THE NORTHERN IRELAND PEACE PROCESS

Criminal Justice Reforms Six Years After the Accords
### Contents

**OF NOTE**  
283

**PRESIDENT’S FAREWELL ADDRESS**  
E. Leo Milonas  
300

**PRESIDENT’S INAUGURAL ADDRESS**  
Bettina B. Plevan  
308

**NORTHERN IRELAND: A REPORT BY A MISSION OF THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS**  
by Gerald P. Conroy, Fiona Doherty, Sam Scott Miller, Marny Requa, Barbara Paul Robinson and Sidney H. Stein  
314

by the Committee on International Human Rights and the Committee on Asian Affairs  
374

**LAW DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK**  
by the Committee on State Courts of Superior Jurisdiction  
394

**TIERING AND THE FOREIGN SOVEREIGN IMMUNITIES ACTS AFTER DOLE**  
The Committee on Federal Courts  
405

Reports by The Committee on Professional and Judicial Ethics  

**FORMAL OPINION 2003-04: OBLIGATIONS UPON RECEIVING A COMMUNICATION CONTAINING CONFIDENCES OR SECRETS NOT INTENDED FOR THE RECIPIENT**  
420

**FORMAL OPINION 2004-01: LAWYERS IN CLASS ACTIONS**  
435

**FORMAL OPINION 2004-02: REPRESENTING CORPORATIONS AND THEIR CONSTITUENTS IN THE CONTEXT OF GOVERNMENTAL INVESTIGATIONS**  
447

**REVISED ARTICLE 1 OF THE UNIFORM COMMERCIAL CODE**  
The Committee on Uniform State Laws  
466

---

Of Note

THE FOLLOWING CANDIDATES HAVE BEEN ELECTED TO THE VARIOUS Association offices and committees for 2004-2005:

President
Bettina B. Plevan

Vice Presidents
Mark G. Cunha
Mary Jo White
Alvin K. Hellerstein

Treasurer
Helaine M. Barnett

Secretary
Cyrus D. Mehta

Members of the Executive Committee
Class of 2008
Norman L. Greene
John S. Kiernan
Peter M. Kougasian
George Wheeler Madison

Members of the Committee on Audit
Donald S. Bernstein
Elizabeth D. Moore
Laurie Berke-Weiss

THE NOMINATING COMMITTEE FOR 2004-2005 CONSISTS OF: ROGER J. Maldanado (Chair); Richard T. Andrias, Deborah A. Batts, L. Priscilla Hall, Deborah Masucci, Thomas H. Moreland, and Benito Romano.

The Executive Committee has elected Barry M. Kamins Chair and Andrew A. Scherer Secretary for 2004-2005.

* 

THE FIFTEENTH ANNUAL LEGAL SERVICES AWARDS WERE PRESENTED
to honor attorneys who provide outstanding civil legal assistance to New York’s poor. Hon. Judith S. Kaye, Chief Judge of the New York Court of Appeals, presented the awards at a reception on May 13 at the Association.

This year’s recipients are: Sally Deluca, Senior Staff Attorney, Legal Services for New York City Brooklyn Branch; Rubin Englard, Senior Staff Attorney, Legal Services of New York Manhattan Branch; Elisa Hyman, Deputy Director, Advocates for Children of New York, Inc.; Ronald S. Languedoc, Co-Director of the Housing Unit, South Brooklyn Legal Services, Inc.; and Patricia Murray, Senior Staff Attorney, Brooklyn Legal Services Corporation A.

The awards, endowed by a contribution from the Horace W. Goldsmith Foundation, are administered by the Special Committee on the Legal Services Awards (John Kiernan, Chair).

* *

THE 2004 BOTEIN AWARDS, A RECOGNITION OF THE PERSONNEL ATTACHED TO THE COURTS OF THE FIRST JUDICIAL DEPARTMENT, were presented at the Association on March 29, 2004. The Hon. John T. Buckley, Presiding Justice of the Supreme Court of the State of New York, Appellate Division, First Department, presented the awards.

The Awards, dedicated to the memory of Bernard Botein, former President of the Association, and Presiding Justice of the First Department, have been presented annually since 1976 to pay tribute to court personnel in the First Department who have made outstanding contributions to the administration of the courts.

This year’s recipients are: Jeffrey E. Carucci, Deputy Chief Clerk, Supreme Court, New York County, Civil Branch; Michael Colodner, Counsel, Office of Court Administration; Alan J. Murphy, Chief Clerk, Supreme Court, New York County, Criminal Branch; and Ronald Uzenski, Court Clerk Specialist, Appellate Division, First Department.

The awards are made possible by a grant from the Ruth and Seymour Klein Foundation, Inc.

* *

THE THIRTEENTH ANNUAL PRESENTATION OF THE HENRY L. STIMSON MEDAL to outstanding Assistant United States Attorneys in the Southern District and in the Eastern District of New York, was held on June 1 at the Association. Hon. Denise L. Cote, Judge of the United States District Court
for the Southern District of New York, delivered welcoming remarks and Association President Betsy Plevan presented the medals.

This year’s recipients are: Daniel R. Alonso, Eastern District/Criminal Division; Kevin P. Mulry, Eastern District/Civil Division; Cathy Seibel, Southern District/Criminal Division; and Beth E. Goldman, Southern District/Civil Division.

The Stimson Medal, made possible by the firm of Pillsbury Winthrop, honors Mr. Stimson, who served as United States Attorney for the Southern District from 1906-1909 during a career of distinguished public service.

The awards are sponsored by the Committee on the Stimson Medal (Mark R. Hellerer, Chair) and the Committee on Federal Courts (Thomas H. Moreland, Chair).

❊

HON. LEWIS A. KAPLAN, UNITED STATES DISTRICT JUDGE OF THE SOUTHERN District of New York, presented the Association’s annual Municipal Affairs Awards on June 21. The Awards are given to lawyers from the New York City Law Department who have demonstrated outstanding performance. This year’s recipients are: Theresa Wilson-Campbell, Family Court Division, Queens; Jared Hatcliffe, Tort Division, Queens; Sheryl R. Neufeld, Administrative Law Division; Concepcion Montoya, Special Federal Litigation Division; and Scott Shorr, Appeals Division.

The awards are sponsored by the Committee on New York City Affairs (Frances Milberg, Chair).

❊

THREE OUTSTANDING MINORITY STUDENTS AT NEW YORK AREA LAW schools have been awarded Thurgood Marshall Fellowships for the 2004-2005 academic year. The program provides three exceptional minority students from New York area law schools the opportunity to work with the Association to advance the goals of civil rights and equal justice. Fellowships have been awarded to Luz Medrano of CUNY School of Law, Brooke Sealy of Columbia University School of Law and Jenny Yun of Fordham University School of Law.

Ms. Medrano and Ms. Yun will assist the City Bar Fund and Ms. Sealy will work with the Association’s Civil Rights Committee.

The fellowships are funded by the Orison S. Marden Lecture Fund and are open to second and third year minority law students from New York area law schools. Fellows were nominated by their schools and se-
lected by the Association’s Committee on the Thurgood Marshall Fellowship Program, chaired by Daniel C. Richman.

* 

THE FOLLOWING ARE THE CHAIRS OF ASSOCIATION COMMITTEES FOR the 2004-05 year:

Brad Laurence Berman, (Admiralty); Elaine S. Reiss (Administrative Law); Andrew Maloney (Aeronautics); Jonathan Givner (AIDS); David P. Stoelting (African Affairs); William Hammond (Alcoholism and Substance Abuse); Kenneth L. Andrichik (Alternative Dispute Resolution); Wayne Dale Collins (Antitrust and Trade Regulation); Robert B. Davidson (Arbitration); Barry H. Garfinkel (Leslie H. Arps Memorial Lecture); Howard Speigler (Art Law); Nicolas C. Howson (Asian Affairs); Burton M. Fine (Association Insurance Plans); Bradley K. Sabel (Banking Law); Marc R. Abrams (Bankruptcy and Corporate Reorganization); Lawrence Kevin Cagney (Benefit Plans for Association Employees); John E. Linville (Bioethical Issues); Lisa M. Stenson (Books-at-the-Bar); Jeffrey J. Kirchmeier (Capital Punishment); Lynette P. Koppel (Career Advancement and Management); Eric Brettschneider (Council on Children); Frederic Paul Schneider (Children and the Law); Sara S. Portnoy (Citybar Public Service Network); Paul Matthew Hellegers (Civil Court of the City of New York); David A. Schulz (Communications and Media Law); Barbara Anthony (Consumer Affairs); Joel Ditchik (Condemnation and Tax Certiorari); Burton N. Lipshie (Continuing Legal Education (CLE)); Michael T. Manzi (Cooperative and Condominium Law); Robert W. Clarida (Copyright and Literary Property); Mark S. Wojciechowski (Corporation Law); Daniel R. Alonso (Criminal Advocacy); John L. Pollok (Criminal Courts); John H. Doyle III (Criminal Justice); Judith E. White (Criminal Justice Operations and Budget); Marjorie J. Peerce (Criminal Law); James E. Brumm (Delegation to the International Bar Association); Thomas H. Moreland (Delegation to the New York State Bar Association); Liberty Aldrich (Domestic Violence); Jonathan S. Rosenberg (Education and the Law); Lawrence Laufer (Election Law); Andrea Shawn Rattner (Employee Benefits); Leslie G. Leach (Encourage Judicial Service); Richard S. Green (Energy); Donald G. Kempf, Jr. (Enhance Diversity in the Profession); Martha Cohen Stine (Entertainment); Rosalind S. Lichter (Entertainment Law); Eileen D. Millett (Environmental Law); Ronni G. Davidowitz (Estate and Gift Taxation); Mark A. Meyer (European Affairs); Judith D. Moran (Family Court and Family Law); Molly S. Boast (Federal Courts); John S. Siffert (Federal Legislation); Adele Hogan (Financial Re-
porting); Guy A. Reiss (Foreign and Comparative Law); Rita M. Molesworth (Futures Regulation); Kirsten E. Gillibrand (Government Ethics); Martha Golar (Health Law); Leonard B. Sand (Honors); Jeffrey Alan Horwitz (Hotels, Restaurants and Tourism); Robert M. Kaufman (House); Elizabeth Donoghue (Housing Court); Michelle D. Schreiber (Housing Court Public Service Projects); Lee Warshawsky (Housing and Urban Development); Claudia Slovinsky (Immigration and Nationality Law); Kenneth M. Dreifach (Information Technology Law); Heidi A. Lawson (Insurance Law); Marcello Hallake (Inter-American Affairs); James R. Silkenat (Council on International Affairs); Lawrence Walker Newman (International Commercial Dispute Resolution); Christopher J. McKenzie (International Environmental Law); Martin S. Flaherty (International Human Rights); Scott Horton (International Law); Manuel Campos-Galvan (Task Force on International Legal Services); Sondra Nicole Deller (International Security Affairs); Rufus Edwin Jarman, Jr. (International Trade); Stuart Hayden Coleman (Investment Management Regulation); Daniel R. Murdock (Council on Judicial Administration); Beth L. Kaufman (Judiciary); Deborah A. Lashley (Juvenile Justice); Daniel Silverman (Labor and Employment Law); Jeannette Arlin Koster (Land Use Planning and Zoning); Derryl Zimmerman (Law Student Perspectives); Andrea J. Berger (Lawyers Orchestra); James A. Beha II (Legal Education and Admission to the Bar); Francis J. Murphy (Legal History); Loren M. Gesinsky (Legal Issues Affecting People with Disabilities); Meena Alagappan (Legal Issues Pertaining to Animals); Matthew John Nolfo (Legal Problems of the Aging); Steven Lloyd Barrett (Legal Referral Service); Susan Patrice Persichilli (Legal Services for Persons of Moderate Means); Christopher Collins and Lisa Bodner (Lesbian, Gay, Bisexual and Transgender Rights); Kathy Hellenbrand Rocklen (Library); Vilia Hayes (Litigation); Laura B. Hoguet (Orison S. Marden Memorial Lecture); Harold A. Mayerson (Matrimonial Law); Bridget Asaro Lawrence (Medical Malpractice); Virginia K. Trunkes (Mental Health Law); Erica H. Steinberger (Mergers, Acquisitions and Corporate Control Contests); Miles P. Fischer (Military Affairs and Justice); Nelson S. Roman (Minorities in the Courts); Michael C. Banks (Minorities in the Profession); Peter J. Kiernan (New York City Affairs); Roger J. Maldonado (Nominating); David G. Samuels (Non-Profit Organizations); Peter A. Sullivan (Patents); Bryan C. Skarlatos (Personal Income Taxation); L. Robert Batterman (Personnel Policy); Marco V. Masotti (Private Investment Funds); William T. Russell, Jr. (Pro Bono and Legal Services); Theodore V.H. Mayer (Product Liability); Barbara S. Gillers (Professional and Judicial Ethics); Edward M. Spiro (Professional Discipline); Richard M. Maltz (Professional Responsibility); Jane Wallison

O F  N O T E

V O L.  5 9,  N O. 2 ♦ 2004

287
Stein (Project Finance); Catherine O’Hagan Wolfe (Project on the Homeless); William Jay Lippman (Real Property Law); Sheila Boston (Recruitment and Retention of Lawyers); Andrew Mandell (Science and Law); Matthew J. Mallow (Securities Regulation); Edward Labaton (Senior Lawyers); Leslie A. Rubin (Sex and Law); Steven M. Ratner (Small Law Firms); Robert F. Bacigalupi (Social Welfare Law); Howard L. Ganz (Sports Law); John P. Albert (State Affairs); Alvan Lee Bobrow (State and Local Taxation); Toby M.J. Butterfield (State Courts of Superior Jurisdiction); Mark R. Hellerer (Henry L. Stimson Medal); Nancy F. Lang, Israella F. Mayeri (Talent Outreach Project); Louis H. Tuchman (Taxation of Business Entities); David Ethan Bronston (Telecommunications Law); Ira M. Feinberg (Thurgood Marshall Fellowship Program); Alfreida B. Kenny (Thurgood Marshall Summer Law Internship Program); Jerome I. Katz (Tort Litigation); Dale M. Cendali (Trademarks and Unfair Competition); Thomas R. Lamia (Transportation); Charles F. Gibbs (Trusts, Estates and Surrogate’s Courts); Sophia R. Vicksman (Uniform State Laws); Elizabeth F. Defeis (United Nations); Beatrice S. Frank (Task Force on Women in the Courts); Carrie H. Cohen (Women in the Profession); and Chia Kang (Young Lawyers).
Recent Committee Reports

**African Affairs**
Letter to the Ambassador to the United Nations expressing concern over the situation in the Darfur region in the Sudan and urging the Security Council to place the situation at the top of its agenda and consider dispatching peacekeeping forces to protect civilians

**AIDS**
Memorandum in support of A. 3940/ S.2082 which would mandate that the Department of Correctional Services develop and implement programs to prevent the transmission of sexually transmitted diseases (“STDs”) and the human immunodeficiency virus (“HIV”) in state correctional institutions

Memorandum in support of A.4204/S.1840 and A.3692 which would direct the Department of Health to perform annual reviews of the Department of Correctional Services’ policies and practices regarding human immunodeficiency virus (“HIV”) and hepatitis C virus (“HCV”) care and prevention and would amend the definition of “hospital” in Article 28 of the Public Health Law to include correctional health facilities

**Banking Law**
Letter to the Financial Accounting Standards Board providing recommendations on setoff and isolation rights

**Bankruptcy & Corporate Reorganization**
Letter to Congress urging support of H.R.4764, the Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Bill that would provide a 5.9 percent increase in funding for the federal judiciary for the 2004-2005 fiscal year

**Capital Punishment**
Statement of the Association of the Bar of the City of New York regarding New York’s death penalty urging that the New York State Legislature not rush into reinstating the death penalty rather they should proceed cautiously and first study the practical consequences and costs of capital punishment
Amicus Brief: People of the State of New York v. Shulman urges the court to consider that the due process guarantee of the New York State Constitution contained in Art. 1, Sec. 6, bars implementation of New York State’s death penalty provision

Children, Council on
Letter to Governor Pataki supporting S.5092/A.11499 which would allow New York State to be in compliance with the Federal Adoption and Safe Families Act (ASFA) and would provide much needed benefits to thousands of children

Civil Courts of the City of New York
Report urging the passage of S.5377/A.8669 which would amend the New York Civil Court Act, the Uniform District Court Act and the Uniform City Court Act, in relation to the method of commencing and filing a lawsuit

Civil Rights/Legal Issues Affecting People with Disabilities/
Mental Health Law
Amicus Brief, Polan v. State of New York Insurance Department which argues that Insurance Law Sec. 4224(b)(2) prohibits the provision of inferior insurance benefits on the basis of mental disability in the absence of a showing of actuarial or experiential data justifying the limitation of benefits

Communications and Media Law
Letter to the Office of Court Administration responding to questions about jury privacy and the right of access posed by the Chief Judge’s Commission on the Jury and urging that OCA not decrease the scope of the public’s access to information

Communications & Media Law
"If it Walks, Talks and Squawks, the First Amendment Right of Access to Administrative Proceedings," a position paper which explores the nature of the public’s constitutional right of access to a class of administrative proceedings where important liberty and property interests are at stake

Communications and Media Law/Immigration and Nationality Law
Dangerous Doctrine: The Attorney General’s Unfounded Claim of Unlimited Authority to Arrest and Deport Aliens in Secret

THE RECORD

290
Construction Law
Letter to the New York State Legislature in support of the Coordinated Construction Act, which seeks to expedite the construction in Lower Manhattan but in a cost-efficient and safe manner, while addressing concerns of the residents and businesses that will be affected.

Letter to Governor Pataki in support of A.5805/S.4045 which would amend the Lien Law to provide protection to hybrid private/public projects which fall through a gap in the current law.

Domestic Violence
Recommendations to the New York City criminal and family courts on how to choose between the various batterers education program models available to them and urging that all defendants be required to participate in the Education Model which most closely reflects the goals of the criminal justice system and the priorities of the domestic violence movement.

Downtown Redevelopment, Task Force
Letter to Governor Pataki and Mayor Bloomberg Regarding the uses of Liberty Bonds to finance the construction of a power plant in Queens.

Education and the Law
Letter to Governor Pataki and members of the New York State Legislature urging that the state in accordance to the mandate of the Court of Appeals in Campaign for Fiscal Equity v. State of NY ascertain the actual cost of providing a sound and basic education in New York City.

Election Law
The New York City Campaign Finance Reform Program in the 2001 Elections: To Make a Good Program Better

Comments Supporting Intro. No. 382-A, a Bill to Amend the New York City Campaign Finance Act.

Comments on rules proposed by the Campaign Finance Board and urging that any changes to the rules not affect the 2005 election since the changes may cause unfair disruption to the campaigns.

Letter to the Joint State’s Legislative Conference Committee on HAVA (Help
America Vote Act) providing comments on the procedures and criteria for permitting an election recount using a manual tabulation of the voter-approved paper recordings of votes

**Energy**
Letter to Governor Pataki urging the administration to draft legislation that would amend the Public Service Law to provide for a reasonable and fair process, community involvement and protection of public health and the environment when siting electric generation facilities in New York

**Environmental Law**
Report urging the passage of S.6493/A.8673 which would amend the New York State Environmental Quality Review Act (SEQRA), in relation to standing to challenge agency environmental quality review determinations

**Federal Courts**
Report discussing the surge of immigration appeals filed in the circuit court of appeals from decisions of the Board of Immigration Appeals and the impact of this surge on the Second Circuit

Report on Tiering and the Foreign Sovereign Immunities Act After Dole examines the state of the law after the Dole decision and discusses whether a state-owned corporation constitutes a foreign state

Amicus Brief, Padilla v. Rumsfeld, raises to the Supreme Court’s attention due process concerns with regard to enemy combatant detainees

**Federal Courts**
The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror, arguing that President’s detention of persons he designates as “enemy combatants,” indefinitely and without access to counsel, without congressional authorization or meaningful judicial review, violates core due process values

Letter to the Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts supporting
with some modifications the proposed amendment to the Federal Rules of Appellate Procedure concerning the citation of unpublished opinions

**Federal Legislation**
Letter to the House Judiciary Committee Urging Support of the Mentally Ill Offender Treatment and Crime Reduction Act of 2003

**Financial Reporting**
Letter to the Public Company Accounting Oversight Board Commenting on the Proposed Auditing Standard for Internal Control Over Financial Reporting

**Financial Reporting/Securities Regulation**
Letter to the SEC providing technical suggestions to the proposal that would provide for the public release of comment letters and filer responses

Letter to the SEC commenting on specific aspects of the proposed rule issued by the SEC concerning Asset-Backed Securities, and urging the SEC to proceed slowly and cautiously given the complexity of the proposed rule

Letter to the Public Company Accounting Oversight Board Concerning the Appropriate Role of the Auditor as One of the Critical Gatekeepers in the Capital Raising Process


**Futures Regulation**
Letter to the SEC commenting on the proposed rule change regarding the treatment of commodity pool trail commissions and urging that the change in the treatment of trail commissions in public commodity pools may result in unnecessarily different treatment of investors in the commodity futures markets

Letter to the SEC commenting on the SEC proposal regarding registration under the advisers act of certain hedge fund advisers

Letter to the SEC commenting on Release No. 34-50065 which concerns the notice of filing and immediate effectiveness of proposed rule changes relating to the treatment of commodity pool trail commissions
Letter to the Commodity Futures Trading Commission commenting on proposed amendments to a cooperative agreement among various futures self-regulatory organizations

Comments on the Proposed Regulation of Compensation, Fees and Expenses in Public Offerings of Real Estate Investment Trusts; Direct Participation Programs, Including Commodity Pools; and Closed-End Funds

Government Ethics
First Amendment Considerations for Judicial Campaigns: The Impact of Republican Party of Minnesota v. White on the New York State Code of Judicial Conduct, stresses the importance of interpreting White narrowly, to ensure an impartial and independent bench

Government Ethics/Judicial Administration/
Council on Professional & Judicial Ethics
Letter to the ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct offering to assist the Commission by providing comments on any recommendations prorogated by the Commission

International Affairs, Council on
Recommendations Related to the Trial of Saddam Hussein, in this report the Association offers observations and recommendations concerning the substance and procedures to be used in the trial of Mr. Hussein

International Human Rights
Letter to Prime Minister Badawi of Malaysia Expressing Concern That the Trial and Conviction of Human Rights Activist Irene Fernandez Violates Internationally Recognized Standards of Free Expression

Letter to Congress in support of HR 4674 which would prohibit the transfer of individuals to countries in which they may be tortured or subjected to cruel, inhuman or degrading treatment

Northern Ireland: A Report to the Association of the Bar of the City of New York From a Mission in May 2003 of the Committee on International Human Rights

Report on the Alien Tort Statute which concludes that the Alien Tort Statute authorizes federal district courts to entertain claims by aliens al-
leging torts in violation of international law without explicit authorization of a cause of action in another federal statute.

Letter to Secretary of State Colin Powell, urging that the United States co-sponsor and vote in favor of the resolution on Human Rights and Sexual Orientation to be offered by the government of Brazil at the April session of the United Nation’s Committee on Human Rights.

**International Human Rights/Asian Affairs**

One Person One Vote: A Memorandum to the Civic Exchange of Hong Kong Addressing the U.S. Electoral System as to the Functional Constituencies Embodied in the Basic Law for the Election of the Chief Executive and the Legislative Council. This report argues that the use in Hong Kong of the analogy to the U.S. Electoral College is inappropriate.

**International Human Rights/Military Affairs and Justice**

Human Rights Standards Applicable to the United States’ Interrogation of Detainees. This report examines the international legal standards governing United States military and civil authorities in interrogating detainees and proposes ways of assuring that those standards are enforced.

**Investment Management Regulation**

Letter to the SEC expressing concern with regard to the proposed settlement announced by the SEC staff regarding Bank of America.

Letter to the SEC opposing the proposal that would require that the board of directors of an investment company have as chairman a “disinterested” director.

**Judicial Administration, Council on**

Report on the Judiciary’s 2004-05 budget requests urging the Legislature to adopt the Judiciary’s funding request in its entirety.

**Judicial Selection, Task Force**

Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York.

**Labor and Employment Law**

Comments to the National Labor Relations Board objecting to its recent decision that employees who are not represented for purposes of collect-
tive bargaining by a labor organization do not have a right to have a co-worker present during an interview that may lead to discipline of the employee

**Legal Issues Affecting People with Disabilities**
Letter to Congress Commenting on Various Recommendations Made in S.1248 Which Would Amend the Individuals with Disabilities Education Act

**Legal Issues Pertaining to Animals**
Letter to Governor Pataki urging him to sign S. 7616 which would prohibit the knowing possession, sale, barter, transfer, exchange or import of certain wild animals as pets

Report approving with recommendations S.4174/A.7985 which would amend the Environmental Conservation Law in relation to making contests and competitions to take wildlife unlawful

Report approving with recommendations S.905-B/A.2684-B which would amend the Environmental Conservation Law in relation to prohibiting the possession of wild animals as pets in New York State

**Lesbian, Gay, Bisexual and Transgender Rights**
Written testimony submitted for the public forum on the issue of civil marriage for same-sex couples urging that the New York State Legislature take the next logical and legal step in promoting the public policy of the state of New York by promulgating and passing a bill which would permit same gender couples to legally marry in the state

Amicus Brief, Langan v. St. Vincent’s Hospital of New York, urging the court to affirm the decision of the lower court which applied New York’s comity rules to recognize a civil union solemnized in Vermont to allow the couple to be recognized as spouses under New York’s wrongful death statute

**Lesbian, Gay, Bisexual and Transgender Rights/Sex and Law**
Amicus Brief, Langan v. St. Vincent’s Hospital of New York

**Mental Health Law**
Letter to Congress urging that Congress allocate $10 million in funding pursuant to America’s Law Enforcement and Mental Health Project to oversee
court-based programs involving continued judicial supervision for non-violent offenders with mental illness

Report urging the passage of S.5329/A.8301 which would amend the Insurance Law to ensure that mental health and chemical dependency coverage is provided by insurers and health maintenance organizations on the same terms as other health care and medical services

**Mergers, Acquisitions and Corporate Control Contests**
Comments on Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors

Letter to the SEC commenting on proposed rules concerning the use of form S-8 and form S-K by shell companies

**Military Affairs and Justice**
Letter to Congress endorsing the Graham Amendment to S.2400 FY 2005 Defense Authorization Act which is intended to grant a measure of independence to uniformed military lawyers operating in each military service

Letter to the Department of Defense providing comments on the procedures for enemy combatants in the custody of the Department at Guantanamo Bay Naval Base, Cuba

**Non-Profit Organizations**
Report conveying the committee’s comments on the discussion draft of the New York State Senate Finance Committee’s proposals for reforms and best practices for tax-exempt organizations

Report urging the passage of S.7219 which would amend the Not-for-Profit Corporation Law in relation to protections against financial fraud and abuse

Report supporting with additional comments S.5041/A.8586-A which would amend the Not-for-Profit Corporation Law in relation to the non-judicial process of dissolution of not-for-profit corporations and dissolution of not-for-profit corporations for failure to file reports

**Patents Law**
Amicus Brief: Phillips v. AWH Corporation, addresses the way in which patent claims are interpreted and urges the court to take a multi-factored approach to claim construction, and presents views on the propriety of revisiting the appellate standard of review for claim construction
Patents
Comments in Opposition to a Proposal to Update the Patent Office's Procedures Regarding Enrollment and Discipline

Private Investment Funds
Letter to the Securities and Exchange Commission Commenting on the Staff Report Titled “Implications of the Growth of Hedge Funds”

Letter to the SEC commenting on the SEC proposal regarding registration under the advisers act of certain hedge fund advisers

Pro Bono and Legal Services

Personal Income Taxation
Letter to the Department of the Treasury and IRS providing comments on Notice of Proposed Rulemaking Circular 230: Tax Shelter Opinions

Private Investment Funds
Letter to Governor Pataki Opposing S.5902/A.11205 which would amend the Limited Liability Company Law and the Partnership Law relating to publication of notices

Professional Responsibility
Letter to the ABA outlining the reason the committee does not support the adoption of the ABA's proposed model rule regarding the disclosure of legal malpractice insurance

Professional and Judicial Ethics
Formal Opinion 2003-04: Obligations Upon Receiving a Communication Containing Confid ences or Secrets not Intended for the Recipient

Formal Opinion 2004-01, Duties of Lawyers in Class Actions: decisions to sue; conflicts of interest; duties to class members; no-contact rule; and disputes within a class

Formal Opinion 2004-2: Representing Corporations and Their Constituents in the Context of Governmental Investigations

Formal Opinion 2004-03, Government Lawyer Conflicts: Representing a Government Agency and its Constituents. This opinion answers the ques-
tion, what are the ethical obligations of a government lawyer in dealing with potential conflicts of interest (a) among government agency clients; (b) between a government agency and its constituents represented by the government lawyer; and (c) between an agency and unrepresented constituents.

**Professional & Judicial Ethics/Government Ethics**
Letter to the ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct commenting on the Commission’s proposed changes to Canons 1 and 2.

**Real Property Law**
Model New York City Office Lease

Model Intercreditor and Subordination Agreement and Accompanying Commentary

**Sex and Law**
Letter to the New York State Legislature urging opposition to S.403/A.7524, the Unborn Victims of Violence Act, which would redefine “person” to include an unborn child at any stage of gestation and create a number of new offenses for crimes committed against the unborn child.

**Social Welfare Law**
Letter to Governor Pataki opposing the public assistance-related proposals in the Governor's Executive Budget as they realize a modest savings by means of harsh and punitive modifications of the welfare law.

**State Affairs**
Report approving S.5731/A.9194 which would amend the State Finance Law to require New York State agencies to purchase handguns only from manufacturers who make every reasonable effort to eliminate sales of weapons that might lead to illegal possession or misuse by criminals, unauthorized juveniles, and other prohibited persons.

**State Courts of Superior Jurisdiction**
Report on the Law Department of the Supreme Court of the State of New York.

**Uniform State Laws**
Report providing comments and recommendations on revised Article 1 of the Uniform Commercial Code.

Copies of any of the above reports are available to members by calling (212) 382-6624, or by e-mail, at akhtar@abcny.org.
President’s Farewell Address

Annual Meeting of the Association

E. Leo Milonas

Traditionally at the Annual Meeting we take stock and review the state of the Association, we recognize the achievements of our members, and with our new President’s address, we look to the future.

One lesson I have learned as President is that much of our work is very much like the practice of law, it is responsive, and dictated by events outside of our control. Our Association’s response to 9/11 was a hallmark in our history. Many have called it our finest hour. And then came the aftermath, when we had to address the complex and sensitive issues involving our security, our liberties and our commitment to international law. Like the good lawyers that we are, we tried to navigate these troubled waters with balance, using the rule of law as our compass. Our finest hour has been followed by the greatest test of our integrity and tenacity. We should take pride in our response.

We have been by far the leading bar association in the United States in addressing the full range of issues flowing from the “war on terrorism.” We have issued no fewer than 20 reports on the subject, and a dozen committees have been engaged in these efforts. Most recently, our International Human Rights and Military Affairs and Justice Committees collaborated on an analysis of the legal standards governing interrogations of detainees. The report was issued just as the first videos of the outrageous actions in Abu Ghraib prison were hitting the airwaves. We have received numerous calls from media here and abroad, and have put the
US interrogation policies in an accurate legal framework. Just what a bar association should be doing. In the last week alone we have been quoted and cited in numerous news reports and programs. Our committee members have been on the McNeil-Lehrer News Hour and in the Washington Post and The New York Times, among others, explaining the international and military law governing interrogations in Iraq, and pointing out that the policies articulated by the Defense Department for those interrogations violate the Geneva Convention.

We are the only bar association in the U.S. to file amicus briefs in the detainee cases now pending in the Supreme Court, and we did so both in the case involving the Guantanamo detainees and the one involving the detention of Jose Padilla. Our position in these briefs, as well as in an excellent comprehensive report by our Committee on Federal Courts, is that the detainees are entitled to due process, and it is for the courts, not the President, to decide what is the appropriate due process. We refute the contention that the President’s invocation of his war-making power insulates him from meaningful review by the courts. We do not deny that these are perilous times, and that the government should act to preserve security. We do not agree, however, that fundamental rights have to be abandoned in order to provide that security.

We have also consistently spoken out regarding the plight of non-citizens in this country, particularly those of Muslim descent, who have been the targets of policies that are unfair, racist and fundamentally at odds with what this country is all about.

Our advocacy efforts are but a small part of what we have done to address policy issues and individual needs resulting from the September 11th disaster. Our Task Force on Downtown Redevelopment has been an active participant in thinking through the legal issues relating to rebuilding the World Trade Center area. Our Insurance Law Committee undertook a detailed analysis of federal proposals to aid insurance companies in coping with further catastrophes. And our City Bar Fund continues to do critical work for the victims of 9/11 and their families. We have helped or are helping over 3,000 individuals and small businesses to address legal issues relating to the loss of a loved one, injuries sustained and damage to property and business. We have also provided assistance to persons who submitted claims to the Special Master handling 9/11 Compensation, Ken Feinberg. Ken appeared at the Association several times in public forums to answer questions and provide progress updates. Indeed Ken was remarkably open, forthcoming and reassuring to the claimants and their attorneys.

Five Association committees collaborated on two fine reports addressing
the SEC regulations implementing Section 307 of the Sarbanes-Oxley Act, setting forth rules regarding conduct by lawyers representing issuers of securities. We argued that while the law itself was fair, the SEC’s regulations went too far, notably by requiring a “noisy withdrawal” by counsel if a corporation does not take corrective action after counsel brings information regarding a material violation of the securities laws or a breach of fiduciary duty to the corporation they represent, and then goes up the corporate ladder with this information. We have yet to see the results of how the SEC’s regulations interface with state ethical codes.

Our several committees in the area of securities and corporate finance have issued a number of comment letters on other aspects of the Sarbanes-Oxley Act. These committees continue to do excellent work, and their views are given serious consideration on the national stage.

Judicial Selection comes under the heading of “as much as things change, they remain the same.” I appointed a blue ribbon Task Force on Judicial Selection, chaired by Bob Joffe, a vice president of the Association, which developed a set of recommendations to deal with the problems in the selection of state court judges, problems most exemplified by the developments in Brooklyn. The control of the election of judges by party leaders, particularly in areas of the state dominated by one party, has led to the broad and accurate public perception that the independence of the bench is compromised. The Task Force considered both measures that can be implemented quickly, even without legislation, and more long term structural changes that would improve the process.

We continue to believe that the best way to select judges is a system of merit appointment, such as is used to select judges of the New York State Court of Appeals, albeit with a cautionary note. Realistically, as there is little chance the State Legislature will adopt merit selection any time soon, the Task Force focused on what can be done now in the current elective system. The immediate answer is that the screening process by which political parties select their candidates must be reformed. For the process to have any credibility, the screening committees must be made more independent, must be allowed to recommend a limited number of candidates for each judicial vacancy, and the political leaders must pledge to only select candidates from those approved.

A commission appointed by Chief Judge Judith Kaye and chaired by John Feerick will be finalizing its own recommendations soon. We await that report, as the next step in pressing for long overdue reform.

But, in the final analysis, a merit selection system depends on the good faith and integrity of the appointive authority, be it the Mayor or
the Governor. There must be a commitment to put party politics and cronyism aside, to keep hands off the panel, and to select only the most qualified candidate. We have a long way to go, but Mayor Bloomberg has been terrific. He should be commended, as should be his screening committee and its chair Zachary Carter, and his deputy mayor Carol Robles Roman, and our own Michael Cardozo, his corporation counsel. The Mayor is noteworthy for his commitment to selecting only the best candidates, and then sending them to the City Bar’s Judiciary Committee for a second, fail-safe screening. He does not appoint anyone who has not passed both committees, the mayor’s and our Judiciary Committee.

This Association has been a leading voice in the effort to allow people of the same sex to marry in New York, and hopefully the State Bar Association will soon join us. We issued two comprehensive reports on the subject well before the current heightened interest in the subject. Our Committees and Sex and Law and Lesbian, Gay, Bisexual and Transgender Rights have written that there is no impediment in New York law to same-sex marriage, and noted the serious constitutional problems with not permitting persons of the same sex to exchange vows. We have also weighed in on the issue of the extent to which Vermont civil unions should be recognized in New York, arguing in an amicus brief (*Langan v. St. Vincent’s Hospital*) that comity requires the recognition of civil unions in the context of a wrongful death action. Surely, there are many legal issues to be sorted through, but the basic principle remains that persons of the same sex should be entitled to the legal rights and obligations of marriage to the same extent as opposite-sex couples.

Our Association’s commitment to International Human Rights takes great fortitude, especially with the embarrassing contradictions caused by current events.

Yet, our Committee on International Human Rights continues to monitor the obligations of governments to preserve due process and the rule of law. We have written extensively on the efforts of the Chinese government to limit the freedoms that were to be available in Hong Kong after the transfer of authority from the British. We have conducted missions, made visits and otherwise continued to support the efforts of those in Hong Kong who seek universal suffrage and to preserve the rights they understood would be provided to that important commercial center.

We have also continued our monitoring of developments in Northern Ireland, having just completed our third mission to that area. While we are optimistic about prospects for lasting peace, the members of our mission found much more needed to be done to reform the justice sys-
tem. The resulting report included a number of detailed recommendations addressing different aspects of the criminal justice system.

We continued to help those in Rwanda who are working to rebuild that nation’s justice system. This is the 10th anniversary of the genocide in that country, and tens of thousands of persons charged with crimes relating to the genocide are still awaiting trial. We have made two missions to Rwanda, led by Bob Van Lierop, in which we met with the major figures in the Rwandan justice system and conducted seminars and training focusing on basic ethical issues. In addition, we are seeking to help Rwanda address the legal aspects of issues ranging from AIDS to handling international commercial transactions.

Finally, we have written to the governments of Malaysia, Egypt, Iran and Kyrgyzstan to protest their treatment of lawyers who are fulfilling their duty of representing those charged with crimes and otherwise pursuing justice through legal means. I am confident this vigilance will continue—it is a truly special role that our Association plays.

We, along with many, if not most, others in the State, continue to be frustrated by the legislative paralysis in Albany. We have long complained that the Legislature is dysfunctional, populated by members who have little chance of losing their seats, with a seemingly permanent division of the legislative Houses along party lines. The result is endless political posturing, with little progress on key issues. So it is that the Rockefeller Drug Laws have not been reformed, although members of both houses of the Legislature agree on the need. Although some modest progress has been made, thousands of persons charged with low-level drug crimes serve excessive sentences, disrupting families and communities and costing the State hundreds of millions of dollars annually. There must be some way that the legislative leaders and the Governor can come together and solve this problem.

If our political leaders can not see the fundamental equity of the need for reform, surely they should be able to see the dollar signs. You’ve heard the political slogan “It’s the economy, stupid;” well “it’s the money.” Albany should be able to add up the significant savings of $35,000 per year, per prisoner for confinement. And, indeed, we may be returning to the mainstream many who shall become child supporting parents and taxpayers.

In December 2003, the Association adopted a Statement of Diversity Principles. The Statement was authored by our Committee to Enhance Diversity in the Profession, which has been ably chaired by Don Kempf. I am pleased to say that as of today 87 law firms and corporate law departments have signed on to the Statement.
The Statement incorporates the fundamental objectives of prior statements while particularly emphasizing retention and promotion, and defining diversity as an inclusive concept, encompassing not only gender, race and ethnicity, but all traditionally underrepresented groups. An essential part of the program is to attempt to find the reasons and some solutions for the significant drop off in retention and to collect annual statistics from signatories, in order to help them track their progress. In addition, to enable the Association to assist signatories in implementing the goals of the Statement, we are creating an Office of Diversity here at the Association. We are in the process of securing funding and staffing for the office.

Earlier this month, we hosted a highly successful overflow event for the members of the signatory firms and organizations, to bring them together to discuss ideas and begin to build a foundation from which the signatories can address the objectives of the diversity principles. I know this is one of Betsy’s priorities and I am sure Betsy will provide tremendous leadership as this effort goes forward.

We have had a terrific roster of speakers at the Association over the past two years, including Supreme Court Justices Breyer and Ginsburg, Mayor Bloomberg and other major City officials, Eliot Spitzer, the Chief Justice of Canada (Beverley McLachlin), Anthony Lewis and, on many occasions, our own Chief Judge Kaye. This is all in addition to the distinguished speakers that participate in our over 100 public programs a year.

Many of these programs are designed to assist lawyers and potential lawyers in thinking through career options. In fact, we provide career-oriented programs throughout the professional life cycle [“from law school to retirement”]:

- we provide summer work experience to inner-City high school students with law firms and other legal employers, along with seminars on law school and law as a career;
- several programs each year are targeted to law students, advising them of opportunities in different fields and how to network and get started on a career;
- in the past year, we presented career-oriented programs for new lawyers, lawyers looking to move laterally, lawyers seeking nontraditional legal jobs and career options outside of law, and lawyers over 30;
- each year we present a program on legal opportunities for lawyers facing retirement.
The financial well being of our Association has been a matter requiring our scrutiny and attention. It has become a priority.

We are no different from other investors who face the uncertainties of financial markets. We have been required to take a number of steps to insure that our financial health, reflected in modest surpluses in the past two fiscal years, improves. Our membership base is strong, as are our complementary income streams generated by our Meeting Services and CLE and the Legal Referral Service. Retaining new advisors for our investment strategy will allow us to do everything possible to maximize the return on our investments. In addition, revision of our retirement program will not only improve it but provide greater predictability of future Association costs. And finally, an increase in dues was a difficult step to take, but it was responsible and necessary.

Speaking of CLE, this past year, we presented over 150 CLE programs, ranging from basic Bridge-the-Gap programs to day-long programs providing comprehensive information in specialized areas. You can come to our programs in person, watch video replays, buy audio or videotapes, or catch them online. We owe thanks to Burt Lipshie, chair of our CLE Committee, and Michelle Schwartz-Clement, Director of the CityBar CLE Center, for developing a first-rate operation.

Our Library remains a model institution, and this year our Director, Richard Tuske, has added a circulation library. Members can borrow any of our materials for two days for a modest fee, instead of running over in the middle of a work day to look something up. Of course, you are always welcome in the Library, and when you come you can take advantage of the free Lexis and Westlaw we provide here.

Before I pass the baton to Betsy, I want to say a few thank yous. First, I have been fortunate in having, during my tenure, two supportive and active Executive Committee Chairs. Laurie Berke-Weiss and Mark Cunha. They have brought the executive committee to life and have guided it through difficult and sensitive problems with great skill and grace and have provided me with wise counsel.

Helaine Barnett, our diligent Treasurer, has risen to the challenge we faced in difficult financial times. She is a very precise, orderly and tenacious Treasurer—just perfect—and all while holding down the Presidency of the Legal Services Corporation in Washington.

The one and only Maria (Pro Bono) Imperial, the Executive Director of our City Bar Fund. She has created the national model, in providing pro bono legal service, in co-ordinating legal services efforts among different organizations and in developing projects to better support our dedicated volunteers.
Carol Rosenbaum, our conscientious, penny pinching, and very hard working CFO, who has been instrumental (I hope without slight of hand) in keeping us in the black. And believe me, it was close.

Nick Marricco, who, as Director of Meeting Services, not only has kept me well fed, but has significantly raised the gourmet level of our food service, all while smoothly running over 3,000 meetings and events a year.

Jayne Bigelsen, who serves both as our Legislative Director and Communications Director. Whatever Jane does she does with infectious enthusiasm, skill and honesty and with a commitment to our mission.

Chief Judge Judith Kaye, you can well imagine what a schedule she has, yet whenever we ask her to pitch in, she is there. And she elevates all our proceedings with her great warmth, intellect and her wit.

Alan Rothstein is the consummate lawyer’s lawyer. Loyal, discrete and skilled at his trade. He is never a small person and is the reservoir of our history. And he does it all with a delightful sense of humor. And it is such a delight to see so many high-powered partners being obedient to Alan.

And Barbara Berger Opotowsky, she carries the Association on her shoulders with an infectious cheerfulness. A CEO with both talent and style and no matter what, she maintains our equilibrium and makes things better.

I want to thank my partners at Pillsbury Winthrop for their patience and support over the last two years.

And thanks to my wife Helen, for making these past two years, and everything else, even more worthwhile and meaningful.

I want to thank the chairs and committee members of our Association who by their work have perpetuated the great worldwide reputation the Association has. And I want to thank our members, who have given me the greatest honor a lawyer can have—being President of this wonderful Association.

And now I am proud and particularly delighted to turn over my office to Betsy Plevan. Betsy is our President because of her demonstrated skills and talents, and because of her enormous contributions to our profession and this Association. For our Association alone, she has chaired four committees, served on six more, served on our Executive Committee, three times on our Nominating Committee and represented us as our delegate on the ABA House of Delegates.

I have known Betsy and worked with her for many years. Betsy is great, and she will be a terrific President.
President’s Inaugural Address
Annual Meeting of the Association

Bettina B. Plevan

Thank you Leo for that generous introduction and for all you have done for the Association and its members over the last two years. Thank you also for being so generous with your time and open to me in the last two months, allowing me to get my feet wet so to speak in the activities of the Association. We are all indebted to Leo for his attentiveness to many issues relating to the operations of the association as well as the important substantive areas such as judicial selection, diversity, the war on terrorism, international human rights and many more.

I am also grateful already for the support and guidance from my two new partners, Alan Rothstein and Barbara Opotowsky, with whom I have spent a great deal of time in the last few months and who I know will guide me and hopefully keep me out of trouble in the two years ahead.

This is an exciting day for me and I am fortunate that so many members of my family could be here. I want to particularly acknowledge my mother, a life-long activist. The phrase “high energy” could have been invented for her; my brother Stephen and sister-in-law Carol flew in from Wisconsin; my children, Bill and his wife Sara, and my younger son, Jeffrey, came from the upper west side but it is important to me they are here. Bill and Jeff heard a lot about the Bar Association all of their childhood. They really enjoyed the trips we took when I was a delegate from
this Association to the ABA House of Delegates, and now as adults have come to appreciate the substantive work we do as well. And finally, there is Ken. He did not just tolerate my outside activities—he was supportive and enthusiastic, even though it often meant increased parental burdens for him. And he didn’t even complain when I told him that this year the Annual Meeting would be held on his 60th birthday.

I have worked with many former presidents of the Association, both here and in other organizations, including the three who are here and I know that I will continue to benefit from their sage advice.

There are however two former presidents who I want to thank, in particular my partner, Bob Kaufman, who could not be here tonight, and my former partner, Mike Cardozo. I’d like to tell the story of what I’ll call the Bar Association genealogy of the three of us because I believe it is instructive about what it means to be a mentor in encouraging public service by members of the private bar.

Thirty-five years ago, in 1969, Bob Kaufman became the Chair of the Civil Rights committee of the Association. At that time, as now, it was customary for the chair (then called chairman) to select a junior lawyer from his or her firm to act as the secretary of the committee. Being the secretary was often a great opportunity not only to do the detail work like scheduling meetings and preparing minutes, but also to participate in activities that might not otherwise be available to a junior lawyer. Bob had the good sense to select Michael Cardozo as his secretary.

Six years later when Michael became chair of the Committee on State Courts of Superior Jurisdiction, he asked me to be the secretary of the committee and, as they say, the rest is history. Mike and I were also encouraged in these activities by our partner, George Gallantz, who chaired the Executive Committee in 1974-75.

I am truly privileged to be part of a law firm that values a commitment to public service that enables me to assume this responsibility. I want to thank all my partners, especially our chair, Alan Jaffe, who does more than his share of public service work, and his predecessors Stanley Komaroff and Ed Silver, and the many others who have encouraged and supported my outside activities for many years. I also want to thank my colleagues, both senior and junior, especially those in the labor and employment group, who will be shouldering some additional responsibilities during the next two years. They have already given generously of their time and volunteered to help in whatever way they can. So I want to say publicly how much it means to me that you are all willing to do that.
We continue to need more young lawyers participating in our public service activities. That means we need more senior members of the bar to encourage their juniors in the direction of the bar Association and other similar public service activities.

In the spirit of expanding the public service activities of New York lawyers, one of my objectives as president will be to engage in outreach to increase the participation of our 22,000 members in the work of the Association so that we have a more active membership generally. I hope to encourage more people to serve on our many committees or to become active in other ways such as our pro bono legal services programs, our public service network, volunteer work with schools, even our entertainment programs and in other ways. I will try to improve our communications so they are both relevant and interesting. We have already made some changes in the 44th Street Notes along these lines by providing more information about the Association activities of the previous month. I expect to engage in many other forms of outreach, visiting with many parts of the legal community in New York, including law firms, corporate law departments, government and other organizations and law schools in an effort to identify areas where we can work together and to build support for public service activities and the initiatives on my agenda.

* * *

The first area that I intend to focus on is the enhancement of diversity in the profession. I believe we are at a critical moment in that endeavor. Under Leo’s leadership, and with the assistance of several committees of the Association including, in particular, the committee to Enhance Diversity in the Profession, chaired by Don Kempf, we have already made important strides. We have developed a statement of diversity principles that is broader in scope than prior initiatives and incorporates important objectives relating to retention and promotion. The statement has already been signed by almost 90 law firms and corporate law departments who, I should add, are committed to promoting change within the firms they select as outside counsel.

