verbal and Math portions of the SAT, a 21 on the ACT, or a 75 on the relevant Regents exams. Students accepted at a senior college with lower SAT, ACT, or Regents’ scores will now be required to take and pass the new placement/exit tests in order to actually...

\(^{112}\) Resolution of the CUNY Board of Trustees, September 27, 1999, emphasis added.

\(^{113}\) Admissions Flow Chart and remarks of Chancellor Goldstein at the September 27, 1999, meeting of the Board of Trustees. Chancellor Goldstein stressed that the admissions decisions should not be based on any single criterion.
enroll at the college that has already “accepted” them. As a practical matter, therefore, CUNY will set a minimum test score as a requirement for admission to all its senior colleges, regardless of grades, difficulty of courses taken, or any other factor which may theoretically figure in determining admissions.

The CUNY leadership, which in the past had resisted any change from the CSAT’s and defended their use, in reality had no choice but to abandon these thoroughly discredited tests now. First of all, the Schmidt Report sharply criticized the CSAT’s, unequivocally stating that they “do not meet generally accepted scientific standards of reliability, validity, and fairness. The CUNY writing assessment test, in particular, is highly unreliable.”114 Then on June 7, 1999, in a move that was ultimately enjoined by Court order,115 the Mayor and City Council added a rider to the FY 2000 budget appropriations providing that no funds would be made available to CUNY unless, by September 30, 1999, the Board of Trustees adopted a resolution to be implemented in the current academic year, that all community colleges must use “an objective test, reflecting nationally based standards, to determine when students who have been placed in remediation programs successfully achieve college readiness and are prepared to exit from remediation.”

Replacing the CSAT’s is necessary but insufficient. Without knowing what the new placement/exit and (realistically) admissions tests are or what cut score(s) will be, we cannot be entirely sanguine about them. There are two major problems with this testing scheme. First, it will have the effect of using one test, standing alone, to make a very high stakes decision: barring an otherwise qualified student from senior college. Second, these tests, as well as those used to exempt students from them (i.e., the SAT and the ACT) may very well have the effect of disproportionately excluding low-income students, urban students, minorities, and women from the senior colleges.116

Use of a Test as a Sole Criterion for a High Stakes Decision

College admissions and testing professionals universally agree that a test should be used only for the purpose for which it was designed and


validated\textsuperscript{117} and that even a validated test should not be used as the sole deciding factor in a high-stakes decision, such as college admissions.

[W]e believe that no single factor should be used as the sole criterion for any important educational decision. No single test can give a complete picture of an individual, and we urge score users to view a test as simply one of the many pieces of information available about a student.\textsuperscript{118}


In elementary or secondary education, a decision or characterization that will have major impact on a test taker should not automatically be made on the basis of a single test score.\textsuperscript{119}

There is no reason why the same should not be true of higher education decisions as well. See also, National Association of College Admissions Counselors Code of Ethics III. A. 3. and 4. (minimum test scores should not be used as a sole criterion for admission and should be used in conjunction with other data.)

It is vital that any new test not only be reliable and professionally validated for the purpose for which it is to be used, i.e., as in effect an admissions test, but also that CUNY establish a cut score that is meaningful and reasonable in the circumstances and that the test not be used as a sole determinant for admissions. The SAT is designed and has been validated only to predict first-year grades in college, and as noted above, ETS, the designer and manufacturer of the SAT, recommends that it not be used as the sole determinant for a high stakes decision.\textsuperscript{120} The same would be true of any standardized placement test ultimately selected by CUNY to replace the reading and writing CSAT’s. If failure to attain a minimum score on one of these tests, presumably designed and validated for the

\textsuperscript{117} See e.g., National Association of College Admissions Counselors (“NACAC”) Statement of Principles of Good Practices, (Revised Oct., 1998) Section III. A. 1. (test scores are to be used “discretely and for the purposes that they are appropriate and validated.”)


\textsuperscript{119} Standard 8.12.

\textsuperscript{120} Ibid.
purposes of placement in and/or exit from remediation, becomes a bar to admission to a senior college, that would be a misuse of the test.

**Fairness and Standardized Tests**

The use of minimum SAT scores as an exemption from the placement tests, along with the general use of an as yet unidentified standardized test to exclude students from senior college illustrates the problems associated with the use of standardized tests with respect to the intended beneficiaries of a CUNY education. It is a sad, but undeniable, fact that scores on standardized tests tend to correlate with parental income and parental education levels, that on average minorities tend to score lower than whites, women tend to score lower than men, and people from urban and rural areas tend to score lower than suburbanites. (Tables 6 to 9 are illustrative.) Obviously, there may be many complicated and interrelated reasons for this, but the fact remains that CUNY is supposed to serve the urban poor, people of color, and immigrants. Relying on these tests to bar entry to a senior college will very likely stratify the student body of CUNY in a manner inconsistent with its mission. Such heavy reliance is particularly troubling for a university whose mission includes equality of access for urban populations (see Table 10) and for institutions serving students who are frequently the first in their families to attend college. (See Table 11.)

1999 is the first year in which all New York State students were required to take Regents examinations to graduate from high school, and the first year in which the “Mathematics A Regents Examination” is being administered. These tests have not yet been repeatedly administered to a broad population, and thus there is no way to gauge their impact on CUNY admissions at this time.

**Realistic Cut Scores**

CUNY students do fairly well on the SATs, but the suggested cut off score of 500 on the Verbal portion and 500 on the Math portion would presumably exclude at least half of the students currently attending even the most selective senior college in the CUNY system (Baruch). There, the mean total SAT score of its student body was 1012 in 1998, the most recent year for which data is available. (The national mean score for all college bound senior test takers in 1999 was 1017 (See Table 6). The other senior colleges had even lower mean SAT scores; the senior college average

---

### Table 6
1999 Average SAT Scores (by race/ethnicity and gender) for College Bound Seniors were:

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>Verbal</th>
<th>Math</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Indian or Alaskan Native</td>
<td>484</td>
<td>481</td>
<td>965</td>
</tr>
<tr>
<td>Asian, Asian Amer., or Pacific Is.</td>
<td>498</td>
<td>560</td>
<td>1058</td>
</tr>
<tr>
<td>Black or African American</td>
<td>434</td>
<td>422</td>
<td>856</td>
</tr>
<tr>
<td>Mexican American</td>
<td>453</td>
<td>456</td>
<td>909</td>
</tr>
<tr>
<td>Puerto Rican</td>
<td>455</td>
<td>448</td>
<td>903</td>
</tr>
<tr>
<td>Hispanic/Latino</td>
<td>463</td>
<td>464</td>
<td>927</td>
</tr>
<tr>
<td>White</td>
<td>527</td>
<td>528</td>
<td>1055</td>
</tr>
<tr>
<td>Other</td>
<td>511</td>
<td>513</td>
<td>1024</td>
</tr>
<tr>
<td>Males</td>
<td>509</td>
<td>531</td>
<td>1040</td>
</tr>
<tr>
<td>Females (54% of total)</td>
<td>502</td>
<td>495</td>
<td>997</td>
</tr>
<tr>
<td>All Test Takers</td>
<td>505</td>
<td>512</td>
<td>1017</td>
</tr>
</tbody>
</table>

Source: “News from the College Board,” College Board Online

### Table 7
1999 Average SAT Scores (by family income):

<table>
<thead>
<tr>
<th>Income Range</th>
<th>Verbal</th>
<th>Math</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $10,000 per year</td>
<td>427</td>
<td>444</td>
<td>871</td>
</tr>
<tr>
<td>$10,000 - 20,000</td>
<td>449</td>
<td>458</td>
<td>907</td>
</tr>
<tr>
<td>$20,000 - 30,000</td>
<td>476</td>
<td>478</td>
<td>954</td>
</tr>
<tr>
<td>$30,000 - 40,000</td>
<td>493</td>
<td>493</td>
<td>986</td>
</tr>
<tr>
<td>$40,000 - 50,000</td>
<td>505</td>
<td>506</td>
<td>1011</td>
</tr>
<tr>
<td>$50,000 - 60,000</td>
<td>514</td>
<td>516</td>
<td>1030</td>
</tr>
<tr>
<td>$60,000 - 70,000</td>
<td>520</td>
<td>523</td>
<td>1043</td>
</tr>
<tr>
<td>$70,000 - 80,000</td>
<td>527</td>
<td>531</td>
<td>1058</td>
</tr>
<tr>
<td>$80,000 - 100,000</td>
<td>539</td>
<td>543</td>
<td>1082</td>
</tr>
<tr>
<td>More than $100,000 per year</td>
<td>559</td>
<td>571</td>
<td>1130</td>
</tr>
</tbody>
</table>

Source: “News from the College Board,” College Board Online
Table 8
Average 1999 ACT Scores (by race, ethnicity and gender)

<table>
<thead>
<tr>
<th>Race/Ethnicity</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American / Black</td>
<td>17.1</td>
</tr>
<tr>
<td>American Indian / Alaskan Native</td>
<td>18.9</td>
</tr>
<tr>
<td>Asian American / Pacific Islander</td>
<td>21.7</td>
</tr>
<tr>
<td>Caucasian</td>
<td>21.7</td>
</tr>
<tr>
<td>Mexican / Chicano</td>
<td>18.6</td>
</tr>
<tr>
<td>Puerto Rican / Cuban / Other Hispanic</td>
<td>19.6</td>
</tr>
<tr>
<td>All Males</td>
<td>21.1</td>
</tr>
<tr>
<td>All Females (57% of total)</td>
<td>20.9</td>
</tr>
<tr>
<td>All Test Takers</td>
<td>21.0</td>
</tr>
</tbody>
</table>

Table 9
1999 ACT Scores (by family income)

<table>
<thead>
<tr>
<th>Income Range</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $18,000 per year</td>
<td>18.4</td>
</tr>
<tr>
<td>$18,000 - 24,000</td>
<td>19.2</td>
</tr>
<tr>
<td>$24,000 - 30,000</td>
<td>19.9</td>
</tr>
<tr>
<td>$30,000 - 36,000</td>
<td>20.5</td>
</tr>
<tr>
<td>$36,000 - 42,000</td>
<td>20.8</td>
</tr>
<tr>
<td>$42,000 - 50,000</td>
<td>21.2</td>
</tr>
<tr>
<td>$50,000 - 60,000</td>
<td>21.6</td>
</tr>
<tr>
<td>$60,000 - 80,000</td>
<td>22.1</td>
</tr>
<tr>
<td>$80,000 - 100,000</td>
<td>22.7</td>
</tr>
<tr>
<td>More than $100,000 per year</td>
<td>23.4</td>
</tr>
</tbody>
</table>

Source:
ACT Assessment 1999 Results: Summary Report,” ACT, News, Online
Table 10
Urban and rural students score below average; suburban students score above average
Source: News from the College Board (Chart 7)

Table 11
1999 Mean SAT Scores by Highest Level of Parental Education

<table>
<thead>
<tr>
<th>Highest Level of Parental Education</th>
<th>Verbal</th>
<th>Math</th>
</tr>
</thead>
<tbody>
<tr>
<td>No High School Diploma</td>
<td>413</td>
<td>437</td>
</tr>
<tr>
<td>High School Diploma</td>
<td>474</td>
<td>476</td>
</tr>
<tr>
<td>Associate Degree</td>
<td>489</td>
<td>490</td>
</tr>
<tr>
<td>Bachelor’s Degree</td>
<td>525</td>
<td>531</td>
</tr>
<tr>
<td>Graduate Degree</td>
<td>558</td>
<td>563</td>
</tr>
</tbody>
</table>

Source: “News from the College Board” Sept. 1999
was 971, with 86.6% of the CUNY senior college population reporting scores. According to the National Center for Educational Statistics (NCES), students scoring 960 are considered to be “moderately qualified for college.” Students with 1110 are “highly qualified.” If the 500/500 cut off is any indication of the score level to be used in the regular admissions process, this means that virtually all CUNY baccalaureate entrants would have to have performed at or above the national average.

This would make admissions criteria at CUNY’s senior colleges higher than at most SUNY colleges, where mean composite SAT scores cluster in the low 1000s, and at least 25% of the regularly admitted first-time students score below 1000 on the SAT at 16 of the 24 SUNY schools that require SAT scores for admission.

CONCLUSIONS AND RECOMMENDATIONS ON REMEDIATION

With respect to the removal of all remedial coursework from the senior colleges as proposed by Trustees Amendment to the Master Plan, the Commission has come to the following conclusions:

- As a matter of principle, remediation should not be necessary for traditional 18 year old entering freshmen at the senior colleges and the elimination of the need for remediation must be a serious goal.

- The feeder schools (be they public, parochial or private) have the responsibility to prepare those students who aspire to higher education for college level work.

- It is the historic and proper role of CUNY, as well as its legally mandated mission, to afford the broadest possible access to the poor and working class urban population of New York City.

122. CUNY Office of Institutional Research and Analysis, “Mean Total SAT scores of Regularly Admitted Students and Regular First-time Freshman Enrollees Fall 1997, Fall 1998” and “Percentage of CUNY Applicants, Admitted Students, and First-time Freshman Enrollees With Valid SAT Scores: Fall 1997, Fall 1998.”


