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Of Note

THE NEW YORK CITY BAR ASSOCIATION BESTOWED ONE OF ITS HIGHEST honors—honorary membership—upon Thomas Buergenthal of the International Court of Justice. Judge Buergenthal has served on the International Court in The Hague since 2000. The award was presented May 16, at the Association.

Born in 1934, Judge Buergenthal grew up in the Jewish ghetto of Kielce, Poland, and was then imprisoned by the Nazis in the concentration camps of Auschwitz and Sachsenhausen, from which he was rescued in 1945. After coming to the United States in 1951, he received his J.D. from NYU Law School and both his LL.M. and S.J.D. from Harvard Law School, where he specialized in international law and human rights. In addition to holding distinguished academic posts in several U.S. law schools, Judge Buergenthal served from 1979 to 1991 as a judge of the Inter-American Court of Human Rights, and from 1995 to 1999 as a member of the United Nations Human Rights Committee.

In his eight years on the International Court, Judge Buergenthal has become well known for the forcefulness of his opinions, including several notable dissents in which he challenged the Court not to apply a double standard or allow itself to become politicized. He is also the author of more than a dozen books and a large number of articles on international law, human rights, and comparative law. The depth of his commitment to the rule of law and the advancement of human rights is evidenced by the courage he has demonstrated throughout his life.

Over the past 10 years, the New York City Bar Association has given honorary membership only eight times, most recently to Chief Justice Iftikhar Chaudhry of the Pakistan Supreme Court.

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THE NEW YORK CITY BAR’S ENHANCE DIVERSITY COMMITTEE PRESENTED the Third Annual Diversity Champion Award at an Award Ceremony, June 4, at the Association. The award recognizes the critical role individuals have played in initiating and sustaining change within their organizations and the overall New York legal community.
OF NOTE

The 2008 Diversity Champion Award winners are:

Michael A. Cardozo, Corporation Counsel of the City of New York; Hon. Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives and Administrative Judge of the Criminal Court of the City of New York; and James B. O’Neal, Co-Founder and Executive Director of Legal Outreach, Inc.

The award honors individuals who embody the New York City Bar’s Statement of Diversity Principles. The Office for Diversity was created in 2004 to work with NYC legal employers to foster more diverse work environments. The Office serves as a resource for individuals seeking to advance and develop their careers, as well as to assist law firms, corporations and other legal employers in their diversity initiatives. The Office was the first office of its kind in a bar association.

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The Stimson Medal is awarded each year by the Association to outstanding Assistant U.S. Attorneys in the Southern and Eastern Districts of New York, both from the Civil and Criminal Divisions. This year’s recipients are:

John M. Hillebrecht, Southern District of New York, Criminal Division; Sean H. Lane, Southern District of New York, Civil Division; Jack Smith, Eastern District of New York, Criminal Division; and Kathleen A. Nandan, Eastern District of New York, Civil Division.

The Honorable José A. Cabranes, United States Circuit Court Judge, U.S. Court of Appeals for the Second Circuit, made opening remarks, and Patricia Hynes, the Association’s president, presented the awards, which are sponsored by Pillsbury Winthrop Shaw Pittman LLP.

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THE 2008 BERNARD A. BOTEIN MEDALS, A RECOGNITION OF OUTSTANDING performance by the personnel attached to the courts of the First Judicial Department, was presented at the Association, March 31. The medal is given each year to employees of the New York City court system for their outstanding contributions to the administration of the courts of the First Judicial Department.

The medals this year were presented to: David Bookstaver, Director of
Communications, Office of Court Administration; Tracey L. Crump, Senior Appellate Court Clerk, Appellate Division, First Department; Deborah Maisonet, Case Management Coordinator, Supreme Court, New York County, Civil Term; John Honahan, Case Management Coordinator, Supreme Court, Bronx County, Criminal Term; Eddy Valdez, Assistant Deputy Chief Clerk, Civil Court, Bronx County; and Vincent Modica, First Deputy Chief Clerk, Criminal Court.

The award is in memory of Bernard Botein, a former Presiding Justice of the Appellate Division and a former president of the Association. The awards are made possible by a grant from the Ruth and Seymour Klein Foundation, Inc.

The Annual Kathryn A. McDonald Award for Excellence in Service to the Family Court was presented May 6, at the Association. Chief Judge Judith S. Kaye of the New York Court of Appeals presented the awards.

This year’s honorees, Jennifer C. Friedman and Margaret O’Marra, LCSW, have dedicated their abilities and leadership skills throughout their careers to the Family Court and the population that it serves.

Friedman is the Founder and Director of the Courtroom Advocates Project at Sanctuary for Families. O’Marra currently serves as the Social Work Supervisor for the Juvenile Rights Division of The Legal Aid Society.

The award presentation was preceded by a program recognizing the work of three retiring Family Court judges: Hon. Guy DePhillips; Hon. Rhea G. Friedman; and Hon. Sara P. Schecter.

The Kathryn A. McDonald Award is named in honor of the former Supervising Judge of the New York City Family Court and is sponsored by the City Bar’s Committees on Children and the Law; Family Court and Family Law; Juvenile Justice; and its Council on Children.

Two outstanding law students have been awarded Thurgood Marshall Fellowships for the 2008-2009 academic year. The program provides two 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, hallmarks of Justice Marshall’s legacy.
Fellowships have been awarded to Crystal Lopez of Columbia Law School and Cherice Vanderhall of Touro Law Center.

Mr. Paul will assist the Association’s Civil Rights Committee and Ms. Severin will work with the City Bar Justice Center.

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 selected by the Association’s Committee on the Thurgood Marshall Fellowship Program, chaired by Ira M. Feinberg.

THE FOLLOWING ARE THE NEWLY APPOINTED CHAIRS OF ASSOCIATION COMMITTEES FOR THE 2008-09 YEAR:

Megan M. Moloney (African Affairs); Kamilla B. Sjodin (AIDS); Deirdre A. Martini (Bankruptcy & Corporate Reorganization); Martin J. Leahy (Capital Punishment); Takemi Ueno (Chamber Music); Fredda Monn (Children and the Law); Karen J. Freedman (Children, Council on); Kimberly J. Tate-Brown (City Bar Chorus); Thomas Maligno (Citybar Public Service Network); Janet Ray Kalson (Civil Court); Elizabeth A. McNamara (Communications & Media Law); Nancy L. Sanborn (Corporation Law); Kent Anker (Education & the Law); Hon. Peter H. Moulton (Encourage Judicial Service); Kathy B. Robb (Environmental Law); Mark A. Meyer (Foreign & Comparative Law); Gregory G. Ballard (Government Ethics); Samuel J. Servello (Health Law); Brian A. Smith (Insurance Law); Arthur W. Rovine (International Law); Helena D. Sullivan (International Trade); Cynthia M. Godsoe (Juvenile Justice); Gary M. Reing (Lawyer Assistance Program); Dennis R. Boyd (Legal Issues Affecting People with Disabilities); Russell N. Adler (Legal Problems of the Aging); Kenneth E. Aldous (Legal History); Louis B. York (Legal Referral Service); William T. Russell Jr. (Legal Services Awards); Patience E. Jones (Legal Services for Persons of Moderate Means); Carmelyn P. Malalis (Lesbian Gay Bisexual and Transgender Rights); Susan L. Bender (Matrimonial Law); John A. Marzulli Jr. (Mergers, Acquisitions & Corporate Control Contests); Myles K. Bartley (Military Affairs & Justice); Juan A. Arteaga (Minorities in the Courts); Lorraine S. McGowen (Minorities in the Profession); J. Russell Jackson (Product Liability); Seth M. Schwartz (Professional & Judicial Ethics); Jeffrey A. Udell (Professional Responsibility); Ernest W. Chung (Project Finance); Melvyn H. Halper (Real Property Law); James Wesley Harbison Jr. (Senior Lawyers); Rachel L. Braunstein (Sex & Law); Olivera Medenica (Small Law Firms); Howard Z.
OF NOTE

Robbins (Sports Law); Cynthia B. Rubin (State Courts of Superior Jurisdiction); Ira A. Reid (Structured Finance); Alan J. Tarr (Taxation of Business Entities); Alan S. Halperin (Trusts Estates & Surrogates Courts); and Stephen H. Broer (Young Lawyers).
Recent Committee Reports

African Affairs/Sex and Law
A Report on a workshop on the investigation, prosecution and adjudication of sexual and gender-based crimes that took place in Kigali, Rwanda on November 18-27, 2007. The Report gives an overview of gender-based violence in Rwanda and details the conference agenda and goals, along with the discussions and recommendations of the workshops in which the judges, prosecutors and police participated. Additionally, the Report enumerates the steps taken to implement the conference’s objectives and anticipated actions to further these goals.

AIDS
Letter to Congress expressing support for the HIV Nondiscrimination in Travel and Immigration Act of 2007 (S.2486), which would end unnecessary discrimination and stigma against HIV positive visitors and travelers to the United States by removing language in the Immigration and Nationality Act (INA) designating HIV-positive individuals as inadmissible and returning authority over whether HIV should be designated as a “disease of public health significance” to the Secretary of Health and Human Services.

Arbitration
Report on the Unauthorized Practice of Law and the Representation of Parties in Arbitrations in New York by Lawyers Not Licensed to Practice in New York. The report examines the issue of whether representation of a party in an arbitration by a lawyer not licensed to practice law in New York constitutes the unauthorized practice of law. The report concludes that it does not and urges that the rule be clarified and remain as such.

Bankruptcy and Corporate Reorganization
Report expressing opposition to the Advisory Committee on Bankruptcy Rules’ proposed amendments to the Federal Rules of Bankruptcy Proce-
dure which would adopt a days-are-days approach to computing time periods under the Bankruptcy Rules and extend the deadline for filing a notice of appeal from a judgment, order or decree in bankruptcy cases. For more than 25 years, Bankruptcy Rule 9006(a) has provided that weekends and holidays are excluded when computing time periods of fewer than 8 days. If adopted, the proposed amendments would require countless forms and notices to be updated at considerable cost. In addition, the report notes, local courts may decide not to conform to the new proposed rules at all and retain the present computational approach through the promulgation of local rules, which would lead to more confusion. The Advisory Committee also proposes to amend Bankruptcy Rule 8002 to extend the deadline for filing a notice of appeal from a judgment, order or decree in bankruptcy cases from 10 to 14 days. The report argues that the current 10 day period is designed to fit within the framework of bankruptcy procedure and accommodate the interests of debtors, their bankruptcy estates and other parties in permitting necessary actions in a timely manner, while respecting the interest of potential appellants in having sufficient time to file their notice of appeal. The proposed extension would only result in a detriment to debtors and other parties in interest in the cases while providing little, if any, benefit to potential appellants.

Bioethical Issues
Letter to the Empire State Stem Cell Board urging that it endorse the ethics of stem cell research and fund scientific research that seeks to derive new embryonic stem cell lines from early stage embryos. The ethical controversy regarding embryonic stem cells arises because they are typically obtained from very early stage embryos that are created in a laboratory but that would be discarded if not used for scientific research. If New York State decides to withhold funding for such research, it is reasonable to expect that the research will go ahead with either private funding or in other countries and regions. This would force scientists to move where they can pursue the research, undermining New York’s historic preeminence in biomedical science.

Children, Council on
Letter to the Director of the ABA Section on Litigation in opposition to the Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act (“the Act”) proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The Act, the letter argues, eliminates the mandate of client-centered confidentiality and takes from
the child-client the right to define the representation and gives that decision to the court. In addition, the Act would undermine the thoughtful and informative work that has been done to define the appropriate role of the attorney for a child and the ABA’s own Standards on Representing Children in Abuse and Neglect Proceedings.

Civil Rights
Both an amicus brief was filed in New York Civil Liberties v. NYC Police Department, NYS Supreme Court, and a letter was sent to NYC Police Commissioner Raymond Kelly expressing concerns regarding the Rand Corporation report, Analysis of Racial Disparities in the New York Police Department’s Stop, Question and Frisk Practices. The concerns in the brief and letter include that: the data accumulated by the NYPD should be made publicly available; there was limited public participation; the report fails to address key issues such as why the number is so high and why does only one stop out of every ten result in an arrest or summons; concerns about the completeness of the data collected and reviewed; the failure to separately consider the stops for non-English-speaking pedestrians; and the Report focuses on potentially innocent reasons rather than on the more troubling one that whites were likelier to receive a summons over an arrest than nonwhites.

Letter to Congress expressing support for Section 102 of H.R. 4156, the Orderly and Responsible Redeployment Appropriations Act of 2008, which would establish the United States Army Field Manual FM2-22.3 Human Intelligence Collector Operations as the standard for interrogation by all government personnel. The adoption of the Army Field Manual standards, the letter argues, would provide clear guidance to all government officials and contractors as to the practices that are permissible and those that are forbidden and eliminate any current ambiguities.

Amicus Brief: Doe v. Mukasey filed with the United States Court of Appeals for the Second Circuit. The brief argues that National Security Letter (“NSL”) provisions of the USA PATRIOT Act are unconstitutional, and that the Reauthorization Act which attempted to cure the unconstitutionality of the original PATRIOT Act provision, fails to remedy the provision’s constitutional defects. The NSL Statute impermissibly infringes on the role of the Judiciary under the constitutional system of separation of powers. First, requiring that courts uphold gag orders unless there is “no reason to believe” the disclosure of the NSL may endanger national security or in-
interfere with criminal or counterterrorism investigations or diplomatic relations conflicts with established constitutional standards for evaluating restraints on speech under the First Amendment. Second, requiring that courts accept the FBI Director’s certification that disclosure may endanger national security or interfere with diplomatic relations, unless the court concludes the Director is acting in bad faith, effectively reduces the court’s role as a check on abuses of constitutional rights which is fundamental to the rule of law. Finally, provisions which still allow FBI agents unbridled discretion in determining whose speech should be suppressed place an impermissible burden on the recipient of an NSL to challenge the non-disclosure order, therefore rendering the judicial review provision meaningless and in violation of the First Amendment.

Communications and Media Law
Amicus Brief: Perozo v. Venezuela (The “Globovisión” Case) filed in the Inter-American Court of Human Rights, May 2008. The brief argues that the actions by the government of Venezuela concerning Globovisión and its employees constitute violations of the American Convention. The complaint involves government-sanctioned harassment and assault of opposition journalists, which has the effect of preventing them from reporting on and broadcasting events of public interest.

Amicus Brief: Rios v. Venezuela (the RCTV Case) filed in the Inter-American Court of Human Rights. The brief argues that the actions by the government of Venezuela concerning RCTV constitute violations of the American Convention. The complaint involves government-sanctioned harassment and assault of opposition journalists, which has the effect of preventing them from reporting on events of public interest, and depriving RCTV of its broadcasting license.

Report urging enactment in New York of the proposed Libel Terrorism Protection Act (S.6687/A.9652). The Act would amend the New York long-arm statute, CPLR § 302, to provide for jurisdiction over a foreign libel plaintiff who secures a foreign defamation judgment when the author or the underlying work has sufficient ties to New York State. This jurisdiction would be limited to an action by the publisher or author seeking a declaration that the foreign judgment is not enforceable. This amendment to the long arm statute, the report notes, would fill a significant gap in New York’s free speech protections. The federal courts already follow a similar rule.
Construction Law
In its report, Construction Law Reform: 21st Century Construction, 20th Century Construction Law, the Construction Law Committee urges that mandatory multiple prime contracting has no place in modern public construction. The entire statutory scheme for public procurement, the report argues, must be overhauled to promote flexibility and innovation and reflect contemporary trends in service delivery methodology. There must be rigorous review of the entire statutory scheme for construction and its products, both publicly and privately financed, to bring New York’s construction industry into the 21st century. Given the pending legislation which would amend the Wicks Law, now is the time for the Legislature and the Governor to convene a multi-disciplinary task force to study the entire statutory scheme covering construction in New York State with a view to proposing reforms to help make the industry more efficient for the benefit of the state and local economies. Many of the current laws, though well intentioned at the time, have grown stale and now have unintended negative consequences.

Consumer Affairs
Report in support of A.8527/S.6203, the Exempt Income Protection Act, which would prevent creditors and debt collectors from freezing a person’s bank account which contain exempt funds. The proposed amendments to the CPLR would: 1) exempt from restraint the first $2500 in a bank account containing exempt funds such as Social Security, disability payments, pensions or public assistance whether such funds have been directly or electronically deposited within the last 45 days; 2) exempt an amount equal to 240 times the minimum wage, except for such part as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and dependents; 3) make it easier for account holders whose funds have been unlawfully frozen to get a restraining notice lifted on their account; and 4) streamline the process for determining claims when there is a question as to whether funds are exempt.

Corrections
Report expressing support for A.08464/S.5559-A, which would effectuate the mandate of Corrections Law Article 23 by ensuring that either a certificate of relief from disabilities (“CRD”) or a certificate of good conduct (“CGC”) will serve to remove statutory barriers to the licensure and employment of people with criminal records, thereby reducing recidivism by promoting the employment of people with criminal histories.
Report supporting A.10864, which would ensure immediate access to health care coverage for certain people leaving prison, by permitting eligible people enrolled in pilot projects in selected state prison facilities to complete necessary paperwork for enrolling in Medicaid prior to their release.

Report in support of A.10860/S.8022, which would remove the provision in New York's Alcoholic Beverage Control Law Section 102(2) that forbids an establishment licensed to sell liquor for on-premises consumption to hire any person in any capacity who has been previously convicted of a felony or certain misdemeanors unless that person has (1) received a pardon or a certificate of good conduct or relief from disabilities or (2) obtained written approval from the New York State Liquor Authority.

**Criminal Justice Operations**

Report expressing general support for legislation that would require electronic recording, with video and audio equipment, of custodial interrogations in their entirety in all felony cases. Electronic recordings not only protect the innocent by guarding against false confessions, but increase the likelihood of conviction of guilty persons by developing the strongest and most reliable evidence possible. Recording interrogations aids investigators, prosecutors, judges, and juries by creating a permanent and objective record of a critical phase in the investigation of a crime that can be reviewed for inconsistencies and to evaluate the suspect's demeanor. The report does recommend a number of changes to the proposed legislation including: 1) broadening the definition of where the electronic recording can take place; 2) requiring that the People prove the statement be “voluntary” rather than “reliable”; and 3) providing for a longer lead time, currently 90 days in the proposed legislation, to equip police offices and train police personnel to comply with the statute.

Report on the Proposed Supplemental Model Justification Charges of the Office of Court Administration’s Criminal Jury Instructions 2d. The report identifies the legal principles relevant to the areas of law that the model instructions do not currently address, and proposes model language that could be included in Criminal Jury Instructions, including: excessive force, victim’s prior threats and defense of a third party initial aggressor.

Letters to the New York City District Attorneys expressing support for New York City’s e-arraignment program, which will aid all five boroughs of
New York City in meeting the 24-hour arraignment goals set forth in People ex rel. Maxian v. Brown by streamlining and automating the arrest-to-arraignment process and creating a comprehensive timestamp monitoring tool that will track the progress of the arraignment process from agency to agency.

**Domestic Violence**

Criminal Orders of Protection in New York City. The report outlines the current system of getting orders of protection and the information about them into the hands of the police and victims in New York City. The report makes a number of recommendations for improving the dissemination of information including: 1) providing victims with timely and easily accessible information on how to access orders of protection, 2) making information about orders of protection available through New York City’s 311 phone system, 3) requiring that information about orders of protection be available on scene, 4) coordinating the available technology to ensure access to orders of protection, 5) making information about orders of protection readily available to the public and 6) increasing funding to community-based organizations so they can better assist with the timely distribution of orders of protection to victims.

Report supporting A.10492/S.7411, which would enhance the penalty for domestic violence perpetrators who repeatedly violate orders of protection. The legislation would provide that a second violation within five years would constitute the felony of criminal contempt in the first degree when the violation is of an order of protection for a “non-family offense” and when the conduct violates any part of the order of protection. This would ensure that all protected parties, whether they are members of the same family as the perpetrator or do not fall within this definition, such as those who are dating or cohabitants, receive the same protection.

Report supporting A.10228/S.7185, which would permit all victims, including non-qualified aliens, to be eligible for emergency domestic violence residential services. The lack of access to domestic violence shelters, the report argues, may force many non-qualified immigrants and their children to stay with their abusers in dangerous situations, subjecting the victims and their children to further violence.

Report in support of S.07587/A.10615, which would increase the number of family court judges in New York City and throughout New York State.
The family courts are overburdened and court calendars reflect this in the long delays between court dates. Adding 39 family court judges statewide would provide much needed resources to the family court system.

**Education and the Law**

Amicus Brief: *Bronx Household of Faith v. Board of Education of the City of New York* filed in the US Court of Appeals for the Second Circuit. This case involves a church asserting its right to use a public school for Sunday worship services. The brief argues that the District Court's decision should be reversed and that the New York City Department of Education should be allowed to enforce Standard Operating Procedure which precludes parties from conducting worship services in the New York City public schools. The activities in this case cross a fundamental line where the church's private religious speech so dominates the forum which is an individual school building that the reasonable observer would perceive it as governmental speech endorsing religion. Therefore, the brief argues, it is the Establishment Clause that provides the most appropriate framework for the requisite constitutional analysis of the situation. And under the Establishment Clause the City is unquestionably obligated to prevent the endorsement of religion within its public schools.

**Energy**

Report entitled *Energy Planning* which recommends that New York establish an Energy Policy Board which would coordinate the efforts of the above agencies and set state policy on key energy issues.

The report recommends that this Energy Policy Board would be responsible for: (1) identification of risks, benefits and uncertainties of energy supply sources; (2) identification of emerging energy trends; (3) energy policies and long-range planning objectives and strategies; (4) recommendations of administrative and legislative actions to implement energy plans and objectives; and (5) analysis of the impact on economic development of such implementation of the Energy Planning Board's plan. The report acknowledges that the scope of responsibilities of the new entity would have to be carefully crafted so as not to conflict with other agencies' planning. The Committee suggests that the Board would also oversee the regular issuance of an energy policy statement.

Letter to Governor Paterson and legislative leaders commenting on the Assembly budget provision which subject funds generated through the New York System Benefit Charge (SBC) Program and the Renewable Port-
folio Standard (RPS) RPS to the annual state appropriation process. The letter argues that these provisions, would be detrimental to the long-term success of the programs supported by the SBC and RPS such as energy efficiency initiatives and renewable energy projects.

**Election Law**

Letter to Governor Spitzer commenting on the proposed constitutional amendment, Governor’s Program Bill No. 26, regarding redistricting. The letter acknowledges that the Bill follows many of the recommendations outlined in a report issued by the Committee earlier in the year; however, there are still several difficulties with the proposal in the areas of the qualifications of Commission members, the criteria for districts and judicial review.

Letter to the Governor’s Office urging that the New York State Constitution and the Public Officers Law be amended to streamline succession rules in New York State and in the event of a mid-term vacancy in a publicly held office. With respect to the office of Governor or Lt. Governor, the report suggests that the most practical and fair solution would be to adopt the federal model, which would permit the new Governor who has succeeded to the post from Lt. Governor to select the new Lt. Governor, whose nomination would then be confirmed by the Legislature. Attorney General and Comptroller vacancies should be filled for the remainder of the term by an election at the next regularly scheduled general election.

**Employment Opportunity for the Previously Incarcerated, Task Force**

This report identifies the barriers that previously incarcerated persons face when seeking work in the legal sector and elsewhere. The report suggests employment barriers may be heightened by the failure of employers to understand the laws under which they operate, as well as employers’ generalized misperceptions about job applicants with conviction histories.

The report makes the following six recommendations: 1) the licensure and employment of persons previously convicted of one or more criminal offenses should be encouraged; 2) law firms and other legal employers should provide the same opportunities for advancement to individuals released from prison as they do to other employees with comparable job skills; 3) law firms and other legal employers should take advantage of job placement and post-placement services provided by workforce intermediaries to identify, employ and provide supportive services to individuals released from prison or jail; 4) steps should be taken to publicize
broadly the availability of workforce intermediaries, the variety of services they provide and the success they have achieved in placing formerly incarcerated individuals in productive and remunerative employment; 5) law firms and other legal employers should encourage suppliers and organizations to which they outsource functions to employ and promote formerly incarcerated persons and to utilize for that purpose the services of workforce intermediaries; and 6) all statutory and regulatory restrictions and disqualifications on licensure and employment based upon criminal convictions should be reviewed and modified, so that denial of employment or licensure is not automatic, but rather requires an individualized determination.

**Environmental Law**

Report commenting on the proposed revisions to the laws concerning the Brownfield Redevelopment Tax Credit and the Brownfield Cleanup Program introduced by the Governor as part of the 2008-2009 State budget process. The Governor’s proposal is divided into two parts, a short-term “fiscal proposal” and a long-term “programmatic proposal.” Though the report is generally supportive of the proposals as constituting a significant improvement over the present statutory regime, the comments do recommend that the proposal be amended to expand the definition of “brownfield site” to include sites containing historic fill.

**Estate Gift Taxation**

Letter to the IRS highlighting inconsistencies in two recently issued Private Letter Rulings (PLR’s), which set forth the calculation method of the income interest upon early termination of a net income with makeup charitable remainder unitrust (NIM-CRUt). The letter points out that the calculation method with respect to early termination of NIMCRUts is inconsistent with previous guidance provided by the IRS with respect to the calculation method to be used upon creation of NIMCRUt, and requests that the IRS issue guidance that eliminates this inconsistency.

Letter to the IRS commenting on Proposed Treasury Regulation Section 1.67-4 and Notice 2008-32. The letter makes a number of recommendations, including that: 1) the Proposed Regulations’ requirement that bundled fees be unbundled should be eliminated; 2) if the IRS will not eliminate its unbundling requirement, then a trust or estate should be allowed to deduct without regard to the 2% Floor the portion of its bundled fiduciary fee that would not be commonly incurred by individuals; 3) the IRS should issue guidance to clarify that taxpayers (and tax practitioners) will
not be subject to penalties relating to 2% Floor issues unless there is no reasonable basis for the taxpayer's position; and 4) the final regulations under Section.67-4 should only apply to taxable years beginning on or after the later of January 1, 2009, or the year in which final regulations are issued.

**Federal Courts**
Letter to the US District Court for the Southern District of New York urging that all attorneys be permitted to bring wireless enabled PDA's and cellular phones into the SDNY courthouses. The letter urges that changing the policy would improve court processes as these devices have become an important organizational tool for storing information and communications regarding court proceedings, and is supported by considerations of fairness as at present Assistant United States Attorneys and Assistant Public Defenders can bring these devices into Southern District courthouses.

Letter to Congress expressing support for S.2450 which would amend the Federal Rules of Evidence by adding Rule 502, which addresses the effect of the disclosure of privileged materials in federal courts and proceedings before federal offices and agencies by establishing consistent guidelines regarding the consequences of both intentional and inadvertent disclosure of privileged material in federal proceedings.

**Financial Reporting**
Letter to the SEC expressing concern that reporting companies may not be prepared to meet the aggressive timetable for the mandated use of interactive data. The letter offers a number of suggestions that would not unduly delay the implementation of mandatory interactive data but would result in a more orderly and cost effective implementation.

**Futures and Derivatives Regulation**
Letter to the Federal Trade Commission commenting on the proposals concerning the prohibitions on market manipulation and false information in Subtitle B of the Energy Independence and Security Act of 2007. The comments focus on issues concerning legal principles of due process and fairness that are crucial to protecting the public interest in maintaining well-functioning crude oil, gasoline and petroleum distillates markets.

**Immigration and Nationality Law**
Letter to the U.S. Department of Labor expressing concern over its an-
nouncement that the DOL will be auditing all PeRM applications filed by the Fragomen Law Firm based upon a suspicion that attorney involvement in recruiting may have tainted labor market tests required under PeRM. Under 20 CFR 656.10(b), despite language stating an “attorney may not interview or consider U.S. workers,” the regulation taken as a whole plainly recognizes attorney representation. The duty to counsel and advise clients is inherent in the job of an attorney, including the legal import of facts arising during the PeRM recruitment process.

Likewise, the letter argues, the employer’s regulatory and statutory right to counsel plainly extends to the highly complex PeRM recruitment process.

**International Commercial Disputes**

28 U.S.C. Section 1782 As a Means of Obtaining Discovery in Aid of International Commercial Arbitration: Applicability and Best Practices. Section 1782 of Title 28 of the United States Code is the mechanism by which the United States provides assistance to foreign or international tribunals in obtaining evidence. The language of Section 1782, the report argues, has led to conflicting decisions and differing views. Conflicts exist over the meaning of the term “foreign or international tribunal” and whether Section 1782 encompasses assistance to foreign private arbitration. The report analyzes the developing jurisprudence and suggests best practices for the application of Section 1782 to international arbitration and concludes that Section 1782 should be available in aid of foreign arbitration. In addition, the report recommends that once the tribunal is constituted, Section 1782 discovery be granted only if the request comes from the arbitrators or with the consent of the arbitrators and that, therefore, district courts consider the source of the request as a very important factor in exercising the discretion granted to them by the statute.

**International Environmental Law**

World Trade Organization Implications of the Lieberman-Warner Climate Change Legislation (S.2191). The report analyzes the bill, which would impose restrictions on and create a cap-and-trade program for greenhouse gas (GHG) emissions from domestic industrial facilities and producers and importers of fossil fuels, and whether it stretches the limits of permissible environmental regulation under the General Agreement on and Tariffs (GATT). The report concludes that it is very likely that title VI of the legislation would be struck down by the World Trade Organization as a violation of GATT. And although there may be protection provided for such legislation under GATT, relying on such protections is not the ideal
vehicle since it is generally viewed as an exception to a country’s obligations under GATT, and the proponent of the exception carries the burden of proof.

International Human Rights
Letter to President Musharraf of Pakistan expressing concern about the status of lawyers, judges, journalists, and the general rule of law in Pakistan. The letter urges that the rule of law be restored immediately in Pakistan to ensure that upcoming elections can take place under the supervision of an independent judiciary and press. It also urges that the detained lawyers and judges be released and the judges deposed since November 3, 2007 be restored to their prior positions. Letter to U.S. Attorney General Michael Mukasey requesting review of the Board of Immigration Appeals decision in the Matter of A-T.

In the decision the Board denied a claim for asylum and withholding of removal of a Malian woman whose claim was based on female genital mutilation and forced marriage. The letter argues that the Board’s decision contravenes its own precedent with regard to its treatment of female genital mutilation and constitutes a serious reversal of policy that will have a harmful effect on a large class of women subjected to this practice. Letter to the All China Lawyer Association expressing concern over the recent intimidation of lawyers in China following their public commitment to provide legal services to individuals detained following protests in China’s Tibet Autonomous Region (TAR). The letter urges that appropriate action be taken to ensure that those lawyers signing the April 2 public legal assistance offer to Tibetan detainees be free to represent those cases they take on, and that they not suffer any professional setbacks as a result.

Letter to the President of the Republic of Zambia, as chairperson of the Southern Africa Development Community (“SADC”), expressing concern over widely-reported electoral irregularities and apparent repression of free political discourse by the government of Zimbabwe.

International Trade
The report, Bilateral Investment Treaties—Evolution or Regression?, proposes an improvement to the language of the next U.S. model Bilateral Investment Treaty (BIT) clause regarding fair and equitable treatment. The report argues that the current BIT language is inadequate and discourages foreign direct investment. The report proposes language for a new, more progressive model BIT which would better protect foreign investors.
Investment Management Regulation

Letter to the SEC commenting on proposed recommendations to alleviate unnecessary burdens on independent directors of investment companies registered under the Investment Company Act of 1940. The letter states that independent directors currently are required to spend too much of their time on routine compliance work or on making required findings which had become overly burdensome, neither of which is in the best interest of the funds or their shareholders. The letter suggests a number of changes that would reduce the unnecessary burdens on independent directors including: eliminating the quarterly review of transactions effected pursuant to certain exemptive rules; eliminating the quarterly reviews required by existing exemptive orders; eliminating the Board’s responsibility to determine, in good faith, the fair value of portfolio securities for which market quotations are not readily available; and leaving determinations that are better made by someone more qualified than the Board to that person with the Board being responsible for providing oversight only.

Letter to the SEC offering comments on the proposed amendments which seek to enhance the disclosure provided to investors in registered open-end management investment companies (“Funds”). Though the letter generally supports the amendments, which encourage Funds to employ technology in delivering information to investors more efficiently and to assist those investors in using information more effectively, it notes that certain provisions of the proposed amendments may have the potential to discourage Funds from using the Summary Prospectus.

Legal Issues Pertaining to Animals

Comments in support of New York City Council Bill Intro. No. 658, which would amend the Administrative Code of the City of New York by repealing all provisions allowing for the operation of horse drawn cabs. New York City, the letter argues, has failed to enact legislation to protect the City’s carriage horses such as: shorter work days for the horses; setting a maximum allowable work period within a week; redefining permissible working conditions which take into effect weather conditions; or improving stable conditions. In the absence of the City’s willingness to undertake such protective measures, the letter urges, the carriage horse trade should be banned in New York City.

Report supporting H.R. 3029, which would prohibit the trade, both domestic and international, of bear viscera and items, products, or substances
containing, or labeled or advertised as containing bear viscera. Bear gall bladders have been known to fetch high black market prices. As a result of this popularity, wild Asian bear populations have been decimated, causing poachers to turn to American bears to meet increasing demand. Although many states have prohibited the traffic in bear viscera, federal legislation, the report argues, is nevertheless needed because of loopholes created by inconsistencies among state laws that allow poaching to flourish.