The task before us is to ensure that the goals and principles in this statement become a reality. We know from past experience, and the statistics confirm, that success will not come easily and that our good intentions are not enough. Our law firms, corporate law departments and other legal institutions need to devote considerable time and resources to this endeavor. I intend to focus a great deal of my time, together with our
staff, including our new office of diversity, to help ensure our success in this area. We will try to do this by monitoring progress, providing guidance on programs and policies that work (or don't), organizing group meetings for the free exchange of ideas and general cheerleading. We had a wonderful diversity event here on May 7, attended by several hundred lawyers and staff, and are already working on the next phase. I am confident that if we all work together on this important issue we will succeed.

* * *

Another important area of my focus will be pro bono legal services, again not a surprise given my activity in this area over the years. I feel really fortunate to be in a position of leadership that will enable me to make a contribution in this area. We have many fine pro bono legal services programs in the city, including those sponsored by our own Association through the City Bar Fund. The City Bar Fund staff now runs legal services programs in the areas of immigration, family matters (especially matrimonial), health (cancer treatment), housing, and small businesses, relying extensively on our volunteer members. The Association would do well and have reason to be proud if all we did was continue these programs in full force. But we can and should do more.

I have already taken the opportunity to discuss pro bono initiatives with many of our committee chairs and I have been amazed at the many possibilities for our committees to become involved in this endeavor (and many of them certainly already are in their particular fields of specialty).

There is an increased level of involvement of our state courts, thanks to the leadership of Chief Judge Kaye and Judge Juanita Bing Newton. Judge Newton is the deputy chief administrative judge for justice initiatives. Under her leadership OCA has organized conferences around the state, conducted surveys and issued a report in January of this past year entitled the future of pro bono in New York.

The January 2004 report summarized statistics about the amount and type of pro bono work performed by lawyers in the state. I found the results disappointing. In 2002 only 46 percent of New York State attorneys (41.3 percent in city) performed any qualifying pro bono work. Only 27 percent performed more than 20 hours of work, the goal that had been set in a resolution of the administrative board of the courts. Perhaps even more disturbing is the fact that this percentage and the hours reflect no increase at all over the fourteen years since the last survey was conducted, even though these numbers are from the year 2002, which is post 9/11.
There is, of course, a tremendous unmet need for legal services in the city in all parts of our society and there is always a client—indeed hundreds of clients—in need for whom legal services are not available. We must continue to advocate for government funding to ensure that this need is met, but in the meantime there is a lot more we can do. Our job is to identify ways in which we can tap into our abundant resources to persuade more of you to provide services yourselves, to contribute financially to that effort and to help establish partnerships with legal services organizations including, of course, the City Bar Fund. Again, with your help we will do better.

* * *

Another area that I believe requires attention and focus may be more aspirational and theoretical than the others I have mentioned because it relates to our role as lawyers. The business community has weathered a tremendous upheaval as a result of many corporate scandals that have plagued us and hindered our economic growth. There has been a reaction to that conduct both in the regulatory arena and within many companies where compliance has a new and enhanced importance, as it should. But I don’t think we have yet spent enough time asking the question: “where were the lawyers?” I do not by any means think it is useful literally to pursue that question in particular cases or particular matters. I do think however, it will be useful to explore issues of corporate governance and the role of lawyers in guiding corporate America on issues of compliance and related subjects. I believe that these issues cut across many lines of professional responsibility, ethics, corporate law and the like. Therefore, I plan to create a task force that will address these issues in a meaningful and serious way and in a way that will provide guidance for those who are involved in this area of professional activity.

* * *

I think what I have outlined is probably more than enough to keep me busy for the next two years. But I also know that there will be many other issues that will arise unexpectedly as they did for all of my predecessors and that will require my immediate attention and action. Many of these issues will surface through the hard work done by our 170 committees, which are the backbone of the Association.

There can be no better example of this type of activity than our work
on the many issues that have arisen in the context of the war on terrorism and that you have heard about in Leo’s talk. Although it is hard to anticipate the future of the “War on Terrorism,” I can assure you that our commitment to the rule of law will remain firm.

Thank you for the opportunity you have given me to lead this great organization. I will do my best to serve the bedrock principles we hold dear, working with the others we have selected as our leaders to analyze issues, speak out as advocates and take action.
Northern Ireland: A Report by a Mission of the Committee on International Human Rights

By Gerald P. Conroy, Fiona Doherty, Sam Scott Miller, Marny Requa, Barbara Paul Robinson and Sidney H. Stein

I. INTRODUCTION

A. Background

The Committee on International Human Rights of The Association of the Bar of the City of New York (“ABCNY”) has been periodically monitoring adherence to international human rights standards in Northern Ireland for the past 17 years. As part of this work, the Committee sponsored missions to Northern Ireland in 1987 and 1998 to examine issues
surrounding the administration of justice. We covered the criminal justice system, the use of emergency laws and, in the 1998 mission, the implementation of the Good Friday Agreement.

The Committee undertook a third mission in May 2003 to continue our dialogue with practitioners and officials in Northern Ireland regarding ongoing efforts to reform the criminal justice system. The mission examined issues pertaining to the Justice (Northern Ireland) Act 2002 (“Justice Act 2002”); the transformation of the public prosecution service; new procedures for judicial appointments; human rights training; compliance with the European Convention on Human Rights; the intimidation of defense lawyers; and the status of the investigations into the murders of lawyers Patrick Finucane and Rosemary Nelson.

Remarkable changes have occurred in Northern Ireland over the past 17 years. Members of our 1987 mission found Belfast a divided city, symbolized by military check points surrounding the city center and signs of violence in many neighborhoods. In contrast, the 1998 mission “encountered a growing sense of optimism” among those interviewed—due in large part to the signing of the Good Friday Agreement on April 10, 1998, and its subsequent ratification by voters in Northern Ireland and the Republic of Ireland on May 22, 1998. The Agreement affirmed the parties’ commitment to “the civil rights and the religious liberties of everyone in the community,” along with certain internationally recognized civil and political rights.


and called upon those in authority to pledge to “serve all the people in Northern Ireland equally.”\textsuperscript{4} The Agreement contemplated the establishment of a new Northern Ireland Human Rights Commission and a new Equality Commission, along with two other important bodies: a Policing Commission to recommend reforms in the Northern Ireland police force (subsequently known as the “Patten Commission,” after its chair, Chris Patten), and a Criminal Justice Review Body to recommend reforms in the criminal justice system.\textsuperscript{5}

In the wake of our 2003 mission, which included three members of the 1998 mission, the Committee is even more hopeful about the prospects for lasting peace in Northern Ireland. In the five years since our last visit, there has been a transformation of public life in Belfast. Gone are heavily armed police in armored vehicles; gone are boarded-up windows and empty streets. In their place are new glass-walled buildings—with many others under construction—vibrant restaurants and a bustling street life in the center of Belfast.

The last five years have also been marked by significant political change. Local administrative powers were devolved from the British government to the Northern Ireland Assembly in December 1999, as outlined in the Good Friday Agreement. The Assembly, composed of 108 elected members, has full legislative and executive authority over all matters devolved from Westminster. To carry out its executive functions, the Assembly elects a First Minister and Deputy First Minister, who stand for election jointly and can only be selected with cross-community support. The First and Deputy First Ministers lead an Executive Committee of Ministers, who are appointed by the individual political parties in proportion to their relative showings in the Assembly elections.

Despite the pivotal roles of the Assembly and the Executive, they have been suspended four times in the past four years—twice for only 24 hours—in periods of political instability. The local government is in fact currently suspended and has been since October 2002. During suspension, the Secretary of State for Northern Ireland, the head of the British government’s Northern Ireland Office (“NIO”), assumes responsibility for the administrative activities of the Executive.

The suspensions represent steps backward and are frustrating, considering the wide-spread public support for the Assembly and the flour-

\textsuperscript{4} Id. Strand One, Democratic Institutions in Northern Ireland, Annex A, Pledge of Office at (c).

\textsuperscript{5} Id. Rights, Safeguards and Equality of Opportunity, Human Rights ¶¶ 5-6; Policing and Justice ¶ 3, ¶ 5.
ishing civil society in Northern Ireland. Despite local support for devolution, however, elections held on November 26, 2003, signaled a polarized electorate, with the anti-Agreement Democratic Unionist Party (“DUP”) gaining seats from the Ulster Unionist Party (“UUP”) and, on the nationalist side, the moderate Social Democratic and Labour Party (“SDLP”) losing seats to Sinn Fein. Although negotiations among local political leaders and the governments of Ireland and the United Kingdom are ongoing, it is unclear how long the suspension of the Executive and the Assembly might continue, considering that the DUP has said it will not share power with Sinn Fein. A review of the Good Friday Agreement by the British and Irish governments, in which the Northern Ireland political parties were participating, began on February 3, 2004.

It is important to note that the devolution of administrative powers is distinct from the devolution of criminal justice. The Good Friday Agreement envisioned local governance over health, education, social services, local budgets, agriculture, and development. Regarding devolution of policing and justice issues, the Agreement was hopeful but noncommittal, stating that the British government was “ready in principle” to devolve these areas with the “broad support of the political parties” and after consultation with the Irish government. In practical terms, this means that in order to devolve justice issues, the Assembly must be reinstated, the British government must commit to a local institutional model with responsibility for justice and policing, and it must authorize devolution to that institution.

6. An article in The New York Times published shortly after the suspension of the Assembly described the people in Northern Ireland as frustrated with the political impasse but confident that the violence of the past would not return. Some of those interviewed said the public had moved ahead of the politicians in trusting the peace process. Warren Hoge, The Troubles in Ulster Shift from Street to the Assembly, NEW YORK TIMES, Oct. 14, 2002.

7. The term “unionist” refers to those whose goal is to maintain Northern Ireland’s unity with the United Kingdom. “Loyalists” are also loyal to the British Crown, but there is an implication that at least some of them would support the use of physical force for that political goal. “Nationalist” generally refers to those who desire a reunification of Ireland. “Republicans” also have a united Ireland as their main goal, but historically the term implies the support by some of their members of physical force to achieve that end.

8. The scope of the review is itself being debated. The DUP would like to renegotiate the Agreement, while the other parties have called for a limited review.


10. As described below, the British government has committed to devolve justice issues within the lifetime of the next Assembly, which has a term of five years once the winners of the November 26, 2003, elections take office. See section III(B)(1), “The Joint Declaration.”
We are dismayed that the local power-sharing government is suspended, because in addition to other concerns, certain criminal justice reforms depend on the devolution of both administrative and criminal justice powers. We hope all involved will ensure that restoration occurs at the earliest date feasible.

B. Focus of the 2003 Mission

In the 2003 mission, our Committee concentrated on the current state of the criminal justice system and the debate surrounding devolution of criminal justice to the local government. Although the new Police Service of Northern Ireland ("PSNI") is unquestionably part of the criminal justice system, the Patten Commission’s report on policing was carried out separately from the Criminal Justice Review, which evaluated all other criminal justice agencies and made recommendations for reform. We decided to focus predominantly on the latter reforms as the Patten Commission’s recommendations were generally consistent with our earlier recommendations and, in comparison, little international attention has been given to the Criminal Justice Review.

During the mission, we found considerable consensus on the shortcomings of the criminal justice system as well as on the steps required to remedy these shortcomings. Most individuals we met with emphasized that political issues should not be used to forestall the implementation of reforms, as they often have been in Northern Ireland. Indeed, one of the greatest frustrations, repeatedly expressed, was with the slow pace of the implementation process. Although we recognize that it is not a simple task to overhaul government structures while dealing with the legacies of a divided society, we agree that the implementation of the reforms has been unnecessarily and repeatedly delayed. Heartened by the changes that have been instituted to date, however, we believe that the promise of the Criminal Justice Review can and should be fully honored.

Many of those we spoke with believed it was necessary to address the violence of the past and unsolved deaths on both sides of the political divide, in a way that does not jeopardize future stability. From this perspective, reforms to the criminal justice system are one aspect of a larger goal—to ensure a just society for everyone in Northern Ireland and find a way to address divisions of the past and the pain that endures, while strengthening participation in public life.

A central goal of our Committee is to maintain a dialogue with lawyers and officials in Northern Ireland and elsewhere, in order to promote respect for and compliance with human rights norms throughout the
world. As we in the United States struggle with the challenges terrorism poses to our own human rights values, we have repeatedly urged our government to ensure that measures taken to increase security do not compromise the rights of the accused, recognizing that we all lose if we disregard the fundamental protections central to our constitutional system. While our Committee has come to better understand the tension between security and liberty in light of our own experiences, we also recognize that the experience in Northern Ireland is unique and we have tried to keep Northern Ireland’s distinct history in mind when making recommendations.

The delegates on our May 2003 mission interviewed a long list of individuals with specialized knowledge of Northern Ireland’s criminal justice system in a series of meetings in Belfast, London, and New York. We met with officials from the Northern Ireland Office, the Office of the Director of Public Prosecutions, the Northern Ireland Court Service, the Police Service of Northern Ireland, the Northern Ireland Human Rights Commis-

---

11. The ABCNY has argued against civil liberties restrictions and potential human rights violations by the federal government in furtherance of the “war on terrorism.” See, e.g., Brief for Amicus Curiae Association of the Bar of the City of New York in Support of Jose Padilla (ABCNY), July 29, 2003 (arguing that the government’s assertion of its right to detain Padilla indefinitely, without charge or process, is both unlawful and unprecedented, and that Padilla has a fundamental and undeniable interest in the assistance of counsel); Committee on Immigration and Nationality Law, Letter to Immigration and Naturalization Service, re: INS No. 2171-01 Custody Procedures, 66 Fed. Reg. 48334 (ABCNY), Sept. 20, 2001 (protesting interim rule that would extend the time in which the INS must make a determination in the event of an arrest without warrant); Committee on Military Affairs and Justice, Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent? Report on The President’s Military Order of November 13, 2001 (ABCNY), Dec. 2001 (criticizing the military order establishing military commissions); Committee on Communications and Media Law, The Press and the Public’s First Amendment Right of Access to Terrorism on Trial: A Position Paper (ABCNY), Feb. 2002 (urging that trials of suspected terrorists be made accessible to the media and the public, citing historic precedent); Committee on Professional Responsibility, Statement Regarding the United States Department of Justice Final Rule Allowing “Eavesdropping” on Lawyer/Client Conversations (ABCNY), March 2002 (arguing that the federal rule allowing the Attorney General to authorize eavesdropping on attorney/client communications upon a finding of “reasonable suspicion” of “terrorism” strikes at the core of the adversarial system of justice); and Committee on Military Affairs and Justice, Letter to Department of Defense Re: Enemy Prisoners of War and Other Detainees (ABCNY), Apr. 18, 2003 (urging that Guantánamo detainees be afforded the right to a formal determination of their status). See generally ABCNY, 57 THE RECORD No. 1-2 (Winter/Spring 2002). The ABCNY also served as a signatory on Brief of Amici Curiae Bipartisan Coalition of National and International Non-Governmental Organizations in Support of Petitioners, Rasul v. Bush and Odah v. U.S., 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 124 S. Ct. 534 (Nov. 10, 2003) (arguing that jurisdiction of U.S. courts over Guantánamo detainees is proper).
sion and the Police Ombudsman’s office, as well as representatives from the Republic of Ireland, academics and legal practitioners. We also met with three non-governmental organizations, each known internationally for its work in promoting human rights protections in Northern Ireland: the Belfast-based Committee on the Administration of Justice (‘CAJ’); the London-based British Irish Rights Watch (‘BIRW’); and the Derry/Londonderry12 based Pat Finucane Center (‘PFC’).13

During previous ABCNY missions, our delegates did not meet with representatives of Northern Ireland’s political parties. In light of the political developments since our last visit, we thought it would be beneficial to discuss criminal justice issues with the parties that were elected to participate in the now suspended Assembly and will share responsibility for justice issues if and when devolution occurs. In that vein, we met with the justice spokespeople for many of the political parties in Northern Ireland.14 We are respectful of the role local political parties continue to play in the peace process, the devolved government, and strengthening local institutions.

II. EXECUTIVE SUMMARY

A. Summary

The Committee on International Human Rights of the Association of the Bar of the City of New York sponsored a mission to Northern Ireland in May 2003. This mission, which focused on ongoing efforts to reform Northern Ireland’s criminal justice system, followed up on the Committee’s two previous missions to Northern Ireland, in 1987 and 1998 respectively. The 2003 mission examined issues pertaining to the Justice Act 2002; the transformation of the public prosecution service; new procedures for judicial appointments; human rights training; compliance with the European Convention on Human Rights; the intimidation of defense

12. Although the official name of the city is Londonderry, the city council changed its name to the “Derry City Council” in 1984. Nationalists refer to the city as Derry, while Loyalists generally refer to it as Londonderry, and local politicians are seeking to have Parliament officially change the name to Derry.

13. For a full list of individuals interviewed during the mission, see Appendix A.

14. Unfortunately, we were unable to meet with members of the two main unionist parties, the Democratic Unionist Party (“DUP”) and the Ulster Unionist Party (“UUP”). The DUP declined to meet with us, although it subsequently agreed to meet with us in New York, and the UUP cancelled a scheduled interview. We researched the policy positions of both parties and met with representatives of the leading nationalist, republican, and cross-community parties.
lawyers; and the investigations into the murders of lawyers Patrick Finucane and Rosemary Nelson.

While we were impressed by the significant changes that have occurred in the five years since our last mission to Northern Ireland—a flourishing civil society, the establishment of the new Policing Service, and the growth of domestic human rights jurisprudence, to name a few—it was frustrating to find that five years after the Good Friday Agreement and three years after the Criminal Justice Review, numerous agreed-upon reforms had not been fully implemented or in some cases even initiated. Planned changes to the prosecution service and the judicial appointments process, which could do much to engender public confidence in the criminal justice system, are two examples of reforms that are only now coming about.

The Committee feels strongly that political issues should not be used to forestall the implementation of reforms, as they often have been in Northern Ireland. With the reduction in violence and diminishing need for a heavily armed security presence, delays that once may have been practical necessity now seem more like political leveraging. Although we recognize that it is not a simple task to overhaul government structures while dealing with the legacies of a divided society, we agree with many of our interviewees that the implementation of the reforms has been unnecessarily held back.

One exception to this has been the reform of Northern Ireland’s policing service. International and local scrutiny ensured that policing reforms—such as the establishment of the Police Ombudsman’s office, the appointment of an Oversight Commissioner, and the drafting of new human rights codes—happened relatively quickly, with opportunity for public consultation and debate on significant issues. Although the process has not been without shortcomings, the pace and transparency of policing reforms has been striking in comparison to reforms of other criminal justice agencies.

For example, the Office of the Director of Public Prosecutions is only now implementing the process of creating its own successor agency, the Public Prosecution Service (“PPS”) for Northern Ireland. The PPS will be phased in gradually over the next three years. It will prosecute all crimes (currently lesser offense are prosecuted by police officers), and its caseload is expected to grow to 75,000 cases from the 10,000 cases currently handled by the Office of the DPP. The number of lawyers in the office will increase from 40 to 150.

Although hiring has already begun—there were 70 lawyers on staff by the time of our visit—information about recruitment and hiring has
not been made public and the prosecution office has yet to publish even a draft of a promised code of conduct for the service. The slow pace of reform was cited by many we met with as a source of frustration, as was the lack of transparency in the reform efforts to date.

It will take time to complete the far-reaching changes contemplated for the PPS, and we recognize the importance of gradual increases in staff, offices, and caseload. We do not see any obstacles, however, to initiating some of the reforms immediately, particularly those that improve transparency, accountability, and public confidence. These include public consultation on codes of ethics and practice, issuing annual reports, speeding up the introduction of an independent complaints mechanism, and publishing information about the hiring process and staff demographics.

In another example, we are concerned by the government’s failure to implement several important judgments of the European Court of Human Rights that directly impact Northern Ireland’s criminal justice system. The European Court has criticized the prosecution service and other criminal justice agencies in a number of recent cases, finding violations of the right to life because of the government’s failure to properly investigate the state’s use of lethal force. As most of these cases stem from incidents that occurred in the 1970s, the European Court was rightly concerned about delays in investigation and prosecution. Since the judgments, the government has not re-investigated any of the cases or enacted legislation to address the shortfalls signaled in the decisions. This delay further undermines any investigation that the state may be able to conduct.

A related concern is the lack of progress in resolving the cases of Patrick Finucane and Rosemary Nelson, two Northern Ireland solicitors murdered in 1989 and 1999 respectively. Both solicitors represented defendants arrested under Northern Ireland’s emergency laws, and both of their cases involve allegations that members of the security forces assisted in the killings. A four-year police investigation of the Finucane case was completed last year. A short public summary of the investigation report made clear that members of the security forces had indeed colluded in Finucane’s murder, but the full report, which also documents obstruction of the investigation itself, has not yet been published. In the Nelson case, almost five years after her death, the police investigation is still ongoing, although there have been no prosecutions. A former soldier and police informer are reportedly among the primary suspects.

In January 2004, a judge appointed to review the evidence of collusion in the Finucane and Nelson cases made clear that he had recommended public inquiries into both cases in October 2003. The U.K. gov-
ernment had yet to act on the recommendations, however. We are deeply frustrated with these delays and continue to call on the government to establish immediate public inquiries in these two cases.

Many of those we spoke with believe it is necessary to address the violence of the past and the large number of unsolved killings on both sides of the political divide, in a way that does not jeopardize future stability. From this perspective, reforms to the criminal justice system are one aspect of a larger goal—to ensure a just society for everyone in Northern Ireland and find a way to address divisions of the past and the pain that endures, while strengthening participation in public life. We recognize that traditional criminal investigations many years after deaths present difficulties in terms of cost, delay, and preservation of evidence, and may not be realistic options in many of the cases. We call on the Law Society and Bar Council to help propose alternative means of seeking justice in these cases and, in general, would like to encourage public dialogue on possible options.

It is important to note that, despite incomplete reform of individual criminal justice agencies, there has been progress in the system’s regard for human rights in recent years. In addition to policing reform and the review of the criminal justice system, the adoption of the U.K.-wide Human Rights Act incorporating the European Convention on Human Rights into domestic law, and civic activism on criminal justice issues have contributed to increased awareness and compliance with human rights norms. Furthermore, shortly following our return from Belfast, publication of an updated Criminal Justice Review Implementation Plan, together with detailed plans and timetables for the continuing implementation process and the subsequent Justice Bill 2003 marked movement toward implementation of the criminal justice aspects of the Good Friday Agreement. Given this recent progress, we have confidence that promised reforms will be carried out. We believe they must be, if the criminal justice system is to become a cornerstone of a peaceful Northern Ireland society.

While the heads of individual agencies have a great deal of control over the speed and depth of reforms, ultimate responsibility for these agencies rests at the ministerial level: the Northern Ireland Secretary of State, the highest official in the Northern Ireland Office, has general responsibility for criminal justice and policing matters in Northern Ireland; the Attorney General for the United Kingdom oversees the Director of Public Prosecutions; and the United Kingdom’s Lord Chancellor is responsible for the Northern Ireland Court Service, management of the courts, and judicial appointments. We believe that it is the duty both of agency per-
sonnel and of ministerial figures to ensure that promises made in the Good Friday Agreement are fully realized, and we call on them to do so.

B. Committee on International Human Rights Central Recommendations

Overview of the Criminal Justice Reform Process

- It is discouraging to discover that five years after the Good Friday Agreement, reform in the prosecution service, judicial appointments process, and other criminal justice areas has just begun to be implemented and lags far behind policing reforms. Overall we welcome the substance of the reforms recommended in the March 2000 Criminal Justice Review, but are concerned by this delay and the reported lack of transparency in the process.

- Likewise, the long-delayed appointment of an Oversight Commissioner is welcomed as it signifies an important step toward meaningful change. We recommend that this post be grounded in statute, believing that this would increase the public accountability of the Oversight Commissioner's office and help ensure that he receives full cooperation from the criminal justice agencies he is overseeing. We also believe the office should be provided sufficient resources.

- Regarding devolution, we believe that local control over criminal justice and policing is a laudable and obtainable goal that will help address human rights concerns. We take no position on the best institutional model for local control, but we strongly believe that there should be public consultation on devolution options. It would be best to start this process right away, so that once the Assembly is reinstated, devolution of criminal justice can occur with minimal delay. (Most of the reforms we discuss in this report, however, are not dependent on devolution.)

- We were pleased that the Justice Bill 2003 was finally issued, but we recommend it be amended before it is enacted to require criminal justice agencies to have due regard to international human rights standards, as promised in the Implementation Plan 2003, and recommend that it codify the powers and duties of the Justice Oversight Commissioner. (Additional desirable amendments to the bill are proposed in the Judiciary and Police Ombudsman sections of our report.)

The Incorporation of International Human Rights Law

- Human rights law is given significantly more weight in Northern Ireland five years after the Good Friday Agreement: it is on the
government agenda and that of the Law Society, the Bar Council, and criminal justice agencies, and it is invoked in domestic case law and lobbying efforts by nongovernmental organizations and political parties.

- We would encourage lawyers and judges to further develop Northern Ireland’s jurisprudence under the European Convention—a powerful tool in defending rights—in domestic cases. In addition, we recommend that all judges, prosecutors, lawyers, and law students be trained in human rights law and that such curricula be evaluated by the Northern Ireland Human Rights Commission.

- Recent decisions by the European Court of Human Rights pointed to longstanding weaknesses in the Northern Ireland criminal justice system. To comply with these judgments, the government should properly investigate the cases in question and amend its regulations and procedures to prevent future violations. Relevant reforms would include implementing procedures for the investigation of the use of force by security personnel, as well as allegations of security-force collusion with paramilitaries; ensuring that these investigations are independent from the forces implicated and conducted expeditiously; updating and monitoring the inquest system; and establishing guidelines for the giving of reasons for the failure to prosecute. We strongly urge the government to address the European Court judgments in a more cohesive and comprehensive manner.

The Prosecution Function

- We support the creation of the PPS, and measures that will require the PPS to prosecute all crimes. Although we realize that these significant changes cannot take place overnight, we regret that the reforms were only recently initiated and will be introduced over the course of three years. We recommend that the timetable of reforms be accelerated where feasible and that the implementation of reforms be a top priority.

- Publishing a code of ethics should also be a high priority for the office of the DPP, and we regret that it has been delayed. At this stage, we recommend publishing a draft code for public comment forthwith.

- Reform efforts have only recently been publicized, and it is difficult to know what changes have been made to date and what steps have been taken to prepare prosecutors for the new service. Publication of a prosecution-specific implementation
plan and a detailed timetable could help to address public concerns. (The 2003 Implementation Plan sets out only general markers for reform to the prosecution service.) We strongly urge the Office of the DPP to issue a detailed annual report next year in order to publicize the status of its reform efforts.

- In general, the Office of the DPP should maintain a higher level of transparency during the reform process than it has to date. There is no need to wait for devolution or full implementation of the PPS to inform the public of prosecution reforms via regular reports, timetables, and a website.
- We recommend that the Northern Ireland Human Rights Commission monitor and lend its expertise in the human rights training of prosecutors.
- The Office of the DPP should publish information about the composition of the prosecution staff and support equality monitoring of the recruitment process. It should ensure that new hires are reflective of society in Northern Ireland and should aim to hire at all levels of the service.
- The recommendation made in the Criminal Justice Review regarding a diversion program for youthful offenders warrants high priority by the DPP as it will enhance public confidence in the prosecutor’s office.
- Regarding the DPP’s giving of reasons in controversial cases, we believe that the presumption should be shifted toward giving reasons for not prosecuting and that the Office of the DPP should clarify its policy in this regard.

**The Judiciary**

- The appointment of the Commissioner for Judicial Appointments was a step forward, despite the Commissioner’s limited authority.
- We welcome the recent news that the Judicial Appointments Commission will be established prior to devolution, and believe it should be established expeditiously, as should the final procedures for its operation.
- Before the JAC is established, we recommend the Court Service of Northern Ireland accept the recommendations of the Commissioner for Judicial Appointments regarding reform of the current process.
- New criminal justice legislation (the Justice Bill 2003) provides that both legal and lay members on the JAC will be appointed with a view toward making the JAC as reflective of the commu-
nity as possible. We welcomed this aspect of the legislation, believing a commission whose members are reflective of Northern Ireland society as a whole will most easily gain the confidence of the entire community in its recommendations.

- We were discouraged, however, that the bill only provides that the Prime Minister would take into consideration the recommendation of the local First Minister and Deputy First Minister in appointing the Lord Chief Justice and Lord Justices of Appeals. We recommend that such appointments be made “based on” the recommendation of the local ministers, as proposed in the 2003 Plan.

- We strongly urge the JAC to engage in active outreach to the community in seeking qualified members, and we urge the requirement of ten years’ service as a barrister or solicitor for High Court appointments and seven years’ service for County Court appointments not to be retained.

- We believe that every effort should be made to appoint qualified women to the bench and to ensure that the applicant pool is representative of all segments of society.

*The Police and Police Ombudsman*

- We are heartened by the numerous and significant reforms made to the policing service in the last five years: the establishment of the PSNI and a generally representative Policing Board; human rights training of officers and the publication of a police code of ethics that relies on the European Convention on Human Rights; and the closing of special detention facilities. We also commend the PSNI for instituting the audiotaping of police interrogations.

- We were disheartened to hear that there continue to be complaints about police treatment of residents of working class areas, as well as reports that Catholics who join the PSNI have been intimidated by members of dissident republican groups. Great effort should be made to improve confidence in the policing service and ensure that every community has a voice in ongoing reforms to the PSNI.

- We recommend that training of current PSNI officers and staff in constitutional and human rights issues be expanded beyond the current two-day course. In addition, human rights training of PSNI personnel should be routinely evaluated.

- We recommend that all police misconduct (including non-criminal conduct subject to disciplinary action) should be re-
ferred to the Police Ombudsman to ensure independent scrutiny of the evidence. We recommend the government consider amending the Justice Bill 2003 to limit the Office of the DPP discretion in making referrals. Such a reform would be more in line with the language of the new Implementation Plan. We also believe that sufficient resources should be allocated to the office to support the increased caseload and to handle investigations into past cases which were recently reinstigated.

- We were relieved to learn that police harassment of lawyers was less of a concern for defense lawyers today than it was five years ago, but even the small percentage of lawyers who are still harassed is unsettling. We recommend that the Police Ombudsman’s office investigate such complaints aggressively and that it continue to survey lawyers concerning their experience with police, consulting with the Human Rights Commission and others as appropriate on methodology. We also recommend that it regularly publicize its availability to barristers and solicitors throughout Northern Ireland so they will come to the Ombudsman’s office in case of intimidation.

- We believe the Police Ombudsman’s office should maintain consistent communication with complainants, police officers, and their representatives regarding pending cases.

Emergency Powers and Interrogation

- While we were pleased that in the years since our last visit, Diplock Courts—non-jury, single-judge trials—have been utilized less often, we strongly recommend they be eliminated and we repeat our past calls to do so.

- We believe that emergency measures, now codified in the Terrorism Act 2000, are unnecessary and should be revoked. The Act significantly widens the definition of terrorism, and in a special section relating only to Northern Ireland, extends the use of non-jury Diplock Courts and the authority to conduct warrantless arrests and searches and seizures. The Terrorism Act also allows for 48-hour detentions without access to counsel. We recommend the repeal of these provisions.

- The Northern Ireland Office should publish clear statistics on past and present use of Diplock Courts.

The Patrick Finucane and Rosemary Nelson Cases

- We continue to believe that public inquiries are necessary in these cases, and we are discouraged that almost five years after
Rosemary Nelson’s death and 15 years after Pat Finucane’s, the cases are unresolved and public inquiries have not been held.

- We urge the government to publish Judge Peter Cory’s reports on these and other cases forthwith and move quickly to establish public inquiries. We also recommend it publish the full Stevens III report.

**The Law Society and Bar Council**

- We commend the Law Society and Bar Council for its role in calling for a public inquiry in the Finucane case, and urge them to remain vocal on his case as well as the case of Rosemary Nelson.

- We welcome the increasing number of women in the legal profession, but would like to see more women and people from other underrepresented communities become Queen’s Counsel.

- We encourage members of the Law Society and Bar Council to play an even stronger role and to speak publicly on issues such as judicial appointments, reform of the prosecution system and police service, support of the Police Ombudsman, and greater regard for human rights in Northern Ireland.

- Regarding human rights training, we believe the legal organizations should have a greater role in insuring that these programs include appropriate materials and encouraging their members and law students to attend human rights-focused training sessions. We also believe that both groups should help to educate the public on these issues.

- We call upon the Law Society and the Bar Council to help propose alternatives to criminal investigations regarding unsolved deaths from the violent years of the conflict, in order to help bring a sense of justice and closure to these many unsolved cases.

---

**III. AN OVERVIEW OF THE CRIMINAL JUSTICE REFORM PROCESS**

**A. The Criminal Justice Review and the Justice (NI) Act 2002**

The Criminal Justice Review Group was established on June 27, 1998, under the auspices of the Good Friday Agreement, which called for “a wide-ranging review” of the criminal justice system.\(^\text{15}\) The Review Group—composed of four government representatives and five independent experts—

---

\(^{15}\) This phrase does not refer to emergency legislation or policing. Review of emergency powers was excluded from the Review’s mandate and policing was considered separately in the Good Friday Agreement.
was to recommend specific reforms to increase accountability, equity, and efficiency within the system. The members of the Group were also to consider the possibility of devolving criminal justice powers from the British government to the local Northern Ireland Assembly. After almost two years of research, consultation, and evaluation, the Review Group published a report, *the Review of the Criminal Justice System in Northern Ireland* ("the Review"), with 294 recommendations in March 2000.

In November 2001, the British government published its Implementation Plan and a draft Justice (Northern Ireland) Bill in response to the Review. The Bill, which received Royal Assent in July 2002 and became the Justice Act 2002, codified aspects of the Implementation Plan. The Act’s provisions did not, however, take immediate effect. Many were contingent on the devolution of criminal justice powers—although the Act established no timetable for devolution. Among the reform provisions that would have to await devolution were the establishment of a post for a new Northern Ireland-specific Attorney General and the establishment of a Judicial Appointments Commission to ensure a more representative judiciary, as recommended in the Review.

The Implementation Plan also made clear that the individual criminal justice agencies were to carry out independently the reform measures that did not require further legislation. The Plan supported human rights training for all criminal justice personnel, for example, but left it to the specific agencies to decide when and how to carry out that training. Human rights organizations criticized the Implementation Plan for not contemplating a mechanism for overseeing the proposed changes, for not laying out a timetable for their implementation, and for not ensuring transparency in the process.

Indeed, although our mission occurred more than three years after the publication of the Review’s recommendations, it seemed that criminal justice agencies had only just begun to initiate significant reforms. Those reforms that had been implemented within the prosecution service and other agencies were not being systematically monitored or publicized, making it hard to give credit where credit might well have been due. Happily, at the time of our trip, the British government was interviewing for the post

of an Oversight Commissioner to oversee the implementation of the criminal justice reforms. (The Justice Oversight Commissioner was appointed in July and is to play a role similar to that of the Oversight Commissioner for Policing Reform, who was appointed in May 2000 to oversee the implementation of the Patten reforms.) The appointment of a Justice Oversight Commissioner earlier in the process could have helped to address problems of transparency and delay, and pushed the justice reform process forward.\textsuperscript{18}

Our Committee welcomed the substance of the reforms recommended in the March 2000 Review and we continue to believe that they will significantly enhance justice and accountability in Northern Ireland if fully implemented. Nonetheless, the members of our 2003 mission were disappointed to discover that five years after the Good Friday Agreement, reform in the prosecution service, judicial appointments process, and other criminal justice agencies is really just beginning and has lagged far behind the policing reforms. Nonetheless, we can report some positive recent developments in the next section.

\textbf{B. Recent Developments in Criminal Justice}

\textit{1. The Joint Declaration}

In a Joint Declaration published in April 2003, the British and Irish governments laid out a series of proposals intended to realize more fully the promises made in the Good Friday Agreement. The Declaration announced that the British government would introduce a second Criminal Justice bill to speed up the creation of a Judicial Appointments Commission and to “make further provision to promote a human rights culture in the criminal justice system.”\textsuperscript{19} The Declaration also made clear that the government “accepted the desirability of devolving policing and justice” within the lifetime of the next Northern Ireland Assembly, as long as this was done with the broad support of Northern Ireland’s political parties.\textsuperscript{20} The Declaration did not specify which responsibilities would be devolved, but it did make clear that the British government would retain control over issues such as the armed forces and national security.

In order to pave the way for devolution, the Declaration also proposed four possible models for the local administration of devolved jus-

\textsuperscript{18} See subsection III(B)(3), “Justice Oversight Commissioner.”

\textsuperscript{19} Joint Declaration by the British and Irish Governments April 2003 (“Joint Declaration”), ¶ 24 (May 2003).

\textsuperscript{20} Id. ¶ 20.
tice powers: (1) the creation of a single justice department headed by one minister; (2) the creation of a single justice department headed by two ministers, in order to “strengthen cross-community accountability”21 by requiring both ministers, presumably from different parties, to agree on decision-making; (3) handing over responsibility for criminal justice matters to the Office of the First and Deputy First Ministers;22 and (4) the creation of two separate departments, for example policing and justice, headed by ministers from different communities.23 These potential models raise questions about the relationships that will exist between the ministers in charge of the department(s) as well as the relationships between these officials and the local executive, the judiciary, the Attorney General, and policing officials.

We believe that local control over criminal justice and policing is a laudable and obtainable goal that will help to address human rights concerns about the current system. Although we take no position on the best institutional model for local control, we strongly believe that there should be public consultation on devolution options and a transparent evaluation of them. This process should be started right away, so that once the Assembly is reinstated, devolution of criminal justice can occur with minimal delay.

2. Updated Implementation Plan and New Legislation

A further positive development, which occurred shortly after our mission, was the June 2003 publication of an updated Criminal Justice Implementation Plan. The 2003 Plan significantly revised the 2001 Implementation Plan and set out a timetable for previously agreed-upon reforms. Most importantly, the new Plan committed the government to introducing new Criminal Justice legislation.

On July 2, 2003, shortly after the issuance of the updated Plan, the Irish and British governments published a timetable for the implementation of the governments’ new short-term commitments.24 The timetable included:


22. The First Minister and Deputy First Minister are the top executive positions in the Assembly, “elected into office by the Assembly voting on a cross-community basis.” Good Friday Agreement, Strand One, Democratic Institutions in Northern Ireland ¶¶ 14-15.


• Introduction of the new Criminal Justice bill in the fall of 2003;
• Launching of the new Public Prosecution Service in December 2003, to be phased in over three years;25
• Publication of statements of ethics by criminal justice agencies by the end of 2003;26 and
• A review by a (not then appointed) Oversight Commissioner in December 2003, with a report to be published in January 2004.

The new Criminal Justice bill (“Justice Bill 2003”) was finally introduced in December 2003 and is expected to become law, after revisions, in the spring or summer of 2004. It will make the following changes to the Justice Act 2002:

• The Judicial Appointments Commission (“JAC”) will be established prior to devolution, with a key objective being to secure a judiciary in Northern Ireland that is reflective of society, consistent with merit requirements.27 Both the lay and legal membership of the JAC will be required to be reflective of society, insofar as possible.28
• The Prime Minister will appoint the Lord Chief Justice and Lord Justices of Appeals taking into consideration the recommendation made by the local First Minister and Deputy First Minister, and the JAC will advise the ministers on the procedure for these appointments.29 In contrast, the 2003 Plan had promised that such appointments would be made “based on” the recommendation of the local leaders,30 and the government

26. As of February 2004, the statement of ethics for the prosecution service had not been published.
30. 2003 Implementation Plan at 57.
has not provided an explanation for this shift in weight. We recommend that the language of the 2003 Plan be implemented instead, giving local ministers more influence in the appointments process.

- Criminal justice agencies must have regard to guidance issued by the Attorney General for Northern Ireland regarding “the exercise of their functions in a manner consistent with international human rights standards.”\(^{31}\) The 2003 Plan had been more straightforward, committing the government to include a provision in the new bill whereby criminal justice agencies would have due regard to human rights standards.\(^{32}\) We recommend use of the Plan’s language. Also, in the proposed legislation, it was not clear if the referral to the “Attorney General for Northern Ireland” meant that the provision would await devolution and the appointment of that post, or if the current Attorney General for the United Kingdom would issue the guidance. This point should be clarified before the bill is enacted.

- The Director of Public Prosecutions for Northern Ireland (“DPP”) shall refer to the Police Ombudsman matters that appear to the DPP to indicate that a police officer “may have committed a criminal offence; or may, in the course of a criminal investigation, have behaved in a manner which would justify disciplinary proceedings” unless the Ombudsman is already aware of the issue.\(^{33}\)

Our Committee welcomes this revised legislation. Its provisions more closely reflect the Criminal Justice Review team’s recommendations than did the Justice Act 2002. As noted above, however, there are significant discrepancies between the new bill and the commitments made in the 2003 Plan. For all of the matters cited, we believe the promises made in the 2003 Plan are the better course of action, and we urge that the bill be so amended.

3. Justice Oversight Commissioner

The British government agreed to appoint an Oversight Commissioner to monitor criminal justice reforms in late 2002 and filled the post on July 18, 2003, with the appointment of Lord Clyde, a former Scottish law

\(^{31}\) Justice Bill 2003 § 8.

\(^{32}\) 2003 Implementation Plan at 11.

\(^{33}\) Justice Bill 2003 § 6(3).
lord. Despite the long delay in establishing this post, we welcome the appointment and believe it signifies an important step toward meaningful change. As previously mentioned, we believe that the appointment of the Oversight Commissioner provides an opportunity not only to monitor progress, but also to push forward the implementation of reform, and we encourage Lord Clyde to work proactively with the criminal justice agencies to increase the pace of reform. In this regard, it is important that Lord Clyde review the provisions of the new Justice Bill.

We also recommend that the government codify the powers and duties of the Oversight Commissioner in statute and ensure that the office is sufficiently resourced in light of the scope and importance of the job. Grounding the powers in statute would create the same standing for the Justice Oversight Commissioner as is given to the parallel Oversight Commissioner for Policing. Providing the Commissioner with a statutory mandate would increase the public accountability of his office and help ensure that he receives full cooperation from the criminal justice agencies he is overseeing. We recommend that these provisions be added to the Justice Bill 2003 before it is enacted.

IV. THE INCORPORATION OF INTERNATIONAL HUMAN RIGHTS LAW

A. Background of the Human Rights Act

The reform of the criminal justice system can only be properly understood against the backdrop of broader developments in human rights law and practice over the past few years. In the Good Friday Agreement, the British government pledged to complete the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”) into Northern Ireland’s domestic legal system. The government fulfilled this commitment when it enacted the 1998 Human Rights Act (“HRA”), which applies across the United Kingdom and came into force in October 2000. The HRA incorporated most of the provisions of the European Convention, but it did not incorporate Article 13, which requires national governments to provide an “ef-
fective remedy” for violations of Convention rights. As a result, those who don’t obtain what they or the European Court of Human Rights (“European Court”) would consider to be an effective remedy after a domestic trial must still apply to the European Court for a determination of relief.

The HRA allows individuals to file suit in domestic courts for the enforcement of Convention rights and allows domestic courts to review legislation for compatibility with the Convention. As public authorities, courts cannot “act incompatibly” with the Convention. Although the judgments of the European Court are not binding on them, domestic courts must take them into account in their own decisions. Before the enactment of the HRA, domestic courts did not recognize the Convention. Individuals in the United Kingdom could enforce their Convention rights only by filing suit before the European Court in Strasbourg, a step possible only after they had exhausted all their domestic remedies.

Although it is not yet common for judges in Northern Ireland to invoke the Convention independently, the use of the Human Rights Act has increased over time and courts are increasingly incorporating its provisions into domestic case law. The government has also encouraged the training of judges, prosecutors, and lawyers in human rights law. It is an exciting development that Northern Ireland’s legal community is increasingly relying on human rights law, and that these rights are on the agenda of the government, the Law Society, the Bar Council, and criminal justice agencies. We hope that lawyers and judges will work to further develop Northern Ireland’s jurisprudence under the European Convention—a powerful tool in defending rights—in domestic cases.

**B. Influence of the European Convention on Criminal Justice**

Indeed, the European Convention has already exerted a strong influ-

36. Article 13 of the European Convention provides that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” Under the U.K.’s Human Rights Act (“HRA”), upon a finding of a violation, a court “may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.” Human Rights Act 1998 (“HRA”), c. 42, § 8(1) (enacted Oct. 2, 2000).

37. Legislation can be read to avoid violation of a Convention right, or courts can make a declaration that a statute is incompatible with the Convention. HRA § 3-4.

38. Id. ¶ 6.

39. Currently judicial training is conducted in-house, and the curriculum is not public. Human rights training of prosecutors and other lawyers is dealt with elsewhere in this report.
ence on the Northern Ireland criminal justice system. In May 2001, the European Court found that the British government had violated Article 2 of the European Convention (the right to life) by failing to investigate properly the state’s use of lethal force in four important cases: *Kelly v. U.K.*, *Jordan v. U.K.*, *McKerr v. U.K.*, and *Shanaghan v. U.K.*\(^{40}\) In these cases, the Court found that the investigations lacked the requisite independence from the forces under investigation, were characterized by unnecessary delays in gathering evidence, suffered from problematic inquest procedures,\(^{41}\) and were hampered by the prosecutor’s refusal to give reasons for failure to prosecute. In *Shanaghan*, the European Court also found that allegations of collusion between members of the security forces and loyalist paramilitaries had not been adequately investigated. Similar findings under Article 2 were issued in two subsequent cases, *McShane v. U.K.* (May 28, 2002) and *Finucane v. U.K.* (July 1, 2003).\(^{42}\) A recent House of Lords decision, relying on *Jordan* et al, incorporated into domestic law the right to an effective investigation of a death resulting from either the use of force by state agents or the negligence of state officials.\(^{43}\)

To comply with these judgments, the government must properly investigate the cases in question and amend its regulations and procedures to prevent future violations. Relevant reforms would include implementing procedures for the investigation of the use of force by security personnel, as well as allegations of security-force collusion with paramilitaries; ensuring that these investigations are independent from the forces implicated and conducted expeditiously; updating and monitoring the inquest procedures; and reforming the inquest system.


\(^{41}\) In the United Kingdom, inquests are public hearings conducted by coroners in order to ascertain, certify, and conduct preliminary investigations into the cause of deaths. We decided against investigating the inquest system—a subject unto itself—in order to focus on other aspects of the criminal justice system. It is important to note, however, that the inquest system in Northern Ireland has been criticized by human rights groups, families of victims, as well as the European Court. In lieu of criminal proceedings, an inquest may be the only opportunity for the families of victims to have access to information about their deaths. The government is currently conducting a review of the inquest system throughout the U.K., in anticipation of reform.


system; and establishing guidelines for the giving of reasons for the failure to prosecute.

The cases mentioned have yet to be re-investigated, and the Committee of Ministers of the Council of Europe, which supervises the execution of European Court judgments, has yet to verify that the United Kingdom has taken adequate measures in these cases. Even so, the European Court’s decisions have already helped shape some of the most important criminal justice reforms. As a result of the 2001 decisions, for example, the U.K. Attorney General, Lord Goldsmith, was questioned in Parliament about the policy of the DPP on the giving of reasons for non-prosecution in controversial cases. Lord Goldsmith replied that the criminal justice reform process would “meet the concerns” of the European Court. He announced that the following policy would be followed:

The policy of the [DPP] ... is to refrain from giving reasons other than in the most general terms. The Director recognises that the propriety of applying the general practice must be examined and reviewed in every case where a request for the provision of detailed reasons is made. ... [In light of the European Court cases,] there may be [exceptional] cases in the future ... where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is, or may have been, occasioned by the conduct of agents of the State. Subject to compelling grounds for not giving reasons, including his duties under the Human Rights Act 1998, the Director accepts that in such cases it will be in the public interest to reassure a concerned public, including the families of victims, that the rule of law has been respected by the provision of a reasonable explanation. The Director will reach his decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case.  

44. The government has not re-opened the cases, arguing that much time has passed since the deaths occurred and investigations would be extremely difficult. In contrast, the claimants believe that the government must investigate the cases in order to comply with the judgments. Claimants in the Jordan and McKerr cases have brought judicial reviews against different government entities in the aftermath of the European Court rulings. These cases are currently working their way through the domestic court system. The House of Lords is also expected to issue a decision on retroactivity of the HRA in the McKerr case; the government argued that McKerr is not entitled to an effective investigation because the HRA was not in force at the time of his death. See also footnote 57 of this report.

45. 631 PARL. DEB., H.L., Part No. 98, WA 259-260 (Mar. 1, 2002).
We address the DPP’s policy on the giving of reasons for non-prosecutions more thoroughly in the next section of this report, where we argue that there should be a new presumption toward the giving of reasons in controversial cases.