124. The Schmidt Report (p.37) proposes a composite score of 1200 for admission to “flagship” schools it recommends establishing.

125. SUNY System Administration, Office of Academic Planning, Policy and Evaluation, “Mean Composite SAT Scores of First-Time Full-Time Students State-Operated Institutions, Fall 1998” and “SUNY Admissions Information Summary.”
This cannot be wished away with mere slogans about standards, nor can it be, in the City’s own self interest, ignored; the economic, social and political health of New York City depend upon an educated populace.

- We have found no persuasive evidence that it is preferable either for the students (remedial and non- or post- remedial), for the senior colleges, for CUNY as a whole, or for the City or New York that all remedial coursework be done by the community colleges only.\textsuperscript{126}

In sum, we recommend against the Board of Regents approval of the CUNY Trustees proposed Amendment to the Master Plan. Further, in our view, the various programs outlined in the proposed Amendment and the recommendations put forth in the Schmidt Report: to do outreach to the public high schools, to expand summer immersion programs, and to provide supplementary TAP funds to remedial students are necessary both to end the need for remedial education and to raise overall standards and educational opportunities at CUNY. They should be put in place on a provisional basis, and their effectiveness monitored.

In the event that the Amendment is, nevertheless, approved in whole or in part, we recommend that:

- Such an important change should not be undertaken without first putting in place and fully funding the Trustees’ proposed programs and the Schmidt Report recommendations with respect to TAP, and CUNY should:
  - allow for flexibility at individual campuses to make the adjustment based upon their individual missions and their understanding of the needs of their students;\textsuperscript{127}
  - undertake a system-wide study of remedial programs, in order to identify and disseminate effective approaches to remediation;

\textsuperscript{126} There may be some financial benefit to the community colleges, but it would be at the cost of becoming “remediation mills” and would likely distract from their other missions.

\textsuperscript{127} It is noteworthy that even Baruch College, which eschewed all formal remedial classes prior to the Trustees’ initiative, has accomplished this transition (and would, according to Interim President Lois Cronholm, prefer to continue) by enrolling students who meet their relatively stringent admissions criteria, but who nonetheless fail one or more of the placements tests, by providing them access to the tutoring center for help with their college-level coursework.
phase in the changes in a manner that maximizes fairness to incoming students and allows for orderly planning by both the students and the colleges; the policy to end remedial coursework at the senior colleges if enacted, must be implemented in reasonable stages, allowing for time to assess the impact and success of new programs designed to minimize student need for remedial courses by the time they enter senior college;

- implement admissions and placement criteria that are reliable, valid, and fair;

- meet the needs of the wide variety of students seeking a CUNY education including people of color, recent immigrants with English language deficits, low-income people, those who must work and/or have family responsibilities, those who are first generation college attendees, older and other non-traditional students, etc.

- permit remedial coursework, administered by senior colleges, for those students, such as SEEK and ESL students, admitted to the senior colleges under exceptions to the general policy in order to give them adequate opportunity to succeed.

November 1999

The Commission on the Future of CUNY

Stanley M. Grossman, Chair
Alice Chandler Jay Mazur
Claire M. Fagin Margie McHugh
Robert Hughes Robert Mundheim
Arthur Levine David Z. Robinson
Lance Liebman Margarita Rosa
Stanley Mark Jack Rudin
Alton Marshall O. Peter Sherwood

Special thanks to Isabelle Katz Pinzler and Thurston A. Domina for their work on the report. The work of the Commission on the Future of CUNY was made possible by a grant from the New York Community Trust.
The Pataki Administration’s Proposals to Expand the Death Penalty

The Committee on Capital Punishment

I. INTRODUCTION

Immediately upon taking office, Governor Pataki proposed restoring the death penalty to New York. After extensive negotiations with a number of groups that expressed concern about the idea, the proposal succeeded, on the basis that it was, in Governor Pataki’s words, “balanced to safeguard defendants’ rights while ensuring our state has a fully credible and enforceable death penalty statute.” 1 He also stressed that the bill “sets forth clear standards to narrow the scope of the death penalty,” 2 limiting it to “the most serious crimes.” 3

On May 11, 1999, Governor Pataki proposed a package of amendments to the death penalty statute. 4 The package passed the state senate in June 1999 without debate. 5 Enactment of these amendments would

---


2. Id. at 2.

3. Administration Memorandum filed with Senate Bill Number 2850, at 5 (March 7, 1995).

4. See S.5907 (June 16, 1999).

break the original promise of an effective but fair and limited capital punishment law. By weakening the proportionality review process, expanding the list of death-eligible crimes, and permitting “victim impact” and “community impact” statements during sentencing in capital trials, the proposals would fundamentally upset the balance that forms the foundation of the current death penalty statute. 6

The primary effect of the proposed amendments is to remove crucial protections that presently guard against arbitrarily differential treatment of capital defendants both at trial and on appeal, while at the same time the amendments would expand radically the number of crimes punishable by death. If enacted, the proposals would work injustice, squander money, and increase the likelihood that New York’s entire death penalty system will be held unconstitutional.

II. SPECIFIC DEFECTS IN THE PROPOSED LEGISLATION.

A. Weakening Proportionality Review Leaves Injustice Unrectified

Inconsistent treatment of similar cases has long bedeviled the application of the death penalty. 7 In 1995, the Legislature, the Governor, and elected officials from both parties worked to address the possibility of arbitrariness, knowing that irrational disparities in the use of the death penalty could poison the entire law.

6. Our detailed discussion in this report focuses on the provisions of the proposed amendments that work the most fundamental alterations in the statutory scheme. But the proposal contains many less dramatic elements as well, and the effect of each of them is to broaden the reach of the death penalty. For example, under Penal Law §125.27(1)(a)(xi) it is currently an aggravating circumstance that “the defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan.” The proposal would extend the period to forty-eight months, while eliminating the requirements that the prior killings have been within the state and “committed in a similar fashion or pursuant to a common scheme or plan.” Similarly, the bill proposes to alter current law so that the prosecution rather than the defense will enjoy the advantage of delivering the final summation at the penalty phase.

7. See, e.g., Legislative Modification of Habeas Corpus in Capital Cases, 44 The Record 848, 852 (1989). Thus, for example, Charlie Brooks and Woody Lourdes were prosecuted in Texas for a crime in which they entered a room and one of them—no one to this day knows which—killed the victim with a single shot. Lourdes ultimately received a 40-year sentence (with parole eligibility in six years), while Brooks became the first person in America to be executed by lethal injection. See Robert Reinhold, Groups Race to Prevent Texas Execution, N.Y. Times, Dec. 6, 1982, at A16 (reporting that the district attorney who prosecuted both cases argued to the Texas pardon board that it should intervene to prevent this outcome).
As a result of these efforts, the 1995 death penalty law requires the Court of Appeals to determine in each case whether the defendant's death sentence “is disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.” The proposed amendment would limit the required review to a determination of whether the sentence of death is disproportionate “to the penalty imposed in other cases where a sentence of death was imposed” (emphasis added). Thus, defendants generally would no longer be entitled to have the death sentences in their cases compared to other cases in which persons who committed similar crimes had received lesser sentences.

This proposed revision would eviscerate the required proportionality review by removing from its ambit exactly the situations raising the most disturbing issues. Thus, for example, if Italian-Americans convicted of killing potential witnesses were routinely sentenced to death for that crime while members of other ethnic groups rarely were, the proportionality review required by the Governor's bill would not reveal the discrepancy. Similarly, the proposed proportionality review will not scrutinize or even reveal whether death sentences are being imposed in a geographically disparate fashion, based on the fortuity of where in the State the crime occurred.

The consequences of adopting the proposed limitations on the required review by the New York Court of Appeals are easily predictable. On an individual basis, arbitrary and indefensible discrepancies in the outcomes of like cases will lead to injustices in specific instances and an erosion of public confidence that fairness is being served. On a system-wide basis, an accumulation of such results would render New York's death penalty statute vulnerable to a successful challenge under Furman v. Georgia or parallel state doctrines.

Moreover, other elements of the proposed package of amendments would exacerbate these consequences.

B. Significantly Expanding the Pool of “Death Eligible” Crimes Multiplies the Potential for Arbitrariness

In commenting on the present statute just before its enactment, the Association wrote:

9. If, taken overall, a state's death penalty system fails to provide meaningful mechanisms for assuring that the discrimination between those who are to die and those who are to live is made on a justifiable basis, the system violates the Eighth Amendment. See Furman v. Georgia, 408 U.S. 238 (1972).
We are concerned that the definition of what crimes are capital should be as narrow as possible. The more broadly the bill sweeps (e.g. by covering felony murders), the more likely it is (a) to engender the sort of arbitrariness that the courts have repeatedly condemned (i.e. that crimes and criminals of equal culpability will receive unequal punishment), and (b) to be held unconstitutional.

By significantly expanding the range of crimes potentially subject to the death penalty, the present proposals implicate just these concerns. The reason is simple: as the pool of “death-eligible” defendants increases, it becomes exponentially more difficult for the state (1) to achieve individual justice, and (2) to meet the federal constitutional requirement that it differentiate “in an objective, evenhanded, and substantively rational way” between those defendants who will receive the death penalty and those who will not.

Moreover, in many areas, including capital sentencing, the New York State Constitution has been read to provide greater protection for individual rights than the federal Constitution. This consideration compounds the imprudence of enacting the proposed amendments.

1. Accomplices to Felony Murders

Under present New York law, a person may be convicted of murder in the second degree (non-capital), and be sentenced to life in prison, if he is an accomplice to certain felonies, such as robbery or kidnapping, where someone is killed by another participant. However, he may be relieved of liability by showing that he did not commit or solicit the homicidal act.

12. This principle, which has been repeatedly reaffirmed by the United States Supreme Court, is the touchstone of its constitutional review of death penalty systems. See Loving v. United States, 517 U.S. 748, 755 (1996); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988).
was not armed, and lacked reasonable grounds to believe that any participant was armed or intended to engage in violent conduct.\(^{15}\)

A person may be convicted of murder in the first degree, and sentenced to death, if during the commission of certain felonies she kills or commands another to kill.\(^{16}\) The proposed bill eliminates the requirement that to commit capital felony murder the defendant must be the actual killer or command the actual killer.

The resulting capital murder statute would not even have the limitations of the current law governing murder in the second degree. It would allow anyone to be executed who participated, no matter how remotely, in a felony where someone was killed. This would include lookouts, drivers and others who were not even present at the murder. There are at least two reasons not to pass such a statute.

(a) It would increase arbitrariness. Under the revised statutory scheme, many participants in a felony that leads to a killing could be charged, in the prosecutor's discretion, either with first degree murder under § 125.27(7) or with second degree murder under § 125.25(3). It is not difficult to imagine a situation where the shooter in one felony murder would be charged with second degree murder while an unarmed getaway driver or lookout in another felony murder would charged with first degree capital murder. Such occurrences would seriously undermine the fairness of New York State's death penalty—particularly if the Court of Appeals' mandatory review were changed in the way already described in Section A, supra, so that any systemic bias in these decisions would go uncorrected. The result would be to increase yet further the chances that New York’s entire death penalty system would be held unconstitutionally arbitrary under the federal or State constitution.

(b) It would be extraordinarily expensive. The change would undoubtedly cause a major increase in the capital caseload, al-

15. See Penal Law § 125.25(3).

16. See Penal Law § 125.27 (a) (vii). It is unclear whether even this provision is narrowly tailored enough to support imposition of the death penalty, cf. People v. Coezer, 695 N.Y.S.2d 781, 784, 285 A.D.2d 74 (4th Dept 1999) (defining “commands” prong of accessorial liability in non-capital murder case, while distinguishing heightened Eighth Amendment analysis required in capital cases), leave to appeal granted, 93 N.Y.2d 1043 (1999), but in any event the proposed amendments would make the situation significantly worse.
though it would probably have only a negligible impact on the execution rate.

Currently, if five people are involved in a robbery and one of them kills a person in furtherance of the robbery, capital charges can be brought against the shooter and second degree murder charges can be brought against the four other participants, assuming none of those four ordered or commanded the killing. If § 125.27(7) were changed in accordance with the proposed bill, capital charges might be brought against all five participants. 17

But whatever public funds were expended in seeking a death sentence in such a situation would be badly spent. Because of the attenuated culpability of the collateral defendants, juries would be most unlikely to render capital verdicts, 18 and, because of the constitutional concerns, the courts would be most unlikely to affirm them. The most salient practical impact would be the diversion of resources from parts of the criminal justice system where they are desperately needed in the public interest. 19

2. Vague Additions to Death-Eligible Crimes

The proposed amendments would add a subparagraph (xiv) to Penal Law § 125.27(1) so as to permit the imposition of the death penalty if "the defendant committed the killing for the pleasure of it, to experience the

17. A significant effect of the proposed amendments is to greatly increase prosecutorial leverage, particularly over people with incidental roles in the crime. For example, it is not difficult to imagine a scenario where prosecutors will be able to obtain cooperation from the driver of the getaway car by threatening the defendant with death, unless the defendant cooperates.