Report supporting A.9975B/S.6942B, which would eliminate the existing requirement that a society for the prevention of cruelty to animals, humane society, pound, animal shelter or an authorized agent that is given custody of a seized animal must first petition the court in order to obtain a security to cover the reasonable cost of the seized animal’s care and housing.

Report supporting S.3352/A.10564, and supporting with recommendations S.7847/A.10843, both of which would seek to alleviate some of the cruelty to agricultural animals when they become unable to walk or if there are health concerns involved in sending them to slaughter.

Reports expressing support for proposed State legislation (S.2052/A.6553) that would place restrictions on the length of time and manner in which dogs could be tethered and for proposed City ordinance that would limit the tethering that takes place outdoors.

Report expressing support for A.7402/S.3528, state legislation which would prohibit manufacturers and contract testing facilities from using traditional animal test methods for product safety testing when an alternative has been validated and recommended by the ICCVAM (Interagency Coordinating Committee for the Validation of Alternative Methods) and subsequently adopted by the relevant federal agency.

Letter to Congress expressing opposition to S.1959 (the Violent Radicalization and Homegrown terrorism Prevention Act of 2007). Although the City Bar supports the goal of preventing violent terrorist acts, it opposes this legislation because of its vague language and weak civil liberties protections, which unacceptably threaten free-speech and association rights without providing concomitant protection against future violent terrorist acts.

Report in support of A.10344/S.7848, which would amend section 809 of the New York Education Law to require the Commissioner of Education to notify
every school district of the existing requirement that elementary schools provide instruction in the humane treatment of animals, their importance in the environment, and the importance of spaying and neutering programs. The bill also adds a new subdivision 3-a to section 3004 of the Education Law requiring that all applicants for a teaching certificate or license complete two hours of course work or training in humane education instruction.

**Lesbian, Gay, Bisexual and Transgender Rights**

Letter to Ambassador Khazee of Iran expressing concern about the violations of the human rights of sexual minorities in Iran. In recent years human rights organizations have documented numerous cases of arrests, flogging and the execution of gay people in Iran. No public discussion of homosexuality is permitted, gay rights organizations are banned and no organization or political party that endorses gay and lesbian human rights is allowed to exist. The letter notes that under the International Covenant on Civil and Political Rights, to which Iran is a party, the right to privacy and the right to freedom from discrimination on the grounds of sexual orientation is well established. The letter urges that the Iranian government therefore take action to decriminalize homosexual conduct.

Letter to Governor Spitzer urging greater diversification of New York State’s judiciary through the appointment and election of members of the LGBT and other under-represented populations. A diverse judiciary is necessary to ensure that our populations are appropriately represented. In addition, judges must be of the highest quality regardless of their backgrounds. Fortunately, the letter points out, there are a number of qualified candidates from the LGBT community and from communities of color, both of which are under-represented in the judiciary.

Scope of Gubernatorial Authority to Recognize Same-Sex Civil Unions and Other Substantial Legal equivalents of Marriage Contacted Outside of New York State. The report urges the Governor to issue an executive Order extending agency recognition to same-sex marriages and civil unions entered into by couples outside the State. The report also outlines which rights and responsibilities of spouses under New York statutes and regulations would be properly extended by executive Order to same-sex partners in civil unions and other substantial legal equivalents of marriage.

**Mergers, Acquisitions and Corporate Control Contests**

Letter to the SEC commenting on proposed revisions to the Cross-Border Tender Offer, exchange Offer and Business Combination Rules and Ben-
Official Ownership Reporting Rules for Certain Foreign Institutions. The letter acknowledges the SEC’s flexibility in granting no-action relief in specific situations and its efforts to codify much of the relief and guidance that it has previously given. It urges the Commission to take this opportunity to take more substantive steps to revise certain aspects of the cross-border rules, and to take into account developments in the substantive corporate law of foreign jurisdictions as well as the continued globalization and integration of financial markets around the world.

**Minorities in the Profession**

Guide to the Best Practices Standards for the Recruitment, Retention, Development and Advancement of Racial/Ethnic Minority Attorneys. From reviewing all the literature on examples of best practices that are emerging in the nation’s law firms, corporate legal departments and government and nonprofit organizations the Guide distills a list of best practices and offers an annotated reference list that highlights particularly helpful texts that should be useful to employers seeking to promote diversity within their own organizations. The purpose of the Guide is to be a reference tool for legal employers looking to improve their diversity efforts, as well as a starting point for discussion of specific diversity initiatives that have been successful.

**National Security and The Rule of Law, Task Force**

Reaffirming the U.S. Commitment to Common Article 3 of the Geneva Conventions: An Examination of the Adverse Impact of the Military Commissions Act and Executive Order Governing CIA Interrogations. The report evaluates the Administration’s effort to interpret its obligations under Common Article 3 through the enactment of the Military Commissions Act of 2006 (“MCA”) and the issuance of the related Executive Order. The Report concludes that the MCA and the Executive Order appear to be inconsistent with U.S. obligations under Common Article 3 and may undermine compliance with those obligations. The Report makes recommendations that will help assure that the United States fully complies with Common Article 3 and restores its moral leadership in the world community.

**Non-Profit Organizations**

Early Action Checklist for New and Smaller Charities. This report outlines a non-exclusive checklist to aid new and smaller charities in getting started on the process of putting in place good governance and operational practices, and includes items likely to need early attention.
President
Letter to the New York Legislature urging that New York State judges be granted a salary increase and that a corresponding mechanism be put in place that provides for future periodic increases. The letter argues that despite the economic difficulties inherent in the budget, judges are entitled to a salary increase, as it has been nearly ten years since New York State judges received their last increase. The failure to increase salaries results in diminished real income to judges, and is an affront to an independent branch of government.

Private Investment Funds
Letter to the SEC commenting on the proposed rules and amendments, entitled “Exchange-traded Funds.” The letter urges that the SEC extend its proposed new rule that would allow mutual funds (and other types of investment companies) to invest in exchange-traded funds to a greater extent than currently permitted under the Investment Company Act of 1940 to unregistered funds as well.

Pro Bono and Legal Services
Letter to Congress urging that the appropriations restriction that limits how Legal Services Corporation grantees may spend their funds from state and local governments as well as private donors be repealed. Since these organizations provide free legal services to the poor, these restrictions prevent LSC funded organizations from using non-LSC funds for uses that LSC funds may not be used for, including class action suits, seeking attorney fees, and representing certain documented, and all undocumented immigrants. These restrictions deprive countless New Yorkers of desperately needed legal representation, deter private funders from donating to LSC-funded organizations, and obstruct state and city efforts to deliver civil legal aid. The only way for a legal aid program to perform work barred by the restrictions is to create a new, privately funded organization with separate staff and separate offices, a requirement so expensive that hardly any organizations around the country have been able to meet it. By removing these restrictions, the letter argues, local legal aid organizations would be able to use their non-LSC funds freely, which would enhance their ability to deliver civil legal aid.

Professional Discipline
Letter to the Departmental Disciplinary Committee expressing support for the re-institution of the rule that would permit the issuance of a Letter of
Caution in attorney disciplinary matters, and suggesting that the former version could be improved upon by explicitly setting forth the type of conduct that would qualify for a Letter of Caution.

Professional Responsibility
Amicus Brief: *James L. Alexander v. Thomas J. Cahill, et al.* filed with the United States Court of Appeals for the Second Circuit. This case primarily concerns the 30-day moratorium to all forms of lawyer advertising. The lower court found that solicitation concerning a specific personal injury or wrongful death event is no less disturbing when it enters a victim or family member’s home through the newspaper, the internet, or the airwaves rather than through the mail. The brief argues that there is a substantial difference between in-person solicitation and general advertising and website solicitations, and that while the ban is appropriate for the in-person targeted communications, including general advertising and website posting makes the ban overbroad. Such general notices do not prompt the pressure and distress which makes in-person solicitation so inappropriate in the immediate days after an accident. Indeed, if an event is significant enough that attorneys will see value in placing an advertisement mentioning the incident, there is a high likelihood that the event will be reported in the press. Potential plaintiffs therefore likely will be reminded of the incident by newspapers, radio and television. Advertisements in the same media are unlikely to contribute to the victims’ distress, but could inform plaintiffs who are considering their legal options.

An Analysis of the Letter of Engagement Rule—Part 1215 to Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York. The report offers guidance to attorneys on what does and does not constitute compliance with the requirements of the Rule.

Securities Regulation
Letter to the SEC commenting on proposed amendments by the Commission to the rules relating to foreign private issuer reporting under the Securities Exchange Act of 1934. The letter acknowledges that the proposals, such as shortening the deadline for filing annual reports on Form 20-F, are the right response to address the significant changes that have occurred in the global capital markets since the original adoption and amendment of these rules, but urges that the SEC provide flexibility in the final rule because the proposed requirement could be burdensome to foreign issuers without providing the market with significant benefits to U.S. investors.
Letter to the SEC commenting on proposed amendments by the Commission to amend Rule 12(g) under the Securities Exchange Act of 1934, which relates to foreign private issuers. The letter supports the Commission’s proposal to exempt eligible non-U.S. companies automatically from registration under the Exchange Act, rather than require them to apply for an exemption. It recommends that the SEC eliminate or substantially modify the proposed 20% trading volume test and make some technical modifications to the other conditions.

Securities Litigation
Report entitled Coordinating Related Litigation which looks at the problem of duplicative or overlapping actions arising from the fragmented nature of the legal system. The report recommends a number of remedial measures including: 1) permitting public companies to contract with their investors to limit the venue for deal litigation to the state of incorporation; 2) enactment of federal legislation that would require shareholder litigation concerning proposed changes in corporate control to be brought in the state of incorporation; and 3) amending the Securities Act by either repealing the bar against removal or eliminating the concurrent state and federal jurisdiction currently provided by the Act. If adopted, the report urges, these recommendations would be an important step toward eliminating unnecessary expenses faced by publicly listed companies from duplicative and overlapping securities litigation.

Sex and Law
Report expressing support for the Safe Harbor for Exploited Children Act, which would permit sexually exploited children to receive vital social services, such as preventative services and safe housing, rather than face prosecution and potential jail time. The report expresses a preference for the Assembly version (A.5258-A) rather than the Senate version (S3175-A), as the former does a better job of recognizing “that the sexual exploitation of children is a child welfare issue, not a criminal justice issue” and that these children should not be incarcerated and deserve a real chance at being helped.

Social Welfare Law
Letter to the New York State Legislature expressing support for A.9807-B, which would increase the basic welfare grant for needy New Yorkers for the first time in eighteen years. Under the current law, the letter argues, a family of three is expected to live on $238 a month, not including the cost of housing. The proposed bill contains a ten percent increase in the
grant per year for the next three years, which would be a start in addressing what has become a crisis situation for many New Yorkers.

Report endorsing A.11297, which would allow baccalaureate and advanced degree programs to count towards the work participation rate for public assistance recipients, and would further provide for certain educational and training activity (homework expected or required by the educational institution) to count towards the satisfaction of the participant’s work activity requirement.

State Courts of Superior Jurisdiction
Letter to the New York State Administrative Board which urges that the Uniform Rules be amended to expressly include e-discovery as a subject at preliminary conferences and proposes suggested language for such an amendment. The proposed language would be inserted to Rule 202.12 as (c)(3) in the New York Civil Practice Law and Rules. Adding e-discovery as an explicit subject at preliminary conferences, the letter argues, will induce litigants to meet and confer on e-discovery issues at an early stage of litigation and contribute to the efficiency of the legal process. Such early disclosure furthers the interest of justice by minimizing surprise at trial and ensuring wide-ranging discovery of relevant information.

Report on En Banc Review in New York Courts. The report supports en banc review by New York’s intermediate appellate courts, noting that if a panel of such a court finds that a prior panel of that court has erroneously decided an issue it has no power to overrule the prior panel. The report argues that given burgeoning caseload, New York courts should be given the tools to resolve intra-department differences and ensure uniformity and consistency in the decisions.

Taxation of Business Entities
Report Regarding Proposals for Accounting Treatment of Interest on Non-Performing Loans. The report considers various aspects of how interest is accrued on non-performing loans and recommends guidance, clarifications and changes regarding the application of the general interest accrual, original issue discount and market discount rules to non-performing loans.

Report Offering Proposals Regarding the “Derivative Benefits” Provisions Found in the Limitation on Benefits Article of Certain U.S. Income tax treaties. The report considers various aspects of the “derivative benefits” provi-
sion found in the Limitation on Benefits ("LOB") Article of certain U.S. income tax treaties and recommends guidance regarding certain aspects of "equivalent beneficiary" status. The report also makes certain policy-based proposals.

**Uniform State Laws/Bioethical Issues**
Report expressing support for S.5154, The Revised Uniform Anatomical Gift Act, which would help to increase the supply of, and access to, organs for transplantation and bring New York in line with other states ensuring that regardless of location, organ supply will increase and transplantation will occur rapidly and more frequently. The proposed Act would: (1) simplify the process for a potential donor to document his or her anatomical gift; (2) add several new classes of persons who may make an anatomical gift for another individual after that individual’s death; (3) establish standards for donor registries; and (4) clarify and expand the rules relating to cooperation and coordination between procurement organizations and coroners and medical examiners.

*Copies of the above reports are available to members at the Association’s website, www.nycbar.org, by calling (212) 382-6624, or by e-mail, at gbrown@nycbar.org.*
Legal Employers
Taking the Lead:
Enhancing Employment Opportunities for the Previously Incarcerated

The Task Force on Employment Opportunities for the Previously Incarcerated

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Legal Employers Taking the Lead: Enhancing Employment Opportunities for the Previously Incarcerated

The Task Force on Employment Opportunities for the Previously Incarcerated*

“The public policy of this state...is to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.”

New York Correction Law, Art. 23-A, § 753

“Providing a former offender a fair opportunity for a job is a matter of basic human fairness, as well as one of the surest ways to reduce crime.


“[T]he importance of employing former inmates, and reintegrating them into society, without risk of absolute liability for those who open doors to them.”

Haddock v. City of New York, 75 N.Y.2d 478, 485 (Ct. App. 1990)

INTRODUCTION AND SUMMARY

On December 31, 2007, more than 62,000 individuals were incarcerated in New York state prisons, and an additional 28,000 or more were confined in jails throughout the State. New York is by no means unique in the

* A full copy of the report which includes the following appendices can be found on the City Bar website at http://www.nycbar.org/pdf/report/Task_Force_Report08.pdf; Appendix 1: A Note on Sources; Appendix 2: List of Task Force Members; Appendix 3: Summary of Responses to Questionnaire for Human Resources Directors; Appendix 4: HIRE Employment Guide; Appendices 5-10: descriptions of and contact information for the organizations found on page 610.

prevalence of incarceration in this country; the United States has the largest prison population in the world—25% of the world’s prisoners with only 5% of its population.2 The prison population is not only vast but ever-changing, as individuals are arrested, convicted, incarcerated for varying periods, and eventually released back into society. In New York State alone, 27,000 individuals are released each year from state prisons,3 and 100,000 from jails.4

The aggregate costs of incarceration are staggering: maintaining a single prison inmate for one year costs more than $30,000,5 but that is only a small fraction of the total cost, for it fails to take into account the other direct costs of the criminal justice system, lost productivity, added burdens on the welfare system, and such non-quantifiable but nonetheless very real collateral consequences as broken families and an increase in homelessness.

The vast prison population is swollen by recidivism. According to federally compiled statistics, 30% of all people released from prison are rearrested within the following six months; 44% within the first year; and 67.5% within three years.6 Many of those rearrests are for parole violations, but even with this qualification, the extent of recidivism is striking.

How can this vicious cycle be stopped or at least slowed? Individuals released from prison or jail face a host of problems conducive to a renewal of criminal behavior, not the least of which is the difficulty that they face in securing employment. Reflect on just one statistic: nine out of ten parole violators are unemployed.7 Unemploy-
ment may in fact be the most serious of all contributors to the high rate of recidivism.\(^8\)

In order to stop or at least slow the recidivism cycle, it is necessary to understand the reasons behind the severe obstacles formerly incarcerated individuals encounter in securing employment, and then to find ways to combat those difficulties and to expand employment opportunities.

Enhancing employment opportunities for the formerly incarcerated and thereby reducing recidivism is a crucial aspect of the administration of criminal justice. Lawyers play central roles in the processes that lead to the imprisonment of individuals. The legal profession should also take a leading role in securing employment for individuals who are released from prison and seek reintegration into society. The New York City Bar Association, with more than 22,000 members from all corners of the legal profession, is uniquely situated to address this subject, particularly when it comes to employment within the legal profession. Accordingly, on the recommendation of the Pipeline Project, the New York City Bar Association appointed this Task Force in August 2007.

President Kamins charged the Task Force not only with identifying the barriers that previously incarcerated persons face when seeking work in the legal sector and elsewhere, but also with determining ways to surmount them. This Report suggests that employment barriers may be heightened by the failure of employers to understand the laws under which they operate, as well as employers’ generalized misperceptions about job applicants with conviction histories. We have also found that legal and other employers seem not to be aware, much less make full use, of workforce intermediaries, many of which provide a wide range of employment-related services, including soft-skills and hard-skills training, job placement and post-placement assistance.

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8. A recent report by a Special Committee of the New York State Bar Association stated that “[r]esearch from both academics and practitioners suggest that the chief factor which influences the reduction of recidivism is an individual’s ability to gain ‘quality employment.’” Special Comm. on Collateral Consequences of Criminal Proceedings, New York State Bar Ass’n, “Re-Entry and Reintegration: The Road to Public Safety,” 59 (May 2006) (hereinafter “Re-Entry and Reintegration”), available at http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11415.

9. The Pipeline Crisis/Winning Strategies Initiative is a consortium of individuals and organizations in the legal, financial services and business communities who are pooling their talents, know-how and resources to help reverse the rising rates of school drop-outs, joblessness and incarceration among young black men, and to increase their representation in the pipeline to higher education and professional endeavors.
We recommend that legal and other employers become familiar with workforce intermediaries and turn to them for support and assistance in identifying and employing qualified applicants. By taking full advantage of workforce intermediaries, an employer can do well and do good—both enlarging the pool of suitable job candidates from which the employer may choose and providing a stabilizing and supportive work environment that will facilitate a former prisoner's reintegration into society. If this Report broadens awareness and appreciation of the range of valuable services offered by workforce intermediaries, and if employers—especially but not only law firms and other legal employers—avail themselves of those services and thereby hire and retain a greater number of qualified persons with conviction histories in positions that afford them the prospect of dignity and self-esteem, our Task Force will have achieved its purpose.

I. THE MAGNITUDE AND MULTIPLICITY OF THE PROBLEM

Barriers to employment faced by formerly incarcerated persons are numerous, varied and formidable. They range from statutory bars to employment in, or licensing required for, certain types of employment to a reluctance to hire based on open or latent fears of threat to safety, dishonesty and liability. Surveys have shown that the formerly incarcerated are less likely to be hired than any other single disadvantaged group (see p. 603, supra), and when they are hired, they are likely to be paid lower wages than employees recruited from other sectors in society.10 Barriers to employment are exacerbated by the difficulties releasees face in obtaining housing and medical care, as discussed below.

The prison population is by definition out of sight, and perhaps it is that invisibility which makes the extent of our country's resort to imprisonment so startling. The New York State Bar Association has observed that one in three New Yorkers passes through the criminal justice system at some point, and nearly six million New Yorkers have conviction histories of felonies, misdemeanors or other violations of law.11 New York is by no means unique in this respect. It has recently been reported that one in every one hundred Americans is currently incarcerated.12 According to the federal Bureau of Justice Statistics, approximately nine percent of all men—

one in every eleven—will spend some time in state or federal prison. The number is much higher for Latinos (16%), and it is highest of all for African-Americans (about 30%).

Young black men are going to prison in record numbers; they are jailed at a higher rate than any other cohort of our population—more than 2.4 times the rate of Latino men and 6.2 times the rate of white males. Indeed, every black male child born in the United States today has a 1-in-3 chance of serving a prison sentence. The social and economic reverberations of these incarceration rates are profound, for more black men serving prison sentences means reduced income, fewer college enrollments and fewer productive careers.

a. Costs to Society
(taxpayers, formerly incarcerated persons and their families)
Like the numbers of the prison population, the costs of crime are enormous. Crime victims may suffer injury, loss of or damage to property, and/or pain and suffering. State and local governments (and, to a limited extent, the federal government) must foot most of the bill for police protection and judicial and legal services, and must bear the costs of maintaining and staffing prisons and jails and making payments under compensation programs. (A small portion of these costs is offset by fees assessed against persons convicted of crimes and in some cases by the restitution they are ordered to pay.)

The imprisoned and their families pay a steep price as well. Many imprisoned adult men are non-custodial fathers who are unable to pay child support or otherwise contribute financially to their families from prison.

14. Id.
16. See id.
18. Non-custodial parents’ child support obligations do not abate when they are incarcerated: incarceration is considered by law to be “voluntary unemployment.” See Re-Entry and Reintegration at 279-81. By the time they are released from prison, these parents have often accrued arrears in the tens of thousands of dollars, and lack means by which to repay them. Id.
b. Housing and Medical Care

Upon release from prison or jail, many individuals are cast adrift. They may be unable to reconnect with their families and resettle in their former neighborhoods, in no small part due to state and federally funded housing authorities’ rigid restrictions on renting to persons with conviction histories. Formerly incarcerated persons are generally prohibited from rejoining their families for certain periods of time when those families reside in public housing, or from renting a public housing apartment on their own.20 As a consequence, and because of the dearth of affordable housing in most New York metropolitan areas, individuals recently released from prison may turn to rooming houses, to temporarily doubling up with friends, and, in many instances, eventually to the streets.

Individuals released from custody frequently lack medical insurance or access to health care providers, including mental health, drug and alcohol treatment programs.21 They may, therefore, be unable to obtain medication or care for chronic conditions such as diabetes, asthma or addiction.

c. Other Obstacles

Given these realities, it is understandable that persons released from


20. The New York City Housing Authority, which receives state and federal funds, prohibits individuals with conviction histories (ranging from non-criminal violation-level convictions through serious felonies) from applying to reside or residing in its project apartments or from receiving Section 8 housing vouchers that defray the cost of renting a private apartment. The prohibition period differs depending on the severity of the offense and begins to run only after the individual is released from parole or probation supervision. While the prohibition may in a very few cases be overcome by a showing that the individual has been “rehabilitated” following commission of the offense at issue, this showing is difficult to make without the assistance of specially trained advocates or attorneys. Re-Entry and Reintegration at 231-39.

21. Legislation passed last session to become effective April 1, 2008 requires that Medicaid coverage be “suspended” during the period of an individual’s incarceration in state or local custody. N.Y. Soc. Servs. L. § 366(1)(13)(d)(1-a) (eff. Apr. 1, 2008). However, the majority of inmates enter jail and prison without Medicaid coverage and so must apply for it when they are released. The application process generally takes three months, and sometimes longer.
custody may be alienated or wanting in either the ability or the motivation to work. It is extremely difficult to seek or to secure a job when living in a shelter with untreated medical needs.

Releasees may also lack basic skills and habits required to obtain—and, equally important, to retain—a job. While some jail and prison facilities provide job readiness programs, these are often not adequate to prepare individuals for a job search in the outside world, and are no longer available to them once they are released.

Finally, formerly incarcerated persons may encounter subtle (and not so subtle) obstacles, including illegal discrimination, when they seek employment. These range from flat bans on hiring persons with conviction histories to de facto refusal to consider such applicants.

II. EMPLOYMENT: ISSUES

Numerous studies have shown that an individual’s likelihood of committing a crime is correlated with his or her work status. A survey conducted by the federal Bureau of Justice Statistics in 1997 disclosed that between 21 and 38 percent of prisoners were unemployed just prior to being incarcerated, depending on their level of educational attainment. Another study reported that nearly half (45%) of a group of surveyed prisoners reported having been fired from a job at least once, and an equally large number had never held a job for as long as two years. According to a third study, the vast majority (89%) of individuals who violate the terms of their probation are unemployed at the time of the violation.

The correlation between the incidence of crime and extent of unemployment is hardly surprising. It stands to reason that when an individual is working within the structure of a job environment and earning a salary capable of meeting at least basic needs, he or she is less likely to commit a crime. That essential point is reinforced by numerous studies show-

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22. These flat bans may violate both the New York State and New York City Human Rights Laws. Employers are required to evaluate each job applicant individually. See Statutory Protections for Employment Applicants, infra pp. 606-610.


25. See Travis at 158.

26. See Independent Committee Report at 6; see also Mukamal.
ing that job instability is associated with higher arrest rates and that as wages go up, crime is reduced. Given the correlation between crime and unemployment, it is ominous that one year after release up to 60% of formerly incarcerated people are unemployed. 27 Why is that number so high?

**a. Objective Barriers to Employment**

The obstacles to employment confronted by an individual released from prison are daunting. Some have already been touched upon: the complexities of family reunion and possible estrangement, lack of appropriate housing leading to unstable living arrangements and, in many cases, eventually to homelessness, and lack of adequate access to affordable health care leading to exacerbation of alcohol and drug abuse and of other physical and mental health problems. These alone would prove formidable obstacles to getting and keeping a job. But there are still other barriers to employment.

Many individuals released from jail or prison return to large urban centers, where there are numerous unskilled residents and relatively few unskilled jobs, such as manufacturing. 28 The effects of this “spatial mismatch” are compounded by the fact that these areas are characterized by little or no job growth. Released inmates return to these areas with diminished social or human capital, lacking the “soft” skills valued by many employers, particularly in service industries, and also lacking contacts to social networks through which job opportunities may be found and pursued. Depending on the length of their imprisonment, their work skills may well have eroded, and their job-related knowledge may have become outdated. 29

Formerly incarcerated individuals are barred by statute from many occupations, particularly those involving vulnerable populations, such as the elderly, the disabled and children, and from obtaining occupational licenses, such as a tow truck license. In some instances, newly released individuals may find themselves barred from the very same jobs they held before being imprisoned, or for which they were trained while in prison, for the number of occupations from which the formerly incarcerated are excluded has been increased by legislation passed after September 11, including the USA PATRIOT Act. One study lists more than

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27. See Independent Committee Report at 3.

28. See Petersilia, supra note 10, at 113.

thirty different occupations from which the formerly incarcerated either are barred or may be rejected by licensing authorities in New York State.30 Some of the restrictions are rationally related to the offense of which the job applicant has been convicted (for example, an individual convicted of certain vehicular offenses may not be employed as a bus driver), but other restrictions make little or no sense (an electrician convicted of a crime may have his license revoked or suspended, and a convicted embezzler may not be hired as an emergency medical technician).31 Many occupational licenses will be granted only to those of “good moral character,” a term widely understood to exclude most persons convicted of a crime.

The impact of the numerous statutory absolute and discretionary bans against employment under New York law is ameliorated by the availability of certificates of relief from disabilities and certificates of good conduct, both of which may be issued by the Board of Parole and the former of which may also be issued by the sentencing court.32 However, certificate applications may take as many as 18 months to process, and may be rejected or denied (in some cases on specious grounds, such as the applicant’s having stated he needs the certificate in order to seek employment generally rather than for a specific job).

In addition to employment bans under New York state law, there are numerous federal law restrictions on employment of individuals with criminal records. Many of these restrictions were put in place after September 11: for example, airport baggage handlers are now required to obtain security seals from the Bureau of Customs and Border Protection, which are denied an applicant convicted of one of a long list of crimes within five years prior to the application “or any longer period that the [Bureau] deems appropriate for the offense in question.”33 As another example, individuals convicted of a criminal offense involving dishonesty may not be employed by or otherwise work in a federally insured depository institution (except, in certain instances, with the written permission of the FDIC or more than ten years after conviction).34

31. See Petersilia, supra note 10, at 114-15. In collaboration with the Legal Action Center, this Association’s Labor and Employment Committee is attempting to prioritize the statutes that, if amended, would have the most beneficial effect in reducing barriers to employment.
b. Employer Reluctance to Hire

Statutory and administrative prohibitions or limitations on employment are at least clear and specific, if not always understandable and defensible. In contrast, several published surveys have demonstrated that the most difficult barriers to employment of the formerly incarcerated are subjective, rooted in a deep-seated and often not wholly rational reluctance to employ a person coming out of prison or jail. Moreover, the presence of a prison record has been found to compound existing racial bias.35

The previously incarcerated are at the very bottom of the hierarchy of potential employees. Consider the affirmative survey responses of a group of 619 employers in the Los Angeles area who were asked whether they would definitely or probably hire an individual falling into one of the following categories:

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current or former welfare recipients</td>
<td>93%</td>
</tr>
<tr>
<td>Recipients of a GED diploma</td>
<td>97%</td>
</tr>
<tr>
<td>Individuals unemployed for a year or more</td>
<td>80%</td>
</tr>
<tr>
<td>Individuals with a spotty employment history</td>
<td>66%</td>
</tr>
<tr>
<td><em>Ex-prisoners</em></td>
<td>21% 36</td>
</tr>
</tbody>
</table>

The modal (most frequent) response of the 619 establishments surveyed was that their willingness to hire previously incarcerated individuals would depend on the nature of the crime of which the individual was convicted; 36.4% of the employers gave that response.37 In contrast, fully 42.6% responded that they definitely (18.5%) or probably (24.1%) would not hire such an individual, regardless of the nature of his or her conviction history.38

The industries most willing to employ formerly incarcerated applicants are those whose workers have little customer contact, like manufacturing and construction.39 Those industries have a preponderance of unskilled or low-skilled jobs, in contrast to establishments in the service sector.

35. See Solomon et al., supra note 19, at 14; see also Paul Von Zielbauser, Study Shows More Job Offers for Ex-Convicts Who Are White, N.Y. Times, June 17, 2005, at B5.


37. Id. at Figure 1.

38. Id.

39. See Solomon et al., supra note 19, at 6, 13.
It is instructive to probe the reasons given by employers for their reluctance or hesitancy to hire an individual with a conviction history. In doing so, we draw upon three surveys conducted in the past seven years:

- the survey just mentioned, which was conducted by telephone in Los Angeles between May 2001 and November 2001;
- four focus groups interviewed in New York City in June 2006, consisting of business owners or individuals with hiring responsibility in companies with more than 5 but fewer than 250 employees; and
- an October 2007 survey conducted by this Task Force of the human resources directors at 21 large New York City-based law firms.

i. The Law Firm Experience

While the Task Force survey results may not be statistically valid, its teachings are nonetheless helpful. Eleven law firms responded to the survey questionnaire (a response rate of 52.4%); three declined to participate; one was unable to provide information because of a recent merger with another law firm; and the remaining six failed to respond. When asked whether they would be willing to hire an individual with a prior criminal history for various employee categories (assuming the individual were qualified), nine answered “yes;” two responded that it “depends.” In response to a question as to why they might be reluctant to hire an individual with a criminal record, four firms cited safety concerns; four pointed to “trust/honesty” issues; two expressed concern with “comfort/fit;” and two were suspicious of an individual’s willingness to volunteer complete information about his or her criminal record.

Three firms noted (not in response to a specific question) that their willingness to hire a previously incarcerated individual would depend on the crime of which the individual had been convicted (the modal response in the 619-establishment survey discussed above). Notably, all eleven re-

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40. The focus groups were conducted by Global Strategy Group, LLC, which was commissioned for that purpose by The Independent Committee on Reentry and Employment (see Independent Committee Report App. A).

41. A tabulation of the results of this survey may be found in App. 3.

42. See App. 3.

43. See id.

44. See id.
sponding law firms stated that they had at some point hired an employee who had been convicted of a crime, although one qualified its response by noting that it had not known of the conviction at the time of employment (and that may have been true of others as well).45

ii. Fears of Negligent Hiring Liability

Many employers are reluctant to hire formerly incarcerated individuals for fear of liability if they hire a person with a criminal record who then commits a criminal or tortious act causing injury to person or property. Although the Task Force survey did not specifically isolate employer fear of liability as a reason for refusal or reluctance to employ former prisoners, other studies suggest that this fear is perhaps the single largest obstacle to employment confronting a person released from prison. Not surprisingly, employer reluctance is greatest in the case of individuals convicted of a crime of violence; employers are five times more likely to hire a drug offender than a perpetrator of violence.46

Employer liability concerns are not without foundation, because New York, like most if not all other states, has accepted the doctrine of negligent hiring, retention and supervision. Under this doctrine, an employer may be held liable for injury inflicted by an employee when the employer knew or should have known that the employee posed a risk of harm to others.

There is reason to believe, though, that many prospective employers, even legal employers, fail to appreciate fully the separate elements that must be established before an employer may be held liable under this theory.

A plaintiff must first establish that the defendant owed him or her a duty of care, that is, that the plaintiff was a member of a class of foreseeable victims.47

Second, the plaintiff must show that the employer either knew or, after making appropriate inquiry under the circumstances, would have known that the employee might commit a wrongful act.48 In practice, actual knowledge may have to be shown, because “courts virtually never

45. See id.
46. See Holzer, Raphael & Stoll at Fig. 3.
47. See Haddock v. City of New York, 75 N.Y.2d 478, 485-86 (1990) (discussing the foreseeability that a park employee with a rape conviction would have unsupervised contact with children in the park).
Third, the plaintiff must establish that the employer’s negligence in hiring or retaining the employee was the proximate cause of the plaintiff’s injury. Thus, for example, the Appellate Division, First Department, has held that an employer who hired as a building porter a person convicted of manslaughter was not liable when the porter many years later abused a child who resided in the building.  

Notably, in negligent hiring and retention cases, both the Court of Appeals and the Appellate Division, First Department, have recognized (in the former’s words) “[t]he importance of employing former inmates, and reintegrating them into society, without risk of absolute liability for those who open doors to them . . . .”