As a general matter, however, we believe that the government should address the European Court judgments in a more cohesive and comprehensive manner. We recognize the difficulties that arise in investigating cases in which the evidence may be very old, but believe that, considering the seriousness of the cases, the government should re-open the investigations to the greatest extent possible, in order to comply with Article 2 of the Convention. We regret that the government has not yet initiated investigations in any of the cases or enacted legislation to address the shortfalls identified by the decisions. We urge the government to do so without further delay.

V. THE PROSECUTION FUNCTION

A. A New Public Prosecution Service

The Office of the DPP is in the process of creating its own successor agency, the Public Prosecution Service (“PPS”) for Northern Ireland, as recommended by the Review and approved in the 2001 and 2003 Implementation Plans. The new service will be phased in gradually, and will completely replace the Office of the DPP by 2006.46

Currently, the Office of the DPP reports to the Attorney General for the United Kingdom. After devolution of criminal justice, an Attorney General responsible solely for Northern Ireland is to be appointed by the First Minister and Deputy First Minister of the Northern Ireland Assembly. The chief prosecutor and deputy chief prosecutor of the planned PPS will be appointed by the new Northern Ireland Attorney General.

The creation of the PPS coincides with the adoption of another significant recommendation of the Review: All crimes are to be prosecuted by the new service. Currently, lesser offenses are prosecuted by police officers. This reform will help ensure that the investigation and arrest of each criminal suspect receives review independent of the PSNI. It also removes a potential for conflict of interest by placing responsibility for arrest and prosecution decisions within separate entities. Furthermore,

47. 2003 Implementation Plan at 30.
under the new agency, PPS lawyers will intervene in each case between the time of arrest and a suspect’s initial court appearance. This welcome development ensures earlier scrutiny of arrest charges by lawyers trained in human rights and criminal law.

The ABCNY’s 1999 Report recommended that in cases involving serious crimes, prosecutors should be involved to assist the police at the investigation stage. The PSNI and the Office of the DPP have differing views on this point. The police favor assigning officers to PPS offices and also believe that this would assist in speedier disposition of cases. The Office of the DPP voiced caution concerning association with the police, and opposes “co-location” of prosecutors in police stations, which it believes could compromise public support for the prosecution service because of historic distrust of the police in many communities.

The Review recommended a diversion program for juveniles, a further enhancement of prosecutorial discretion. The program is comparable to policies in state and federal prosecutors’ offices in the United States, and allows the prosecutor to dismiss lower-level charges against first-time juvenile offenders who comply with specific conditions. This will enable a youthful offender who complies with the conditions to avoid a criminal record and its stigma. The Office of the DPP has yet to implement this recommendation. It warrants high priority as it will enhance public confidence in the prosecutor’s office.

Because of the shift in prosecution responsibilities from the police to professional lawyers, the PPS’s caseload is expected to increase to 75,000 cases from the 10,000 cases currently handled by the Office of the DPP. The number of lawyers on the prosecutor’s staff will increase accordingly, from 40 to 150. (Seventy lawyers were on staff by the time of our visit.)

Newly hired lawyers for the PPS undergo six months of training, including courses in human rights law. According to the DPP, veteran staff lawyers also receive training in human rights law and ethics. An official of the Northern Ireland Human Rights Commission (“NIHRC”) said that

48. The PSNI is planning to establish organized crime task forces, including lawyers, independent of the Office of the DPP / PPS.
50. The Northern Ireland Human Rights Commission, established in the Northern Ireland Act 1998 which codified elements of the Good Friday Agreement, is charged with reviewing the “adequacy and effectiveness … of law and practice relating to the protection of human rights,” advising the Secretary of State and the Assembly on human rights protection, and promoting
he is “reasonably satisfied” with the human rights training described to him by the Office of the DPP. However, the Commission would prefer that it be allowed to monitor the training.

The new PPS will be located in five regional offices throughout Northern Ireland, in addition to its Belfast office, which has been the sole location of the Office of the DPP.

The PPS pilot scheme began in South Belfast in December 2003. The five regional offices were to be opened one at a time through 2006.

Although the establishment of the PPS is not dependent on devolution of criminal justice, as are some reforms recommended by the Review, the pace of implementation appears slow, especially when compared to the establishment of the PSNI. The Office of the DPP has defended this gradual approach. Its officials emphasize that the creation of the PPS is a large undertaking in a divided society and that the government only has “one shot to get it right.” According to Sir Alasdair Fraser, the DPP, the Crown Prosecution Service in England—which also shifted responsibility for minor offenses from the police to the prosecutor—was introduced too rapidly, with terrible administrative consequences. By using South Belfast as a pilot project for planning the structure of the regional PPS offices, the DPP hopes to “tease out” problems before they might affect the entire service.

While it is wise to conduct reforms at a gradual pace, we regret that the process is only now being initiated. The Office of the DPP should ensure that the implementation of reforms is its top priority. Given that most reforms in the prosecution service are not dependent on devolution, they should not be slowed in any way by political considerations. Where feasible, we strongly recommend that the timetable of reforms be accelerated.

The Office of the DPP was to publish a draft code of ethics and a draft code of practice for the new PPS in December 2003; as of February 2004, neither of the codes had been announced. The government’s 2003 Implementation Plan promised that “these draft Codes will be revised and developed during the course of the pilot scheme and publication will follow the experience of the scheme.” The DPP informed us that the draft ethics code is based on procedures of the International Association


52. 2003 Implementation Plan at 18-19.
of Prosecutors and the “human rights community,” an approach we very much welcome. As it currently stands, the code may not be final until after the completion of the pilot scheme in 2006.53 (In contrast, the PSNI published a final code of ethics in February 2003.) We are frustrated that the Office of the DPP has not yet published the draft code and that its intended timetable for a final code is so protracted. In the short term, publishing the draft code of ethics for public comment would be a positive step toward furthering public awareness of the prosecution service reforms.

B. Transparency and Accountability

An overarching concern, expressed by many, was a lack of transparency in the reform efforts to date. We discovered that even those most engaged in the criminal justice debates lacked any real sense of what exactly the Office of the DPP was doing—including the experts who had served as independent members of the Criminal Justice Review. The lack of a detailed public prosecution implementation plan was of particular concern.

In this vein, we believe the Office of the DPP should issue an annual report next year in order to publicize the status of its reform efforts. The Justice Act 2002 requires the Director of the new PPS to prepare a report after the end of each financial year.54 The current office has indicated it will not publish a report until transition to the PPS is complete—December 2006 at the earliest. This restrictive interpretation of the requirement undermines the office’s efforts to be more open and publicly accountable and to address public concerns about the process.

As the Alliance Party, the largest cross-community political party, emphasized in its response to the Criminal Justice Review, “[i]t is most important that in a deeply divided society like Northern Ireland, fairness and independence of the prosecution should not only exist but be clearly seen to exist.”55 The human rights groups and many of the political party representatives told us that by failing to expose the current reform efforts to public view, the Office of the DPP had missed this central point. Many also expressed concern that the retention of senior DPP officials in the new PPS undermined the Review Group’s promise of “a fresh start.” In contrast to the PSNI and other criminal justice bodies, the Office of the DPP has not replaced top personnel or introduced new officials to augment the existing leadership.

53. Id.
We believe that these concerns make it even more critical that the implementation of the prosecution reforms be as transparent as possible. We see no need to wait for devolution or full implementation of the PPS to inform the public of prosecution reforms via regular reports, timetables, and a website. Allowing the Northern Ireland Human Rights Commission to monitor and lend its expertise in the human rights training of prosecutors would also help to gain critical community support.

The Office of the DPP did hold a public meeting several months after our mission. As part of this meeting, the DPP distributed a short explanation of key reforms and provided a timeline for some of its activities. These kinds of public initiatives will help build confidence in the system and should be considered an important part of the reform process. They should be repeated often throughout the implementation period, reaching as wide an audience as possible. We commend the Office of the DPP for holding this public event and hope that this and future events will help respond to the frustration expressed by many of those we interviewed in Belfast regarding the lack of transparency in the reform process.

To address concerns about staffing, the Office of the DPP should also publish information about the composition of the prosecution staff and support equality monitoring of the recruitment process. Although a significant number of new staff members have been hired, the hiring process has not received public scrutiny. Circulating information about hiring efforts could aid in attracting lawyers from under-represented sectors of society and those with backgrounds in criminal defense and human rights law. We urge the DPP to take these steps and believe the newly appointed Oversight Commissioner, Lord Clyde, could play a role in monitoring the office’s hiring to ensure that it is as open and competitive as possible. Aside from the transparency aspect of recruiting, the Office of the DPP should ensure that new hires are reflective of society in Northern Ireland and should aim to hire at all levels to signal a substantively new service.

It will take time to complete the far-reaching changes contemplated for the PPS, and we recognize the importance of gradual increases in staff, offices, and caseload. We do not see any obstacles, however, to initiating some of the reforms immediately, particularly those that improve transparency, accountability, and public confidence. These include holding a public consultation on codes of ethics, issuing annual reports, speeding up the introduction of an independent complaints mechanism (which is being developed in conjunction with other office reforms), and publishing demographic information about current staff members.
C. The giving of reasons for non-prosecution

The British government rejected a recommendation by the Criminal Justice Review concerning public statements by the DPP in instances where controversial crimes are not prosecuted. The Review recommended that in such cases, the presumption should shift towards the giving of reasons for non-prosecution to those with a proper interest in the case, if this can be done without harming the interests of justice or the public interest. We agree with the Review, which described the proposal as “an important accountability issue.”

The policy set out in the 2003 Implementation Plan mirrors that outlined by the Attorney General, Lord Goldsmith, in March 2002, as discussed in Section IV(B). In response to Shanaghan v. U.K. (a 2001 European Court decision which criticized the policy that the DPP would continue to refrain from giving reasons for declining to prosecute), Lord Goldsmith allowed that exceptions may be made in the future in instances in which a victim’s death may have been occasioned by agents of the state, leaving it to the DPP to weigh the public interest considerations in each case. The DPP advised us that he has not had occasion to apply this policy since it was announced by the Attorney General. Notably, the DPP has not subsequently provided explanations in any of the cases in which the

57. In Jordan v. U.K., a case released at the same time as Shanaghan, the European Court found that the circumstances of the death of Pearse Jordan, who was killed by a police officer, “cried out for an explanation,” and that although the DPP is not required to give reasons in every case, in controversial cases it may be necessary to foster public confidence and provide information to the family of the victim in order to comply with Article 2 of the European Convention. In this case, the victim’s right to life was violated in part because of the DPP’s failure to give reasons. Jordan v. U.K., 2001 Eur. Ct. H.R. 24746/94, ¶¶ 122-124, 142-145. (According to this and other cases, the right to life, set out in Article 2 of the Convention, requires an effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the state. Id. ¶ 105 (citing McCann v. U.K., 21 Eur. H.R. Rep. 97 ¶ 161 (1996) and Kaya v. Turkey, 28 Eur. H.R. Rep. 1 (1999) (decided 1998))). Jordan’s family subsequently sought judicial review in domestic court of the DPP’s decision not to give reasons, and Justice Brian Kerr found that the DPP would have been required to give reasons for his decisions not to prosecute in this case but for the timing of the DPP’s action: when he made the decisions in 1993 and 1995, the HRA was not yet enacted and it is not retroactive. In re Jordan, [2003] NIQB 1 (June 2003). The decision is currently being appealed. (On retroactivity, an English Court of Appeal recently found that Article 2 applied in the case of a death that occurred prior to the enactment of the HRA, because of the fundamental nature of the right to life. R. (on the application of Khan) v. Sec’y of State for Health, 4 All E.R. 1239 (2003), ¶¶ 83-85. See also footnote 44 of this report.)
European Court criticized his office for not giving reasons for decisions not to prosecute. Although the 2003 Implementation Plan promised that the government would continue to develop its position on this issue, it did not provide any guidelines for doing so.

We recognize that in some cases, articulating reasons for non-prosecution may taint persons not charged with any offense, or compromise subsequent efforts by the police and prosecutors to charge those responsible for a crime. However, in the past, the non-prosecution of soldiers or police officers who were involved in controversial killings deepened community mistrust of the Office of the DPP, and of criminal justice in general. While the giving of reasons will not be appropriate in all cases, we believe that the presumption should be shifted toward giving reasons and that the Office of the DPP should clarify its policy in this regard, particularly for controversial cases.

VI. THE JUDICIARY

A. Background

In our 1999 Report, the Committee called for greater openness and transparency in the process of selecting judges and urged that efforts be made to involve a broad spectrum of society in that process. The result, we hoped, would be to increase the number of judges from under-represented groups, including women, and to increase the degree of confidence the public has in judicial appointments. Progress has been made since 1999, although certain areas lag behind, especially the selection of women for judicial posts.

The Northern Ireland judiciary continues to deserve considerable credit for its courage and determination to uphold the rule of law under difficult conditions. Judges were targeted and killed because of their official positions during the conflict. There have been no physical attacks on judges since we were last in Northern Ireland, insofar as we could learn. We hope that the day is approaching when judicial officers will not need the protection of armed police officers.

The criminal courts in Northern Ireland are divided between the Crown Court, which presides over indictable offenses, and the County Courts and Magistrate Courts, which hear lesser offenses. Judges of the High Court and the County Court are still appointed by the Queen upon the

58. Crown Court offenses may be heard by High Court judges and County Court judges, as well as the Lord Chief Justice and Lord Justices of Appeal.
recommendation of the Lord Chancellor of the United Kingdom following advice from the Lord Chief Justice of the High Court in Northern Ireland. Barristers and solicitors with 10 years’ practical experience are eligible for appointment to the High Court, but only barristers who are Queen’s Counsel (“QCs”)—senior-ranked barristers—have traditionally been considered. Solicitors or resident magistrates may be appointed to the County Court in certain circumstances; there is a seven-year experience requirement for these posts. Women judges remain rare. In 1999, none of the High Court justices were women; of the 15 judges on the County Court, only one was a woman; and of the 17 magistrate judges only three were women. The comparable figures in 2003 are: no women on the High Court out of a total of eight justices; of 17 judges on the County Court, two are women; of four district judges, two are women; and of the current 19 magistrate judges, three are women, resulting in a net gain of three women in the judiciary.

Traditionally, the process for judicial appointments in Northern Ireland was cloaked in mystery. It reportedly involved the Lord Chief Justice consulting with his judicial colleagues and select barristers before arriving at his advice for appointments to the bench. In our 1999 report, we criticized this veiled process, concluding that the process would be more credible if there were more openness, public participation, and accountability. We suggested that a nominating commission, such as that used in New York State in connection with appointments to the New York Court of Appeals, would allow for greater public participation without compromising quality. We suggested that such a commission should include lawyers and non-lawyers and represent a broad spectrum of society. We felt that by actively soliciting applications from a variety of sources, checking references, and interviewing leading candidates, the commission would help ensure that attorneys of diverse backgrounds were given full consideration for appointment. We also suggested that statistical reporting in which the need for confidentiality was respected would increase transparency and public accountability.

B. The Commissioner for Judicial Appointments

We were, accordingly, heartened when the Criminal Justice Review

59. District judges hear certain civil cases within County Courts.

recommended a similar mechanism—a new Judicial Appointments Commission ("JAC"), discussed in detail below. But until the JAC was up and running, the Review recommended that the government appoint an individual as Commissioner for Judicial Appointments to oversee and monitor the fairness of the existing appointments system.61 Happily, the government did make this appointment.

The first Commissioner for Judicial Appointments, John Simpson, took office in January 2002. He was appointed for a five-year term that runs until December 2006, subject to review when the JAC comes into existence. The Judicial Appointments Commissioner audits the current procedures for appointing judges and QCs and handles complaints that may arise out of the application of those procedures. Indeed, Commissioner Simpson informed us that he had monitored the eight judicial appointments made in the year prior to our visit. He also has the power to recommend changes to those procedures to the Lord Chancellor, and he publishes an annual report.

Commissioner Simpson’s first report auditing the process, completed in February 2003 and followed by an annual report in October, recommended in part that the Court Service immediately develop an adequate monitoring system for the entire judiciary, that all candidates for appointment should make a formal application, and that the Court Service make a formal commitment to diversity.62 Unfortunately, the Court Service did not unequivocally agree to these recommendations—it agreed to monitor applicants but not the whole judiciary, without specifying a date; it affirmed the requirement of formal applications only up to and including the level of County Court judges (although the Court Service has since followed this procedure for High Court judges); and stated that the recommendation regarding a formal commitment to diversity “requires further consideration.”63 We believe the Court Service should follow Commissioner Simpson’s recommendations on these matters.

The appointment of the Commissioner—who is independent of the judiciary although he reports to the Lord Chancellor—is a salutary step in the direction of increasing transparency in the process of selecting judges and in diversifying the bench. By itself, however, it is insufficient to make significant change possible, since the Commissioner’s authority is limited

61. Review at 413, recommendation 95.
to monitoring and recommending rather than having a direct role in appointing judicial officers or in implementing reforms. For significant change, an active JAC is needed.

C. The Judicial Appointments Commission

We believe that an effective JAC will address the credibility issues identified in our 1999 Report, and very much regret that it has not yet been established. In this regard, we welcome government commitments since May 2003 that the creation of the JAC is to be accelerated and established before devolution. The 2003 Implementation Plan states that the government intends to devolve responsibility for judicial appointments alongside other justice functions.

The 2003 Implementation Plan and the Justice Bill 2003 do contain significant movement toward the implementation of the Review recommendations on judicial appointments. The Bill adopts the position that the power to appoint the Lord Chief Justice and the Lord Justices of Appeal will be vested in the Prime Minister, taking into consideration joint recommendations by the First Minister and Deputy First Minister. We believe that the stronger language included in the 2003 Plan was more appropriate—that the Prime Minister make appointments based on the recommendation of the local ministers—and further believe that the Prime Minister should be required to accept that recommendation. The Justice Bill also states that the government is fully committed to the objective of securing a judiciary that is as reflective of Northern Ireland society, in particular by community background and gender, as can be achieved consistently with the overriding requirement of merit, and requires that the JAC so far as it is reasonably practicable, secure that a range of persons reflective of the community in Northern Ireland is available for consideration.

The Justice Bill 2003 also provides that both legal and lay members on the JAC will be appointed with a view toward making the JAC as

67. 2003 Implementation Plan at 57, recommendation 75. According to the text accompanying the recommendation, “the First Minister and Deputy First Minister acting jointly will make recommendations to the Prime Minister, who in turn will recommend appointments on that basis.”
68. Justice Bill 2003 § 3. See also 2003 Implementation Plan at 54, recommendation 69.
reflective of the community as possible. Although the exact division of positions between legal members (from the judiciary, the Bar, and the Law Society) and lay members has not been decided upon, we take no specific position on that issue, other than to recommend that there be a meaningful degree of lay participation. Most importantly, we believe that a commission whose lay and legal members are reflective of Northern Ireland society as a whole will most easily gain the confidence of the entire community in its recommendations. We strongly recommend that the JAC engage in active outreach to the community in seeking qualified members. We recommend as well that the requirement of ten years’ service as a barrister or solicitor for High Court appointments—and seven years’ service for County Court appointments—not be retained. Every effort should be made to appoint qualified women to the bench, considering the gender imbalance that continues in the Northern Ireland judiciary.

With the new Implementation Plan and Justice Bill 2003, the government has now put its imprimatur on a program of action and outreach to stimulate interest in becoming a judge, especially from sections of the community where historically applications have been disproportionately low, and has announced that the requirements for recruitment to all levels of the bench will not differentiate between barristers and solicitors. We believe the government should move quickly on these reforms, strongly agreeing that the establishment of the JAC should not await the devolution of other justice functions to the Northern Ireland executive. The JAC should be established expeditiously, as should the final procedures for its operation. Political responsibility and accountability for the judicial appointments process can then be transferred to the First Minister and Deputy First Minister after the Northern Ireland Assembly and Executive have been restored.

VII. THE POLICE AND POLICE OMBUDSMAN

A. The New Policing Service

The policing reform process has been the most expansive of the criminal justice reforms since the 1998 ABCNY mission and has received the most

international scrutiny. The Independent Commission on Policing for Northern Ireland—the Patten Commission—was established pursuant to the 1998 Good Friday Agreement. For 15 months this international commission took testimony at public hearings throughout Northern Ireland, and studied the most effective means of reforming the Royal Ulster Constabulary (“RUC”), the composition of which was disproportionately Protestant and Unionist. In response to the Patten Commission’s recommendations, a new police service, the PSNI, was established with a new governing authority, the Northern Ireland Policing Board (“Board”).

The Board, comprised of nineteen members, first met in November 2001. Ten of the Board’s seats are filled by previously elected members of the suspended Northern Ireland Assembly, proportionate to their parties’ representation in the Assembly, with the exception of Sinn Fein members, who have declined to take seats on the Board.70 (This composition has remained in place during the suspension of the Northern Ireland Assembly.71) The remaining nine members of the Board—including the current Chairperson and Vice Chairperson—are selected by the Secretary of State for Northern Ireland following an open competition. Only two Board members are women, and only one is a member of an ethnic minority group.

Operational responsibilities of the PSNI, launched in April 2002, are overseen by the Chief Constable, who reports directly to the Board. In September 2002, the Board appointed Hugh Orde, formerly a lead investigator on the Patrick Finucane case and a former Deputy Assistant Commissioner of the London Metropolitan Police, to this position. The Board conducts at least ten public meetings per year, produces an annual report and, pursuant to the Police (Northern Ireland) Act 2000, publishes a policing plan each year. The plan sets forth annual performance targets for the PSNI and strategic planning for succeeding years. The Chief Constable prepares the plan, which is subject to the approval of the Board and the Secretary of State.

The Patten Commission recommended a code of ethics for police officers, and the Policing Board published the Code of Ethics for the Police Service of Northern Ireland in February 2003.72 The PSNI drafted the eth-

70. Currently, four Board members are representative of the UUP, three of the DUP, and three of the SDLP.
71. When the Assembly was suspended, the Secretary of State re-appointed the incumbent Assembly members of the Board in order to keep it active.
ics code in consultation with human rights groups, including the Northern Ireland Human Rights Commission, as part of a wide consultation exercise. It is modeled on a code promulgated by the International Association of Chief Police Officers. The PSNI ethics code states in its preamble that among its intentions is “to make police officers aware of the rights and obligations arising out of the European Convention on Human Rights.” 73 It cites the Convention and European Court decisions as source authority five times throughout its thirteen pages and specifically directs that “[a]rrest and detention shall only be carried out in accordance with the provisions of Article 3, 5 and 6 of the [Convention], relevant legislation and associated Codes of Practice.” 74 We applaud the PSNI’s emphasis on Convention rights and its interaction with human rights bodies in drafting the code.

The PSNI has also established a two-day training course in ethics, human rights issues, and the new constitutional framework, which the Chief Constable described to us as “unique in the United Kingdom.” It is compulsory for all police officers and civilian staff of the PSNI. The Oversight Commissioner for Policing Reform, a post established in 2000, was supportive of the PSNI’s effort in establishing the training, but criticized it for not being adequate considering the complexity of the topics, particularly in relation to teaching the new constitutional arrangements; for not integrating human rights into all aspects of police training, as recommended by the Patten Commission; and for not providing a plan for the evaluation of the training. 75 CAJ and other groups were disappointed that the PSNI did not consult with outside organizations on the content of the training material. The Northern Ireland Office was in the process of auditing the training program at the time of our visit, but a report on the topic has not been published. We concur with the Oversight Commissioner: two days is insufficient to train law enforcement personnel in a broad range of constitutional and human rights issues.

Members of the Policing Board informed us that the PSNI is on target with respect to the Patten Commission’s recommendations on shifting the composition of the PSNI to better reflect the community. To meet the Patten requirements both to reduce the overall numbers of police and to

73. Id., preamble § (d)(2).
74. Id., art. 5.1. The Code notes that the referenced “Codes of Practice” include the Terrorism Act 2000, which allows detention of certain suspects for up to 48 hours without access to counsel.
ensure a more representative force, incentives were given to encourage the pool of (primarily Protestant) senior police officers to retire. Recruits are appointed from a merit pool on a 50 percent Catholic/50 percent non-Catholic basis. Currently, Catholics constitute 36 percent of applicants to the PSNI, and women constitute 37 percent of applicants. At the start of 2003, Catholic officers made up about 12 percent of the regular PSNI and women about 15 percent. In addition to community background and gender, efforts are being made to address the low numbers of members of ethnic minorities, disabled persons, and other underrepresented groups in the PSNI. While we realize there is still a long way to go before the PSNI is truly representative of Northern Ireland society, we were impressed by the policies of the PSNI leadership and by their recruitment efforts.

Despite improvements in the police service, Sinn Fein, the largest republican political party, has declined to take its allotted seats on the Policing Board. We met with a Sinn Fein representative, who explained that his party believes that the “spirit of the Patten Report has not been lived up to” by the Board and the PSNI. He said that there was no constituent support for his party’s participation on the Board, and that Sinn Fein still views the police as a political institution. Other observers with whom we spoke, not politically affiliated, agreed that there was still distrust of the police in the republican and nationalist communities, but that the new police service was moving in the right direction. The participation of Sinn Fein would, of course, demonstrate and help to institutionalize further community support of policing reforms.

As a general matter, we were discouraged to hear that there continue to be complaints about police treatment of residents of working class areas, as well as by reports that Catholics who join the PSNI have been intimidated by members of dissident republican groups. There have also


78. According to a survey conducted by the Policing Board, 72 percent of the Catholics who were questioned cited fear of intimidation or attacks as reasons that Catholics might be deterred from joining the PSNI. Northern Ireland Policing Board, Community Attitudes Survey 2002, Mar. 19, 2003, at 6. In the same survey, 13 percent of Protestants and 30 percent of Catholics felt that the police did not deal fairly with everyone. Id., table 3.
been attacks on members of the Policing Board and the District Policing Partnerships, who act as police/community liaisons, to try to intimidate them from serving. We deplore such acts and are disheartened by the difficulties they create in the recruiting and reform process. We are cognizant that change—in a policing service and society—cannot happen overnight, but we believe that great effort should be made to improve confidence in the policing service and ensure that every community has a voice in ongoing reforms to the PSNI.

B. The Police Ombudsman

1. Background on Office and Powers

The Office of the Police Ombudsman was still in the planning stages during our last mission to Northern Ireland. This new office investigates complaints of police misconduct brought by the public or at the Ombudsman’s own initiative. The office may make referrals to the Chief Constable or to the Policing Board for disciplinary action, or to the Office of the DPP for criminal prosecution. Nuala O’Loan, who met with members of the 2003 mission, was appointed as the first Police Ombudsman by the Northern Ireland Secretary of State in November 2000. Her office is accountable to the British Parliament through the Secretary of State and is independent of the Policing Board and the Chief Constable of the PSNI.

Many of the officials and practitioners we met in Northern Ireland shared respect for Ombudsman O’Loan as well as a consensus that she had brought credibility to the position. A nationalist elected representative with whom we met described the Police Ombudsman as “very effective—the most effective of all police reforms.” Chief Constable Orde said that the Police Ombudsman has “a good team” of investigators. We are very supportive of Ombudsman O’Loan’s activities and are impressed by the progress of her newly established office.

There has been, however, some political and institutional resistance to the new office. David Trimble, leader of the UUP and the First Minister of the Northern Ireland Assembly before its suspension, called for a “review” of the Police Ombudsman’s office in 2001 to reconsider its powers. Other unionists also called for a review of the office. Reviews that audit and evaluate the effectiveness of a government entity are undertaken as a matter of course at five-year intervals. We can see no reason to accelerate this process during this critical formative period as the Police Ombudsman strives to gain the confidence of a divided community. In what may be a backhanded compliment to the effectiveness of the Police Ombudsman, the office was subjected to three judicial reviews, or lawsuits chal-
lenging its authority. The Police Ombudsman prevailed in all three reviews. The union representing police officers withdrew one such suit on the eve of the initial hearing.

The DPP's office is currently obligated to report evidence of criminal conduct by the police to the Police Ombudsman's office for investigation and referral, as appropriate, for prosecution. The new Justice Bill 2003 directs the Office of the DPP to refer all cases to the Police Ombudsman where it “appears to the Director to indicate” that a police officer “may have committed a criminal offense; or may, in the course of a criminal investigation, have behaved in a manner which would justify disciplinary proceedings.”79 We believe that all police misconduct (including non-criminal conduct subject to disciplinary action) should be referred to the Police Ombudsman to ensure independent scrutiny of the evidence and recommend the government consider amending the Justice Bill 2003 to limit the Office of the DPP's discretion in making referrals. Such a reform would be more in line with the language of the new Implementation Plan.80

Our 1999 report expressed concern that the Police Ombudsman’s office was inadequately funded at three million pounds, or less than half the budget of the investigatory agency it was designed to replace. The office was subsequently funded at seven million pounds, and has a staff of 125, which its director described to us as “adequate.” At the time of our visit, O’Loan said that she had approached the NIO for more resources to investigate a number of past cases, but her request had been denied. BIRW criticized the Ombudsman’s office for delaying investigation of controversial past cases, arguing that she should spread the resources she has among both old and new cases and pointing out that these cases were most at risk of evidence being lost. Recently, the Ombudsman’s office reinstigated investigations into past cases, a development we support. We call on the government to ensure that sufficient resources are allocated to the office to support both this effort and the office’s increased caseload as a result of the Justice Bill.

After returning from Belfast, we were told by human rights groups that some legal representatives of both complainants and police officers

80. 2003 Implementation Plan at 33. According to the text accompanying the recommendation, “[t]he Government has given a commitment to bring forward fresh legislation to place a requirement on the Director to refer to the Police Ombudsman all cases where a member of the police force may have committed an offence or behaved in a manner which would justify disciplinary proceedings.” CAJ has argued that an objective test would be more reliable in referring incidents of misconduct than the subjective language used in the Justice Bill 2003.
had complained about treatment by the Police Ombudsman. Specifically, the office was criticized for not keeping complainants, solicitors, and/or NGOs informed about cases and for objecting to representative attendance at meetings. The Police Ombudsman has stated that it is the policy of the office not to exclude solicitors from meetings. We believe the office should maintain consistent communication with complainants, police officers, and their representatives.

The Ombudsman is currently empowered to investigate active police officers. Because large numbers of police officers have recently retired as part of the Patten process on securing a police force more reflective of the community, the Police Ombudsman’s inability to compel cooperation from these retirees in her investigations of past cases presents a limitation on the office’s investigatory powers in the near term.

2. Survey of Barristers and Solicitors

In a recent publication, released in March 2003, the Police Ombudsman reported on the results of a survey of Northern Ireland barristers and solicitors regarding their treatment by the police.\(^{81}\) Police harassment of criminal lawyers, sometimes in the form of threats communicated via the lawyers’ clients, was a grave concern of the members of the 1998 mission and remains so. According to the Ombudsman’s report, slightly more than half the surveyed lawyers responded. Of those, 55 respondents (3.8 percent of those who responded) said that they had received intimidation, harassment or threats from the police. About 60 percent of those who reported harassment chose not to make a complaint at the time, in many cases because they said they believed that the police would not do anything about the matter. According to the report, the majority of the incidents reported occurred before the establishment of the Police Ombudsman’s office, although dates of incidents were not included in the survey results.

The Police Ombudsman’s office interviewed a sample of the respondents who reported harassment. The five lawyers interviewed characterized the incidents they experienced as relatively minor. They discussed various areas of concern in their interviews and described the incidents of harassment as: (1) defamation of character; (2) delay in access to clients; (3) being treated in the same way as the alleged criminals; and (4) intimidation during interviews.\(^{82}\) Other lawyers who complained of ha-


\(^{82}\) Id. at 7.
rassment in the survey but were not interviewed reported physical threats, sectarian abuse, and threats that officers would pass their information to paramilitary organizations. Although the number of lawyers reporting harassment was low, the majority of those who did so reported three or more incidents, signaling that certain lawyers seem to have been “frequent targets,” according to the study. From past experience, we know this to be true: a small group of lawyers regularly carries out paramilitary defense work in Northern Ireland, and they have been the targeted lawyers.

The NIHRC and other observers have criticized the methodology of the Ombudsman’s report because the dates of the incidents of harassment were not specified in the results, making it difficult to know if the situation improved in recent years. BIRW was also critical of the report, commenting that the nature of the survey underestimated the number of lawyers involved, the depth of the problem, and the effect harassment has had on the legal profession in Belfast.83

Despite these questions on methodology, we were relieved to learn that police intimidation is clearly less of a concern for defense lawyers today than it was five years ago, a finding that correlates with a reduced number of terrorism cases. Most of the respondents to the Ombudsman’s survey said that they viewed “the establishment of the Police Ombudsman’s Office as a positive development... and expected there to be an improvement in the way complaints against the police would be dealt with.”84 We hope the trend away from intimidation by police holds if there is ever any resurgence in terrorism cases, but recent history demonstrates that there must be constant vigilance against police harassment of lawyers. The Office of the Police Ombudsman is the logical agency to investigate such complaints. We recommend that it do so aggressively and that it continue to survey lawyers concerning their experience with the police, consulting with the Human Rights Commission and others as appropriate on methodology. We also recommend that it regularly publicize its availability to barristers and solicitors throughout Northern Ireland so they will come to the Ombudsman’s office in case of intimidation.

83. BIRW, Comments on the Research Conducted by the Police Ombudsman for Northern Ireland into the Treatment of Lawyers by the Police, Apr. 2, 2003. BIRW has conducted its own research on police harassment of lawyers, finding that “almost all lawyers who acted for clients detained under emergency laws came in for abuse from the police,” and that such abuse “has become a thing of the past,” although loyalist paramilitary intimidation of lawyers still occurs. Id.

84. Ombudsman’s report at 7.
VIII. EMERGENCY POWERS AND INTERROGATION

In our 1999 report, we questioned the government’s continued reliance on emergency powers in the wake of the Good Friday Agreement. In particular, we were critical of the Prevention of Terrorism Act 1989 ("PTA"), which entitled the police to detain terrorism suspects for up to seven days without charge and hold them for 48 hours without access to counsel. We were also critical of the continued use of non-jury “Diplock” courts, originally introduced in 1973 to prevent “perverse verdicts and juror intimidations” in terrorism cases. In our 1999 report, we advocated “an immediate return to the jury trial, a right enjoyed by all citizens of the United Kingdom not being tried for alleged terrorist offenses in Northern Ireland,” noting that in 1998 the government had committed to returning as rapidly as possible to jury trials for all offenses.

Unfortunately, the British government specifically excluded emergency laws from the remit of the Criminal Justice Review, and many of the emergency powers were placed on permanent, U.K.-wide footing in the Terrorism Act 2000, adopted more than two years after the Good Friday Agreement. Under the new law, which went into force in February 2001, the police can detain any person they suspect of terrorism for up to 48 hours without charge or access to counsel; the detention can be extended for a further five days with judicial authorization. The Act significantly widens the definition of terrorism, and in a special section relating only to Northern Ireland, extends the use of non-jury Diplock Courts and the authority to conduct warrantless arrests and searches and seizures. The Northern Ireland provisions of the Act expire automatically if they are not renewed each year by order of the Secretary of State for Northern Ireland. So far, they have been renewed each year. The Joint Declaration indicated, however,

86. 1999 ABCNY Report, “Trials in Diplock Court” section.
88. In a separate development, the British government enacted the Antiterrorism, Crime and Security Act 2001, after September 11, 2001. Similar to its U.S. counterpart, the USA PATRIOT Act of 2001, this legislation is most criticized for allowing indefinite detention without charge. In order to enact the law, the U.K. derogated from Article 5(1) of the European Convention, which “guarantees the right to liberty and prohibits detention without trial.” Philip A. Thomas, 9/11: USA and U.K., 26 FORDHAM L. REV. 1193, 1216-1219 (2003).
89. Terrorism Act 2000, c. 11, pt. VII.
90. The Secretary of State recently decided to renew most of the Northern Ireland provisions...
that the British government intended to repeal these provisions by April 2005 if there was a “continuing enabling environment.” 91

We are concerned that the Terrorism Act 2000 defines terrorism too vaguely and that its provisions allowing the use of Diplock Courts, the possibility of 48-hour detention without access to a lawyer, and warrantless arrest violate international human rights law. The U.N. Human Rights Committee has expressed its concern about Diplock Courts and 48-hour detention 92 and other human rights groups have criticized the Act. 93

Many of the practitioners and officials we talked to in Belfast, however, said that the Northern Ireland provisions of the Act are rarely used. The Northern Ireland Office has not reported the number of Diplock trials in recent years, but statistics indicate that there were 149 offenses heard before Diplock courts in 2002. (The number of trials was significantly less, in that defendants in each case are likely to have been charged with multiple offenses.) 94 Although we are pleased that Diplock trials are no longer used as frequently as in the past, it is difficult to understand why the special procedures are still on the books and used to the extent that they are. We criticized these courts and other emergency powers in 1987 and again in 1999, and we believe that reduced violence and the small number of terrorism arrests signal that there is even less justification for them on national security grounds now. We believe the Northern Ireland provisions of the Terrorism Act are unnecessary and that revocation should occur before April 2005, the date proposed in the Joint Declaration. In addition, the Northern Ireland Office should publish clear statistics on past and present use of these courts.

With regard to interrogations, our 1999 report applauded the then-recently established practice of audiotaping police interrogations of de-

---

94. According to recent statistics, at least 111 offenses in 2001 and 149 in 2002 were not “certified out of the scheduled mode of trial by the Attorney General” after defendants applied for certification, meaning that these offenses were heard in Diplock trials. See D. Lyness & M. Carmichael, NIO, Northern Ireland Statistics on the Operation of the Terrorism Act 2000: Annual Statistics 2002, RESEARCH AND STATISTICAL BULLETIN, Sept. 2003, table 10 (titled “Number of instances in Northern Ireland for which offences are certified out of the scheduled mode of trial by the Attorney General”).

---

THE RECORD
tained suspects in Northern Ireland. The taping of such interviews had been a long-standing police practice in England and Wales at the time. According to Chief Constable Orde, audiotaping and videotaping of suspect interrogations is now standard practice in Northern Ireland as well. We support this development, believing that accurate records of these interviews will help to ensure that police have complied with European Convention standards in their treatment of suspects. We were also pleased to note that the notorious holding centers for detained suspected terrorists—little used by the time of the 1998 mission—are now officially closed.

IX. THE PATRICK FINUCANE AND ROSEMARY NELSON CASES

Our Committee has long been pressing for public inquiries into the murders of Patrick Finucane and Rosemary Nelson—two lawyers who were killed for their work in representing individuals detained in those holding centers. Both Finucane and Nelson represented people arrested under Northern Ireland’s emergency laws and took on other high-profile terrorism cases. Shortly before his death, for example, Patrick Finucane brought a case to the European Commission on Human Rights, challenging the government’s seven-day detention powers and its derogation from the European Convention. According to many sources, both lawyers were told repeatedly by their clients that police officers had issued threats against them during interrogation sessions at the holding centers (during which lawyers were not allowed to be present).

Patrick Finucane was murdered on February 12, 1989, when masked gunmen broke into his Belfast home and shot him 14 times in front of his wife and three children. Although the Ulster Defense Association, a loyalist paramilitary group, claimed responsibility for the killing, strong evidence has emerged linking members of the British security forces to the murder. In April 2003, Sir John Stevens, the Chief Commissioner of the London Metropolitan Police, delivered a report on the case to PSNI Chief Constable Hugh Orde. The report, known as “Stevens III,” was the result of a four-year investigation. A summary of the report was published, making clear that members of the security forces, both the police and the army, had actively colluded with loyalist paramilitaries in the murder. Stevens also reported that the authorities could have prevented Finucane’s murder and that the original investigation into his death should have led to early arrests.95 In addition, the Stevens III report documented obstruction

of the investigation, including a fire in his team’s office, which the Stevens team believes “was a deliberate act of arson.” Chief Constable Orde—who ran the investigation’s day-to-day operations before his current position—is charged with implementing the recommendations and deciding whether to make the entire report public. As of February 2004, the report had not been published.

Rosemary Nelson established her own law practice shortly after Patrick Finucane’s murder, taking on a handful of high-profile terrorism cases along with a regular caseload. We met with Nelson during our 1998 mission, and she told us of the many threats on her life—including the reports of police threats against her at the holding centers. Nelson was murdered on March 15, 1999, less than six months after we met with her, when a booby-trapped bomb exploded under her car as she drove from her home to her office. A loyalist paramilitary group called the Red Hand Defenders claimed responsibility for her murder. Nearly five years later, the police investigation into the murder is still ongoing, but there have been no prosecutions in the case. In September 2003, members of her family released a statement revealing that the investigating officers had informed them that among those implicated in the murder were a former soldier and an informer for the police service.

In May 2002, the British and Irish governments jointly appointed Judge Peter Cory, a retired justice of the Supreme Court of Canada, to investigate the evidence of security force collusion in the murders of Patrick Finucane and Rosemary Nelson, along with four other controversial cases—two from Northern Ireland and two from the Republic of Ireland. In each of the six cases, the judge was given the power to recommend the establishment of a public inquiry, and the governments pledged to abide by his recommendations.

Human rights groups, as well as U.N. Special Rapporteur Dato’ Param Cumaraswamy, expressed concern that the Cory investigation might un-

96. Stevens 3 ¶ 3.4.
97. On July 1, 2003, the European Court found that Finucane’s right to life under Article 2 of the European Convention was violated because the state failed to promptly and effectively investigate the evidence of collusion in his murder. Finucane v. U.K., 37 Eur. H.R. Rep. 29 (2003).
99. These two cases are the murders of Billy Wright and Robert Hamill.
100. These are the cases of Lord Justice and Lady Gibson and Chief Superintendent Harry Breen and Superintendent Bob Buchanan.
duly delay the process, as they had long argued that there was already sufficient evidence for public inquiries in the Finucane and Nelson cases. But Judge Cory worked promptly and delivered reports to the British and Irish governments in all six cases in early October 2003. The governments were expected to make the reports public in December 2003, and on December 18, 2003, the Irish government did publish its two reports. The British government has yet to release its four reports, however, maintaining that they are still under review by government lawyers. Judge Cory was dismayed by the delay in regard to the British cases, and on January 12, 2004, independently informed the families—including the Nelson and Finucane families—that he has recommended a public inquiry in each case.

The Finucane, Nelson, and Wright families filed suit in an effort to force the British government to publish the reports. In early March 2004, the British government announced that it would publish Cory’s reports by the end of the month and at the same time “disclose their intentions for following up the reports.” As a result, the High Court in Belfast agreed to a three-week adjournment of the families’ suit. On the same day the Finucane family filed an additional suit to compel the government to set up a public inquiry immediately and on March 8 the High Court granted the family leave to apply for judicial review in the matter, setting a hearing date for April 22.

Now that it is clear that Judge Cory has recommended public inquiries in these cases, we urge the government to publish his reports forthwith and move quickly to establish public inquiries. No more delay can be permitted. Indeed, our Committee has been discouraged that almost five years after Rosemary Nelson’s death and 15 years after Patrick Finucane’s, the cases are unresolved and inquiries have not been held. The British government should abide by its May 2002 commitment and move to implement Judge Cory’s recommendations.


X. THE LAW SOCIETY AND BAR COUNCIL

A. Background

The Law Society and Bar Council seem invigorated by their recent roles in criminal justice and policing reform, and the contrast between the concerns of lawyers today and five years ago is impressive. In Northern Ireland, the legal profession is bifurcated into two segments, the solicitors who advise and counsel clients, and the barristers who appear in court on their behalf; all solicitors admitted to practice must belong to the Law Society and all barristers to the Bar Council.

The Law Society and Bar Council historically had relatively few women members. Women now constitute over 25 percent of the membership of the Bar Council and a greater percentage of the Law Society.\textsuperscript{105} Despite this progress, thus far only five women have become Queen’s Counsel, out of a total of 50 QCs. Since QCs are the most likely source of candidates for appointment to the highest positions in the judiciary, we hope that these numbers will continue to improve.

The legal organizations historically avoided activism but, as noted in our 1999 Report, the Law Society, which includes lawyers who are the first line of defense for those accused of crimes, held what they describe as an “historic meeting” to decide whether to publicly acknowledge the Patrick Finucane and Rosemary Nelson cases on May 11, 1999. Called by petition by some of its members, the meeting threatened to divide the Law Society into two different Societies. To the surprise of some, a consensus emerged at that meeting that the Law Society should call for a public inquiry into the murder of Finucane and an independent investigation into that of Rosemary Nelson.\textsuperscript{106} The majority of the Law Society’s members recognized their shared responsibility to defend lawyers representing clients, including unpopular clients, without being identified with or threatened because of their clients’ alleged activities. The Bar Council’s Human Rights Committee had already called for a public inquiry into the Finucane case in February 1999 and expressed outrage at the Nelson murder in March of that year.\textsuperscript{107}

\textsuperscript{105} According to the NIO, 26 percent of barristers were women in 2000 and 36 percent of solicitors were women. Statistics and Research Branch, NIO, \textit{Gender and the Northern Ireland Criminal Justice System}, Mar. 2002.


Both the Law Society and the Bar Council now have Human Rights Committees involved in addressing the recent incorporation of the European Convention into domestic law through conferences and training among their members. While the organizations have become more proactively engaged in issues of law reform and the restructuring of the justice system to reflect human rights, both are still reluctant to speak out forcefully and publicly on issues that might divide their memberships. We applaud their progress and urge their ongoing and more proactive involvement in the promotion of reforms supporting a greater regard for human rights in the domestic legal system. We particularly applaud the Bar Council for its support of fellow members who wished to become QCs but refused to take the declaration to the sovereign of the United Kingdom, because it demonstrates that the Council is representative of all barristers regardless of their political allegiances.\(^\text{108}\)

Since our 1998 mission to Northern Ireland, we have been pleased to find that many of the problems identified in our 1999 report are no longer significant issues for the legal profession. Both the Law Society and the Bar Council confirmed that harassment of lawyers defending unpopular clients—particularly those accused of acts of terrorism—has been significantly reduced.\(^\text{109}\) The notorious detention centers have been closed, all police interviews of those accused of crimes are now taped with the option to have a defense lawyer present, lawyers have prompt access to their clients and there are generally speedier hearings. When there is geographical difficulty in accessing clients in detention, lawyers often gain access to distant jails by means of video communication. From the perspective of the United States, suddenly faced anew with the difficulty of protecting national security while upholding the rights of those accused, we appreciate how difficult it has been in Northern Ireland. As we in the United States are more directly tested, it is heartening to see the increased respect the Northern Ireland legal system has for the rights of the accused under trying circumstances.

**B. Role in the Criminal Justice Reforms**

The Law Society and the Bar Council have viewed their roles as consultative regarding the Criminal Justice Review and subsequent implemen-


\(^{109}\) Even so, while *police* harassment of lawyers has been virtually eliminated, complaints are still made regarding lawyers’ details being found on loyalist hit lists, resulting in reluctance by lawyers to take on high-profile cases.
tation efforts. Importantly, both submitted comments and recommendations to the Review Group, and one member of the Bar Council served on the Review body, but both continue to be true to their tradition of playing quiet roles. Both acknowledge support for the reform of the judicial appointments process, as a departure from the closed door “tap on the shoulder system” which had been the style for appointments in the past. Both have high regard for the Police Ombudsman and her role in the reform of the policing system and oversight of complaints about police misconduct. Both support the strengthening of an independent prosecution service and the critical role of an independent judiciary, but their voices have been muted by traditional reluctance to speak out forcefully on these issues. We commend the Law Society and the Bar Council for their positions, but urge them to play an even stronger and more public role on these issues.

The Law Society and the Bar Council do provide some education for their members and the broader public on issues of criminal justice and human rights. But in Northern Ireland, unlike New York City, they do not provide ongoing continued legal education programs, which are currently required for members of the Law Society but not members of the Bar Council. At present, independent providers offer these services. We would hope there might be a greater role for both the Law Society and the Bar Council in insuring that these programs include appropriate materials on human rights issues, whether by offering their own programs or through advice to and cooperation with independent providers, and encouraging their members and law students to attend human rights-focused training sessions. In addition, we believe that both legal organizations should help educate the public at large on these issues.

One of the great challenges facing the Northern Ireland criminal justice system in the aftermath of political conflict is the need to address the unsolved deaths of hundreds of people, on both sides of the divided


111. The Criminal Justice Review considered human rights protections central to the criminal justice system and the Implementation Plans have endorsed human rights training. Criminal justice agencies, including the NIO, the Office of the DPP, the PSNI and the Court Service, provide training for their staff. 2003 Implementation Plan at 11.

112. While human rights issues are increasingly included in legal training modules, they are a minor part of law school curricula in Northern Ireland.

113. Chief Constable Orde has estimated that there are more than 1800 unsolved deaths.
community. While we continue to call for public inquiries into the murders of Patrick Finucane and Rosemary Nelson because there is substantial evidence supporting the conclusion that their deaths were motivated in large part by their role as lawyers acting in defense of their clients, we recognize that many others in Northern Ireland lost family members during the political conflict, including many members of the police force. There is a need for accountability, but we recognize that traditional criminal investigations many years after deaths present difficulties in terms of cost, delay, and preservation of evidence, and may not be realistic options. We call upon the Law Society and the Bar Council to help propose alternatives that might help bring a sense of justice and closure to these many unsolved cases. Other societies have struggled with alternatives, and none offer a perfect solution. The Law Society and the Bar Council can and should play a valuable role in exploring and crafting alternatives helpful to the particular needs of Northern Ireland.