18. See Edmund v. Florida, 458 U.S. 782, 794-96 (1982) (reviewing empirical data and concluding that the "evidence is overwhelming that American juries have repudiated imposition of the death penalty" for "accomplice liability in felony murders.").

19. In commenting on the 1995 legislation, we, like the Criminal Justice Section of the New York State Bar Association, called attention to its effect in placing an "enormous drain on already overstressed resources." Committee on Civil Rights, The Association of the Bar of the City of New York, Report on Legislation S. 6350, A. 9028, at 6. The proposed amendments would make this situation worse, at a moment when, for example, the state has already cut back on the fees paid to capital defense lawyers, notwithstanding the unanimous recognition by authorities across the political spectrum--including the sponsors of the 1995 statute, see, e.g., 1995 Committee Bill Memorandum, Bill Jacket, 1995 Ch. 1, at 36--that the provision of competent defense counsel is critical to the effort to ensure fairness. See Michael A. Cooper, Counsel Fees in Capital Cases: A Rush to Execution, New York L. J., Oct. 14, 1998, at 2; see also Section II.E.1, infra.
act of killing or to obtain membership or status in a group or organization.”

Consistent with the bedrock constitutional requirement that states which choose to impose capital punishment must do so on the basis of rational and defensible criteria, such states “must define the crimes for which death may be imposed in a way that obviates standardless sentencing discretion.”

The terms contained in the proposed amendments lack a clear and objective meaning, and thus open the door to arbitrary imposition of the death penalty. Perhaps for this reason, no other state death penalty statute, so far as we are aware, contains similar language.

Under current law, juries must determine such matters as whether the victim was an employee of a corrections department or whether the defendant was serving a life sentence. Under the proposal, the crimes for which a person may be sentenced to death have been expanded and will turn on such determinations as whether a killing was “for the pleasure of it,” “to experience the act of killing,” or “obtain or maintain membership or status in a group or organization.” The conclusions that different juries reach as to such vaguely defined and in many cases inherently unknowable questions will necessarily lack consistency.

Indeed, a reasonable juror might believe that every intentional murder is done in part “to experience the act of killing.” Rather than channeling the jury’s discretion, the proposed additional provisions would thus untrammel it, leaving jurors free to impose the death penalty in all, or virtually all, cases. It is precisely to obviate the resulting potential arbitrariness that the Supreme Court has specifically held, “If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.” And even an aggravating circumstance that does not fall into this class must nonetheless not be “too vague to provide any guidance to the sentencer.” Thus the terms defining the proposed new class of death-eligible crimes are probably unconstitutional.

But even if they are not, adoption of the proposed amendments would,

20. See supra notes 13–14 and accompanying text.
22. See Penal Law §§125.27 (1)(ii), (iii), (iv).
once more, further a pattern of arbitrary outcomes that would undermine the ability of the New York death penalty system to withstand ultimate constitutional scrutiny.

C. Victim Impact Testimony At Capital Sentencing is Unfair to Victims as Well as to Defendants

The proposal would amend Criminal Procedure Law § 400.27 to allow for the introduction at the sentencing phase of a capital murder trial of testimony concerning “the impact of the crime on the victim’s family and the community.”

Since the United States Supreme Court’s 1991 decision in Payne v. Tennessee, it has not been a violation of the federal constitution for a state to permit the introduction of victim impact testimony in a capital case. But New York should adhere to the policy decision that it made in 1995 to exclude such evidence.

Prior to its decision in Payne, the Supreme Court had consistently prohibited the introduction of victim impact statements at the sentencing phase of capital murder trials. In Booth v. Maryland, the Supreme Court held that admission of such evidence violates the Eighth Amendment because it makes the sentencing determination turn on inflammatory and emotional testimony unrelated to the guilt of the defendant. Grief and anger are normal and understandable emotions for family members of victims; however, the Booth Court pointed out that a danger of arbitrary jury verdicts exists in situations where the victim leaves behind no family, or the family members are inarticulate or unpersuasive in expressing their 25. 501 U.S. 808 (1991).

26. The New York Court of Appeals has not yet ruled on the issue under the state constitution.


28. See Booth, 482 U.S. at 508.

29. It is precisely for this reason, and in the interests of uniform and impartial justice across cases, that Western societies some centuries ago transferred the function of prosecuting murders from the aggrieved family to the state. Thus, the memorandum in support of the proposals proceeds from an erroneous premise in claiming that there is an “imbalance” in current law because it precludes victim impact testimony while “enabling a convicted killer to present a wide range of evidence in mitigation of the crime.” The comparison is flawed because the parties to the proceeding are the state and the defendant, not the victim’s survivors and the defendant.

30. In capital cases, the direct victim of the crime is necessarily dead. Hence, the “victims” of a capital murder for these purposes consist of whatever indirect victims, that is, members of the defendant’s family or community, there may happen to be.
loss. “Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die.” The Booth Court held that allowing admission of emotionally charged opinions for the jury to consider “does not provide a ‘principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not.’” In the same vein, in South Carolina v. Gathers, the Supreme Court reiterated that at sentencing in a capital trial, the prosecution should be limited to discussing matters directly related to the events and circumstances of the crime.

In Payne, the Supreme Court overruled these precedents to the extent of holding that the Eighth Amendment imposes no per se prohibition on the admission of victim impact statements and evidence. The Court made it clear, however, that trial courts should proceed with caution where statutes allow such testimony, since extensive presentations of victim impact could render the sentencing process unconstitutional in specific cases.

Although Payne now allows for the possibility of victim impact testimony at capital sentencing, it would be a grave mistake to permit it in New York. As the Supreme Court noted in Booth, it is quite probable that the impact will be greatly different in each case; this ensures that the outcome of any given criminal case will depend more on the worth the prosecutor assigns to the victim and the impression the victim’s family makes on the jury than on the actions of the defendant. Poor families, immigrants without families in the United States, homeless persons, under-represented ethnic and racial minorities, and groups whose members may lack a network of sympathetic and charismatic survivors may offer less compelling testimony than others. Thus, the severity of the defendant’s sentence may vary depending on the income, education, status, race and social acceptability of the victim or the survivors—an outcome fundamentally at odds with the concept of evenhanded justice. In New York,

31. Booth, 482 U.S. at 505.
32. Id.
36. Id. at 831.
37. See Booth v. Maryland, 482 U.S. at 506-7. Furthermore, the accumulation over time of such arbitrary outcomes will also increase the likelihood that the New York statute will
where a heterogeneous population makes these concerns particularly pressing, the situation would be exacerbated by the adoption of the proposed statute’s evisceration of mandatory proportionality review. 38

In recognition of the danger to a fair capital sentencing process inherent in admitting victim impact testimony, New York, like several other states, 39 decided in 1995, despite Payne, to exclude it. That decision was sound. Admitting such testimony severely distracts the jury from the task at hand, namely deciding whether in view of all the circumstances concerning the defendant, the death penalty is warranted. 40

In the eight years since Payne, experience in other states has demonstrated that, once the floodgates have been opened to victim impact testimony, there is little prospect of channeling the flow. Evidence from a limitless range of persons, including co-workers and even emergency rescue workers, has been admitted in the form of poetry, handcrafts, diaries, videotapes, and gruesome postmortem photographs. 41 This sort of testimony—if available and offered—ordinarily has an intense emotional impact on juries, and even otherwise stoic judges. 42 For that very reason, its presentation is fundamentally at odds with the maintenance of a rational, consistent, and culpability-based system of capital sentencing.

ultimately be invalidated under Furman v. Georgia, supra note 11 or related state constitutional principles.

38. See supra Section II.A.


40. Indeed, the heart of the problem with victim impact testimony is that it leads to sentencing decisions on bases other than the defendant’s moral culpability. Someone who stabs an unknown person sleeping on a park bench in order to steal her money has committed an act that is equally wrongful whether the victim turns out to be a prostitute or the president of the local chamber of commerce. If, on the other hand, the defendant knew of the identity of the victim (as, for example, in Payne itself, where the defendant stabbed the mother knowing that her young child was present), then the impact on the victim (the child in that case) may indeed have a rational relationship to culpability. But no change in existing New York law is necessary for the jury to become aware of circumstances of that kind, since they will invariably be presented as part of the prosecution’s case at the guilt phase.


42. Logan, supra note 43, at *7.
The use of victim and community impact statements during the sentencing phase of capital trials tends to transform the proceedings into a trial about the victim's character rather than the defendant's deserts. That is a transformation, which serves only to reinforce existing social inequalities, to the prejudice of defendants and victims alike. For that reason, New York should continue to reject it.

D. Hynes v. Tomei: Solutions in Search of Problems

The death penalty statute enacted in 1995 provided that only a jury could impose a sentence of death. Pleas to first-degree murder charges were permissible, but only when the agreed-upon sentence involved some measure of punishment other than death. Since the law made no provision for the empanelling of a jury after a plea bargain, only defendants who chose to exercise their Fifth and Sixth Amendment rights to trial were exposed to the death penalty.

In Hynes v. Tomei, the Court of Appeals held unconstitutional the portion of the New York death penalty statute that excluded death as a possible sentence for any defendant who chose to plead guilty to a capital offense. The Court explained that "under the New York statute, only those defendants who exercise the Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial put themselves at risk of death." Thus, the Court found, these rights were unconstitutionally burdened by the statute's providing for different levels of punishment depending on the manner by which the defendant's guilt was established—by plea bargain, with no possibility of imposition of the death penalty, or by

43. Suppose for example, two identical cases, in one of which the survivor was legally married to the victim, and in the other of which the survivor was the victim's gay life partner. It simply makes no sense for the defendant's fate to turn upon the fortuity of whether the jury has more sympathy for the one category of survivor than the other.

44. Indeed, the two are inseparably interconnected. As an overwhelming empirical record shows, members of racial minority groups suffer discrimination in the capital punishment system both as defendants and as victims. When they are defendants, they are more likely to be prosecuted and sentenced capitally than identically-situated whites, but when they are victims, their killers are much less likely to be prosecuted capitally. See David C. Baldus & George Woodworth, Race Discrimination and the Death Penalty, in James R. Acker et al., eds., America's Experiment with Capital Punishment 385 (1998).

45. See CPL § 400.27.

46. See CPL 220.10(5)(e).


jury conviction, with death as a possible punishment.\textsuperscript{49} The Court's solution was to hold that "a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending."\textsuperscript{50}

If the effect of Hynes had been to eliminate plea-bargaining in capital cases, then a legislative solution to that situation would be warranted. However, that has not been the effect of the decision, and there is accordingly no pressing need for legislative intervention.

Nonetheless, since part of what the bill proposes in light of Hynes, viz., providing for jury sentencing after guilty pleas, might be reasonable, we might support that concept if offered alone.\textsuperscript{51} Regrettably, however, the proposed legislation's sentencing provisions go far beyond responding to Hynes, and make extraneous changes to the statute that would reduce the ability of juries to calibrate the sentence to the crime and the defendant.

1. \textit{Hynes Has Not Ended Plea-Bargaining}

Experience in the months since the Hynes ruling has demonstrated that plea bargaining under the death penalty statute can take place in a constitutional fashion. Hence, there is no urgent necessity for legislation.

Under Hynes, a defendant can still, by agreement with the district attorney, plead guilty to murder in the first degree prior to a district attorney's filing of a notice of intent to seek the death penalty. The period for filing the notice of intent is lengthy (120 days after the filing of a first-degree murder indictment) and can be extended by agreement of the parties and with the approval of the trial court.

Moreover, even after the filing of a notice of intent, cases can still be resolved by agreement of the prosecutor and defendant, as evidenced by decisions of the New York state courts subsequent to Hynes. For example, some courts have allowed pleas to first degree murders to take place coincident with a death notice being withdrawn.\textsuperscript{52} In \textit{People v. Smelefsky},\textsuperscript{53} the

\textsuperscript{49} See \textit{Hynes}, 92 N.Y.2d at 624-27 (discussing federal cases).

\textsuperscript{50} \textit{Id.}, at 629.

\textsuperscript{51} Any such proposal would require close analysis in light of New York State Constitution, Article 1, Section 2.


\textsuperscript{53} 695 N.Y.S.2d 689 (Queens Co. 1999).
court outlined a more formal procedure. First, the defendant proffers the plea and asks the District Attorney to withdraw the notice of intent to seek death; second, the District Attorney expresses a willingness to do so, provided that an agreed-upon sentence is imposed and the defendant gives a full and truthful allocution; third, defendant undergoes the allocution; fourth, the District Attorney consents to the plea, withdraws the notice and joins in defendant’s motion that the plea be accepted; and, fifth, the court grants the motion, accepts the plea, and orders it be entered.54

Further flexibility results from the fact that Hynes does not affect a capital defendant’s ability to plead guilty to a lesser charge, such as murder in the second degree, at any stage of the proceedings.55

In short, since there is no evidence suggesting that Hynes has ended, or even significantly impaired, plea-bargaining in capital cases, there is correspondingly little urgency about legislating a solution to a largely theoretical issue.