III. EMPLOYMENT: SOLUTIONS

a. Statutory Protections for Job Applicants

Both the federal and New York State governments recognize the reluctance of business establishments to employ individuals released from prison or jail, and both have enacted legislation that protects an employer’s right to make legitimate inquiry concerning a job applicant’s background while at the same time protecting job applicants from discrimination because of a criminal record.

According to a recent report by the American Bar Association Commission on Effective Criminal Sanctions, New York affords greater protection to the formerly incarcerated against discrimination in employment and provides more effective enforcement of those rights than most other states. Under Section 752 of the New York Correction Law (part of Article 23-A of the Law, by which it is commonly known), an employer may not discriminate against a job applicant on the ground of a prior convic-


50. See Ford v. Gildin, 613 N.Y.S.2d 139, 142 (1st Dep’t 1994) (noting that the employee resided in the building, had befriended the child’s mother and became the child’s godfather, and reasoning that “Taylor’s sexual assaults upon the infant plaintiff had nothing to do with his employment as a porter . . .”).

51. Haddock, 75 N.Y.2d at 485; see also Ford, 613 N.Y.S.2d at 141.


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tion—and it is unlawful for a state or local authority to deny a license application on that ground—unless either

(i) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought, or

(ii) the issuance of the license or granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

The Correction Law provides guidance in applying Section 752 by defining "direct relationship" to mean that "the nature of [the] criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought."

Section 753 of the Law provides further guidance in making the Section 752 determination by enumerating relevant factors to be weighed in arriving at that determination. A prospective employer "shall consider" (a) "the public policy of this state...to encourage the licensure and employment of persons previously convicted of one or more criminal offenses;" (b) the "specific duties and responsibilities" of the prospective job; (c) "the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties and responsibilities;" (d) "the time which has elapsed since the occurrence" of the offense; (e) "the age of the person" at time of the offense; (f) the "seriousness of the offense . . .;" (g) any available information regarding the person's "rehabilitation and good conduct;" and (h) the "legitimate interest of the . . . employer in protecting property, and the safety and welfare of specific individuals or the general public." 53

Read together, Sections 752 and 753 clearly require, as the courts have in applying the statute, an individual assessment of each applicant and

53. This Association’s Labor and Employment Law Committee has proposed legislation that would create a rebuttable presumption in favor of an employer sued for negligent hiring or retention if the employer, after learning of an applicant’s or employee’s conviction history, has evaluated the factors enumerated in Section 753 and determined in good faith that such factors militate in favor of hiring of the applicant or retention of the employee. A prior proposal by the Committee, which would have created a statutory affirmative defense to a negligent hiring claim if the employer could demonstrate compliance with Article 23-A, has been noted in a recent report issued by the New York State Commission on Sentencing Reform. New York State Comm’n on Sentencing Reform, The Future of Sentencing in New York State: A Preliminary Proposal for Reform 50 (Oct. 15, 2007).
his or her record; flat bans on employing persons with conviction histo-
ries violate the statute. So long as the employer weighs in good faith the
various factors enumerated in Section 753, the resulting determination
will not be overturned.\textsuperscript{54}

We believe that compliance with Article 23-A should effectively fore-
close liability for negligent hiring.

Article 23A is reinforced by the New York State Human Rights Law,
Section 296(15) of the New York Executive Law and Section 8-107(10)(a)
of the New York City Human Rights Law, which make it unlawful to deny
employment or a license to an individual in violation of Article 23A.\textsuperscript{55}
Prospective employers should also be aware that it is a violation of Sec-
tion 296(16) of the Executive Law to ask a job applicant about, or act
adversely on, any arrest or criminal accusation not then pending that was
resolved favorably to the applicant (or Youthful Offender adjudication
or sealed violation-level conviction).

Under Title VII of the Civil Rights Act of 1964, job applicants are
similarly protected against discrimination in employment. Guidance pro-
vided by the Equal Employment Opportunity Commission admonishes
employers not to exclude job applicants with criminal convictions from
employment unless there is a “business necessity” to do so, taking into ac-
count the gravity of the offense, the time that has elapsed since the convic-
tion and/or completion of the sentence, the nature of the job sought and the
applicant’s employment history.\textsuperscript{56} There is a complementary prohibition

\textsuperscript{54} But if a job applicant is refused employment and the record reveals that a significant
statutory factor was not considered, the employment decision will be overturned. See \textit{Gallo v. State, Office Of Mental Retardation and Developmental Disabilities}, 830 N.Y.S.2d 796,
797 (N.Y. App. Div. 2007) (remanding petition in Article 78 proceeding because of a failure
to consider the “public policy...to encourage the...employment of persons previously
convicted...”); see also \textit{Hollingshed v. The New York State Office of Mental Retardation and
Developmental Disability}, Index No. 6848/07 (N.Y. Sup. Ct. Bronx County, Feb. 11,
2008), reported in N.Y.L.J. Feb. 20, 2008 p. 27, col. 1 (granting relief under Article 78 and
holding that OMRDD had been arbitrary and capricious and had abused its discretion in
rejecting petitioner’s job application given the facts that “[h]is felony convictions are decades
old and they are not related to the job he will be performing...”).

\textsuperscript{55} The New York State Human Rights Law was amended last legislative session to apply not
only to job applicants but also to current job holders. The New York City Human Rights
Commission interprets the New York City Human Rights Law to apply to current job holders
as well.

\textsuperscript{56} See \textit{EEOC Notice No. 9-105, Policy Statement on the Issue of Conviction Records Under
Title VII of the Civil Rights Act of 1964} (Feb. 4, 1987), EEOC Compliance Manual § 604.10 ¶
2089 (CCH).
against denying employment because of an arrest record in the absence of a "business justification" (defined similarly to "business necessity").

The foregoing federal and state law substantive protections are reinforced by the New York State Fair Credit Reporting Act, which prohibits a credit reporting agency from reporting or maintaining information regarding an arrest or criminal charge unless there has been a criminal conviction or the charge is still pending. In addition, the federal Fair Credit Reporting Act requires that where an employer intends to make an adverse employment determination (such as denying a job) based on a "consumer report" (defined include commercially prepared criminal background checks), the employer is required to provide the applicant with a copy of the report prior to making the determination. This requirement gives the applicant an opportunity both to check the report for errors and to explain the circumstances described in the report and whatever rehabilitation she or he has undertaken since any conviction was entered. While no time is specified in the law, it has been suggested that employers do so at least five days prior to denying employment.

One lesson to be drawn from state, local and federal legislation is that fears of some prospective employers that a formerly imprisoned person may renew criminal conduct in the workplace are in fact recognized by government, but only to the extent those fears are rationally related to the characteristics of the job under consideration. Individual consideration of each applicant is the touchstone. While none of these laws requires that an employer hire a person with a conviction history, they do require that prospective employers analyze the nature of the crime committed and how long ago it took place against the backdrop of the applicant's rehabilitation, achievements and fitness for the job in question.

The foregoing review of New York State, New York City and federal law is informative, but does not itself provide a useful guide to human resources directors and others engaged in hiring who obtain commercially a background check that discloses a criminal conviction. A detailed and


58. N.Y. Gen. Bus. L §380-j. Credit reporting agencies thus violate this law if they report or maintain information regarding a conviction for a non-criminal offense, such as a violation. With this understanding, the New York State Office of Court Administration last year stated that it would no longer include information about non-criminal convictions in the records it sells to the public, including to credit reporting agencies.

practical guide has been prepared by the National H.I.R.E. Network. Additionally, the Labor and Employment Committee of this Association is preparing informational brochures for both employers and prison releasees seeking employment.

b. The Role of Workforce Intermediaries

in Overcoming Employer Reluctance to Hire

As we have seen, there are supply-side and demand-side barriers to reentry of prisoners into the workforce after release. These barriers are powerful; neither side of the employment equation can alone overcome them, nor is it practical to expect them to work together to surmount those barriers without assistance. There is, fortunately, a category of organization that can and does successfully interface between the employer and employee and bring them together. These organizations, known as workforce inter-mediaries, provide job readiness and solid skills training, job placement assistance, and continuing support once the applicant is employed. They work with both the applicant and the employer to assure, as best they can, that the placement works. New York City is fortunate to have several such organizations. They include (in alphabetical order):

- the Center for Employment Opportunities,
- ComALERT,
- the Doe Fund,
- the Fortune Society,
- the Osborne Association and
- STRIVE.

Five are not-for-profit organizations; the sixth, ComALERT (the acronym for Community and Law Enforcement Resources Together), was created by the Kings County District Attorney’s Office in 1999 under the personal leadership of District Attorney Charles J. Hynes and is rapidly expanding (in 2006, 365 parolees entered the program; it hopes to serve 1,200 in 2008). Most recently, Manhattan District Attorney Robert M.
Morgenthau last month announced his office’s Fair Chance Initiative, which will work with reentry service providers to address the major issues, including employment, facing individuals recently released from incarceration. 61

As the table on page 614 shows, these intermediary agencies provide a wide array of services including both “soft skills” and “hard skills” training, and some have chosen to partner with others (the Doe Fund’s Ready, Willing and Able program provides transitional employment and housing to participants in ComALERT). What they have in common is that they all contribute in one or more ways to provide connections between, and support for, formerly incarcerated job seekers and prospective employers. 62 In addition to securing employment for former prisoners and assisting employers in identifying job applicants, the workforce intermediaries offer continuing services to assist previously incarcerated employees in gaining additional training and education and developing social skills that will qualify them for advancement in their careers.

How effective are the programs operated by these organizations? That effectiveness can be portrayed anecdotally.

Phillip A. was released from prison in 2006 after serving a sentence for criminal sale of a controlled substance. He entered CEO’s Paid Transitional Employment program, where he learned resumé preparation and interviewing skills. After initially gaining employment as a sheet metal laborer, Phillip was laid off during a business downturn. CEO subsequently placed him in a position as a forklift driver. He has been promoted twice in ten months and now supervises a staff of four.

Derrick S. embarked on a path of addiction and violence that led to imprisonment for more than five years. He found The Doe Fund Ready, Willing & Able (RWA) program in mid2006, participated in its food services vocational training track, received a New York City Department of Health food handler’s certificate, and was hired as a cook by a major national company in 2007. He currently participates in The Doe Fund’s Graduate Services program.

James L. came to CEO following his release after conviction and imprisonment for sale of a controlled substance. After working with a Job Developer and Job Coach, James was hired by a national ice cream chain, which has subsequently promoted him to train new hires.


62. In addition to the direct service providers identified above, there is a valuable information resource on the national H.I.R.E. website http://www.hirenetwork.org.
## THE RECORD

### Providers

<table>
<thead>
<tr>
<th>Services for Participants: EMPLOYMENT</th>
<th>DOM FUND</th>
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<tbody>
<tr>
<td>Pre-Employment/Soft Skills Training</td>
<td>☑️</td>
</tr>
<tr>
<td>Transitional Employment</td>
<td>☑️</td>
</tr>
<tr>
<td>Hard Skills Training (not below)</td>
<td>☑️</td>
</tr>
<tr>
<td>Job Placement Assistance</td>
<td>☑️</td>
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<tr>
<td>Development/Advancement Services</td>
<td>☑️</td>
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<tr>
<td>Post Placement Support/Follow-Up</td>
<td>☑️</td>
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### Services for Participants: NON-EMPLOYMENT

<table>
<thead>
<tr>
<th>Services for Participants: NON-EMPLOYMENT</th>
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</thead>
<tbody>
<tr>
<td>Management/Counseling/Mentoring Services</td>
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<tr>
<td>Mental Health Services</td>
</tr>
<tr>
<td>GED/Continuing - Higher Education</td>
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<tr>
<td>Computer Courses</td>
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<tr>
<td>Financial Management Assistance</td>
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<tr>
<td>Substance Abuse Services</td>
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<tr>
<td>Housing Placement Assistance</td>
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<tr>
<td>Housing (On-Site)</td>
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<tr>
<td>Legal Services</td>
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<tr>
<td>Child Support/Advocate</td>
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<tr>
<td>Health Services/Counseling</td>
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<tr>
<td>Family Services</td>
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### Services for Employers

<table>
<thead>
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<th>Services for Employers</th>
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<tbody>
<tr>
<td>Federal Bonding</td>
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</table>
Rudolph W. was recruited into The Doe Fund’s RWA program as a trainee just before his release from prison in December 2005. After a year in the program, following 25 years of drug addiction, imprisonment and homelessness, Rudolph was hired by a private company and earned a salary increase after only a few weeks of employment.

The effectiveness of the workforce intermediary programs can also be measured statistically, although caution must be taken in using the data because individuals may avail themselves of differing services offered by different organizations—or even within the same organization. With that qualification, an October 2007 evaluation report on the ComALERT prisoner reentry program noted that ComALERT graduates were nearly four times more likely to be employed than a comparison group with similar criminal history. Indeed, ComALERT graduates during the evaluation period (October 1, 2004-December 31, 2006) who participated in the Ready, Willing and Able program of the Doe Fund exhibited an especially high 90% rate of employment, and only 5% of Ready, Willing and Able Criminal Justice graduates were rearrested within one year of graduation. In a separate study of the Center for Employment Opportunities’ reentry population, using a random assignment research methodology, fewer than 1% of the people entering CEO were sent back to prison for a new crime during the year after entering the program, and only 9.1% were reincarcerated for technical parole violations and other non-criminal activity.

With the training and support these organizations offer—free of charge—it would be expected that employers would frequently turn to them for help with hiring and retention. However, this is not the case. Why is this so? A previously cited recent survey of several hundred business establishments in New York City concluded that “employers are virtually unaware of staffing resources in the form of intermediary organizations and transitional programs.” Efforts, therefore, need to be made to alert employers—large and small, within and beyond the legal community—to the existence of these organizations and to the benefits they

64. Id. at 60.
65. Id.
provide. Similarly, workforce development organizations should be encouraged to seek more connections with legal and other employers.

c. Additional Employer Incentives

Recognizing that employers face certain real and perceived obstacles in hiring persons with conviction histories, the federal and New York State governments have created certain incentives in order to increase employer willingness to hire such persons. The Federal Bonding Program of the Department of Labor issues fidelity bonds to protect employers against theft, embezzlement or forgery by covered employees. The program was created because many private agencies will not bond job applicants with a criminal record. The employer need not pay any premium. Coverage is usually up to $5,000 with no deductible, but may be increased up to $25,000; coverage is extended to any at-risk applicant, including individuals with criminal records. The bonds are issued by a local agency certified by the Federal Bonding Program.

Another incentive to employment of the formerly incarcerated is the Work Opportunity Tax Credit authorized by the Small Business Job Protection Act of 1996, which has been subsequently reauthorized and most recently extended through August 31, 2011. This federal tax credit reduces an employer’s federal income tax liability by as much as $2,400 per qualified new worker. Among the categories of qualifying new hires are persons convicted of felonies who are members of low-income families. The individuals must have been hired not more than one year after their conviction or release from prison.

Finally, the New York State Office of Temporary and Disability Assistance operates a wage subsidy program for Family Assistance recipients who have been unable to find or retain employment and other families with household incomes less than 200% of the federal poverty level. Under this program, nonprofit community-based organizations place individuals in wage-subsidized jobs which the organizations develop with employers. Most current providers use a three- or six-month subsidy period. Employers receive 80% of wages and can claim the remaining 20% if the employee is retained for 90 days.

68. See Re-entry Policy Council Report at 296.
IV. RECOMMENDATIONS

Our study of employment opportunities for the formerly incarcerated leads us to make the following six specific recommendations:

- In accordance with the stated legislative policy “to encourage the licensure and employment of persons previously convicted of one or more criminal offenses,” law firms and other legal employers should be as willing to interview and hire such persons as any other individuals possessing comparable job skills.
- Consistent with the quoted legislative policy, law firms and other legal employers should provide the same opportunities for advancement to individuals released from prison as they do to other employees possessing comparable job skills.
- Law firms and other legal employers should take full advantage of the job placement and post-placement services provided by workforce intermediaries to identify, employ and provide supportive services to individuals released from prison or jail.
- All appropriate steps should be taken to publicize broadly the availability of workforce intermediaries, the variety of services they provide and the success they have achieved in placing formerly incarcerated individuals in productive and remunerative employment.
- Law firms and other legal employers should encourage suppliers and organizations to which they outsource functions such as food service to employ and promote formerly incarcerated persons and to utilize for that purpose the services of workforce intermediaries.
- All statutory and regulatory restrictions and disqualifications on licensure and employment based upon criminal convictions should be reviewed and modified, so that denial of employment or licensure is not automatic, but rather requires an individualized determination that (i) there is a direct relationship between the conduct constituting the offense and the license or job sought, or (ii) granting the license or employment in the job would pose an unreasonable risk to individual or public safety or property.

The foregoing recommendations are addressed in the first instance to law firms and other legal employers. But it bears emphasis that the recommendations are equally applicable to all other establishments with hiring needs in both the private and the public sectors. The effects of the
failure to reverse the policies that have swollen our prison population and the failure to reintegrate into society individuals released from prison extend far beyond the legal profession.

Nevertheless, it is appropriate that lawyers “lead the way.” To that end, the Association is committed to enhancing the employment opportunities for the previously incarcerated. In furtherance of that commitment, the Association will collaborate with its members, bar leaders, legal and other employers and workforce intermediaries to implement the recommendations of this report. The Association’s reentry project director will consult with law firms and corporate law departments that request assistance in this area, and the Association will encourage the development of opportunities for individuals released from prison to enhance interviewing skills and meet with prospective employers through such approaches as mock interviews and job fairs.

**CONCLUSION**

Providing secure employment with prospects for advancement to the formerly incarcerated will reduce recidivism, reduce the costs of maintaining a huge prison population (thereby lowering taxes or reducing the pressure to raise them), strengthen family ties, and enhance public safety—all of which are important social objectives. Moreover, there is an economic value to having a diverse, inclusive workforce, reflecting the self-evident fact that needed skill sets exist within groups of employees of diverse backgrounds.

As we have seen, employment is not easily found by the formerly incarcerated, for there are numerous, significant hurdles, some caused by prejudice and misinformation and others by law or social circumstances. To overcome these hurdles requires a “matchmaking” that can be brokered and supported by workforce intermediaries. These groups not only assist the prospective applicant with appropriate training and support, but also assist the prospective employer with opportunity for feedback and help if the employee requires it. The Task Force believes that the services of these groups are fundamental to shattering employers’ misconceptions about the formerly incarcerated and to helping the prospective employees both cross the hiring threshold and remain in work that provides financial support and fosters reintegration into society.

*March 2008*
Task Force on Employment
Opportunities for the Previously Incarcerated

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Reaffirming the U.S. Commitment to Common Article 3 of the Geneva Conventions

An Examination of the Adverse Impact of the Military Commissions Act and Executive Order Governing CIA Interrogations

The Task Force on National Security and the Rule of Law

The United States has a long and honorable tradition of humane treatment of detainees in armed conflict stretching back to the Revolutionary War. That tradition has been shattered by revelations of brutal treatment of detainees in the wars in Afghanistan and Iraq and in the “global war on terror.” This departure from our tradition has been attributed, at least in part, to a decision made by the President in February, 2002, interpreting the Geneva Conventions, including the minimal humanitarian standards of Article 3 common to all four Conventions (“Common Article 3”), as inapplicable to suspected members of Al Qaeda and the Taliban captured in Afghanistan.

Four years later, the Supreme Court held that Common Article 3 did apply to armed conflicts with non-state entities, and in that case, to an alleged member of Al Qaeda captured in Afghanistan. The Administration immediately recognized that the Court’s interpretation of Common
Article 3 made its requirements applicable to the treatment of detainees, including techniques used to interrogate them.

This Report, prepared by the Task Force on National Security and the Rule of Law of the New York City Bar Association (the “Association”), evaluates the Administration’s effort to interpret its obligations under Common Article 3 through the enactment of the Military Commissions Act of 2006 (“MCA”) and the issuance of the Executive Order providing “an Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency” (the “Executive Order”). The Report concludes that the MCA and the Executive Order appear to be inconsistent with U.S. obligations under Common Article 3 and may undermine compliance with those obligations. The Report makes recommendations that will help assure that the United States fully complies with Common Article 3 and restores its moral leadership in the world community.

EXECUTIVE SUMMARY AND INTRODUCTION

Common Article 3 of the Geneva Conventions provides a minimal humanitarian standard for treatment of detainees in armed conflicts, among other things, prohibiting torture and cruel and degrading treatment. In 2006, the United States Supreme Court rejected the Bush Administration’s position, under which it had operated since February, 2002, that Common Article 3 did not apply to members of Al Qaeda and the Taliban. The Court held that Common Article 3 did apply to an alleged member of Al Qaeda captured in Afghanistan and detained at Guantanamo and to other detainees in armed conflicts involving non-state parties.

This decision was of enormous significance. Other treaties and do-

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mestic laws prohibit U.S. officials from engaging in torture and cruel, inhuman and degrading treatment including the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment ("CAT"), the U.S. Anti-Torture Statute, 5 and the Detainee Treatment Act of 2005 6 ("DTA"), but the Administration has given these treaties and laws restrictive interpretations, which have been used to authorize interrogation practices that would violate Common Article 3’s prohibition of torture and cruel, humiliating and degrading treatment. Thus, the Department of Justice’s Office of Legal Counsel ("OLC") has so narrowly interpreted U.S. obligations under CAT and the Anti-Torture Statute that it has approved the CIA’s “enhanced interrogation techniques,” which reportedly include methods, such as waterboarding, which are widely considered to be cruel, inhuman and degrading treatment, if not torture. The DTA, like U.S. reservations to CAT, defines cruel, inhuman and degrading treatment as conduct prohibited by the Fifth, Eighth and Fourteenth Amendments, an uncertain and ambiguous standard, which OLC has interpreted to permit abusive interrogation practices to be balanced against the need to obtain information to protect national security. Significantly, DTA provisions incorporating explicit prohibitions of waterboarding and other brutal interrogation techniques specified in the Army Field Manual apply only to Department of Defense personnel and not to the CIA. Moreover, the DTA has no enforcement mechanism, and it purports to deny to the most likely victims of brutal interrogation methods any resort to the courts for protection. Hence, like CAT and the Anti-Torture Statute, the DTA is apparently considered no obstacle to the CIA’s “enhanced interrogation” program.

The Supreme Court’s conclusion that Common Article 3 is applicable to members of Al Qaeda or other non-State persons in an armed conflict, however, created an entirely different situation. Under the War Crimes Act, 7 as it read at the time, any violation of Common Article 3’s straightforward, unqualified prohibitions of torture, and cruel or humiliating and degrading treatment was a federal crime. The Administration acknowledged the special significance of the Court’s interpretation of Common Article 3 as applying to members of Al Qaeda, declaring that it exposed

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CIA personnel employing the “enhanced interrogation techniques” to prosecution under the War Crimes Act and suspending that program until Congress enacted legislation “clarifying” Common Article 3.

In September 2006, Congress responded by enacting the MCA, which, among other things, amended the War Crimes Act to limit the violations of Common Article 3 constituting a crime to a list of narrowly defined “grave breaches” and delegating to the President the authority to define violations of Common Article 3 other than “grave breaches.” Thereafter, the President issued an Executive Order providing “an Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency.” This Report concludes that the MCA and the Executive Order are not adequate to assure U.S. compliance with its obligations under Common Article 3. The MCA’s complicated and ambiguous definitions of cruel or inhuman treatment constituting “grave breaches” are virtually indistinguishable from the definition of torture under the Anti-Torture Statute and are open to interpretations that would penalize only the most barbaric treatment. While the MCA also purports to prohibit cruel, inhuman and degrading treatment not rising to the level of “grave breaches,” it gives the same uncertain and ambiguous definition contained in the DTA and provides no means to enforce this prohibition. The MCA delegates to the President the authority to proscribe conduct violative of the Geneva Conventions not amounting to “grave breaches” and to provide for compliance. The Executive Order, issued pursuant to this authority, for the most part, however, does little more than incorporate by reference the provisions of the MCA, DTA and Anti-Torture Statute. It does provide a definition of humiliating and degrading treatment. But that definition is so ambiguous that it can be interpreted to permit even the most humiliating and degrading treatment, if it is motivated by a need to obtain information to protect national security. Not surprisingly, recent testimony before Congress by DOJ and intelligence officials indicates that the Administration may still believe that, at least in some circumstances, even waterboarding could be lawfully employed, notwithstanding U.S. obligations under Common Article 3.10

10. See infra notes 73 and 74.
The United States’ treatment of detainees following the attacks of September 11, 2001 has violated our Nation’s traditions of decency and humanity and severely damaged our reputation throughout the world. Strict compliance with Common Article 3’s standards for the treatment of detainees is one important means of restoring our values and our international reputation. The MCA and the Executive Order are not adequate to ensure such compliance. We therefore make the following recommendations:

1. The provisions of the MCA amending the War Crimes Act and limiting its application to “grave breaches” of Common Article 3 as defined by the MCA should be repealed. The War Crimes Act should be restored to read as it did prior to the enactment of the MCA, making criminal all violations of Common Article 3. We submit that attempts to further define cruel or inhuman treatment or “humiliating” and “degrading” treatment are unnecessary. The definitions supplied by Congress in the MCA and by the President in the Executive Order have merely introduced ambiguities that offer opportunities to evade the commonly understood meanings of Common Article 3’s humanitarian standards. Any attempt to devise general rules that further define Common Article 3’s standards are likely to have that result, inviting a search for loopholes that permit an evasion of its prohibitions or the creation of new forms of cruel and degrading treatment that are not captured by a more specific rule.

Nor are we persuaded by the claim that Common Article 3’s standards expose interrogators to prosecutions for crimes they could not have anticipated: prosecutors are unlikely to seek criminal penalties except in cases where there is little question that the practices involved amount to cruel, humiliating or degrading treatment. At the same time, any risk that Common Article 3’s standards may cause interrogators to err unduly on the side of refraining from practices of uncertain legality is offset by the need to discourage abuses which come too close to the line of prohibited conduct or efforts to find loopholes that permit conduct which violates international humanitarian standards. By insisting on adherence to the plain terms of Common Article 3, rather than some legislative or Executive substitute definition of those terms, we send a signal to the world of our renewed commitment to the Geneva Conventions. We therefore recommend that the Executive Order be withdrawn, and that the DTA be amended to make the Army Field Manual applicable to all government personnel. Given past history of OLC opinions authorizing abusive treatment of detainees and recent testimony before Congress, we believe it would be appropriate by way of example only and without in any way limiting the terms of Common Article 3, to list specific practices, such as
those explicitly prohibited by the Army Field Manual, as violations of Common Article 3 and the War Crimes Act.

2. The MCA's purported delegation of authority to the President to define the conduct prohibited by Common Article 3 beyond “grave breaches” should be stricken. The President’s authority to interpret treaties in the course of executing and enforcing them and the deference to be accorded such interpretations is already well-established. To the extent the MCA may be read to provide greater authority or force to such interpretations, it interferes with the judiciary’s ultimate authority to interpret treaties and violates separation of powers principles.

3. Section 6(a) of the MCA, which bars courts from using foreign or international sources of law in interpreting the War Crimes Act, and Sections 5(a) and 3, which preclude litigants from invoking the Geneva Conventions as a source of rights in actions against government officials, should be repealed. These provisions undermine confidence in the United States’ commitment to its obligations under Common Article 3 and deprive the courts of accepted sources for interpretation of U.S. treaty obligations. Foreign and international decisions interpreting the language of Common Article 3 are established sources for understanding the meaning attached to it by other signatories to the Geneva Conventions, and the inability of victims of violations of Common Article 3 to invoke it as a source of rights in actions against responsible government officials renders Common Article 3 effectively unenforceable.

For similar reasons, we also recommend repeal of Section 7(a)(2) of the MCA, which bars courts from entertaining actions by certain alien detainees alleged to be “enemy combatants” relating, among other things, to their treatment or conditions of confinement, at least insofar as this provision bars suits for equitable relief protecting such detainees from treatment or conditions that violate Common Article 3 or other applicable treaties or laws.11

4. The question of whether victims of violations of Common Article 3 should be permitted to bring damage actions against responsible U.S. officials seeking monetary compensation is more difficult. There are con-

11. In Boumediene v. Bush, No. 06-1195, 553 U.S. ___ (2008), the Supreme Court held Sections 7’s bar to habeas corpus actions by such Guantanamo detainees a violation of the Suspension Clause of the Constitution. The Court, however, found it unnecessary to address the “reach of [habeas] with respect to claims of treatment or conditions of confinement.” Id., slip op. at 64. As we discuss later, there is a Circuit split on whether such claims can be addressed in habeas or only under the civil rights laws. Congress should make it clear that such an action, at least for equitable relief, is available, no matter how designated.
cerns that the threat of private damage actions against officials authorizing or conducting interrogations might chill legitimate efforts to obtain information needed to protect the nation against terrorism. Courts have consistently rejected such claims, without considering their merits, based on the state secrets privilege, Westfall Act immunity, qualified immunity and other legal grounds. This has resulted in the dismissal of suits, such as those brought by Maher Arar and Khaled El Masri, that appear to be well founded. A Canadian government investigation confirmed the accuracy of Mr. Arar's claims that Canadian and U.S. officials were responsible for his wrongful detention and deportation to, and torture in, Syria. Canada subsequently awarded him approximately $9 million in compensation. A Council of Europe investigation confirmed as true Mr. El Masri's claims that the CIA and others conspired to abduct him to Afghanistan, where he was subjected to abusive interrogation and mistreatment. A German criminal investigation reached similar conclusions and issued indictments of CIA agents believed to be involved. Nevertheless, both Mr. Arar's and Mr. El Masri's claims were summarily dismissed by U.S. courts without ever reaching their merits.

We have concluded that some system of compensation is necessary, both to compensate victims of torture or cruel, inhuman and degrading treatment and to deter violations of Common Article 3. Recognizing that Congress is unlikely to accept private damage actions against individual officials and fears that private damage actions might be subject to misuse, we propose the establishment of an administrative tribunal that has the

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power to award compensation by the United States to persons who establish that they were victims of violations of Common Article 3. Protection against misuse of this process can be implemented through heightened pleading requirements and penalties for the filing of objectively groundless claims. Problems created by classified evidence and state secrets can be addressed in a manner similar to that proposed in Senate and House bills seeking to regulate the use of the state secrets privilege.18

DISCUSSION

BACKGROUND

Following the attacks of September 11, 2001 and the U.S. invasion of Afghanistan, the United States began detaining members of Al Qaeda and the Taliban captured on the battlefield and other suspected members of Al Qaeda or allegedly affiliated groups captured elsewhere in the so-called “war on terror.” The Bush Administration’s views of the requirements governing its treatment of these detainees has been a subject of criticism from the outset and continues to this day.

Common Article 3 of the Geneva Conventions and the War Crimes Act

The treatment of detainees in armed conflict is governed by the four Geneva Conventions of 1949. In a statement released by the White House in February 2002, however, President Bush took the position that, although the U.S. would treat members of Al Qaeda “humanely” and “to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949,” the Geneva Conventions had no application to members of Al Qaeda captured by the U.S. in Afghanistan “and elsewhere.”19 Of special relevance here, the Administration rejected the widely-held view that even if the protections for prisoners of war did not apply to members of Al Qaeda, at the very least, Common Article 3 of the Geneva Conventions applied to them.

Common Article 3 provides in pertinent part that detainees “shall in all circumstances be treated humanely” and prohibits the following acts “at any time and in any place whatsoever”:

(a) violence to life and person, in particular murder of all kinds,

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mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.20

Unlike other provisions of the Geneva Conventions, which govern armed conflicts between nation-states, Common Article 3 applies to armed conflicts “not of an international character.”21 Many commentators interpreted this to mean simply conflicts not between nations. President Bush, however, maintained that Common Article 3 did not apply to Al Qaeda or the Taliban because, he declared, they are engaged in conflicts “international in scope” and hence not conflicts “not of an international character.”22 Accordingly, while the War Crimes Act, as amended in 1997, made all violations of Common Article 3 a crime under U.S. law, under the President’s interpretation, the War Crimes Act had no application to the treatment of suspected members of Al Qaeda or other groups allegedly affiliated with Al Qaeda.

The United States, however, was, and continues to be, bound by other treaties, and domestic laws, prohibiting torture and cruel, inhuman and degrading treatment, as discussed below.23

The Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment

Foremost among these treaties is CAT.24 CAT requires that “each State Party” “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” and “undertake to prevent in any territory under its jurisdiction other acts of

21. Id.
22. Supra note 19.
24. Supra note 4.
cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”25 CAT defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.26

CAT also specifically provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”27

The United States ratified CAT, subject to certain understandings and reservations that differed from the language of CAT. Thus, it attached an understanding defining torture as an act:

*specifically intended* to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to *prolonged mental harm* caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.28

25. Id.
26. Id.
27. Id.
The United States also attached a reservation limiting its obligation to refrain from cruel, inhuman or degrading treatment to “cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”

The U.S. Anti-Torture Statute
To fulfill its obligation under CAT to enact laws criminalizing torture, the United States enacted the Anti-Torture Statute, 18 U.S.C. § 2340, which provides for the prosecution of a U.S. national or anyone present in the United States who, while outside the U.S., commits or attempts to commit torture. The statute’s definition of torture reflects the U.S. “understanding” that varies from the language of CAT in that it defines torture as an “act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” Severe mental pain or suffering is defined by the statute as “the prolonged mental harm caused by or resulting from . . . the intentional infliction or threatened infliction of severe physical pain or suffering.” Severe physical pain or suffering is not further defined.