March 2004

Charles M. Sennott, *To move on, a call for ‘total truth’,* The Boston Globe, July 8, 2003. The figure does not include deaths caused by state actors or collusion.
APPENDIX A
CHRONOLOGY OF MEETINGS

New York
Wednesday, September 18, 2002
• Sir Joseph Pilling, Permanent Under-Secretary of State, Northern Ireland Office

Friday, March 21, 2003
• Paul Mageean, Legal Officer, (subsequently Acting Director) Committee on the Administration of Justice
• Jane Winter, Director, British Irish Rights Watch

July 25, 2003
• Lord Goldsmith, Attorney General for the United Kingdom

Wednesday, October 8, 2003
• Justice Brian Kerr, QC, High Court (currently Lord Chief Justice)

London
Friday, May 9, 2003
• Jane Winter, Director, British Irish Rights Watch

Belfast
Sunday, May 11, 2003
• Kieran McEvoy, Professor of Law and Transitional Justice, Human Rights Centre, Queen’s University Belfast School of Law
• Stephen Livingstone, Professor of Law and Director, Human Rights Centre, Queen’s University Belfast School of Law
• Martin O’Brien, Director, Committee on the Administration of Justice
• Paul Mageean, Legal Officer (subsequently Acting Director), Committee on the Administration of Justice

Monday, May 12, 2003
• Kevin Winters, Solicitor, Kevin R. Winters and Co.
• Monica McWilliams, former member of the Northern Ireland Legislative Assembly (“MLA”), Northern Ireland Women’s Coalition
PEACE IN NORTHERN IRELAND

- Dr. William Lockhart, former member of the Criminal Justice Review; Chief Executive, Extern

Tuesday, May 13, 2003
- Alban Maginness, former MLA, Social Democratic and Labour Party
- Gerry Kelly, former MLA and policing and criminal justice spokesperson, Sinn Fein
- Kathy Stanton, former MLA, Sinn Fein
- Sam Porter, Policy Advisor, Sinn Fein
- Sir Joseph Pilling, Permanent Under-Secretary of State, Northern Ireland Office
- Paul Priestly, Head of Criminal Justice Reform Division, Northern Ireland Office
- Kirsten McFarlane, Human Rights and Equality Unit, Northern Ireland Office
- Maura Quinn, Criminal Justice Review Implementation Team, Northern Ireland Office
- Stephen Leach, Director, Criminal Justice, Northern Ireland Office
- John Simpson, Commissioner for Judicial Appointments, Office of the Commissioner for Judicial Appointments for Northern Ireland
- Professor Brice Dickson, Chief Commissioner, Northern Ireland Human Rights Commission
- Angela Stevens, Acting Caseworker, Northern Ireland Human Rights Commission

Wednesday, May 14, 2003
- Nuala O’Loan, Police Ombudsman, Office of the Police Ombudsman for Northern Ireland
- Sam Pollock, Chief Executive, Office of the Police Ombudsman for Northern Ireland
- Eamonn McKee, Counsellor, Anglo-Irish Division, Department of Foreign Affairs, Republic of Ireland
- Máire Flanagan, First Secretary, Anglo-Irish Division Department of Foreign Affairs, Republic of Ireland
Thursday, May 15, 2003

- Sir Alasdair Fraser, C.B., QC, Director of Public Prosecutions, Office of Public Prosecutions, Royal Courts of Justice
- Roy Junkin, Deputy Director of Public Prosecutions, Office of Public Prosecutions, Royal Courts of Justice
- James Scholes, Senior Assistant Director, Office of Public Prosecutions, Royal Courts of Justice
- Hugh Orde, Chief Constable, Police Service of Northern Ireland
- J.A. Kearney, Chief Inspector, Police Service of Northern Ireland
- Paul O’Connor, Pat Finucane Center
- Joseph A. Donnelly, President, Law Society of Northern Ireland
- John Bailie, Chief Executive and Secretary, Law Society of Northern Ireland
- Kevin Delaney, Assistant Secretary and Chair of Human Rights Committee, Law Society of Northern Ireland
- Peter O’Brien, Assistant Secretary, Law Society of Northern Ireland
PEACE IN NORTHERN IRELAND

- Elliott Duffy Garrett, Law Society of Northern Ireland
- Pierce McDermott, Law Society of Northern Ireland
- Brian Fee, QC, Chair, Human Rights Committee and former Chair of the Bar Council, Bar Council of Northern Ireland
- Brendan Garland, Chief Executive, Bar Council of Northern Ireland

Friday, May 16, 2003
- Stephen Farry, General Secretary, Alliance Party of Northern Ireland
- John McAtamney, solicitor, Trevor Smyth & Co.
- Peter Madden, solicitor, Madden & Finucane
- Sean McCann, solicitor, McCann & McCann
- Noel Phoenix, solicitor
APPENDIX B

BIBLIOGRAPHY

CASES


R. (on the application of Khan) v. Sec’y of State for Health, 4 All E.R. 1239 (2003), ¶¶ 83-85.


UNITED KINGDOM STATUTES AND GOVERNMENT DOCUMENTS


Joint Declaration by the British and Irish Governments April 2003 (“Joint Declaration”) (May 2003).


Northern Ireland Act 1998, c. 47.


Terrorism Act 2000, c. 11.

**PUBLICATIONS**


Committee on the Administration of Justice (“CAJ”), *CAJ Continues to Lobby Internationally for Public Inquiries*, JUST NEWS, Apr. 2002, at 1.


The Rule of Law in Hong Kong

“One Person, One Vote”: The U.S. Electoral System and the Functional Constituencies Embodied in the Basic Law for the Election of the Chief Executive and of the Legislative Council

By the Committee on International Human Rights and the Committee on Asian Affairs

I. INTRODUCTION

The Association of the Bar of the City of New York (the “Association”) has had a longstanding interest in preserving the rule of law in Hong Kong, and encouraging its progress to a truly democratic society with universal suffrage as envisaged in Articles 26, 39, 45 and 68 of the Basic Law. Accordingly, we view certain recent developments in the Hong Kong Special Administrative Region of China (the “HKSAR”) with great concern, in particular, the recent regressive “interpretations” of the Basic Law by the Central Government of China by which it pre-empted the question of whether there is a “need to amend” the Basic Law regarding the election of the Chief Executive in 2007 and the Legislative Council in 2008, the manner in which such “interpretations” were delivered, and the barrage of intimidating personal attacks by the Central Government against

1. The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China.
the pro-democracy supporters of universal suffrage which accompanied these “interpretations.”

As the debate over constitutional reform in Hong Kong intensified over the course of this year, voices supportive of maintaining the electoral status quo in Hong Kong raised, at certain points, the example of the United States and its electoral system as they argued to reject the rising call in Hong Kong for the more immediate fulfillment of the Basic Law’s promise of “universal suffrage.” It is this reference to the U.S. electoral system that we will address in this Memorandum. The Memorandum will also address the historical experience of the United States with the democratic “one person, one vote” principle as it has evolved and expanded over the past 215 years.

The Association, founded in 1870 to combat corruption in the U.S. judiciary, is an independent, non-governmental organization with a membership of more than 22,000 lawyers, judges, prosecutors, law professors and government officials, principally from New York City but also from throughout the United States and from 40 other countries. The Association has had a long and ongoing interest in supporting Hong Kong as a democratic society.2 This interest is not only one of principle but of pro-

2. Prior to and following the return of sovereignty to the People’s Republic of China on July 1, 1997, we, together with the Joseph R. Crowley Program in International Human Rights at Fordham Law School, have carefully followed legal and political developments in Hong Kong through missions, reports and symposia:


· Symposium on Right of Abode Decision of Court of Final Appeals, May 25, 1999, Great Hall of The Association of the Bar of the City of New York sponsored by the Asian Affairs Committee of the Association.


fessional interest to our members. For many years, numerous New York
law firms and hundreds of our members have been working as lawyers in
their Hong Kong regional offices, and many are permanent residents. We
believe they contribute significantly to the economic, commercial, and
financial life of Hong Kong. In addition, many of our members have
regional headquarters in Hong Kong or do extensive business in Hong
Kong and often seek our advice regarding the benefits of locating in,
relocating from, or doing extensive business in and from Hong Kong.
Over the years, we have commented favorably on Hong Kong’s indepen-
dent and highly qualified judiciary, its free press, its active lawyers’ asso-
ciations, its conditions of transparency, its absence of corruption and its
adherence to the rule of law and common law principles that protect
civil, political and commercial rights. Our experience confirms what econo-
mists can now demonstrate—that only societies with such freedoms at-
tain and maintain economic prosperity and viable capital markets.³

Through the 1984 Joint Declaration,⁴ the United Kingdom and the
People’s Republic of China (“China” or “PRC”) entered into a solemn
compact: the return of sovereignty to China in exchange for continued
maintenance of Hong Kong’s political, social, economic, and legal insti-
tutions accompanied by a high degree of autonomy, and the promise
that universal suffrage would be instituted for the election of the Chief
Executive and members of the Legislative Council. Expressly stipulated in
the Basic Law implementing China’s obligations under the Joint Declara-
tion is the commitment by China and the Hong Kong Special Adminis-
trative Region Government (the “H.K.S.A.R.G.”) that the fundamental
rights of free speech, free press, freedom of assembly, freedom of associa-
tion and freedom of religion, as well as due process, would not only con-
tinue but flourish and that the “ultimate aim” of universal suffrage would
be implemented for the election of both the Chief Executive and the Leg-
islative Council.⁵ It is therefore incumbent on all interested parties, the
United Kingdom (through the Joint Declaration), China (through the
Joint Declaration and the Basic Law) and the HKSAR government (through

³. See Chen Zhiwu, “Freedom of Information and the Economic Future of Hong Kong,”
presented at “Freedom and National Security—Has the Right Balance Been Struck?”, Hong
Kong University (June 14, 2003), http://www.hku.edu.hk/ccpl/pub/conferences.
⁴. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern
Ireland and the Government of the People’s Republic of China on the Question of Hong
⁵. For a discussion of the structures put in place for democracy in Hong Kong, see generally
Joseph R. Crowley Program, supra note 2, at 66-89.
the Basic Law), to maintain these basic principles in action as well as words. The benefits of such freedoms will accrue not only to the people of Hong Kong but to Hong Kong’s economy, as a society which safeguards such rights and freedoms is the most secure foundation upon which to build a prosperous economy.

Freedom of speech, freedom of the press, freedom of assembly and freedom of association are not abstract principles embodied in the Basic Law for cosmetic purposes. Rather, they are the foundations for an informed public to choose those who would govern, assure transparency in government, and determine who would be accountable for their actions. To support these four freedoms but deny universal suffrage to the citizens of Hong Kong is to weaken or frustrate the attainment of a truly democratic society.

Until these recent developments, and with certain exceptions, we have been gratified that Hong Kong and the People’s Republic of China generally have fulfilled their obligations under both the Joint Declaration and the Basic Law. However, the Association is particularly concerned with the unsolicited (by the Hong Kong Government, the Court of Final Appeal, or any other Hong Kong actor) April 6, 2004 and April 26, 2004 “interpretations” of the Basic Law and pronouncements by the Central

6. As Justices Brandeis and Holmes stated in their concurrence to the majority opinion in Whitney v. California, 274 U.S. 357, 375 (1926):

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

7. We have had previous concerns, such as the controversy surrounding the right of abode in Hong Kong and, most recently, the controversy over the proposed Article 23 Legislation, which this Association addressed separately in its Legal Analysis of Certain Provisions of the National Security (Legislative Provision) Bill, supra note 1. The controversy surrounding Articles 45 and 68 of the Basic Law, and the unsolicited “interpretation” by the Standing Committee of the NPC in connection therewith, however, represent the first overt instances of direct interference by the Central Government in the matter of Hong Kong governance without a request from the Hong Kong Government, the Court of Final Appeal, or any other Hong Kong actor.
Government that freeze in place the “functional constituency” system and thus blatantly frustrate the goal of universal suffrage in the foreseeable future. Our concerns are not academic, but reflect matters that have an immediate impact on Hong Kong’s economic prospects. Foreign investors with whom our members work as legal advisors—both those investors with a long history in Hong Kong and those just now entering the Asian markets—are unsettled by the implications of such unilateral actions which directly frustrate Hong Kong’s development as a free and open democratic society. This is of critical importance for the relative attractiveness of Hong Kong as a regional business and financial center and the ongoing economic prosperity of Hong Kong. Recently, concerns have been expressed by the major debt and currency rating agencies regarding the Central Government’s actions impeding universal suffrage in a manner that undermines Hong Kong’s autonomy in what is essentially a local matter. At the core of those concerns was the swift, unilateral, and unsolicited action of the Central Government in its “interpretations” of the Basic Law in response to the very civil and thoughtful public appeals for greater democracy as called for in the Basic Law itself.

Part II of this report will summarize recent comments raising the example of U.S. electoral arrangements in the context of Hong Kong’s electoral debate. Part III will then detail the “one person, one vote” tradition within the U.S. system and give a brief historical background of the U.S. Electoral College and Senate. Part IV will address Hong Kong’s “functional constituencies” in light of the U.S. historical experience.

II. THE U.S. ELECTORAL SYSTEM IN THE CONTEXT OF HONG KONG’S ELECTORAL DEBATE

Since early 2004, the Central Government through intimidating pronouncements, “interpretations” and virtual amendments to the Basic Law, has unilaterally imposed impediments to consideration of amendments to the Basic Law which would provide for election of the Chief Executive through universal suffrage rather than through an 800 member Election Committee composed of representatives from various business, financial, professional, labor and governmental groups known as “functional constituencies.” In seeking to justify the present Election Committee structure, it has been suggested that its indirect nature is no less democratic than the Electoral College in the United States.

In March of this year, Sir David Akers-Jones, now retired, but previously serving in Hong Kong’s colonial government, stated that “one-man-one-vote ... is not the only democratic method of election. Each democratic country has a very different democratic system... [For example, t]he U.S. president is actually selected through indirect election.”9 Just a month later, Zhu Yucheng, director of the Institute of Hong Kong and Macau Affairs, a voice for the Central Government of China, stated that “[t]he development of democracy cannot be achieved in just one step... The election system in the United States, for instance, is not ‘one-person one-vote’ although it has a history of about 150 [sic] years.”10 Even further back, after the occasion of the 2000 U.S. Presidential election, Shiu Sin-por, the then and current Executive Director of the One Country, Two Systems Research Institute, a Hong Kong think tank with strong links to the Central Government and certain sectors of the Hong Kong business community, in an article entitled “Popular Elections Cannot Secure Good Governance” criticized the electoral system of the United States and used it as an example to justify non-direct and restrictive elections in Hong Kong.11

The consistent comparison to the U.S. Electoral College is inappropriate for several reasons, not least because, unlike the Election Committee whose members are selected by a limited and self-perpetuating number of special interest groups and represent only 163,500 residents of Hong Kong, the 538 members of the U.S. Electoral College are elected by universal suffrage exercised by the citizens of each State and who, in casting their State’s electoral votes for the Presidential nominees of the political parties, are essentially acting as proxies for the universal constituency of voters who selected them.

More directly, however, the comparison is not useful because of the particular circumstances that brought the Electoral College into existence. The Electoral College structure was one of many compromises among the original thirteen States necessary in order to adopt a unique constitutional government in which the people of both large and small States with varied economic, social, and cultural interests, and stretching over thousands of square miles with primitive means of communication, would agree to surrender a large degree of sovereignty and be bound by a Federal constitution.

Fundamentally, comments such as these incorrectly characterize both representative democracy generally within the United States and the unique nature specifically of the Electoral College through which the U.S. President is elected. They therefore deserve a direct response from an institution such as the Association, which has ample experience of direct democracy in the United States and a thorough knowledge of the nation’s political and constitutional history. We hope that the following discussion of both the history and operation of the Electoral College and of representative democracy through universal suffrage on a “one person, one vote” basis in the United States will conclusively rebut the inappropriate and plainly wrong commentary that now feature in the democratization debate in Hong Kong, and add to the force of argument put forth by those insisting on the present implementation of the Basic Law’s express commitment to universal suffrage and thus a more democratic Hong Kong.

III. REPRESENTATIVE DEMOCRACY IN THE UNITED STATES

A. Introduction

For the English subjects who, in the 18th century, separated themselves from the British Empire and set to the task of forming a Union of States out of the former British colonies in America, settling on a manner of popular sovereignty through representation for the national government was fundamental. “For the guiding political theorists of the Revolutionary generation, the English system of representation, in its most salient aspects of numerical inequality, was a model to be avoided, not followed.”

Representation in the American colonies early on developed in a markedly more democratic direction than in England in several interrelated ways. The franchise in colonial America tended to be far more extensive because the greater abundance of land in America rendered landholding requirements less restrictive. Colonial apportionment likewise followed population shifts to an extent that was nearly unthinkable for Parliamentary elections. By contrast, the “rotten boroughs,” which characterized the

12. Baker v. Carr, 369 U.S. 186, 267, 307 (1962) (Frankfurter, J., dissenting). Frankfurter does document, however, that American practice departed from a strict adherence to numerical equality to facilitate local governance, as in apportioning representatives among local government entities such as towns or counties, rather than abstract units of approximately the same population. Id. This practice nonetheless did not depart from the idea of numerical equality nearly to the extent it did in eighteenth-century England. See infra, text accompanying notes 11-14.

English system of representation, grew from a system of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population. Nor did the colonies import the practice of voting for local representatives through occupational guilds, the closest historical equivalent of Hong Kong’s functional constituencies. The American colonists not surprisingly came to oppose the British idea of “virtual” representation—the idea that Parliament could reflect all significant functional groupings in the empire—in favor of “actual” representation—the notion that representatives should reflect the views of those who elect them. As the eminent historian Bernard Bailyn states, “there were no ‘functional groupings,” in this English sense in pre-Revolutionary America.”

As the group of men that would draft the U.S. Constitution gathered in Philadelphia in 1787, certain principles emerged from the debates that shaped the Constitutional Convention: an insistence upon election “by the people” in the selection of the President and the Congress and, in the case of Congress, that democratic representation would be equal, that is, “the proportion of the representatives and of the constituents [would] remain invariably the same.” These democratic ideals, however, were di-

14. As population shifted, this system of apportionment led to severe and stark examples of disproportionate representation between various boroughs, the most notorious example being that of “Old Sarum,” a town deserted in the sixteenth century and continuously unpopulated but which continued to elect a representative to Parliament until the early 19th century when the system allowing “rotten boroughs” was abolished. See J.R.M. Butler, The Passing of the Great Reform Bill 236-38 (1964 ed.).

15. Reliance on medieval guilds in this way was the practice in 18th century London. See George Rude, Wilkes and Liberty 149-55 (1970).

16. Bailyn, supra note 11, at 100-101 (1968). For a more recent general study, see Edmund S. Morgan, Inventing the People (1988). See also Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 170 (1969) (“None of [the] electoral safeguards for the representational system, however, was as important to Americans as equality of representation; ‘in other words,’ said John Adams, ‘equal interests among the people should have equal interests’ in the legislatures. More than anything else this equality would prevent the ‘unfair, partial, and corrupt elections’ and the ‘monstrous irregularity’ of the English representational system whereby over three hundred members of the House of Commons, as the English radicals never ceased broadcasting, were elected by only a handful of the English population concentrated in numerous ‘beggarly boroughs.’”).

17. Reynolds v. Sims, 377 U.S. 533, 564 (1964) (quoting James Wilson, a leader in thought and argument, with James Madison and Gouverneur Morris, of the delegates present at the Constitutional Convention). See also Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 224 (1996) ("Madison had long since concluded that equitable reapportionment of representation was an essential requirement of republican government....").
luted over the course of the Constitutional Convention as the delegates struggled to reach acceptable compromise positions between the large States favoring representation based on population and the smaller States favoring equal representation among the States in Congress in order to protect them from oppression by the larger States. In order to avoid the abandonment of the constitutional project altogether, compromises, such as are embodied in the Senate and the Electoral College, were forced into the original U.S. constitutional structure.

B. One Person, One Vote and the Expansion of the Electorate

In 1789, creating a federal government that would be elected by white males over 21 and owning a relatively accessible amount of land or other property was a revolutionary concept, or in the words of one American colonist, “a leap in the dark.” However, over the past 215 years the franchise has been expanded to all citizens regardless of race, sex, property or educational status. In the words of another early Patriot, “the course of things in this country is for the extension and not the restriction of popular rights.” Property requirements were, generally, abandoned by 1855; the 15th Amendment to the Constitution adopted in 1870 assured that the right to vote would not be denied on the basis of race; the 17th Amendment adopted in 1913 provided that Senators would be elected in each State by direct, general election rather than by each State’s legislature; the 19th Amendment adopted in 1920 granted women the right to vote; the 24th Amendment adopted in 1964 prohibited poll taxes or any qualifications based on wealth or property; and the 26th Amendment adopted in 1971 lowered the voting age to 18. In 1970, Congress enacted a nationwide ban on literacy tests, which was upheld by the Supreme Court.

Beginning in the early 1960s the U.S. Supreme Court ruled on a line of cases addressing vote dilution and districting controversies which established clearly, as Justice Douglas writing for the Supreme Court in an early vote dilution case stated, that “[t]he concept of ‘we the people’ under the Constitution visualizes no preferred class of votes but equality among those who meet the basic qualifications.” As Chief Justice Warren, writing the majority opinion on behalf of the Supreme Court in the


1964 case of *Reynolds v. Sims*, observed, “history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” He went on to say, “neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes.” In addressing the “one person, one vote” principle that underlies representative democracy in the United States, the Supreme Court in 1963 noted that the Electoral College and the allocation of Senators in a non-population based manner are the only Constitutionally-sanctioned deviations from the “one person, one vote” principle.

C. Exceptions to the One Person, One Vote Principle in the U.S. Electoral System

While the Constitution embodies the fundamental democratic value of equality of representation, there exist within our constitutional structure certain exceptions to this principle, the most notable of which are the Electoral College and the Senate. With regard to the Senate’s deviation from this democratic principle, Chief Justice Warren, again in *Reynolds v. Sims*, held that, “The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government.” And, with regard to the Electoral College, the Court in *Gray v. Sanders* found that: “The inclusion of the Electoral College in the Constitution, as the result of specific historical concerns validated the collegiate principle despite its inherent numerical inequality....” The following two sections will discuss each of these deviations and the context out of which they arose.

22. *Id.*, at 579.
24. *Reynolds*, 377 U.S. at 574
1. The Case of the U.S. Senate

The importance that the Framers placed on fashioning the form of the national legislature cannot be overstated. As such, it was the first item, outside of general procedural resolutions on the conduct of the Convention, to be addressed by the delegates of the Convention. The debate that ensued over the nature of representation in Congress was fought between delegates from the large States, on the one hand, and delegates from the smaller States, on the other. Equality of representation based on population was the democratically principled argument of the larger States that faced the intransigent argument of the smaller States that each State must have an equal number of representatives in the Congress regardless of population. It quickly became clear that a compromise was necessary to keep the smaller States from abandoning the Convention and the Constitution with it. John Dickinson, a Delaware delegate to the Convention and proponent of the small State position, speaking to James Madison, an adherent of population-based representation in the legislature, warned: “[W]e [small States] would sooner submit to a foreign power than ... be deprived of an equality of suffrage in both branches of the Legislature, and thereby be thrown under the domination of the large states.”

The ensuing compromise was fashioned through agreement on a bicameral legislature where one body, the House of Representatives, would apportion representatives based on population and the other body, the Senate, on the basis of equality among the States, where each State would be apportioned two Senators. The establishment of a bicameral legislature would provide a system of checks and balances preventing the majority population from dominating the minority. Thus, the non-population based apportionment of Senators in the U.S. Congress was entrenched in the Constitution as a key compromise necessary to form a lasting Union of States. The debates surrounding the choice of a mode of Presidential


27. Id. at 468-469 (quoting Oliver Ellsworth (delegate from Connecticut), as reported by James Madison on June 29, 1787):

The proportional representation in the first branch was conformable to the national principle and would secure the large states against the small. An equality of voices [in the second branch] was conformable to the federal principle and was necessary to secure the small states against the large. He trusted that on this middle ground a compromise would take place. He did not see that it could on any other. And if no compromise should take place, our meeting would not only be in vain but worse than in vain....
selection were equally hard fought as they involved issues of representation similar to those that the large and small States had fought over in the context of the Congress.

2. Selecting the U.S. President through the Electoral College

a. The Constitutional Text

Article II of the Constitution, as amended by the Twelfth Amendment, outlines the form of the Electoral College. Article 1 of that Article provides each State of the Union with the power to appoint, in a manner to be determined by such State's legislature, a number of Presidential electors equal to the number of its representatives in both the House of Representatives and in the Senate. It also defines how the electors, once appointed, shall cast their ballots for President and Vice President, how the votes shall be counted and finally provides for a contingency procedure should the electoral vote tally fail to produce an absolute majority for any of the candidates in the case of either the Presidential or Vice-Presidential contest.

The contingency procedure provides that, in the case where the electors fail to agree on a Presidential candidate by an absolute majority, the top three vote-winners will be submitted to a vote in the House where each State's delegation will cast only one vote. The contingency procedure in the case where the electors fail to agree on a Vice Presidential candidate is nearly identical but that the decision passes to the Senate for vote.

In addition, Article II, Section 1 provides that “no Senator or Representative, or Person holding and Office of Trust or Profit under the United States, shall be appointed an Elector.” By contrast, the composition of Hong Kong's Election Committee includes the 60 members of the Legislative Council and 36 members of the National People's Congress of China. Such a composition sets up exactly the type of conflict of interest that the Framers of the U.S. Constitution sought to avoid in the process of electing the President.

b. Birth of the U.S. Electoral College—Constitutional Convention (1787)

The record of the Convention left behind by the delegates, James Madison principal among them, makes clear that the Electoral College was born of the practicalities of political compromise and not of any

28 While the body of electors for which Article II, Section 1 provides is commonly and historically referred to as the “Electoral College,” that term is not found anywhere in the Constitution itself.

29 U.S. Const. art. I, § 1, cl.1.
abstract theoretical arguments in its favor. The delegates, having just re-
solved the large State-small State conflict over apportioning representa-
tion in the Congress that had threatened to dissolve the entire Constitu-
tion-making exercise, were not eager to bring the Convention to another
crisis and, therefore, were ready for compromise in order to keep the Union
alive. In fact, the delegates proposing the Electoral College’s form had
nothing to recommend in it other than that it acted as a middle ground
between the two modes of Presidential selection initially proposed by various
delegates to the Convention: 1) direct election by the people and 2) elec-
tion by the national legislature. Or, as one prominent historian has noted:
“Its principal merit was to avoid the greater disadvantages that weighed
against the other modes of election.”

The option of election of the President by the national legislature
was objected to on several principled grounds, the separation of powers
being first among them. Most of the delegates wished to keep the Presi-
dent outside of Congressional control as far as possible, particularly out-
side the reach of the Senate, an institution that already had several checks
on the proposed Presidential powers. On the other hand, while a number
of the delegates to the Convention voiced fears that direct election by the
people would lead to demagoguery, there was no agreement on this point
and its rejection, instead, seemed to rest largely on several practical objec-
tions. These practical objections included: 1) the numerical disadvantage
the Southern States would suffer as their population included a high per-
centage of non-voting slaves, and 2) the belief that the Union would be
too decentralized and far-flung to produce anything but a dispersion of
votes among each State’s “favorite sons,” with no candidate receiving
anything close to a majority of the popular vote. While the proposal for
direct election of the President had strong support from several of the
most respected delegates to the Convention, James Madison, James Wil-
son (a leading constitutionalist of the time and playing a role second
only to Madison’s at the Convention31) and Gouverneur Morris, among
them, even the persuasive force of these individuals’ arguments was un-
able to rally agreement among the delegates on direct election. In fact,
the only consensus that could be reached settled on the Electoral College
as a compromise between the two other options.

1787*, at xii (Adrienne Koch, ed. 1966).
The delegates, in choosing this mode of Presidential election, believed that after the conclusion of George Washington's term, with no other individual having his status, electors would no longer be able to provide electoral vote majorities and that the President would most often be chosen by the House contingency mechanism described above. The accepted conception, therefore, was that the electors would in effect serve as a nominating body, in most cases failing to vote in a candidate by an absolute majority, and thereby throwing the process to the House where the members of that body would cast their votes with one vote per State delegation. It satisfied proponents of both the direct election plan and the legislative election plan: the people, through the Electoral College, nominate and the House elects on a State unit basis.

The arguments made in support of the Electoral College during the ratification debates that followed the conclusion of the Convention subsequently imbued the Electoral College with theoretical content not present at its inception, with such theoretical post facto justifications continuing to be repeated—erroneously—even into the modern age. In the Federalist No. 68, Alexander Hamilton asserts that “if the manner of [the Electoral College] be not perfect, it is at least excellent” and proceeds to list the variety of desirable attributes that combined in the form of the Electoral College. Hamilton’s essay, in part, is the most likely source of the common and incorrect perception that the Electoral College was created out of a philosophical mistrust of the people’s deliberative capabilities. While Federalist No. 68 states that it was “desirable... that the immediate election should be made by men most capable of analyzing the qualities adapted to the station....”, the records of the Convention show that such a concern did not prevail during the debates and eventual selection of the Electoral College as the mode of electing the President.

Due to the lack of a convincing theoretical basis to support it, the Electoral College remains an oddity unique to the United States’ system. The anomalous historical considerations existing in the 18th Century giving rise to our Electoral College no longer apply, and the Electoral College concept, as originally envisioned, has not been copied in any State of the United States or—as far as we can tell—by any other democratic society.

32. THE FEDERALIST No. 68 (Alexander Hamilton).
33. Id.
34. For just these reasons, the Association—along with many other institutions—has repeatedly called for a constitutional amendment to the Constitution supporting direct election of both the President and Vice President. Committee on Federal Legislation, Association of the Bar of the City of New York, Proposed Constitutional Amendment Providing for Direct
Rather, the generally accepted principle of “one person, one vote” prevails in democratic states, and is embodied in the International Covenant on Civil and Political Rights—in particular, Article 25— which is incorporated into Hong Kong law through Article 39 of the Basic Law. As such, references to the U.S. electoral system in arguments supporting maintenance of the electoral status quo in Hong Kong are unfounded.

c. Current Operation of Electoral College

The Electoral College never operated as contemplated by the Framers and very quickly began its process of evolution away from its originally conceived design. The rise of the two-party political system in the U.S., in particular, has done more to shape the functioning of the Electoral College than the Framers’ contemplation of how the Electoral College would operate. As the political parties served to solidify national support for their preferred candidate, the Framers’ speculation that the House contingency mechanism, whereby the electoral college would serve a nominating function and the House would actually select the President (described above), would determine the selection of the President “nineteen times out of twenty” was proven wrong. Popularly-based political parties, instead, became the vehicle for nominating presidential candidates, and the election was determined by the electors with the House contingency mechanism rarely being invoked.

Further, as the Framers left the details for the selection of electors in the hands of the individual State legislatures, the manner in which electors would be chosen was left open to inconsistencies across the nation. Nonetheless, by 1796, three modes of choosing electors predominated in the States: popular election of individual electors by districts, popular election of a statewide slate, and appointment by a popularly elected State legislature. The operation of the Electoral College, however, in the selection of electors did very quickly become largely standard across the nation and, by 1828 South Carolina was the only State where electors were

---


35. Article 25(b) establishes that every citizen shall have the right “[t]o vote and to be elected at genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

appointed by the State legislature. Everywhere else winner-take-all, popular voting prevailed.  

The current operation of the Electoral College is largely characterized by the following practices among the States: a) the direct election of electors through universal suffrage in each State; b) the winner-take-all award of a States’ electoral votes by which all States, other than Maine and Nebraska, award the totality of their State’s slate of electors to the candidate winning the popular vote within such State; and c) the “automatic” role of the electors whereby the electors perform the role of proxy for the people, voting as instructed by the State’s voters, with only the very rare appearance of a “faithless elector” who votes against the instructions of the State’s voters. This last convention illustrates a further aspect of evolution toward control by the electorate. Although it was originally contemplated that the electors chosen would exercise their independent judgment in selecting a President, very early on, again with the emergence of political parties, this concept of elector independence gave way to the proxy concept of the elector. In fact, approximately one-third of the States have laws requiring electors to vote in accordance with their pledge. 

Notably, in 215 years of operation, on only three occasions in exceedingly close elections has a candidate who did not win a plurality of the popular vote go on to become President due to the mechanics of the Electoral College. The likelihood of a candidate losing the popular vote by a wide margin, but winning a majority of the electoral votes, remains remote.

IV. FUNCTIONAL CONSTITUENCIES AND THE ONE PERSON, ONE VOTE PRINCIPLE IN HONG KONG

The functional constituencies in Hong Kong exist both in the selection of the Chief Executive and in the election of the Legislative Council. They are a form of government by special interests that provides inequitable distributions of power not only between local Hong Kong business and social constituencies, but also between them and foreign commercial actors. Our American experience, both since the founding of our republic and as English colonies, has shown that constituent arrangements that deviate from the “one person, one vote” principle should be disfavored as they tend towards a system of patronage, which is at odds with a free market, both in the political and in the economic context. A democrati-

37. See The Unfinished Election, supra note 28 at 220.
38. Longley and Peirce, supra note 34, at 24.
cally elected executive and legislative branches of government provide greater responsiveness to the people and, therefore, a more balanced and equitable distribution of resources. Such a government has greater support, stability and credibility that contributes to the economic and social growth of the community and acts as an attraction for foreign investors. Thus, universal suffrage is more than a lofty ideal, it is a powerful incentive for better, more equitable government.

Although various economic groups had sought representation in pre-revolutionary colonial assemblies or councils, there were no “functional groups” in America as originated in the medieval guild system and practiced in England in the 18th Century. The medieval system in which “local men, locally minded, whose business began and ended with the interests of their constituency” were sent to Parliament to do their constituents’ bidding and spoke for no group larger than the one that had specifically elected them was repudiated by the Framers. 39 In fact, the use of “functional groups” for voting purposes was never considered during the debates at the Constitutional Convention in 1787. Special interest groups and hereditary prerogatives, such as England’s “rotten boroughs,” were deemed to have no place in a democratic society.

The last colonial governor of Hong Kong, has described Hong Kong’s functional constituencies as “an abomination.” 40 He added that “[w]hoever had devised them must have had a good working knowledge of the worst abuses of British eighteenth-century parliamentary history, and had presumably concluded that such a system would appeal to the business barons of Hong Kong as it had to those of Britain two centuries before....” 41 Such a system tending towards corruption on its own, as it has in the distant and recent past, in conjunction with the arguably otherwise eroding rule of law in Hong Kong, 42 if unchecked, can be expected to lead inevitably to a destabilizing effect on Hong Kong society and, with it, Hong Kong’s prosperous economy and financial markets.

41. Despite his apparent preference for getting rid of the functional constituencies altogether, Patten did note those based on a wider franchise were preferable to those that were not. As he put it, “[o]n the whole, the larger the number of voters and the more open the voting process the more defensible the functional constituency became. Other constituencies were tiny, which led to corruption (the representative of 1991’s smallest constituency, covering a handful of voters from the Regional Council, went to prison for his electioneering methods)....” 42. See supra, text accompanying notes 5-6.
V. CONCLUSION: THE BASIC LAW, THE RULE OF LAW AND DEMOCRACY—GUARANTEES FOR STABILITY AND PROSPERITY IN HONG KONG

The genesis, structure and continued existence of both the Electoral College and the U.S. Senate do not provide any theoretical foundation upon which to build arguments antithetical to the democratic ideals of “universal suffrage” and “equality,” both of which, in the context of electing Hong Kong’s leaders, are being called for today and both of which, beyond forming the bedrock of the most prosperous and stable of modern polities, are securely embedded within the Basic Law.43

Those seeking to stagnate democratic development in Hong Kong should not seek justification of their position in historical foreign political anomalies, such as the U.S. Electoral College and the U.S. Senate. As explained above, they are inapplicable to the situation of Hong Kong and, in fact, are decidedly more democratic in nature than the corresponding Hong Kong institutions that have been put in place only since 1997. Instead, those challenging the growing democratic tide, should take heed, if not of the promise of “universal suffrage” in Articles 45 and 68 in the Basic Law, then of the HKSAR’s obligations under Article 109 of the Basic Law: “The Government of the Hong Kong Special Administrative Region shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre.” The true lesson from the American experience is that a government not elected by the people lacks the credibility and responsiveness to address the needs of its citizenry and, therefore, threatens the social and political stability of the region.

While business leaders, such as Gordon Wu, the Princeton-educated chairman of Hopewell Holdings, have publicly argued against the current push towards democratic progress, claiming that such moves will only lead to a welfare state in Hong Kong,44 the counterpoint is made clearly by foreign businesses in Hong Kong. Both the American and British Chambers of Commerce in Hong Kong have recently indicated that an erosion of democratic principles and the rule of law in Hong Kong would unsettle the international business community that has heretofore chosen Hong Kong as its Asian base. Frank Martin, president of the American Chamber of Commerce in Hong Kong recently stated that, “In order to ensure Hong

43. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA, arts. 25, 26, 39, 45 and 68.
44. Tycoons Prefer the Status Quo, FINANCIAL TIMES (London), May 31, 2004, at 13 (“The voting thing is an evolutionary process. If you try to take it as a revolutionary process ... economically it produces very, very bad results.”).
Kong’s continued role as an international financial centre, it is absolutely essential that we have no erosion of the rule of law and no erosion of free press principles.”45 In the 2003 Annual Business Confidence Survey commissioned by and conducted in part by the The British Chamber of Commerce in Hong Kong, one can find the following under the heading of “What’s Not So Good About Business in Hong Kong”: “Members are increasingly dissatisfied with government leadership (9 per cent decrease) and a stable government and political system (20 per cent decrease).”46 The stymied development of democratization in Hong Kong as promised will only add to these anxieties and concerns.

As China moves to a more open and pluralistic society, with a higher level of education and improved economic conditions for all citizens, the call for greater democracy and participation will increase. Hong Kong, having reached this stage, is more than ready for implementation of the democratic provisions contemplated in the Basic Law. China, by helping Hong Kong realize these goals, will be better able—when the time comes—to implement its own democratic government with Chinese characteristics. In this way, Hong Kong, it is hoped, will be the laboratory for China’s eventual moves to a pluralistic society, universal suffrage and a government responsible to its citizens.

It would indeed be ironic if in matters of self-government and democracy within the “one country, two systems” framework, Hong Kong will not be the model for Taiwan, but instead Taiwan a model for Hong Kong. China may well keep in mind the statement of John Dickinson, an American colonial patriot writing in 1765 against the Stamp Act imposed on the American Colonies by the English Parliament: “. . . many states and kingdoms have lost their dominions by severity [but] . . . I remember none that have been lost by kindness.”47

September 2004


Committee on
International Human Rights

Martin S. Flaherty, Chair
Jeanmarie Fenrich, Secretary

Charles Adler
Patricia C. Armstrong
Hon. Deborah A. Batts
Nicole Barrett
Seymour H. Chalif
Amy Christina Cococcia
Catherine Daly
Eric O. Darko
Jane M. Desnoyers
Mark K. Dietrich
Fiona M. Doherty
Douglas C. Gray
William M. Heinzen
Alice H. Henkin
Sharon K. Hom
Anil Kalhan
Mamta Kaushal
Christopher Kean
Elise B. Keppler
Katharine Lauer
Sara Lesch
Yvonne C. Lodico
Marko C. Maglich
Elisabeth Adams Mason
Nina Massen
Sam Scott Miller
Elena Dana Neacsu
Dyanna C. Pepitone
Sidney S. Rosdeitcher
Margaret L. Satterthwaite
Joseph H. Saunders
Katherine B. Wilmore

Committee on Asian Affairs

Barry Metzger, Chair
Richard R. Yang, Secretary
Lisa Y. H. Chun, Assistant Secretary

Daniel Anderson
Naomi Aoyama
Oren B. Azar
Laura Campbell
William R. Campbell
Russell J. Dasilva
Michael A. Doherty
John Du
Richard M. Gray
Edward Handelman
Nicholas C. Howson
Christopher H. Lunding
Satoru Murase
Edmond L. Papantonio
Fei Qiao
Roger W. Rosendahl
Andrew Starger
Wang Su
Frank K. Upham
Kenneth T. Wasserman
This report reviews the role of the Law Department in the Supreme Court of the State of New York in addressing the large number of motions generated in the courts of this state, with a particular focus on the Law Department in New York County. The Committee recommends, inter alia, an increase in the number of attorneys working in the Law Department and streamlining of the hiring process.

INTRODUCTION

In New York State courts, it is not unheard of for litigants to wait more than six months from submission after argument or the return date for motions that are not argued for a decision on a motion.1 Of course, with aggressive case management implemented in 1996 and differentiated case management implemented in 2000, the number of such experiences

1. In 1990, the State Commission on Judicial Conduct censured a judge for misconduct arising from failure to timely render decision in nine cases. One decision took nine years to render, and in four of the cases, Article 78 petitions had been filed to compel Justice Greenfield to render decisions. The Court of Appeals later reversed the censure, finding that Justice Greenfield had done his best, and that recently enacted administrative changes would assist judges in the future to track their motions. Matter of Greenfield, 76 NY2d 293, 558 NYS2d 881 (1990).
has decreased over time. The average length of the delays has also declined. With approximately 3.5 million cases filed in New York State each year and only 1,143 full-time judges, it is not surprising that such delays occur. Increasing the number of judges is an obvious solution, but not an option in the immediate future. Other alternatives which would decrease delays in deciding motions include increasing the size of judges' staffs, reducing the number of motions, and reducing the number of actions. However, these too suffer from practical implementation problems. Where would additional staff members work in old courthouses which are already overcrowded?

Therefore, the Committee on State Courts of Superior Jurisdiction (the “Committee”) decided to focus on the Law Departments, where a significant amount of the drafting of decisions occurs. Specifically, this report will focus on the Law Department in the Supreme Court, New York County, Civil Term, because of the high volume of cases there, the fact that many committee members practice there (making information gathering easier), and the fact that differences in both court procedures and

2. Compare the Greenfield case with In re Washington, 2003 NY Lexis 3315 (Oct. 21, 2003), where the Court of Appeals recently sustained the State Commission on Judicial Conduct’s determination to remove a part-time City Court judge in White Plains who had 33 decisions which had taken over one year to issue, and seven decisions which had taken over two years to issue, despite administrative efforts to help reduce the backlog. Judge Washington had also filed late, incomplete and false quarterly reports.


4. Daniel Wise, Elective System Is Put Under Intense Review; But Suggested Reforms Are Likely to be Narrow, Voluntary, NYLJ, November 12, 2003, p 1. This includes 24 Appellate Division and Appellate Term Judges, but does not include Acting Supreme Court Judges or certified Judges. Judiciary Law §140-a authorized 323 elected Supreme Court Justices in 12 Judicial Districts. According to the 24th Annual Report of the Chief Administrator of the Court, for calendar year 2001, there were 1199 authorized judges (some of which were not full-time) and an additional 2300 Town and Village Justice Courts.


7. The Committee acknowledges that there are certain limitations to focusing narrowly on a single Law Department, although anecdotal evidence suggests that the experience in other counties is similar. The committee therefore encourages the Office of Court Administration to seek further data from other the Law Departments in addressing the issues identified in this Report.

V O L. 5 9, N O. 2  •  2004
the collection of data in different counties make it difficult to compare or synthesize data from law departments in different courts and counties.\(^8\)

The purpose of this report is to educate the profession about the Law Department, its important role in the courts, and the challenges it experiences, as well as to recommend changes which will hopefully decrease the time it takes to receive a decision on a motion. As a result of the Committee’s study of the Law Department, the Committee concludes that increasing the number of attorneys in the Law Department would be an efficient use of limited resources.

1. Background

In Supreme Court, New York County, Civil Term, 24,862 new cases were filed in 2002,\(^9\) which when added to already-pending actions brought the total of cases pending at the close of 2002 to 40,273. These actions generated 33,139 new motions in 2002, while 34,101 motions were decided, indicating that the large backlog of cases may be beginning to be addressed, for which the Office of Court Administration (“OCA”) should be commended.\(^10\) Under CPLR 2219, motions must be decided within 60 days of their submission.\(^11\) In addition to their staffs, each consisting of one lawyer\(^12\) and one secretary,\(^13\) judges in New York state courts are assisted by a pool of lawyers not specifically assigned to any particular judge. This pool is known as the “Law Department.” The Supreme Courts, both civil and criminal, in all five boroughs, except the Criminal Term of the

\(^8\) For example, many counties count cross-motions separately. However, in New York County, a motion is given a sequence which is counted as one motion regardless of how many cross motions are made.

\(^9\) This number does not include uncontested matrimonial actions, which numbered approximately 17,426 cases in 2002. Matrimonial Judges do not use the Law Department.

\(^10\) The data on motions does not include ex parte applications.

\(^11\) See Section 4.1 of the Rules of the Chief Judge which requires Judges to submit periodic reports of matters pending undecided for more than 60 days. The 60 day limitation is “directory,” and is not a limitation on a Judge’s authority to decide a motion after 60 days. Kaminsky \_v_ Abrams, 51 Misc. 2d 5, 272 NYS2d 530 (Sup. Ct., NY County 1965). Additionally, the Canons of Judicial Ethics require judges to dispose promptly of the business of the Courts. 22 NYCRR 100.3[B][7].

\(^12\) Historically, the title of this position has been law secretary, though its salary line is entitled Principal Law Clerk. Judiciary Law §36; Rules of the Chief Judge §5.1. Many people in the position simply refer to themselves as Court Attorneys.

\(^13\) Instead of a secretary, many judges hire a recent law school graduate who makes a commitment for one or two years. The starting salary for this position is $35,000.
Supreme Court, New York County, have Law Departments which range in size from 3 to 61 attorneys.¹⁴

In 1995, in New York County Supreme Court, there were 47,960 cases pending and 27,580 new actions filed. This compares to 41,141 cases pending in 2003 and 21,231 new cases filed. While the numbers have decreased, the complexity has increased due to the establishment of the Commercial Division in 1993, which is designed to hear larger and more complex cases and has succeeded in attracting more such cases that might otherwise have been filed in federal or other states’ courts.¹⁵

2. The Current Situation in the Law Department of Supreme Court, New York County, Civil Term

This report focuses on the Law Department in the Supreme Court, New York County, Civil Term (the “Law Department”). Fifty judges sit in that court and each manages about 600 cases which yield hundreds to thousands of motions each year depending on the part in which the judge sits. For example, in 2002 over 2,000 motions were made in a Motor Vehicle part while over 1,000 were made in a Commercial Division part.

Lawrence Birnbaum is the Chief Court Attorney of the Law Department. Mr. Birnbaum has held the Chief’s position since 1995, when he succeeded Seymour Bieber who had held the position for 21 years. The Chief Court Attorney reports to the New York County Supreme Court’s Chief Clerk, John Werner. The Chief Court Attorney, Deputy Chief Court Attorney and five Principal Court Attorneys supervise 54 full- and part-time Court Attorney positions¹⁶ and nine Special Referees.¹⁷ Court Attorneys draft decisions on motions and hold discovery conferences for Judges.

¹⁴ In addition, the Court of Appeals, all four Appellate Divisions and Appellate Terms have Law Departments.

¹⁵ Tamara Loomis, Commercial Division: High Profile Case Casts Spotlight on Well-Repected Court, NYLJ, June 20, 2002.

¹⁶ Three of the Court Attorneys work part-time, two are assigned to the office of the self-represented and one is assigned to the motion support office.

¹⁷ On December 5, 2000, Judge Pfau proposed streamlining the structure for the legal series. Currently, there are five separate categories for lawyers, on the budget for the courts, which may create inconsistencies and operational difficulties. Judge Pfau proposed limiting the categories to only two: (1) law clerks who work for judges and (2) court attorneys. Both series would take into consideration up to five years of prior legal experience. Since the “referee” title would be abolished, the referee function would be handled by the higher level court attorneys or clerks. However, implementation of these changes has been delayed due to the budget crisis.
Special Referees can be appointed under CPLR 4001 to hold evidentiary hearings either to hear and determine under CPLR Article 42 or hear and report under CPLR Article 43. Until 1991, the Law Department consisted of 22 attorneys.\textsuperscript{18} It increased to 50 in 1995 and by 2001, it had increased to its current level of 61.\textsuperscript{19} Today, there are three Court Attorney vacancies for which the Law Department is in the process of hiring.