2. The Proposed Legislative Solution is Overbroad

That portion of the proposed legislative package directly addressing Hynes provides a solution that accords with the common practice of other states. Under this part of the proposal, a defendant may plead guilty while a death notice is pending, in which case he will proceed to a sentencing phase before a jury. As indicated, this may be reasonable in isolation.

However, it is unfortunately not being proposed in isolation. Rather, the package also provides that the three existing sentencing options under the capital statute—life with parole, life without parole, and death—be reduced to two, life without parole and death.

In our view, allowing the jury to chose among three options is the preferable course, and should be retained. First, it provides for a greater level of sentencing flexibility. Second, a significant body of research demonstrates that jurors who are told that the defendant will be sentenced to “life” remain erroneously convinced that he will be out on the street on  

54. A third manner of accepting pleas post-Hynes has been discussed in a recent New York Law Journal article. According to the author, in People v. Irwin, the court required the defendant to make a sworn statement on the record admitting the crime. Thereafter the prosecutor withdrew the notice of intent to seek the death penalty. The defendant then repeated the prior statement a second time, whereupon the court accepted the plea. See Daniel Wise, Pleas Accepted In Death Cases After “Hynes”, New York L. J., Sept. 14, 1999, at 17.

55. See Hynes, 92 N.Y. at 629.
parole in ten years or less. By giving the jury all three options, it will understand clearly that a sentence of “life without parole” rather than “life with parole” really means what it says.

Accordingly, we believe that retaining the status quo is preferable to the enactment of the proposed amendments.

However, when appropriately narrow Hynes legislation is eventually introduced, it should correct another potential constitutional flaw in the statute. Under current law, if a sentencing jury cannot agree, it must be instructed that, if the deadlock persists, the judge will impose a sentence of life with parole. See N.Y.C.P.L. §400.27(10). At least one trial judge, believing that the purpose and effect of this provision is to coerce deadlocked juries into voting for death, has refused to give the instruction. See People v. Harris, 177 Misc.2d 160 (Kings Co. 1998). The appropriate legislative solution would be to inform the jury that (a) it has the option of imposing life with parole, (rather than, as now, having that outcome result automatically from a failure to agree), and (b) if it is unable to agree, the Court will impose a sentence of life without parole.

E. The Amendments Would Entail High Monetary Costs and Impose a Heavy Burden on the Judiciary

The proposed amendments would greatly increase the number of defendants who are eligible for the death penalty, and undoubtedly increase the number of death sentences that are sought and imposed, at least at the trial level. This would impose large additional costs on New York State, both in monetary terms and in judicial resources. Given the finite nature of the New York State budget, each dollar spent on capital punishment is a dollar that will be taken from another government program, including government programs with a demonstrably greater impact on the crime rate. The proposed amendments should be evaluated in this context.


57. As previously indicated, supra note 6, the package contains many other elements, not specifically discussed in this report, designed to have this effect, e.g., a broadening of the range of prior convictions that the prosecution may introduce in sentencing.

58. In light of the constitutional concerns we have identified, and the experiences elsewhere, we believe it likely that a significant proportion of convictions would be reversed during the appellate process.

1. Monetary Costs To New York Taxpayers

The costs to New York State of broadening the death penalty statute would be high: each additional death penalty sought brings with it significant additional expenses, even when—as is usually the case—no execution results.\(^{60}\)

The monetary costs associated with each additional capital prosecution stem from three basic categories of costs: pre-trial, trial, and appellate/post-conviction (the least expensive).

Pre-trial costs in death penalty cases, primarily those associated with investigation and motion practice, are significantly greater than in non-capital cases.\(^{61}\) The estimated number of pretrial motions filed in a capital case is between two and four times the number filed in non-capital cases.\(^{62}\) In addition to increasing the number of cases in which these pre-trial expenses must be borne, the proposed changes would tend to increase the cost of motion practice in each capital case because the changes would raise additional novel legal issues.\(^{63}\)

Trial costs can usually be completely avoided in non-capital cases, because the vast majority of non-capital cases are resolved by guilty pleas and there is no trial. In a capital case in which the parties do not reach an agreement on a non-death disposition, there is virtually always both a guilt/innocence trial and a capital sentencing proceeding. Capital trials are much longer, and therefore far more expensive, than non-capital murder trials. In North Carolina, for example, the average length of a non-capi-

---

\(^{60}\) As a result of this phenomenon, the excess costs in the relatively few cases in which executions actually take place run into the millions of dollars. For example, each execution in Florida costs the state approximately three million dollars in incremental costs, see D. Von Drehle, Bottom Line: Life in Prison One-sixth as Expensive, \textit{Miami Herald}, July 10, 1996, at 12A, and the same estimate has been made for New York, see Jim Dwyer, Death Penalty Doesn’t Add Up, \textit{Daily News} (New York), July 28, 1998, at B.


\(^{63}\) Cf. Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation, prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, 6 (1998) (describing the complexity and cost of motion practice in capital litigation and explaining that part of that expense results from the many novel legal issues concerning the constitutionality and interpretation of the new federal death penalty laws).
tal murder trial is 3.8 days, while the average length of a capital trial is 14.6 days. A study in New York in 1982 estimated that a death penalty trial would cost approximately $1.3 million.

If a trial does result in a death sentence, the case will nearly always proceed through direct and collateral appeals. In fact, in New York, each case is constitutionally required to proceed to the New York State Court of Appeals. This right is not waivable. Although the appellate phase is the least expensive portion of the capital process, a report from the New York Public Defense Backup Center to the New York State Finance Committee, the Assembly Ways and Means Committee, and the Division of Budget nonetheless estimated that direct appeals to the New York State Court of Appeals would cost an average of $245,720 in attorney’s fees alone. On the other side, New York estimates the cost of defending direct appeals to be $330,000 per case, without considering the extensive available collateral remedies.

2. Additional Burdens Placed On the Judiciary

In addition to the specifically monetary costs, every increase in the volume of capital litigation entails a disproportionate increase in the amount of judicial attention required, thereby decreasing the resources available for other cases of social importance.

Judges who have experienced the demands of presiding over death penalty cases have publicly decried the enormous strain that widespread

64. See Brooks and Erickson, supra note 64, at 891 (citing Phillip J. Cook & Donna B. Slawson, The Cost of Processing Murder Cases in North Carolina, 61 (1993)).
65. See New York State Defender’s Ass’n Inc., Capital Losses, supra note 64, at 18; see generally Brooks and Erickson, supra note 64, at 889 The Dire Wolf Collects His (citing The Report of the Governor’s Commission on the Death Penalty, An Analysis of Capital Punishment in Maryland: 1978 to 1993, 148 (1993)).
67. Id.
69. Prosecution costs in death penalty cases are often much higher than defense costs. For example, the average total cost of prosecuting a federal death penalty case, not including non-attorney investigative costs or the costs of expert and other assistance provided by law enforcement agencies is $365,000 and the average cost of payments to private retained experts is $20,269 per prosecution, while the average cost of defending a federal capital case is $218,112. See Federal Death Penalty Cases, supra note 65, at 7.
imposition of the death penalty places on the judiciary. For example, in Florida, which ranks third behind Texas and Virginia in the number of executions, Chief Justice Kogan, having spent 12 years on the Supreme Court addressing capital punishment cases, last year expressed his alarm that although death penalty cases made up only three percent of the court's cases, they consumed twenty-five to fifty percent of the Justices' time.70 "As a matter of proportion," he asked, "are we going to spend all of our time on the minute portion of cases that in the long run do not impact a great number of people?"71 Likewise, Chief Justice Dixon of the Louisiana Supreme Court lamented in 1989 that "[c]apital punishment is destroying the system."72

The lesson that Judge Alex Kozinski of the Ninth Circuit has drawn from these experiences is that, to be effective, the death penalty must be narrowly imposed. Although a vocal supporter of capital punishment, Judge Kozinski has urged that "[i]nstead of adopting a very expansive list of crimes for which the death penalty is an option, state legislatures should draft narrow statutes that reserve the death penalty for only the most heinous criminals."73

In 1995, the New York Legislature sought to follow this advice of restraint. The proposed amendments of 1999 would do precisely the opposite. By greatly expanding the number of crimes eligible for the death penalty and including changes in the law that are, at the very least, of questionable constitutionality, the amendments would impose on the state and its localities enormous costs in monetary and judicial resources. Given the multitude of problems raised by the substance of the proposals, as described elsewhere in this report, these costs are not worth paying.

III. CONCLUSION

The New York death penalty statute of 1995 balanced two fundamental principles: that death is sometimes an appropriate penalty for the most heinous crimes, and that any system for its infliction must be built around safeguards of fairness commensurate with the gravity of the penalty.

70. See Jenny Staletovich, Justice Raising Voice to Bury Death Penalty, PALM BEACH POST, Jan. 19, 1998 at 1A; Peter Wallsten, Death Penalty Pragmatism, ST. PETERSBURG TIMES, Feb. 22, 1998, at 1D.

71. Peter Wallsten, Justice Criticizes Death Penalty, ST. PETERSBURG TIMES, Jan. 1, 1998, at 1A.


73. Alex Kozinski, For an Honest Death Penalty, NEW YORK TIMES, March 8, 1995, at A21.
The one-sided statutory amendments now proposed are inconsistent with both principles. Under the proposals, death would be an available penalty for crimes that are far from heinous, while existing protections for fairness—both on the individual and system wide level—would be deliberately dismantled. The state would thus wind up spending significantly more money to achieve significantly less justice.

The same principles that underlie the current statute counsel rejection of the proposed amendments.

December 1999
The Committee on Capital Punishment

Norman L. Greene, Chair
Julia Tarver, Secretary

Gregory T. Camp***
Art Cody
Tanya Coke
Faith Colangelo
John J. Conley
Kevin Doyle***
Eric M. Freedman**
Leon Friedman
Barbara Jaffe***
Edwin S. Matthews, Jr.
Russell Neufeld**
Daniel L. Rabinowitz

Norman Redlich*
Reena Sandoval
Jeremy Shockett
Marjorie M. Smith
Ronald Tabak**
Ruti Teitel
Niki Warin**
Kate Birmingham Wilmore**
Elizabeth Wilson**
Sue Wycoff
Arthur Zitrin

*Chair of the Subcommittee that prepared this Report
**Member of the Subcommittee that prepared this Report
***Did not participate in the preparation of this Report
Revisiting the Codification of Privileges Under the Federal Rules of Evidence*

The Committee on Federal Courts

Since 1934, the Supreme Court has been authorized to promulgate rules of evidence for use in federal courts.¹ Before that time, the Court had the long-standing power to provide rules for suits in equity and admiralty, but in actions at law each federal court had been required by statute to follow the procedural rules in the state in which the particular federal court was located.² The 1934 statute was the product of a battle waged in Congress by legislators who favored the implementation, under the Supreme Court's authority and control, of a single system of procedure applicable to all federal cases.

Although Congress has retained the power to revise evidentiary and procedural rules proposed by the Court, it was not until the 1970s that

---

* Prepared by a subcommittee consisting of Edward Copeland, Daniel Isaacs, Steven C. Krane (Chair) and Mary Kay Vyskocil.

Congress exercised that power and substantially changed the Federal Rules of Evidence ("FRE") that the Court had developed. As reflected in the records of the hearings held with respect to the FRE, the most controversial aspect of the proposal was its treatment of evidentiary privileges. Privileges at common law date back as far as the advent of compulsory process in the British legal system, with the attorney-client privilege appearing first in 1577. The spousal privilege followed shortly thereafter. The first treatises devoted to the Law of Evidence appeared in the mid-1700s in England and in the early 1800s in the United States. As the nineteenth century progressed, and as dissatisfaction with the common law system grew, many states enacted privilege statutes to replace the judicially created common law of privileges. The New York law revision commission of the early 1800s prepared a codification of evidence law in addition to a codification of pleading rules. Unlike what became to be known reverentially as the "Field Code," the proposed evidence code was rejected by the New York Legislature.

However, shortly thereafter (in 1828), the New York Legislature codified a physician-patient privilege. Other states followed, each adopting—to the extent it deemed necessary or advisable—its own version of the common law of evidence and evidentiary privilege. By the 1860s, whatever unity of principle may have existed in the common law had been replaced by a wide variation among state statutes governing the rules of evidence and privilege.

3. Indeed, the Federal Rules of Civil and Criminal Procedure were implemented without change from the version released by the Supreme Court. See Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., 74, 76 (1974) (testimony of Professor James William Moore).
7. See Z. Swift, A Digest of the Law of Evidence (Hartford 1810).
10. See id. at 1459.
The late 19th Century saw the beginning of a movement toward standardization of evidence rules, with commentators bemoaning the then-existing “patchwork” of “confused doctrines, expressed in ambiguous phrases, Latin or English, half understood, but glibly used . . . .” In 1922, a group of academicians led by Dean John Wigmore undertook to propose a reform of evidence rules in the United States. The American Law Institute commenced a similar project in 1939—rejecting the concept of a “restatement” of the law of evidence for such an inconsistent body of law—and issued an 806-rule “Model Code of Evidence” in 1942. Other efforts to create a uniform code of evidence included that of the National Conference of Commissioners on Uniform State Laws, whose “Uniform Rules of Evidence”—ultimately adopted by only two states—were released in 1953.