The Detainee Treatment Act
In December, 2005, Congress also enacted the DTA. The DTA provides:

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman or degrading treatment or punishment.

The DTA defines cruel, inhuman and degrading treatment as:

the cruel, unusual, and inhuman treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to [CAT].

29. Id.
31. Id. § 2340(2).
The DTA also provides that:

No person in the custody or under the effective control of the Department of Defense . . . shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.34

As it then read, the Army Field Manual on Intelligence Interrogation specifically prohibited “acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.”35 According to the manual, “examples of physical torture include—Electric shock. Infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape). Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time. Food deprivation. Any form of beating.”36 The Field Manual on Intelligence Interrogation further instructed military interrogators to consider the following rule in attempting to determine if a contemplated approach was permissible: “If your contemplated actions were perpetrated by the enemy against US PWs, you would believe such actions violate international or US law.”37

U.S. Interpretations of Governing Interrogation Standards

These treaties and laws, however, were narrowly interpreted by the Department of Justice (“DOJ”)’s Office of Legal Counsel (“OLC”), which gave opinions reportedly authorizing conduct widely considered torture or cruel, inhuman and degrading treatment. Disclosures of documents following the shocking revelations in 2004 concerning the treatment of detainees at Abu Ghraib indicated that the Administration was authorizing harsh interrogations practices at Abu Ghraib, Guantanamo, Bagram Airbase in Afghanistan and elsewhere.38 An August 2002 memorandum

36. Id.
37. Id.
from OLC gave an astonishingly narrow definition of torture, under U.S. reservations to CAT and as used in the Anti-Torture Statute, limiting torture to acts specifically intended to cause pain so severe that it accompanied “death or organ failure.”

Moreover, the memorandum, emphasizing the requirement of “specific intent” used in the U.S. reservation to CAT and the Anti-Torture Statute, argues that “even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.” While the memorandum recognizes that, as a practical matter, a jury could infer from the circumstances that the defendant did have the required specific intent, as shown later in this Report, the concept that ‘the objective’ of securing information to protect national security could justify conduct known to cause severe pain shows up repeatedly in Administration officials’ attempts to defend the legality of brutal interrogation techniques.

A very recently disclosed memorandum prepared in March 2003 gave an equally narrow definition of cruel, inhuman and degrading treatment. In that memo, OLC opined that under the U.S. reservation to CAT limiting cruel, inhuman or degrading treatment, the Eighth Amendment prohibition on cruel and unusual punishment turned not only on the severity of the treatment, but on the subjective question of whether the treatment was administered maliciously or sadistically and without any other purpose than to cause harm or whether it was administered to protect a legitimate government interest—in the case of interrogation methods, to obtain information to protect national security. It read the Due Process Clauses of the Fifth and Fourteenth Amendments to prohibit only con-
duct that “shocks the conscience.” Although recognizing that this standard “is not pellucid,” here too the opinion concludes that whether the conduct “shocks the conscience” turns in part on whether it is without justification. It also opines that such conduct must be undertaken in conscious disregard of the risk to health and safety of the prisoner; that it does not preclude “a shove or a slap as part of an interrogation”; and that the detainee must sustain some sort of injury, e.g., physical injury or severe mental distress. Moreover, both the August 2002 and March 2003 memos opined more broadly that the President could overrule any legal restriction on torture or other interrogation practices if he considered it necessary in the exercise of his war powers as Commander in Chief.

Against this background, in December 2002 and in March 2003, the Secretary of Defense and a “working group” organized by the Secretary prepared a list of harsh interrogation tactics first for use at Guantanamo and later for use at Abu Ghraib that included hooding, exploitation of phobias, stress positions, and the deprivation of light and auditory stimuli.

Disclosures were also made about the CIA’s “enhanced interrogation” program. Members of President Bush’s cabinet, including Vice President Dick Cheney, Condoleezza Rice and Donald Rumsfeld, reportedly conducted top secret meetings in the White House, with the President’s approval, to discuss and approve specifically the “enhanced” interrogation

43. Id. at 68.
44. Id.
45. See supra note 39, at 200-07; supra note 42, at 4-19.
techniques to be employed by the CIA against top Al Qaeda suspects. Although the details of the methods used in the CIA’s “enhanced interrogation” program are classified, in the past the program allegedly included techniques such as waterboarding, stress positions, sensory deprivation, sleep deprivation and prolonged isolation. Several Judge Advocates General, among others, have publicly stated that these techniques amount to torture and cruel or inhuman treatment and constitute violations of Common Article 3.

In a December 2004 legal opinion, the Justice Department withdrew its August 2002 opinion and publicly declared torture to be “abhorrent.” Nevertheless, a footnote to that opinion states:

While we have identified various disagreements with the August, 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe any of their conclusions would be different under the standards set forth in this memorandum.

Moreover, the memorandum’s entire thrust is to narrowly limit the meaning of torture. It also expressly evades the question of whether the President’s powers would enable him to override prohibitions on torture, and it makes no mention of the more sweeping March, 2003 Yoo memorandum or its discussion of the meaning of cruel, inhuman and degrading.

Finally, notwithstanding the December, 2004 memorandum, the New York Times recently reported that in February 2005, the Justice Department issued a secret opinion which endorsed as lawful the harshest interrogation techniques ever used by the CIA. According to officials, that


52. Id. at 2, n. 8.

opinion provided explicit authorization to employ a combination of painful physical and psychological tactics upon terrorist suspect detainees, including head-slapping, waterboarding and exposure to frigid temperatures.\textsuperscript{54} These officials also claimed that later in 2005, the Justice Department issued another secret opinion, declaring that none of the CIA “enhanced” interrogation methods violated the “cruel, inhuman and degrading” standard, including, in some circumstances, waterboarding, if the suspect was believed to possess crucial intelligence about a planned terrorist attack.\textsuperscript{55}

The Hamdan Decision

In June, 2006, the Supreme Court, in \textit{Hamdan v. Rumsfeld},\textsuperscript{56} rejected the Bush Administration’s interpretation of Common Article 3, initially set forth in the President’s February, 2002 declaration. \textit{Hamdan} involved a challenge to the President’s authority to create military commissions to try detainees for war crimes. In the course of deciding that such authority was lacking, the Court held that Common Article 3’s application to “conflicts not of an international nature” referred to armed conflicts not between nations, and that accordingly, Common Article 3 did apply to a suspected member of Al Qaeda captured in Afghanistan.\textsuperscript{57}

This decision had an enormous impact beyond the specific issue of trial by military commission. As noted, the War Crimes Act, as it then read, made \textit{all} violations of Common Article 3 a federal crime. The Court’s interpretation of Common Article 3 meant that Common Article 3’s prohibitions on torture and cruel, inhuman and degrading treatment and outrages against personal dignity applied to the treatment of suspected members of Al Qaeda and that, therefore, violations of those prohibitions could be prosecuted under the War Crimes Act as it then read.

Common Article 3’s prohibition on torture is virtually universally considered to apply to the waterboarding of detainees,\textsuperscript{58} a practice the

\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} 126 S. Ct. 2749 (2006).
\textsuperscript{57} The Court did not decide the question of whether Common Article 3 was self-executing. It found it unnecessary to address that question because it concluded that the President’s creation of military commissions conflicted with Congress’ direction that military commissions, unless authorized by statute must be authorized by “the law of war,” which includes Common Article 3 of the Geneva Conventions. It found that the military commissions created by the President did not conform to Common Article 3 or to the applicable statute, the Uniform Code of Military Justice. 126 S. Ct. at 2789-2798.
\textsuperscript{58} The United States Department of State itself has characterized waterboarding as torture.
United States has admitted it has applied during the “global war on terror,” and the prohibition on torture could well apply to other brutal practices undertaken since 2002. Some of the practices authorized for use at Guantanamo and Abu Ghraib by the Defense Department and the military and reportedly included in the CIA’s “enhanced interrogation” program, such as sleep deprivation, stress positions, and exposure to extremes of heat and cold have been held to be cruel, inhuman and degrading treatment by international courts and agencies. Moreover, while Hamdan involved the application of Common Article 3 to a detainee captured in the Afghanistan war, many commentators consider it equally applicable to the U.S. treatment of detainees who have been captured far from Afghanistan and outside any conventional war zone and who are being held indefinitely as “unlawful enemy combatants” in the so-called “war on terror.” Without conceding that the “war on terror” is a “war” that is governed by law of war principles, the Association does agree that so long as the U.S. detains persons based on law of war doctrines, its treatment of those detainees should be governed by Common Article 3.

The Government’s Response to Hamdan

Following the Supreme Court’s decision in Hamdan, in September 2006, the U.S. Department of Defense released a revised Field Manual for Human Intelligence Collector Operations (the “Revised Field Manual”) to provide guidance to armed services personnel in conducting lawful inter-

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59. See, e.g., The Republic of Ireland v. The United Kingdom, (1979-80) 2 E.H.R.R. 25 (finding methods of sensory deprivation and disorientation referred to as the “five techniques”—including, wall-standing, hooding, subjecting to noise, deprivation of sleep, and deprivation of food and drink—constituted inhuman and degrading treatment); Judgment Concerning The Legality Of The General Security Service’s Interrogation Methods, 38 I.L.M. 1471 (Sept. 9, 1999) (concluding that shaking, the “frog crouch,” the “shabach” position, cuffing, causing pain, hooding, the consecutive playing of powerful loud music and the intentional deprivation of sleep for a prolonged period of time are prohibited interrogation methods).

rogations. The Revised Field Manual provides for compliance with Common Article 3 in its entirety and specifically lists interrogation methods, that are forbidden, including:

- forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee; using duct tape over the eyes; applying beatings, electric shock, burns, or other forms of physical pain; waterboarding; using military working dogs; inducing hypothermia or heat injury; conducting mock executions; or depriving the detainee of necessary food, water, or medical care.61

Much like the earlier Field Manual, the revised Field Manual also instructs armed services personnel to consider the “golden rule” in determining whether a contemplated approach is permissible, namely whether he or she would consider the interrogation technique to be abusive if used by the enemy against a fellow soldier.62

President Bush, however, expressed concern that the language of Common Article 3 was too vague a standard to provide guidance to CIA interrogators and that certain practices engaged in by the CIA in its “enhanced interrogation” program might retroactively be subject to prosecution under the War Crimes Act.63 The President asked Congress to provide more specific guidance to the CIA. Congress responded in September 2006 in the course of enacting the MCA.

In the MCA, Congress amended the War Crimes Act to narrow the conduct that may be prosecuted thereunder as violations of Common Article 3 to certain specified “grave breaches,” namely: torture; cruel or

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62. Revised Field Manual 2-22.3.

63. White House Press Release: President Discusses Creation of Military Commissions to Try Suspected Terrorists, September 6, 2006, available at http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html (“[P]rovisions of Common Article Three are vague and undefined, and each could be interpreted in different ways by American or foreign judges. And some believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act—simply for doing their jobs in a thorough and professional way.”)
inhuman treatment; performing biological experiments; murder; mutilation or maiming; intentionally causing serious bodily injury; rape; sexual assault or abuse; and taking hostages.\textsuperscript{64} As we discuss below, grave breaches involving “cruel or inhuman treatment” and intentionally causing “serious bodily injury” are given such narrow definitions that they are virtually indistinguishable from torture. Beyond the listed “grave breaches,” Congress gave the President the authority to interpret Common Article 3 and to issue regulations defining conduct that Common Article 3 forbids.\textsuperscript{65} These amendments to the War Crimes Act are made retroactive to November 26, 1997, the date the War Crimes Act was amended to criminalize all violations of Common Article 3.\textsuperscript{66} Thus, past violations of the pre-MCA War Crimes Act predicated on Common Article 3 are immunized unless the conduct fell within the MCA’s narrow definition of “grave breaches.” Congress also barred the courts from considering foreign or international sources of law in interpreting “grave breaches” under the War Crimes Act\textsuperscript{67} and barred resort to the Geneva Conventions as a source of rights in actions against government officials.\textsuperscript{68}

In accordance with the interpretive authority granted to the President in the MCA, on July 20, 2007, the President issued the Executive Order, which applies to detainees in CIA (not military) custody, purports to be “authoritative for all purposes as a matter of United States law, including satisfaction of the international obligations of the United States,” including Common Article 3, and indirectly confirms the existence of the CIA’s detention and interrogation program.\textsuperscript{69} The Executive Order incorporates the prohibitions of the federal Anti-Torture Statute and the War Crimes Act as amended by the MCA, the prohibitions on cruel, inhuman and degrading treatment as set forth in the MCA and the DTA (but not including section 1003 of the DTA incorporating the Field Manual), and prohibits acts denigrating religion, religious practices, or religious objects

\textsuperscript{64} MCA § 6(b) (amending 18 U.S.C. § 2241).
\textsuperscript{65} MCA § 6(a)(3)(A) and 6(C).
\textsuperscript{66} MCA § 6(b)(2).
\textsuperscript{67} MCA § 6(a)(2).
\textsuperscript{68} MCA § 5(a).
\textsuperscript{69} Exec. Order § 3(b)(i)(E); see also White House Press Release: President Bush Signs Executive Order, July 20, 2007, available at http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html (noting that “the interpretation of Common Article 3 set forth in this Order is applied to the Central Intelligence Agency’s detention and interrogation program whose purpose is to question captured Al Qaeda terrorists . . . .”).
of the individual. It then interprets Common Article 3’s prohibition of “outrages against personal dignity, in particular, humiliating and degrading treatment” to prohibit:

Willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield.70

Both the MCA and the Executive Order claim that their provisions reflect full U.S. compliance with Common Article 3. The MCA states that “[t]he provisions of [the War Crimes Act], as amended by [the MCA], fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in Common Article 3.”71 Likewise, in the Executive Order, the President “determine[s] that a program of detention and interrogation approved by the Director of the [CIA] fully complies with the obligations of the United States under Common Article 3” provided that it is in compliance with the Executive Order.72

* * *

For the reasons discussed below, the Association believes that the MCA and the Executive Order are open to interpretations that undermine compliance with Common Article 3. We believe that conclusion is borne out by recent testimony before Congress which left open the possibility that

70. Exec. Order §3(b)(i)(E).
71. MCA § 6(a)(2). It is not clear whether the requirements of Article 129 actually apply to violations of Common Article 3. Article 129 incorporates the grave breaches listed in Article 130, which applies to “protected persons.” “Protected persons” is defined in the Fourth Geneva Convention in a way that would exclude persons covered only by Common Article 3. The Third Geneva Convention, to which the MCA refers, contains no definition of “protected persons,” but it might be argued that it is anomalous to read that term differently from its use in the Fourth Convention. Nevertheless, Congress believed that Article 129 applies to Common Article 3 and we therefore will examine below whether the MCA does live up to the requirements of Article 129. See infra at pp. 642-44.
72. Exec. Order § 3(b).
waterboarding might be considered a lawful method of interrogation, depending on the circumstances, recent reports that the Justice Department has informed Congress that whether abusive or degrading interrogation techniques are unlawful may depend on the purpose of the interrogator, and the President's recent veto of legislation that would have made the specific prohibitions of the Army Field Manual applicable to all government personnel, including the CIA.

We turn first to a detailed examination of the pertinent provisions of the MCA and Executive Order that we believe undermine Common Article 3 and then to our recommendations.

**THE MCA MAY UNDERMINE U.S. OBLIGATIONS UNDER COMMON ARTICLE 3**

Common Article 3 protects all detainees captured in situations of armed conflict not between nation-states against inhumane treatment, including: “violence to life and person, in particular murder of all kinds, 73. Oversight Hearing of the U.S. Department of Justice Office of Legal Counsel, Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Comm. on the Judiciary, 110th Cong. (2008) (testimony of Steven G. Bradbury) (testifying that waterboarding was not unlawful at the time it was committed in 2002 and refusing to state whether waterboarding is lawful under current law, but conceding that “the Military Commissions Act...would make it much more difficult to conclude that the practice were lawful today”); Oversight Hearing of the Department of Justice, House Comm. on the Judiciary, 110th Cong. (2008) (testimony of Michael B. Mukasey) (refusing to say one way or the other whether waterboarding is unlawful under current law); Hearing of the Senate Select Committee on Intelligence, 110th Cong. (2008) (testimony of Adm. Michael McConnell) (“if there was a reason to use such a technique [as waterboarding], you would have to make a judgment on the circumstances and the situation regarding the specifics of the event, and if such a desire was generated on the part of—in the interests of protecting the nation”).

74. See Mark Mazzetti, Letters Give C.I.A. Tactics a Legal Rationale, N.Y. Times, Apr. 27, 2008, available at http://www.nytimes.com/2008/04/27/washington/27intel.html?_r=1&emc=eta1&oref=slogin (reporting that the Justice Department wrote a letter to Congress on March 2, 2008 stating that “[t]he fact that an act is undertaken to prevent a threatened terrorist attack, rather than for the purpose of humiliation or abuse, would be relevant to a reasonable observer in measuring the outrageousness of the act.”).

75. See Section 327 of H.R. 2082, 110th Congress, 2d Sess. (2008). This Association supported a similar provision in a bill proposed last fall, Section 102 of H.R. 4156, the Orderly and Responsible Iraq Redeployment Appropriations Act, 2008 establishing the United States Army Field Manual FM2-22.3 Human Intelligence Collector Operations as the standard for interrogation by all government personnel, either as employees or agents, including private contractors. See Letter of the Association of the Bar of the City of New York to Nancy Pelosi, Re: Section 102 of H.R. 4156, Nov. 14, 2007.

mutilation, cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment.”

The legislative history of the MCA indicates that at least some members of Congress believed that the MCA was drafted so as to leave intact all U.S. obligations under the Geneva Conventions. Nevertheless, as written, the MCA may be read to undermine those obligations in a number of respects. The President has stated that the CIA’s “enhanced interrogation” program is permitted under domestic law as expressed by the MCA. But, as noted, recent reports and testimony before Congress indicate that the Administration continues to consider harsh interrogation techniques, including waterboarding, to be lawful, even though those techniques are widely considered to be torture or cruel or inhuman treatment. At the same time, Senators McCain, Graham and Warner have declared that waterboarding is “incontestably” a violation of the MCA. As evidenced by these divergent interpretations, notwithstanding the legislative his-

78. See Statement of Sen. John McCain, 152 Cong. Rec. S10, 354, S10, 413-14 (Sept. 28, 2006) (“[T]his legislation before the Senate does not amend, redefine, or modify the Geneva Conventions in any way. The conventions are preserved intact . . . . [T]his bill makes clear that the United States will fulfill all of its obligations under those Conventions.”)
80. Karen DeYoung, Bush Approves New CIA Methods, Wash. Post, July 21, 2007, at A01 (noting that since the July 20, 2007 Executive Order, certain CIA interrogation techniques have been re-authorized and officials report that the CIA is again holding prisoners in “black sites” overseas); Scott Shane, David Johnston and James Risen, Secret U.S. Endorsement of Severe Interrogations, N.Y. Times, Oct. 4, 2007, at A1. See supra notes 73 and 74.
81. See supra note 58.
82. See Letter from Senators John McCain, Lindsey Graham and John Warner to the Honorable Michael B. Mukasey (Oct. 31, 2007), available at: http://warner.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=f4780eff-a101-4721-ac60-ac0da9b0cd70 (noting that “[w]aterboarding, under any circumstances, represents a clear violation of U.S. law. . . . It is, or should be, beyond dispute that waterboarding ‘shocks the conscience.’”); see also U.S. Senator John McCain, Press Release: Senators McCain and Graham urge Attorney General Mukasey to Review “Repugnant” Interrogation Technique, Nov. 9, 2007, available at http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=49D2ADEC-DA16-99A1-322F-7E08BEE9D486 (“Whether or not the Administration took a contrary view, it is incontestable that [waterboarding is] outlawed by the 2006 Military Commissions Act. Indeed, during the negotiations that led to the MCA, we were personally assured by Administration officials that waterboarding was prohibited under the new law.”).
tory, the MCA as enacted is sufficiently ambiguous so that it can be read to exclude from its prohibitions conduct that violates Common Article 3. In this respect and others, the MCA calls into question the United States’ commitment to Common Article 3.

1. The MCA’s Definition of Cruel and Inhuman Treatment May Exclude Conduct Prohibited Under Common Article 3

As noted, the MCA amended the War Crimes Act to limit its unqualified prohibition of violations of Common Article 3 to conduct the MCA defines as “grave breaches.” These “grave breaches” include “torture,” “cruel or inhuman treatment” and “intentionally causing serious bodily injury.” However, the MCA’s definitions of “cruel and inhuman treatment” and “serious bodily injury” are so narrow that the MCA could be interpreted to exclude from the War Crimes Act conduct that unquestionably violates Common Article 3’s prohibition of cruel and inhuman treatment.

The MCA’s definition of “cruel or inhuman treatment” is almost identical to its definition of torture. “Cruel or inhuman treatment” is defined as conduct “intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse.” The intentional infliction of “severe physical pain” is torture, so this portion of the definition of “cruel and inhuman treatment” adds nothing. The definition of “serious physical pain or suffering” is limited to “bodily injury that involves—(i) a substantial risk of death; (ii) extreme physical pain; (iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (iv) significant loss or impairment of the function of a bodily member,

83. MCA § 6(b) (amending 18 U.S.C. § 2441).
84. Common Article 3 refers to “cruel treatment,” but the word “inhuman” mentioned elsewhere in the Geneva Conventions, including its “grave breaches” provision, does not appear in Common Article 3. However, “cruel” and “inhuman” have been interpreted as interchangeable terms for purposes of Common Article 3 and no difference is believed to exist between the terms. See Cordula Droege, “In Truth the Leitmotiv”: the Prohibition of Torture and Other Forms of Ill-treatment in International Humanitarian Law, 89 International Review of the Red Cross 515, 520 (2007).
85. MCA § 6(b)(1)(B). The MCA’s definition of “torture” uses the same language as the Anti-Torture Statute, defining torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” MCA § 6(b)(1)(B).
86. MCA § 6(b)(1)(B).
organ, or mental faculty.” Under this definition, it is difficult to see how any conduct inflicting physical pain short of torture could amount to cruel or inhuman conduct—thus rendering this latter category superfluous. Moreover, by making “bodily injury” a prerequisite, this definition would exclude conduct—even conduct inflicting “extreme pain”—that is widely considered prohibited by Common Article 3, but that arguably does not involve the infliction of bodily injury—such as water-boarding, exposures to extreme heat and cold, stress positions, and sensory deprivation.

The MCA’s definition of “serious mental pain or suffering” amounting to “cruel or inhuman treatment” is also overly restrictive. Under the MCA, “serious mental pain or suffering” is defined as “serious and non-transitory mental harm (which need not be prolonged)” caused by or resulting from: (i) the intentional infliction or threatened infliction of severe physical pain or suffering; (ii) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (iii) the threat of imminent death; or (iv) the threat that another person will imminently be subjected to the conduct set forth in (i) through (iii). The requirement that “serious mental pain or suffering” will not be considered “cruel or inhuman treatment” unless it is accompanied by “serious and non-transitory mental harm” also could be read to permit practices like water-boarding, prolonged isolation, exposures to extreme temperatures and sensory deprivation, so long as any mental harm that those practices cause is temporary, no matter how severe the mental pain. Moreover, the conduct that is covered by this definition is indistinguishable from torture. For example, the intentional

87. MCA § 6(b)(2)(D) (emphasis added).
89. MCA § 6(b)(2)(E). “Severe mental pain or suffering” amounting to torture under the MCA is defined, also by reference to the Anti-Torture Statute, as “prolonged mental harm” resulting from the same enumerated causes. MCA § 6(b)(2)(A).
90. The requirements of “prolonged” or “non-transitory” mental harm, in any event, are problematic. They require predictions that an interrogator is surely incapable of making concerning both the mental harm, and the duration of mental harm, resulting from the infliction of harsh interrogation techniques, no matter how severe the immediate pain they inflict and which will vary between individual subjects of interrogation. Neither CAT nor the Geneva Conventions include resulting mental harm as requisite to a determination of whether a practice amounts to torture or cruel, inhuman or degrading treatment.
infliction of severe physical pain or the threat of imminent death would amount to torture under both domestic and international standards, regardless of whether it results in mental harm.

In sum, although the MCA’s inclusion of “cruel or inhuman treatment” as a “grave breach” separate and apart from “torture” presumably was intended to capture a range of harsh and painful treatment less severe than torture, its definition of “cruel or inhuman treatment” is so restrictive that it is difficult to imagine what conduct would fall within its scope unless it also constitutes “torture.”

The MCA’s prohibition against “intentionally causing serious bodily injury” is similarly narrow. The MCA defines “serious bodily injury” as “bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”

2. The MCA May Violate U.S. Obligations Under Section 129 of the Third Geneva Convention and Raises Questions About U.S. Commitment to Common Article 3

These narrow definitions also seem to contradict the MCA’s statement that it satisfies “the obligation under Article 129 of the Third Geneva Convention . . . to provide penal sanctions for grave breaches encompassed in Common Article 3.”

As noted, there are questions as to whether the requirements of Article 129 apply to persons who are protected only by Common Article 3.

91. MCA § 6(b)(2)(B) (defining “serious bodily injury” by reference to 18 U.S.C. § 113(b)(2)).
92. MCA § 6(a)(2).
93. See note 71, supra. We also note that the War Crimes Act, as amended in 1997, made all “grave breaches” of the Geneva Conventions a “war crime,” and then separately made any violation of Common Article 3 a “war crime.” 18 U.S.C. § 2441(c)(1) and (c)(3) respectively.
apply to such persons. Assuming that it does, Congress’ assertion that the MCA’s amendments fulfill U.S. obligations under Article 129 is doubtful. Article 129 refers to “grave breaches” as defined in Article 130 of the Third Geneva Convention. Article 130’s definition includes “inhuman treatment,” which in turn includes, among other things, “willfully causing great suffering or serious injury to body or health.” Yet, the MCA’s narrow definition of “cruel or inhuman treatment” as a grave breach would appear to exclude at least some conduct causing great suffering. For example, as noted, under the MCA, even conduct causing “extreme pain” would not amount to “cruel or inhuman treatment” unless it inflicts “bodily injury” or “non-transitory” serious mental harm.

Moreover, the perception of U.S. commitment to enforce the prohibitions of Common Article 3 and the requirements of Article 129 is severely undermined by the provision of Section 6(a)(2) that bars U.S. courts from looking to foreign or international sources of law in interpreting the War Crimes Act provisions incorporating the Geneva Conventions. It is an established canon of interpretation of treaties that courts should take account of the interpretations of other signatories. As Justice Scalia has explained: “the object of a treaty being to come up with a text that is the same for all countries, we should defer to the views of other signatories, much as we defer to the view of agencies.” By barring courts from looking to foreign or international sources of law, the MCA prevents the
courts from assuring that “grave breaches” prohibited by the War Crimes Act in fact encompass some of the most egregious violations of Common Article 3, as understood by other signatories to the Geneva Conventions. The perception of U.S. commitment to Common Article 3 is further undermined by Section 5(a) of the MCA, which provides:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories."99

By barring victims of violations of Common Article 3 from invoking the Geneva Conventions in habeas corpus proceedings or civil actions, this provision renders Common Article 3 unenforceable, except for conduct that theoretically could be prosecuted under the War Crimes Act, if it falls within the MCA’s excessively narrow definition of “grave breaches.” And enforcement respecting such “grave breaches” depends entirely on the Executive’s discretion to prosecute under the War Crimes Act.

3. The MCA Improperly Delegates to the President Unfettered and Unreviewable Discretion to Define Conduct Beyond “Grave Breaches” That Violates Common Article 3

The MCA provides that its definitions of “grave breaches” of Common Article 3 do not define “the full scope of United States obligations under [Common Article 3].”100 But apart from a provision that specifies an “additional prohibition” on cruel, inhuman and degrading treatment that constitutes “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments,” as defined in the U.S. reservations to CAT,101 it specifies no other prohibitions en-
compassed by Common Article 3 and provides no mechanism for enforcing them.

As noted, “cruel, unusual and inhumane treatment prohibited by the Fifth, Eighth and Fourteenth Amendments” is itself an uncertain and ambiguous standard, especially as it applies to detainees in the “war on terror.” This standard has been read by OLC to permit consideration of whether the interrogation practices in issue had the purpose of protecting national security.102 Moreover, the MCA fails to identify or define conduct that violates Common Article 3’s prohibition of “outrages upon personal dignity, in particular, humiliating and degrading treatment.” 103 Instead Congress delegated to the President the authority to “ensure compliance with [the additional prohibitions of cruel or inhuman treatment] . . . through the establishment of administrative rules and procedures” 104 and otherwise provides that “the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.” 105

The MCA also provides that nothing in this delegation of authority “shall be construed to affect the constitutional functions of Congress and the judicial branch of the United States.” 106 The reality, however, is to the contrary. Congress has imposed no standards to guide the President’s interpretations of Common Article 3 and by barring the invocation of the Geneva Conventions as a source of rights in any action against the government or its officials, Congress has assured that the judicial branch will never have an opportunity to review the President’s interpretation of Common Article 3. Congress thus has abdicated its responsibility to legislate and given the President unfettered and unreviewable authority to interpret Common Article 3 (except for “grave breaches”). 107

103. MCA § 6(b).
104. MCA § 6(c)(3).
105. MCA § 6(a)(3)(A).
106. MCA §6(a)(3)(D).
107. Moreover, the MCA makes the President’s Executive Orders interpreting Common Article 3 “authoritative (except as to grave breaches of Common Article 3) as a matter of United States law, in the same manner as administrative regulations.” Section 6(a)(3). Prior to enactment of the MCA, it was well established that deference must be given to the President’s interpretation of treaties, but that the courts have the ultimate authority to interpret treaties.
The Executive Branch thus has been given the exclusive authority to police itself. But the President can hardly be expected to be a neutral judge of the standards prohibiting interrogation methods that violate individual rights under Common Article 3. Given the President’s heavy responsibilities to enforce the law and protect the nation, the President may too readily yield to pressures to permit harsh interrogation methods that violate these standards.\(^\text{108}\) The history of the past six years shows that this is more than just probable. Moreover, leaving protection of the fundamental right to be free from cruel or inhuman treatment exclusively to the President is contrary to our constitutional system of checks and balances. As Justice O’Connor stated in \textit{Hamdi v. Rumsfeld}: “[w]hatsoever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”\(^\text{109}\)

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In sum, the MCA has too narrowly defined “grave breaches” of Common Article 3 and may shield from prosecution under the War Crimes Act conduct that is widely accepted to amount to “cruel or inhuman treatment” if not torture; it fails to provide a definition of humiliating and degrading treatment; it fails to provide any enforcement mechanism for conduct that violates Common Article 3 beyond its definition of grave breaches; and it has improperly delegated plenary and unreviewable authority to the President to interpret Common Article 3 beyond grave breaches. As the discussion below shows, the Executive Order issued pursuant to the authority conferred by the MCA is equally deficient.

The deference given the President’s interpretations can be overcome when it is contrary to the plain language of the treaty, would lead to unreasonable results, or would contradict the understanding of other signatories. United States v. Stuart, 489 U.S. 353, 369 (1989); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 259 (1984); see also Medellin v. Texas, 128 S. Ct. 1346, 1357-58 (2008). Thus, by including a provision making the President’s interpretations of Common Article 3 “authoritative as a matter of law” the MCA implies that the President’s interpretations be given greater deference than is normally accorded. Once again, the Administration’s record over the past six years, makes this especially inappropriate.

\(^{108}\) Cf. United States v. United States District Court, 407 U.S. 297, 316-17 (1972) (explaining why Executive cannot be given unreviewable discretion to decide whether domestic wiretaps meet constitutional restrictions on unreasonable searches and seizures).

4. The Executive Order Is Not Adequate to Ensure Compliance with Common Article 3 and Fails to Provide Guidance to CIA Personnel Conducting Interrogations

In accordance with the authority granted by the MCA, on July 20, 2007, President Bush issued the Executive Order interpreting “the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency.” Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 24, 2007). In an accompanying press release, the President asserted that “the Order has clarified vague terms in Common Article 3, and its interpretation is consistent with the decisions of international tribunals applying Common Article 3.” Moreover, the Executive Order was purportedly promulgated to establish “clear legal standards so that CIA officers involved in [a program of detention and interrogation] are not placed in jeopardy for doing their job.”

The Executive Order fulfills none of these objectives. It is so ambiguous and so filled with qualifications that it could be read to provide loopholes that would permit conduct that violates Common Article 3 and it provides no guidance to CIA officials who wish to assure that their conduct of interrogations complies with domestic and international law.