Court Attorneys come to the Law Department with varied and significant experience. Prior legal experience includes: Law Secretaries to Judges sitting in the Court of Appeals, Appellate Division, First Department and Supreme Court's Commercial Division; major New York law firms; The Legal Aid Society; the Second Circuit’s Law Department; the NYS Attorney General's office; and the United Nations. All New York City law schools are represented in the Law Department. On average, Court Attorneys are 18 years out of law school. Currently, the average tenure of a Court Attorney in the Law Department is eight years. Salaries range from $51,858 to $116,266. The Law Department offers a flexible work schedule including job sharing, part-time schedules and flexible hours. In addition to competitive medical, dental and vision benefits, court employees begin with four weeks of vacation and generous sick leave policies. One of the benefits of working in the Law Department is that court attorneys work independently. Some Court Attorneys transfer from the Law Department to work for a specific judge, which often translates to a higher salary and more responsibility. Law Department alumni include: Court of Appeals Judge Carmen Beauchamp Ciparick, Deputy Chief Administrative Judge Jonathan Lippman, Appellate Division First Department Justices Betty Weinberg Ellerin and Angela M. Mazzarelli, and John F. Werner, the Chief Clerk of Supreme Court, New York County, Civil Branch.

Court Attorneys are assigned approximately two motions per week and may be assigned “expedites,” which are motions designated by judges as time sensitive and in need of immediate decisions. As a result of the limited number of Court Attorneys, the Law Department limits judges to sending one expedite to the Law Department per week. Approximately 4,000 motions are sent to the Law Department each year, which translates to each Court Attorney drafting about 100 decisions per year. All drafts are reviewed, edited and proofed at least once by more senior Court Attorneys, before being sent to a judge. For two years, training for new hires

\textsuperscript{18} Martin Fox, ‘Temp’ Court Attorney Retires After 46 Years, NYLJ, July 20, 1995.

\textsuperscript{19} Sixty-one budget lines are approved for the Law Department, including lines for the Chief Court Attorney, Deputy Chief Court Attorney, five Principal Court Attorneys and 54 full and part-time Court Attorneys.
includes multiple rounds of review and editing. In addition, all Court Attorneys receive 12 hours of CLE training per year, provided and paid for by the OCA.

The hiring process for positions in the Law Department begins with a job posting for 21 days. A recent posting yielded 250 resumes. A committee of six (three members selected by Judge Silbermann, one by Judge Carey, one by Judge Bing Newton and one by Judge Pfau) reviews the resumes and picks approximately 30 candidates for interviews. A new committee is selected for each new posting. After interviews by the full hiring committee, the candidates receiving the most votes are approved for hiring. The committee then submits a list to Judges Carey and Pfau for final approval. Candidates begin their jobs approximately four months after the initial posting. Candidates seeking the position of Principal Court Attorney and referee get two more levels of review in the interview process.

3. Challenges Facing the Law Department

It appears that the primary issue facing the Law Department today is a large backlog of pending motions, which results in a prolonged turnaround time in completing any given motion. This backlog was created when a hiring freeze took effect in early 2002. Five positions went unfilled for one year leading to a backlog of over 500 cases. Once the hiring freeze ended, five new Court Attorneys were immediately hired. Since thereafter no new Court Attorneys were added, the backlog continues. As a result, new motions cannot be assigned to Court Attorneys until 2 weeks to over a month after a motion is sent to the Law Department by a Judge. Accordingly, it is not uncommon for up to four months to pass after a motion is assigned to the Law Department before a decision is drafted.

It appears to the Committee that the backlog of cases stems in large part from the inadequate size of the Law Department staff and the amount of time it takes to hire new attorneys when vacancies occur. As to staff size, even the addition of a few attorneys would greatly decrease the load on all of the staff members. Moreover, there are almost always open positions within the Law Department, but because the hiring process takes so long, other vacancies are likely to open by the time the current positions are filled, resulting in “rolling” vacancies on the staff.

Procedures for filling open positions are cumbersome and require a great deal of attention from administrators, further impeding the process. The Committee has learned from the Law Department that currently, even when a post is vacant, and there is a viable candidate whom the Law Department wishes to hire, the process of arranging meetings with the
committee members for interviews can prove difficult. This logistical issue alone can add to the delay in the hiring process. Such requirements mean the hiring process is approximately four months long and can last longer. In extreme cases, the delay has resulted in losing viable candidates.

In the current economic climate, the Law Department is not having substantial difficulty garnering a pool of qualified applicants for open positions. However, as a logical matter, relatively low salaries, the extended hiring process, and a general lack of awareness about the Law Department among law students and law firm associates must inevitably result in potential candidates finding employment elsewhere, or not applying for positions in the first instance. The Committee anticipates, and anecdotal evidence supports, that the issue of consistently attracting the quality and quantity of candidates required will remain, and may become more pronounced as the economic conditions improve. The Committee commends the Law Department for maintaining the high quality of its staff in the face of these constraints and believes that more should be done to support these efforts, as discussed in Section Five of this report.

4. Impact of Current Challenges on the Administration of Justice

The adage “justice delayed is justice denied,” generally attributed to William Gladstone, is based on a nugget of truth. The delay in drafting decisions, on its face, leads to delay for litigants who desire (if not necessarily expect) the swift administration of justice. Obviously, delays in rendering decisions on motions result in delays in resolving cases in their entirety. While the Committee believes that the Law Department has contributed greatly to the efficient and fair administration of justice in the state of New York, the issues raised in the previous section represent unnecessary encumbrances on the system.

Delay can also lead to more expense for litigants, especially if costly discovery is ongoing while a motion is pending. CPLR 3214 stays discovery pending decision on certain motions unless the Court orders otherwise. However, under Rule 12 of the Rules of the Commercial Division of the Supreme Court, New York County, certain discovery continues. Delay can also result in judges having to hold conferences and decide procedural matters when a speedy resolution of the substantive motion would render such effort unnecessary.

5. Recommendations

In general, the Committee has four basic recommendations concerning the Law Department:
A. Commit to Increasing the Staff Size of the Law Department and Increasing Salaries of Employees. The Committee is fully aware of the budget issues facing the judicial system and the State of New York as a whole. However, we strongly recommend that OCA consider working to ensure that the Law Department is fully staffed at all times, and to consider increasing the overall size of the Law Department. In addition, the Committee recommends increasing the salaries of at least some Court Attorneys so some salaries keep up with wage inflation, as this would allow the Law Department to continue to attract high quality candidates and to retain competent Court Attorneys. The Law Department continues to have a pressing need for such candidates in order to efficiently prepare the high quality opinions which judges expect. In addition, it must provide incentives for existing employees to stay.

The Committee believes that if the Law Department can offer even slightly increased salaries, particularly to those within the Law Department who provide exemplary work and draft opinions, it will help increase the productivity of the entire Law Department, relieve the burden on judges, and result in improved administration of justice.

Swifter issuance of decisions also may lead to swifter dismissal of unmeritorious cases and swifter resolution (by a summary judgment or otherwise) of other cases which currently linger in the system. For this reason, the Committee believes that a small investment in high quality lawyers assisting the judges to make high quality decisions may result in great dividends elsewhere.

B. Streamline the Hiring Process for the Law Department. In the case of a particularly strong candidate, or a strong recommendation, the Law Department should be able to hire more swiftly. Dispensing with the expectation of in-person interviewing by all of the members of the hiring committee would greatly facilitate the hiring of quality candidates. Rather than selecting a new hiring committee for each posting, a hiring committee could be selected for a term such as one year with regularly scheduled meetings during which candidates would be interviewed regardless of whether there is one vacancy or several. In addition, the Committee recommends that a meeting of the hiring committee occur annually, regardless of whether there are positions that currently need to be filled, in order to discuss staffing needs and promote a systemized hiring process.

C. The Bar Can Assist in Publicizing and Educating the Law Department.

The Committee acknowledges that Court Attorneys’ salaries are limited by the salaries of judges set at $136,700.
The Committee calls upon members of the bar, law firms (particularly those firms which are accredited providers of Continuing Legal Education), and other bar committees to participate in CLE programs and other events for Court Attorneys, whether sponsored by the Judicial Institute or by OCA, in order to enhance those attorneys’ educations. The Committee also recommends that firms and other groups participate in and help publicize the City Bar’s current career panels, which include discussions concerning the Law Department, the career opportunities available there, and in particular highlight the close interaction with judges which many Court Attorneys enjoy. This could be the Bar’s contribution to enhancing the hiring goals of the Law Department.

We do not recommend that law firms create special CLE programs or sponsor particular events for Court Attorneys, and in particular strongly discourage any such events located at a particular firm. Such events could create the appearance of impropriety. For example, securities defense firms presenting the current state of the law on dismissal of securities-related claims could be seen as a one-sided attempt to influence decision makers. We nevertheless believe that many other CLE panels may be of interest to Court Attorneys. For example, current updates on procedural issues can only help Court Attorneys. Practitioners should continue to support and attend a wide selection of CLE programs attended by or designed for Court Attorneys. In particular, we believe the New York State Judicial Institute would be an excellent forum in which to provide CLE to Court Attorneys, drawing upon private bar involvement.

D. Examine the Possibility of Funded Internships in the Law Department. The Committee considered whether to pursue a proposal, initially suggested by Justice Herman Cahn, to establish a new system of internships whereby employees of larger law firms would remain on law firm payrolls, but be placed as interns within the Law Department and assigned to the Commercial Division. Some members of the Committee were enthusiastic about this proposal.

However, the Committee concluded that such an intern program would be difficult to administer. Enthusiasm from firms for participation in such an expensive program was not clear, and the apparent conflicts issues presented were too complicated to resolve satisfactorily. In particular, there was concern that a lawyer on the payroll of a large law firm could be viewed as having a bias toward particular types of defendants or plaintiffs, and/or being too closely involved with the particular clients of law firms appearing in cases before the Commercial Division. Many on the Committee believe that such conflicts issues might be resolvable but agree
that it is more problematic to deal with the perception of bias. Consequently, at this stage, the Committee does not recommend creating such an internship program.

OCA’s Legal Fellows Program and the Law Department’s experience with volunteer summer interns suggest that there are other creative ways in which additional personnel can be brought in to assist the Law Department and its growing body of work. The Committee is interested in whether various charitable foundations which make financial contributions to the administration of justice could, perhaps jointly or with contributions from law firms, create a scholarship fund which could, via its income, pay one or two employees to supplement the staff of the Law Department. This is obviously a long term project, but we believe that the OCA may be pleasantly surprised at the favorable reaction it could receive if an endowment of this type is created.

5. Conclusions
The Committee has four recommendations to be implemented.

Recommendations 1 and 2, to increase salaries and streamline the hiring of Law Department personnel, require action by OCA.
Recommendation 3, which proposes CLE programs and perhaps a panel concerning the Law Department, requires action by bar associations, law firms and lawyers.
Recommendation 4, concerning the creation of additional internship and fellowship opportunities, requires action by OCA.

The Committee is confident that some additional attention to the Law Department on all sides of the profession can result in significantly increased productivity.

February 2004
Committee on State Courts of Superior Jurisdiction

Toby M.J. Butterfield, *Chair*
Lance Koonce, *Secretary*

Ron Berson
David Black
Robert Blum
Leo Crowley
Tracee Davis
Jeffrey Eilender
Paul Feinman
Michael Graff
Terry Gushner
Gary Horowitz
Sheilah Kane
Gary Levenson
Howard Levi

Paul Levinson
Andrea Masley*
Diana Murray
Preston Ricardo
Ambrose Richardson
Irvin Rosenthal
David Sculnick*
Steven Sinaiko
Lewis Bart Stone
Howard Trepp
Lauren Wachtler
Elizabeth Yablon

* Drafters of the Report
Tiering and the Foreign Sovereign Immunities Act After Dole

The Committee on Federal Courts

I. Introduction

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1602 et seq., provides the sole basis for jurisdiction in United States courts (federal and state) in actions against foreign states. Reflecting the sovereign immunity and U.S. foreign policy concerns that are raised whenever a foreign sovereign is haled into a U.S. court, the FSIA provides various protections to foreign states, including the presumption of immunity,1 the right to remove an action to federal court,2 and the right to a bench trial.3 While the applicability of the FSIA is clear in suits involving foreign states themselves, the term “foreign state” also includes political subdivisions of states and agencies and instrumentalities of foreign states.4 An “agency or instrumentality” in turn includes entities, like government-owned corporations, “a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.”5

3. See id.
Until last year circuit courts were split on the question of whether an agency or instrumentality indirectly owned (i.e., through an intermediate corporate entity) by a foreign state qualified as a “foreign state” under the FSIA. In *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (2003), the Supreme Court resolved the issue when it ruled that only agencies and instrumentalities *directly* owned by a foreign government are “foreign states” for purposes of the FSIA. Therefore, an oil company wholly owned by a foreign state would constitute a foreign state, but the oil company’s subsidiaries, even if wholly owned, would not. The *Dole* majority noted that if unrestricted tiering were permitted, a distant subsidiary, with only nominal ties to a foreign sovereign, might be given foreign state status under the FSIA. Justice Breyer, joined by Justice O’Connor, dissented, arguing that the majority’s decision would arbitrarily grant foreign state protection to a state-owned corporate parent but deny it to its wholly-owned subsidiary.

The *Dole* decision went against the weight of circuit authority and has since been criticized. Many foreign governments structure important state-owned enterprises as government-owned corporations, which, in turn, have multiple layers of subsidiaries. Under *Dole*, only the top tier corporation owned directly by the foreign government is protected by the FSIA—its corporate offspring are not. A preferable alternative would be based on the foreign state’s beneficial ownership of the tiered entity—regardless of whether such ownership is direct or indirect. On the one hand, this approach acknowledges that beneficial ownership, rather than direct ownership, is a better test for determining the extent of a foreign sovereign’s interest in a particular enterprise. On the other hand, by requiring *majority* beneficial interest, the approach avoids the dangers of “infinite loop- ing,” whereby an entity with no meaningful relationship to the foreign sovereign might enjoy immunity.

The problem posed by *Dole* is far from theoretical—foreign governments, no less than private corporations, are increasingly relying on complex corporate forms to structure important interests. Under *Dole*, these corporations, no matter how important to the foreign government, will not enjoy the protections of the FSIA unless they are directly held by the state itself. We therefore propose that Congress amend section 1603(b) of the FSIA to implement a beneficial interest analysis to define whether a state-owned corporation constitutes a “foreign state.” Such a test would not look at the number of tiers, but at the aggregate beneficial ownership interest of the foreign government in the enterprise. Under such an analysis, a wholly-owned subsidiary of a state-owned enterprise would constitute a “foreign state” under the FSIA. In the case of a 51-percent owned subsid-
iary of a 51-percent state-owned enterprise, the beneficial interest would be just over 25 percent. Consequently, the entity in question would not constitute a “foreign state” under the FSIA.

II. BACKGROUND

A. Foreign Sovereign Immunity Prior to the FSIA

In *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), Justice Marshall articulated the doctrine of foreign sovereign immunity, opining that:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.6

In the years following *The Schooner Exchange*, the Supreme Court embraced a broad view of foreign sovereign immunity, including where the sovereign’s activities were purely commercial.7

The expansive conception of foreign sovereign immunity was jettisoned in 1952 in favor of what became known as the “restrictive theory.” In that year, the Department of State issued the so-called “Tate Letter” which narrowed the scope of foreign sovereign immunity:

> [T]he widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons, it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.8

6. 11 U.S. at 137. For an overview of foreign sovereign immunity upon which this section is based, see Andrew Loewenstein, *The Foreign Sovereign Immunities Act and Corporate Subsidies of Agencies or Instrumentalities of Foreign States*, 19 Berkeley J. Int’l L. 350, 353-56 (2001).

7. See, e.g., *Berizzi Bros., Co. v. The Pesaro*, 271 U.S. 562 (1926) (denying jurisdiction over a state-owned commercial vessel because it was used for so-called public purposes including advancing trade and providing funds for the national treasury).

Under the restrictive theory, foreign governments were presumed to enjoy immunity. However, such immunity could be countered by a showing that the relevant government activity was commercial in nature.

In light of judicial deference to the Executive Branch in matters touching upon foreign relations, the Department of State’s ad hoc decision as to whether a foreign sovereign would enjoy immunity or not was frequently determinative. With substantial interests on the line, foreign governments sometimes pressured the Department of State into recommending sovereign immunity even where the facts of the case did not so dictate.

B. The Foreign Sovereign Immunities Act

In order to de-politicize the determination of whether a foreign sovereign would enjoy immunity in a given case, and to avoid the case-by-case and sometimes contradictory decision-making of the Department of State, Congress enacted the FSIA in 1976. The FSIA codified the rules for determining sovereign immunity and effectively shifted the immunity determination from the Executive Branch to the Judicial Branch so as to “serve the interests of justice” and “protect the rights of both foreign states and litigants in United States courts.”

In addition to the FSIA, Congress enacted statutes governing jurisdiction and removability in actions brought against foreign states. Districts courts therefore have original jurisdiction over cases against foreign states without regard to the amount in controversy. Foreign states may also remove actions against them in state court to federal court, without obtaining the consent of other defendants. A foreign state is not required to submit to a trial by jury.

9. See Loewenstein, at 355-56.
10. See id.
15. See id.
role in cases involving foreign sovereigns was to promote “uniformity in decision,” which was deemed desirable “since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.” Similarly, the purpose of permitting cases involving foreign states to be tried by the court instead of a jury was “to promote a uniformity in decision where foreign governments are involved.”

The determination of whether an entity is or is not a foreign state is thus critical. The FSIA defines a “foreign state” as follows:

(a) A “foreign state”, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

The legislative history of the FSIA suggests that the term “agency or instrumentality” was intended to be read broadly:

[Entites which meet the definition of an “agency or instrumentality of a foreign state” could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.]

---


19. Id.


In light of the statutory language and legislative history, the question arose whether the definition of an “agency or instrumentality” extended only to entities that are directly majority state-owned (i.e., “first-tier”) or also to those that are majority owned by an entity that is itself majority owned by a state (i.e., “second-tier” and below). This ambiguity became known as the “tiering” problem.

III. DOLE FOOD CO. V. PATRICKSON

In *Dole Food Co. v. Patrickson*, the Supreme Court held that the FSIA does not permit tiering. In so deciding, the Court sided with the minority of circuits that had rejected tiering.

A. Pre-Dole Circuit Split

During the first twenty years of the FSIA, the majority of circuit courts, as well as other courts, held that tiered corporations were foreign states and thus entitled to the protections of the statute. The Seventh Circuit held that the FSIA applied to an entity indirectly owned by the Italian and French governments, relying on the FSIA’s legislative history and “crystal clear” congressional intent that tiering be permitted. And the Fifth Circuit, citing the *In re Air Crash Disaster* case, held that because the “plain language of the statute...draws no distinction between direct and indirect ownership,” tiering was permitted. Various district courts followed the reasoning of the tiering decisions.

23. See Griggs, supra note , at 403-05. The Seventh Circuit noted that “nearly all courts which have confronted indirect or ‘tiered’ ownership situations have considered majority state-owned corporations to be ‘agencies or instrumentalities of foreign states’ under the FSIA, even where the state ownership was indirect.” *In re Air Crash Disaster Near Roselawn, Ind. on October 31, 1994*, 96 F.3d 932, 939 (7th Cir. 1996). Circuit courts ruling in favor of tiering included the Fifth, Seventh, D.C., and, as discussed infra, possibly the Second. See *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000), cert. denied, 532 U.S. 972 (2001); *In re Air Crash Disaster; Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982) (“clear” that a subsidiary corporation indirectly owned by Ireland was a foreign state under the FSIA). See also Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 447 (6th Cir. 1988) (applying FSIA to entity indirectly majority owned by French government).
24. *In re Air Crash Disaster*, 96 F.3d at 940.
The Ninth Circuit was the one circuit court to reject tiering.\textsuperscript{27} In Gates v. Victor Fine Foods,\textsuperscript{28} California-based Golden Gate Fresh Foods abruptly shut down its pork production plant, fired all of its workers, and terminated its benefits plan. Golden Gate’s workers filed suit, alleging violations of several statutes. Golden Gate was owned by Fletcher Fine Foods, which in turn was owned by the Alberta Pork Producers Development Corporation, an entity created by the Canadian government.\textsuperscript{29} The court held that Alberta Pork was an agency or instrumentality of Canada. However, it held that Fletcher Fine Foods was not. This determination was based on the court’s finding that a contrary result would render the term “or political subdivision thereof” in section 1603(b)(2) superfluous. It concluded that Fletcher Fine Foods was owned by an agency and instrumentality but that it did not qualify as an agency or instrumentality in its own right. The Ninth Circuit also expressed concern that permitting entities owned by agencies or instrumentalities to qualify as agencies or instrumentalities “would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision.”\textsuperscript{30} Gates was followed by various district courts.\textsuperscript{31}

New York courts struggled with the tiering question. In O’Connell Machinery Co. v. M.V. “Americana,”\textsuperscript{32} the Second Circuit examined whether the entity Italia Di Navigazione, S.p.A. (doing business as the “Italian Line”) was a “foreign state” for purposes of the FSIA. The majority of the Italian Line’s shares were owned by the Societá Finanziaria Marittima, which in turn was under the direct control of the Istituto per la Ricostruzione Industriale, a public financial entity that coordinates the management

\textsuperscript{27} In \textit{Federal Insurance Co. v. Richard I. Rubin & Co.}, 12 F3d 1270, 1285 n.12 (3d Cir. 1993), \textit{cert. denied}, 511 U.S. 1107 (1994), a single judge noted in dictum that tiering might be prohibited by the FSIA.

\textsuperscript{28} 54 F.3d 1457 (9th Cir.), \textit{cert. denied}, 516 U.S. 869 (1995).

\textsuperscript{29} See \textit{id.} at 1459.

\textsuperscript{30} \textit{Id.} at 1462.


of commercial enterprises with the Italian government. The Second Circuit Court of Appeals upheld the district court’s holding that the Italian Line qualified as an agency or instrumentality of the Republic of Italy. It noted that “[t]he fact that the Italian Government saw fit to double-tier its administrative agencies did not compel a holding to the contrary.” In reaching this conclusion, the Second Circuit did not parse the language of 1603(b), with the result that district courts disagreed whether the Court had definitively held tiering to be permissible, although the majority of reported Southern District decisions on the question held in favor of tiering.

B. The Dole Decision

*Dole*, like the Fifth Circuit’s Delgado decision, concerned Israeli chemical companies that were alleged to have exposed workers to a harmful pesticide. Unlike in Delgado, however, the precise ownership interest at each tier was not specified in the Court’s opinion, although the decision makes clear that the chemical companies were several tiers removed from direct Israeli ownership: “Israel wholly owned a company called Israeli Chemicals, Ltd.; which owned a majority of shares in another company called Dead Sea Works, Ltd.; which owned a majority of shares in Dead Sea Bromine Co., Ltd.; which owned a majority of shares in Bromine Compounds, Ltd..”

Justice Kennedy, writing for the majority, framed the question before the Court as “whether Israel owned shares in the Dead Sea Companies as a matter of corporate law, irrespective of whether Israel could be said to

33. See *id.* at 116.

34. *Id.*


have owned the Dead Sea Companies in everyday parlance." The majority’s rubric was therefore formal corporate structure ("owned shares") as opposed to the substantive ownership status (ownership in "everyday parlance") of the entities in question.

The Court noted that a "basic tenet of American corporate law is that the corporation and its shareholders are distinct entities" and that "[t]he fact that the shareholder is a foreign state does not change the analysis." Given that corporate veil piercing is "the rare exception" to be applied only in "exceptional circumstances," Israel’s control of indirectly-owned corporations was irrelevant, because "[c]ontrol and ownership...are distinct concepts." Consequently, the Court concluded that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement [of the FSIA]." 38

Justice Breyer, joined by Justice O’Connor, dissented. Justice Breyer found the language of the FSIA to be ambiguous at best. 39 He noted, for example, that the inclusion in section 1603(b)(2) of the term ‘‘other ownership interest’ might, or might not, refer to the kind of majority-ownership interest that arises when one owns the shares of a parent that, in turn, owns a subsidiary.” 40 Justice Breyer therefore turned to the underlying purpose of the FSIA and concluded that it was intended to give federal courts broad jurisdiction over foreign states. He rhetorically asked, "Given these purposes, what might lead Congress to grant protection to a Foreign Nation acting through a Corporate Parent but deny the same protection to the Foreign Nation acting through, for example, a wholly owned Corporate Subsidiary?" 41 The answer, he maintained was that "nothing at all would lead Congress to make such a distinction." 42 Breyer argued that the majority’s reading of the FSIA catapulted form over substance, and noted that foreign states frequently employ complicated corporate structures to control key state-owned industries.

**IV. CRITICISM OF DOLE**

*Dole* is susceptible to criticism on a variety of grounds. Textually, it is unclear how the Court’s decision can be reconciled with FSIA section 1603(a),

37. *Id.*
38. *Id.* at 1660 (emphasis added).
39. See *id.* at 1664-65.
40. *Id.* at 1664.
41. *Id.* at 1666.
42. *Id.* (emphasis in original).
which defines “foreign state” to include agencies and instrumentalities of a foreign state. If that definition is applied in section 1603(b)(2), an instrumentality would include a subsidiary of an instrumentality—a second-tier corporation. Dole also arguably reads section 1603(b)(2)'s reference to “other ownership interest” out of the statute.

Moreover, Dole's bright-line rule of direct ownership, while making the determination of agency or instrumentality status simple, often leads to arbitrary or incongruous results. As noted supra, one of the purposes of the FSIA was to promote uniformity of treatment of foreign states. With the exception of Gates and a handful of other cases, “[m]ost judges [have] felt that American courts should not concern themselves with how a foreign government chooses to structure its agencies or instrumentalities.” Indeed, “[w]hy should it matter to an American court whether, for example, Mexico chooses to exercise its state monopoly over the oil industry through a single corporation (as Mexico did before 1982), or through a holding company and four operating subsidiaries (as Mexico did after 1982)?”

One of the implicit concerns in Dole (and one explicitly mentioned in Gates) was that permitting tiering might bring under the FSIA corporate entities many tiers down, with no meaningful connection to a foreign state. While Dole answers this concern, it creates another; namely, that important state-owned companies will not be covered by the FSIA, despite the reality that litigation involving such companies may substantially impact foreign state interests. For example, under Dole, a 51 percent state-owned enterprise would be covered by the statute, while the wholly-owned subsidiary of a wholly state-owned company would not. Whether the foreign state has a greater interest in a first-tier corporation that is only majority-owned than in a second-tier corporation that is wholly-owned is at least open to question. Indeed, prior to Dole an A.B.A. Working Group strongly endorsed presumptive sovereign immunity for corporations indirectly majority owned by foreign states, because some states utilize a tiered corporate structure “to manage and control important areas of national interest, such as natural resources.”

44. Id. at 89.
45. See Gates, 54 F.3d at 1462.
added that “[t]he strength of a foreign state’s sovereign interests in an area does not necessarily dissipate when it employs more complicated legal structures resembling those used by modern private businesses.” Yet *Dole* forbids such analysis in favor of a rigid black and white rule against tiering.

Finally, defense attorneys contend that *Dole* will permit plaintiffs to forum shop and sue subsidiaries of state-owned corporations in the most pro-plaintiff state courts. The availability of more favorable fora will in turn increase the number of suits filed against foreign sovereigns.

**V. TOWARDS A NEUTRAL PRINCIPLE—BENEFICIAL OWNERSHIP**

The *Dole* Court was rightly concerned that if unrestricted tiering were permitted, an entity with only distant ties to a foreign sovereign might be considered a “foreign state” under the FSIA. However, *Dole*’s mechanical rule paints the reality of foreign sovereign-owned entities with too broad a brush. While a foreign sovereign’s interest in an entity might diminish after the first tier, this is not necessarily so. A better test, which we propose here, would be to examine the foreign sovereign’s beneficial interest in the entity in question, without regard to the number of tiers involved. Where the beneficial interest of a foreign sovereign is greater than half, the entity would be considered a “foreign state” for FSIA purposes. Where the beneficial interest is 50 percent or less, the entity would not be considered a “foreign state” for FSIA purposes.

Accordingly, we propose amending section 1603(b)(2) as follows:

(b) An “agency or instrumentality of a foreign state” means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivi-

---

47. Id.


49. See id.

50. For example, under a regime of unrestricted tiering, a sixth-level tiered entity would be considered a “foreign state” as long as it (and every other higher tier) were majority-owned by the tier above it.
sion thereof, or a majority of whose shares or other ownership interest is majority owned directly or indirectly by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Thus, if State A owns 100 percent of an oil holding company that in turn owns 100 percent of several subsidiaries—the subsidiaries would qualify as instrumentalities because the underlying state interest is still 100 percent—under Dole, the subsidiaries would not be considered instrumentalities; under the proposed beneficial ownership test they would.

Alternatively, suppose that State B owns 99 percent of a transportation holding company that in turn owns 51 percent of an airline. Under both Dole and a beneficial interest test, the holding company would be considered an agency or instrumentality. However, under Dole, the airline would not be considered an instrumentality, because it is not directly owned by the state. Under a beneficial ownership test, the airline would be an instrumentality because the state interest is 99 percent of 51 percent—50.49 percent.

Suppose, however, that State B owns 51 percent of a holding company which in turn owns 51 percent of an airline. Under Dole, the airline would not be considered an instrumentality because it is not directly majority-owned by State B. Under a beneficial ownership test, the airline would also not be considered an instrumentality because the beneficial interest in the state is 51 percent of 51 percent—26.01 percent.

Judge Kaplan proposed such a beneficial interest test in Musopole v. South African Airways (Pty.) Ltd.51 The entity in question in that case, South African Airways, was 80 percent owned by Transnet Ltd., which in turn was wholly owned by the South African Ministry for Public Enterprises. He noted that “there can be little doubt that the interests of the foreign sovereign are implicated to an extent sufficient to bring the case within the intended ambit of the [FSIA].”52 Responding to the plaintiff’s argument that permitting tiering would permit “infinite looping,” (i.e., that nth level tiers, with no meaningful link to a sovereign state, could potentially be immune under the FSIA), Judge Kaplan noted that the FSIA could be read to embrace a beneficial interest analysis:

52. Id. at 447.
One might well read the statute, for example, as bringing second- and lower-tier subsidiaries of a foreign nation within the definition of “foreign state” provided that the foreign government beneficially owns a majority of the shares of the entity in question. This would bring within the statute, for example, an nth-tier subsidiary, all of the shares of which were held by a company at the bottom of a long chain of foreign government subsidiaries, all of the shares of each of which was held by the company above it, all the way up the chain to the foreign government itself, but exclude from its protection [a subsidiary 51% owned by a parent company in turn 51% owned by a foreign government].\(^{53}\)

A beneficial interest test, Judge Kaplan added, “would be entirely consistent with the overall policy of the [FSIA, and] would have the added virtue of giving effect to the substance of a foreign government’s interest rather than to the form of ownership.”\(^{54}\)

Ultimate beneficial ownership is also what appears to have drawn the Seventh Circuit’s decision in *In re Air Crash Disaster*. While the company at issue in that case, Avions de Transport Regional, G.I.E. (“ATR”), was several tiers removed from its sovereign parents, Italy and France, the court ruled that through intermediaries “France and Italy retain indirect ownership of approximately 75 percent of ATR.”\(^{55}\) What was critical to the Seventh Circuit’s analysis was the states’ majority beneficial ownership in the enterprise, not how the states chose to structure that ownership interest.

Indeed, it was precisely a question of the structure of a majority beneficial ownership that led the Republic of Ireland to submit an amicus brief in the *Dole* case. In 1985, Ireland purchased insolvent insurance company ICI. Due to certain requirements of Ireland’s law, and based on the government’s belief that speed and initial secrecy were essential to the acquisition, Ireland purchased ICI (later renamed Icarom PLC) through a wholly-owned shell corporation “whose only function is to act as [Ireland’s] nominee in holding bare legal title to Icarom’s stock.”\(^{56}\) Under *Dole*, Icarom would not qualify as an instrumentality, notwithstanding Ireland’s avowed

---

53. *Id.* (emphasis in original).
54. *Id.*
55. 96 F.3d at 936.
VI. CONCLUSION

While Dole eliminated the ambiguity of FSIA’s section defining a “foreign state,” it introduced a host of new difficulties. Most significant among these is that Dole’s rigid rule requiring the direct ownership of agencies and instrumentalities does not comport with reality. Numerous foreign sovereigns utilize complicated corporate structures to manage important state-owned industries such as oil extraction or air transport. In placing a premium on corporate structure at the expense of substance, Dole ignores a foreign state’s interest in an enterprise unless the relationship is structured as one of direct ownership.

A better solution would be to amend the FSIA so that entities that are majority beneficially owned by a foreign sovereign are considered “foreign states” under the FSIA and thus entitled to presumptive immunity. Such a solution would perfectly balance the concerns of both sides in the tiering debate. On a theoretical level, the approach recognizes that beneficial ownership is a better indicator of state interest than mere corporate structure. On a practical level, the approach acknowledges that many foreign sovereigns structure important state-owned corporate interests as subsidiaries of one or more parent companies. Finally, a beneficial ownership analysis would be truer to the original aims of the FSIA—to promote uniformity in the immunity determination by channeling cases involving foreign states to the federal courts.

July 2004

57. While a detailed examination of sovereign immunity law in other nations is beyond the scope of this Report, it is important to note that this Report’s proposal would not produce a marked difference in U.S. sovereign immunity law from that of other nations. This proposal would not result in second tier entities engaged in commercial activities being immune from jurisdiction to suit in the U.S. Rather, it would afford such entities relevant FSIA protections, such as removal rights and the right to a bench trial. Of course, in European civil law countries, an agency or instrumentality would not be subject to jury trial (since the civil law system does not have civil jury trials). And while there is a dearth of case law in the subject, European states, in applying principles of customary intentional law as well as the European Convention on State Immunity, May 16, 1972, C.E.T.S. no. 074, art. 27, would probably adjudge even indirectly-held entities immune so long as these were found to perform sovereign “functions.”
Committee on Federal Courts

Thomas H. Moreland, Chair

Jill S. Abrams
David JB Arroyo
Carmine D. Boccuzzi*
Francisco E. Celedonio
Lewis Richard Clayton
Eric O. Corngold
James L. Cott
Michael H. Dolinger
Thomas A. Dubbs
Martin D. Edel
William C. Fredericks
Barry S. Gold
Thomas H. Golden
Rita W. Gordon
Marc L. Greenwald+
Caitlin J. Halligan
Lynne Troy Henderson
Fran M. Jacobs
Bruce Robinson Kelly
Lynn Mary Kelly
Michael B. Mushlin
Lynn K. Neuner
Katherine Huth Parker
Douglas J. Pepe
Amy Rothstein
Gail P. Rubin
Peter Salerno
Wendy H. Schwartz
Alexandra Shapiro
James A. Shifren
Ellen B. Unger
Alan Vinegrad
Hilary M. Williams
Victor Worms

* Principal author of report
+ Not participating
Formal Opinion 2003-04

Obligations Upon Receiving a Communication Containing Confidences or Secrets Not Intended for the Recipient

The Committee on Professional and Judicial Ethics

**TOPIC:** Inadvertent Disclosure of Communications Containing Confidences or Secrets; Duty to Preserve Confidences and Secrets; Obligation of Zealous Representation; Obligation to Refrain from Conduct Prejudicial to the Administration of Justice.

**DIGEST:** When a lawyer receives a letter, fax, e-mail or other communication containing confidences or secrets that the lawyer knows or reasonably should know were transmitted by mistake, the lawyer confronts a number of issues implicating the administration of justice, respect for the attorney-client relationship and the obligation to zealously represent one’s own client. This opinion examines the various approaches to these issues and concludes that a lawyer receiving a misdirected communication containing
confidences or secrets (1) has obligations to promptly notify the sending attorney, to refrain from review of the communication, and to return or destroy the communication if so requested, but, (2) in limited circumstances, may submit the communication for in camera review by a tribunal, and (3) is not ethically barred from using information gleaned prior to knowing or having reason to know that the communication contains confidences or secrets not intended for the receiving lawyer. However, it is essential as an ethical matter that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary.

**CODE:** DR 1-102(A)(5), DR 4-101, DR 7-101(A), DR 9-102(C).

**Questions**

What are the ethical obligations of the lawyer who receives a misdirected communication containing confidences or secrets? Must the lawyer notify the sender? Must the lawyer return the communication and/or destroy all copies? May the lawyer review the communication? May the lawyer use information learned from the communication?

**Opinion**

A lawyer who receives a misdirected communication containing confidences or secrets should promptly notify the sender and refrain from further reading or listening to the communication, and should follow the sender’s directions regarding destruction or return of the communication. However, if there is a legal dispute before a tribunal and the receiving attorney believes in good faith that the communication appropriately may be retained and used, the receiving attorney may submit the communication for in camera consideration by the tribunal as to its disposition. Additionally, the receiving attorney is not prohibited as an ethical matter from using the information to which the attorney was exposed before knowing or having reason to know the communication was inadvertently sent. However, it is essential as an ethical matter—that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary.
Discusssion
As advances in technology have made communication easier, so too they have made mistakes in transmission of those communications easier as well. It is therefore not surprising that the legal ethics community first began to devote attention to the problem of the misdirected communication in the late 1980s, when the fax became a widespread method of communication. The problem has attracted even more attention as electronic mail has become commonplace. From the perspective of legal ethics, the questions arising from misdirected communications are identical whether the error in transmission stems from pressing the wrong speed-dial button on a fax machine, mistakenly choosing the “all counsel” e-mail list, or simply putting a letter to client in an envelope mistakenly addressed to opposing counsel: What are the ethical obligations of the lawyer who receives a misdirected communication containing confidences or secrets? Must the lawyer notify the sender? Must the lawyer return the communication and/or destroy all copies? May, or must, the lawyer review the communication and use the information learned for the benefit of the lawyer’s client?1

I. PRIOR APPROACHES
Ethics opinions and rules have been far from uniform in answering these questions, finding varied obligations with respect to notification of the sender, return or destruction of materials and use of information learned from them.

A. Obligation to Notify and/or Return
1. Notify and Return Upon Request
One of the first bodies to address the question of the lawyer’s obligations upon receiving a misdirected communication was the ABA Standing Committee on Ethics and Professional Responsibility (the “ABA Committee”). In Opinion 92-368 (1992), the ABA Committee concluded that a lawyer who receives a misdirected communication from another lawyer “should notify the sending lawyer of their receipt and should abide by

1. This Opinion addresses issues arising only from misdirected communications. It does not address questions arising from an attorney’s receipt of confidential information obtained by other means, such as when a third party intentionally provides confidential information. See, e.g., New York State Bar Ass’n Opinion 700 (1998) (curtailing actions of lawyer receiving unsolicited and unauthorized disclosure of confidential or secret information from former employee of adversary firm).
the sending lawyer’s instructions as to their disposition.” Acknowledging that existing disciplinary rules did not clearly address the issue, the ABA Committee based its conclusion upon, among other things, the profession’s overarching interest in protecting the confidentiality of client communications, analogies to the obligations of bailees under common law principles, and a version of the “golden rule” (i.e., “[w]hile a lawyer today may be the beneficiary of the opposing lawyer’s misstep, tomorrow the shoe could be on the other foot.

Several ethics bodies have formally concurred in whole or in part with ABA Opinion 92-368. For example, in July 2002, the New York County Lawyers’ Association’s Ethics Committee issued Opinion 730 (“NY County Opinion 730”), concluding that the absence of a directive regarding misdirected communications in New York’s Code of Professional Responsibility did not relieve lawyers of the obligation to “share responsibility for ensuring that the fundamental principle that client confidences be preserved—the most basic tenet of the attorney-client relationship—is respected . . . .” And in 1995, the Association of the Bar of the City of New York’s Committee on Professional Responsibility issued a report, “Ethical Obligations Arising Out of an Attorney’s Receipt of Inadvertently Disclosed Information,” Record of the Association of the Bar of the City of New York, Vol. 50, No. 6, p. 660 (1995) (the “1995 ABCNY Report”). The 1995 ABCNY Report recommended a new Disciplinary Rule codifying the position advanced in ABA Opinion 92-368. The new rule would have required attorneys receiving inadvertently-sent documents to refrain from examining the documents, notify the sender, and abide the sending party’s instructions regarding return or destruction.

2. Notify Only

But when the ABA itself adopted a new ABA Model Rule of Professional Conduct addressing inadvertent disclosure, it did not impose obligations as broad as those set forth in ABA Opinion 92-368. In February 2002, the ABA adopted Model Rule 4.4(b), which provides: “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” While Model Rule 4.4(b), like ABA Opinion 92-368, requires the lawyer to notify the sender of the receipt of a misdirected document, it does not obligate the lawyer to take any further steps. The Comment to Model Rule 4.4 suggests that if any additional obligation exists, it exists solely by virtue of substantive law, not principles of legal ethics.
A number of state bar ethics opinions similarly only require notification. See, e.g., Maine Prof. Ethics Comm. of the Bd. of Overseers, Opinion 146 (Dec. 9, 1994); Florida Bar Ass’n Comm. on Prof’l Ethics Opinion 93-3 (Feb. 7, 1994). Still others have endorsed alternative obligations, requiring notice and return when the receiving lawyer is aware that the disclosure is inadvertent (as per ABA Opinion 92-368), but requiring only notice (as per Model Rule 4.4(b)) when the receiving lawyer reviews a communication before realizing that its disclosure was inadvertent. See, e.g., Colorado Bar Ass’n Ethics Comm. Opinion 108 (May 20, 2000).

3. Retain

At least one ethics body has opined that a lawyer who receives a misdirected communication has no obligation to notify the sender or to abide by the sender’s request for return of all copies of the communication. See Philadelphia Bar Ass’n Prof. Guidance Comm. Opinion 94-3 (June 1994). The Philadelphia opinion appears to be based on the view, although not explicitly stated, that the ethical duty to represent one’s client zealously within the bounds of the law not only permits but requires the lawyer to employ all resources at the lawyer’s disposal, including those obtained due to another person’s mistake, so long as those resources were obtained without the lawyer’s wrongdoing. See generally David J. Stanoch, Comment, “Finders . . . Weepers?”: Clarifying a Pennsylvania’s Lawyer’s Obligations to Return Inadvertent Disclosures, Even After a New ABA Rule 4.4(b), 75 Temple L. Rev. 657 (2002). See also Monroe Freedman, The Errant Fax, Legal Times, Jan. 23, 1995, at 26 (advocating that inadvertently disclosed communications should be exploited for the benefit of a receiving attorney’s clients).

B. Use Of Information Contained In The Communication

Opinions also are divided on the questions whether the receiving lawyer may review the communication and whether the lawyer may use the information learned from that review. Some opinions, such as ABA Opinion 92-368 and NY County Opinion 730, decline to draw any distinction for ethical purposes between the lawyer’s obligations vis-a-vis the physical communication, on the one hand, and the information contained therein, on the other. See ABA Opinion 92-368 (“Any attempt by the receiving lawyer to use the missent letter for his own purposes would thus constitute an ‘unauthorized use.’”); see also Virginia Legal Ethics and Unauthorized Practice Opinion 1702 (Nov. 24, 1997).

Others, however, draw such a distinction and permit use, at least to
the extent the lawyer has reviewed the communication in good faith before realizing it was missent. See, e.g., Colorado Opinion 108; D.C. Bar Legal Ethics Comm. Opinion 256 (May 16, 1995); Illinois State Bar Ass’n Advisory Opinion 98-04 (Jan. 1999); Kentucky Bar Ass’n Ethics Opinion E-374 (1995); Maine Opinion 146 (December 9, 1994). Some of these opinions were influenced by cases holding that even an inadvertent disclosure of a privileged communication can, under certain circumstances, waive the attorney-client privilege such that an adversary may review and use information to which they would not otherwise have access. See, e.g., Maine Opinion 146 at 5 (“So long as use of the memorandum is permitted by the Federal Rules of Evidence or Procedure, use of the memorandum cannot be said to be prejudicial to our adversary system of litigation.”) (footnote omitted); D.C. Ethics Opinion 256. Other bodies that prohibit retention but permit use have noted the practical problem of requiring lawyers to “unlearn” information they already have learned through review of the misdirected communication. See, e.g., D.C. Opinion 256; Ohio Opinion 93-11 (“Once confidential material has been examined even briefly, the information cannot be purged from the mind of the attorney who inadvertently receives it.”).

Similarly, the rule proposed by the 1995 ABCNY Report did not proscribe use and put the burden on the sender “to seek court protection to limit the recipient’s use of the document.” Meanwhile, one of the most recent states to adopt a formal rule regarding inadvertent disclosure has determined that a receiving lawyer should notify the sender and refrain from use “for a reasonable period of time in order to permit the sender to take protective measures.” Arizona State Supreme Court Rule of Prof’l Conduct 42, ER 4.4(b) (eff. Dec. 1, 2003). 2

II. ANALYSIS

As we are addressing ethical obligations of attorneys in New York, we ultimately must look to New York’s Code of Professional Responsibility to determine if it gives rise to obligations similar to or different than those

2. New Jersey is another state that recently has adopted a formal rule regarding receipt of inadvertent disclosures. New Jersey Rule of Professional Conduct 4.4(b) (eff. Jan. 1, 2004) makes no distinction between confidential and non-confidential information and requires a receiving lawyer who has reasonable cause to believe the document was inadvertently sent to not read (or stop reading) the document, promptly notify the sender and return the document to the sender. The New Jersey rule does not address the question of use of information learned prior to the receiving lawyer’s having reasonable cause to believe the document was inadvertently sent.
recognized in the variety of opinions described above. Guidance on this subject is particularly important given that the Code has no specific rule addressing the issue and eight years have passed since the 1995 ABCNY Report recommended adopting such a rule.

As explained further below, we conclude that a receiving lawyer has obligations under the New York Code to notify, return and refrain from review of inadvertent disclosures, particularly when considering the duties of a lawyer not to engage in conduct prejudicial to the administration of justice, to preserve client confidences and secrets and to represent clients with zeal but within the confines of the law. At the same time, we concur with those authorities finding that a blanket proscription on use of inadvertent disclosures in all situations extends too far. Accordingly, we acknowledge that there are limited circumstances where ethical rules alone do not bar use of such information, particularly where, as more specifically set forth below, the receiving attorney has a good faith basis to argue that inadvertent disclosure has resulted in waiver of a privilege or where the receiving attorney has been exposed to confidential information prior to knowing or having reason to know that the communication was misdirected.

A. Foundations in the Code for Obligations Triggered By Receipt of Inadvertent Disclosures

Inadvertent disclosure brings into tension two fundamental rules of the Code: the duty to preserve confidences and secrets of a client pursuant to DR 4-101 and the duty to zealously represent a client by using reasonably available means permitted by law under DR 7-101(A). The Committee believes that this tension can be resolved by focusing the issues presented by inadvertent disclosure through the lens of DR 1-102(A)(5), which prohibits “engag[ing] in conduct that is prejudicial to the administration of justice.”

Obligations of a receiving attorney with respect to a misdirected communication containing confidences or secrets cannot rest squarely on the duties imposed by DR 4-101. After all, the receiving attorney has no attorney-client relationship with the client whose information is exposed. The Code nevertheless recognizes that preservation of client confidences and secrets is crucial to stability of the legal system. As EC 4-1 states, “the proper functioning of the legal system require[s] the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer.” Failing to notify the sender of an inadvertent disclosure would deprive the sending attorney of the opportunity to seek ap-
propriate protection for the disclosed information and thereby prejudice the administration of justice. Likewise, reading beyond the point where the lawyer knows or reasonably should know that the communication is an inadvertent disclosure of confidences or secrets undermines the duty incumbent on all attorneys pursuant to DR 1-102(A)(5) to respect the foundations on which our legal system is based.

Other opinions construing DR 1-102(A)(5) lend support to the conclusion that a lawyer receiving an inadvertent communication may not freely exploit it without undermining the administration of justice. For example, this Committee previously has opined that when a lawyer receives from his client adversarial attorney-client communications that the client, without the attorney's knowledge, intercepted, the lawyer must notify the adversary attorney and return the communications. ABCNY Comm. Prof'l. Jud. Ethics Opinion 1989-1. As the Committee explained, "[h]aving such information gives the inquirer and his client an advantage that, however slight, they are not entitled to have, and to permit them to retain that advantage, of which the opposing party and counsel are unaware, would in the Committee's opinion be prejudicial to the administration of justice and, therefore, ethically impermissible."

Meanwhile, the New York State Bar Association's Ethics Committee has opined that an attorney's use of software to extract otherwise inaccessible information about the drafting history of an adversary's e-mail or its attachments would be prejudicial to the administration of justice to the extent the technology could expose confidential information or secrets. New York State Opinion 749 (2001). Similarly, in New York State Opinion 700 (1998), the same committee concluded that accepting from an adversary's former paralegal unsolicited information that disclosed the adversary's confidences or secrets would prejudice the administration of justice. Though the conduct at issue in these opinions was more active and deliberate than reviewing and using a misdelivered communication, the conduct that the State Bar ethics committee considered to be prejudicial to the administration of justice shares vital characteristics with the conduct considered here. In each instance, an attorney has reviewed information that the opposing party and their counsel do not want the receiving attorney to see; and, in each, the receiving attorney has gained access to the information without the opposing party's knowledge or intent.