In 1958, the American Bar Association adopted a resolution urging the Judicial Conference of the United States to consider the adoption of rules of evidence for use in federal courts. After six years of work by its Advisory Committee, the Supreme Court promulgated the FRE on November 20, 1972, and transmitted them to Congress on February 5, 1973. Among the concepts addressed by the proposed FRE were the attorney-client privilege, trade secret protection, and psychotherapist-patient confidentiality, as well as the preservation of government secrets and the identity of informers. A catch-all provision limited the power of federal courts to expand upon any of the privileges codified in Article V, or to recognize any non-enumerated evidentiary privileges.

Preliminary drafts released by the Advisory Committee in 1969 and 1971 had already prompted substantial criticism from bar organizations and others. Some of the proposals were emotionally provocative, such as the suggestion—being made during the Watergate era, no less—that a broad “governmental privilege” should be adopted. Moreover, the rules governing privileges were justifiably viewed as the most important in the

FRE because, unlike other provisions that chiefly affect conduct in the courtroom, privilege rules have a pervasive effect on the substantive behavior of citizens outside of court.\textsuperscript{19} Under the Rules Enabling Acts,\textsuperscript{20} rules promulgated by the Supreme Court take effect automatically 90 days after their transmission to Congress. In response to the controversy swirling around the privilege rules, however, Congress resolved that the rules would not take effect until it had completed its review and affirmatively approved the rules.\textsuperscript{21}

A lengthy debate ensued. Opponents attacked the proposed privilege rules on three principal grounds. First, they contended that the Erie\textsuperscript{22} doctrine rendered the application of federal privilege law in diversity cases "unconstitutional." According to these opponents, courts could not apply federal privilege law in diversity cases because privilege rules are primarily substantive, not procedural. Unlike rules governing hearsay, authenticity and the like, privilege rules represent substantive legislative judgments concerning the relative values of preserving certain relationships and advancing the search for truth.\textsuperscript{23} Supporters of the FRE responded by urging that Erie did not set forth doctrine of constitutional magnitude and that Congress had the power to enact rules governing evidentiary privileges. In reply, opponents contended that the federalist principles underlying the Erie doctrine supported the continued application of state privilege rule in cases in which state law furnished the rules of decision.\textsuperscript{24}

Second, and relatedly, opponents relied on the fact that the Supreme Court had the power under the Rules Enabling Acts only to change procedural rules, and could not adopt any rules that abridged, enlarged or modified substantive rights.\textsuperscript{25} These opponents contended that because the Supreme Court received no political input and is not subject to politi-

\textsuperscript{22} Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
\textsuperscript{25} 28 U.S.C. §§ 2072, 2075.
cal constraints, it is not and should not be empowered to promulgate privilege rules.26

Third, critics argued that even if federalized privilege rules were lawful, advisable and desirable, the particular proposed rules, or in some instances the absence or substantial curtailment of certain privileges such as those shielding the spousal and physician-patient relationships, were substantially unacceptable.27 Some pointed to the incongruity of protecting communications between clergy and communicant but not between husband and wife, or between psychotherapist and patient but not between physician and patient.28 The attorney-client privilege provision was, in contrast, elaborately drafted by the all-attorney Advisory Committee.29

Ultimately, Congress declined to enact any of the substantive provisions in proposed Article V, and instead in 1975 adopted only what is currently Rule 501, which directs federal courts to look to “the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.” Over the past two decades, courts have struggled with the application of this rule. While some courts have recognized privileges that were not part of the “common law” or codified in the 1969 or 1971 proposals, others have declared the existence of a “strong presumption” against the recognition of any new privileges.30 This division has led some to suggest that the time has come to revisit the adoption of a code of federal privilege rules.

This Committee has considered that issue and determined that it would be unwise to attempt, once again, to codify the law of privilege for use in


federal courts. We reach this conclusion for several reasons. First, we object in principle to any attempt to codify of privilege rules. The common law development of the law of privilege has allowed for case-by-case adaptation and gradual delineation of boundaries in the context of particular facts. In our view, it is better for courts to retain a measure of flexibility in determining whether, in all the circumstances involved, certain communications should be protected. Second, we have serious doubts that agreement could be reached on the precise parameters of any of the privileges. To attempt to legislate boundaries would be a difficult, if not impossible, exercise. Lastly, we see no compelling need for engaging in the process. While some may bemoan the lack of a consistent approach to privileges under Rule 501, we are not aware of any evidence, empirical or otherwise, suggesting that this lack of consistency has any impact on the administration of justice in our federal court system. Codification is not likely to provide crystal clarity to the law of privilege, but would only shift the divisions from the general approach to the law to questions of interpretation of words and phrases in whatever rules are adopted. This change is not, in our view, beneficial.

For these reasons, we conclude that no effort should be made at this time to codify the federal law of privilege.

September 1999
The Committee on Federal Courts

Guy Miller Struve, Chair
Ola N. Rech, Secretary

Stuart E. Abrams
Allan Arffa
Jacob Aschkenasy
Joseph T. Baio
Lucy Billings
Evan R. Chesler
Brian M. Cogan
Edward Copeland
Matthew Diller
William K. Dodds
Carol A. Edmead
Mark C.M. Fang
Ira M. Feinberg
David Friedman
R. Peyton Gibson
Gregory Horowitz
Daniel M. Isaacs
James W. Johnson

Theodore H. Katz
Daniel J. Kramer
Steven C. Krane
Robert J. Lack
Kim J. Landsman
Seth Lesser
Lewis J. Liman
Carl Loewenson
Robert W. Mullen
Sean O’Brien
Cheryl L. Pollak
Tracey Salmon Smith
Jay G. Strum
Mary Kay Vyskocil
Robert A. Wallner
Lillian S. Weigert
Natalie R. Williams
Joseph P. Zammit
# New Members

As of January 2000

<table>
<thead>
<tr>
<th>RESIDENT</th>
<th>DATE ADMITTED TO PRACTICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jonathan M. Anderson</td>
<td>Tory Haythe</td>
</tr>
<tr>
<td></td>
<td>New York NY 07/98</td>
</tr>
<tr>
<td>Daria C. Apter</td>
<td>200 E 78th St.</td>
</tr>
<tr>
<td></td>
<td>New York NY 11/99</td>
</tr>
<tr>
<td>Roma Baran</td>
<td>Parole Violators At Rikers Island</td>
</tr>
<tr>
<td></td>
<td>New York NY 04/95</td>
</tr>
<tr>
<td>Janet Ann Barbier</td>
<td>841 President St.</td>
</tr>
<tr>
<td></td>
<td>Brooklyn NY 06/84</td>
</tr>
<tr>
<td>Paul W. Barnard</td>
<td>Fischbein Badillo Wagner Harding</td>
</tr>
<tr>
<td></td>
<td>New York NY 06/79</td>
</tr>
<tr>
<td>Nathan M. Barotz</td>
<td>347 W 22nd St.</td>
</tr>
<tr>
<td></td>
<td>New York NY 02/92</td>
</tr>
<tr>
<td>James J. Becker</td>
<td>Law Office of James J. Becker</td>
</tr>
<tr>
<td></td>
<td>New York NY 07/95</td>
</tr>
<tr>
<td>Donna E. Bennick</td>
<td>Law Office of Donna E. Bennick</td>
</tr>
<tr>
<td></td>
<td>New York NY 05/85</td>
</tr>
<tr>
<td>Jonathan Beyer</td>
<td>Fischbein Badillo Wagner Harding</td>
</tr>
<tr>
<td></td>
<td>New York NY 12/79</td>
</tr>
<tr>
<td>Elise C. Boddie</td>
<td>NAACP Legal Defense Fund</td>
</tr>
<tr>
<td></td>
<td>New York NY 02/97</td>
</tr>
<tr>
<td>Katherine M. Bolger</td>
<td>Latham &amp; Watkins</td>
</tr>
<tr>
<td></td>
<td>New York NY 05/99</td>
</tr>
<tr>
<td>William J. Brady, III</td>
<td>Frankel &amp; Abrams</td>
</tr>
<tr>
<td></td>
<td>New York NY 03/77</td>
</tr>
<tr>
<td>Richard F. Braun</td>
<td>NYS Supreme Court</td>
</tr>
<tr>
<td></td>
<td>New York NY 12/75</td>
</tr>
<tr>
<td>Farah S. Brelvi</td>
<td>Cravath Swaine &amp; Moore</td>
</tr>
<tr>
<td></td>
<td>New York NY 03/99</td>
</tr>
<tr>
<td>Jonathan J. Brennan</td>
<td>Brown &amp; Wood LLP</td>
</tr>
<tr>
<td></td>
<td>New York NY 04/98</td>
</tr>
<tr>
<td>Jena Du Quant Bridges</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
</tr>
<tr>
<td></td>
<td>New York NY 01/98</td>
</tr>
<tr>
<td></td>
<td>New York NY 03/95</td>
</tr>
<tr>
<td>Richard R. Buery, Jr.</td>
<td>IMentor/ BlueRidgeFoundation</td>
</tr>
<tr>
<td></td>
<td>New York NY 06/98</td>
</tr>
<tr>
<td>Eric M. Burt</td>
<td>Weil Gotshal &amp; Manges LLP</td>
</tr>
<tr>
<td></td>
<td>New York NY 09/99</td>
</tr>
<tr>
<td>Garth C. Butterfield</td>
<td>Pfizer Inc.</td>
</tr>
<tr>
<td></td>
<td>New York NY 11/95</td>
</tr>
<tr>
<td>John G. Campbell</td>
<td>U.S. Department of Labor</td>
</tr>
<tr>
<td></td>
<td>New York NY 12/94</td>
</tr>
<tr>
<td>Dorothea McGann Capone</td>
<td>Baumeister &amp; Samuels PC</td>
</tr>
<tr>
<td></td>
<td>New York NY 11/98</td>
</tr>
<tr>
<td>Sarah R. Cebik</td>
<td>Debevoise &amp; Plimpton</td>
</tr>
<tr>
<td></td>
<td>New York NY 09/99</td>
</tr>
<tr>
<td>Partha P. Chattoraj</td>
<td>Wachtell Lipton Rosen &amp; Katz</td>
</tr>
<tr>
<td></td>
<td>New York NY 12/98</td>
</tr>
<tr>
<td>David O. Chinowsky</td>
<td>P.O. Box 1196</td>
</tr>
<tr>
<td></td>
<td>New York NY 12/89</td>
</tr>
<tr>
<td>Melissa J. Choi</td>
<td>White &amp; Case LLP</td>
</tr>
<tr>
<td></td>
<td>New York NY 02/99</td>
</tr>
<tr>
<td>Elaine N. Chou</td>
<td>White Fleischner &amp; Fino</td>
</tr>
<tr>
<td></td>
<td>New York NY 12/95</td>
</tr>
<tr>
<td>Denise L. Cisternino</td>
<td>Wachtell Lipton Rosen &amp; Katz</td>
</tr>
<tr>
<td></td>
<td>New York NY 03/98</td>
</tr>
<tr>
<td>William F. Clarke, Jr.</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
</tr>
<tr>
<td></td>
<td>New York NY 12/97</td>
</tr>
<tr>
<td>Gregory J. Colao</td>
<td>Ross &amp; Cohen LLP</td>
</tr>
<tr>
<td></td>
<td>New York NY 05/99</td>
</tr>
<tr>
<td>Beth Ann Collier</td>
<td>Debevoise &amp; Plimpton</td>
</tr>
<tr>
<td></td>
<td>New York NY 04/99</td>
</tr>
<tr>
<td>Camille L. Cooke</td>
<td>NYS Dept. of Economic Dev.</td>
</tr>
<tr>
<td></td>
<td>New York NY 07/85</td>
</tr>
<tr>
<td>Catherine Cornelius</td>
<td>The Association of the Bar</td>
</tr>
<tr>
<td></td>
<td>New York NY 11/89</td>
</tr>
<tr>
<td>Name</td>
<td>Firm/Legal Service</td>
</tr>
<tr>
<td>-----------------------</td>
<td>-------------------------------------------</td>
</tr>
<tr>
<td>Todd G. Cosenza</td>
<td>Sullivan &amp; Cromwell</td>
</tr>
<tr>
<td>Sandra W. Cuneo</td>
<td>75 Prospect Park S.W.</td>
</tr>
<tr>
<td>Charlotte E. Davidson</td>
<td>Davis Polk &amp; Wardwell</td>
</tr>
<tr>
<td>John P. Davis</td>
<td>Cahill Gordon &amp; Reindel</td>
</tr>
<tr>
<td>Julie E. Dinnerstein</td>
<td>Center for Battered Women’s Legal Services</td>
</tr>
<tr>
<td>Arthur T. Doyle, Jr.</td>
<td>Fried Frank Harris Shriver &amp; Jacobson</td>
</tr>
<tr>
<td>Dasha Smith Dwin</td>
<td>Paul Weiss Rifkind Wharton &amp; Garrison</td>
</tr>
<tr>
<td>Christopher W. Dysard</td>
<td>Cravath Swaine &amp; Moore</td>
</tr>
<tr>
<td>John S. Elofson</td>
<td>Wachtell Lipton Rosen &amp; Katz</td>
</tr>
<tr>
<td>Hillary J. Exter,</td>
<td>Brooklyn Legal Services Corp A</td>
</tr>
<tr>
<td>Howard B. Felcher</td>
<td>Law Office of Howard B. Felcher</td>
</tr>
<tr>
<td>Rachael Fink</td>
<td>Latham &amp; Watkins</td>
</tr>
<tr>
<td>Edward W. Flis</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
</tr>
<tr>
<td>Maria A. Fonti</td>
<td>Covenant House Legal Serv.</td>
</tr>
<tr>
<td>Nicholas Fortuna</td>
<td>Allyn &amp; Fortuna</td>
</tr>
<tr>
<td>Ilene Froom</td>
<td>Bear Stearns &amp; Co. Inc.</td>
</tr>
<tr>
<td>Laura K. Gasiorowski</td>
<td>Robert M Simels</td>
</tr>
<tr>
<td>Hector D. Geribon</td>
<td>Lieff Cabraser Heiman &amp; Bernstein LLP</td>
</tr>
<tr>
<td>Jeffrey C. Goldberg</td>
<td>Sadis &amp; Goldberg LLC</td>
</tr>
<tr>
<td>Brandi M. Goldenberg</td>
<td>Wall Street Planning Assoc. Ltd.</td>
</tr>
<tr>
<td>Andrew M. Goldner</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
</tr>
<tr>
<td>Michael H. Goldsmith</td>
<td>Arthur Andersen &amp; Company</td>
</tr>
<tr>
<td>Adam S. Gottbetter</td>
<td>Kaplan Gottbetter &amp; Levenson LLP</td>
</tr>
<tr>
<td>Stacey Maya Gray</td>
<td>Law Office of Stacey M. Gray</td>
</tr>
<tr>
<td>Brian E. Greer</td>
<td>Bear Marks Upham LLP</td>
</tr>
<tr>
<td>Mary L Grein</td>
<td>Daytop Village Inc.</td>
</tr>
<tr>
<td>Joshua Paul Groban</td>
<td>Paul Weiss Rifkind Wharton &amp; Garrison</td>
</tr>
<tr>
<td>Rio M. Guerrero</td>
<td>Lazare Potter Giacovas &amp; Kranjac LLP</td>
</tr>
<tr>
<td>Andrew S. Halpern</td>
<td>Colarmarino &amp; Sohns LLP</td>
</tr>
<tr>
<td>Jennifer M. Hampton</td>
<td>White &amp; Case LLP</td>
</tr>
<tr>
<td>Andrew M. Harris</td>
<td>Isaacs &amp; Evans LLP</td>
</tr>
</tbody>
</table>
NEW MEMBERS