Most of the Executive Order merely incorporates by reference the prohibitions of the Anti-Torture Statute, the MCA, the War Crimes Act (as amended by the MCA) and the DTA (excluding section 1002 of the DTA, applicable only to the Department of Defense, requiring compliance with the Field Manual). Aside from its prohibition on conduct denigrating religion, the only other provision of the Executive Order that purports to clarify conduct violative of Common Article 3’s prohibition of “outrages against personal dignity, in particular, humiliating and de-

110. Press Release, Office of the Press Secretary, President Bush Signs Executive Order (July 20, 2007), available at http://www.whitehouse.gov/news/releases/2007/07/20070720-5.html. The President justifies his interpretation as consistent with the decisions of international tribunals applying Common Article 3: a paradoxical position since the MCA bars courts applying the War Crimes Act to “grave breaches” of Common Article 3 from considering foreign or international decisions interpreting the Geneva Conventions, even though it is the judicial branch that has the ultimate authority to interpret treaties. Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2684 (2006) (“If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department.’”) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

111. Id.


grading treatment” is Section 3(b)(1)(E) of the Executive Order, which prohibits:

willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield.\textsuperscript{114}

This language contains qualifications not found in Common Article 3 and blurs the boundaries between permissible and impermissible interrogation conduct by conditioning the determination of whether an interrogation practice is prohibited or whether the acts of personal abuse are done “for the purpose of” humiliating and degrading and “in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency.” This language appears to suggest that, in some “circumstances,” personal abuse that might otherwise be unlawful would be permitted. As former Marine Corps Commandant, General Paul X. Kelley (Ret.) stated, under this language: “As long as the intent of the abuse is to gather intelligence or to prevent future attacks, and the abuse is not ‘done for the purpose of humiliating or degrading the individual”—even if that is an inevitable consequence—the President has given the CIA carte blanche to engage in ‘willful and outrageous acts of personal abuse.”\textsuperscript{115} Like General Kelley, the Judge Advocates General of all branches of the military have expressed concern that this provision appears to be worded to allow humiliating or degrading interrogation techniques when the interrogators’ purported purpose is to protect national security.\textsuperscript{116} In fact, Administration officials appear to confirm that they are so construing Common Article 3.\textsuperscript{117}

\textsuperscript{114} Id. § 3(b)(i)(D) (emphasis added).
\textsuperscript{116} See, e.g., Charlie Savage, Military Cites Risk of Abuse by CIA: New Bush Rules on Detainees Stir Concern, Boston Globe, Aug. 25, 2007, at A1 (describing a meeting with senators, in which “[t]he JAGs said Bush’s wording [in the Executive Order] appears to make it legal for interrogators to undertake that same abusive action if they had some other motive, such as gaining information.”).
\textsuperscript{117} See supra note 74.
Moreover, as Senator Durbin noted, under this language, “humiliating and degrading treatment, which Common Article 3 absolutely prohibits, is permitted under the Executive Order as long as it is not ‘willful and outrageous’ or a reasonable person would not consider it ‘beyond the bounds of human decency.’” 118 Most significantly, the Executive Order does not specifically address the controversial techniques believed to be employed in the CIA’s “enhanced interrogation” program, including stress positions, slapping, waterboarding, sleep deprivation, sensory bombardment, violent shaking, sexual humiliation, and prolonged isolation and sensory deprivation. 119

This is in marked contrast to the Revised Field Manual, which provides clear guidance to armed services personnel by specifically listing prohibited practices. 120

Additionally, the Revised Field Manual provides a “golden rule” for military personnel to follow in assessing the legality of an interrogation plan which goes much further than either the MCA or the Executive Order in complying with the spirit and the letter of Common Article 3. Specifically, military personnel considering an interrogation technique must ask themselves: (1) would they consider the interrogation technique to be abusive if used by the enemy against a fellow soldier and (2) would the proposed technique, even if they did not consider it abusive, violate a law or regulation. 121 This “golden rule” provides military interrogators with a clear framework for assessing the appropriateness of an interrogation practice that is at a minimum coextensive with existing law and, indeed, inspires an even greater level of care. By contrast, the Executive Order’s failure to address specific interrogation practices—and its ambiguous terms which could be read to permit conduct violative of Common Article 3—leaves CIA officers without clear guidance as to how to conduct lawful


119. The only instance in which the Executive Order arguably addresses a specific CIA “enhanced” interrogation technique is in Section 3(b)(iv), which requires that “detainees in the program receive the basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care.” It is not clear, however, that this provision is intended to bar interrogation techniques (as distinct from everyday living conditions) involving exposure to extreme cold or withholding food and water and medical care during the course of interrogation.

120. See pp. 634–35, supra.

121. Revised Field Manual at 5-76.
interrogations that do not violate Common Article 3. As noted, President Bush vetoed legislation that would have required the CIA to follow the Revised Field Manual, claiming that “[i]f we were to shut down this program and restrict the CIA to methods in the Field Manual, we could lose vital information from senior Al Qaeda terrorists, and that could cost American lives.”122

Finally, there is no mechanism for enforcing the prohibitions contained in the Executive Order. Courts have no occasion to even consider whether the regulations contained in the Executive Order are complied with or whether these regulations meet our obligations under Common Article 3, and the Executive Order itself asserts that it does not create any right or benefit enforceable at law or equity except as a defense for a CIA official.123 The clear implication is that the purpose of the Executive Order is to enable CIA personnel to defend themselves against charges that their harsh interrogation techniques violated Common Article 3, rather than to give them guidance as to how to comply.

II. CONCLUSION AND RECOMMENDATIONS

The Association appreciates the importance that intelligence gathering plays in protecting national security. Nevertheless, the goal of national security is only truly achieved if our intelligence operations are consistent with our nation’s tradition of humane treatment of detainees and reflect adherence to international humanitarian obligations essential to preserving respect for the United States in the world community. Failure to comply with these humanitarian obligations puts at risk U.S. military and civilian personnel who may be detained abroad, undermines our nation’s ability to obtain international cooperation in combating terrorism, and incites hostility that furthers the goals of our enemies. Contrary to President Bush’s stated goal to “compl[y] with both the spirit and the letter of our international obligations,”124 the MCA and the Executive Order do not provide “the clarity our intelligence professionals need to continue questioning terrorists and saving lives” nor do they provide confidence that they will “compl[y] with both the spirit and the letter of our

international obligations.” Instead, they appear to offer opportunities for finding loopholes that permit the continuation of harsh practices that have violated our nation’s traditions and stained our reputation.

Accordingly, the Task Force makes the following recommendations:

1. Amending the MCA to Restore the Earlier War Crimes Act Provision and Withdrawing the Executive Order

The provisions of the MCA amending the War Crimes Act should be repealed, and the War Crimes Act should be restored to the way it read prior to the enactment of the MCA. This would assure that any violation of Common Article 3 would constitute a federal war crime. The MCA’s limitation of the War Crimes Act to the “grave breaches” it defines is too narrow and may be read to permit conduct that plainly violates Common Article 3. Indeed, the Administration’s statements and Congressional testimony suggest that this is already occurring. Our proposal would thus criminalize conduct violating Common Article 3 that would not amount to “grave breaches” within the meaning of Articles 129 and 130 of the Geneva Conventions, assuming those provisions applied to persons covered only by Common Article 3. By applying criminal penalties for all violations of Common Article 3, this would make the scope of the War Crimes Act broader than the obligation to provide penal sanctions required by Article 129. Article 129, however, merely sets a minimum standard. There is no reason why the U.S. should not set a higher standard, applying criminal penalties for all violations of Common Article 3. We do not find persuasive arguments that Common Article 3’s language is too vague to establish criminal liability. There is a substantial body of international authority illustrating the practices that are considered cruel, inhuman and degrading and persons responsible for the treatment of detainees held as “enemy combatants” should have little difficulty in understanding whether their conduct is cruel, inhuman and degrading.

Notably, the Revised Field Manual, while prohibiting specific practices, goes beyond those practices, requiring military personnel to refrain from any conduct that violates Common Article 3, and the DTA makes the Field Manual a legal standard for all Defense Department personnel. These standards, including the “golden rule” advising military interrog-
tors to ask themselves whether they would consider proposed conduct abusive if applied by the enemy to one of their fellow soldiers is sensible guidance for the CIA. While the Administration has argued that the CIA needs greater clarity about the meaning of terms like “humiliating” and “degrading” and “outrages to personal dignity,” so that CIA agents can know what they can and cannot do, the definition provided in the Executive Order provides no more clarity than the terms of Common Article 3. Indeed, the ambiguities in the Executive Order seem designed merely to provide interrogators with defenses for conduct that may be unquestionably humiliating or degrading, but are intended to “soften up” the detainee for the purpose of obtaining information allegedly needed for national security.\footnote{127} For this reason, we would recommend that the Executive Order be withdrawn, and instead the Revised Army Field Manual should be made applicable to the CIA as well.\footnote{128} As noted, any attempt to more specifically define the standards of treatment established by Common Article 3 is likely to result in evasion of its prohibitions. As previously discussed, claims that Common Article 3’s humanitarian standards will expose interrogators to unfair prosecutions or will chill their use of interrogation practices of uncertain legality are not persuasive.\footnote{129}

Given the history of U.S. government abuses, however, we would recommend that the War Crimes Act be amended to provide by way of example only, a list of brutal practices believed to have been employed that would clearly violate Common Article 3, including waterboarding, stress positions, severe sleep deprivation, exploitation of the fear of dogs or other phobias, exposure to extremes of heat or cold, and sexual humiliation.

2. Repealing MCA Provisions Delegating Authority to the President and Which Interfere With The Proper Function and Role of the Judiciary and the Enforceability of Rights to be Protected From Torture and Cruel or Inhuman Treatment

Section 6(a)(3)(A) of the MCA conferring authority on the President to interpret the Geneva Conventions is unnecessary and appears to confer authority beyond that heretofore recognized. Existing law adequately recognizes the deference due to the President’s interpretations of treaties,

\footnote{127. See pp. 622-623 supra.}
\footnote{128. The Association previously supported a resolution passed by the American Bar Association calling upon Congress to override the July 20, 2007 Executive Order. See American Bar Association Resolution 10-B (2007).}
\footnote{129. See pp. 624-25 supra.}
but under our constitutional system, it is the judicial branch that has the ultimate authority to interpret treaties. To the extent that the MCA precludes litigants from invoking the Geneva Conventions as a source of rights (Section 5) and bars courts from making their own judgments regarding the President’s interpretations of the Convention and relying upon well-established sources of international law to do so (Section 6(a)(2)), it undermines our commitment to Common Article 3 and the constitutional function of our judiciary. Accordingly, these sections should be repealed. Finally, Section 7(a)(2) of the MCA purports to strip courts of jurisdiction to entertain actions or proceedings by certain alien detainees concerning their treatment or conditions of confinement. This provision thus bars such detainees who are victims of violations of Common Article 3 from enforcing its protections.

As noted, the Supreme Court recently concluded that detainees at Guantanamo Bay have a constitutional right to bring habeas actions challenging their confinement, but left open the question of whether the writ also reaches treatment and conditions of confinement. Moreover, the Circuits are split as to whether habeas is available to challenge treatment and conditions of confinement. We recommend that Congress should repeal Section 7(a)(2) at least insofar as it bars equitable relief concerning treatment and conditions of confinement. Congress should make it clear that all detainees are entitled to seek equitable relief addressing treatment and conditions of confinement that violate the Geneva Conventions, any other treaty, the Constitution or law, no matter how the action is designated.

3. Providing Compensation for Victims of Torture and Cruel, Inhuman and Degrading Treatment

Victims of violations of Common Article 3 must have some remedy that compensates them and deters future violations. As noted, U.S. courts

130. See supra note 11.

131. Compare, e.g., Thompson v. Choinski, 525 F.3d 205, 209 (2nd Cir. 2008) (“This court has long interpreted § 2241 as applying to challenges to the execution of a federal sentence, ‘including such matters as the administration of parole, . . . prison disciplinary actions, prison transfers, type of detention and prison conditions.’”); with, McIntosh v. U.S. Parole Comm’n, 115 F.3d 809, 812 (10th Cir. 1997) (“A habeas corpus proceeding ‘attacks the fact or duration of a prisoner’s confinement and seeks the remedy of immediate release or a shortened period of confinement. In contrast, a civil rights action . . . attacks the conditions of the prisoner’s confinement and requests monetary compensation for such conditions.’” (internal citation omitted)).
have consistently dismissed, at the pleading stage, suits seeking compensation for alleged mistreatment in violation of U.S. and international law, invoking such doctrines as the state secrets privilege, qualified immunity, Westfall Act immunity, political question or “special factors” counseling against a *Bivens* remedy. Congress has provided no express damage remedy to compensate victims of torture or cruel, inhuman and degrading treatment.

While repealing the MCA amendments to the War Crimes Act may make that Act a greater deterrent, no prosecution has ever been brought under that law or the Anti-Torture Statute. Political pressures may deter the Executive from prosecuting government officials who used methods violating Common Article 3, but claim to have done so to obtain information needed to protect the nation. Moreover, neither habeas nor criminal statutes provide compensation for the victims of torture or cruel, inhuman and degrading treatment. We recognize the difficulties inherent in private damage actions against U.S. officials claimed to have used methods of interrogation that amount to torture or cruel, inhuman and degrading treatment. But a system can be devised that would compensate victims of torture and cruel or inhuman treatment, while deterring the initiation of frivolous claims and minimizing evidentiary problems inherent in protecting state secrets. An independent administrative agency to handle such claims could develop an expertise in the handling of such claims; pleading standards and procedures for summary dismissal might be developed to weed out frivolous claims; costs could be imposed for claims that prove to have been filed without a reasonable basis; procedures to address the government’s invocation of the state secrets privilege could be adopted along the lines of legislation now being proposed to govern the state secrets privilege in federal court proceedings; and liability could be limited to the United States, thereby excluding damage claims against individual personnel. While this system would not have the same deterrent effect as private damage actions against individual personnel, it would provide compensation for victims and give the federal government an incentive to educate personnel about the standards for treatment of detainees imposed by U.S. and international law and discipline those who violate those standards.

We submit that adoption of these recommendations is necessary to assure compliance with our nation’s international obligations, to preserve long-established human rights and moral traditions, and to restore our nation’s reputation in the world community.

*June 2008*
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An Analysis of the Letter of Engagement Rule—Part 1215 to Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York (the “Rule”)

The Committee on Professional Responsibility

I. INTRODUCTION
This report is intended to provide guidance to the Bar on what does and does not constitute compliance with the requirements of the Rule. This report is not intended to be a comprehensive analysis of the best practices as to what should and should not be included in an engagement letter.¹

II. THE “RULE”
The Rule was proposed and adopted by the New York State Office of Court Administration on March 4, 2002 and amended soon thereafter on April 3, 2002.² The Rule was designed to limit misunderstandings between attorneys and clients about the scope and cost of legal services;³ it was not

¹. See Association of the Bar of the City of New York Formal Opinion 2006-1 regarding advance conflict waivers.
². N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1215.1, 1215.2 (2002).
³. “The Craco Committee report identified misunderstandings over the scope and cost of legal
designed, however, as a means of disciplining attorneys. The Subcom-
mittee on Engagement Letters of the Committee on Professional Responsi-
bility of the Association has drafted analysis and commentary on the Rule.
The objective of this Report is to provide guidance to the Bar on: (i) the
key elements of the Rule; (ii) how best to comply with the dictates of the
Rule; and (iii) factors that can lead to non-compliance with the Rule and
an inability to collect fees.

III. PURPOSE OF THE RULE
The Rule is a court rule, not a Disciplinary Rule, and enforcement of
the Rule through the disciplinary system was not envisioned by the courts.5
Contrasting the purpose of the rules governing matrimonial matters with
that of the Rule, the Second Department in Seth Rubenstein, P.C. v. Ganea,
833 N.Y.S.2d 566, 2007 WL 1016998 (2d Dep’t 2007), noted that

[the Rule] contains no penalty language in the event of an
attorney’s noncompliance, and it is not underscored by a spe-
cific Disciplinary Rule, unlike 22 NYCRR 1400.3 and Code of
Professional Responsibility DR 2-106(C)(2)(b). If the Appellate
Divisions...intended for [the Rule] to serve a penal or disciplin-
ary purpose, language could have been included to accomplish
that purpose. The Appellate Divisions did not do so. We de-
cline to extend [the Rule] beyond its expressed terms.

Seth Rubenstein, 2007 WL 1016998 at 6.

IV. THE ELEMENTS OF THE RULE
A. The Letter
1. When a client brings a matter to an attorney and seeks
representation, the client may not be sure what the next step
is. Letters of engagement and retainer agreements (collectively,

services as one of the greatest sources of public dissatisfaction with lawyers.” Roy Simon,
4. Chief Administrative Judge Jonathan Lippman said “...this is not about attorney discipline
in any way, shape or form, and we certainly do not expect in any significant degree there to
be a large number of disciplinary matters coming out of this rule.” John Caher, Rule Requires
“Letter(s)” help outline the terms under which the attorney will represent the client, and offer the client a better understanding of the attorney’s path of representation. A retainer agreement is a letter of engagement that has been countersigned by the client.6

B. The Rule Explained
1. The Rule requires that a written Letter be provided to the client prior to commencement of representation when an attorney undertakes to represent a client and enters into an arrangement for, charges or collects any fee from the client.7 If doing so is impracticable or the scope of the engagement cannot be determined at that time, then the Letter should be provided within a reasonable time after commencement of the engagement.

2. The Rule classifies certain entities, including insurance carrier entities, as the “client” when such entities engage the attorney to represent third parties.8 If someone other than the client will pay the lawyer’s fee bills, DR 5-107(A)(1) requires the client’s consent before the lawyer can accept such compensation.

3. When there is a significant change in the scope of services or the fees to be charged to the client, the attorney is required to provide an updated Letter that addresses those changes.

C. What the Letter Must Contain
1. The Letter must explain the scope of the legal services to be provided, as well as an explanation of fees, expenses and billing practices. Finally, the Letter must provide notice of the right to arbitrate fee disputes (where applicable). DR 2-106(E) requires fee disputes in civil representations be submitted for nonbinding arbitration at the client’s election pursuant to Part 137 of the Rules of the Chief Administrator of the New York State Supreme Court, Appellate Division. These rules permit arbitration where the amount of disputed fees range from $1,000 to $50,000. The required disclosure regarding the state-sponsored fee arbitration program does not preclude an agreed-upon arbitration

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7. In New York, written engagement letters are also required in contingency fee matters (governed by DR 2-106(D)) and in domestic relations matters (governed by 22 NYCRR 1400.3 and DR 2-106(C)(2)(b)).
provision that is applicable to all disputes that arise between the client and the lawyer; such an arbitration provision may specify the arbitration rules and location of the arbitration proceeding. 9

D. The Retainer Agreement
As noted above, a retainer agreement is a letter of engagement countersigned by both the attorney and the client, and must include all the elements that letters of engagement are required to contain.

E. Exceptions
1. A Letter does not have to be provided by an attorney when fees for the representation are expected to be less than $3,000, or when the legal services are of the same general kind as previously provided to and paid for by the client.
2. Domestic relations matters are not covered by the Rule. Instead, 22 NYCRR 1400.3 (Procedure for Attorneys in Domestic Relations Matters) governs the use of Letters in such matters.
3. Finally, the Rule does not govern representations by attorneys admitted to practice in other jurisdictions and who do not maintain offices in the State of New York, or assignments where no material portion of the services are to be rendered in New York.

V. PROBABLE NON-COMPLIANCE WITH THE RULE
A. Since the Rule was adopted six years ago, decisions have been reduced on the application of the Rule. We have noticed certain trends after reviewing the case law and commentary concerning the Rule. Some courts have sought to effectuate the intent of the Rule by precluding the collection of fees where the attorney failed to provide a Letter to the client, and where exceptions to the Rule did not apply.

1. Feder, Goldstein, Tanenbaum & D’Errico v. Ronan, 195 Misc.2d 704, 761 N.Y.S.2d 463 (Dist. Ct. Nassau County 2003), was the first non-matrimonial case to interpret the Rule. The court found that failure to provide a Letter precluded an attorney from collecting payment for services. There, the plaintiff-attorney appeared once for an attorney/former classmate and both parties acknowledged that no Letter

was provided. The court did not accept the plaintiff-attorney’s argument that payment was due based upon an oral contract theory or a quantum meruit theory. The court, noting that as of the date of the opinion there was no precedent on the Rule, analogized the action to a domestic relations matter, to which the letter of engagement rule under 22 NYCRR 1400.3 applies. That rule states that an attorney is precluded from recovering fees if the attorney fails to provide the client with a written retainer agreement.

2. In *Klein Calderoni & Santucci, LLP v. Bazerjian*, 6 Misc.3d 1032(A), 800 N.Y.S.2d 348, 2005 WL 51721 (Sup. Ct. Bronx County 2005), the court granted summary judgment for the defendant where the plaintiff-attorney acknowledged that he failed to provide a Letter in connection with representing the defendant before the September 11 Victim Compensation Fund. The plaintiff-attorney argued that it was impracticable to provide a Letter since the defendant contacted him on May 12, 2004, visited his office on May 14, 2004 and the hearing was held on May 19, 2004. The court disagreed and found there had been sufficient time to provide a Letter: “[The] Plaintiff’s failure to provide a letter of engagement or a signed retainer agreement was deliberate, and not a result of being ‘impracticable.’” 2005 WL 51721 at *1. The court apparently focused on § 1215.1(a)(1) of the Rule, which allows a delay in providing a Letter if it is “impracticable” to do so before commencement of representation. For the court in *Klein Calderoni*, it was not impracticable to prepare and deliver a Letter within five to seven days after being retained by the client.

3. Similarly, in *Nadelman v. Goldman*, 7 Misc.3d 1011(A), 801 N.Y.S.2d 237, 2005 WL 877962 (Civ. Ct. New York County 2005), the court relied on *Klein Calderoni* to preclude the plaintiff-attorney from recovering legal fees because non-

10. “As much as he has deserved. When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an assumpsit on a quantum meruit.” Bouvier’s Law Dictionary (6th ed. 1856) (citing 2 Bl. Com. 162, 3 1 Vin. Ab. 346; 2 Phil. Ev. 82).
compliance with the Rule was intentional and the client denied agreeing to compensate the plaintiff for legal services. The Nadelman court distinguished In re Feroleto, 6 Misc.3d 680, 791 N.Y.S.2d 809 (Surr. Ct. Bronx County 2004), rejecting plaintiff’s argument that non-compliance with the Rule does not preclude fee recovery on a quantum meruit basis. The court reasoned that “if such a claim were recognized, then the purpose of [the Rule] would be thwarted in the sense that non-compliance would engender no penalty. That would render [the Rule] meaningless.” Nadelman, 2005 WL 877962 at 3.

VI. WHEN FEES MAY BE DUE EVEN WHERE THE RULE IS NOT FOLLOWED COMPLETELY

A. In contrast to the outright preclusion of fees due to the attorney’s failure to provide a Letter, some courts have permitted partial recovery of fees under certain scenarios.

1. When fees are paid for services rendered, failure to provide a Letter does not entitle the client to a return of the fees paid. Lewin v. Law Offices of Godfrey G. Brown, 8 Misc.3d 622, 798 N.Y.S.2d 884 (Civ. Ct. Kings County 2005). In that case, the defendant sought to be paid a total of $15,000 for his representation of the plaintiff’s relative in a criminal action. Those arrangements were made orally without the preparation and delivery of a Letter. The plaintiff requested the return of $7,500 paid to the defendant.

The court found that the defendant had provided valuable legal services to the plaintiff and, similar to courts in previous decisions, analogized the action to a matrimonial case involving the failure to provide a Letter. In contrast to the court in Feder, however, the court in Lewin cited a line of matrimonial cases where the attorney was not precluded from collecting fees when services were rendered and no Letter provided. The court noted:

Even in that context of heightened caution [matrimonial cases], however, courts have held that an attorney’s
failure to execute a valid retainer agreement does not warrant ‘the return of a retainer fee already paid for properly earned services.’ Mulcahy v. Mulcahy, 285 A.D.2d 587, 588, 728 N.Y.S.2d 90, 92 (2d Dep’t 2001); see also Markard v. Markard, 263 A.D.2d 470, 692 N.Y.S. 2d 733 (2d Dep’t 1999). It follows then, that the same rule should apply here.

Id. at 626.

2. In Glazer v. Jack Seid-Sylvia Seid Revocable Trust, 2003 WL 22757710 (Dist. Ct. Nassau County 2003), the court also allowed an attorney to retain fees paid from an escrow deposit where the attorney provided services prior to enactment of the Rule, and the client conceded that the services were provided and that the material terms of the retainer were agreed upon orally. However, the attorney was precluded from receiving the full amount sought for representation of the client.

3. Similarly, the court precluded an attorney from recovering full fees in Grossman v. West 26th Corp., 9 Misc.3d 414, 801 N.Y.S.2d 727 (Civ. Ct. Kings County 2005), where the attorney failed to provide a Letter. The court reasoned that the attorney should be entitled to the $3,500 already paid by the client under a theory of quantum meruit; however, the full $8,900 requested by the attorney was denied. The attorney’s arguments that (i) he did not have sufficient time to provide a Letter, (ii) the scope of services could not be determined and (iii) the type of services were of the same general kind rendered in the past all failed because the court found that five days was sufficient time to send a Letter and determine the scope of services. The court further noted that the services at issue—a new and more sophisticated kind of mortgage transaction—differed enough from the attorney’s prior real estate representation so as to require a Letter.

4. The court’s decision in In re Feroletto, 6 Misc.3d 680, 791 N.Y.S.2d 809 (Surr. Ct. Bronx County 2004), further underlines the notion that the Rule should not to be used to
preclude recovery of fees when it is clear that services were provided in accordance with the expectations of both parties. The court in Feroleto found that where an attorney sent a retainer agreement (a signed copy of which was never returned) and the client disputed the billing during the representation, the attorney’s failure to comply with the Rule was not willful and it would be too harsh to find that no fees were due under the circumstances. The court further noted that “the more measured penalty [for non-compliance with the Rule] is to resolve any misunderstanding arising from the lack of a letter of engagement or signed retainer agreement in favor of the [client].” Id. at 684. Under that reasoning, the attorney was entitled to $3,000, rather than the requested $10,000.

5. In Beech v. Lefcourt, 12 Misc.3d 1167(A), 820 N.Y.S.2d 841, 2006 WL 1562085 (Civ. Ct. New York County 2006), the court granted summary judgment to a defendant attorney who failed to provide a Letter to a client where the client sought to recover a previously paid legal fee of $15,000. The court, citing In re Feroleto, 6 Misc.3d 680 at 683-684, reasoned that “a client cannot utilize noncompliance with [the Rule] as a sword to recover fees already paid for properly-earned legal services. ...Instead, a violation of [the Rule] was only intended to be used as a shield or as a defense to the collection of unpaid legal fees.” Id. at 3.

In what is a good summary of the status of jurisprudence on the Rule, the court stated that “...an attorney’s failure to comply with [the Rule] has severe consequences for an attorney seeking collection of fees with the harshest penalty of forfeiture to be imposed on the intentional or willful noncompliance to the least sanction of a reduced fee imposed on a quantum meruit theory for unintentional violations.” Id. at 3.

6. Finally, in 2007, the Appellate Division, Second Department in Seth Rubenstein, P.C. v. Ganea, 833 N.Y.S.2d 566, 2007 WL 1016998 (2d Dep't 2007), addressed for the first time the issue of whether an attorney who fails to provide a Letter to a non-matrimonial client, in violation of the Rule, may nevertheless recover the reasonable value of ser-
vices rendered on a quantum meruit basis. The court, citing In re Feroleto, 6 Misc.3d 680 at 684, reasoned that “a strict rule prohibiting the recovery of counsel fees for an attorney’s noncompliance with [the Rule] is not appropriate and could create unfair windfalls for clients, particularly where clients know that the legal services they receive are not pro bono and where the failure to comply with [the Rule] is not willful.” Id. at 6. The court took into account the fact that the attorney’s failure to comply was attributed to the promulgation of the Rule only seven weeks prior to his retention. Accordingly, the court permitted the attorney to recover attorneys’ fees on a quantum meruit basis. However, the court noted that it’s holding would be different were this matter a matrimonial action governed by the more stringent disciplinary requirements of 22 NYCRR 1400.3 and DR 2-106(c)(2).

The court acknowledged that prior published decisions from the Supreme, Surrogate and Civil Courts reached well-reasoned but conflicting conclusions. The court noted that these trial level decisions fall into three categories. The first category permits the quantum meruit recovery of attorneys’ fees notwithstanding noncompliance with the Rule. These cases include In re Feroleto and Grossman. The second category takes a “middle ground,” permitting the non-compliant attorney to keep fees already received from the client for services, while prohibiting the recovery of additional fees. These cases include Beech, Lewin and Smart v. Adams, 798 N.Y.S.2d 348, 2004 WL 2167819 (Sup. Ct. Duchess County 2004). The third category prohibits recovery of attorneys’ fees for noncompliance with the Rules. These cases include Nadelman, Klein Calderoni and Feder.

VII. COMPLIANCE GUIDELINES

A. From Case Law—It is clear an attorney must follow the Rule completely to be in compliance and ensure payment of all fees charged. Below is a summary, based on the case law, of particular circumstances that may lead to no or partial recovery of fees.

1. A period of five to seven days following initial contact
with the client should be sufficient time for the attorney
to prepare and deliver a Letter. It is not “impracticable” to
provide a Letter during such a period.

2. Oral contracts may establish the parties’ intent that fees
be paid for representation; however, oral agreements that
are not memorialized in a Letter will probably result in
only a partial recovery of fees.

3. When a Letter is not provided but fees have been prop-
erly earned and paid, a court is not likely to require a re-
fund of the fees because the payment is generally an indi-
cator of the parties’ intent.

4. A court is more likely to deny collection of amounts not
yet paid, which may or may not have been billed, when
the Rule has not been followed.

5. It is important to be sensitive to the scope of a new
engagement. A court is likely to deny application of the
“of the same general kind as previously rendered to and
paid for by the client” exception to the Rule when a Letter
was not provided for the initial engagement.

6. The language in a Letter is more likely to be construed in
favor of the client because it is the attorney who drafts the
Letter. 12

7. Failure to provide a Letter to the client may lead a court
to construe any purported oral agreement related to the
payment of fees in favor of the client.

8. Recent case law suggests that courts may be less likely to
analogize cases involving the Rule to domestic relations
matters. 22 NYCRR 1400.3 requires attorneys to provide
a Letter before commencement of domestic relations rep-
resentations. One commentator suggests that the anal-
ogy to domestic relations cases may not be appropriate
in cases involving the Rule because the failure to pro-
vide a Letter in a domestic relations matter is also a viola-

12. Courts as a matter of public policy give particular scrutiny to fee arrangements between
attorneys and clients, casting the burden on attorneys to show the contracts are fair, reason-
able and fully understood by their clients. Shaw v. Manufacturers Hanover Trust Co., 68
Slip Copy 2007 WL1310160 (S.D.N.Y. 2007), dealt with the issue of the enforceability of an
ambiguous provision in a contingency fee retainer agreement. The court relied on Shaw and
held that when a retainer agreement is ambiguous, there is a rebuttable presumption against
the attorney and in favor of the client’s reading of the agreement.
tion of a Disciplinary Rule. In contrast, the Disciplinary Rules do not contain an obligation generally to provide a Letter, nor do they prohibit a lawyer from collecting a fee in nondomestic relations matters when no Letter is provided.

9. Recent case law from the Appellate Division, Second Department, suggests that attorneys have “every incentive to comply...with the Rule as compliance establishes in documentary form the fee arrangements to which clients become bound, and which can be enforced through Part 137 arbitration or [other] proceedings. Attorneys who fail to comply are...at a marked disadvantage, as [fee recovery] becomes dependent upon factors [beyond their]...control, such as...proving...that the terms [of the Letter] were fair, understood, and agreed upon.” Seth Rubenstein, 2007 WL 1016998 at 6.

10. Failure to advise a client of the right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator of the New York State Supreme Court, Appellate Division may cause a court to preclude an attorney from recovering fees over and above those already collected. See Smart v. Adams, 2004 WL 2167819 at 1.

B. Sample Clauses in Letters of Engagement and Retainer Agreements—The Subcommittee has reviewed a number of sample Letters to identify provisions that further the intent of the Rule and will limit misunderstandings between the attorney and the client about the scope and cost of legal services. The sample provisions were drawn from a wide range of sources, including retainer agreements from large in-house legal departments and letters of engagement from large to mid-size firms. We have kept the names of the companies and firms confidential in order to maintain their anonymity.

1. Citing to the Rule—Although the Rule does not have to

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13. “The Feder, Goldstein court seemed unaware that a Disciplinary Rule in the Code of Professional Responsibility, DR 2-106(C)(2)(b), expressly prohibits a lawyer from collecting a fee in a domestic relations matter ‘[u]nless a written retainer agreement is signed by the lawyer and client...’ No comparable Disciplinary Rule requires a lawyer to provide a client with a letter of engagement or prohibits a lawyer from collecting a fee in a matter where the lawyer failed to provide a letter of engagement.” Roy Simon, Simon’s New York Code of Professional Responsibility Annotated 1563-1564 (2005).
be referenced in a Letter, some sample Letters do refer to the Rule. Examples:

(a) “As required by the Joint Rules of the Appellate Divisions of the courts of New York State, it is our practice to provide an engagement letter to our clients prior to our commencing a new representation.”

(b) “NOTICE (Pursuant to Part 1215.1 to Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York).”

2. Explaining the scope of the engagement—The Rule requires that the Letter explain the scope of the services to be provided, and also requires that an updated Letter be provided upon a significant change in the nature of the engagement or the fees to be charged to the client. The explanation of the scope of the services to be provided includes a description of the work to be done as well as the entity or entities to be represented. Example:

“We look forward to representing _________ (the “Company”) in connection with [DESCRIBE MATTER AND SCOPE OF ENGAGEMENT] [For example, if the matter entails a private placement of equity to investors to be identified by the Company the Letter should state: “Our engagement will involve assistance with the preparation of a private placement memorandum and compliance with federal and applicable state securities laws.”]

3. Clarifying the identity of the client—Letters often identify the entity or entities to be represented and limit and/or disclaim representation of other related parties. Examples:

(a) “[Name of Firm] will represent [Client] in [description of scope of legal services]. In this engagement, we will not represent any directors, members, officers, partners, shareholders, subsidiaries or affiliates of, or other

14. The exact legal name of the specific entity or entities that the attorney will be representing in the matter should be used.