At the same time a lawyer must not engage in conduct prejudicial to the administration of justice, the same lawyer must fulfill the dictates of DR 7-101, entitled "Representing a Client Zealously," to "seek the lawful objectives of the client through reasonably available means." But that
obligation is explicitly qualified: the “reasonably available means” must be those “permitted by law and the disciplinary rules.” DR 7-101(A)(1). It therefore is necessary to consider generally applicable legal principles in determining the extent, if any, to which the obligation to remain within the bounds of the law constrains a lawyer's conduct upon receipt of a misdirected communication containing confidences or secrets.

This Committee's review of relevant legal principles suggests that the ethical obligation of zeal does not require a lawyer to retain and/or use misdirected confidential communications. To the contrary, those principles direct the opposite. As the ABA Committee observed in Opinion 92-368, those who find or otherwise come into possession of lost property must, under the law of bailments, return it to the owner upon request. See, e.g., Jesse Dukeminier, Property, at 65, 83-86 (2d ed. 1988). That is also the rule outside the context of bailments. For example, when a bank mistakenly credits funds to the wrong account, principles of restitution require the recipient of the mistakenly transferred funds to notify the transmitting bank and to return them. American Law Institute, Restatement of the Law of Restitution § 126 (1937); Banque Worms v. BankAmerica Int'l, 77 N.Y.2d 362, 366-67, 570 N.E.2d 189, 191-92, 568 N.Y.S.2d 591 (1991).

The same is true for mail. Mail that has not reached its intended recipient, either because it has been misaddressed by the sender or misdelivered by the postal service, must be returned to the sender by the wrongful recipient as soon as they learn of the error. “Once it is clear to the unintended recipient that the letter has been misdelivered or misaddressed, he knows that he has no business opening the mail and then possessing it.” United States v. Coleman, 196 F.3d 83, 86 (2d Cir. 1999). Failures to return misdelivered mail have been the subject of successful federal criminal prosecutions. See, e.g., id.; United States v. Palmer, 864 F.2d 524 (7th Cir. 1988); United States v. Douglas, 668 F.2d 459 (10th Cir. 1982); United States v. Lavin, 567 F.2d 579 (3d Cir. 1977).

This Committee perceives no reason why the well-established principles applicable to misdirected property and communications should not apply in the context of legal ethics. From an ethical perspective, misdirected faxes and e-mail, on the one hand, and misdelivered mail, on the other, are identical. See D.C. Ethics Opinion 256 (“A [misdirected communication] comes to the lawyer with ‘notice’ that it does not belong to him. In that sense, it is little different than a wallet found on the street: if the finder knows that it does not belong to him, and should he appropriate to himself the wallet’s contents, the finder engages in the tort of conversion.”) Because established legal principles require a lawyer to re-
turn and not make use of mistransmitted funds or mail, so too the rules of legal ethics generally should require the lawyer to return and refrain from using a misdirected communication.³

Note also should be taken of a provision appearing under Canon 9, entitled “A Lawyer Should Avoid Even the Appearance of Professional Impropriety.” Rule 9-102(C) specifically addresses a lawyer’s obligations with respect to funds or property belonging to another. Thus, a lawyer must “promptly notify a client or third person of the receipt of funds, securities or other properties in which the client or third party has an interest,” DR 9-102(C)(1), and, if requested, similarly must “promptly pay or deliver” those funds or properties to the person entitled to receive them, DR 9-102(C)(4). As noted by a recent commentator, the Code does not define what is meant by “other properties” nor gives any indication that the rule was intended to apply to misdirected confidential communications or their content. Barry Tempkin, Errant E-Mail: Inadvertent Disclosure of Confidential Material Poses Dilemma, 230 New York Law Journal (Oct. 14, 2003). Nevertheless, these provisions reflect the Code’s acknowledgment of ethical principles consistent with the legal principles described above regarding misdirected mail and funds.

B. Use of Inadvertently Disclosed Confidences or Secrets

Notwithstanding the above precepts, an absolute rule requiring return or destruction of all copies and barring use of an inadvertently disclosed confidential communication in all circumstances would itself be prejudicial to the administration of justice. In two limited contexts, we find no ethical bar to use of inadvertently disclosed material.

First, lawyers should not be constrained in their right to argue that inadvertent disclosure, in appropriate circumstances, has waived the attorney-client or other applicable privilege.⁴ See, e.g., New York Times Co. v.

³. This Opinion is directed specifically to inadvertent communications containing confidences or secrets. We recognize, however, that much of the reasoning based on principles governing misdirected property and funds applies to misdirected communications of any type, not only those containing confidences or secrets. Indeed, those principles, along with respect for professional courtesy (see DR 7-101(A)(1)), suggest that attorneys should notify senders of and, if asked, return to them misdirected communications of any type. See, e.g., 1995 ABCNY Report (proposing rule encompassing any inadvertently produced document); Comments to ABA Model Rule 4.4(B) (“the obligation is the same regardless of whether the document appears confidential”). Because of the special concern attending client confidences and secrets, however, this Opinion focuses on those communications.

⁴. This Opinion does not address whether an inadvertent disclosure in discovery during litigation does in fact waive the attorney-client privilege or any other privilege or protection
but merely acknowledges that the argument has been made and accepted by courts. Moreover, we note the increasingly popular practice in litigation of entering into agreements containing explicit provisions as to how the parties will deal with documents inadvertently produced during discovery. This practice appears to be a useful means of establishing ground rules and clarifying the parties’ expectations, particularly where, as discussed further below, ethics rules and legal principles do not provide easy answers in all circumstances.

Likewise, there may be occasions when the communication does not in fact contain a confidence or secret and should be produced in connection with a litigated matter. The administration of justice would be prejudiced if a receiving attorney were not ethically permitted to bring to a tribunal’s attention a document that had been improperly held from production but which the attorney learned of only through inadvertent disclosure.

Thus, we conclude that a receiving lawyer may ethically retain a misdirected communication for the sole purpose of presenting it to a tribunal for in camera review, if the lawyer (1) promptly notifies the sending lawyer about the mistaken transmission, and, if requested, provides a copy to the sending lawyer, (2) believes in good faith, and in good faith anticipates arguing to the tribunal, that the inadvertent disclosure has waived the attorney-client or other applicable privilege or that the communication may not appropriately be withheld from production for any other reason, and (3) reasonably believes disclosing the communication to the tribunal is relevant to the argument that privilege has been waived or otherwise does not apply.

This limited permitted use does not, however, apply in the circumstance where a receiving attorney—prior to having received an inadvertent disclosure—is on notice that a confidential communication has been transmitted by mistake and should be returned without review to the sending
attorney. In such a situation, there effectively has been no “disclosure” and the receiving attorney knows prior to receiving the communication that it contains confidences or secrets. \textit{See American Express v. Accu-Weather, Inc.}, 91 Civ. 6485, 1996 WL 346388 (S.D.N.Y. June 25, 1996) (favorably citing ABA Opinion 92-368 and sanctioning attorneys who ignored sending counsel’s instruction to return a not-yet-opened package of documents containing a privileged communication).

A more difficult question arises with respect to use of inadvertently disclosed information when the receiving attorney has reviewed part or all of the communication before having reason to know that the communication was not intended for that attorney. In many instances, an attorney should know before reviewing the content of a communication that it is a confidential communication intended for someone else and will be ethically proscribed from reviewing its content. In other instances, however, the lawyer will not know or have reason to know of the inadvertent disclosure until after having started to review the communication’s content. The lawyer thereby will have learned confidential information that cannot simply be erased from memory.

For example, suppose a lawyer receives a one-page fax saying, “Offer $100,000, but you have authority to settle for up to $300,000.” We believe it is not realistic to expect that the attorney, once being exposed to this information, can forget it and continue litigating or negotiating without the information influencing the attorney’s course of action. To put the attorney at ethical risk for using information that cannot be suppressed from knowledge potentially would penalize the innocent receiving attorney and their client for the error of another.

Likewise, there may be instances where the confidential information disclosed is of the type to which the Code does not accord full protection from disclosure. For example, DR 4-101(C)(3) permits a lawyer to reveal the intention of a client to commit a crime and the information necessary to prevent the crime. A blanket prohibition on use of inadvertently disclosed information would have the peculiar effect of according an individual’s intent to commit a crime greater protection when learned of through inadvertent disclosure than when disclosed to one’s own attorney. The administration of justice does not countenance such an outcome. Similar concerns would be raised if the misdirected communication revealed an intention of the sender or a third party to take harmful and wrongful steps against the receiving lawyer’s client in the future (\textit{e.g.}, as by destroying relevant documents or suborning perjury).

Nothing in this opinion, however, should preclude a sending attor-
ney from seeking relief before a tribunal to prevent a receiving attorney from using inadvertently disclosed confidential information. Although ethical rules may not preclude use, governing law, rules of evidence, or other principles may limit or preclude use. Accordingly, it is essential—as an ethical matter—that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure of the information at issue.

The above approach best harmonizes the Code’s concerns for the administration of justice, client confidences and secrets, and zealous representation. We recognize that critics may raise voices on both sides of the fence. Some might fear that an exception permitting even limited use of information learned from a misdirected communication will invite attorneys to read further in misdirected communications than they would read if they were not allowed to use the information at all. That is a valid concern but one which is tempered by the ethical obligations described in this opinion and which does not justify a blanket prohibition that otherwise prejudices the administration of justice.

On the other hand, some may advocate for unfettered use of inadvertent disclosures, arguing that this will fortify the attorney-client privilege (and consequently the administration of justice) by creating disincentives for careless disclosures. See, e.g., Int’l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 450 (D. Mass. 1998) (“a strict rule that ‘inadvertent’ disclosure results in a waiver of the privilege would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure”). There is some merit to this point as well. The law is not without harsh consequences for law office administrative failures. Consider, for example, statutes of limitations and appellate deadlines may foreclose legal rights when there is no good cause to excuse an administrative lapse. But we believe the “incentive” rationale is overstated when the carelessness in question is as innocent and as difficult to deter as attaching the wrong file attachment to an e-mail or pressing the wrong speed dial button on a fax machine. The practice of law is not a card game or sport. Some administrative errors are unavoidable and should be corrected, not exploited. See United States v. Rigas, No. 02 CR

5. The Committee stresses, however, that attorneys who review or use misdirected communications in violation described here should not ordinarily be disqualified. See ABCNY Formal Opinion 2001-1 (receipt of unsolicited e-mail communication from potential client does not require disqualification of the attorney from continuing to represent a different client with adverse interests). Just as the receiving lawyer should not be able to exploit the sending
III. CONCLUSION

Receipt of an inadvertent communication containing confidences or secrets triggers ethical obligations for the receiving attorney. A lawyer who receives such a communication should promptly notify the sender and refrain from further reading or listening to the communication and should follow the sender’s directions regarding destruction or return of the communication. If, however, the receiving attorney believes in good faith that the communication appropriately may be retained and used, the receiving attorney may, subject to the conditions set forth in this opinion, submit the communication for in camera consideration by a tribunal. Where the receiving attorney has been exposed to content of the communication prior to knowing or having reason to know that the communication was misdirected, the attorney is not barred, at least as an ethical matter, from using the information. However, it is essential as an ethical matter that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure. Following these directives fulfills the obligation not to engage in conduct prejudicial to the administration of justice and appropriately balances the interests in both preserving client confidences and secrets and zealously representing one’s own client.

December 2004

lawyer’s error, so too the sending lawyer should not be able to exploit their own error. Moreover, were disqualification to be among the available sanctions for violating the obligation not to review misdirected communications, that possibility could create incentives for improper gamesmanship. Attorneys and/or their clients might deliberately send otherwise confidential communications to their adversaries or their counsel, claiming mistake, in the hope of “tainting” the receiving lawyers and thereby establishing a basis for disqualification. Though such a tactic would be dishonest and worthy of sanctions, the deliberate nature of such misconduct might be difficult to detect. Accordingly, the Committee believes the best way to prevent such deception is to eliminate the possibility that it might be advantageous.

6. In any event, and as observed earlier, even if ethical rules do not foreclose an attorney from using inadvertently disclosed confidential information in particular circumstances, substantive or evidentiary legal principles may do so. Accordingly, any attorney contemplating use of such information should proceed with caution.
Committee on Professional and Judicial Ethics

Barbara S. Gillers, Chair
Katherine D. Johnson, Secretary

David E. Brodsky
Naomi Reice Buchwald
Carrie H. Cohen
Anthony E. Davis
Anne K. DeSimone
Jeremy R. Feinberg
Robert D. Goldbaum
Helen A. Gredd
Bruce A. Green
David N. Greenwald
Luisa K. Hagemeier
Gerard E. Harper
John B. Harris
Barbara Krasa Kelly
John Joseph Kirby
John E. Larkin
Robert W. Lehrburger

John D. Leubsdorf
Mara A. Leventhal
Robert Levy
John M. Mastando
John M. McEnany
Denis J. McInerney
Ronald C. Minkoff
Steven M. Ostner
Michael D. Patrick
James W. Paul
Kathleen A. Roberts
Alan E. Rothman
Roy D. Simon, Jr.
William J. Sushon
M. David Tell
Michael Waldman
Latrisha Anita Wilson
Formal Opinion 2004-01

Lawyers in Class Actions

The Committee on Professional and Judicial Ethics

**Topic:** Duties of Lawyers in Class Actions: Decision to Sue; Conflicts of Interest; Duties to Class Members; No-Contact Rule; Disputes Within Class

**Digest:** (a) A lawyer must obtain informed consent from individual clients before asserting class claims on their behalf; (b) When conflicts of interest arise, a class lawyer must obtain informed consent from individual clients before proceeding, but so far as other class members are concerned the court may authorize the representation; and a class lawyer may without consent undertake a representation adverse to a class member that the lawyer does not individually represent provided that representation is unrelated to the class action; (c) A class lawyer has obligations of competence, diligence and confidentiality to class members; (d) When a class has been certified, the class lawyer or the court must consent before a lawyer opposing the class may communicate directly with class mem-
bers about the action; (e) A class lawyer may sup-
port or oppose a settlement or take other steps in
the action over the objections of named plaintiffs
or other class members, but must act in the best
interests of the class and with appropriate disclo-
sure to the court.

**Code:** DR 4-101; DR 5-101; DR 5-105(C); DR 5-107;
DR 6-101; DR 7-101(A); DR 7-104; DR 7-105

**Question**
What are the ethical obligations relating to a lawyer’s
representation of a class in a class action?

**Opinion**
This Opinion discusses some of the ethical rules applicable to a law-
yer seeking to represent a plaintiff class in a class action. The action will
be assumed to be brought in a United States District Court, and hence
subject to Federal Rule of Civil Procedure 23. Extensive caselaw under that
rule affects the duties of lawyers in class actions, and in certain respects
modifies or supersedes the application of the Code of Professional Re-
sponsibility. ¹ Although the requirements of Rule 23 thus constitute an
indispensable background for understanding the duties of class counsel,
this Committee has no jurisdiction to advise on the proper construction
of that rule, or of other applicable legislation such as the Private Securi-
ties Litigation Reform Act of 1995. Nor should this Opinion be taken as
intimating answers to the many questions concerning class lawyers’ be-
behavior that it does not discuss.

The special circumstances created by class actions sometimes affect
the application of professional rules. The interests of some class members
will sometimes diverge. Under Rule 23, that may call for denying class
action certification, or for providing separate representation for subclasses;
but if class actions are to be possible, it is sometimes necessary to proceed
despite such divergences. In addition, it is usually not practical to consult
with each class member in the same way as a lawyer should with a client.

¹. The procedure in class actions brought in New York state courts is governed by CPLR §§
901-09; see 3 Weinstein, Korn & Miller, New York Civil Practice ¶¶ 901.01-909.04 (March
2000). We have found no authority under these sections inconsistent with the assumptions of
this opinion. We note, however, that state court authority is lacking on some class action
procedural issues relevant to this opinion.
As a result, a lawyer speaking for a class often has substantial discretion to decide what position to advocate without much possibility of monitoring and control by class members, and in a situation in which the lawyer's financial interest in obtaining a fee may be larger than the interests of class members. Lawyers must therefore be especially careful to seek the best interests of the class, and courts have a special obligation to ensure adequate representation by class counsel.

1. The Decision to Bring a Class Action

Before a class action complaint is filed, the prospective named plaintiffs are usually already clients of the lawyer who will file it. Depending on the circumstances, and on how those clients define their own interests, a class action can be a good, a bad, or a questionable way to advance those interests. For example, a class action might be desirable if a public-spirited client wishes to forward the interests of the other class members, or if relief limited to the client might be unsatisfactory, or if the expected recovery from an individual action would be too small compared to the action’s expenses to make such an action economically feasible. On the other hand, a class action might delay and complicate the client's claim, or burden the client with the obligations of representing other class members. The lawyer should therefore consult with the clients about the advantages and disadvantages of a class action, and proceed only with their informed consent. See EC-7-7, EC 7-8, DR 7-101(A)(1); Restatement (Third) of the Law Governing Lawyers, § 125, cmt. f (2000).

2. Conflicts of Interest

A named plaintiff’s interests may sometimes conflict with interests of another named plaintiff, other class members or putative class members, the lawyer, or the lawyer’s present or past clients outside the class. If so, the lawyer may proceed only when the named plaintiff (as well as other relevant past or present clients) gives informed consent and such consent is permissible under the rule applying to the conflict in question. See DR 5-101, 5-1-5, 5-108. The rules governing fees (DR 2-106) also apply to the relationship between named plaintiff and lawyer, as do those governing payment of the lawyer by other persons (DR 5-107(A, B). In some situations, financing arrangements for class actions raise conflict of interest problems, or are subject to review by the court in which the action is pending. See Restatement (Third) of the Law Governing Lawyers, § 47, cmt. h & Reporter's Note (2000).

The interests of class members who are not named plaintiffs may
likewise conflict with those of named plaintiffs, other class members, the lawyer, or the lawyer's past or present clients outside the class. It is rarely practical for a class lawyer to speak individually with each class member subject to such a conflict in order to seek informed consent, although in some instances nonconsenting class members may be able to opt out of the action. See Fed. R. Civ. P. 23(c)(2), (e)(3). At least in the ordinary class action, a lawyer is not required to seek such individual consents. In practice, therefore, it is the court that decides whether the action may proceed. The court has a continuing obligation to protect the class members, and may not certify a class action unless it concludes that the named plaintiffs and class counsel will fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4), (g)(1)(B) (as amended 2003). The standards used by courts in deciding whether to approve class representation, to limit the size of the class or recognize subclasses with independent representation, or to deny certification altogether draw to a considerable extent on standards of professional responsibility, but ultimately they are found in caselaw construing Rule 23, and hence matters of law beyond the Committee’s jurisdiction.

Although the court may thus in effect act for class members in deciding whether to consent to conflicts of interest involving them, a lawyer seeking to represent a class must nevertheless honor his or her own professional obligations to the extent consistent with court orders. For example, a lawyer may not seek the court’s approval “if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer’s own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby.” DR 5-101(A). Similarly, a lawyer may seek court consent to a conflict among present clients only “if a disinterested lawyer would believe that the lawyer can competently represent the interest of each.” DR 5-105(C). A lawyer who is barred by these rules from seeking court approval should not undertake to represent a class. When the court is asked to designate a class lawyer,


3. The court’s power to do this can be reconciled with the Code’s conflict of interest rules in several ways, which are briefly described in the second paragraph of point 5, below.
the lawyer must ensure that there has been “full disclosure of the implications of the simultaneous representation and the advantages and risks involved” (DR 5-105(C); see DR 5-101(A), 5-108(A, B)); In re “Agent Orange” Prod. Liab. Litig., 800 F.2d 14, 18 (2d Cir. 1986); Piambino v. Bailey, 757 F.2d 1112, 1145 (11th Cir. 1985). And the lawyer must, as discussed below, provide adequate representation to all the class members in question.

Whether a class lawyer may undertake a representation adverse to a class member who has not individually retained the lawyer is a difficult issue. If such a class member is treated as a client for the purpose of applying the conflict of interest rules, it follows that, absent informed consent (when permissible), the lawyer may ordinarily not act adversely to the class member while the class action is pending, and after it ends may act adversely to the class member only in a matter that is not substantially related. DR 5-105, 5-108; see Fuchs v. Schick, No. 01 Civ. 10224, 2002 U.S. Dist. Lexis 6212 (S.D.N.Y. Apr. 10, 2002) (treating as a former client a class member who participated actively in the class action). We believe that, at least in one situation, that approach is inapplicable. If a class member has not individually retained the class lawyer or consulted with that lawyer and the lawyer has not acquired confidential information about that class member, the lawyer should be free to accept an unrelated matter against the class member while the class action is pending. Accord, Rules of Prof’l. Conduct, Rule 1.7, Cmt. [25] (2002). In such a situation, there is no danger that the lawyer will misuse the class member’s confidential information or yield to any incentive to provide inadequate representation to either client; and the relationship would not warrant the class membership in expecting the lawyer to be loyal to the class member’s interests in a matter unrelated to the class action. The language of DR 5-105, moreover, does not require a total prohibition of representations adverse to a class member. See, e.g., Brown & Williamson Tobacco Corp. v. Patak, 152 F. Supp. 2d 276 (S.D.N.Y. 2001) (representation adverse to current client in unrelated matter is prima facie forbidden but may be justified on proper showing); Thomas D. Morgan, Suing a Current Client, 9 Geo.J. Legal Ethics 1157 (1996); Ted Schneyer, Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law, 16 Rev. Litig. 537, 547-51 (1997).

3. The Lawyer’s Duties to Class Members: Competence, Diligence, and Confidentiality

There are almost always members of a plaintiff class who have never personally retained the class lawyer to represent them. We consider now
some, but not all, of the duties a class lawyer or a lawyer seeking to be designated as a class lawyer owes such class members under the Code of Professional Responsibility.

Analytically, there are several ways in which this relationship might be classified. Each class member might be considered a client, owed all the usual duties of a lawyer to a client. Class members might be considered quasi-clients, owed those duties to the extent consistent with the law and practicalities of class actions. One might consider them nonclients, to whom the lawyer nevertheless owes certain duties because the lawyer represents named plaintiffs who owe fiduciary duties to class members. One might trace the lawyer’s professional obligations to the law of civil procedure, which has long recognized what Federal Rule of Civil Procedure 23(g)(1)(B) now declares: “An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class” (as amended effective Dec. 31, 2003). Or one might consider the class as an entity to be the lawyer’s client. See Debra L. Bassett, When Reform is Not Enough: Assuring More Than Merely “Adequate” Representation in Class Actions, 38 Ga. L. Rev. 927 (2004); Nancy J. Moore, Who Should Regulate Class Action Lawyers?, 2003 U. Ill. L. Rev. 1477 (2003); David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913 (1998); Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 Nw. U.L. Rev. 469 (1994). In addition, one could classify the lawyer’s obligations one way before the court has certified a class and another way afterwards.

For present purposes, we consider it more useful to address the obligations of lawyers issue by issue. We lack both the jurisdiction and the ability to promulgate an authoritative theory of class action representation. We also doubt that any theory can avoid the need to consider separately the concerns and practical problems relating to each duty a lawyer might owe to class members, as well as the varying factual situations that class lawyers confront.

A lawyer representing a class clearly owes class members the competence and diligence ordinarily due to clients. He or she must not neglect the action, proceed without competence or preparation, fail to seek the class’ lawful objectives through reasonably available and lawful means, or prejudice or damage class members. DR 6-101, DR 7-101(A). The limits and qualifications noted in these rules to these duties likewise apply.4

A class lawyer’s duties of confidentiality likewise extend to informa-

4. We discuss in point 5 below the duties of a class lawyer when disagreements arise between class members.
tion obtained from a class member in the course of the professional relationship that the class member “has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental” to the class member. DR 4-101(A). Whether confidences of a class member who has not individually retained the class lawyer are protected by the client-lawyer privilege is an issue of law on which we express no opinion. But we believe that a lawyer’s professional duty of confidentiality does apply to information provided by such a class member, because the policy of encouraging disclosure in order to promote effective representation is fully applicable, and because class members reasonably rely on class lawyers to protect their interests. Once again, the usual exceptions to the duty of confidentiality apply to information provided by class members. See EC 4-2, 4-3, 4-7; DR 4-101(C). For example, a class lawyer may reveal information “when necessary to perform the lawyer's professional employment.” EC 4-2. Thus, if class members disagree on whether to accept a settlement, a class lawyer might appropriately disclose to the court at least some otherwise confidential information necessary to enable the court to decide whether to uphold the settlement. See infra pt. 5.

4. The No-Contact Rule

Complex problems arise when it is asked whether the class lawyer’s consent is required before a lawyer representing someone else may communicate with a class member who has not individually retained the class lawyer. Disciplinary Rule 7-104 would bar communications without such consent if the class member is considered “to be represented by” the class lawyer unless some exception applies. When the lawyer proposing to communicate represents a party opposing a class, the prohibition applies when the class has been certified, although it does not apply before certification. Communications by such lawyers risk the dangers, such as the ne-


gotiation of imprudent settlements, against which the no-contact rule guards. Disciplinary Rule 7-104’s prohibition is limited to “communications on the subject of the representation” and does not prevent communications about other matters that may be pending between the lawyer’s client and the class member. When communications about the class action are warranted, the class action court may authorize them, and they are then “authorized by law” and therefore consistent with Disciplinary Rule 7-104. And if the class member has retained his or her own lawyer, that lawyer may consent to direct communication.

We express no opinion as to the application of Disciplinary Rule 7-104 in other situations, such as when the communication is made by a lawyer representing other class members. Under Federal Rule of Civil Procedure 23(d), the court has broad power over communications between parties and their lawyers and class members. As noted above, a communication authorized by the court is consistent with DR 7-104. The court likewise is empowered to prohibit some communications that might be allowed by DR 7-104. Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981); Carnegie v. H & R Block, Inc., 180 Misc.2d 67, 687 N.Y.S.2d 528 (Sup. Ct. 1999); 5 Conte & Newberg, Class Actions §§ 15:5-20; Debra L. Bassett, Pre-Certification Communication Ethics in Class Actions, 36 Ga. L. Rev. 353 (2002). A lawyer may not disregard such a prohibition, although the lawyer may take appropriate steps in good faith to test its validity. DR 7-106(a). And a lawyer may not make a communication that is misleading, coercive or otherwise improper. DR 7-102 (A)(1, 5, 7, 8), DR 7-104(A)(2), DR 7-105.

5. Disagreement Within the Class: Settlement Decisions

Perhaps the most troublesome ethical problems for class lawyers arise when there are divisions within the class. We discuss first divisions incident to proposed settlements purporting to bind the class.

The Code of Professional Responsibility must be applied in light of court decisions establishing that a class lawyer may properly advocate a settlement that the lawyer believes to be in the best interests of the class, or oppose a settlement the lawyer believes to contravene those interests, even though named plaintiffs or other class members disagree. The lawyer is not required to withdraw, as might be the case in the event of disagreement among joint clients in other circumstances. See, In re “Agent Orange” Prod. Liab. Litig., 800 F.2d 14 (2d Cir. 1986); Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159 (7th Cir. 1988); Lazy Oil Co. v. Witco, 166 F.3d 581 (3d Cir. 1999); In re M & F Worldwide Corp. S’holder Litig., 799 A.2d 1164 (Del. Ch. 2002). These decisions may be reconciled with DR 5-108 in several
ways: the class action court may be considered to consent to the representation on behalf of the various class members; Rule 23 may be thought to override conflicting state rules; or, the lawyer’s client might be considered to be the class as a whole rather than its individual members. In any event, the practicalities of class action litigation preclude any requirement that class counsel must withdraw whenever class members disagree.

A class lawyer who decides to oppose positions taken by class members must take “steps to the extent reasonably practical to avoid foreseeable prejudice to the rights of” those members. “[T]he lawyer must inform the tribunal of the differing views within the class or on the part of a class representative.” Restatement (Third) of the Law Governing Lawyers, § 128, cmt. d(iii)(2000); accord, Hazard & Hodes, The Law of Lawyering § 12.16 (3d ed. 2003). If the disagreeing class members have not already arranged to present their views to the court, the class lawyer should inform them of their right to intervene and to seek the appointment of counsel. See Fed. R. Civ. P. 23(c)(2), (e)(4)(as amended effective December 31, 2003); Devlin v. Scardelletti, 536 U.S. 1 (2002). Should the disagreement reflect a genuine conflict of interests within what has hitherto been considered a single class, the lawyer may be obliged to inform the court and clients that a single lawyer or group of lawyers can no longer properly represent the class as a whole, so that appointment of additional counsel, subclassing, or redefinition of the class is appropriate.

A class lawyer’s decision to support or oppose a settlement must be made in the best interests of the class. This may at times require the lawyer to balance the interests of different groups within the class in light of the strength of their claims and other relevant factors. The lawyer may not favor the claims of some class members because they are named plaintiffs, have individually retained the lawyer, or threaten to block a desirable settlement. See, e.g., County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1325 (2d Cir. 1990); Parker v. Anderson, 667 F.2d 1204, 1210-11 (5th Cir. 1982); 5 Conte & Newberg, Class Actions § 15:27 (2002) (citing cases).

A class lawyer’s decision, likewise, may not be influenced by the lawyer’s desire to increase the fees he or she will receive. Thus, the lawyer negotiating a class action settlement may not seek more favorable fee provisions in exchange for less favorable relief for the class.7 A class lawyer may prop-

7. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 852 (1999); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877 (7th Cir. 2000). A lawyer representing a defendant sued by a class should likewise not seek to induce the class lawyer to violate duties to the class by seeking to trade off concessions by the class lawyer of relief for the class against more favorable fee terms for the lawyer. Yet class lawyers, like other lawyers, are not required to serve without
erly favor fee provisions that tend to align the lawyer’s incentives with those of class members, for example by linking the fee with what class members actually receive. Whatever fee arrangement is reached should be fully disclosed to the court. See Fed. R. Civ. P. 23(e)(2); In re “Agent Orange” Prod. Liab. Litig., 818 F.2d 216 (2d Cir. 1987); Bowling v. Pfizer, Inc., 102 F.3d 777 (6th Cir. 1996). This is necessary as a matter of civil procedure so that the court can perform its duty of ascertaining whether the settlement is a fair one, and in particular, whether the interests of class members have been sacrificed to those of lawyers. See e.g., Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277 (7th Cir. 2002). The disclosure is also required as a matter of professional responsibility. In effect, because the class members are not in a position to evaluate the settlement and attorney fees themselves, the court acts on their behalf, and is therefore entitled to disclosure comparable to what would be appropriate when a lawyer submits a proposed settlement to a client. See EC 7-7, 7-8.

What we have said here about settlement decisions is generally applicable to other issues on which class members may disagree during a class action, such as what relief to request from the court. In such situations as well, disagreement with named plaintiffs or other class members does not require a class lawyer to withdraw. After consultation, the lawyer should follow the course that is in the best interests of the class, without playing favorites or pursuing the lawyer’s own interests. The lawyer should facilitate the presentation of other viewpoints to the court and when appropriate propose the appointment of additional counsel, subclassing, or redefinition of the class.

Conclusion

Court decisions rendered under the authority of Federal Rule of Civil Procedure 23 specify or affect many of the obligations of lawyers in class compensation. On settlement offers calling on class lawyers to waive their fee claims, see Evans v. Jeff D., 475 U.S. 717 (1986); Coleman v. Fiore Bros. Inc., 552 A.2d 141 (N.J. 1989); ABCNY Formal Opinion No. 1987-4.

actions. The Code of Professional Responsibility must be applied in the context of such decisions. Nevertheless, class lawyers may not proceed on the assumption that the Code is simply irrelevant to class representations. This Opinion has considered the application of the Code to some but not all issues confronting class lawyers.

In brief, and subject to the fuller discussion above, our conclusions are as follows. A lawyer must obtain informed consent from individual clients before asserting class claims on their behalf. When conflicts of interest arise, a class lawyer must obtain informed consent from individual clients before proceeding, but so far as other class members are concerned the court may authorize the representation; and a class lawyer may without consent undertake a representation adverse to a class member that the lawyer does not individually represent provided that representation is unrelated to the class action. A class lawyer has obligations of competence, diligence and confidentiality to class members. When a class has been certified but not before, DR 7-104 requires the consent of the class action lawyer or the court before a lawyer opposing the class may communicate directly with class members about the action. A class lawyer may support or oppose a settlement or take other steps in the action over the objections of named plaintiffs or other class members, but must act in the best interests of the class and with appropriate disclosure to the court.

January 2004
Committee on Professional and Judicial Ethics

Barbara S. Gillers, Chair
Katherine D. Johnson, Secretary

David E. Brodsky
Naomi Reice Buchwald
Carrie H. Cohen
Anthony E. Davis
Anne K. DeSimone
Jeremy R. Feinberg
Robert D. Goldbaum
Helen A. Gredd
Bruce A. Green
David N. Greenwald
Luisa K. Hagemeier
Gerard E. Harper
John B. Harris
Barbara Krasa Kelly
John Joseph Kirby
John E. Larkin
Robert W. Lehrburger

John D. Leubsdorf
Mara A. Leventhal
Robert Levy
John M. Mastando
John M. McEnany
Denis J. McInerney
Ronald C. Minkoff
Steven M. Ostner
Michael D. Patrick
James W. Paul
Kathleen A. Roberts
Alan E. Rothman
Roy D. Simon, Jr.
William J. Sushon
M. David Tell
Michael Waldman
Latrisha Anita Wilson
Representing Corporations and Their Constituents in the Context of Governmental Investigations

The Committee on Professional and Judicial Ethics

Topic: Multiple Representations; Corporations and Corporate Constituents

Digest: Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of DR 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise. In determining whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)’s disinterested lawyer test in light of the particular facts and circumstances.
at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation. Even if the lawyer concludes that the requirements of DR 5-105(C) are met at the outset of a multiple representation, the lawyer must be mindful of any changes in circumstances over the course of the representation to ensure that the disinterested lawyer test continues to be met at all times. Finally, the lawyer should consider structuring his or her relationships with both clients by adopting measures to minimize the adverse effects of an actual conflict, should one develop. These may include prospective waivers that would permit the attorney to continue representing the corporation in the event that the attorney must withdraw from the multiple representation, contractual limitations on the scope of the representation, explicit agreements as to the scope of the attorney-client privilege and the permissible use of any privileged information obtained in the course of the representations, and/or the use of co-counsel or shadow counsel to assist in the representation of the constituent client.

**Code:** DR 2-110; DR 4-101; DR 5-105; DR 5-107; DR 5-108; DR 5-109; DR 7-104

**Question**
Under what circumstances may a lawyer simultaneously represent a corporation and one or more of its officers, directors, employees or other constituents in the context of a governmental investigation? What disclosures must the lawyer make to her current and prospective clients and what consents must she obtain prior to undertaking such a representation? How may the lawyer structure his relationship with her clients so as to minimize adverse consequences if conflicts between their interests arise?

**Opinion**
In an era in which each day’s edition of *The Wall Street Journal* brings fresh reports of companies under investigation, it has become increas-
ingly common for lawyers to be asked to undertake simultaneous representation of a corporation and one or more of its officers, directors, employees or other constituents (sometimes collectively referred to as “constituents”) in the context of a governmental investigation. In addition, in an era in which corporations are under increasing pressure to demonstrate that they are “good corporate citizens” by cooperating fully with governmental investigations, it has become increasingly likely that simultaneous representation of a corporation and its constituents may involve the representation of differing interests.

At the same time, there is relatively little guidance available to attorneys on the ethical issues implicated by a request for simultaneous representation of a corporation and an officer or employee of that corporation in the context of a governmental investigation. We have found no ethics opinions addressing the topic. In addition, reported case law on multiple representation—which tends to be limited to issues such as when conflicts will require the disqualification of counsel or the reversal of a conviction—is of only limited assistance.

As a result, we believe it would be helpful and timely to outline the ethical issues implicated by multiple representation of a corporate client and one or more officers, directors, employees or other constituents in the context of a governmental investigation. In particular, this Opinion focuses on: (1) the circumstances under which a lawyer for the corporation may ethically undertake simultaneous representation of one or more employees of the corporation; (2) the disclosures that must be made and the consents that must be obtained in order to render such multiple representation ethically permissible; and (3) the steps that can or should be considered to minimize potential harm to the corporate and employee clients if conflicts between their interests arise. Although this Opinion

1. Although we have found one ethics opinion in New York relating to multiple representation in a corporate context, that opinion is limited to the relatively narrow issue of an attorney’s duties when perjury is committed by a corporate officer and the attorney represents both the officer and the corporation. NYSBA Comm. On Prof’l Ethics, Op. 674 (1995).

2. The issues that might arise at trial are distinct from those implicated at the investigative stage of a matter. In addition, whether counsel should be disqualified and whether counsel should have accepted or continued in multiple representation are separate questions. Thus, while decisions rendered in the context of litigated actions provide some assistance, they do not define the universe of issues relevant to deciding whether it is ethically permissible to undertake multiple representation of a corporate client and one or more employee clients in the context of a government investigation.

3. The guidelines established in this Opinion apply to situations where a lawyer represents or may represent an organization and also one of its constituents, regardless of whether the
deals specifically with multiple representations in the context of governmental investigations, we believe that most, if not all, of the concepts discussed in this opinion would apply to any multiple representation of a corporation and one or more of its constituents.

While there is no per se bar to simultaneous representation of corporate and employee clients in the context of governmental investigations, the Code of Professional Responsibility imposes three important restrictions on the permissibility of such representations. First, the lawyer must be able to conclude that a disinterested lawyer would, given the facts at hand, regard multiple representation as in the interest of both the corporate client and the employee client. Second, the lawyer must obtain the consent of both clients after full disclosure of the advantages and risks involved in multiple representation. Third, the lawyer must be alert to changes in circumstances that would render continuation of multiple representation impermissible.

In addition, the lawyer contemplating multiple representation should consider whether steps might be taken to structure his relationship with each client so as to minimize adverse consequences in the event that a conflict between them arises. For example, it may be appropriate or even necessary for the lawyer to seek a prospective waiver from his clients permitting him to continue his representation of the corporate client in the event that a conflict arises between the corporate client and the employee client. Additionally, or alternatively, the lawyer may conclude that the disinterested lawyer test is more clearly satisfied if he jointly represents one or both clients with co-counsel or shadow counsel.

The Standard Articulated in DR 5-105

DR 5-105 articulates the ethical standard governing the permissibility of representing multiple clients in a matter. Subject only to the exception contained in DR 5-105(C), the provisions of DR 5-105(A) and (B) prohibit undertaking or continuing in multiple representation “if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected” or “if it would be likely to involve the lawyer in representing differing interests.”

As defined by the Code, differing interests “include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a constituent is an officer, director, or employee, and we use those terms interchangeably throughout the Opinion. However, as with all circumstances in which disclosure and consent is or may be required, the degree of sophistication of the constituent will play a role in how detailed the discussions of those issues need to be.
client, whether it be conflicting, inconsistent, diverse, or other interest.” 22 N.Y.C.R.R. § 1200.1(a); see also NYSBA Comm. on Prof’l Ethics Op. 674 (n.d.). Accordingly, a finding of “adverse” or “differing” interests does not require “actual detriment” or any actual conflict; rather, a broad prophylactic rule is appropriate because it “not only preserves the client’s expectation of loyalty but also promotes public confidence in the integrity of the bar.” Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 131, 674 N.E.2d 663, 667 (1996) (discussing, on motion to disqualify, similar standard under DR 5-108 regarding conflicts with former clients).

Under DR 5-105, a lawyer may undertake or continue multiple representation of clients with potentially differing interests only if:

a disinterested lawyer would believe that the lawyer can competently represent the interests of each [client] and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

DR 5-105(C).

**The Disinterested Lawyer Test**

Thus, under DR 5-105, the first determination that must be made before undertaking simultaneous representation of a corporate client and an employee client is that a disinterested lawyer would believe that a single lawyer could competently represent the interests of each client. In addition, since DR 5-105 also speaks to continuing a multiple representation, it requires the attorney to remain alert to potential conflicts and to reassess, as circumstances change, whether the disinterested lawyer test is still satisfied.

A “disinterested lawyer” is an objective, hypothetical lawyer “whose only aim would be to give the client the best advice possible about whether the client should consent to a conflict” or potential conflict. Simon’s New York Code of Prof’l Responsibility Ann. 554-55 (2003). If the lawyer believes that such a disinterested lawyer “would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for” consent to multiple representation. EC 5-16.

In some instances, it will be obvious that the disinterested lawyer test cannot be satisfied with respect to the simultaneous representation of a corporate client and an employee client. For example, if the government
is investigating securities law violations relating to the filing of false or misleading financial statements, a disinterested lawyer could not reasonably conclude that a single lawyer could competently represent both the corporation and an employee who has admitted wrongdoing in connection with the financial statements under investigation.

In such a scenario, the corporation would have a strong interest in avoiding or limiting criminal or civil liability by, among other things, cooperating fully with the government and providing any information sought by the government regarding the preparation of the financial statements. The individual employee would, by contrast, have to consider a variety of factors before deciding whether it was in his interest to cooperate with the government, and he would need counsel able and willing to negotiate the best possible resolution of the matter for him.

In other scenarios, it would be clear that the disinterested lawyer test is easily satisfied. For example, in our same hypothetical investigation of securities law violations, an employee in the corporation’s maintenance department who merely overheard comments regarding the need to alter the corporation’s financial statements would have no reason for concern about personal liability. Such an employee would have no need for counsel to negotiate independently with the government on his behalf, and a disinterested lawyer would easily conclude that a single lawyer could competently represent the interests of both the corporation and the maintenance worker.

Many situations, however, are likely to be far less clear than the two scenarios described above. What if, for example, instead of working in the corporation’s maintenance department, the employee was the head of one of the corporation’s accounting divisions, albeit not the one in-

4. In recent years, both the Department of Justice and the Securities and Exchange Commission, among other law enforcement agencies, have repeatedly cited the willingness of a corporation to cooperate with governmental investigations (which cooperation is sometimes requested to include waiver of the attorney-client privilege) as an important factor in determining whether to hold a corporation civilly or criminally liable for the actions of its officers or employees. See, e.g., United States Attorneys Manual, Criminal Resource Manual 161 (January 20, 2003 memorandum of Deputy Attorney General Larry D. Thompson announcing a revised set of principles governing federal prosecution of business organizations) (“The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”); SEC Release No. 34-44969, 2001 WL 1301408 (October 23, 2001) (Report on the Relationship of Cooperation to Agency Enforcement Decisions) (describing the nature and extent of a company’s cooperation with the SEC as important factors to be taken into account in determining whether an enforcement action will be brought against the company).
volved in the financial statements under investigation? What if the employee worked in the accounting division under investigation, and had some, but not full, discretion to decide how to account for the transactions giving rise to the investigation? What if the employee had no decision-making authority, but nonetheless participated in booking the transactions? What if the employee is the corporation’s CEO, who is not an accountant but who certified the accuracy of the corporation’s financial statements?

In all such scenarios, the question of whether multiple representation would pass the disinterested lawyer test is much closer and likely would turn on the specific knowledge possessed by the employee, the specific laws or regulations implicated by the conduct, and the perceived scope of the government’s investigation. As a result, in all such scenarios, the lawyer must take particular care to ensure that he has a sufficiently detailed grasp of the relevant facts to be able to make the assessment required by DR 5-105(C).

**Obtaining the Facts Needed to Apply the Disinterested Lawyer Test**

The need for facts sufficient to apply the disinterested lawyer test raises the issue of what, if any, precautions a lawyer must take in his fact-gathering to avoid potential harm to his existing or prospective clients. In the typical case, an attorney’s first encounter with a corporate employee will occur in the context of an interview in which the attorney is representing only the corporation and is engaged in fact-gathering on behalf of the corporation. In such interviews, it is typical for the attorney to advise the employee that: (1) the attorney represents the corporation, not the employee; (2) any information imparted to the attorney is privileged, but the privilege is held by the corporation, not the employee; and (3) it will be up to the corporation to decide whether to waive the privilege and share any information imparted by the employee with third parties.

In all cases where the interests of the constituent and the interests of the corporation may differ, attorneys are affirmatively required to give at least part of the advice described above. The Code requires an attorney to advise a corporation’s employees that she is “the lawyer for the organization and not for any of the constituents” in any situation in which “it appears that the organization’s interests may differ from those of the constituents.” DR 5-109(A). Given the ease with which the “differing interests” test is satisfied, we believe an attorney should usually advise a corporate employee that she represents the corporation rather than the
employee. Furthermore, given the increased solicitude that courts and other authorities have shown for the reasonable expectations of a party in determining whether an attorney-client relationship has been formed, an attorney also acts at the peril of his corporate client if the attorney fails to make clear whom she does and does not represent.

If, in an initial interview, a corporate employee asks the corporation’s attorney whether he should consult with counsel, it is typical for the attorney to reiterate that he represents the corporation and therefore cannot advise the employee. Here, too, the Committee regards that practice as a prudent precaution. While DR 7-104(a)(2) allows an attorney to advise an unrepresented party to secure counsel, the attorney also must bear in mind that as corporate counsel, “he owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity.” EC 5-18. Because affirmatively advising a corporate employee to secure counsel may work against the interests of the corporation, we believe it is appropriate for corporate counsel to be reluctant to render that advice—at least in the absence of the consent of his client to do so.7

5. See, e.g., Restatement (Third) of the Law Governing Lawyers § 14 & cmts. e-f (conditioning attorney-client relationship on client’s intent and lawyer’s failure to “manifest lack of consent,” and stating that failure of corporate counsel to clarify whom he represents “in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer”); Nancy J. Moore, Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee, 39 S. Tex. L. Rev. 497, 506 (1998) (noting the inability of many corporate employees to understand the distinction between the lawyer’s role as corporate counsel and his role as counsel for the employee in his individual capacity); see also Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (implying attorney-client relationship between corporate counsel and corporate officer where attorney represented close corporation and officer “reasonably believed that [attorney] was representing him”). But see Talvy v. Am. Red Cross, 205 A.D.2d 143, 149-50, 618 N.Y.S.2d 25, 29-30 (1st Dep’t 1994) (“Unless parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees.”), aff’d mem., 87 N.Y.2d 826, 661 N.E.2d 159 (1995).

6. DR 7-104(a)(2) states that “[d]uring the course of the representation of a client a lawyer shall not give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.” However, since the employee will not typically be named in any related action actually being litigated before a tribunal while the governmental investigation is still pending, the employee, properly speaking, may not be a “party” within the meaning of this provision.

7. As noted above, DR 5-109(A) prescribes what corporate counsel must instruct a corporate constituent in cases where the interests of the corporation and the constituent “differ.” Where
If a constituent requests, prior to an initial interview by corporate counsel, to be represented by corporate counsel, it is typical for corporate counsel to decline at that point to undertake multiple representation. The Committee regards that practice as a prudent precaution. While it is, in theory, possible that corporate counsel will already have facts sufficient to enable her to apply the disinterested lawyer test prior to an initial interview with the employee, it seems likely that in most instances she will not have sufficient facts. Thus, we regard it as likely to be an exceptional case in which corporate counsel could properly agree to represent one of the corporation’s employees prior to an initial interview of that employee.

If an employee who has already been interviewed subsequently requests representation by corporate counsel—a request that typically is triggered by a request from the government to interview or take testimony from the employee—the corporate attorney will then need to determine whether he has sufficient facts to enable him to apply the disinterested lawyer test. If he does not, he must then determine how best to obtain those additional facts.

In this regard, the corporate attorney should take care to avoid proceeding in a manner that could work against the interests of his existing client, the corporation. Thus, for example, if the corporate attorney were simply to agree to meet again with the corporate employee for the purpose of determining whether he could represent the employee, without first discussing whether the attorney may not be free to share with the corporation any additional information that was imparted, then the attorney may not in fact be able to share that information with the corporation, see, e.g., United States v. Dennis, 843 F.2d 652, 656-57 (2d Cir. 1988) (statements made by prospective client are privileged even if attorney ultimately declines the engagement), and might even in some cases be unable
to continue to represent the corporation. See Restatement (Third) of the Law Governing Lawyers § 15 (2000) (addressing a lawyer’s duty to protect information relating to the representation of a prospective client and how to protect against adverse consequences to an existing client). As a consequence, to protect the interests of the existing client, the corporation, it is important that the lawyer make clear to the employee that information shared in the interview will be disclosed to the corporation and that the corporation will control the decision as to whether to disclose such information further.

Consent After Full Disclosure

If the attorney concludes that the disinterested lawyer test has been satisfied, the lawyer may undertake multiple representation only with the consent of each client after “full disclosure of the implications of the simultaneous representation and the advantages and risks involved.” DR 5-105(C).

“Full disclosure” means the provision of “information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict . . . .” EC 5-16; cf. People v. Gomberg, 38 N.Y.2d 307, 314, 342 N.E.2d 550, 554 (1975) (“Attorneys are under an ethical obligation to disclose to their clients, at the earliest possible time, any conflicting interests that might cloud their representation.”).

Full disclosure also includes “disclosure of any and all defenses and arguments that a client will forgo because of the joint representation, together with the lawyer’s fair and reasoned evaluation of such defenses and arguments, and the possible consequences to the client of failing to raise them.” NYCLA Ethics Op. 707 (1995).