Douglas R. Hirsch  Sadis & Goldberg LLC  New York NY 02/91
Jay Holtmeier  Reuters America Inc.  New York NY 04/92
John G. Hutchinson  Sidney & Austin  New York NY 06/86
Karen L. Itzkowitz  AT&T Legal Department  New York NY 12/88
Erika L. Jenkins  Hofheimer Gartlir & Gross LLP  New York NY 03/99
Charles W. Juntikka  Charles Juntikka & Assoc. LLP  New York NY 10/83
Peter Kamboseles  Brown & Wood LLP  New York NY 03/99
Aasma A. Khan  US Court of International Trade  New York NY 01/98
Kevin G. Kitching  Simpson Thacher & Bartlett  New York NY 07/98
Robert M. Kornreich  Wolf Topper LLP  New York NY 06/99
Donna R. Lee  Cravath Swaine & Moore  New York NY 04/98
Sang Jin Lee  Major Hagen & Africa  New York NY 11/97
Burton M. Leibert  Willkie Farr & Gallagher  New York NY 09/99
William G. Lienhard  Queens Legal Services  Long Island City NY 11/95
Julianne M. Linder  Brown & Wood LLP  New York NY 05/98
Solange Maldonado  Sidney & Austin  New York NY 05/97
Mlunelle L. Mamzo  Mc Dermott Will & Emery  New York NY 10/98
Jana W. Mansour  Hunton & Williams  New York NY 12/96
Benjamin M.I. Marks  Kramer Levin Naftalis & Frankel LLP  New York NY 10/98
Terry A. Maroney  Urban Justice Center  New York NY 06/99
John J. Matson  Arthur Cox  New York NY 05/96
Pamela L. McCormack  Credit Suisse First Boston  New York NY 12/96
Donald J. McHugh  NYC Police Department  New York NY 11/99
Robert C. Meade, Jr.  Supreme Court  New York NY 06/74
Marianne Medve  Doar Devorkin & Rieck  New York NY 10/94
Rebecca Lynn Mendel  Rosin & Reiniger  New York NY 12/98
Alfred N. Metz  Deutsch Coffey & Metz LLP  New York NY 06/82
Steven F. Meyer  Morgan & Finnegan LLP  New York NY 12/89
Edward B. Micheletti  Skadden Arps Slate Meagher & Flom LLP  New York NY 06/97
Robin Davis Miller  The Authors Guild  New York NY 06/89
G. Foster Mills  NYC Law Department  New York NY 05/79
Alix Mondesir  Supreme Court-Kings County  Brooklyn NY 01/83
A. Juliet Neisser  NYC Dept. Environ. Protection Control Boards  New York NY 06/82
Kim A. O'Connor  Shearman & Sterling  New York NY 05/96
Raluca V. Oncioiu  The Association of the Bar  New York NY 10/99
Pamela Joy Papish  Cravath Swaine & Moore  New York NY 05/98
<table>
<thead>
<tr>
<th>Name</th>
<th>Firm</th>
<th>Location</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michael J. Perloff</td>
<td>Proskauer Rose LLP</td>
<td>New York</td>
<td>05/99</td>
</tr>
<tr>
<td>William G. Polansky</td>
<td>Richards &amp; O'Neil LLP</td>
<td>New York</td>
<td>05/97</td>
</tr>
<tr>
<td>David Aaron Polinsky</td>
<td>Linklaters</td>
<td>New York</td>
<td>08/98</td>
</tr>
<tr>
<td>Julie Katherine Pope</td>
<td>Bryan Gonzalez &amp; Vargas</td>
<td>New York</td>
<td>02/88</td>
</tr>
<tr>
<td>Beatrice Prati</td>
<td>Troma Entertainment</td>
<td>New York</td>
<td>11/98</td>
</tr>
<tr>
<td>Charles P. Reichmann</td>
<td>The Columbia House Co.</td>
<td>New York</td>
<td>05/78</td>
</tr>
<tr>
<td>Linda S. Rein</td>
<td>Fried Frank Harris Shriver &amp; Jacobson</td>
<td>New York</td>
<td>03/99</td>
</tr>
<tr>
<td>Sharyl A. Reisman</td>
<td>Jones Day Reavis &amp; Pogue</td>
<td>New York</td>
<td>11/92</td>
</tr>
<tr>
<td>Christopher J. Reitzel</td>
<td>Squire Sanders &amp; Dempsey LLP</td>
<td>New York</td>
<td>09/98</td>
</tr>
<tr>
<td>Neil C. Rifkind</td>
<td>Kramer Levin Naftalis &amp; Frankel LLP</td>
<td>New York</td>
<td>04/98</td>
</tr>
<tr>
<td>Tyler Brooks Robinson</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York</td>
<td>09/99</td>
</tr>
<tr>
<td>Jennifer L. Rochon</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York</td>
<td>11/95</td>
</tr>
<tr>
<td>John D. Roesser</td>
<td>13 East 9th Street</td>
<td>New York</td>
<td>11/62</td>
</tr>
<tr>
<td>Danforth W. Rogers</td>
<td>Friedman Kaplan &amp; Seiler LLP</td>
<td>New York</td>
<td>08/98</td>
</tr>
<tr>
<td>David J. Schraa</td>
<td>The Cochran Firm</td>
<td>New York</td>
<td>06/99</td>
</tr>
<tr>
<td>Harriett J.D. Sheridan</td>
<td>Constantine &amp; Partners</td>
<td>New York</td>
<td>06/94</td>
</tr>
<tr>
<td>Jeffrey I. Shinder</td>
<td>Law Office of Zafar Siddiqi</td>
<td>New York</td>
<td>12/96</td>
</tr>
<tr>
<td>Humayun Z. Siddiqi</td>
<td>Bainton McCarthy &amp; Siegel LLC</td>
<td>New York</td>
<td>07/96</td>
</tr>
<tr>
<td>Ethan D. Siegel</td>
<td>Hunton &amp; Williams</td>
<td>New York</td>
<td>11/94</td>
</tr>
<tr>
<td>Glen Phillip Smith</td>
<td>Squadron Ellenoff Plesant &amp; Sheinfeld LLP</td>
<td>New York</td>
<td>02/96</td>
</tr>
<tr>
<td>Christa M. Stewart</td>
<td>Victim Service Inc.</td>
<td>Jackson Heights</td>
<td>12/94</td>
</tr>
<tr>
<td>Joseph J. Sullivan</td>
<td>CIBC World Markets Corp.</td>
<td>New York</td>
<td>06/90</td>
</tr>
<tr>
<td>Jane Summers</td>
<td>Barclays Bank PLC</td>
<td>New York</td>
<td>01/85</td>
</tr>
<tr>
<td>Robert H. Sweeney</td>
<td>Societe Generale</td>
<td>New York</td>
<td>05/91</td>
</tr>
<tr>
<td>Fazl Syed</td>
<td>Holland &amp; Knight LLP</td>
<td>New York</td>
<td>07/99</td>
</tr>
<tr>
<td>Rossie E. Tarman, III</td>
<td>Proskauer Rose LLP</td>
<td>New York</td>
<td>09/99</td>
</tr>
<tr>
<td>David I. Tesler</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York</td>
<td>09/99</td>
</tr>
<tr>
<td>K. Khiem Ting</td>
<td>Deloitte &amp; Touche LLP</td>
<td>New York</td>
<td>06/92</td>
</tr>
<tr>
<td>Leo R. Tsao</td>
<td>Cravath Swaine &amp; Moore</td>
<td>New York</td>
<td>09/99</td>
</tr>
<tr>
<td>Salvador C. Uy</td>
<td>American Clerical Service</td>
<td>New York</td>
<td>04/91</td>
</tr>
<tr>
<td>Richard C. Wald</td>
<td>Emigrant Funding Corp</td>
<td>New York</td>
<td>03/85</td>
</tr>
<tr>
<td>Andrew S. Wisch</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York</td>
<td>02/99</td>
</tr>
<tr>
<td>Ido Zemach</td>
<td>Wachtell Lipton Rosen &amp; Katz</td>
<td>New York</td>
<td>05/97</td>
</tr>
</tbody>
</table>
### NEW MEMBERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Firm/Office</th>
<th>Location</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daniel C. Zinman</td>
<td>Richards Spears Kibbe &amp; Orbe</td>
<td>New York</td>
<td>04/94</td>
</tr>
<tr>
<td>John Claude Bahenrebung</td>
<td>Law Off. of John C. Bahenrebung</td>
<td>W. Simsbury</td>
<td>06/84</td>
</tr>
<tr>
<td>Maurizio Bianchini</td>
<td>Studio Santa Maria</td>
<td>Milan</td>
<td>10/99</td>
</tr>
<tr>
<td>Peter Castellon</td>
<td>Freshfields LLP</td>
<td>London EC4Y</td>
<td>04/97</td>
</tr>
<tr>
<td>Susan G. Diamondstone</td>
<td>Law Office of Susan Diamondstone</td>
<td>Seattle WA</td>
<td>12/84</td>
</tr>
<tr>
<td>Dan F. Laney</td>
<td>Rogers &amp; Hardin LLP</td>
<td>Atlanta GA</td>
<td>06/81</td>
</tr>
<tr>
<td>Reed Wayne Super</td>
<td>Law Office of Reed W. Super</td>
<td>San Fran. CA</td>
<td>06/93</td>
</tr>
<tr>
<td>Bari B. Brandes</td>
<td>The Law Firm of Joel R. Brandes PC</td>
<td>Garden City</td>
<td>04/99</td>
</tr>
<tr>
<td>Kathleen A. Casey</td>
<td>Law Office of Thomas J. Casey</td>
<td>Huntington</td>
<td>07/99</td>
</tr>
<tr>
<td>Robert A. Kahn</td>
<td>Connecticut College-Dept. of Gov.</td>
<td>New London</td>
<td>CT05/90</td>
</tr>
<tr>
<td>Lawrence G. Keane</td>
<td>Pino &amp; Associates LLP</td>
<td>White Plains</td>
<td>05/89</td>
</tr>
<tr>
<td>Joe Khanna</td>
<td>Pitney Bowes Inc.</td>
<td>Stamford  CT</td>
<td>12/95</td>
</tr>
<tr>
<td>Peggy A. Miller</td>
<td>Law Office of Peggy A. Miller</td>
<td>Yonkers NY</td>
<td>02/78</td>
</tr>
<tr>
<td>Lewitt C. Nurse</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bernard J. Robins</td>
<td>2 Pine Court</td>
<td>Pomona NY</td>
<td>01/62</td>
</tr>
<tr>
<td>Darian B. Taylor</td>
<td>75 Beech Hill Rd</td>
<td>Scarsdale NY</td>
<td>10/94</td>
</tr>
<tr>
<td>Amos Weinberg</td>
<td>49 Somerset Drive South</td>
<td>Great Neck NY</td>
<td>06/78</td>
</tr>
</tbody>
</table>