15. The description should be reasonably detailed and, in addition to describing the legal services that are within the scope of the services to be provided, should describe those legal services that are not within such scope if appropriate in the particular circumstances to avoid
persons or entities associated with, [Client].”

(b) “Unless specifically stated in our letter, our representation of you does not extend to any of your affiliates and we do not assume any duties with respect to your affiliates. For example, if you are a corporation, we do not represent your parents, subsidiaries, sister corporations, employees, officers, directors, shareholders, or partners, or any entities in which you own an interest. If you are a partnership…”

4. Explaining rates—The Rule requires that the Letter explain all fees, expenses, and billing practices. Examples:

(a) “Our schedule of hourly rates for attorneys and other members of the professional staff is based upon their years of experience, practice area, specialization, training and level of professional attainment. My standard billing rate is $__ per hour, with other partners generally billed at a lower rate, associates at $___ to $__ per hour and legal assistants at $__ to $__ per hour.”

(b) “Although time and hourly rates (currently ranging from U.S.$__ for junior associates to U.S.$__ for senior partners) are considered in determining our fees, we may also consider the novelty and difficulty of the questions involved; the skills requisite to perform the services you require; the experience, reputation, and ability of those performing the services; the time limitations imposed by you or the circumstances; the amount at stake and the results we obtain; and any other factors that may be relevant under the applicable rules of professional conduct.”

(c) “In addition to professional fees, [Client] will also be responsible for expenses incurred by [Name of Firm] on [Client’s] behalf, including the cost of travel, computerized legal research, photocopies, telephone calls, and the like. We have attached our Policy Statement any misunderstandings as to what is, and what is not, within such scope. In the event a significant change were to occur in the scope of services or the fee to be charged, an updated letter of engagement should be provided to the client.
Concerning Charges and Disbursements, which explains our current expense policy in detail. All third-party invoices in excess of U.S. $___ will be passed on from [Name of Firm] to you for direct payment to the third party.”

5. Explaining arbitration rights—The Rule requires that clients be made aware of their arbitration rights where applicable. Examples:

(a) “Pursuant to Part 137 of the Rules of the Chief Administrator of the New York State Supreme Court, Appellate Division (“Part 137 of the Chief Administrator Rules”), [Client] has the right to request binding arbitration of fee disputes if the fee is between $1,000 and $50,000. Under the rules of certain jurisdictions, to the extent such rules are applicable to this engagement, [Client] may have the right to request binding arbitration of fee disputes in certain circumstances.”

(b) “In the event of a fee dispute between [Client] and [Name of Firm] involving amounts from $1,000 to $50,000, [Client] shall be entitled to arbitration in accordance with Part 137 of the Chief Administrator Rules.”

(c) “If we are unable to resolve any disputes regarding our invoices, you may be entitled to require arbitration under a procedure established in New York State for resolution of certain fee disputes pursuant to Part 137(b) of the Chief Administrator Rules. We will provide a copy of those Rules to you if such a dispute arises or upon your request. Except to the extent required by such Rules, any dispute or claim arising out of or in any way relating to the Firm’s representation of you (including, without limitation, any claim of malpractice or breach of contract) shall be finally settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award may be entered in any court having jurisdiction thereof. The place of arbitration shall be New York, New York. This agreement to arbitrate shall constitute an irrevocable waiver of each party’s right to a trial by jury, but
the arbitrators shall have the power to grant any remedy for money damages or equitable relief that would be available to such party in a dispute before a court of law in New York.”

July 2008

Committee On Professional Responsibility

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Laura Smith, Secretary

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James Fuchs
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Jeffrey Udell
James Walker
Letters of Engagement Rules

Joint Order Of The Appellate Divisions

The Appellate Divisions of the Supreme Court, pursuant to the authority invested in them, do hereby add, effective March 4, 2002, Part 1215 to Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York, entitled "Written Letter of Engagement," as follows:

Part 1215 Written Letter of Engagement

§1215.1 Requirements

a. Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

b. The letter of engagement shall address the following matters:

1. Explanation of the scope of the legal services to be provided;
2. Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.

c. Instead of providing the client with a written letter of en-
gagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

§1215.2 Exceptions
This section shall not apply to:

1. representation of a client where the fee to be charged is expected to be less than $3000,
2. representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client, or
3. representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 NYCRR), or
4. representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

As amended April 3, 2002
Best Practice Standards for the Recruitment, Retention, Development, and Advancement of Racial/Ethnic Minority Attorneys

The Committee on Minorities in the Profession

In 2006, the New York City Bar’s Minorities in the Profession Committee reviewed the extensive literature relating to “best practices” for recruiting, retaining, developing, and advancing racial/ethnic minority attorneys. That literature is very rich and is replete with examples of best practices that are emerging in the nation’s law firms, corporate legal departments and the legal departments of government and nonprofit organizations. Rather than publishing a “best practices” guide of its own, the Committee believed that a best practices resource guide that included a list of best practices distilled from this extensive literature and an annotated reference list that highlighted certain particularly helpful texts would probably be most useful to those seeking to promote diversity within their own organizations. The Committee hopes that this document will be a guide and reference tool for legal employers looking to improve their diversity efforts, as well as a useful starting point for discussions of specific diversity initiatives within these “best practices” standards that have been successful.
The Committee advocates the following ten Best Practices Standards.

**Best Practice Standard No. 1: Senior Management Commitment**
Demonstrated commitment by General Counsel/Chief Executive Officer or managing partner and department heads to promote and advance racial/ethnic minorities.

**Best Practice Standard No. 2: Organizational Accountability**
Creation of a system that monitors, and includes a system of rewards and penalties for, the extent to which partners/managers have succeeded in implementing the Best Practices Standards.

**Best Practice Standard No. 3: Diversity Structure; Integration of Diversity Efforts into All Organizational Initiatives**
Establishment of a senior-level diversity committee with management/executive committee representation to oversee and support diversity efforts. Hire diversity professional (or designate a member of the human resources staff) to develop and implement diversity strategy. Ensure adequate resources in budget and staffing to meet goals. Integrate diversity into other relevant efforts, including recruitment, professional development, marketing, and performance management efforts.

**Best Practice Standard No. 4: Proportionate Representation**
Employment and retention of a proportionate number of racial/ethnic minorities across all levels and in all practice areas and departments. Significant presence of racial and ethnic minorities in visible leadership positions within the organization (and, in law firms, as equity partners) to serve as role models.

**Best Practice Standard No. 5:**
**Career Advancement; Development and Training**
Transparency regarding the criteria required for and timing of promotion, formal process for the distribution of assignments, and accurate and effective feedback on career development and advancement. Development plans for all attorneys and training in areas that promote advancement, including business development, networking, and how to become a leader.

**Best Practice Standard No. 6: Work-Life Effectiveness**
Ensure that programs that assist attorneys in managing work and
personal life, such as flexible work arrangements and family care leaves, are available to all attorneys across racial groups who need them. Be responsive to cultural differences in family commitments and elder care for different groups.

**Best Practice Standard No. 7: Mentoring Culture**
Foster a mentoring culture that includes developing and implementing an effective and tailored internal mentoring program, and instruction on how to establish and maintain informal mentoring relationships. Encourage and promote outside mentoring opportunities.

**Best Practice Standard No. 8: Internal and External Networking**
Foster opportunities for minority attorneys to develop relationships internally with senior leaders and other attorneys of color, particularly through affinity groups. Encourage participation in external networking activities.

**Best Practice Standard No. 9: Diversity and Inclusion Education**
Mandatory ongoing education on racial/ethnic diversity, including inclusion, discrimination, subtle bias, stereotyping, and the interplay between race-based stereotypes and performance perceptions.

**Best Practice Standard No. 10: Recruiting/Pipeline**
Set goals and ensure diverse slates for entry and lateral hiring. Provide support to lateral hires to integrate them within the organization and to ensure their success. Support and develop initiatives to bolster the pipeline of racial/ethnic minorities entering the legal profession from early education to bar passage.

The Committee believes that when legal employers take steps to create a more diverse and inclusive work environment for racial/ethnic minority attorneys, all attorneys—regardless of race or ethnicity—will benefit.

Notably, several of the listed Best Practices Standards for minority lawyers overlap with the New York City Bar’s *Best Practices for the Hiring, Training, Retention, and Advancement of Women Attorneys*.¹ This underscores the fact that women of color in the legal profession face challenges that

are common to both women and minorities but also unique\textsuperscript{2} and that the Best Practices Standards set forth below are most effective when integrated and viewed as connected to best practices for women.

The Committee recognizes that legal employers are searching for more substance when it comes to diversity programs. Every legal employer that is focused on diversity efforts wants to hear about the new-and-improved secret for recruiting, retaining, developing, and advancing racial/ethnic minority attorneys. However, there is no magic bullet or one-size-fits all solution to creating a more diverse work environment. Additionally, certain racial/ethnic minority groups may experience unique challenges that must be taken into account when implementing these standards. The Committee believes that the ten Best Practices Standards set forth above and the accompanying list of resources will be most useful to legal employers in conjunction with a dialogue of how these concepts are being implemented at law firms and other legal employers, and how the programs were successful or not at the particular organization.

The Committee is cognizant of the many challenges that are inherent in the structure of certain organizations that make retention and advancement difficult generally. Law firms, for example, have a revenue system based on billable hours, and the difficulty of maintaining a work-life balance in the face of pressures to meet official or unofficial billable hour commitments, together with an “up or out” system of promotion, make retention of valued associates challenging. In corporate and other in-house legal departments, a relatively flat structure with little attrition or movement make opportunities for advancement limited. These structural challenges make it essential for law firms, corporations and other legal employers to recruit, retain, and promote the best attorneys, regardless of race, ethnicity or gender. This is an imperative that the Best Practices Standards set forth above will help organizations to achieve.

**USEFUL RESOURCES**

The following is a list of resources that the Committee believes will be useful to persons starting or managing initiatives to promote diversity within their own organizations.

\textsuperscript{2} See American Bar Association Commission on Women in the Profession, Visible Invisibility: Women of Color in Law Firms (Chicago, IL: ABA Commission on Women in the Profession, 2006).
General

American Bar Association (ABA), 321 North Clark Street, Chicago, IL 60610 (Telephone: 312.988.5000). The ABA’s website, which may be found at http://www.abanet.org, contains a wealth of useful materials. Among these are reports and other materials of ABA’s Presidential Advisory Council on Diversity in the Profession relating to programs and services to improve diversity in the pipeline to the legal profession. See the description of the Advisory Council’s Pipeline Diversity Directory under “Pipeline Programs” below. The ABA’s Commission on Racial and Ethnic Diversity in the Profession, in addition, has prepared many useful reports, including the Miles to Go: Progress of Minorities in the Legal Profession study described below.

Catalyst, Inc., 120 Wall Street, 5th Floor, New York, NY 10005, (Telephone: 212.514.7600). Founded in 1962, Catalyst works with businesses to expand opportunities for women. Catalyst’s website, located at www.catalyst.org, lists numerous materials of interest to diversity professionals, including studies of the networking practices of women of color and a “Making Change” series on introducing diversity initiatives in the workplace. These materials are available for purchase through Catalyst’s website. Catalyst also maintains a diversity consulting practice that works with Catalyst members who are interested in promoting a more diverse work environment.

Minority Corporate Counsel Association (MCCA), 1111 Pennsylvania Ave, N.W., Washington, DC 20004 (Telephone: 202.739.5901). Established in 1997 to promote increased hiring, retention and promotion of minority attorneys in corporate law departments and law firms, MCCA has sponsored numerous studies and surveys of minority attorneys. MCCA also publishes Diversity & the Bar, a bimonthly magazine that features articles of interest to diversity professionals and minority attorneys. MCCA sponsors an annual CLE expo and an annual Creating Pathways to Diversity Conference that feature substantive sessions and offer numerous opportunities for networking. MCCA’s website may be found at www.mcca.com.

Legal Employers

the American Bar Association’s Colloquium on Diversity in the Legal Profession in October 1999 to increase racial and ethnic diversity at all levels of the legal profession. The resource guide contains summary information on organizations across the country that are working to fulfill the six goals set forth in the resource guide.


**Minority Corporation Counsel Association.** A SET OF RECOMMENDED PRACTICES FOR LAW FIRMS (BLUE BOOK). Washington, D.C.: Minority Corporate Counsel Association, 2000 (available online at http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=613). Based on a benchmarking survey of 104 law firms and interviews with focus groups, this study describes the barriers that law firms face in implementing diversity programs and the challenges that minority attorneys confront. Among those most affected were women of color, who experienced an almost 86 percent attrition rate before their seventh year. The study concludes with a list of ten recommended best practices to address the problems described in the report.

**Minority Corporation Counsel Association.** A STUDY OF LAW DEPARTMENT BEST PRACTICES. Washington, D.C.: Minority Corporate Counsel Association, 2005 (available online at http://www.mcca.com/_data/n_0001/resources/live/Pathways_Green_2005_book.pdf). This publication updates an earlier study on in-house attorneys published in 2000. The update finds that there was substantial growth in the representation of women and minority general counsel at Fortune 500 companies between 2000 and 2005, while minority partner growth in law firms remained relatively flat during that period. The report then examines fifteen best practices that have aided such progress.

**NALP, NALP Diversity Best Practices Guide.** (March 2006) (available online at http://www.nalp.org/assets/221_diversitybestpracticesgui.pdf). NALP’s Diversity Best Practices Guide is intended as a resource for legal employers seeking to establish diversity initiatives for their own organizations. Based on industry research and interviews with legal professionals, the guide is a collection of diversity best practices in four areas: (i) leadership; (ii) retention, culture, and inclusion; (iii) professional development;
and (iv) recruitment. The guide also contains a useful list of diversity resources, including websites at which legal professionals can obtain a wealth of additional information.

**Vault/MCCA Guide to Law Firm Diversity** (published annually). Developed by Vault and the Minority Corporate Counsel Association, this guide offers diversity profiles on almost 200 major law firms nationwide. The guide provides information on the number of women, minorities and lesbian, gay, bisexual and transgender attorneys at each level, as well as on diversity efforts that each firm has undertaken. The standardized format facilitates comparisons among firms, and the narratives that the firms provide often contain ideas for diversity initiatives that can be implemented by others.

**Professional Services Firms**

Akinola, Modupe, and David A. Thomas. *Racial Diversity Initiatives in Professional Service Firms: What Factors Differentiate Successful from Unsuccessful Initiatives?* Harvard Business School Working Paper, 2006 (available online at http://www.hbs.edu/research/pdf/07-019.pdf). Akinola and Thomas propose a study to examine management initiatives to promote racial diversity in professional service firms. The study would seek to identify the factors that lead to the successful implementation of certain diversity practices and explore how such firms can recruit and retain a more diverse workforce.

Anthony, Kathryn H. *Designing for Diversity: Gender, Race, and Ethnicity in the Architectural Profession.* Urbana-Champaign, IL: University of Illinois Press, 2001. Based on hundreds of interviews with architects, this book describes the forms of discrimination frequently experienced by women and minorities in architectural firms. Anthony finds, among other things, significant salary differences along gender lines and a large percentage of her respondents who reported having seen or heard of sexual or racial discrimination in an architectural office.

Bagati, Deepali. *Retaining People of Color: What Accounting Firms Need to Know.* New York: Catalyst, Inc., 2007. Based on a survey of members of three professional associations for minority accountants and interviews with former employees of a sample of large accounting firms, this study found that a significant percentage (between 37 and 50 percent) of minority accounting professionals did not feel obligated to stay in their current job and intended to leave. Bagati provides anecdotal evidence highlighting perceived stereotyping, differential performance standards
and the absence of professional development opportunities as issues to be addressed to promote retention of persons of color.

**Pipeline Programs**

**American Bar Association Council on Legal Education Opportunity (CLEO)**. CLEO is a non-profit project of the ABA’s Fund for Justice and Education. Through LSAT preparation and a six-week prelaw summer institute taught by law professors, CLEO seeks to expand opportunities for groups that are underrepresented in the legal profession. Additional information on CLOE may be found at the following website: http://www.abanet.org/cleo/whatis.html#.

**American Bar Association Presidential Advisory Council on Diversity in the Profession and the Law School Admission Council**. The Pipeline Diversity Directory is an ever-growing online searchable database of projects, programs and initiatives that encourage and equip minority students to pursue legal careers. This free service presents key information on programs from across the country in an easily accessible, succinct format. It includes programs sponsored by law schools, law firms, in-house counsel, bar associations, other organizations, and collaborations that promote law careers for racially and ethnically diverse students. The Pipeline Diversity Directory is available online at http://www.abanet.org/op/pipelndir/home.html.

**Legal Outreach, Inc.’s College to Law School Pipeline Diversity Initiative**. Founded in 1983, Legal Outreach prepares underprivileged urban youths in New York City to compete at high academic levels through educational programs and internships. The College to Law School Pipeline Diversity Initiative is a new program that focuses on helping minority college students prepare for law school by providing free LSAT preparation and placing students in paralegal internships in major law firms. Legal Outreach’s website may be found at www.legaloutreach.org.

**National Bar Association Pipeline Programs**. The Commercial Law Section of the National Bar Association formed a Committee on the Development of Ethnically Diverse Lawyers to develop and implement a network of pipeline programs. The pipeline programs are aimed at increasing the number African American, Asian American, Latino, Native American and other lawyers of color graduating from law schools to enhance diversity within the corporate and legal communities, starting in the State of
Arizona. The NBA has partnered with the Association of Corporate Counsel, Arizona Chapter; the State Bar of Arizona Committee on Minorities and Women in the Law; and the Maricopa County Bar Association Task Force on Recruitment and Retention of Women and Minority Lawyers. A description of the pipeline programs is available at http://www.nbapipeline.org/index.html.

**The Pipeline Crisis/Winning Strategies Initiative.** Sponsored by Sullivan & Cromwell, Goldman Sachs & Co., and Harvard Law School’s Charles Hamilton Houston Institute for Race and Justice, the Pipeline Crisis: Winning Strategies Initiative seeks to pool the talent, knowledge and resources of the professional and business communities to develop and support concrete solutions that combat the alarming rate at which young black men are dropping out of the track to meaningful employment.

**Practicing Attorneys for Law Students (PALS), 42 West 44th Street, New York, NY 10036.** PALS is a non-profit organization that provides mentoring as well as career and skills development resources to minority law students and beginning lawyers in the New York City metro area to facilitate their entry into the legal profession. Since its creation over 20 years ago, PALS has been the premier organization of its kind in the New York City area whose mission is to provide services primarily directed to minority law students and new attorneys of color. PALS’ Supplemental Bar Tutorial, which is conducted in the summer and winter, has provided hundreds of minority law students with seminars to enhance their New York State Bar passage rates. PALS also has a Mentor Matching Program and Mock Interview and Resume Workshop program designed give minority law students an opportunity to interact with attorneys and develop professional relationships. PALS’s website may be found at www.palsprogram.org.

**Sponsors for Educational Opportunity (SEO).** Through its Corporate Law Program, SEO annually places outstanding college students of color in summer internships with leading law firms and in-house legal departments. Interns also participate in a two-week Corporate Law Institute, where they listen to presentations by legal practitioners and law professors on substantive legal topics and learn skills necessary to excel during the first year of law school. SEO’s website may be found at www.seo-ny.org.

**Street Law, Inc. Corporate Legal Diversity Program.** Street Law, Inc. and the Association of Corporate Counsel (ACC) have developed a pro-
gram that brings corporate legal departments together with nearby diverse, high school law classes in an effort to engage the students, teach them more about civil law, and encourage them to consider careers in the legal profession.

There are a substantial number of law firms that have partnered with high schools and law schools to provide scholarships, mentoring programs, and internships for minority students and potential lawyers. There are also minority legal scholarships sponsored by several organizations, such as the Minority Corporation Counsel Association’s Lloyd M. Johnson, Jr. Scholarship Program. In addition, there are several bar association pipeline programs, such as the New York City Bar’s Minority Fellowship Program and the Thurgood Marshall Summer Law Internship Program. Other similar programs can be found in the ABA’s Pipeline Diversity Directory.

The following are examples of pipeline programs developed for other professions:

· Diversity Pipeline Alliance: The Diversity Pipeline Alliance is a network of national organizations that seeks to prepare students and professionals of color for leadership roles in the workforce. The organization works with middle and high school students, among others, to encourage them to seek careers in management. The organization’s website may be found at www.diversitypipeline.org.

· INROADS: Established in 1970, INROADS helps businesses gain greater access to diverse talent through continuous leadership development of outstanding ethnically diverse students and placement of those students in internships at many of North America’s top corporations, firms and organizations. The organization’s website may be found at http://katie.cob.ilstu.edu/inroads.html.

· National Action Council for Minorities in Engineering: Founded in 1974, NACME seeks to increase African American, American Indian and Hispanic representation in the nation’s technical, science and engineering workforce. NACME does this through scholarships and a new electronic resume service. NACME has also been working on a pre-college initiative. The group’s website may be found at www.nacme.org.

· National Black MBA Association, Inc.: NBMBAA sponsors
scholarship programs and a Leaders of Tomorrow® youth mentoring program. The organization’s website may be found at www.nbmbaa.org.

· National Society of Hispanic MBAs’ L.I.F.E. (Latin Initiative to Foster Empowerment) Program: Developed to increase undergraduate graduation rates for Latinos, the program sponsors leadership and pre-MBA programs.

Retention and Advancement
McKay, Patrick, Derek Avery, Scott Tonitandel, Mark A. Morris, Morela Hernandez, and Michelle R. Hebel. *Racial Differences in Employee Retention: Are Diversity Climate Perceptions the Key?* Personnel Psychology, 35 (2007). The study examines the role of varying perceptions of the organization’s “diversity climate” in producing turnover intentions among various racial/ethnic groups of managers in a national retail organization.

National Association of Multi-ethnicity in Communications (NAMIC), 336 West 37th Street, Suite 302, New York, NY 10018 (Telephone: 212.594.5985). NAMIC sponsors several key initiatives to promote diversity in the telecommunications industry, among them, the L. Patrick Mellon Mentorship Program (which pairs top industry executives with NAMIC members to develop career strategies), the Executive Leadership Development Program (a selective program to prepare NAMIC members to become corporate executives) and the Leadership Seminar (a professional development program to prepare NAMIC members for leadership roles in corporations). NAMIC also sponsors an annual conference that focuses on diversity issues. NAMIC’s website may be found at http://www.namic.com.


Sander, Richard H., *The Racial Paradox of the Corporate Law Firm*, 84 N.C.L. Rev. 1755 (2006). The author examines the hiring preferences given to African Americans by large law firms and argues that, as a result, blacks
in law firms tend to have lower law school grades than their white counterparts. The author links this disparity to a variety of counterproductive mechanisms, such as quality of assignments, which, he argues, produce very high African-American (and, to a lesser degree, Hispanic) attrition from law firms.

Coleman, James E., and Mitu Gulati, *A Response To Professor Sander: Is it Really About the Grades*, 84 N.C.L. REV. 1823 (2005-2006). The authors’ thesis is that the higher attrition rate of African American associates cannot be explained without taking into account the dynamics within individual firms. They also argue that the data do not support Sander’s conclusion that the lower law school grades is a key reason for higher minority law firm attrition.

Richardson, Veta T., *The Unqualified Myth*. LEGAL TIMES, (August 21, 2006) (available online at http://www.acc.com/public/employment/legaltimeswtrrebuttaltostaylorarticle.pdf). Richardson responds to articles by Richard Sander and their progeny. This article cites research that shows law school grades bear little relationship to attributes leading to law firm success, that African Americans are held to higher objective standards than whites, and that racial and gender bias impact minorities’ experiences at law firms.

**Mentoring and Professional Advancement**

Abbot, Ida O. *The Lawyer’s Guide to Mentoring*. Washington, D.C.: National Association for Law Placement, Inc., 2000. This is a comprehensive, yet reasonably compact, guide that covers everything from how mentoring relationships work and the benefits of mentoring to how to establish a formal mentoring program. It also offers individual attorneys advice on how to find mentors. Abbott also addresses the particular challenges that women and minority attorneys face in law firms.

Abbot, Ida O. *Learning from Your Mentor* (available online at http://www.law.com/special/professionals/pay/fy_2000_09_05h.shtml). Written for first-year law firm associates, this article describes how to get the most out of a mentoring relationship and how to find a mentor in a firm that has no formal mentoring program.

This handbook sets forth guidelines for the American Intellectual Property Law Association’s mentoring program. The guidelines are useful for a bar association or other organization wishing to establish its own formal mentoring program.

**Crutcher, Betty Neal.** *Mentoring Across Cultures.* **ACADEME.** 93 (July-Aug. 2007) (available online at http://www.aaup.org/AAUP/pubsres/academe/2007/JA/Feat/crut.htm). Based on a study of cross-cultural mentoring performed while the author was a graduate student at the University of Miami, this article finds that there are many challenges in such mentoring relationships. These include mentors from a dominant culture needing to overcome fears, biases and stereotypes, treating a mentee as an individual while viewing the mentee in a larger social context and maintaining boundaries and professional authority.

**LAWPRO Magazine: Focus on Mentoring** (April 2002) (available online at http://www.lawpro.ca/lawpro/LawPROmagazine1.pdf). Published by Lawyers Professional Indemnity Company, which is based in Toronto, Canada, this issue describes mentoring programs and practices for attorneys in Canada.

**Lawyers Professional Indemnity Company.** *Managing a Mentoring Relationship.* Toronto: Lawyers Professional Indemnity Company, 2002 (available online at http://www.practicepro.ca/practice/Mentoring_Booklet.pdf). This brochure offers helpful advice to both mentors and mentees on how to make a mentoring relationship work.

**Minority Corporate Counsel Association.** *Mentoring Across Differences: A Guide to Cross-Gender and Cross-Race Mentoring* (Yellow Book). Washington, D.C.: Minority Corporate Counsel Association, 2003 (available online at http://www.mcfa.com/index.cfm?fuseaction=page.viewpage&pageid=666). This report is the result of a year-long study of, among other things, how attorneys build successful cross-gender and cross-race mentoring relationships. The report offers concrete recommendations for mentors and mentees in diverse mentoring relationships, as well as for firms seeking to support such mentoring relationships. The report also includes a helpful checklist and curriculum for a formal mentoring program.

**Oshima, Michael W.** *Beyond Recruitment: Achieving a More Diverse Partnership.* **DIVERSITY & THE BAR** (July/Aug. 2006) (available online at http://
www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=960). In this article, Oshima identifies five things that law firms should consider to increase diversity in their partnership ranks.

**Ostrow, Ellen.** Mentoring: Constructing a Personal Advisory Board. Wisconsin Lawyer (Oct. 2001) (available online at http://www.lawyerslifecoach.com/articles/story_15.html). Ostrow argues that the old mentoring model in law firms, in which a senior attorney worked with a protégé/apprentice, is no longer practical because of the heavy demand on partners’ time. She argues instead for the need for young attorneys to form strategic alliances with persons who can provide advice on a broad range of professional issues.

**Thomas, David A.** Race Matters: The Truth About Mentoring Minorities. Harvard Business Review (Apr., 2001). Based on a study of racial minorities at three large U.S. corporations, this article explores why promising white professionals tend to enter fast tracks early in their careers while many minorities plateau in middle management. He finds that minorities who stayed in middle management tended to receive mentoring that was largely instructional and skill-based. The minorities who advanced beyond middle management, by contrast, tended to have a strong network of mentors and corporate sponsors. Thomas also discusses some of the challenges of mentoring across racial lines, including negative stereotypes and peer resentment. Finally, he offers concrete advice on how mentors can support broader initiatives at their organizations to foster the upward mobility of professionals of color.

**Vinson & Elkins.** New Lawyer Mentoring Program Handbook. (available online at http://www.vinson-elkins.com/pdf/overview/NewLawyerMentoringHandbook.pdf) This handbook is an example of guidelines for mentoring programs that law firms are establishing.

**Metrics**

**Ball, Calvin B., III.** Diversity Metrics: A Guide to Constructing an Inclusiveness Audit (available online at www.diversitydtg.com/articles/diversity_metrics.htm). This article provides a set of questions to assist firms in creating measurement tools for practically all of their diversity initiatives.

**General Counsel Roundtable.** From Thought to Action: Fostering Legal Department Diversity. Washington, D.C.: Corporate Executive Board, 2002
This reference sets forth, among other things, possible measures of progress in recruiting, retention, advancement and diversity program performance.

**Hubbard, Edward E.** *Measuring Diversity Results.* Petaluma, CA: Global Insights Publishing, 1997. This book provides readers with 100 measures, formulas, and tools to measure the results of diversity initiatives. These measures go beyond a simple tracking of outputs to determining how diversity efforts contribute to a company’s bottom-line performance, which Hubbard describes as “Diversity’s Return on Investment.”

**Minority Corporate Counsel Association.** *Metrics for Success: Measurement in Diversity Initiatives (Burgundy Book).* Washington, D.C.: Minority Corporate Counsel Association, 2003 (available online at http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=615). This is a comprehensive reference text that summarizes the case for diversity, provides formulas for measuring the performance of diversity initiatives, and explains how such initiatives contribute to an organization’s bottom line.

**Research Studies/Books**

**ABA Commission on Women in the Profession.** *Visible Invisibility: Women of Color in Law Firms.* Chicago, IL: ABA Commission on Women in the Profession, 2006. This study addresses the unique situation experienced by women of color at law firms, exploring such topics mentoring, networking, training, job satisfaction and work/life balance. According to the study, nearly two-thirds of the women of color surveyed reported that they had been excluded from networking opportunities and 44 percent said that they had been denied desirable assignments.

**Barrett, Paul M.** *The Good Black: A True Story of Race in America.* New York: Dutton Press, 1999. The career of Larry Mungin is explored in this book. A graduate of both Harvard College and Harvard Law School, Mungin’s career seemed headed for success. However, years later he finds himself suing his law firm for racial discrimination. This book details the story of Mungin’s upbringing that taught him to focus less on race and more on individualism, as well as his eventual discrimination suit.

**Chambliss, Dr. Elizabeth.** *Miles to Go: Progress of Minorities in the Legal Profession.* Chicago, IL: ABA Commission on Racial and Ethnic Diversity in the Profession, 2005. Similar to its predecessors in 1998 and 2000,
this report explores the status of racial and ethnic minorities in the legal profession. Its six major findings highlight: (i) the lower representation of minorities in law than other professions; (ii) the decrease in minority representation in law schools; (iii) the differential between minority and white lawyers’ initial employment; (iv) the underrepresentation of racial/ethnic minorities at the highest level of private sector jobs; (v) the slower progress of minority women relative to their male counterparts; and (vi) the ongoing challenges faced by minorities entering and practicing in the legal profession.

Ely, Robin J., Martin N. Davidson, and Debra E. Myerson, *Rethinking Political Correctness*, Harvard Business Review (Sept. 2006). This article addresses the benefits and hidden costs of political correctness. The authors argue that by adhering strictly to political correctness, people are less likely to form relationships with others who have differing racial/ethnic, gender and religious backgrounds. The authors provide five principles for addressing tension and conflict that sometimes arise over difference.

Minority Corporate Counsel Association. *The Myth of Meritocracy: A Report on the Bridges and Barriers to Success in Large Law Firms*. Washington, D.C.: Minority Corporate Counsel Association, 2003 (available online at http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=614). This report sets forth the findings of research in which MCCA explored: (i) the criteria used to elect partners; (ii) factors that distinguish those who make partner from those who do not; and (iii) the extent to which credentials and experiences are indicators of the likelihood of being elected to partnership. Based on its research, MCCA sets forth ten conclusions and eight recommendations for law firms and individuals wishing to achieve effective diversity programs.

Reeves, Arin N. *Colored by Race: Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees*. Diversity & the Bar (Sept./Oct. 2006) (available online at http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=576). This study reports the findings of interviews with hiring partners and others involved in the law firm hiring process. One of the central findings is that racial/ethnic bias is present in this process. In addition to addressing the findings, the author provides strategies for combating bias. These strategies focus on acknowledging the presence of racial biases and providing training for those involved in the hiring process.
Steele, Claude M., and Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*. *Journal of Personality and Social Psychology*. 6 (1995): 797-811. Steele and Aronson offer an alternative explanation for the white-African American test score gap—"stereotype threat.” As defined by the authors, stereotype threat is “the threat of being viewed through the lens of a negative stereotype, or the fear of doing something that would inadvertently confirm that stereotype.” In their research, the authors find that when testing situations are controlled for stereotype threat, the gap between African American and white students’ test performance dramatically narrows.

Thomas, David A., and Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, *Harvard Business Review* (Sept./Oct. 1996). In this article, the authors assess the benefits and limitations of two approaches to diversity efforts—the “discrimination-and-fairness paradigm” and the “access-and-legitimacy paradigm.” Arguing for movement to a new paradigm that connects “diversity to work perspectives,” Thomas and Ely provide eight preconditions to this paradigm.


U.S. Equal Employment Opportunity Commission. *Diversity in Law Firms*. Washington, D.C.: U.S. Equal Employment Opportunity Commission, 2003 (available online at http://www.eeoc.gov/stats/reports/diversitylaw/index.html). This report examines the changes in employment status of women and minority lawyers in mid-size and large law firms since 1975. According to the EEOC, the most pressing issue for women and minority lawyers in these firms is no longer hiring but promotion to partnership. The EEOC found that, although the presence of women and minorities in law firms has increased dramatically since 1975, the odds of a woman or minority lawyer becoming a partner remain significantly lower than for their white male counterparts. Among minority attorneys, Asian attorneys were found to have the lowest odds of becoming partners.