This Opinion cannot, and does not attempt to, catalogue all possible advantages and risks attendant to simultaneous representation of a corporation and one or more of its employees. Instead, the Opinion attempts to provide general guidance in this area by noting some of the more common advantages and risks, with the caveat that in each case in which multiple representation is contemplated, the attorney must give careful, fact-specific consideration to the potential risks and advantages of the representation so that there can be full disclosure to the clients within the meaning of DR 5-105(C).

Risks and Advantages from the Corporate Client’s Perspective

In the case of a corporate client, the most common (and most readily apparent) advantage to multiple representation is avoiding the expense
of separate counsel. Other common advantages include providing employees with the benefit of counsel who has a detailed and broad knowledge of the relevant facts and avoiding the suggestion that there is any division of interest between the corporation and its employees.\(^8\)

With respect to the risks posed to a corporate client from multiple representation, the most serious potential risk will tend to be the possibility that a conflict will arise that will disable corporate counsel from continuing as corporate counsel. If a matter is time sensitive, or if corporate counsel has invested considerable time in the representation, the prejudice to the corporation from such a development could be quite significant.

In this regard, corporate counsel should ensure that the corporation understands that if the interests of the corporation and the employee become materially adverse, corporate counsel will not be able to continue in the matter on behalf of the corporation unless the employee consents to counsel doing so. See DR 5-108(A) (prohibiting, absent consent after full disclosure, representation that is materially adverse to a former client in the same or a substantially related matter). In addition, if there is any reasonable possibility of a divergence of interests, we believe that corporate counsel should seriously consider advising the corporation to obtain a prospective waiver sufficient to satisfy DR 5-108(A) as a condition of consenting to multiple representation. Indeed, in some cases, the absence of such a waiver might well cause the multiple representation to fail the disinterested lawyer test.

Other common disadvantages, from the corporation's perspective, to multiple representation include potential loss of credibility with the investigating agency, complication of corporate counsel's ability to report facts to the corporation, and complication of the corporation's ability to report facts to the government.

With respect to the first of those possible disadvantages, it may well be the case that a government attorney will regard with greater suspicion the testimony of a corporate employee that is favorable to the corporation if the employee is represented by counsel for the corporation. Indeed, a government attorney may even affirmatively object to the multiple representation. In such cases, it is not uncommon for the corpora-

---

8. Less sophisticated corporate clients might also mistakenly believe that multiple representation carries the benefit of ensuring that their employees are represented by attorneys whose first loyalty is to the corporation. In such cases, it is incumbent upon corporate counsel to make clear to the corporation that he will owe a full and equal duty of loyalty to the employee clients, and that, if she is unable to discharge that duty, she will not be able to continue representing the employee clients.
tion or its counsel to decide against multiple representation even if it is believed to be permissible.

Multiple representation may also complicate corporate counsel’s ability to report to the corporation because, absent consent, she may not be able to pass on the confidences or secrets of his employee client. See DR 4-101(B)(3); DR 4-101(C)(1) (confidences and secrets of a client cannot be disclosed or used for the advantage of a third party without consent of the client after full disclosure); Greene v. Greene, 47 N.Y.2d 447, 453, 391 N.E.2d 1355, 1358 (1979) (prohibition against disclosure of client confidences covers any confidential communication made by the client in the course of the lawyer’s representation and continues even after the dissolution of the attorney-client relationship). While such a factor is likely to be less significant in cases in which the prospective employee client has already been extensively debriefed, it nonetheless remains a potential complicating factor that ordinarily should be disclosed prior to seeking consent for multiple representation.

Similarly, corporate counsel should ordinarily consider and discuss with the corporation the possibility that multiple representation could complicate the corporation’s ability to cooperate with, and report facts to, the government. As noted above, the current state of the law, and the current state of mind of law enforcement officials, operate to place considerable pressure on corporations to be willing to self-report, to waive the attorney-client privilege and effectively to serve as an investigative arm of the government with respect to the conduct of their employees. Allowing corporate counsel to simultaneously represent a corporate em-

9. Although there is an exception to the obligations of DR 4-101 “where an attorney acts for two or more clients jointly,” the scope of this exception is not entirely clear. Some authorities suggest that it is limited “only to the evidentiary privilege and applies only in subsequent litigation between the clients.” NYSBA Comm. on Prof’l Ethics Op. 555 (1984). These sources stress that before confidences may be shared between jointly represented clients, “the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality.” Id. Courts, however, have appeared more willing to infer such consent from the nature of the relationships in a multiple representation. See Tekni-Plex, 89 N.Y.2d at 137, 674 N.E.2d at 670 (“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 . . . .”); accord Talvy, 205 A.D.2d at 149-50, 618 N.Y.S.2d at 29-30. Given these differing approaches, the Committee believes that it will always be advisable, prior to sharing the confidences of one client with another, for the lawyer to obtain the client’s consent, after full disclosure. See DR 4-101(C)(1). This can be done in an engagement letter that sets out the understandings and agreements between the corporate client and the employee client with regard to the sharing and control of confidential information.
ployee may put the corporation or its counsel in the undesirable position of having information that is of interest to the government but that cannot be shared with the government because the employee client has declined to waive his attorney-client privilege.\textsuperscript{10}

**Risks and Advantages from the Employee’s Perspective**

From the employee’s perspective, many of the common advantages of multiple representation tend to be similar to the advantages that exist from a corporate client’s perspective. Those advantages typically include obtaining counsel who has a detailed and broad knowledge of the relevant facts and avoiding the suggestion that there is any division of interest between the corporation and the employee.\textsuperscript{11}

The principal risks posed to the employee client from multiple representation typically tend to be that corporate counsel’s larger constituency may render it difficult for him (despite his best intentions) to be as vigilant in his protection of the individual client’s interests, or that a divergence of interests will require the attorney to withdraw from representation of the employee client. Any such risks should be discussed with the prospective employee client prior to obtaining his consent to multiple representation. In addition, where the need to withdraw would be likely to work a significant disadvantage to the employee client (because, for example, the matter is time sensitive or especially complex), consideration should be given to the advisability of having co-counsel or shadow counsel.\textsuperscript{12}

**Structuring the Representation to Minimize Potential Adverse Consequences**

As the foregoing discussion indicates, an attorney contemplating multiple representation can, and often should, consider whether the attorney-client relationship can be structured to minimize potential drawbacks to multiple representation. Such structuring may include obtaining prospective waivers of conflict, contractually limiting representation to minimize the possibility of conflicts, having a written understanding with regard to confidential information learned during the representations, and providing for co-counsel or shadow counsel.

\textsuperscript{10} For an example of one such potential complication, see infra note .

\textsuperscript{11} Cost savings will not ordinarily be among the potential advantages to the employee client because the cost of separate counsel would in many, if not most, cases be borne by the corporation. Payment of such costs by the corporation is plainly allowed so long as there is full disclosure and the client consents. See DR 5-107.

\textsuperscript{12} To determine whether to withdraw from employment in the context of a multiple representation, a lawyer should refer to, \textit{inter alia}, DR 2-110 and EC 5-15.
Prospective Waivers

There is, as a general matter, no ethical bar to seeking a waiver of future conflicts. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 372 (1993); NYCLA Ethics Op. 724 (1998). In order to best ensure the likelihood that such waivers will be effective, however, it is advisable to put them in writing, see ABA Formal Op. 372, and they should otherwise meet all the requirements for contemporaneous waivers. See id.; NYCLA Ethics Op. 724; see also, e.g., Woolley v. Sweeney, No. 3:01-CV-1331-BF, 2003 U.S. Dist. LEXIS 8110, at *22 (N.D. Tex. May 13, 2003) (rejecting client’s prospective waiver of conflicts where client “has never had the benefit of full disclosure”). The nature of these requirements depends on the specific conflicts to be waived, which, in turn, depend on the interests of the various clients. NYCLA Ethics Op. 724 (stating that “adequacy of disclosure and consent will depend . . . upon the circumstances of each individual case”) (citation omitted).

In seeking to obtain a prospective waiver from clients, it frequently will be difficult for an attorney to make “full disclosure” to the same extent as in connection with a concurrent waiver. This is because it may not be clear to the attorney at the outset of the representation just what conflicts might later arise. To satisfy his obligation of full disclosure, then, the lawyer seeking a prospective waiver should at least advise the client “of the types of possible future adverse representations that the lawyer envisions, as well as the types of matters that may present such conflicts. The lawyer also should disclose the measures that will be taken to protect the client or prospective client should a conflict arise.” NYCLA Ethics Op. 724. “[I]t would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicted clients would survive scrutiny.” ABA Formal Op. 372. In other words, the more specific the lawyer can be, the more likely the waiver is to be upheld. Id.

In the context of governmental investigations, prospective waivers may be useful in dealing with a number of the potential conflicts discussed above. Most commonly, prospective waivers may be sought in such cases from an employee client regarding the ability of corporate counsel to continue representing the corporate client in the event an actual or potential conflict develops. In addition, if there is any realistic likelihood that the governmental investigation might lead to litigation, consideration should be given to obtaining a waiver of the employee client’s right to object to being cross-examined by his former attorney. Such a waiver will satisfy the specificity requirement for advance waivers because the
constituent client will understand the nature of the future representation in which the lawyer would cease to represent the individual and continue to represent the entity.\textsuperscript{13}

It bears noting that even if the prospective waivers do comport with the requirements for contemporaneous waivers as of the time they are made, the lawyer must still revisit the issues at the time the actual or potential conflicts arise. ABA Formal Op. 372 (stating that securing “‘second’ waiver” from client at time that actual conflict develops “in many cases . . . will be ethically required”); NYCLA Ethics Op. 724 (stating that “[n]otwithstanding” prospective waiver, “the lawyer must reassess the propriety of the adverse concurrent representation . . . when the conflict actually arises”). If the actual or potential conflicts turn out to be “materially different” from those the clients waived, the lawyer will not be permitted to rely on the prospective waivers, and will have to obtain new, contemporaneous waivers. NYCLA Ethics Op. 724. Likewise, courts will not necessarily accept the validity of prospective waivers, and may have to satisfy themselves that such waivers continue to be appropriate in light of the circumstances that actually develop. \textit{Cf. United States v. Alex}, 788 F. Supp. 359, 363 (N.D. Ill. 1992) (rejecting waiver of conflicts by former clients as “by no means binding on this court,” and recognizing “obligation to independently review the former clients’ consents to waive their former counsel’s conflict of interest”). Thus, in seeking such prospective

\textsuperscript{13} In seeking the prospective waivers and advance permission to reveal confidential information (see discussion \textit{infra} at 13), counsel should also bear in mind any specific reporting requirements to which the corporate client may be subject. For example, certain corporations, such as banks and broker-dealer firms, are subject to federal laws that require them to report suspicious financial transactions by filing suspicious activity reports (“SARs”). See, e.g., 12 C.F.R. pt. 21. If counsel for such a corporation undertakes the simultaneous representation of a corporate employee, counsel may obtain, in the course of representing that employee, otherwise privileged information regarding suspicious transactions that, as an agent of the corporation, counsel may be obligated to disclose to the corporation and that the corporation, in turn, may be obligated to report to the government. As such, counsel for corporations with reporting requirements should consider seeking prospective waivers and advance permission to disclose information from any potential employee client that would permit the filings of such reports. While DR 4-101(C)(2) permits an attorney to reveal client “[c]onfidences or secrets when . . . required by law . . . ,” the precise scope of this provision is unclear. It is thus uncertain whether the attorney, absent consent from the employee client, could report to the government information acquired in the course of representing that employee. Moreover, given that some of the reporting laws prohibit the filer of a SAR from informing any party that is involved in the underlying transaction, see, e.g., 31 U.S.C. 5318(g)(2)(A)(i), a prospective waiver prior to undertaking the representation may be the only opportunity for counsel to obtain the employee client’s consent.
waivers, the lawyer should be as specific as possible, in order to ensure that the lawyer has adequately disclosed the risks, and to maximize the likelihood that a reviewing court will conclude that the waiver was knowl-
edgeably made.14

**Contractual Limits on Representation**

A lawyer may likewise ethically limit by contract his representation of a client, provided that the representation still comports with the requirements of the N.Y. Code of Professional Responsibility. NYSBA Comm. on Prof’l Ethics Op. 604 (1989). In effect, this means that the representation may not be so limited as to be inadequate. Ass’n of the Bar of the City on New York Comm. on Prof’l & Judicial Ethics [hereinafter “ABCNY”] Formal Op. 2001-3 (2001). Stated otherwise, the representation “must be sufficient . . . to render practical service to the client,” and must not “ma-

14. In evaluating the validity of prospective waivers, reviewing courts try to ascertain whether the client was reasonably informed about the future matter. See Restatement (Third) of the Law Governing Lawyers § 122 (2000) (defining “informed consent” to a prospective (as well as current) waiver as “requiring that the client or former client have reasonably adequate information about the material risks of such representation”). ABA Formal Op. 372 (“the particular future conflict of interest as to which the waiver is invoked [must have been] reasonably contemplated at the time the waiver was given”); NYCLA Ethics Op. 724 (an advance waiver is valid if “the subsequent conflicts should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought”). Where the attorney specifically identifies the party or parties with whom the client’s interests potentially could differ and explains how that divergence could occur, courts have tended to uphold prospective waivers. See Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1345 (9th Cir. 1981) (quoting In re Boivin, 533 P.2d 171, 174 (Or. 1975)); accord Fisons Corp. v. Atochem N.A., Inc., No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284, at *15 (S.D.N.Y. Nov. 14, 1990); see also Interstate Props. v. Pyramid Co., 547 F. Supp. 178, 181-82 (S.D.N.Y. 1982). In the scenarios being considered in this opinion, the party with whom the client’s interests might differ normally will be reasonably clear. Cf. W.R. Grace & Co. v. Goodyear Tire & Rubber Co., No. 1:99-CV-305, 1999 U.S. Dist. LEXIS 22554, at *12-*16 (W.D. Mich. 1999) (upholding prospective waiver executed by members of defense group that prohibited members from objecting “to the continued representation by Common Counsel of all or any of the other members [of the group] in connection with any legal services arising out of” the subject of the agreement). Moreover, even in litigation, courts have upheld prospective waivers involving representation of a corporation and its constituents. See In re Rite Aid Corp. Sec. Litig., 139 F.Supp.2d 649 (E.D. Pa. 2001) (permitting a lawyer who represented the corporation and several of its executives to withdraw from representing one of the executives and continue to represent the corporation after a conflict developed, based upon a written engagement letter containing an advance waiver); see also Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 6th Dist. 1995) (upholding an advance waiver permitting a lawyer who represented a corporation and an individual to continue representing the corporation after a conflict developed between the corporation and individual).
terially impair the client’s rights.” NYSBA Ethics Op. 604. Such a limitation on representation is, however, subject to many of the same requirements as valid waivers: there must be full disclosure of the terms of the engagement and the client must consent. ABCNY Formal Op. 2001-3. In addition, such a representation should not be proposed if “a client could not reasonably conclude that the proposed arrangement serves its interests.” Id. Finally, any such representation “must cover a discreet matter or a discreet stage of a matter and not terminate before the completion of that stage.” NYSBA Ethics Op. 604.

Accordingly, it may be possible for a lawyer to limit his representation of an employee of the corporation to a discreet stage of an investigation in which a conflict with the corporation is unlikely to arise. For example, the lawyer may attempt to limit his representation of the employee to the investigatory stage of the case, thereby eliminating any risk that he would still represent the employee at the time of trial, should he then need to cross-examine the employee. Alternatively, depending on the facts of the particular case, the lawyer may be able to limit the scope of his representation of the employee even more narrowly, perhaps to just a single interview or a handful of interviews with the government about a narrowly circumscribed topic.

Understandings with Respect to Privileged and Confidential Information

Once it is decided that the lawyer will represent the corporation and the constituent, it is important to have a clear understanding with both clients as to (1) whether and what kind of confidential information will be shared; (2) who will control the privilege with respect to such information; (3) how the attorney-client privilege will operate in the event a dispute arises between the clients concerning the matter; and (4) whether the lawyer will continue to represent the corporation even if a conflict develops between the corporation and the constituent. While the New York Code does not require that such understandings be in writing, we strongly recommend that they be in writing.

Co-Counsel or Shadow Counsel

Another potential middle ground that may be appropriate in some cases is the use of co-counsel or shadow counsel—that is, separate counsel who serves as additional counsel for the corporate employee and thus is available to offer independent advice to the employee and, if necessary, to take over as sole counsel for the employee. While the use of such coun-
Multiple representations are ethically complex, and the high-stakes nature of a typical governmental investigation only adds to the complexities. Before undertaking simultaneous representation of a corporation and one or more of its employees in the context of a governmental investigation, an attorney must carefully consider whether a disinterested lawyer would conclude that he can competently represent the interests of each client. The attorney must also take care to ensure that she has sufficient information to apply the disinterested lawyer test, and must give careful, fact-specific consideration to the risks and advantages to multiple representation and discuss those factors fully with each client before seeking their consent to multiple representation. In addition, throughout the representation, the attorney must remain alert to changing circumstances that may render continuation of multiple representation impermissible or inadvisable, and the attorney must discuss any such circumstances with his clients. Finally, the attorney should give consideration to whether there are ways in which the multiple representation can be structured so as to minimize adverse consequences to her clients should a conflict between them arise.

May 2004
Committee on Professional and Judicial Ethics

Barbara S. Gillers, Chair
Katherine D. Johnson, Secretary

David E. Brodsky
Carrie H. Cohen
Anthony E. Davis
Anne K. DeSimone
Jeremy R. Feinberg
Robert D. Goldbaum
Helen A. Gredd
Bruce A. Green
David N. Greenwald
Gerard E. Harper
John B. Harris
Luisa K. Hagemeir
Barbara Krasa Kelly
John Joseph Kirby
John E. Larkin
Robert W. Lehrburger

John D. Leubsdorf
Mara A. Leventhal
Robert Levy
John M. Mastando
John M. McEnany
Denis J. McInerney
Ronald C. Minkoff
Steven M. Ostner
Michael D. Patrick
James W. Paul
Kathleen A. Roberts
Alan E. Rothman
Roy D. Simon, Jr.
William J. Sushon
M. David Tell
Latrisha Anita Wilson
Revised Article 1 of the Uniform Commercial Code

By the Committee on Uniform State Laws

TABLE OF CONTENTS

A. Section-by-Section Comparison 468
B. Detailed Discussion of RA 1-301 469
   Domestic and International Transactions 470
   Default Choice-of-Laws Rules 471
   Consumer Protection Provisions 472
   Current New York Non-UCC Consumer Protection Provisions that 475
       Might Be Preserved by RA 1-301
   Current New York UCC Consumer Provisions that Would Be 476
       Preserved by RA 1-301
   Choice of Forum 478
   Fundamental Policy 479
   New York Fundamental Public Policy 482
   Title 14, New York General Obligations Law 485
   Constitutionality of Governing Law Clauses in General 487
   Constitutionality of Title 14 491
   Harmonization of 5-1401 with Section 1-301 492
C. Statute of Frauds: Repeal of NYA 1-206 494
   Current Law 494
   Repeal of FUA 1-206 by RA 1 495
   Recommendation: New York Should Not Carry Forward the Rule 496
       Set Forth in NYA 1-206
D. “Good Faith” 501
E. Conforming Changes to Other New York State Statutes 502
F. Committee Recommendation 502
Revised Article 1 of the Uniform Commercial Code

By the Committee on Uniform State Laws

Article 1 of the Uniform Commercial Code (the “UCC”) sets forth basic definitions and concepts that are utilized throughout the other articles of the UCC. In December 2001, the joint sponsors of the UCC, the National Conference of Commissioners on Uniform State Laws and the American Law Institute, promulgated a revision of Article 1.1 RA 1 has been enacted in the States of Idaho, Texas and Virginia and in the United States Virgin Islands and has been introduced in the legislatures of five other States: Alabama, Hawaii, Massachusetts, Minnesota, and West Virginia.2

This report (“this Report”) of the Committee on Uniform State Laws of the Association of the Bar of the City of New York (the “Committee”)

1. This report and the accompanying chart uses the following abbreviations in referring to the various relevant texts of UCC Article 1: “NYA” (New York Article) will refer to New York’s current statute, N.Y. U.C.C. (McKinney 2002); “FUA” (Former Uniform Article) will refer to the 2000 Uniform Text, U.C.C. (2000); and “RA” (Revised Article) will refer to the 2001 Uniform Text, U.C.C. (2001). As the text of NYA 1 usually conforms to FUA 1, only in those cases where there are differences will reference be made to the Former Uniform Article.

analyzes RA 1 and compares it to existing New York law. This Report is organized in the following manner. Part A of this Report is a section-by-section comparison, in chart form, of the provisions of RA 1 against the provisions of NYA 1, the version of Article 1 of the UCC currently in effect in New York. Part B discusses RA 1-301, the section dealing with choice of law. Section RA 1-301, in the words of the Official Comment, “represents a significant rethinking of choice of law issues” addressed in NYA 1-105 and FUA 1-105 and thereby merits detailed consideration here. Part C of the Report discusses the statute of frauds section currently found at NYA 1-206 and which, because RA 1 contains no statutory analogue to NYA 1-206, would be repealed if RA 1 were enacted. Part D of the Report discusses the definition of “good faith” in RA 1 in comparison with current law. Part E of the Report lists other New York statutes that refer to definitions contained in or provisions of NYA 1. These other statutes would need to be amended to reflect references to RA 1 if RA 1 were enacted in New York. Finally, Part F of this Report contains the recommendations of the Committee as to whether New York should enact RA 1.

A. Section-by-Section Comparison

RA 1, for the most part and with the exception of RA 1-301, the revision of the definition of “good faith” in RA 1-201(20), and the repeal of NYA 1-206, does not substantially change existing New York law. Accordingly, the Committee determined that the chart attached as Exhibit A to this Report (the “Comparison Chart”) would be the most user-friendly means of conveying in a concise fashion the differences between RA 1 and NYA 1.

The Comparison Chart contains a section-by-section comparison of the provisions of RA 1 against the provisions of NYA 1. The provisions of RA 1 appear in the leftmost column of the Comparison Chart in the order of their appearance in RA 1. Their NYA 1 analogues appear in the middle column. At times, analogues to one RA 1 section are found in several provisions of NYA 1. For ease of comparison these separate provisions have been brought together in the middle column alongside the relevant RA 1 section. In the rightmost column of the Comparison Chart, the Committee has added comments reflecting the results of its research, as well as its views, as to whether the relevant provision of RA 1, if enacted, would change current New York law.

The Committee elected not to summarize in the Comparison Chart the provisions of RA 1 because these provisions already are summarized in the Official Comments to RA 1. [In the interest of brevity, Exhibit A has
been deleted from The Record. Exhibit A is available at http://www.abcny.org/pdf/report/LEGALDOCS-1.pdf

B. Detailed Discussion of RA 1-301

In general, RA 1-301 provides for party autonomy in choosing the governing law for “a transaction to the extent that it is governed by another article of the” UCC, so long as (i) “one of the parties to a transaction is [not] a consumer,”3 or (ii) a “fundamental policy of the State or country whose law would govern” under otherwise applicable conflict of law principles is not violated.4 In addition, even non-consumers are restricted to choosing only the law of one of the States of the United States when the transaction is a “domestic transaction.”5

Although NYA 1-105 did not explicitly state that it covered only transactions governed by the UCC, as in contrast RA 1 does in RA 1-301(b), the drafters of RA 1 believe that this limitation was “implicit.”6 The Official Comments also make it clear that RA 1-301 “does not apply to matters outside the scope of the Uniform Commercial Code, such as a services contract, a credit card agreement, or a contract for the sale of real estate.”7 One possible explanation for the inclusion of this explicit statement is a concern that RA 1-301 not be the means to justify a choice of laws that would implicate the Uniform Computer Information Transaction Act (“UCITA”).8 This depends, of course, on whether the courts consider “the distribution of boxes of software to be ‘transactions in goods’

3. RA 1-301(e).
4. RA 1-301(f).
5. RA 1-301(c)(1). A “domestic transaction” is “a transaction other than an international transaction.” RA 1-301(a)(1). In turn, an “international transaction” is “a transaction that bears a reasonable relation to a country other than the United States.” RA 1-301(a)(2). The meaning of “reasonable relation” is discussed in the text accompanying note 27, infra. In effect, RA 1-301 is carrying forward, for the purpose of distinguishing international and domestic transactions, the concept of “reasonable relation” contained in NYA 1-105, which provides that parties to a transaction may only choose the law of a jurisdiction that bears a “reasonable relation” to “a transaction.” RA 1-301 does not limit party autonomy as severely as does NYA 1-105 based on this concept but some limitations do remain.
6. RA 1-301 cmt. 1.
7. RA 1-301 cmt. 1.
8. The concern is what state A without UCITA would do when faced with a choice of law provision naming a state B where UCITA is the law. If RA 1-301 is in force in state A and the transaction is one for the sale of goods, then the choice of UCITA would be honored. If RA 1-301 does not apply, then reasonable relation would be applied and UCITA would be enforced only if there was a reasonable relation to state B.
thereby bringing them within the new UCC choice of law rule [RA 1-301].”9 If the courts consider boxes of software as goods, then RA 1-301 will make application of UCITA exceptionally easy as no reasonable relationship with a jurisdiction where UCITA was enacted would have to be shown.

If the explicit limitation that RA 1-301 applies only to “a transaction to the extent that it is governed by another article of the [Uniform Commercial Code]” is given effect as absolutely as the accompanying Official Comments suggest, RA 1 may change New York law in the realm of hybrid good-sales transactions. When a transaction has involved both a sale of goods and a furnishing of services, New York courts typically have been hesitant to treat such transactions as divisible but rather have determined at the outset whether or not the transaction as a whole falls under the UCC and then applied to all aspects of the transaction either the UCC’s choice of law rule in NYA 1-105(1) or the fallback New York choice of law rules. In determining as a threshold matter what law to apply, New York courts typically determine which aspect of the transaction predominates and then consider the transaction as one.10 Thus, where a transaction is deemed to be primarily a transaction for the sale of goods, New York courts will look to the UCC; however, where the sale of goods is incidental to the provision of services, the courts will look to other applicable law.11

**Domestic and International Transactions.** There has been some controversy concerning the restrictions on choice of law provisions in RA 1-301 with respect to domestic transactions. Several members of the American Law Institute expressed disagreement with this restriction on the grounds that it was “xenophobic” and did not represent the realities of international business transactions.12 Professor Russell Weintraub has expressed the thought that subsection (c)(1), which provides that parties in a do-

---


10. See, e.g., Perlmutter v. Beth David Hospital, 123 N.E.2d 792 (N.Y. 1954) (finding that a transfusion of blood is not a transaction for the sale of goods); Laing Logging v. International Paper Company, 644 N.Y.S.2d 91, 93 (App.Div. 1996) (finding that an agreement for the provision of wood chips was a sale of goods transaction); Sears, Roebuck & Co. v. Galloway, 600 N.Y.S.2d 773, 775 (App.Div. 1993) (finding that the sale and installation of a boiler was predominantly a sale of goods); Inn Between, Inc. v. Remanco Metropolitan, 33 UCC Rep.Serv.2d 1110 (N.Y.D.C. 1997) (finding that the sale and maintenance of a restaurant computer system was a sale of goods falling under the UCC).

11. See cases cited supra note 10.

mestic transaction may select as the governing law of their agreement the law of any State without regard to the existence of a relation between the State and the transaction, should be restricted to issues of the validity of an agreement. In his view, “[t]here is no reason to restrict parties to a domestic transaction to choice of U.S. Law if the issue is one of construction—one in which parties are simply incorporating by reference terms that would have been held valid by any relevant jurisdiction if stated in detail.”

The drafters of RA 1 have defended subsection (c)(1) on two grounds. First, they have pointed out that, once a reasonable relation is established with any foreign jurisdiction, the parties are free to choose the law of any jurisdiction, even if the chosen jurisdiction has no relation to the parties or the transaction. Second, the drafting committee was concerned that there might be “overreaching” if “one of the parties with greater bargaining power chooses not a fellow state, where, of course, we have some degree of common legal heritage and some degree of Congressional power through the Commerce Clause to keep things within some moderation, but instead chooses the law of a foreign country that has fundamentally different policies.”

Default Choice-of-Laws Rules. In the event that no choice of law is made, the default rules also are quite different between NYA 1-105 and RA 1-301. RA 1-301 provides that, in the absence of any agreement between the parties, normal conflict of laws principles would apply, with the exception that both the (i) protections of consumers contained in subsection (e) and (ii) limitations of choice of law where there is an explicit provision later in the UCC contained in subsection (g) still apply. NYA 1-105(1) provides that, in the event that no choice of law is made, the UCC as in effect in the forum state applies “to transactions bearing an appropriate relation to” the forum state. The intent of the latter provision was to encourage the application of the UCC even if it had not been adopted by all States. The drafters of RA 1 note that, by adopting “an appropriate relation” rather than a more restrictive test, NYA 1-105(1) was “express[ing] a bias in favor of applying the forum’s law.” This bias is no longer justi-

14. RA 1-301 cmt. 5 (using the example of a non-consumer lease of goods involving a Mexican lessor and Louisiana lessee in which the law of Ireland governs the transaction).
16. RA 1-301(d).
17. RA 1-301 cmt. 7.
fiable now domestically because the UCC “has been adopted, at least in part, in all U.S. jurisdictions” and internationally because of “comity concerns.”

In addition, the drafters note that the courts “frequently ignored” the “appropriate relation” test; rather the courts applied their normal choice of law rules. This observation is consistent with case law that has interpreted NYA 1-105 and the related Official Comments.

The federal and New York State courts applying NYA 1-105 looked to Official Comment 3 and its use of the phrase “significant contacts.” “This [phrase], in and of itself, indicates legislative approval of the Restatement rule of ‘most significant relationship.’” The New York Annotations to NYA 1-105 state that Official “Comment 3 suggests that the Code adopts the significant contacts test of Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).” Although these cases and the New York Annotations arguably have misread Official Comment 3 by focusing solely on the phrase “significant contacts” rather than the entire comment, the fact remains that the default rule in RA 1-301 would not represent a change from how NYA 1-105 was interpreted by the New York courts and federal courts applying New York law.

**Consumer Protection Provisions.** Before discussing the protections granted by RA 1 to consumers, it is important to acknowledge the limited universe that is afforded these protections. A “consumer” is defined as an “ind-

---

18. *Id.*

19. RA 1-301, cmt. entitled “Summary of changes from former law”.


22. N.Y. U.C.C. §1-105 annotations (McKinney 2002). Auten represents an earlier approach to choice of laws that applied that law of the jurisdiction “which has the most significant contacts with the matter in dispute.” Auten v. Auten, 124 N.E.2d 99, 103 (N.Y. 1954) (quoting Rubin v. Irving Trust Co., 113 N.E.2d 424, 431 (1953)). “Recent New York cases have followed the rule that a contractual provision setting forth the law applicable to the agreement in question will be followed as long as the transaction bears a reasonable relationship to the law chosen or, more precisely stated, to the jurisdiction whose law is chosen. The cases have followed this rule in spite of *Auten v. Auten.*” Michael Gruson, *Governing Law Clauses in Commercial Agreements-New York’s Approach*, 18 COLUM. J. TRANSNAT’L L. 323, 329-30 (1979).
individual who enters into a transaction primarily for personal, family, or household purposes.” This definition, which is derived from UCC Section 9-102(a)(25), excludes all entities through its use of the word “individual” and excludes all business users through the use of the phrase “personal, family, or household purposes.” No attempt is made to distinguish between large businesses involved in large transactions, which rationally are able to expend the transaction costs needed to understand and negotiate choice of law provisions, and large businesses engaged in small transactions. Nor is any distinction made with respect to small businesses, which rationally will not expend the transaction costs, and will, therefore, have no understanding of what the choice of law provision means, and may need protection from overreaching as much as individual consumers do.

Three special protections are afforded consumers by RA 1-301. First, a choice of law agreement “is not effective unless the transaction bears a reasonable relation to the State or country designated.” This is the same standard that was incorporated into NYA 1-105(1), but that applied to all persons, nonconsumer as well as consumer.

The phrase “reasonable relation” is used twice in RA 1-301. First, to define the meaning of “international transaction” in subsection (a)(2) and then in the consumer protection provisions in subsection (e)(1). As this phrase also was used in NYA 1-105 and no indication in the Official Comments to RA 1-301 exists that any further gloss on the meaning of “reasonable relation” is intended, there should be no change in New York law on this point.

23. RA 1-201(b)(11).
24. RA 1-201 cmt. 11. Neither Section 9-102(a) nor the Official Comments thereto provide any further gloss on the meaning of “consumer.”
26. RA 1-301(e)(1).
27. “Except as provided hereafter in this section [referencing subsection (2) with its list of specific choice of law provisions in other articles of the UCC], when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.” NYA 1-105(1) (emphasis added). As NYA 1-105(1) used “and,” it would be possible to read NYA 1-105(1) as requiring both a reasonable relationship to New York as well as to another jurisdiction before allowing parties to choose another jurisdiction’s laws. Gruson, supra note 22, at 348-49. New York courts, however, have not adhered to the literal language of NYA 1-105(1) and have allowed parties to choose the law of any jurisdiction that bears a reasonable relationship to the transaction even if the forum has no relationship. Id. at 350.
Second, RA 1-301 prevents parties from opting out of certain consumer protection laws. Specifically, RA 1-301 preserves “the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement.”

In turn, there is a rule for determining which jurisdiction’s consumer protection laws are pertinent. In transactions that are not sales of goods and in certain sales of goods transactions, the pertinent jurisdiction is the “State or country in which the consumer principally resides.” In sales of goods transactions where the consumer “both makes the contract and takes delivery of those goods” in a jurisdiction other than the “State or country in which the consumer principally resides,” then the consumer protection laws of that other jurisdiction are the relevant ones for RA 1-301(e)(2). The Official Comments to RA 1 describe the latter provision as intended to cover “face-to-face transactions” so that sellers who engage in such transactions are able to determine what are the relevant consumer protection laws, “without the necessity of determining the principal residence of each buyer.” The Official Comments state that the reference to the concept of making a contract is not meant to “incorporate formalistic concepts of where the last event necessary to conclude the contract took place; rather, the intent is to identify the state in which all material steps necessary to enter into the contract were taken by the consumer.” In light of this comment, transactions other than face-to-face ones might be covered as well by RA 1-301(e)(2)(B). In particular, a transaction where the buyer resides in one jurisdiction and works in another but both places the order from the work jurisdiction and takes delivery in the work jurisdiction would seem to be covered. In other words, a transaction in which a Connecticut resident who works in New York State and places an order with a New Jersey merchant for delivery in New York would appear to be subject to New York consumer protection laws.

Third, the consumer protections granted by RA 1-301(e)(2) apply even in the situation where no choice of law has been made by the parties to the transaction and normal conflict of laws principles are being applied.

---

28. RA 1-301(e)(2).
29. RA 1-301(e)(2)(A).
30. RA 1-301(e)(2)(B).
31. RA 1-301 cmt. 3.
32. Id.
33. Id.
pursuant to RA 1-301(d).33 ("Application of the law of the State or country
determined pursuant to subsection (c) or (d) may not deprive the con-
sumer of the protection of any rule of law . . . .")

The consumer protection provisions of RA 1 have been criticized both
for undermining the “certainty and predictability” that the “justified
expectations” of parties to a contract will be carried out34 and for leaving
out a choice of forum provision, which could substantially weaken the
protections contained in subsection (e).35

The American Bankers Association has argued that trying to comply
with the consumer protection provisions will be a “compliance night-
mare” as “[f]inancial institutions with customers residing in another state
will need to become experts on the consumer protection laws of the other
jurisdiction.”36 In addition, the American Bankers Association is concerned
that the sale of goods provisions in subsection (e)(2)(B) may extend to
such situations as the use of a credit card to purchase goods.37 Finally, the
American Bankers Association is concerned that the consumer protection
provisions are inconsistent with federal law.38 In light of these concerns,
the American Bankers Association would like subsection (e) deleted, as
well as subsection (f) on “fundamental policy,” which is discussed below.

Current New York Non-UCC Consumer Protection Provisions that Might Be Pre-
served by RA 1-301. RA 1-301 would work to preserve many of the state con-
sumer protection laws consumers enjoy in New York. Exhibit B to this Report
contains an indicative list of New York’s consumer protection laws that
are both protective of consumers and may not be varied by agreement.39

34. Memorandum on Proposed Final Draft of Revisions to UCC Article 1 from L.H. Wilson,
Associate General Counsel, American Bankers Association (dated April 5, 2001) (May 3,

35. Peter Linzer, Two Cheers for UCC 1-301 5-6, in Comm. on U.C.C., A.B.A. Sec. of Bus. Law,
Deregulatory Choice of Law: The Ups and Downs of Changing the Contractual Choice of Law Rule in
UCC Article 1 17, 21-22 (2000).


37. Id.

38. As the American Bankers Association itself notes, many of the provisions of federal
banking law “have been litigated and found to preempt state consumer protection laws.” Am.
Bankers Ass’n May 3, 2001 Memorandum, supra note 34. Why the American Bankers Asso-
ciation should be concerned about the conflict between RA 1 and federal banking law is,
therefore, opaque. If RA 1-301 mandates the application of a state consumer protection law,
that law will be preempted to the same extent as it is currently.

39. Please note the list contained in Exhibit B is indicative and not exhaustive.
Exhibit B is available at http://www.abcny.org/pdf/report/LEGALDOCS-1.pdf.] The courts will face two preliminary issues with respect to each of these laws. First, although all of these laws cover consumers, the definitions of “consumer” in these existing laws and in RA 1-301 are not always the same. Thus, if RA 1 is enacted, the courts will have to decide on a statute-by-statute basis whether these laws fall within RA 1-301’s definition of “any rule of law … which both is protective of consumers and may not be varied by agreement.”40 Second, the courts will need to determine the “extent” to which a particular transaction that is subject to such a provision is “a transaction . . . governed by another article of the [Uniform Commercial Code.]”41 Insofar as the transaction is not so governed, RA 1-301 will not apply.

Current New York UCC Consumer Provisions that Would Be Preserved by RA 1-301. The UCC itself contains a number of provisions that have been interpreted to be both “protective of consumers” and invariable “by agreement.”42 For example, RA 9 and its rules for recovering the amount of a deficiency in an action arising from a “consumer transaction” preserve existing New York case law43 that approaches in three different ways the failure of a secured party to comply with the provisions of Part 6 of Article 9 relating to collection, enforcement, disposition, or acceptance of collateral.44 To date, no cases have been decided under NYA 9-626, so these older cases should continue to be good law. As to commercial transactions, RA 9 has adopted “the rebuttable presumption rule;” for consumer

40. RA 1-301(e)(2).
41. RA 1-301(b).
42. RA 1-301(e)(2).
43. The New York courts have applied three different rules in cases arising under NYA 9 prior to its amendment in 2001. These cases arose under FUA 9-504 and its requirements that a secured party comply with certain procedures in disposing of collateral after default and the effect of such a disposition on the debtor’s obligations to the secured party. The first approach bars a secured party’s collection of a deficiency from a debtor when the secured party has failed to comply with its obligations under FUA 9-504. This is often called the absolute bar rule. The second approach creates “a presumption that the fair market value of the collateral equals the balance of the outstanding indebtedness, thereby extinguishing the indebtedness unless the secured party proves the contrary.” The third approach does not affect a secured party’s right to a deficiency and restricts the debtor to its remedy under FUA 9-507(1) to recover “from the secured party any loss caused by a failure to comply with the provisions of this Part,” which leaves the debtor to pursue a set-off. Memorandum to the Law Review Commission Relating to the Right of a Secured Party to Recover a Deficiency Judgment under Part 5 of Article 9 of the New York U.C.C., reprinted in 1983 N.Y. LAWS 2317, 2321.
44. NYA 9-626(a) cmt. 2.
transactions, NYA 9-626(a) explicitly exempts them and subsection (b) states that “[t]he court may not infer from that limitation the nature of the proper rule in consumer transactions and may continue to apply established approaches.”

The following table lists and describes other provisions of the UCC that are invariable “by agreement” and appear to be “protective of consumers.”

<table>
<thead>
<tr>
<th>SECTION</th>
<th>DESCRIPTION OF PROVISION</th>
</tr>
</thead>
<tbody>
<tr>
<td>2-719(3)</td>
<td>Limitation of consequential damages for personal injury related to consumer goods is prima facie unconscionable.</td>
</tr>
<tr>
<td>2A-106</td>
<td>For consumer leases, choice of law or forum clauses are invalid, unless the law chosen is that of the state of the consumer lessee’s residence or where the goods will be kept, or the chosen forum is one that otherwise would have jurisdiction over the lessee.</td>
</tr>
<tr>
<td>2A-108(4)</td>
<td>For consumer leases, if a court finds a lease (or its provisions) unconscionable, the court shall award the lessee reasonable attorney’s fees. The amount of recovery does not control in determining the amount of attorney’s fees to award.</td>
</tr>
<tr>
<td>2A-109(2)</td>
<td>For consumer leases, the burden of establishing good faith (to accelerate payment or performance or require collateral or additional collateral at will or when the party deems itself “insecure”) is on the party who seeks to accelerate.</td>
</tr>
<tr>
<td>2A-503(3)</td>
<td>Limitation, alteration, or exclusion of consequential damages for personal injury related to consumer goods is prima facie unconscionable.</td>
</tr>
<tr>
<td>9-207(b)(4)</td>
<td>Secured parties with possession of collateral in the form of consumer goods may not use or operate the collateral, except, under 9-207(d), where the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or consignor. (Nonwaivable pursuant to Section 9-602)</td>
</tr>
<tr>
<td>9-614</td>
<td>Requirements regarding the contents of a notification of disposition for consumer goods. (Nonwaivable pursuant to Section 9-602)</td>
</tr>
<tr>
<td>9-616</td>
<td>In a consumer goods transaction where the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under Section 9-615 after a disposition, the secured party must send an explanation and pay the surplus or make written demand for the deficiency to the debtor or consumer obligor. The writing must conform with detailed requirements set forth in this section. (Nonwaivable pursuant to Section 9-602)</td>
</tr>
</tbody>
</table>

---

45. RA 1-301(e)(2).
Choice of Forum. Choice of forum is important because forcing a “consumer or small businesswoman with a valid claim” to “assert it in a distant forum or not at all” is to “effectively deprive[] her of that claim.”\textsuperscript{46} The first draft of RA 1-301 had contained a choice of forum provision that provided substantial protection both to businesses and consumers by making the choice of forum provision ineffective if: “(ii) utilization of that forum would effectively deprive a party of the ability to bring, or defend against, an action regarding such a dispute [, or would be otherwise fundamentally unfair]; or (iii) if the transaction is a consumer transaction and the action is brought against the consumer, the judicial forum would not otherwise have jurisdiction over the consumer.”\textsuperscript{47} The

\textsuperscript{46} Linzer, supra note 35, at 22.
language in the brackets in draft subsection (d) was modified in the February 1997 draft to read “or would otherwise unfairly disadvantage that party” and subsection (d) was deleted in its entirety in the April 1997 draft. 48

The Reporter for RA 1, Professor Neil Cohen, gave an explanation for the deletion of the choice of forum provisions at the American Law Institute’s 2000 meeting. He first noted that choice of forum is “not a uniquely commercial issue” and then, more importantly, that the drafting committee did not feel that choice of forum could be applied separately to the non-UCC and UCC aspects of a dispute; in contrast, choice of law could be applied separately. 49 In other words, a lawsuit can be brought in only one jurisdiction although different bodies of law may govern different aspects of the lawsuit. 50

Fundamental Policy. The meaning of “fundamental policy” in RA 1-301(f) has been the source of much discussion. Subsection (f) provides that, in both consumer and nonconsumer transactions, a choice of law provision “is not effective to the extent that application of the law of the State or country designated would be contrary to a fundamental policy of the State or country whose law would govern in the absence of agreement under subsection (d).” 51 The Official Comments attempt to narrowly define the phrase “fundamental policy.” A fundamental policy is one that is “a fundamental principle of justice” or “‘mandatory’ in that it must be applied in the courts of that State or country without regard to otherwise-applicable choice of law rules of that State or country and without regard to whether the designated law is otherwise offensive.” 52

It is important to note that the second, mandatory type of fundamental policy does not contemplate an evaluation by the forum state of the desirability of the designated law. It seems, therefore, that provisions such as the legislation against UCITA currently being considered in New York State would not be fundamental policy under RA 1-301(f). The Official Comments provide a gloss on the meaning of “mandatory” by stating that “rules that cannot be changed by agreement under” the forum

47. Revised Article 1 §1-301(d)(1)(ii), (iii) (Tentative Draft October 1996).
48. Revised Article 1 §1-301(d)(1)(ii), (iii) (Tentative Draft February 1997).
50. Id. But see text accompanying notes 10 and 11, supra, as to whether courts, as a practical matter, apply different bodies of law to different aspects of the lawsuit.
51. RA 1-301(f) (emphasis added).
52. RA 1-301 cmt. 6.
state’s law are not “for that reason alone” mandatory.\textsuperscript{53} In fact, the Official Comments attempt to restrict fundamental policy to those situations in which “a mandatory choice of law rule is established by statute” by noting that it is “rare” for courts to otherwise “decline[] to follow the designated law.”\textsuperscript{54}

Despite the attempt to create a narrow definition of fundamental policy, RA 1-301(f) has provoked criticism for restricting freedom of contract. The American Bankers Association, for example, criticized Revised Article 1 Draft 1-301(e), a forerunner of RA 1-301(f) that did not differ in any way except numbering, for being “an open invitation to litigation. It is an ambiguous standard. Its scope is not clear: is it limited to business-to-business transactions or does it also apply in the consumer context?”\textsuperscript{55} The American Bankers Association requested that this section be deleted.\textsuperscript{56}

Professor Woodward shares the concern of the American Bankers Association that the concept of fundamental policy may be ambiguous, although he locates the ambiguity in the very concept of allowing parties to choose unrelated law. Professor Woodward argues that, historically, courts, in analyzing fundamental policy, have relied “substantially on a comparison of the connection that the chosen and unchosen state have to the controversy, independently of the parties’ choice.”\textsuperscript{57} If we move to a regime where parties are able to choose unrelated law, “[t]he current relatedness requirement and judicial analysis built on it will make it hard to predict what a forum court will do with a case where the chosen state has no contact with the controversy (other than the fact that it was chosen), and an unchosen state has obvious contacts with the controversy.”\textsuperscript{58}

\begin{itemize}
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} Am. Bankers Ass’n May 3, 2001 Memorandum, supra note 34.
  \item \textsuperscript{56} Putting aside the American Bankers Association’s objection that RA 1-301(f) is “an open invitation to litigation,” the American Bankers Association’s further complaint that the scope is not clear does not seem justified. RA 1-301(f) refers to an agreement made under subsection (c). In turn, subsection (c) refers to “an agreement by parties” and makes no distinction between business-to-business agreements and agreements in which a consumer is one of the parties. This conclusion is strengthened by subsection (e), the section dealing with consumers, which explicitly contemplates that an agreement governed by subsection (c) may have a consumer as one of its parties.
  \item \textsuperscript{58} Id.
\end{itemize}
Professor Weintraub points to another conceptual confusion contained within subsection (f) that arises from conflating, in the Official Comments to RA 1, the two different meanings of “public policy” and “fundamental policy” in the Restatement (Second) of Conflict of Laws. In the Restatement, “public policy” is used to determine whether a cause of action based on foreign law should be entertained in the forum state’s courts. “No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.” As the comments state, this section of the Restatement “does not apply to situations where the forum does decide the controversy between the parties and, on the stated ground of public policy, applies its own local law ... in determining one or more of the issues involved.”

In those cases, one turns to Section 187 of the Restatement to determine when a forum state will apply its own law or that chosen by the parties to the contract. In Section 187, the test is whether “the law of the chosen state would be contrary to the fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which ... would be the state of the applicable law in the absence of an effective choice of law by the parties.” The Official Comments note, as Professor Woodward has pointed out, that “an important consideration” in determining whether a fundamental policy exists is the extent and type of contacts with the forum and chosen jurisdictions. “The more closely the state of the chosen law is related to the contract and the parties, the more fundamental must be the policy of the state of the otherwise applicable law to justify denying effect to the choice-of-law provision.” The Official Comments also note that “[t]o be ‘fundamental’ within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit on a foreign cause of action under the rule of §90.”

The differing usages of the two phrases—“public policy” and “fundamental policy”—within the Restatement and their conflation within the Official Comments to RA 1 led Professor Weintraub to be concerned that
courts may become confused in applying subsection (f). In Professor Weintraub’s view, the potential confusion is increased by the use in Official Comment 6 to RA 1-301 of the Loucks v. Standard Oil Co. of New York case, which was a case brought in the New York courts to enforce rights under a Massachusetts law and therefore was a “public policy” case.

Professor Woodward raises another issue about the citation to Loucks. As he points out, Massachusetts had “a strong interest in the dispute” as the accident in question had occurred in Massachusetts. Loucks, thus, did not involve deference to a jurisdiction that had no interest in the dispute, as could occur under RA 1-301.