### LAW SCHOOL GRADUATE

<table>
<thead>
<tr>
<th>Name</th>
<th>Firm/Office</th>
<th>Location</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Laila Abou-Rahme</td>
<td>Willkie Farr &amp; Gallagher</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Laura Ahn</td>
<td>Wachtell Lipton Rosen &amp; Katz</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Kenneth E. Aldous</td>
<td>Proskauer Rose LLP</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Scott H. Allan</td>
<td>Thacher Proffitt &amp; Wood</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Alain Armand</td>
<td>175 Underhill Ave</td>
<td>Brooklyn NY</td>
<td></td>
</tr>
<tr>
<td>Dorothy J. Aronovich</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Stacy P. Aronowitz</td>
<td>Schulte Roth &amp; Zabel LLP</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Suzanne A. Ascher</td>
<td>695 Pelton Ave</td>
<td>Staten Island NY</td>
<td></td>
</tr>
<tr>
<td>David Stephen Baxter</td>
<td>Winthrop Stimson Putnam &amp; Roberts New York NY</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Tamerlaine M. Beattie</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Corey D. Boddie</td>
<td>147 S. Oxford St</td>
<td>Brooklyn NY</td>
<td></td>
</tr>
<tr>
<td>Debra M. Burg</td>
<td>Wollmuth Maher &amp; Deutsch LLP</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Teresa R. Cappella</td>
<td>Roberts Sheridan &amp; Kotel PC</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Dennis M. Cariello</td>
<td>The Association of the Bar</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Kristin A. Carnahan</td>
<td>22-64 43rd Street</td>
<td>Astoria NY</td>
<td></td>
</tr>
<tr>
<td>Olivier C. Catherine</td>
<td>Sullivan &amp; Cromwell</td>
<td>New York NY</td>
<td></td>
</tr>
<tr>
<td>Adam David Chassin</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York NY</td>
<td></td>
</tr>
</tbody>
</table>
NEW MEMBERS

Nyaguthii Chege  Simpson Thacher & Bartlett  New York NY
Tian-Wei Dianna Chen  Sullivan & Cromwell  New York NY
Robert J. Cosgrove  Nassau County DA'S Office  Hempstead NY
Karen K. Crew  Milbank Tweed Hadley & McCloy LLP  New York NY
Randall J. Cude  Proskauer Rose LLP  New York NY
Phillip C. Duncker  Deloitte & Touche LLP  New York NY
Maurice R. Dyson  Simpson Thacher & Bartlett  New York NY
Robert J. Eddington  Proskauer Rose LLP  New York NY
Michael L. Eden  Proskauer Rose LLP  New York NY
Allison B. Eliegier  Simpson Thacher & Bartlett  New York NY
Ruth Ann Eugene  Ernst & Young  New York NY
Gayle M. Farbman  Proskauer Rose LLP  New York NY
Yolanda E. Figueroa  1867 Seventh Ave  New York NY
John T. Flippen  White & Case LLP  New York NY
Lawrence H. Fogelman  Skadden Arps Slate Meagher & Flom LLP  New York NY
Kenneth H. Frenchman  Roberts Sheridan & Kotel PC  New York NY
Darren M. Fried  3123 Carlear Ave  Bronx NY
Brian L. Friedman  Proskauer Rose LLP  New York NY
Bryce L. Friedman  Simpson Thacher & Bartlett  New York NY
Israel E. Friedman  Wachtell Lipton Rosen & Katz  New York NY
Christopher H. Gardepeh  Wollmuth Maher & Deutsch LLP  New York NY
Burt M. Garson  Goldman & Hafetz  New York NY
Philip M. Garthe  Willkie Farr & Gallagher  New York NY
Michael Gat  Wachtell Lipton Rosen & Katz  New York NY
Daniel E. Glatter  Wagner Davis & Gold PC  New York NY
Aaron A. Goach  Winthrop Stimson Putnam & Roberts  New York NY
Lee M. Goldsmith  Proskauer Rose LLP  New York NY
Jennifer K. Grady  Simpson Thacher & Bartlett  New York NY
Phillippe E. Greenberg  Scudder Kemper Investments  New York NY
Robyn Joy Greenberg  Simpson Thacher & Bartlett  New York NY
Maura R. Grossman  Wachtell Lipton Rosen & Katz  New York NY
Jennifer Beth Handler  Morrison & Foerster LLP  New York NY
Elizabeth A. Hanna  248 Carlton Ave  Brooklyn NY
Julia E. Herr  White & Case LLP  New York NY
Malika S. Hinkson  Simpson Thacher & Bartlett  New York NY
Karen M. Hoffman  Skadden Arps Slate Meagher & Flom LLP  New York NY
Beverly P. Izes  Simpson Thacher & Bartlett  New York NY
Brian A. Jacobs  Kelley Drye & Warren LLP  New York NY
Mark C. Jones  Winthrop Stimson Putnam & Roberts  New York NY
Suzanne L. Joyce  Stadtmauer & Bailkin LLP  New York NY
Anil Kalhan  Cleary Gottlieb Steen & Hamilton  New York NY
## NEW MEMBERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Firm/Company</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joshua A. Kamens</td>
<td>Printing House Press</td>
<td>New York NY</td>
</tr>
<tr>
<td>Brandi T. Katz</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Neil S. Kaufman</td>
<td>Kaye Scholer Fierman Hays &amp; Handler LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Arvind Bob Khurana</td>
<td>Davis Weber &amp; Edwards PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Mark H. Kim</td>
<td>Wachtell Lipton Rosen &amp; Katz</td>
<td>New York NY</td>
</tr>
<tr>
<td>Aaron C. Kless</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Jessica L. Kotary</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Mary M. Kuan</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Caryn Dawn Lasky</td>
<td>Winthrop Stimson Putnam &amp; Roberts</td>
<td>New York NY</td>
</tr>
<tr>
<td>Erin J. Law</td>
<td>Kaye Scholer Fierman Hays &amp; Handler LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Jeremy Lechtzin</td>
<td>Brobeck Phleger &amp; Harrison LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>David C. Levenson</td>
<td>Andrew Spinnel</td>
<td>New York NY</td>
</tr>
<tr>
<td>James J. Lillie</td>
<td>Hedman Gibson Costigan &amp; Ho PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Christopher E. Lim</td>
<td>Law Firm of Ismael Gonzalez</td>
<td>New York NY</td>
</tr>
<tr>
<td>Soo Young Lim</td>
<td>Milbank Tweed Hadley &amp; McCloy LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Jennifer H. Lin</td>
<td>Winston &amp; Strawn</td>
<td>New York NY</td>
</tr>
<tr>
<td>Gabrielle B. Lipson</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Cynthia R. Litman</td>
<td>15 West 12th St</td>
<td>New York NY</td>
</tr>
<tr>
<td>Anne M. Littwin</td>
<td>3725 Henry Hudson Pkway</td>
<td>Riverdale NY</td>
</tr>
<tr>
<td>Mary Logan</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Karin J. Lundell</td>
<td>Willkie Farr &amp; Gallagher</td>
<td>New York NY</td>
</tr>
<tr>
<td>Joseph R. Magnus</td>
<td>Roberts Sheridan &amp; Kotel PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Eric S. Manne</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Lori Beth Marino</td>
<td>Cravath Swaine &amp; Moore</td>
<td>New York NY</td>
</tr>
<tr>
<td>Robert Marinovic</td>
<td>Meyer Suozzi English &amp; Klein PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Hakim A. Mark</td>
<td>Wolf Haldenstein Adler Freeman &amp; Herz LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Morris J. Massel</td>
<td>311 E 71st St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Christopher C. Matteson</td>
<td>Winthrop Stimson Putnam &amp; Roberts</td>
<td>New York NY</td>
</tr>
<tr>
<td>Simone R. McBean</td>
<td>Thelen Reid &amp; Priest LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Mark E. McGrath</td>
<td>Eaton &amp; Van Winkle</td>
<td>New York NY</td>
</tr>
<tr>
<td>Kathryn A. Meyers</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Lisa C. Miller</td>
<td>24-53 43rd St.</td>
<td>Astoria NY</td>
</tr>
<tr>
<td>Robert A. Monahan</td>
<td>Roberts Sheridan &amp; Kotel PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Meir Morgulis</td>
<td>Podell Schwartz Schechter &amp; Banfield</td>
<td>New York NY</td>
</tr>
<tr>
<td>Matthew J. Morris</td>
<td>Proskauer Rose LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Russell D. Morris</td>
<td>Cravath Swaine &amp; Moore</td>
<td>New York NY</td>
</tr>
<tr>
<td>Christopher B. Mulvihill</td>
<td>Hollyer Brady Smith Troxell Barrett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Name</td>
<td>Firm/Position</td>
<td>City</td>
</tr>
<tr>
<td>-----------------------</td>
<td>----------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Joshua A. Munn</td>
<td>Wachtell Lipton Rosen &amp; Katz</td>
<td>New York NY</td>
</tr>
<tr>
<td>Jason I. Nagel</td>
<td>500A Grand St</td>
<td>New York NY</td>
</tr>
<tr>
<td>Lucient Nasiri</td>
<td>666 Greenwich St</td>
<td>New York NY</td>
</tr>
<tr>
<td>Ari M. Nat</td>
<td>Wall Street Planning Associates</td>
<td>New York NY</td>
</tr>
<tr>
<td>Ellen M. Nichols</td>
<td>Frank &amp; Breslow PC</td>
<td>Farmingdale NY</td>
</tr>
<tr>
<td>Olga Nikiciuk</td>
<td>Martin Clearwater &amp; Bell</td>
<td>New York NY</td>
</tr>
<tr>
<td>Constance B. Oberle</td>
<td>Cadwalader Wickersham &amp; Taft</td>
<td>New York NY</td>
</tr>
<tr>
<td>Carol W. Ohlandt</td>
<td>Schulte Roth &amp; Zabel LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Michael D. Okon</td>
<td>Sullivan &amp; Cromwell</td>
<td>New York NY</td>
</tr>
<tr>
<td>Amy K. Orange</td>
<td>Debevoise &amp; Plimpton</td>
<td>New York NY</td>
</tr>
<tr>
<td>Benjamin T. Orfici</td>
<td>Cowan Liebowitz &amp; Latman PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Matthew E. O'Shea</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Christina E. Paglia</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Heidi Jill Parry</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Nicole A. Perez</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Sali Qaragholi</td>
<td>White &amp; Case LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Peter P. Rahabar</td>
<td>Proskauer Rose LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Coulter K. Richardson</td>
<td>Richardson Mahon Casey &amp; Rooney</td>
<td>New York NY</td>
</tr>
<tr>
<td>James B. Roberts</td>
<td>Debevoise &amp; Plimpton</td>
<td>New York NY</td>
</tr>
<tr>
<td>Meredith B. Rosen</td>
<td>Peter S. Crane</td>
<td>New York NY</td>
</tr>
<tr>
<td>Emmanuelle Rouchel</td>
<td>Sullivan &amp; Cromwell</td>
<td>New York NY</td>
</tr>
<tr>
<td>Dana B. Rubin</td>
<td>Dienst &amp; Serrins LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Kesari Ruza</td>
<td>Cleary Gottlieb Steen &amp; Hamilton</td>
<td>New York NY</td>
</tr>
<tr>
<td>Teena-Ann V. Sankoorikal</td>
<td>Cravath Swaine &amp; Moore</td>
<td>New York NY</td>
</tr>
<tr>
<td>Natasha Sankovitch</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Danielle Scarano</td>
<td>6700 192nd St.</td>
<td>Fresh Meadows NY</td>
</tr>
<tr>
<td>Kara R. Schiffman</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Ran Zev Schijanovich</td>
<td>332 E 6th Street</td>
<td>New York NY</td>
</tr>
<tr>
<td>Dawn M. Schneider</td>
<td>Willkie Farr &amp; Gallagher</td>
<td>New York NY</td>
</tr>
<tr>
<td>David E. Schorr</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Michael Seung-Ouk-Shim</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Aaron D. Singer</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Christopher D. Skoczen</td>
<td>Clauss &amp; Chakwin LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Cyril E. Smith</td>
<td>Hodgson Russ Andrews Woods &amp; Goodyear LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Laura Lee Smith</td>
<td>Winthrop Stimson Putnam &amp; Roberts</td>
<td>New York NY</td>
</tr>
<tr>
<td>Todd P. Smith</td>
<td>The Legal Aid Society</td>
<td>Bronx NY</td>
</tr>
<tr>
<td>Margarita I. Soto</td>
<td>Manhattan DA Office</td>
<td>New York NY</td>
</tr>
<tr>
<td>David Spiegelman</td>
<td>Dershowitz &amp; Eiger PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Karoli Ssemogerere</td>
<td>Levin &amp; Srinivasan LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Heather D. St. John</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Nicole J. St. Louis</td>
<td>Cullen &amp; Dykman</td>
<td>Brooklyn NY</td>
</tr>
</tbody>
</table>
### NEW MEMBERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Firm</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Daniel M. Steinman</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Matthew D. Strada</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Sean Sullivan</td>
<td>Wachtell Lipton Rosen &amp; Katz</td>
<td>New York NY</td>
</tr>
<tr>
<td>Stephen K. Sullivan</td>
<td>Pennie &amp; Edmonds LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Nicole M. Sykes</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>William W. Torrey</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Brian D. Unroe</td>
<td>Roberts Sheridan &amp; Kotel PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Marianna Vaidman</td>
<td>Debevoise &amp; Plimpton</td>
<td>New York NY</td>
</tr>
<tr>
<td>Hector I. Velez</td>
<td>Peckar &amp; Abramson PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Joel M. Villaseca</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Diane Vo-Verde</td>
<td>Skadden Arps Slate Meagher &amp; Flom LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Jinho Yoon</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Richard M. Wartchow</td>
<td>P.O. Box 607</td>
<td>New York NY</td>
</tr>
<tr>
<td>Linda S. Webb</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Heath N. Weisberg</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Desirae L. Wells</td>
<td>Valu Express LLC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Tiffany A. Werner</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Glen E. Werthamer</td>
<td>Touro Law School</td>
<td>Huntington NY</td>
</tr>
<tr>
<td>Leo P. Whittlesey</td>
<td>Meiselman &amp; Gordon</td>
<td>New York NY</td>
</tr>
<tr>
<td>Hectchur C. Wilde</td>
<td>Darby &amp; Darby PC</td>
<td>New York NY</td>
</tr>
<tr>
<td>Allison J. Winick</td>
<td>Simpson Thacher &amp; Bartlett</td>
<td>New York NY</td>
</tr>
<tr>
<td>Thomas Feng Wong</td>
<td>Proskauer Rose LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Mark M. Woznicki</td>
<td>124 W 72nd St</td>
<td>New York NY</td>
</tr>
<tr>
<td>Lana T. Yang</td>
<td>Proskauer Rose LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>John Sung Yoo</td>
<td>Parker Chapin Flattau &amp; Klimpl LLP</td>
<td>New York NY</td>
</tr>
<tr>
<td>Benjamin R. Zimmermann</td>
<td>Kaye Scholer Fierman Hays &amp; Handler LLP</td>
<td>New York NY</td>
</tr>
</tbody>
</table>