Wilder, Gita Z. *The Road to Law School and Beyond: Examining Challenges to Racial and Ethnic Diversity in the Legal Profession*. Law School Ad...

April 2008

Committee on Minorities in the Profession

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En Banc Review in New York State Courts

The Committee on State Courts of Superior Jurisdiction

I. INTRODUCTION
A. The Issue

The New York City Bar Association Committee on State Courts of Superior Jurisdiction has become aware that, within each department of the New York Appellate Division, conflicts sometimes arise between decisions made by that department on particular legal issues.1

Generally speaking, if a panel of an intermediate appellate court finds that a prior panel of that court has erroneously decided an issue, the panel has no power to overrule the prior panel.2

The power to overrule is left to the highest level of appellate court, the New York Court of Appeals. But because the high court decides comparatively few cases and does not focus on intradepartment conflicts, such conflicts persist, thereby promoting confusion and more litigation.

The Committee has spent a significant amount of time studying the issue and believes that such confusion is unacceptable because in most ordinary cases, the Appellate Division is the court of last resort.

The Committee further believes that the Appellate Division could resolve these intradepartment conflicts if it were permitted to sit for en banc hearings. Unlike a majority of the jurisdictions which have sizeable


intermediate appellate courts that hear cases in revolving panel formats, New York does not provide for en banc rehearings by its Appellate Division.

**B. Survey Results**

Our survey has found that 23 states, the entire federal court system, and the District of Columbia all provide for en banc review by their intermediate appellate courts. En banc review is used in all of these jurisdictions to enable the intermediate appellate courts to resolve conflicts in their own decisions, thereby promoting clarity and the resolution of disputes.

**C. Recommendations**

For three reasons, the Committee believes that New York should adopt an en banc review provision.

First, the other states which do not provide for en banc review tend to be moderately sized states which either: (a) do not have intermediate appellate courts; or (b) have intermediate appellate courts with small caseloads compared to that of the New York Appellate Division. The smaller intermediate appellate courts generally do not need an en banc review provision to ensure uniformity and consistency in their decisions.

Second, the historical reason for New York’s position (certain of the Appellate Division departments formerly had no more than five justices) has long since become irrelevant because each of the departments now has at least eleven justices.

Third, modern courts with burgeoning caseloads should be given the tools necessary to enable them to produce a consistently superior quality of judicial work. Intradepartment conflicts promote confusion and litigiousness. The adoption in New York of an en banc review provision would provide each department of the Appellate Division with a tool to assist in the elimination of such conflicts.

Therefore, the Committee recommends that New York law be amended to permit each Appellate Division department to conduct rehearings en banc. While other jurisdictions sometimes permit their intermediate appellate courts to hold their initial hearing of an appeal en banc, we do not believe that it is necessary to adopt that type of en banc review in New York.

**II. BACKGROUND**

**A. Origins Of Modern En Banc Review**

Modern en banc review at the intermediate appellate court level began in the federal court system approximately one hundred years ago.
Beginning with the Judiciary Act of 1789, federal statute has provided that appeals pending in the circuit courts of appeals shall be heard in three-judge panels.

The prospect of rehearing an appeal by a court of more than three members first arose in 1911 when the restructuring of the federal circuits provided three circuits (Second; Seventh; Eighth) with four circuit judges each. Previously, the federal circuit courts each consisted of just three members.

In 1941, the United States Supreme Court upheld the authority of a circuit court of appeals to rehear a case en banc. For a unanimous court, Justice William O. Douglas wrote that providing for such en banc hearings at the intermediate court level:

makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases.

This power was confirmed by Congress in 1948. The statute, 28 U.S.C. § 46(c), granted the en banc power to the circuit courts, but left it to the courts themselves “to establish the procedure for exercise of the power.”

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9. Id. at 335. Justice Douglas further wrote that en banc proceedings also “obviate the situation where there are seven members of the [circuit] court and, as sometimes happens, a decision of two judges (there having been one dissent) sets the precedent for the remaining judges.” Id. at 335 n. 14.
The en banc power extended to both original hearings and rehearings. The Supreme Court later confirmed this statutory grant in a 1953 decision entitled *Western P.R. Corp. v. Western P.R. Corp.*12

**B. Restraint In Its Exercise**

For busy intermediate appellate courts, en banc review can become a source of disruption unless there is restraint in its exercise. In the *Western P.R. Corp.* case, a concurring opinion by Justice Felix Frankfurter noted the dangers of allowing rehearings en banc too frequently:

> Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed a normal procedure. * * * [I]n some circuits these petitions [for rehearing en banc] are filed almost as a matter of course. This is an abuse of judicial energy. It results in needless delay. It arouses false hopes in defeated litigants and wastes their money.13

**C. Fed. R. App. P. 35**

Justice Frankfurter’s admonitions were later taken to heart when Fed. R. App. P. 35 was adopted by the federal courts in 1967. Entitled “En Banc Determination,” the rule states that en banc proceedings “are not favored and ordinarily will not be ordered.” Under subdivision (a) of the rule, en banc hearings or rehearings are authorized in just two circumstances:

1. en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; and
2. the proceeding involves a question of exceptional importance.

Based on these two criteria, a majority of the circuit judges who are in regular active service may order that an appeal be heard or reheard before the entire court.14

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12. Id.

13. Id. at 270 (Frankfurter, J., concurring). These sentiments appear to be shared by Judge Newman, who noted in his 1984 article that the Second Circuit only rarely heard cases en banc. Hon. J. Newman, supra note 5 at 371. In his 1994 biography of Circuit Judge Learned Hand, Professor Gerard Gunther noted that the judge “scorned” en banc review and considered it to be both disruptive and wasteful. Gunther, Learned Hand: The Man And The Judge, 515-16 (Knopf 1994).

**D. En Banc Review In The State Courts**

**1. States Providing For En Banc Review**

Twenty-three states and the District of Columbia provide some type of en banc review. These states tend to have intermediate appellate courts which: (a) consist of four or more judges; and (b) typically hear cases in three-judge panels. Our survey has found that these states provide for en banc review for the same reasons as the federal court system.

**2. States Which Do Not Provide For En Banc Review**

Twenty-seven of the states do not provide for en banc review. Of these twenty-seven states:

a. Nine have no intermediate appellate court (and therefore have no need for an en banc review provision); and

b. Six have small intermediate appellate courts which, compared to the large intermediate appellate courts, have little need for en banc review to maintain uniformity and consistency in their decisions.

c. Twelve other states in this category have large intermediate appellate courts.

However, with the lone exception of New York, each of these states maintains the uniformity and consistency of its intermediate appellate courts’ decisions by allowing its courts to issue two types of opinions: published and unpublished. Generally, the published decisions are considered “precedential” and require a majority vote of the courts’ judges to approve such publication. Unpublished decisions are not considered to be precedential.

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15. These states include: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nevada, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Washington.


17. These states include: Maine, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

18. These states include: Alaska, Hawaii, Idaho, Nebraska, New Mexico, and Utah.

19. These states include: Arizona, California, Colorado, Illinois, Indiana, Kentucky, Minnesota, New Jersey, New York, North Carolina, Oklahoma, and Wisconsin.
New York law does not permit the New York Appellate Division to issue unpublished opinions. Under Judiciary Law §§ 431 through 433a, every case decided by the Court of Appeals and Appellate Division must be reported to the New York State Law Reporting Bureau. Therefore, New York stands alone amongst the fifty states in that it: (a) maintains a large intermediate appellate court; (b) does not provide for en banc review; and (c) prohibits unpublished decisions by its appellate courts. As a result, by not authorizing en banc review or unpublished opinions, New York places the heaviest burden of any state on its intermediate appellate court when it comes to maintaining the uniformity and consistency of its decisions.

III. PROCEDURAL CONSIDERATIONS

A. When The Request For En Banc Review Should Be Made

To minimize disruption to the Appellate Division’s workflow, the request for an en banc rehearing should be made at the same time as the motion for a reargument. For example, in the First Department, 22 NYCRR 600.14 could be supplemented to require that en banc rehearing requests be made: (a) within thirty days of the subject decision (just as reargument motions are now so required); and (b) in the same motion that seeks reargument. Page limits could be imposed on the motion briefs, just as they are now with respect to appellate briefs under 22 NYCRR 600.10.

B. CPLR 5513-5514

An en banc rehearing feature could be adopted so that it would not affect the timing of any notices of appeal or motions for leave to appeal governed by CPLR 5513-5514.

C. CPLR 5601

An en banc rehearing provision should have only positive effects on the case load of the New York Court of Appeals, which is a certiorari type of court established to articulate statewide principles of law, not decide individual factual disputes.

Currently, most appeals as of right pursuant to CPLR 5601 come from two types of cases: (a) where an Appellate Division decision finally determines an action and two justices have dissented; or (b) where an Appel-
late Division decision finally determines an action and the case directly involves the construction of the state or federal constitutions.

If the en banc revision provision can be utilized to eliminate one or both of these grounds in a particular case, the provision will not only assist in resolving the case in a more expeditious manner but it will also lighten the burden of the Court of Appeals, whose docket is supposed to be reserved for only the most important issues of statewide importance.21

On rare occasions, an appeal as of right may develop for the first time from the en banc decision, such as when two justices file dissents. The language of CPLR 5601(a) is broad enough to encompass such a result. No amendment of CPLR 5601 would be necessary. For those who are concerned that an en banc review provision might lead to a material increase in the Court of Appeals’s docket, we suggest that a companion provision could be adopted amending CPLR 5601(a) wherein two-fifths of the justices voting in an en banc case ought to dissent before an appeal as of right is triggered.

D. CPLR 5602

Discretionary appeals to the Court of Appeals are governed by CPLR 5602. Each year, significant judicial resources are expended by the appellate courts in ferreting through thousands of motions for leave to appeal, only a fraction of which are ever granted. An en banc rehearing provision would assist in identifying the truly leaveworthy cases.

E. Current Impediments To En Banc Review In New York

The modern Appellate Division was created at the 1894 Constitutional Convention.22 Since that time, the New York State Constitution has stated that no more than five justices shall sit in any case heard by the Appellate Division.23

As noted in a 2006 article published by Appellate Division Justice David B. Saxe, this five-justice rule was adopted at an earlier time when the downstate departments of the Appellate Division had seven justices while the upstate departments had just five.24

23. N.Y. Const., Art. 6, § 4.b. The same five-justice rule is also contained in Judiciary Law § 82.
Nothing in the record of the 1894 Constitutional Convention rejects the idea of limited en banc review. The record indicates that the issue was never discussed, much less contemplated.

Each department of the Appellate Division now consists of at least eleven justices.25 Thus, there is no legitimate reason for the strict five-justice rule to stand in the way of permitting a limited en banc review.

IV. RECOMMENDED ACTION

The New York Appellate Division cannot engage in en banc rehearsings unless Article 6, Section 4.b. of the New York Constitution is amended to modify the strict five-justice rule.26 The Committee believes that this can be accomplished with a minor amendment to Article 6, Section 4.b., which appears in the italicized phrase below:

b. The appellate divisions of the supreme court are continued, and shall consist of seven justices of the supreme court in each of the first and second departments, and five justices in each of the other departments. In each appellate division, four justices shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case, except when a majority of the justices of any department votes to rehear en banc a case originally heard by that department. If a case is reheard en banc, the concurrence of a majority of the department’s justices eligible to sit on the case shall be necessary to a decision.

Because the size and challenges of the four Appellate Division departments vary, the Committee also recommends that each Appellate Division be granted the discretion to implement its own procedures for en banc rehearsings. Most of the jurisdictions which permit en banc review have allowed the courts to devise their own procedural rules on the subject.

However, the Committee does not recommend that en banc hearings be permitted with respect to the initial hearing of an appeal. Such a pro-

25. The First Department has eighteen seats, the Second Department has twenty-two seats, the Third Department has eleven seats, and the Fourth Department has eleven seats, http://www.courts.state.ny.us/courts (last viewed November 3, 2008)

26. The amendment procedure is explained in Article XIX of the New York Constitution. Judiciary Law § 82 will also have to be amended.
vision is not needed to ensure the uniformity and consistency of the decisions of New York’s intermediate appellate court. Moreover, it would likely prove to be disruptive to the courts’ workload, which is already one of the most prodigious in the nation.

May 2008

Committee on State Courts of Superior Jurisdiction

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Unauthorized Practice of Law and the Representation of Parties in Arbitrations in New York by Lawyers Not Licensed to Practice in New York

The Committee on Arbitration

INTRODUCTION

In 1975, The Committee on Labor and Social Security Legislation of the Association of the Bar of the City of New York (now the City Bar Association) prepared a report on Labor Arbitration and the Unauthorized Practice of Law. Speaking for the Association, the Committee concluded that “representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law. Even if it is held to be the practice of law, there are sound and overriding policy reasons for permitting such non-lawyer representation in the labor arbitration field.”

The Committee’s position was influential beyond its labor law context. In 1982, Judge Weinfeld quoted the 1975 Report authoritatively in

UNAUTHORIZED PRACTICE OF LAW

Williamson, P.A. v. John D. Quinn Construction Corp. for the express proposition (in the context of a fee dispute in a domestic construction arbitration) that “[r]epresentation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the practice of law.”

A decade after Williamson, another decision, Seigel v. Bridas Sociedad Anomina Petrolera Industrial y Comercial, followed Judge Weinfeld’s lead. This time, the court used the 1975 Committee Report as support, in the context of an international commercial arbitration, for its holding that “[r]epresentation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.” That same year, another committee of the City Bar (and this Committee’s predecessor), the Committee on Arbitration and Alternative Dispute Resolution, reiterated that “[w]e are of the unanimous view that, as a matter of New York law, and professional ethics, parties to international or interstate arbitration proceedings conducted in New York may be represented in such arbitration proceedings by persons of their own choosing, including lawyers not admitted to practice in New York.”

Finally, only several months ago, the federal courts in New York reaffirmed Judge Weinfeld’s holding in Williamson yet again in Prudential Equity Group, LLC v. Ajamie. The reaffirmation was a ringing one. First, Judge Rakoff declared Judge Weinfeld “perhaps the greatest judge ever to sit in this District.” Second, Judge Rakoff noted that other courts had followed Judge Weinfeld’s decision in Williamson. Third, Judge Rakoff noted that

respected commentators had praised Judge Weinfeld’s decision in Williamson.\(^9\)
Finally, Judge Rakoff cited the views of the committees of City Bar as consistent with Judge Weinfeld’s decision in Williamson.\(^10\) Given these factors, Judge Rakoff rejected the contrary reasoning of the California courts in the notorious case of Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Ct.,\(^11\) and not only found “Judge Weinfeld’s reasoning wholly persuasive”, but was “certain the New York Court of Appeals would find likewise.” As Judge Rakoff explained,

> Although, in the quarter century since Judge Weinfeld wrote, arbitration proceedings have become more protracted and complex, not to mention costly, they still retain in most settings their essential character of private contractual arrangements for the relatively informal resolution of disputes. Indeed, the Court notes that the rules of the New York Stock Exchange, where the Sahni arbitration was held, do not require members of the arbitration panel to be lawyers at all. See N.Y. Stock Exch. Rule 607. It would be incongruous to apply a state’s unauthorized practice rules in such an informal setting. Whatever beneficent purposes New York’s prohibition against the unauthorized practice of law may serve in protecting clients and regulating lawyers’ conduct, it is not designed as a trap for the unwary or as a basis on which New York lawyers can extend a monopoly over every private contractual dispute-resolving mechanism.\(^12\)

The holding in Williamson and the views of the 1975 Committee Report, despite their seminal status and continued reaffirmation in New York over the years, have not translated directly into a national view on the issue of unauthorized practice of law in the context of arbitration, however—not even just as it applied to lawyers. Most obviously, in August 2002, the American Bar Association, in adopting proposed changes to its Model Rule of Professional Conduct 5.5, took what some considered to be a narrower approach. ABA Model Rule 5.5 had (until then) provided that “[a] lawyer shall not (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b)

10. \textit{Id.}
11. 949 P.2d 1 (Cal. 1998).
assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." New ABA Model Rule 5.5(c)(3) instead included a limited exception for "legal services"

that are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.14

While the ABA’s Model Rules of Professional Conduct have been adopted in one form or the other by all states except California, Maine, New York, and Ohio, the adoption of Model Rule 5.5(c)(3) has been less widespread. Since its August 12, 2002 approval, only eleven states have (according to the ABA) adopted Model Rule 5.5(c)(3) without change.16 Many others


14. Model Rules of Prof’l Conduct R. 5.5(c)(3) (2002), http://www.abanet.org/cpr/mrpc/rule_5_5.html (last visited Feb. 9, 2008). The official comments to this rule state that it "permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require." Id. R. 5.5 cmt. 12 (2002). The official comments also state that "Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted." Id. R. 5.5 cmt. 14 (2002). (ABA Model Rule 5.5(c)(4) permits the "provision of legal services" in a sister jurisdiction where those services "are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice." Id. R. 5.5(c)(4) (2002).) This does not mean the party must be from the lawyer’s home state; in the ABA’s explanatory comments, the client may simply have used the lawyer before, or "a significant aspect of the matter may involve the law of that jurisdiction," or "the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law." Id. R. 5.5 cmt. 14.


have made substantive revisions to the rule, and a number have not adopted it in any form.\footnote{17}

To some extent this cautious approach to the ABA Model Rule may be based on a view by some jurisdictions that the Model Rule might be read to be narrower than prior law. But this concern seems small when compared to the very strict view of the issue of a lawyer representing a client in an arbitration in a state where the lawyer is not licensed to practice taken by several courts over the past decade. For example, in the notorious case of 

\textit{Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court}, a California court held, on the theory that "[c]ompetence in one jurisdiction does not necessarily guarantee competence in another", that "in the absence of clear legislative direction, we decline to . . . allow[] unlicensed legal practice in arbitration . . . ."\footnote{18} As another example, a Connecticut state court, denying a motion to admit a New York lawyer \textit{pro hac vice} in an arbitration, recently held that "[n]otwithstanding the credentials of the applicant" (who was licensed in another state) "[Connecticut law] contains no provision which would authorize this court to allow Attorney Glatthaar to represent his clients in Connecticut arbitration . . . ."\footnote{19}

These recent trends outside New York raise at least two important questions about part of the issue originally addressed by the Committee on Labor and Social Security Legislation in 1975. First, is a narrower approach than the one adopted by the federal courts in New York in 1982 and 1991 now appropriate to the question of the unauthorized practice of law by a lawyer not licensed in the state where he or she is representing a party in an arbitration? Second, and more specifically, with the New York Code of Professional Responsibility soon to be replaced by some form of the ABA Model Rules of Professional Conduct, is the approach of ABA Model Rule 5.5(c) the right one, or should New York (as have many other states in differing ways) modify or avoid that rule?\footnote{20}

\footnote{17. See generally infra at 18-55.}

\footnote{18. 949 P.2d 1, 8 \& n.4 (Cal. 1998) (citing CAL. BUS. \& PROF. CODE § 6125 (Deering 2006) ("No person shall practice law in California unless the person is an active member of the State Bar."). The conflation of a state jurisdiction with an arbitral jurisdiction is a common logical error in arguments such as this. The place of an arbitration has no necessary connection to the law of that place. \textit{Cf.}, e.g., \textit{infra} at 34-35 (discussing Colmar Ltd. v. Fremantlemedia N.A., Inc., 801 N.E.2d 1017 (III. App. 2003)).}

\footnote{19. \textit{In re Application to Admit Attorney James Glatthaar Pro Hac Vice}, No. 05-4015630, slip op. at 1 (Conn. Super. Ct. Hartford Oct. 24, 2005).}

\footnote{20. There is a third important question we do not address in this report—should the position of the 1975 Committee Report as it applies to laypersons continue, or should any exception
We address these questions in the context both of the history of the unauthorized practice of law in New York and in the context of what other jurisdictions do. Our conclusion is that New York should not change the view announced by this Committee’s predecessor in 1975 that “representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.” This view does not lead us to any particular opposition to the proposed be limited to lawyers? There are substantial arguments to be made on that subject. For example, there are many cases in small claims courts where litigants regularly appear without lawyers. Some courts have long recognized this as an exception to rules against the unauthorized practice of law. See, e.g., Lowell Bar Ass’n v. Loeb, 52 N.E.2d 27, 33 n.2 (Mass. 1943) (“An exception may exist in ‘small claims’ procedure . . . .”) (citing, e.g., Am. Automobile Ass’n, 117 F.2d at 25; McLaughlin v. Municipal Ct., 32 N.E.2d 266 (Mass. 1941); Crystal Spring Finishing Co. v. Freetown, 50 N.E.2d 34, 35 (Mass. 1943)). The exception is not limited to claims by individuals, either. See, e.g., NYC Civil Ct. Act § 1802-A (2006) (establishing that commercial claims may be brought in the Small Claims Court Commercial Part by corporations, partnerships, or associations, with or without an attorney). Indeed, in some small claims courts, lawyers other than certain in-house counsel are forbidden. See, e.g., NYC Civ. Ct. § 1802-A (2006) (establishing that commercial claims may be brought in the Small Claims Court Commercial Part by corporations, partnerships, or associations, with or without an attorney). If not all proceedings in court require a lawyer, then it would be erroneous to believe that all arbitrations require a lawyer. It is then fair to ask whether any arbitration requires a lawyer. Many organizations seem to think not, at least within their own jurisdictional limits. Membership organizations often do not require lawyers for representation of parties in disputes (including arbitrations) between members. Many providers of arbitration do not require that persons representing a party be a lawyer, either. See, e.g., AMERICAN ABB’N COMM. ARB. R. 24 (representation by “counsel or other authorized representative”), http://www adr.org/sp.asp?id=22440 (last visited May 16, 2007). While the Financial Industry Regulatory Authority (“FINRA”) avoids the ultimate issue by acceding to state law, it otherwise in general permits parties to be “represented in an arbitration or mediation by a person who is not an attorney” unless they have been barred from the securities industry or are a disbarred or suspended lawyer. See FINRA Regulatory Notice No. 07-57, 2007 FINRA LEXIS 56, at *7 (Nov. 2007).

21. We believe there is no longer any meaningful dispute that an arbitrator need not be a lawyer. In general, judges need not be lawyers, after all. See, e.g., U.S. CONST. art. II, §2, cl. 3. The typical definitions of law practice, see, e.g., D.C. Ct. App. R. 49 cmt. to § 49(b)(2), http://www.dcappeals.gov/dccourts/docs/DCCA_Rules.pdf (last visited May 16, 2007) (“the provision of professional legal advice or services where there is a client relationship of trust or reliance”), also help explain why actually serving as an arbitrator (or mediator) is not considered to be the practice of law: acting in such a capacity apparently does not involve any “client relationship.”

22. 1975 Committee Report, at 422.
version of the ABA Model Rules of Professional Conduct considered by
the New York State Bar Association (the “NYSBA”) and to be considered
by the New York courts, however.

On March 31, 2007, the NYSBA House of Delegates approved pro-
posed Rule of Professional Conduct 5.5(c)(3) and (c)(4) in the following
form and with the following comment:

(c) A lawyer admitted in another United States jurisdiction or
in a foreign jurisdiction, and not disbarred or suspended from
practice in any jurisdiction, may provide legal services on a tem-
porary basis in this state that:

(3) are in or reasonably related to a pending or potential arbi-
tration, mediation, or other alternative dispute resolution pro-
ceeding in this or another jurisdiction, if the services arise out
of or are reasonably related to the lawyer’s practice in a juris-
diction in which the lawyer is admitted to practice and are not
services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or
are reasonably related to the lawyer’s practice in a jurisdiction
in which the lawyer is admitted to practice.23

To maintain the view announced by this Committee’s predecessor in
1975 that “representation of a party in an arbitration proceeding by a
non-lawyer or a lawyer from another jurisdiction is not the unauthorized
practice of law” based on this Proposed Rule of Professional Conduct, the

23. New York State Bar Ass’n Comm. on Standards of Attorney Conduct, PROPOSED R. OF PROF’L
CONDUCT R. 5.5(c) (as approved by the NYSBA House of Delegates Mar. 31, 2007), http://
www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home&Template=/CM/ContentDisplay.cfm&ContentID=11806
[COSAC033107[1].pdf] (last visited May 8, 2008). This language is identical to the ABA
Model Rule. The NYSBA comments to this language are substantively identical to the com-
ments to the ABA Model Rule as well, see, e.g., id. R. 5.5 cmts. 12-14, except for the omission
of certain language from the ABA’s Model Court Rule on Provision of Legal Services Follow-
ing Determination of Major Disaster. Compare id. R. 5.5 cmt. 14, at 13-14 with ABA House
of Delegates, Recommendation (adopted Feb. 12, 2007) (adopting MODEL CT. R. ON PROVID-
ION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER and amending comment 14 to ABA
Model Rule 5.5(c)(3) to include a statement that “[l]awyers desiring to provide pro bono legal
services on a temporary basis in a jurisdiction that has been affected by a major disaster, but
in which they are not otherwise authorized to practice law, as well as lawyers from the
affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in
which they are not otherwise authorized to practice law, should consult the Model Court
Rule on Provision of Legal Services Following Determination of Major Disaster.”), http://
New York courts could choose to reject this proposal from the NYSBA (which follows the newest version of ABA Model Rule 5.5), and could instead choose to use the original language proposed for Model Rule 5.5 by the ABA. This is what Colorado has been considering.24

In the alternative, the New York courts could draft their own language to substitute for Proposed Rule of Professional Conduct 5.5(c)(3). For example, the New York courts could require that the Proposed Rule expressly state that “representation of a party in an arbitration proceeding by . . . a lawyer from another jurisdiction is not the unauthorized practice of law”, the current state of the law as announced by the federal courts in New York.25

Or, the New York courts could adopt Proposed Rule of Professional Conduct 5.5(c) as approved by the NYSBA with the understanding that the requirement of Proposed Rule 5.5(c)(3) that “services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice” 26 will be met not only if the lawyer already represents in a home jurisdiction for any purpose the particular client or clients involved in the New York arbitration, but also if the lawyer represents or has ever represented any client in arbitration “in a jurisdiction in which the lawyer is admitted to practice.”27 This approach—interpreting Proposed Rule 5.5(c)(3) broadly and flexibly—is the one favored by, for example, the Professional Responsibility Committee of the City Bar Association.28

The Arbitration Committee of the City Bar Association supports any approach that effectively preserves the current right of an attorney licensed outside New York to appear in New York to represent a client in an arbitration in New York. The interpretive approach to Proposed Rule 5.5(c)(3) would accomplish that goal. If possible, however, the New York courts (and the NYSBA) should also consider providing a formal comment to the effect that the requirement “if the services arise out of or are reason-

24. See infra at 24.
25. See, e.g., supra at 1-3.
26. Model R. Prof’l Conduct R. 5.5(c)(3).
27. This would be a recognition that practicing law can legitimately involve two different foci, either of which can provide some minimal assurance of benefit to a client in a matter in this state without undue risk to this state’s own fundamental policies: the representation of particular clients in matters generally and the representation of clients generally in particular kinds of matters.
ably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice” will, among other things, always be satisfied if the lawyer represents or has represented the client involved before, or if the lawyer represents or has ever represented any client in an arbitration “in a jurisdiction in which the lawyer is admitted to practice”, as well as being satisfied under other circumstances when the matter to be arbitrated is reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.29 As shown below, this would be consistent with long-settled New York precedent.

A BRIEF HISTORY OF THE UNAUTHORIZED PRACTICE RULE AS APPLIED TO ARBITRATION IN NEW YORK

New York State has long had two explicit bans on the unauthorized practice of law: Rule 3-101 of the Disciplinary Rules of the Code of Professional Responsibility30 and Sections 478 and 484 of the New York Judiciary Law.31 Disciplinary Rule 3-101 (which relates to a series of Ethical Considerations under Canon 3 of the New York Code of Professional Responsibility)32 contains two prohibitions. First, it states that “[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law.”33 Second, it

29. See also id.
32. Canon 3 states that “A Lawyer Should Assist in Preventing The Unauthorized Practice of Law.” N.Y. CODE PROF’L RESPONSIBILITY, Canon 3 (1981). The Disciplinary Rules implementing this Canon, and not the Canon itself or the Ethical Considerations explicating it, are the primary source of positive law applicable to lawyers in this area. See D.R. 3-101, 22 N.Y. COMP. CODE R. & REGS. § 1200.16. The Ethical Considerations for Canon 3 do, however, repeat most of the policy arguments traditionally used to support all regulations prohibiting or discouraging the unauthorized practice of law. See, e.g., E.C. 3-1, 22 N.Y. COMP. CODE R. & REGS. § 1200.16 (“The prohibition against the practice of law by a non-lawyer is grounded in the need of the public for integrity and competence of those who undertake to render legal services.”); E.C. 3-3, 22 N.Y. COMP. CODE R. & REGS. § 1200.16 (“A non lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. . . . Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of the client.”); E.C. 3-9, 22 N.Y. COMP. CODE R. & REGS. § 1200.16 (“Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where not permitted by law or by court order to do so.”).
states that “[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.”

The restrictions in New York Judiciary Law Sections 478 and 484 are broader than these two restrictions in Disciplinary Rule 3-101 because they are not limited to lawyers; but, they are narrower in other respects because they focus on proceedings in courts and particular legal acts done for money, rather than law practice generally. Section 478 provides that “[i]t shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state . . . without having first been duly and regularly licensed and admitted to practice law in the court of record of this state.” Section 484 provides that:

No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted to practice as an attorney or counselor, in the courts of record in the state.

While there has always been some flexibility in the interpretation of these various provisions, in many situations they clearly bar both the

34. D.R. 3-101(B), 22 N.Y. Comp. Code R. & Regs. § 1200.16(B).

35. N.Y. Jud. L. § 478. There are some narrow non-lawyer exceptions to this prohibition for law students and “officers of societies for the prevention of cruelty to animals.” Id.

36. N.Y. Jud. L. § 484. The same narrow exceptions found in Section 478 apply to this prohibition as well. Id.

37. Ethical Consideration 3-5 notes that

It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law... The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client... Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas.

wholly unlicensed practice of law and the practice of law in New York by lawyers licensed only elsewhere. In the seminal 1965 case of Spivak v. Sachs, for example, the plaintiff was a California attorney not admitted in New York. At the request of the defendant, and after telling her that he was not licensed in New York and therefore could not appear in court for her, the California lawyer flew to New York to advise the defendant on her pending divorce action. While in New York, the California lawyer counseled the defendant (“based on his knowledge of both New York and California law”) on the financial provisions being offered to her, opined that New York (rather than Connecticut, where the divorce was pending) was the better jurisdiction for her, and tried to get her to fire her existing New York lawyer and to hire a different one to assist her. Maybe the advice was good; maybe it was bad. But either way, when the California lawyer submitted a bill to the defendant, she refused to pay.

The resulting collection case eventually reached the New York Court of Appeals. That court held that the California lawyer’s behavior had not been a “single, isolated incident” that might be overlooked. Instead, “[h]ere we have a California lawyer brought to New York not for a conference or to look over a document but to advise directly with a New York resident as to most important marital rights and problems. . . . To say that this falls short of the ‘practice of law’ in New York is to defeat section 270 and the policy it represents.” The Court of Appeals went on to note the policy reasons for its position: “The statute aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions.” It concluded that “[t]his was an illegal transaction and under our settled rules we refuse to aid in it but leave the parties where they are . . . .” Yet despite these harsh words, the Court of Appeals was also careful to limit the Spivak opinion to its facts. As the court noted,

There is, of course, a danger that section 270 could under other
circumstances be stretched to outlaw customary and innocuous practices. We agree with the Supreme Court of New Jersey . . . that, recognizing the numerous multi-State transactions and relationships or modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York. We can decide those cases when we get them but they are entirely unlike the present one.45

Years later, the intentionally narrow scope of decisions such as Spivak left room for the federal courts in Williamson and Seigel to hold that representing a party in an arbitration is not the unauthorized practice of law. In Williamson, a New Jersey law firm represented a New York corporation in an arbitration proceeding in New York. When the New Jersey law firm sued for its fees, the corporation responded that the firm was not authorized to practice law in New York.46 Judge Weinfeld concluded, however, that representation in an arbitration proceeding does not constitute the practice of law. He reasoned that “[a]n arbitration tribunal is not a court of record; its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission pro hac vice of local or out-of-state attorneys.”47 Relying in part on the 1975 Committee Report, Judge Weinfeld (forcefully, but perhaps incorrectly by the time of his decision, and ignoring the distinction between the “practice of law” and the “unauthorized practice of law”) noted that “no support has to date been found in judicial decision, statute or ethical code for the proposition that representation of a party in any kind of arbitration amounts to the practice of law.”48

In Seigel, the situation was almost the same, except the lawyer not licensed in New York was suing for fees earned by representing the client in an international arbitration held in Mexico but involving certain legal work in New York.49 Quoting Williamson and the 1975 Committee Report, the court held that “[a]n attorney who is not admitted to practice in New York is . . . entitled to recover legal fees for services rendered in represent-

45. Id. at 330-31 (citing Appell v. Reiner, 204 A.2d 146 (N.J. 1964)).
46. 537 F. Supp. at 615.
47. Id. at 616.
48. Id. at 616 (citing the 1975 Committee Report at 422).
ing a client in an arbitration” because “[r]epresentation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.”