New York Fundamental Public Policy. Although there are many New York cases in which the fundamental public policy issue is discussed in general terms, there are not many cases in which these principles are applied to particular bodies of law. In addition, the New York cases do not explicitly make the distinction found in the Restatement (Second) of Conflicts of Law between “public policy” and “fundamental policy.” The inquiry about the nature of a particular public policy has moved from an examination of legislative intent to a broader examination that covers New York’s “State Constitution, statutes and judicial decisions.” Even “prevailing social and moral attitudes of the [New York State] community” must be examined to determine what constitutes New York’s public policy, even if these attitudes are different from explicit New York legislation.

Where public policy has been used to overrule the choice of another jurisdiction’s law, it often has been in cases involving the twin grounds that a New York “fundamental public policy” has been violated and that New York has the “most ‘substantial relationship’” with the transaction.

66. Weintraub, supra note 13, at 25.
67. 128 N.E.198 (N.Y. 1918).
68. Weintraub, supra note 13, at 25.
69. Woodward, supra note 57, at 736 n.178.
70. Id.
This type of analysis is consistent with either subsection (a) or (b) of Section 187(2) of the Restatement (Second) Conflict of Laws. Subsection (a) requires that the forum state not enforce the chosen state’s law when “the chosen state has no substantial relationship to the parties or the transaction,” while subsection (b) requires that a forum state enforce “the law of the chosen state” except when such enforcement would be “contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which ...would be the state of the applicable law in the absence of an effective choice of law by the parties.” Use of two alternative rationales for their holdings muddies the significance of these cases for understanding New York public policy.

Public policy has been invoked by the New York courts in an extremely limited range of situations to either invalidate contractual provisions valid under the chosen law or to enforce New York law when it leads to a different result than the chosen law.

In situations where one party seeks to enforce its rights under another jurisdiction’s laws in the New York courts, the New York courts have been similarly hesitant in applying New York public policy to invalidate the other jurisdiction’s laws. One means of avoiding the issue has been to hold that that there are “not sufficient contacts between New York, the parties and the transactions involved to implicate our public policy and call for its enforcement.” Another means has been to look beyond the normal sources of New York law to the “prevailing social and moral atti-
tudes of the community.”\textsuperscript{79} If such attitudes are different than the applicable New York statutes, such attitudes may trump application of the statutes.\textsuperscript{80} These holdings are consistent with the Restatement (Second) of Conflict of Laws, which, in comment (c) to Section 90, states that “[a]ctions should rarely be dismissed because of the rule of this Section.”

One area in which the New York courts have refused to enforce another state’s law is in the area of “insurance indemnification for punitive damage awards,” where New York has an “unswerving policy against permitting” such indemnification.\textsuperscript{81}

On the one hand, RA 1-301 does not work a change in New York law through its narrow definition of “fundamental policy” as the New York courts have not articulated the distinctions that the Restatement (Second) of Conflict of Laws makes between “public policy” and “fundamental policy” and have applied a public policy rationale in only limited circumstances to enforce New York law. On the other hand, insofar as the reluctance of New York courts to apply public policy arguments has been based on the common factual thread in most cases that another jurisdiction has a greater interest in the transaction than New York, RA 1-301 will work a change in New York law. This change will arise from shifting the legal focus from the relationship to the policy itself. Under RA 1-301, a narrow definition of public policy that was ordinarily applied only when another state had a greater interest in a transaction will be applied even when the other state has no interest in the transaction.\textsuperscript{82} In other words, one has to ask whether the New York courts would have created such a narrow definition of public policy if any state’s laws could have applied.\textsuperscript{83}

\textsuperscript{79.} Intercontinental Hotels Corp., 203 N.E.2d at 212-13.

\textsuperscript{80.} Id. at 210-12 (allowing “access” to the New York courts for a plaintiff “seeking to enforce [gambling] obligations validly entered into in the Commonwealth of Puerto Rico and enforceable [sic] under Puerto Rican law”).

\textsuperscript{81.} Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 642 N.E.2d 1065, 1070 (N.Y. 1994) (refusing to determine whether New York or another state’s law applied because, even if the other state’s law applied, indemnification would not be permitted under New York public policy).

\textsuperscript{82.} See Woodward, supra note 57, at 736 n.178 (New York caselaw “stand[s] for judicial deference to the sovereign interests and public policy of a state with a strong interest in the dispute”).

\textsuperscript{83.} A separate issue is presented by Section 5-1401 of the New York General Obligations Law, which is discussed in the text immediately below. Section 187(2)(b) of the Restatement (Second) of Conflict of Laws and its public policy exception to a choice of law provision have no bearing on a choice of law provision that is valid under Section 5-1401. See, e.g., Supply & Bldg Co. v. Estee Lauder Int’l, Inc., No. 95 Civ. 8136, 2000 WL 223838, at *3 (S.D.N.Y.)
Title 14, New York General Obligations Law. In 1984, New York added Title 14 to the General Obligations Law, which allowed parties a limited amount of autonomy in choice of law and choice of forum. Section 5-1401 allows parties to choose New York law as the governing law of “any contract, agreement or undertaking, contingent or otherwise” so long as the transaction is “in the aggregate not less than two hundred fifty thousand dollars.” There are two important qualifications to party autonomy contained within this initial language. First, the transaction, even if between two businesses, has to be of a certain size before parties can choose New York law. Second, the parties do not have complete autonomy to choose any jurisdiction’s law. They may only choose New York law.

In addition, Section 5-1401 does not apply to certain consumer transactions or to agreements concerning “labor or personal services.” The excluded consumer transactions are those involving “any transaction for personal, family or household services,” almost exactly the same words used within RA 1-201(b)(11), which defines a consumer as “an individual who enters into a transaction primarily for personal, family, or household purposes.” The two definitions do differ in that RA 1-201(b)(11) includes the qualifier “primarily,” which allows a transaction that is engaged in for both business and non-business purposes still to be categorized as a consumer transaction.

The dollar and consumer limitations contained within Section 5-1401 were meant to ensure that only “large non-consumer transactions” were covered. The intent was to protect against “any party agree[ing] to a governing law through fraud, mistake, overreaching or unequal power.”

In addition, parties to large non-consumer transactions did not need as

Feb. 25, 2000) (“[T]he clear provisions of section 5-1401 make no exception for a foreign state’s public policy….”); accord Lehman Bros. Commercial Corp. v. Minmetals Int’l Nonferrous Metals Trading Co., No. 94 Civ. 8301, 2000 WL 1702039 at *12-13 (S.D.N.Y. Nov. 13, 2000) (“This Court agrees that §5-1401 is not limited by Restatement §187(2)(b). Section 5-1401 is clear on its face, and thus there is no need to look beyond its own provisions to resolve any ambiguity in its meaning.”).

84. N.Y. GEN. OBLIG. LAW §5-1401(1) (McKinney 2001). In the original 1982 bill containing Section 5-1401, the transaction had to be at least $1 million. The Committee on Foreign and Comparative Law, Ass’n B. City N.Y., Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements, 38 REC. 537, 538, 542 (1983) [hereinafter 1983 ABCNY Report]. The $1 million restriction remained in Section 5-1402(1), the companion choice of forum provision that was part of the same 1984 law. N.Y. GEN. OBLIG. LAW §5-1402(1) (McKinney 2001).

85. 1983 ABCNY Report, supra note 84, at 543.

86. Id.
much protection because it is “probable” that such parties “will have been represented by counsel during the negotiation process. These factors guarantee, as much as possible, that the parties focused on the choice-of-law provisions and carefully considered the consequences of their choice of New York law.”87

The restriction to choosing New York law was meant to ensure that New York would maintain its position of “one of the world’s major financial and commercial Centers[sic].”88 The expectation was that the legal community would benefit from increased work due to the choice of New York law, and that New York, therefore, could expect increased “employment opportunities and tax revenues.”89

The complete party autonomy allowed under RA 1–301 in nonconsumer transactions is, thus, inconsistent with the policies underlying Section 5-1401. Only the law of New York State may be chosen under Section 5-1401, not the law of any State (in a domestic transaction) or any jurisdiction (in an international transaction) under RA 1-301. In addition, RA 1-301 makes no distinction between large commercial transactions and smaller ones, as does Section 5-1401, which provides protection for small businesses and even large businesses when they are engaged in small transactions.

In contrast, Section 5-1401 and RA 1-301 share a common goal of protecting consumers. Both restrict the free choice of governing law in a transaction involving a consumer. RA 1-301 is more restrictive, however, than the current state of New York conflict-of-laws jurisprudence. Under RA 1-301, the residence of the consumer dictates the applicable law except in sales of goods in which the consumer “makes the contract and takes delivery of those goods” in a jurisdiction other than the one of her residence. Under New York common law principles, another jurisdiction’s law can be applied either when the jurisdiction has a “reasonable relationship” to the transaction or when the jurisdiction has “the most significant contacts” with the transaction.90

87. Id.


89. 1983 ABCNY Report, supra note 84, at 549. The latter policy behind Section 5-1401 seems particularly unconvincing as there is nothing in Section 5-1401 that encourages a business to locate in New York State. In fact, the common law choice-of-laws rules were more likely to lead to a business’s presence in New York State if the business wanted New York law to apply to its agreements. Barry W. Rashkover, Note, Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results, 71 CORNELL L. REV. 227, 243 (1985).

90. Rashkover, supra note 89, at 236-238.
As soon as Title 14 was enacted in New York State, concerns were raised about its constitutionality under the federal constitution. Federal district courts have echoed these concerns, although no court has ever held that Section 5-1401 is unconstitutional. Similar concerns have been raised about RA 1-301.

Constitutionality of Governing Law Clauses in General. Complete party autonomy in choice of law clauses raises two constitutional issues in domestic transactions. These issues are based on the constitutional limitations in the Due Process Clause and the Full Faith and Credit Clause. In 1981, the United States Supreme Court gave its modern formulation of the constitutional issues, summarizing them as follows: “[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” The plurality opinion in Hague treated the two issues as “functionally coextensive.” Justice Stevens in his concurring opinion treated the two issues as separate ones. Professor Greenstein also treats the two issues as conceptually separate, although he notes that they are often linked in particular factual situations.

The due process issue involves individual rights and whether the application of a governing law clause is “arbitrary” or “fundamentally unfair;” in other words, whether the parties could anticipate that the gov-

91. See id.
94. In international transactions, the only constitutional issue is due process. See Home Ins. Co. v. Dick, 281 U.S. 397, 410-11 (1930) (noting that Fourteenth Amendment, not Full Faith and Credit Clause, addresses whether a State must recognize rights derived from laws of foreign countries).
95. “[N]or shall any State deprive any person of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV, §1.
96. “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.” U.S. CONST. art. IV, §1.
98. Greenstein, supra note 93, at 1172.
100. Greenstein, supra note 93, at 1170-73.
erning law that was applied would be applied.\textsuperscript{101} Insofar as parties consent to a governing law clause, it is hard to see what the due process argument could be.\textsuperscript{102} How can a party raise a due process claim based on the theory that she could not have anticipated the governing law when she has consented to that very law? Once the issue is framed as one of consent, the further issue of whether a person can consent to an adhesion contract is raised.

Although the United States Supreme Court has never ruled explicitly on whether adhesion contracts raise a Due Process issue, it seems unlikely that it would find the Due Process Clause implicated in such contracts.\textsuperscript{103} In \textit{Carnival Cruise Lines}, the Court upheld a forum selection clause in a form contract as reasonable, although it did note that the “fundamental fairness” of such clauses remained subject to “judicial scrutiny.”\textsuperscript{104} In light of the fact that the burden of showing “fundamental fairness” was easily met, it seems unlikely that this remains a viable alternative for challenging forum selection clauses and, by extension, choice of law provisions.

In \textit{Carnival Cruise Lines}, the forum selection clause could have been challenged on “fundamental fairness” grounds only if there was an “indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims.”\textsuperscript{105} In determining that there was no such indication, the Court looked to three facts: the cruise line had its “principal place of business” in Florida and conducted much of its business there; the cruise line did not engage in “fraud or overreaching” in “obtain[ing] [the customers’] accession to the forum clause”; and the customers “were given notice of the forum provision.”\textsuperscript{106} Insofar as the Court relied in part on the cruise line’s principal place of business and the location of much of its business, traditional factors in a choice of laws analysis, there remains room to challenge a choice of law provision upon “fundamental fairness” grounds if there is no connection between the chosen law and the parties or the transaction but it seems a weak argument in light of the result-oriented reasoning of \textit{Carnival Cruise Lines}.\textsuperscript{107}

\textsuperscript{101} \textit{Id.} at 1166-67, 1171.
\textsuperscript{102} \textit{Id.} at 1173.
\textsuperscript{104} \textit{Id.} at 586.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} Cf. Edward A. Purcell, Jr., \textit{Geography as a Litigation Weapon: Consumers, Forum-
In New York, adhesion arguments would not have much power as “[u]n[equal] bargaining power ... alone does not invalidate [a] contract [for the purchase of goods] as one of adhesion” when the weaker party has “the ability to make the purchase elsewhere and the express option to return the goods.”108 A contract for the purchase of goods may be set aside, however, for unconscionability if the cost of pursuing a mandatory arbitration remedy provided in the contract is “excessive.” The plaintiffs in *Brower* had argued that the arbitration provision was substantively unconscionable109 both because Chicago was the forum for the arbitration and because the arbitration had to be conducted in accordance with the rules of the International Chamber of Commerce, which would lead to fees in excess of the cost of most of the products that would be the subject of the arbitration.110 The First Department held that, although the choice of forum was not unconscionable, “the excessive cost factor that is necessarily entailed in arbitrating before the [International Chamber of Commerce] is unreasonable and surely serves to deter the individual consumer from invoking the process.”111

The full faith and credit issue is whether the selected governing law is that of a State that has “state interests” arising from “a significant contact or significant aggregation of contacts.”112 The full faith and credit issue will be framed differently depending on whether RA 1 is uniformly enacted. If it is uniformly enacted, then an argument can be made that each State has waived its right to have its own law applied to any transaction.113 (RA 1-301 would preserve a State’s right to have its fundamental

---

109. After holding that the arbitration provision was not procedurally unconscionable, the *Brower* court noted that New York normally required both procedural and substantive unconscionability before finding a contract unconscionable but that “the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable.” *Id.* at 574.
110. *Id.* at 574. The ICC rules required, for a claim of less than $50,000, “advance fees of $4,000 (more than the cost of most Gateway products), of which the $2,000 registration fee was nonrefundable even if the consumer prevailed at the arbitration.” *Id.* at 571.
111. *Id.* at 574.
law applied.) If it is not uniformly enacted, then, with respect to the non-enacting States, the Full Faith and Credit Clause will remain in full effect. In the latter situation, all of the practical concerns that have arisen in connection with the choice of laws provisions of UCITA and that have been explored in great depth in that context also will become relevant. These concerns have centered around the possibility that a State that adopts UCITA may dictate, through the choice by a licensor of an enacting State’s law, the law that applies to residents of the forum State when those residents are involved in litigation in any enacting State.114

In the event of uniform enactment of RA 1, the argument can be made that each State intended to cede almost unlimited power to private parties to regulate their affairs free of that State’s law, other than its fundamental policy. Whether this intention can be gleaned from uniform enactment is unclear if States also continue to pass legislation that is protective of their residents. As Professor Greenstein phrases the problem, “suppose [that a State] enacts ... safety regulations and the proposed UCC amendments [to NYA 1-105]. What exactly are the policy objectives of a state that, on the one hand, adopts safety regulations and, on the other hand, enacts a choice of law provision that allows individuals to choose another state’s law and thereby avoid compliance with those regulations?”115

Another constitutional issue may be raised by the fundamental policy exception to party autonomy contained in RA 1-301(f) and discussed above. Determination of fundamental policy has a constitutional dimension under RA 1-301 if one accepts the argument that a State can waive its rights under the Full Faith and Credit Clause. The extent of that waiver will be determined by what a State’s fundamental policy is.116 As Professor Greenstein notes, no guidance is given by RA 1-301 on how a forum court is to interpret an interested jurisdiction’s fundamental policy. Is a court to use a subjective test, trying to gauge what the interested jurisdiction itself believes its fundamental policies to be? Or is a court to use an objective standard, using its own legal principles?117 If a subjective test is adopted and “[i]f there is serious reason to doubt whether a forum can accurately discern the fundamental policy of another state, then the constitutional significance of that determination might argue for not allowing a disin-

114. See generally Woodward, supra note 57, at 779-80.
115. Greenstein, supra note 93, at 1182.
116. Id. at 1179.
117. Id. at 1178 n.119, 1180, 1180 n.130.
interested forum to make such a determination. That is, full faith and credit may require that a disinterested forum always defer to the prescriptive law of an interested state, thereby once again calling into question the constitutionality of the proposed amendment.”

Constitutionality of Title 14. After passage of Section 5-1401, there has been a split in cases involving the contractual selection of a New York choice-of-law provision between those decisions that have not required a contacts analysis before applying the provision,¹¹⁹ and those that have continued to require contacts between New York State, the parties and the transaction.¹²⁰

The First Department appears to have implicitly adopted the position that a contacts analysis is no longer necessary when Section 5-1401 applies.¹²¹ In contrast, many federal cases in applying New York law have taken the approach that contacts are still required.

The Eastern District, in a case dealing with a contractual selection of New York choice-of-law provision and Section 5-1401, has held that such a provision was enforceable only “so long as there is a reasonable basis for the choice or the state whose law is selected has sufficient contacts with the transaction.”¹²² Even federal cases that have stated that Section 5-1401 does not require significant contacts with New York have often examined such contacts and, therefore, may be viewed as having implicitly embraced such a test.¹²³

A recent Southern District case has clarified the reasoning behind these earlier cases, explaining that the application of Section 5-1401 to

¹¹⁸. Id.


any particular agreement is subject to both the Due Process Clause and the Full Faith and Credit Clause. 124

The drafters of Title 14 argued that the very act of parties’ choosing New York law as governing provides New York with “significant contract [sic] with the parties and the underlying transaction.”125 Presumably this was the drafters’ attempt to answer full faith and credit objections to Section 5-1401.126 No court has ever decided this issue. The closest is Lehman Brothers, although Judge Kennan did not have to decide this issue because there were other contacts between New York State and the transaction and parties.127 Judge Kennan left for another day resolution of the issue of “whether a state with no connection to either the parties or the transaction could apply its own law, consonant with the Full Faith and Credit Clause, when doing so would violate the important public policy of a more-interested state.”128

In light of these cases, we can expect New York State courts and federal courts applying New York law to examine carefully the constitutional issues raised by RA 1-301 in the event that it is enacted in New York. Unless the courts accept the waiver argument, they are likely to continue to look for a relationship between the chosen jurisdiction and the parties and transaction.

Harmonization of 5-1401 with Section 1-301. The enactment of RA 1 (including RA 1-301) in New York, would affect Section 5-1401 in several ways.

First, enactment of Section RA 1-301 effectively would remove for UCC transactions the $250,000 threshold in Section 5-1401. In other words, parties selecting New York law as the governing law in non-UCC transactions are assured of obtaining New York law only where the transaction covers in the aggregate $250,000 or more. If the legislature enacts RA 1, UCC transactions, as a result of Section 1-301, would not be subject to this limitation. The legislature will need to consider whether retention of the $250,000 threshold in Section 5-1401, and the distinction between large and small commercial transactions that it embodies, continues to make sense.

125. Legislative Memorandum, supra note 88, at 3289.
126. See Hanley, supra note 92, at 8.
127. Lehman Bros., 2000 WL 1702039 at *13 (“This is not a case involving parties or transactions without any connection to New York. Lehman is headquartered in New York and the transactions and payments occurred, at least in part, in New York.”).
128. Id.
Second, if RA 1 is enacted in New York with Section RA 1-301 in its current form, Section 5-1401 would need to be revised to correctly cross-reference the relevant provisions of 1-301. Clause (c) of Section 5-1401 now provides that Section 5-1401 does not apply “to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code.” Subsection two of NYA 1-105 is the list of other sections of the Uniform Commercial Code that specify choice-of-law rules applicable to transactions that are the subject of other articles of the UCC. If RA 1 is enacted, this reference in clause (c) of Section 5-1401 to “subsection two of section 1-105 of the uniform commercial code” would need to be revised to refer to “subsection (g) of section 1-301 of the uniform commercial code.”

If RA 1 is enacted in New York with Section RA 1-301 in its current form, other changes to Section 5-1401 may be desirable to harmonize the policies behind 5-1401 and RA 1-301. The extent of those revisions will depend on the legislature’s view as to whether the policy embodied in Section 5-1401 of applying New York law wherever possible is paramount to other policies. Subsection (e) of RA 1-301 would allow a New York court to apply New York law in a consumer transaction only if the transaction has a reasonable relation to New York and application of New York law would not deprive the consumer of the protection of non-waivable consumer laws of the State or country of the consumer's principal residence or the State or country in which the consumer made the relevant contract and took delivery of the goods. Thus, application of subsection (e) of RA 1-301 may result in the application of the law of a state or country other than New York which seems contrary to the stated policy behind Section 5-1401. However, if RA 1 is enacted in New York with Section RA 1-301 in its current form, RA 1’s enactment could be read as the New York legislature’s endorsement of the approach to consumer laws taken in subsection (e) of RA 1-301 despite the general policy favoring New York law embodied in Section 5-1401. Accordingly, the reference in clause (c) of Section 5-1401 to “subsection two of section 1-105 of the uniform commercial code” then would need to be revised to also refer to subsection (e).

A similar approach is applicable to subsection (f) of Section 1-301. Subsection (f) specifies that the parties' agreement as to choice of law will not be effective to the extent application of the law chosen would be contrary to the fundamental policy of the State or country whose laws

129. Section E of this report lists other New York statutes that would require changes if RA 1 is enacted.
would otherwise apply to the transaction if the parties had made no choice of law. There is no such limitation on application of New York law under Section 5-1401 although, as discussed above, some courts have implied such a limitation. Theoretically, and this seems contrary to the stated policy behind Section 5-1401, subsection (f) could result in the application of the law of a state other than New York in a transaction where the parties had chosen New York law. However, if RA 1 is enacted in New York with Section RA 1-301 in its current form, one can argue that its enactment should be read as the New York legislature's endorsement of the approach to fundamental policy taken in subsection (f) of RA 1-301 despite the general policy favoring New York law embodied in Section 5-1401. If so, the reference in clause (c) of Section 5-1401 to “subsection two of section 1-105 of the uniform commercial code” should be revised to refer to also refer to subsection (f).

C. Statute of Frauds: Repeal of NYA 1-206.

Current Law. NYA 1-206 is a statute of frauds generally applicable to contracts for sale of personal property of any kind other than goods, securities, and property the sale of which is governed by Article 9. Under NYA 1-206, a contract for sale of personal property that is subject to that section “is not enforceable by way of action or defense beyond [§5000] in amount or value of remedy” unless there is a sufficient writing evidencing the contract, signed by the party against whom enforcement is sought.

NYA 1-206 tracks the uniform text of FUA 1-206, with one exception: the New York enactment contains a nonuniform subsection (3) that narrows drastically the applicability of the section to “qualified financial contracts” as defined in N.Y. General Obligations Law Section 5-701 (“GOL § 5-701”).

GOL § 5-701 is the basic statute of frauds in New York. It declares contracts of various types to be unenforceable unless evidenced by a signed writing. In 1994, GOL § 5-701 was amended extensively so as to limit its effect on any contract of a type subject to that section that is also a “qualified financial contract.” “Qualified financial contract” is defined for that purpose to include agreements covering broad classes of relatively sophisticated transactions. The definition was broadened in 2002, and as

130. See discussion of constitutionality of Section 5-1401 above.

131. Article 9 of the UCC governs transactions creating a consensual lien in most types of personal property, but it also governs outright sales of certain rights to payment. Specifically, Article 9 governs an outright sale of an “account,” “chattel paper,” “payment intangible” or “promissory note,” as those terms are defined in Article 9. UCC 9-109(a)(3).
currently defined “qualified financial contract” includes (in paraphrase) over-the-counter derivative contracts, contracts for purchase or sale of foreign exchange, forward contracts, and contracts for sale of broad classes of indebtedness. Under GOL § 5-701, if a contract is of a type subject to that section, and is also a “qualified financial contract,” then it is enforceable if it meets conditions that are much less stringent than the usual requirement of a signed writing. Specifically, a qualified financial contract that is subject to GOL §5-701 is enforceable if (in paraphrase):

(i) the parties entered into a separate written contract by which they opted out of the statute of frauds as to that qualified financial contract, or

(ii) the qualified financial contract is evidenced in one of the following ways:

- an electronic communication (including a recorded phone call or a computer printout);
- a written confirmation sent by one party that was received and not timely objected to by the other party;
- an admission by the party against whom enforcement is sought; or
- a signed writing sufficient under the usual requirement.

The same bill that amended GOL § 5-701 to add these provisions added the nonuniform subsection (3) to NYA 1-206 in order to make the application of NYA 1-206 to qualified financial contracts consistent with GOL § 5-701. Under that nonuniform subsection (3), a contract is not rendered unenforceable by NYA 1-206 if it is a qualified financial contract and if one of the above-paraphrased conditions to enforceability set forth in GOL § 5-701 is satisfied.

Repeal of FUA 1-206 by RA 1. RA 1 contains no analogue to FUA 1-206. At first blush it would seem to follow from the usual presumption in favor of uniform enactment of uniform laws that, if New York enacts RA 1, FUA 1-206 should be repealed and not carried forward in New York law. However, such is not the case. RA 1 contains the following legislative note on this matter (located immediately after Revised 1-206):

Legislative Note: Former Section 1-206, a Statute of Frauds for sales of “kinds of personal property not otherwise covered,” has been deleted. The other articles of the Uniform Commercial Code make individual determinations as to requirements
for memorializing transactions within their scope, so that the primary effect of former Section 1-206 was to impose a writing requirement on sales transactions not otherwise governed by the UCC. Deletion of former Section 1-206 does not constitute a recommendation to legislatures as to whether such sales transactions should be covered by a Statute of Frauds; rather, it reflects a determination that there is no need for uniform commercial law to resolve that issue.

RA 1 is therefore agnostic on the desirability of an enacting state retaining the rule set forth in FUA 1-206. A California bar committee that reviewed RA 1 for enactment in that state has, in fact, recommended that the California legislature enact RA 1 but retain the rule set forth in FUA 1-206, by recodifying it elsewhere in the California statutory code.132

The Committee has therefore evaluated FUA 1-206 on its merits and considered whether it should be retained if New York enacts RA 1. It is clear that if New York were to elect to retain the rule of FUA 1-206, the rule would no longer be appropriately situated in the New York UCC after enactment of RA 1, and so would have to be recodified elsewhere in the New York statutory code.133

**Recommendation: New York Should Not Carry Forward the Rule Set Forth in NYA 1-206.** On the merits, the Committee believes that New York should indeed repeal the rule set forth in NYA 1-206, and should not preserve it by recodifying it elsewhere.

The California bar committee gave as its reason for recommending that California preserve the rule only that the committee “sees no reason at this time to change substantive law with respect to non-UCC transactions to which this statute of frauds might apply.”134 That is less a reason for the recommendation than a restatement of it. A state that enacts RA 1 is changing its law. In the view of the Committee, the case for retaining the rule of FUA 1-206 should be based on the merits of the rule. The California report says nothing about the merits of the rule or its reception by California courts.

---


133. The natural home for a recodified version of NYA 1-206 would seem to be New York’s general statute of frauds, GOL § 5-701.

134. CALIFORNIA BAR REPORT, supra note 132, at 13.
In the view of the Committee, there is not a sufficient case for New York to retain the rule of NYA 1-206 following enactment of RA 1:

1. Although the opening words of NYA 1-206 give the impression that the section is of mountainous importance (insofar as subsection (1) states that the section applies to every “contract for the sale of personal property”), the exceptions in subsection (2) turn the section into something closer to a molehill. Subsection (2) excludes from that section any contract for sale of goods, securities, or rights to payment governed by Article 9. Not much personal property is left when those are excluded.

2. Only a handful of reported cases have relied on NYA 1-206 in the 50 years that it has been law in New York. The clearest cases in which NYA 1-206 has been appropriately applied involve sales of copyrights and other intellectual property. Other cases have applied NYA 1-206 to situations in which its applicability is, in the view of the Committee, doubtful. In the few reported cases that have applied NYA 1-206 properly to bar enforcement of an alleged oral contract, NYA 1-206 almost never determined

135. See Mellencamp v. Riva Music Ltd., 698 F.Supp. 1154 (S.D.N.Y 1988), which held that rock music star John Mellencamp did not have an enforceable contract with a recording company to transfer copyrights to certain songs back to Mellencamp. The court held that a contract for sale of copyrights would be subject to NYA 1-206, but did not find it necessary to rule on whether an adequate writing existed. The court ruled instead that the facts showed that the parties had not intended to enter into a binding contract.

Likewise, Grappo v. Alitalia Linee Aeree Italiane, S.p.A., 56 F.3d 427 (2d Cir. 1995), held NYA 1-206 applicable to an alleged oral contract by an employee against his former employer on an alleged contract to buy a copyrighted training program.

It should be noted that federal law might require a signed writing in order to enforce a contract for sale of a copyright. The Copyright Act provides that “a transfer of copyright ownership” generally is not valid unless evidenced by a signed writing. 17 U.S.C.A. § 204(a) (1996). Although by its terms applicable only to the transfer of a copyright, this provision has been interpreted to render unenforceable a contract to transfer a copyright in the absence of a signed writing. See, e.g., Mellencamp, 698 F.Supp. 1161-62. To that extent that the Copyright Act is so interpreted, it makes no practical difference whether a state statute of frauds also applies to such a contract.

136. For instance, in Cohn, Ivers & Co. v. Gross, 289 N.Y.S.2d 301 (N.Y. App. Term 1968), the court awarded damages of a call option on securities granted by the defendant to the plaintiff, notwithstanding absence of a writing evidencing the contract. The court held the contract to be outside the Article 8 statute of frauds on the ground that the contract was not one for sale of a security (a dubious holding). The court held the contract to be outside NYA 1-206 as the amount involved was less than $5000 (a holding that seems correct). Note that the outcome would have been no different had NYA 1-206 not been in force.

In Federal Deposit Insurance Corporation v. Herald Square Fabrics Corp., 439 N.Y.S.2d 944 (N.Y. App. Div. 1981), the court enforced a contract for sale of chattel paper, holding that the Article 9 statute of frauds did not apply as the contract was not a “pure” security
the outcome of the case, as in most such cases the court also noted other reasons for not enforcing the contract.

3. As statutes of frauds go, NYA 1-206 is a very peculiar one. It does not say that a contract for sale of personal property that is subject to that section, and that is not evidenced by a sufficient writing, is not enforceable. Rather, it says that such a contract is not enforceable "beyond [$5000]." Courts applying New York law have interpreted this to mean exactly what it says: that a contract that is subject to this section and that is not evidenced by a sufficient writing may nevertheless be enforced—but only up to $5000, and no more.\textsuperscript{137}

Consider, for instance, an otherwise valid oral contract involving sale of personal property worth $100,000 and as to which party D's breach resulted in provable damages to party P of $20,000. From a policy perspective, it can reasonably be argued that the lack of a writing should not

\textsuperscript{transaction (which seems incorrect), further holding that the sale was subject to NYA 1-206 (incorrect, given that the transaction was subject to the Article 9 statute of frauds), and concluding that the contract was enforceable because an adequate writing existed. Again, the outcome would have been no different had NYA 1-206 not been in force.}

In Sel-Leb Marketing, Inc. v. Dial Corp., No. 01 Civ. 9250, 2002 WL 1874056 (S.D.N.Y. 2002), Sel-Leb sued Dial for breach of contract on account of Dial's failure to give Sel-Leb the right to purchase, on a "right of first refusal" basis, certain discontinued inventory of Dial. This would seem to be within the Article 2 statute of frauds, but the court held it instead to be within NYA 1-206, and declined to enforce it for want of a sufficient writing. The same result would seem to follow from the Article 2 statute of frauds. But in any event the statute of frauds did not determine the outcome as the court found the contract to be unenforceable for lack of consideration and vagueness anyway.

In Beldengreen v. Ashinsky, 528 N.Y.S.2d 744 (N.Y. Civ. Ct. 1987), the court held a contract for sale of a dental business subject to NYA 1-206, on the ground that it involved sale of "a business," which the court considered to be a single thing constituting personal property. This seems dubious, in that the sale involved the seller's interest in, among other things, the equipment, supplies and lease appertaining to a dental office; and sale of most if not all of those items would appear to be subject to other statutes of frauds. Horn & Hardart Co. v. Pillsbury Co., 703 F.Supp. 1062 (S.D.N.Y 1989), built on this dubious holding, holding that an alleged oral standstill agreement in a takeover contest was subject to NYA 1-206 and unenforceable. The court held that NYA 1-206 applied rather than the Article 8 statute of frauds, stating only that "We hold that of the two statutes, [NYA 1-206] is the more appropriate, the alleged contract being essentially one for the sale of a business (or a portion thereof)." \textit{Id.} at 1064. The court did not clearly identify just what was being sold—stock or assets.

impede P’s right to get a judgment for $20,000 against D, so long as the factfinder determines that a contract was indeed made. Conversely, from a policy perspective it can reasonably be argued that P ought not expect to be able to enforce a contract of this size that has not been reduced to writing, and so the lack of a writing should preclude P from recovering any damages. But the Committee perceives no coherent justification for the outcome that NYA 1-206 mandates, which is to award P $5000. That result seems quite arbitrary and raises questions of why the statute was constructed in this manner.

4. This oddity aside, the arguments for and against NYA 1-206 are much the same as those for and against statutes of frauds generally. The effect of a statute of frauds is to preclude an aggrieved party to an otherwise valid oral contract from enforcing the contract. A statute of frauds can operate to prevent fraudulent claims that a contract was established when none was in truth established. But equally it can operate to encourage fraudulent denials that a contract was established when one was in truth established.

The modern trend is away from statutes of frauds. If an alleged contract is not subject to a statute of frauds, it is left to the factfinder to determine whether a contract was established, and the factfinder is not constrained in that determination by any per se evidentiary requirement. A claimant is free to try to establish that an oral contract was formed, but the factfinder is entitled to be skeptical that there was a genuine meeting of the minds if the situation is one in which reasonable people would have reduced their agreement to writing.

An instance of the trend away from statutes of frauds is the repeal of any statute of frauds for a contract for sale of securities. That repeal was effected by the 1994 revision to the Official Text of Article 8 of the UCC, which was enacted by New York in 1997.138 Another instance of the trend is the special treatment given to qualified financial contracts by the 1994 amendments to GOL § 5-701 and NYA 1-206(3), the scope of which was expanded as recently as 2002. While not quite abolishing the applicability of statutes of frauds to qualified financial contracts, these provisions narrow their applicability nearly to the vanishing point.

In the international arena, the trend away from statutes of frauds is particularly evident. For instance, the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), to which the United States is party and which came into force in 1988, contains no

138. NYA 8-113.
statute of frauds.\textsuperscript{139} Similarly, the UNIDROIT Principles of International Commercial Contracts, finalized in 1994 (which are not intended for adoption by any country and not legally binding, but rather are a sort of international equivalent of the Restatements of the Law produced by The American Law Institute), provides that no writing is necessary in order for a contract to be enforceable.\textsuperscript{140}

Finally, the explosive growth of electronic commerce contributes to the trend by blurring—indeed transcending—the distinction between a written and an oral contract. Electronically-formed contracts have been validated by a variety of laws at the federal and state level, including the federal Electronic Signatures in Global and National Commerce Act,\textsuperscript{141} New York's Electronic Signatures and Records Act,\textsuperscript{142} and the Uniform Electronic Transactions Act, which has been enacted by at least 42 states.\textsuperscript{143}

It is true that established statutes of frauds have not invariably been scuttled when reviewed by thoughtful drafters. A prominent example is the revision of UCC Article 2, pertaining to sales of goods, promulgated in 2003 by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It retains a statute of frauds, although it raises the threshold for applicability from $500 to $5000 and accepts electronic records as an equivalent of a writing.\textsuperscript{144} This exception is the proverbial one that tends to prove the rule, however, as during the 13-year revision process the drafters changed their minds at least twice as to the desirability of continued applicability of a statute of frauds to contracts for the sale of goods. The study group of UCC's Permanent Editorial Board on the revision of Article 2 concluded as follows:

\begin{quote}
Despite its ancient lineage, there is no persuasive evidence either that the statute of frauds has prevented fraud in the proof of the making of a contract or that its presence has channeled behavior toward more reliable forms of record keeping.... En-
\end{quote}

\begin{flushright}
\textsuperscript{140} UNIDROIT Principles 1.2.
\textsuperscript{141} 15 U.S.C. § 7001 et seq.
\textsuperscript{142} N.Y. STATE TECHNOLOGY LAW §§ 101-109 (McKinney 2003).
\textsuperscript{144} National Conference of Commissioners on Uniform State Laws, \textit{Amendments To Uniform Commercial Code Article 2—Sales}, Section 2-201 (Annual Meeting Draft 2003).
\end{flushright}
gland repealed the statute of frauds for sales in 1953. Since [then] there has been little discussion and no reports about the impact, if any. In short, the statute of frauds has apparently sunk in England without an adverse trace.\textsuperscript{145}

5. As noted earlier, three states, Idaho, Texas and Virginia, have enacted RA 1 as of the date of this Report. It appears from examination of the bills enacting RA 1 in these three states that no state chose to carry forward the rule set forth in FUA 1-206.\textsuperscript{146}

Accordingly, the Committee recommends that if and when New York enacts RA 1, New York should not seek to retain the rule set forth in NYA 1-206 by recodifying it elsewhere in the New York statutes. Rather, NYA 1-206 should simply be repealed and not carried forward.

D. “Good Faith”

RA 1-304 provides, as NYA 1-203 does, that “[e]very contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.” RA 1-201(b)(20) defines “good faith,” however, to require not only “honesty in fact,” which is the same subjective standard currently in NYA 1-201(19), but also “observance of reasonable commercial standards of fair dealing.” Accordingly, the definition of “good faith” under RA 1 would represent a change in New York law by adding an objective test for determining the existence of good faith.

This change in the definition of “good faith” in RA 1 would affect New York’s version of Article 3 of the UCC but, except as discussed below, will have no effect on the versions of Article 3 in effect in 48 other states and the District or Columbia, as each of these jurisdictions has adopted a definition of good faith that parallels that of RA 1. In New York, however, application of the RA 1 definition of good faith would have the effect of changing the meaning of good faith in New York’s version of Article 3 from a subjective to an objective standard. Many of the Article 3

\textsuperscript{145} PEB Study Report on Article 2, at 50-51 (1990).

\textsuperscript{146} In Idaho, the enacting bill was SB 1228, introduced on January 26, 2004 and signed by the Governor on March 10, 2004, available at http://www3.state.id.us/oasis/S1228.html. In Texas, the enacting bill was HB 1394, introduced on February 27, 2003 and signed by the Governor on June 20, 2003, available at http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=78&SESS=R&CHAMBER=H&BILLY=H&BILLSUFFIX=01394&VERSION=5&TYPE=B. In Virginia, the enacting bill was H1778, introduced on January 8, 2003 and approved by the Governor on March 8, 2003, available at http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+CHAP0353.
cases decided under New York law that have involved the standard of good faith have referenced the subjective definition of good faith standard in NYA 1. The Committee found no cases that applied an objective standard of good faith.

Some commentators have made the technical point that the change to the definition of good faith in RA 1 is more significant than is commonly believed. According to one commentator, “[w]hile the recent revisions to Articles 3, 4, 4A, 8 and 9 already enhanced the definition of ‘good faith’ in those articles in this manner, only the change to Article 8 expressly made that enhancement applicable to the general duty of good faith imposed by Article 1 (in connection with Article 8 transactions). The revisions to Article 9 attempted to do this by comment, but technically the definition there as well as in Article 3, 4, and 4A applies only to the phrase “good faith’ when used in the text of that article. Thus a strict reading of the Code as currently enacted would indicate that the standard of mere honesty in fact applies to most contractual and legal duties arising in transactions governed by Articles 3, 4, 4A and 9. Not until Article 1 is enacted will the higher standard of commercial reasonableness generally apply.” 147 In other words, RA 1’s objective standard of good faith would imbue generally all transactions under the UCC except those governed by Article 5 (rather than applying only when a specific UCC provision explicitly renders good faith applicable) only once RA 1 is adopted.

E. Conforming Changes to Other New York State Statutes

Various existing New York State statutes refer to definitions or other provisions in NYA 1. If RA 1 is enacted in New York, these references will need to be updated to refer to the corresponding provisions in RA 1. A list of these existing statutory provisions is included at Exhibit C to this Report together with proposed revisions to these existing statutory provisions. [In the interest of brevity, Exhibit C has been deleted from The Record. Exhibit C is available at http://www.abcny.org/pdf/report/LEGALDOCS-1.pdf.]

F. Committee Recommendation

In the Committee’s view, RA 1 is in many respects an improvement on existing NYA 1. RA 1 integrates Article 1 with the recent revisions to other articles of the UCC. RA 1 makes explicit that Article 1 applies only to the extent that another article of the UCC also applies and that Article

1 is not a general statement of law to be applied unthinkingly to all transactions. It is now clear that courts will need to consider how to apply Article 1’s provisions where transactions have mixed UCC and non-UCC related components. In another beneficial change, “course of performance” has now been added to “course of dealing” and “usage of trade” in RA 1-303 as one of the tools to be used in the interpretation of UCC transactions generally. Previously, “course of performance” applied only to transactions governed by Articles 2 (sales) and 2A (leasing). The Committee wishes to commend the National Conference of Commissioners on Uniform State Laws and The American Law Institute, who are the sponsors of the UCC, and the drafting committee that prepared RA 1 under the auspices of those organizations, for their work product, which continues the tradition of UCC craftsmanship.

Despite these worthwhile changes in RA 1, the Committee was divided over the proper course of action with respect to RA 1, principally as a result of the changes in RA 1 in the rules governing choice of law. As a result of this division, no more than a plurality of the members of the Committee was able to agree as to any one of the possible recommendations for the course of action that the New York Legislature could take with respect to RA 1. Nearly every member, however, preferred making no recommendation regarding enactment of RA1 at this time to the New York Legislature as his or her second preference. Accordingly, the Committee is issuing this Report without a recommendation as to the enactment of RA1 at this time in New York.

The change in the rules governing choice of law under the UCC, set forth currently in NYA 1-105 and in the revision in RA 1-301, along with the expanded definition of “good faith,” are the most significant changes that RA 1 would make to NYA 1. As discussed in the section-by-section analysis earlier in this Report, RA 1-301 generally increases party autonomy in choice of law. Except in consumer transactions, RA 1 eliminates the restriction in current law that permits the parties to a transaction governed by the UCC to choose only the law of a jurisdiction that has a reasonable relation to the transaction. For the most part (and again with the exception of consumers), under RA 1-301, parties who choose a particular jurisdiction’s law can expect to have that choice honored whether or not the jurisdiction has a reasonable relationship to the transaction. For business transactions (including international business transactions), the rule of RA 1-301 would bring New York into conformity with international norms that enable parties to choose the law of any jurisdiction, regardless of that jurisdiction’s contacts (if any) to the transaction.
one on the Committee had problems with RA 1-301 in the context of transactions between businesses. However, some Committee members have expressed concerns about RA 1-301 as applied to consumer transactions, with regard to the impact of the section on businesses such as banking and manufacturing. One trade group in particular focused on compliance considerations. Others on the Committee accepted the drafters’ policy decision to strengthen the reach of consumer protection in this area.

The Committee has considered various possible choices, grouped here in the following three categories: (1) recommending adoption of RA 1; (2) recommending adoption of a non-uniform RA 1; and (3) recommending not adopting RA 1. As previously noted, the Committee was not able to reach agreement as to which of these three courses of action to take. The Committee’s lack of agreement as to a course of action stemmed in part from the division among the Committee members over the importance of uniform enactment of RA 1-301 by all other states.

One group of Committee members believed that the content of the UCC choice of law rule was arguably less important than having that rule—whatever its content may be—enacted uniformly by all the states. While it is always presumptively a good result for a uniform law to be enacted uniformly, in the opinion of this group, uniform enactment would be uniquely important with respect to a choice of law rule. For example, if Montana were to retain the existing choice of law rule of FUA 1-105, and a suit arising out of a contract that the parties had agreed would be governed by New York law is brought to a Montana court, the Montana court would apply FUA 1-105 and enforce the contractual choice of New York law only if it finds that the transaction bears a reasonable relationship to New York. If, on the other hand, the same suit is brought in Illinois, which (it is assumed here) had adopted the new rule of RA 1-301, the Illinois court would enforce New York choice of law regardless of any “reasonable relationship” between the transaction and New York. Thus, this group argued, if different choice of law rules were in force in different states, then the law that a court would apply to a given transaction—and, accordingly, the outcome of a dispute involving that transaction—might vary depending upon the happenstance of where suit is brought. This diversity of choice of law rules among the states would inject uncertainty into transactional planning, and also could give rise to potential issues under the Full Faith and Credit Clause.

In this respect, this group of Committee members drew attention to the prospect that there would be non-uniformity among the choice of law rules in effect in various states in the event that some states enact the
revision and others do not, or in the event that states alter the applicable choice of law rule. Widespread long-term non-enactment of RA 1 was, in view of many Committee members, another possibility, as Article 1 of the UCC was revised as part of the revision of the entire UCC, and its revision was not responsive to an affirmative substantive need in and of itself (by contrast with, for instance, the 1999 revision of UCC Article 9 and the 1994 revision of UCC Article 8). Hence, some Committee members were concerned that inertia alone could defer enactment in some jurisdictions for a period of time even if there were no substantive concern regarding RA 1-301. It was also pointed out that some business groups have expressed opposition to RA 1-301, making the likelihood of reasonably prompt uniform enactment of RA 1-301 more problematic. To date, only three states, Idaho, Texas and Virginia, have enacted RA 1, and they have all enacted RA 1 without RA 1-301, replacing it with the existing rule set forth in FUA 1-105.148

Another group of Committee members, however, believed that while uniform enactment of the UCC provisions by all of the states is generally important, it is perhaps less so with respect to the choice of law rule of RA 1-301, as the non-uniformity arguably would have practical importance only in the context of consumer transactions. This group argued that as long as a business takes the simple step of choosing as the law to govern its agreements the law of a state with which the transaction has a reasonable relationship, the only type of transaction that would be affected by non-uniformity in choice of law provisions would be one in which a suit arises between a business and a consumer located in a state that has adopted RA 1-301. In the view of these members, predictability can still be achieved in transactions between businesses even where some states have adopted the choice of law rule of RA 1 and some that of FUA 1. In the event that RA 1-301 were to be adopted in some states and FUA 1-105 remained in effect in other states and to the extent that businesses choose the law of a jurisdiction with a reasonable relationship to a transaction in order to achieve certainty in choice of law in transactions between businesses, it would be possible to view businesses that make this choice as having lost the benefit of freely choosing the law of any domestic jurisdiction. This benefit is one on which RA 1 is implicitly based. But in the factual circumstances posited, this loss of the benefit with respect to business-to-business transactions would be due to the fact that certain industries such as financial institutions and large manufacturers are unwilling to support

148. See *supra* note 2.
RA 1 because of concerns about the nonuniformity that could be fostered by the consumer protections that it contains in RA 1-301.

Although the revised choice of law rule in RA 1-301 is the principal reason for the Committee’s decision to make no recommendation, the Committee also notes disagreement and uncertainty among its members as to the proper “good faith” standard to be applied in RA 1 in light of the fact that New York has yet to adopt Revised Articles 3 and 4 of the Uniform Commercial Code.\footnote{In addition, the Committee notes that, of the three states that have enacted RA 1, Idaho and Virginia enacted it nonuniformly, with the definition of “good faith” as present in existing law. (FA 1-201(19)). The bill introduced in Alabama also continues the definition of “good faith” in existing law. Texas, by contrast, adopted the broadened definition of “good faith” that is contained in RA 1. (RA 1-201(20)). The bills introduced in Hawaii, Massachusetts and West Virginia likewise at present use the broadened definition contained in RA 1. The bill introduced in Minnesota leaves the definition of “good faith” open by “reserving” it.}

Based on the foregoing, the Committee is issuing this Report on RA 1 with no recommendation as to whether RA 1 should be enacted. In the event that RA 1 were at some time in the future to be considered by the New York Legislature for enactment, the Committee recommends, whatever the outcome on the choice of law and good faith rules to be enacted, that if RA 1 is enacted it be enacted with the few minor nonuniform revisions recommended in the section-by-section analysis of this Report.

April 2004
Committee on Uniform State Laws

Sophia R. Vicksman, Chair
Michelle A. Meertens, Secretary

Joseph R. Alexander
Peter C. Berry
David W. Dykhouse
Patricia A. Essoff
Francis J. Facciolo
Cassondra E. Joseph
William Klimashousky
Michael V. McKay
Michael M. Membrado
Michael Matthew Mezzacappa

Janet S. Nadile
Lawrence J. Portnoy
Jamila A. Roos
Lawrence I Safran
Lavesh Samtani
Katherine A. Sawyer
Paul M. Shupack
Sandra S. Stern
Jonathan B. Whitney