### LAW STUDENT MEMBERSHIP

<table>
<thead>
<tr>
<th>Name</th>
<th>School</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mark G. Anderson</td>
<td>Tulane Law School</td>
<td>New Orleans LA</td>
</tr>
<tr>
<td>Lourdes M. Andreu</td>
<td>New York Law School</td>
<td>New York NY</td>
</tr>
<tr>
<td>Libby Babu</td>
<td>Brooklyn Law School</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Victoria V. Bach</td>
<td>800 West 254th St.</td>
<td>Bronx NY</td>
</tr>
<tr>
<td>Keith A. Barron</td>
<td>Time Warner Inc.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Margie Bechara</td>
<td>Brooklyn Law School</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Renee T. Beshara</td>
<td>111 Hicks St.</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Patrick J. Boyd</td>
<td>1000 Hudson St.</td>
<td>Hoboken NJ</td>
</tr>
<tr>
<td>Ruth A. Braun</td>
<td>184 Joralemon St.</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Eugene P. Caiola</td>
<td>94-B Bayberry Lane</td>
<td>Westport CT</td>
</tr>
<tr>
<td>Name</td>
<td>Address</td>
<td>City, State</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>-------------------------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Wendy C. Chon</td>
<td>415 E 80th St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Lauries B. Cohen-Miller</td>
<td>25 Chatham Wood Drive</td>
<td>Centerereach NY</td>
</tr>
<tr>
<td>Anna Czege</td>
<td>50 West 82 Street</td>
<td>New York NY</td>
</tr>
<tr>
<td>Rachael E. Dehner</td>
<td>15 East 11th St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Michael F. Di Stephan</td>
<td>171-16 84th Road</td>
<td>Jamaica NY</td>
</tr>
<tr>
<td>Henry C. Dieudonne, Jr.</td>
<td>Touro Law School</td>
<td>Huntington NY</td>
</tr>
<tr>
<td>Karen L. Dorman</td>
<td>205 E 95th Street</td>
<td>New York NY</td>
</tr>
<tr>
<td>Gloria B. Dunn</td>
<td>Fordham Univ. School of Law</td>
<td>New York NY</td>
</tr>
<tr>
<td>Timothy Dunphy</td>
<td>320 East 58th St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Orli M. Elkon</td>
<td>25 E 67th St</td>
<td>New York NY</td>
</tr>
<tr>
<td>John V. Erskine</td>
<td>NY Life Insurance Co.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Wanda J. Ferguson</td>
<td>3636 16th Street NW</td>
<td>Washington DC</td>
</tr>
<tr>
<td>Alexander R. Fink</td>
<td>36 Clark St.</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Karen Lynne Fiumano</td>
<td>1045 W Broadway</td>
<td>Woodmere NY</td>
</tr>
<tr>
<td>William T. Flynn</td>
<td>144-38 77th Avenue</td>
<td>Flushing NY</td>
</tr>
<tr>
<td>Victoria P. Foster</td>
<td>163 Third Ave.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Chris C. Fowler</td>
<td>250 W 15th Street</td>
<td>New York NY</td>
</tr>
<tr>
<td>Matthew G. Gabin</td>
<td>110 West 3rd St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Kelly K. Gelein</td>
<td>117 Pacific St</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Robert J. Girard, II</td>
<td>133 Park Ave.</td>
<td>Hoboken NJ</td>
</tr>
<tr>
<td>Rebecca Beth Goodman</td>
<td>295 Park Ave</td>
<td>New York NY</td>
</tr>
<tr>
<td>Molly L. Graver</td>
<td>143-25 41st Ave.</td>
<td>Flushing NY</td>
</tr>
<tr>
<td>Nicholas R. Gugliuzza</td>
<td>34-41 30th Street</td>
<td>LI City NY</td>
</tr>
<tr>
<td>Vivek V. Gupta</td>
<td>306 Mott St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Tony Johnson</td>
<td>200 E 89th St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Steven J. Katz</td>
<td>1336 E 22th St.</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Alan L. Kerman</td>
<td>2556 Eileen Rd.</td>
<td>OceansideNY</td>
</tr>
<tr>
<td>Daniel Kohns</td>
<td>100 W 57th St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Ursula Levelt</td>
<td>302 W 112th St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Dorothy H. Levin</td>
<td>11 Overhill Rd.</td>
<td>Scarsdale NY</td>
</tr>
<tr>
<td>Catia Lewin</td>
<td>102-30 Queens Blvd</td>
<td>Forest Hills NY</td>
</tr>
<tr>
<td>Timothy Wayne Lewis</td>
<td>155 W 60th St.</td>
<td>New York NY</td>
</tr>
<tr>
<td>Xiomara Lopez</td>
<td>86 Townsend St.</td>
<td>New Brunswick NJ</td>
</tr>
<tr>
<td>Alexander Lumelsky</td>
<td>P.O. Box 830</td>
<td>New York NY</td>
</tr>
<tr>
<td>William Malpica</td>
<td>40-37 27th Street</td>
<td>LI City NY</td>
</tr>
<tr>
<td>Joshua Martin</td>
<td>6 Howe St</td>
<td>Huntington NY</td>
</tr>
<tr>
<td>Dwayne C. Mason</td>
<td>185 Erasmus St.</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Sharon McKenzie</td>
<td>195A Washington Park</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Judith C. Messier</td>
<td>14 Woodstock Place</td>
<td>Lake Grove NY</td>
</tr>
<tr>
<td>Susan A. Millus</td>
<td>62 Boylston St.</td>
<td>Boston MA</td>
</tr>
<tr>
<td>Carey C. Moore</td>
<td>2 Pierrepont St.</td>
<td>Brooklyn NY</td>
</tr>
<tr>
<td>Susan B. Neustein</td>
<td>Kingsbridge Station</td>
<td>Bronx NY</td>
</tr>
<tr>
<td>Justin B. Nielsen</td>
<td>156-45 77th St.</td>
<td>Howard Beach NY</td>
</tr>
</tbody>
</table>
### NEW MEMBERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>City</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Christopher D. Oldenburg</td>
<td>200 E 11th St.</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Helen A. Pappas</td>
<td>PO Box 1196</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Jeffrey P. Perron</td>
<td>343 Park Ave.</td>
<td>Nutley</td>
<td>NJ</td>
</tr>
<tr>
<td>Claire C. Pizzuti</td>
<td>2 Oak Ridge Rd.</td>
<td>White Plains</td>
<td>NY</td>
</tr>
<tr>
<td>Jennifer M. Pugh</td>
<td>696 Forte Blvd.</td>
<td>Franklin Square</td>
<td>NY</td>
</tr>
<tr>
<td>Illana Ram</td>
<td>176 Walton Ave.</td>
<td>Uniondale</td>
<td>NY</td>
</tr>
<tr>
<td>Richard C. Reid</td>
<td>400A South Country Rd.</td>
<td>Brookhaven</td>
<td>NY</td>
</tr>
<tr>
<td>Michelle A. Ricardo</td>
<td>725 Broad Ave.</td>
<td>Ridgefield</td>
<td>NJ</td>
</tr>
<tr>
<td>Maria E. Rodi</td>
<td>St. John's Univ.-School of Law</td>
<td>Jamaica</td>
<td>NY</td>
</tr>
<tr>
<td>Christopher J. Rooney</td>
<td>167 Avenue A</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Simon B. Sanchez</td>
<td>12 Irving Street</td>
<td>Albany</td>
<td>NY</td>
</tr>
<tr>
<td>Edward V. Sapone</td>
<td>313 E 61st St.</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Lara Joy Schneider-Bomzer</td>
<td>500 Riverside Dr.</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Jason A. Sharf</td>
<td>45 Rupert Ave</td>
<td>Staten Island</td>
<td>NY</td>
</tr>
<tr>
<td>Allison M. Smith</td>
<td>425 Dayton Towers Dr.</td>
<td>Dayton</td>
<td>OH</td>
</tr>
<tr>
<td>Lyman H. Smith</td>
<td>18 Ferndale St.</td>
<td>Yonkers</td>
<td>NY</td>
</tr>
<tr>
<td>Claire B. Steinberger</td>
<td>16 West 16th Street</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Robert L. Stinson</td>
<td>184 Joralemon St.</td>
<td>Brooklyn</td>
<td>NY</td>
</tr>
<tr>
<td>Katharine Marie Suarez</td>
<td>313 96th Street</td>
<td>Brooklyn</td>
<td>NY</td>
</tr>
<tr>
<td>Damon W. Soden</td>
<td>155 W 60th St.</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Payam M. Tanaeim</td>
<td>P.O. Box 4045</td>
<td>Great Neck</td>
<td>NY</td>
</tr>
<tr>
<td>Octavia U. Taylor</td>
<td>555 Washington Ave.</td>
<td>Brooklyn</td>
<td>NY</td>
</tr>
<tr>
<td>Victorio R. Tolentino</td>
<td>St. Vincent's Hospital</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Stephanie Jane Van Duren</td>
<td>527 W 121st Street</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Edward A. Vasquez</td>
<td>420 Teaneck Rd.</td>
<td>Ridgefield Park</td>
<td>NJ</td>
</tr>
<tr>
<td>Maureen Ann Vitucci</td>
<td>273 Mountainview Ave.</td>
<td>Staten Island</td>
<td>NY</td>
</tr>
<tr>
<td>Elizabeth S. Walker</td>
<td>405 Heatherbrooke Rd.</td>
<td>Birmingham</td>
<td>AL</td>
</tr>
<tr>
<td>Kristy L. Watson</td>
<td>132 W 71st Street</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Brain D. Weber</td>
<td>166 E 34th St.</td>
<td>New York</td>
<td>NY</td>
</tr>
<tr>
<td>Joseph J. Won</td>
<td>25 Pierrepont St.</td>
<td>Brooklyn</td>
<td>NY</td>
</tr>
<tr>
<td>Perry Y. Woo</td>
<td>320 Nassau Rd.</td>
<td>Huntington</td>
<td>NY</td>
</tr>
<tr>
<td>Fausto E. Zapata</td>
<td>81 Edward St.</td>
<td>Roslyn</td>
<td>NY</td>
</tr>
<tr>
<td>Nachman Y. Ziskind</td>
<td>FJA Consultants</td>
<td>New York</td>
<td>NY</td>
</tr>
</tbody>
</table>