When the ABA amended its Model Rule of Professional Conduct 5.5 in 2002, it did not expressly adopt the holdings of cases such as Williamson and Siegel. For a number of years, this has not been of much significance for arbitrations occurring in New York because the NYSBA never fully addressed the ABA Model Rules. (Both the state courts and local federal courts in New York State follow the existing New York Code of Professional Responsibility.)

In September 2005, however, the NYSBA Committee on Standards of Attorney Conduct issued a report that contained a complete set of proposed New York Rules of Professional Conduct based on the current ABA

50. Id. at *17 (quoting Williamson, 537 F. Supp. at 616).

51. As noted earlier, ABA Model Rule 5.5(c)(3) only permits an attorney to provide legal services in connection with an arbitration in a state where he or she is not licensed if the state of the arbitration does not require a pro hac vice admission to do so and if the arbitration is reasonably related in some way to the lawyer’s practice where he or she is licensed. See MODEL RULES OF PROF’L CONDUCT 5.5(c)(3).

52. In June 2003, the NYSBA House of Delegates approved proposed amendments to the New York Code of Professional Responsibility that included a variation of the ABA’s Model Rules. That set of proposed amendments, although never acted upon, remained (in theory at least) pending before the Appellate Division. See ABA Joint Committee on Lawyer Regulation, http://www.abanet.org/cpr/jclr/jclr_home.html (last visited May 16, 2007). In 2001 the NYSBA did adopt two Disciplinary Rules addressing the provision of non-legal services by lawyers, but these have had no real effect on the issue of arbitration, largely because the definition of “non-legal services” they use is somewhat circular. See D.R. 1-106, 22 N.Y. COMP. CODE R. & REGS. § 1200.5-b (“Responsibilities Regarding Non-Legal Services”); D.R. 1-107, 22 N.Y. CODE R. & REGS. § 1200.5-c (“Contractual Relationships Between Lawyers and Non-Legal Professionals”). The relevant definition provides that, “[f]or purposes of DR 1-106 [1200.5-b], ‘non-legal services’ shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer.” D.R. 1-106(c), 22 N.Y. COMP. CODE R. & REGS. § 1200.5-b(c).

Model Rules, including all of ABA Model Rule 5.5.\textsuperscript{54} In April 2006, the NYSBA voted to consider adoption of these new rules and, on March 31, 2007, adopted Model Rule 5.5(c)(3) verbatim.\textsuperscript{55} As a result, the issue of the

\textsuperscript{54} ABA Model Rule 5.5 provides in its entirety that:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

\textsuperscript{55} See, e.g., supra at 6-10.

\textsuperscript{55} See, e.g., supra at 6-10.
unauthorized practice of law and arbitration could be in flux in New York State in the near future.\textsuperscript{56}

A BRIEF HISTORY OF THE UNAUTHORIZED PRACTICE RULE AS APPLIED TO ARBITRATION ELSEWHERE

Apart from decisions in New York, a number of other jurisdictions have, over the years, considered whether or not a lawyer not licensed in that jurisdiction, but appearing for a party in an arbitration (usually a domestic arbitration) in that jurisdiction, is engaged in the practice (or the unauthorized practice) of law. In general, the older the case, the easier it is to predict that the court may have decided that appearing for a party in an arbitration was not the practice of law at all. The newer the case, the more likely it is that the court will have considered the issue as one of the practice of law to which an exception should either be permitted or not.

ABA Model Rule 5.5 reflects the newer trend. As noted earlier, Model Rule 5.5(c)(3), adopted in 2002, approaches the issue as one of an exception to prohibitions against the unauthorized practice of law for “legal services” that:

\begin{itemize}
  \item are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.\textsuperscript{57}
\end{itemize}

\textsuperscript{56} In the meantime, courts in New York have tried hard not to answer questions about unauthorized practice, including in the context of arbitration. In Olitt v. Vacco, No. 97 Civ. 9139, 1998 U.S. Dist. LEXIS 20441, at *8 (S.D.N.Y. Dec. 23, 1998), for example, the plaintiff was an attorney disbarred in the State of New York. \textit{Id.} at *1. He sued for a declaratory judgment that, under federal law, he was nonetheless entitled to represent parties in securities arbitrations. \textit{Id.} at *1-2. Utilizing virtually every possible abstention doctrine to avoid deciding the issue, the federal court also noted at the end of its opinion that “plaintiff’s complaint must be dismissed to the extent that all the remaining claims ask for a declaratory judgment that he is ‘entitled to represent parties to securities arbitrations as their advocate,’” because while “plaintiff claims two complaints were filed against him, he admits that no action has been taken. . . . That plaintiff may do or say something in the future to prompt an official action by the state presents a contingent, not an actual, controversy and is an insufficient basis for this court’s jurisdiction.” \textit{Id.} at *8.

\textsuperscript{57} MODEL R. PROF’L CONDUCT R. 5.5(c)(3).
But only eight states have adopted ABA Model Rule 5.5(c)(3) verbatim. As a result, the variation among jurisdictions on the underlying issue of representation of parties in arbitration remains wide.

A. The Current State of the Law in Alabama

Alabama has not adopted ABA Model Rule 5.5(c)(3) or any similar rule addressing the issue of representing a party in an arbitration. Current Alabama Rule of Professional Conduct 5.5 addresses the unauthorized practice of law in general, using the language of former ABA Model Rule 5.5. Alabama is not currently considering any revision to Alabama Rule of Professional Conduct 5.5. No reported Alabama case seems to have addressed the issue of unauthorized practice of law in an arbitration by a lawyer licensed elsewhere, either.

B. The Current State of the Law in Alaska

Like Alabama, Alaska has not adopted ABA Model Rule 5.5(c)(3) or any similar rule. Current Alaska Rule of Professional Conduct 5.5 simply repeats the language of former ABA Model Rule 5.5. No reported Alaska case seems to have addressed the issue of unauthorized practice of law in arbitration by a lawyer licensed elsewhere, either.

C. The Current State of the Law in Arkansas

Arkansas is one of the eight states that has adopted ABA Model Rule 5.5(c)(3) verbatim. To date, however, no decision from the Arkansas courts has interpreted the state’s rule.


59. See Ala. R. Prof’l. Conduct 5.5 (2006), http://www.alabar.org/ogc/ropc/rule5-5.cfm (last visited May 16, 2007). (“A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”).


61. See Alaska R. Prof’l. Conduct 5.5 (1993) (“A lawyer shall not: (a) practice law in a jurisdiction where doing so violate the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”), http://www.touchngo.com/lglcntr/ctrules/profcon/htframe.htm (last visited May 16, 2007).

62. Thus, in Arkansas “[a] A lawyer admitted in another United States jurisdiction . . . may”
D. The Current State of the Law in Arizona

Arizona has adopted a modest variation on ABA Model Rule 5.5(c)(3). In addition to the basic Model Rule, Arizona requires the out-of-state attorney to inform his or her client that the attorney is not admitted to practice in Arizona. The out-of-state attorney must then obtain the client’s informed consent to the representation on that basis. Finally, the out-of-state attorney must agree to be subject to the Arizona Rules of Professional Conduct and the Rules of the Arizona Supreme Court regarding attorney discipline.

E. The Current State of the Law in California

From the point of view of an ethics code, California Rule of Professional Responsibility 1-300 largely follows the old ABA Model Rules of Professional Conduct. It applies to any “member,” which means any lawyer licensed in the United States or a foreign country or political subdivision of another state, to represent a party in an arbitration in Arkansas if the representation is “legal services on a temporary basis” that “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice . . . .” The out-of-state attorney must then obtain the client’s informed consent to the representation on that basis. Finally, the out-of-state attorney must agree to be subject to the Arizona Rules of Professional Conduct and the Rules of the Arizona Supreme Court regarding attorney discipline.

THE RECORD
The limitation on a “member’s” practice is simply that he or she “shall not aid . . . in the unauthorized practice of law” and “shall not practice law in a jurisdiction where to do so would be a violation of regulations of the profession in that jurisdiction.”

California’s application of its code to the representation of parties in arbitration by out-of-state lawyers has been notably variable in recent years, however—and has involved New York directly. In its 1998 Birbrower case, the California Supreme Court dealt with the situation of a New York law firm (without any lawyers licensed in California) having represented a California client in a California domestic arbitration (which was settled without any hearings being held). In a subsequent lawsuit for malpractice, the law firm counterclaimed for unpaid fees. The California trial court granted summary judgment against the law firm and dismissed the counterclaim. The California Court of Appeals and California Supreme Court upheld that decision. In doing so, the California Supreme Court began by assuming that what the New York law firm had done was the practice of law. It distinguished the Southern District of New York’s Williamson case on grounds that, in Williamson, the lawyers not licensed in the jurisdiction were actually in arbitration hearings, while in Birbrower “none of the time that the New York attorneys spent in California was spent in arbitration.” Noting without comment the conclusion of this Committee’s predecessor in 1975 that representing a party in arbitration is not the unauthorized practice of law, the California Supreme Court then specifically declined to “craft an arbitration exception to section 6125’s prohibition of the unlicensed practice of law in this state. Any exception for arbitration is best left to the Legislature . . . .”

Following the substantial negative publicity generated by the Birbrower case, California amended its Rules of Professional Conduct to explicitly bar an out-of-state lawyer from representing a party in an arbitration without being licensed in California. This change was effective as of November 1, 2006. 

68. Id. 1-300(A), (B).
69. 949 P.2d, at 3.
70. Id. at 4.
71. Id.
72. Id. at 2-3.
73. Id. at 9 (internal quotations omitted).
74. Id. Much of the rest of the court’s analysis, and even the analysis of the dissent, centered on whether the New York law firm was practicing in California. See, e.g., id. at 14-16.
decision, individual California courts were quick to distinguish it in their decisions. Rather than change its ethics code, however, California adopted a rule of court and section of its code of civil procedure to allow out-of-state counsel to obtain permission to represent a party to an arbitration in California. These changes also established that “an attorney who is a member in good standing of the bar of any state may represent the parties in connection with rendering legal services in this state in the course of and in connection with an arbitration pending in another state,” (Counsel from other countries still may not represent clients in domestic arbitrations held in California, however.78)

F. The Current State of the Law in Colorado

The current Colorado Rules of Civil Procedure provide that an “out-of-state attorney may practice law in the state of Colorado except that [one] who wishes to appear in any state court of record” or “administrative tribunal” must apply for admission pro hac vice pursuant to the Colo-


76. See Cal. R. Ct. 983.4; Cal. Code Civ. Proc. § 1282.4. This statute was scheduled for automatic repeal as of January 1, 2007, but has been readopted, in a modified form, through 2011. See Cal. Code Civ. Proc. § 1282.4. As currently in force, Section 1282.4 provides that an attorney licensed elsewhere appearing in a domestic arbitration in California must promptly serve a certificate on the arbitrators, the California State Bar, and all other parties and counsel attesting to various matters, including that the attorney is admitted to practice elsewhere in the United States and is in good standing and that the attorney neither resides nor is regularly employed or engaged in substantial activities in California. Id. § 1282.4(b), (c). The attorney must subject himself to the jurisdiction of California courts as if he were a member of the California State Bar and must list a member of the State Bar who will act as attorney of record in the arbitration. Id. § 1282.4(c)(9), (11). The out-of-state representation then must be approved by the arbitrators or the arbitral forum. See id. § 1282.4(d). None of this applies, however, to “an arbitration arising under collective bargaining agreements in industries and provisions subject to either state or federal law.” Id. § 1282.4(h).


78. Lawyers licensed elsewhere—and laypersons—may, however, represent clients in international arbitrations held in California without any prior approval. This is because the California Code of Civil Procedure expressly provides that, in international arbitrations, “[t]he parties may appear in person or be represented by any person of their choice. A person
rado Rules of Civil Procedure. Combined with Colorado’s version of former ABA Model Rule 5.5, this would allow lawyers not licensed in Colorado to represent parties in arbitrations in Colorado.

The Colorado Supreme Court is presently considering adoption of the revised ABA Model Rules. In light of the state’s present permissiveness, however, Colorado’s proposed new Model Rule 5.5 does not contain the equivalent of ABA Model Rule 5.5(c)(3). To date, there are no reported cases interpreting the relevant provisions of the Colorado Rules of Civil Procedure or its Model Rule 5.5.

G. The Current State of the Law in Connecticut

Both the courts and the local bar in Connecticut have taken a restrictive stance on the issue of arbitration and the unauthorized practice of law. In 2002, the Connecticut Bar Association’s Unauthorized Practice of Law Committee issued informal opinion 2002-02 on whether a New York lawyer could represent a corporation in an arbitration in Connecticut. That committee opined that the New York lawyer would be engaged in the unauthorized practice of law in Connecticut if he represented his client in this arbitration because he would be:

advis[ing] his client on issues of Connecticut law . . . [t]he proceeding is not likely to be informal and . . . will involve discovery, depositions, and briefing, as well as a trial of issues of fact. [The Committee] think[s] it likely, given the amount of money at stake, that the case will be litigated to the same extent that it would be in trial court. In this context, it appears . . . that the lawyer is engaged in the practice of law in Connecticut.

A Connecticut Superior Court recently underscored the practical effect of this opinion by holding that it did not have the power to admit a

83. Id.
New York attorney to appear pro hac vice in Connecticut arbitration. The court found that the provision of Connecticut law relevant to admission pro hac vice only relates to “matters in the court; it makes no reference to arbitrations outside the court.” A subsequent unpublished decision by a different Connecticut court agreed that representation by a lawyer not licensed in Connecticut of a party in an arbitration in Connecticut would be the unauthorized practice of law, but that it could—and would—admit that lawyer pro hac vice. Either way, representation by an attorney not fully licensed in Connecticut, or not admitted pro hac vice in Connecticut, of a party in a domestic arbitration in Connecticut constitutes the unauthorized practice of law. To make the contrast even starker, Connecticut (much like states such as California and Florida) reaches precisely the

85. Id. at *1-2 (citing CONN. PRACTICE BOOK § 2-16 (2005)).
87. In 2004, the Connecticut Bar Association Task Force on Multijurisdictional Practice recommended adoption of a rule similar to ABA Model Rule 5.5. On January 12, 2004, the House of Delegates of the Connecticut Bar Association rejected the proposal. Since then, the Task Force has reconvened and has plans to bring the proposal back to the attention of the Connecticut Bar Association this year. See Report of the CBA Task Force on Multijurisdictional Practice and General Agreement on Trade Services, May 12, 2006, http://www.ctbar.org/filemanager/download/789/.pdf (last visited May 16, 2007). In the meantime, Connecticut law continues to differ in its treatment of attorneys participating in arbitration depending on whether the arbitration is international or domestic in nature. By statute, representation of a party in an international arbitration proceeding does not constitute the unauthorized practice of law; therefore, representation of a party by an out-of-state attorney in an international arbitration is permissible. See CONN. GEN. STAT. § 51-88(a), (d)(3) (2006).
88. See CAL. CODE CIV. PROC. § 1297.351; In re Amendments to the R. Regulating the Fla. Bar and the Fla. R. of Jud. Admin., 907 So. 2d 1138 (Fla. May 12, 2005). Florida defines an “international arbitration” to include the arbitration of disputes between two or more residents of the United States if the dispute involves property located outside the United States, relates to a contract or other agreement to be performed or enforced in whole or in part outside the United States, involves an investment outside the United States (or the ownership, management, or operation of a business entity through which such an investment is effected, or any even agreement pertaining to any interest in such an entity), bears some other relation to one or more foreign countries, or involves a foreign state as defined in 28 U.S.C. § 1603. Id. at 1551. International arbitration does not include the arbitration of any dispute about the ownership, use, development, or possession of, or a lien of record upon, real property located in Florida or any dispute involving domestic relations. Id. at 1151-52. The international arbitration ends once an award is rendered; thus, an out-of-state lawyer may not appear in state court in Florida to confirm or vacate awards rendered in an international arbitration proceeding without following the procedures for appearing in Florida courts. See id. at 1152.
opposite conclusion in international arbitrations venued in Connecticut. Representing a party in such a proceeding (as opposed to a domestic arbitration) clearly does not constitute the unauthorized practice of law.\(^89\)

\textbf{H. The Current State of the Law in Delaware}

Delaware has adopted ABA Model Rule 5.5(c)(3) verbatim.\(^90\) To date, however, no decision from the Delaware courts has interpreted the state's rule.

\textbf{I. The Current State of the Law in the District of Columbia}

In contrast to the trends exemplified by the California and Connecticut decisions discussed above, the case law in the District of Columbia remains that of an older era in which representing a party in an arbitration might not be the practice of law at all. In the 1940 case of American Automobile Ass’n v. Merrick, the District of Columbia Motor Club (the “D.C. Club”) served as the local representative of the American Automobile Association.\(^91\) As part of membership benefits to some 29,000 local members, the D.C. Club provided certain alternative dispute resolution services. These included lay staff members trying “to adjust without court action claims for property damage to automobiles for or against a member where the amount in controversy does not exceed $100 (now $50)” and, if unsuccessful, then “attempt[ing] to settle such claims by arbitration . . . .”\(^92\)

A local bar association sued to enjoin these activities as the unauthorized practice of law. On appeal from a ruling adverse to the D.C. Club, the Court of Appeals ultimately concluded that the D.C. Club indeed was engaged in the practice of law because of some of its activities.\(^93\) But it also noted that the decree against the D.C. Club should be modified so as not to “prevent appellant, through lay employees, from arbitrating or procuring the arbitration of its members’ claims . . . .”\(^94\) In other words, the

\(^{89}\) See CONN. GEN. STAT. § 51-88(d) (2007). This Section states that “[t]he provisions of this section shall not be construed as prohibiting: (3) any person from acting as an agent or representative for a party in an international arbitration as defined in subsection (3) of section 50a-101.”

\(^{90}\) See DEL. LAWYERS’ R. PROF’L CONDUCT R. 5.5(c)(3).

\(^{91}\) See 117 F.2d 23, 23 (D.C. Cir. 1940).

\(^{92}\) Id. at 23. The American Automobile Association opinion is somewhat unclear as to whether the arbitration services were reserved for cases in which two members were involved in a dispute with each other, see id. at 24, but the possible distinction does not seem to have been material to the reasoning of the court, see id. at 25.

\(^{93}\) Id. at 25.

\(^{94}\) Id.
court apparently did not consider representing a member of the D.C. Club in arbitration to be the practice of law. This decision has not been overruled in the District of Columbia. The local bar has, however, begun to consider the application of ABA Model Rule 5.5(c)(3). Until Model Rule 5.5(c)(3) or some other change is adopted, the interaction of the Merrick decision and current District of Columbia Rule of Professional Conduct 5.5 would seem to allow a lawyer not licensed in the District to represent a party in an arbitration in the District.

J. The Current State of the Law in Florida

The state of Florida, while backing down somewhat from the harshest possible position, has clearly decided to be more restrictive than in the past concerning the representation of parties in arbitrations in Florida. In the 2003 case of The Florida Bar v. Rapoport, the respondent lawyer belonged to the District of Columbia Bar. He represented a variety of clients in federal securities arbitrations (and advertised for such clients in Florida). Despite his arguments to the contrary, the court held that this amounted to the unauthorized practice of law in Florida.

When (as with the Birbrower decision in California), there was a strong reaction to this result, Florida developed rules to permit lawyers licensed in another state to represent a client in an arbitration in Florida. The

96. See infra n.110 (proposed changes similar to those in Florida).
100. Id.
101. Id. at 10.
102. See generally, e.g., Amendments to R. Regulating the Fla. Bar, 907 S. 2d 1138. Some of these amendments went into effect in 2005 in the wake of Hurricane Katrina, when the Florida Bar filed an emergency motion to advance their effective date. The Florida Supreme Court granted the motion on September 14, 2005 and held that the changes to Rules 4-5.5., 3-2.1, 3-4.1, 3-4.6 and 3-72 of the Rules Regulating the Florida Bar “shall be effective immediately.” In re Amendments to R. Regulating the Fla. Bar & R. of Jud. Admin., No. SC04-135, 2005 Fla. LEXIS 2026, *1 (Fla. Sept. 14, 2005). The remaining amendments took effect as scheduled on January 1, 2006.
rules contain significant restrictions and definitely do not treat representation by lawyers licensed in another state as anything other than the practice of law. As at least one commentator has observed, they also “may raise more questions than they answer.”

The stated goal of the Florida amendments is to “implement changes that improve legal services for the public by permitting the limited, temporary multi-jurisdictional practice of law but at the same time protecting the public, the legal profession, and the judiciary.” The basic means to this end are rules that allow non-Florida attorneys who are licensed and in good standing in another state to provide “temporary legal services,” whether transactional or litigation, in Florida in general and, more specifically, to represent clients in domestic and international arbitration proceedings in Florida. The new rules define “temporary legal services” to include three activities: first, services undertaken with a Florida attorney who actively participates in the matter; second, services undertaken prior to a pro hac vice admission; and third, services related to a pending or potential arbitration or mediation (assuming that the services are for a client in the lawyer’s home state or are related to the lawyer’s practice in a jurisdiction in which he is admitted). In addition, a non-Florida attorney may perform “temporary legal services” when such services are “performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice”, or “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” A non-United States attorney may also provide “temporary legal services” if such services are governed primarily by international law or the law of a non-United States jurisdiction in which the lawyer is a member.

104. Amendments to the R. Regulating the Fla. Bar, 907 So. 2d at 1140.
105. Id. at 1141.
106. See id. at 1156-57 (citing Fla. BAR REG. R. 4-5.5(c)(1)-(3)).
107. Id. at 1157 (citing Fla. BAR REG. R. 4-5.5(c)(4)).
108. Id. at 1158 (citing Fla. BAR REG. R. 4-5.5(d)(5)). The official comments to the new rules state that a “variety of factors” determine whether the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted, including whether “[t]he lawyer’s client may have been previously represented by the lawyer”; whether the client “may be [a] resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted”; whether “[t]he matter, although involving other jurisdictions, may have a significant connection with that jurisdiction”; whether “significant aspects of the
**ARBITRATION**

While these rules might at first seem a reasonable approach to the issue of arbitration there is a big caveat: they only permit non-Florida attorneys to appear in three separate arbitration proceedings within a 365-day period. \(^{109}\) An attorney who exceeds this limit will be presumed to be engaged in the “general [and unauthorized] practice” of law in Florida. \(^{110}\) The out-of-state attorney must also file with the Florida Bar a verified motion (similar to a *pro hac vice* motion for court appearances), pay a $250 filing fee for each appearance, and agree to be subject to the rules of the Florida Bar. \(^{111}\)

The numeric limitation on appearances is particularly discriminatory.

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\(^{109}\) Amendments to the R. Regulating the Fla. Bar, 907 So. 2d, at 1150. Suggested new rules in the District of Columbia would contain a similar limit on the annual participation of an out-of-state lawyer in alternative dispute resolution in the District. See District of Columbia Bar Special Committee on Multijurisdictional Practice, *Report and Recommendations*, [http://www.dcbar.org/inside_the_bar/structure/reports/special_committee_on_multijurisdictional_practice/recommendations.cfm](http://www.dcbar.org/inside_the_bar/structure/reports/special_committee_on_multijurisdictional_practice/recommendations.cfm) (last visited May 16, 2007). (District of Columbia Bar Special Committee on Multijurisdictional Practice proposed amendments to permit out-of-state lawyers “to provide legal services in or reasonably related to pending or potential arbitration, mediation, or other alternative dispute resolution proceedings” if the person is authorized and in good standing to practice law in another jurisdiction, does not begin to provide services in more than five such proceedings in the District in any calendar year, and does not otherwise practice in the District).

\(^{110}\) See Amendments to the R. Regulating the Fla. Bar, 907 So. 2d at 1150. *See generally, Peter M. Panken & Miranda Valbrune, Representing Nationwide Clients Where They Do Business - But You Are Not Admitted - Do Good Fences Make Good Neighbors?*, SL018 ALI-ABA 731 (July 28-30, 2005). These restrictions produce significant difficulties for in-house legal departments, where a very small group of in-house lawyers may have responsibility for a particular kind of repetitive arbitration nationwide.
It disfavors businesses with repeat arbitration issues who might wish to have in-house lawyers handle such cases on a national basis. It also disfavors attorneys who develop expertise in fields where arbitrations are not so common as to provide a local market, yet common enough to make expertise valuable. In general, the restrictions simply increase prices for legal services in Florida, both to outsiders and to Florida residents.\textsuperscript{112}

\textbf{K. The Current State of the Law in Georgia}

Rule 4-102 of the Georgia State Bar Rules and Regulations is substantially identical to ABA Model Rule 5.5(c)(3).\textsuperscript{113} The Rule also contains separate (and similar) rules for attorneys of other countries, an apparent vestige of Georgia’s efforts to become the site of the South American Arbitration Center.\textsuperscript{114} To date, no reported Georgia decision has analyzed the provisions of Georgia Rule of Professional Conduct 4-102, or discussed the unauthorized practice of law by a lawyer not licensed to practice in Georgia in connection with an arbitration proceeding in the State of Georgia.

\textbf{L. The Current State of the Law in Hawaii}

The State of Hawaii has not yet adopted ABA Model Rule 5.5(c)(3). Former ABA Model Rule 5.5, codified at Rule 5.5 of the Hawaii Rules of Professional conduct, remains in effect.\textsuperscript{115} The leading decision on the practice of law in Hawaii by out-of-state attorneys, issued in 1998, does not directly address the subject of arbitrations.\textsuperscript{116} Its heavy reliance on California’s \textit{Birbrower} opinion\textsuperscript{117} should, however, give pause to any out-of-state lawyer considering the representation of a client in an arbitration located in Hawaii.


\textsuperscript{114} \textit{See id., R. 5.5(e).}


\textsuperscript{116} \textit{See Fought \& Co. v. Steel Eng’g and Erection, Inc.}, 951 P.2d 487 (Haw. 1998).

\textsuperscript{117} \textit{See 949 P.2d 1 (Cal. 1998); \textit{see also supra} at 20-21.}
M. The Current State of the Law in Idaho

Idaho continues to use the language of former ABA Model Rule 5.5 in its relevant ethics provision, but also includes four exceptions under which out-of-state attorneys may practice law in Idaho. First, an out-of-state attorney may practice in Idaho when he or she is or expects to be admitted pro hac vice. Second an out-of-state attorney may practice in Idaho when the lawyer is an employee of the client being represented. Third, an out-of-state attorney may practice in Idaho when “act[ing] with respect to a matter that arises out of or is otherwise reasonably related to the lawyer’s representation of a client in a jurisdiction in which the lawyer is admitted.” Finally, an out-of-state attorney may practice in Idaho when the lawyer is associated with an Idaho lawyer who actively participates in the representation. The scope of these bases for practice by out-of-state attorneys is broad enough to cover many (albeit not all) arbitral appearances. No reported decision of an Idaho court has yet specifically addressed the issue of the unauthorized practice of law in arbitrations by attorneys not licensed to practice in the State of Idaho.

N. The Current State of the Law in Illinois

Even through Illinois has not adopted ABA Model Rule 5.5(c)(3), it has considered the existence of that rule deciding to permit the representation of a party in an Illinois arbitration by an out-of-state attorney. In Colmar, Ltd. v. Fremantlemedia N.A., Inc., plaintiff Colmar, Ltd. (“Colmar”) sought to vacate an arbitration award in favor of Fremantlemedia N.A., Inc. (“FNMA”) on the grounds that the award was void because FMNA

118. IDAHO R. PROF’l CONDUCT R. 5.5(a), (c) (2004), http://www2.state.id.us/isb/PDF/IRPC.pdf (last visited May 11, 2007).

119. Id., R. 5.5(b)(1). While Idaho’s pro hac vice rule pertains to only attorneys “retained to appear in the [Idaho] courts”, see IDAHO BAK COMM’N R. 222, the ethics rule is not limited to admission pro hac vice. It also provides for appearance by the out-of-state attorney as ordered by any “tribunal” or “administrative agency.” It is not clear whether an arbitration panel could be a “tribunal” for this purpose.

120. IDAHO R. PROF’l CONDUCT 5.5(b)(2)(i).

121. Id., R. 5.5(b)(2)(ii).

122. Id., R. 5.5(b).

123. An official comment to Idaho Rule of Professional Conduct 5.5(b)(2)(i), for example, expressly notes that permitted behavior may include “participation in alternative dispute resolution procedures.” IDAHO R. PROF’l CONDUCT R. 5.5, cmt. 5.

124. See ABA Center for Professional Responsibility Policy Implementation Committee, supra n.60 (Illinois is currently considering adoption of a rule identical to the Model Rule).
was represented by an attorney not licensed to practice in Illinois. The court found that the representation had no effect on the award. First, the court recognized that "arbitration is not a judicial proceeding but, rather, an alternative to such a proceeding, given that judicial fact finding, court procedures, evidentiary rules, and other characteristics of the judicial process do not apply in the arbitration context." Because of the significance of the distinction between arbitration and a court proceeding, the court held that representation of a party by an out-of-state attorney does not constitute the unauthorized practice of law.

Colmar had also advanced the argument that the arbitration award should be void because of the general rule in Illinois which provides that any judgment is void that is the result of a legal proceeding in which a person who is not licensed to practice in Illinois represented one of the parties. The court held that that although "there is good reason to restrict the practice in Illinois to those persons licensed by the supreme court," this case involved arbitration, and as such, the court declined to extend the general rule to apply to situations where an out-of-state attorney represents a client in arbitration Illinois. The policies underlying the general rule—such as concerns about a lack of knowledge of Illinois courts' procedural and evidentiary rules—were not relevant in this context.

O. The Current State of the Law in Indiana

Indiana has adopted ABA Model Rule 5.5(c)(3) verbatim and at least one reported decision has addressed (in a concurrence) the issue of

126. Id. at 1022.
127. Id. at 1023.
128. Id. at 1026. In this context, the Court found the existence of Model Rule 5.5(c)(3) elsewhere "persuasive in that it reflects the modern trend in the law of multijurisdictional practice and is also in keeping with well-reasoned decisions from other jurisdictions that have found that an out-of-state attorney’s representation of a client during arbitration does not violate the rules prohibiting the unauthorized practice of law.” Id. (also citing Williamson, 537 F. Supp. 613).
130. Id. at 1028.
131. Id.
the unauthorized practice of law in connection with an arbitration.133 In Richards & O’Neill v. Conk, the plaintiff sued a New York law firm for professional negligence, breach of contract, and securities law violations in connection with the purchase of shares of an Indiana corporation. The initial complaint did not deal with the unauthorized practice of law in Indiana or any other jurisdiction.134 As one Indiana Supreme Court justice pointed out in his concurring opinion, however, there exist “potential issues in cases of this kind arising from the multi-jurisdictional practice of law.”135 While “[a]t first blush”, the New York law firm’s “actions seem to raise the specter of the unauthorized practice of law in Indiana,”136 the adoption of ABA Model Rule 5.5(c)(3) in the Indiana Rules of Professional Conduct “allow[s] attorneys to perform non-litigation work that arises out of the representation of a client in another jurisdiction and to perform work in another jurisdiction that is ancillary to a pending ADR proceeding.”137

P. The Current State of the Law in Iowa

Iowa has adopted ABA Model Rule 5.5(c)(3) verbatim.138 To date, however, no decision from the Iowa courts has interpreted the state’s rule.

Q. The Current State of the Law in Kansas

Kansas Supreme Court Rule 226 (Rule 5.5 of the Kansas Rules of Professional Conduct) is identical to former ABA Model Rule 5.5 and therefore does not directly address the issue of arbitration.139 While the reasoning of State v. Martinez140 and a 1979 Kansas Attorney General’s opinion141 would tend to suggest that the representation of clients in arbitrations in Kansas is deemed the practice of law in Kansas, neither authority clearly

134. See id. at 545.
135. Id. at 548.
136 Id. at 549.
137. Id. at 550. The concurring opinion, went on, however, to note various “hazards when an attorney appears to practice law in a foreign jurisdiction.” Id. at 549.
indicates whether an out-of-state attorney’s appearance in an arbitration would constitute the unauthorized practice of law. Kansas Supreme Court Rule 116, governing pro hac vice admissions, applies by its terms only to practice in the “courts or any administrative tribunal of this state.”

R. The Current State of the Law in Kentucky

Kentucky has not adopted ABA Model Rule 5.5(c)(3). The Kentucky Bar Association’s position, however, is that out-of-state attorneys must comply with the Kentucky Supreme Court’s rule governing pro hac vice admissions in order to represent clients in arbitrations there. That rule allows out-of-state attorneys to “practice a case in this state” if they subject themselves to the state’s jurisdiction and professional conduct rules, pay a $100 fee per case, and associate with local counsel whose presence shall be necessary when required by the “court.”

S. The Current State of the Law in Louisiana

Louisiana has adopted ABA Model Rule 5.5(c)(3) essentially verbatim in its Rules of Professional Conduct. The rules governing admission to the Louisiana State Bar, however, also provide that “[a]n out-of-state attorney may render legal services to prepare for and participate in an ADR [arbitration or mediation] procedure regardless of where the ADR procedure is expected to take or actually takes place.” To date, however, no decision from the Louisiana courts has interpreted the state’s ethics rule in light of this more general grant of authority.

T. The Current State of the Law in Maine

Because Maine Code of Professional Responsibility Rule 3.2(a) is similar to old ABA Model Rule 5.5(a), Maine has no specific directive with respect to appearances by out-of-state attorneys in arbitrations in Maine.

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144. Id.
At least one Maine court has, however, recently held that out-of-state attorneys may not represent clients in arbitrations in the state. That court also held that no rule or statute permits the courts to grant permission to out-of-state attorneys to practice before administrative agencies and arbitrators. Yet also according to that court, laymen may represent clients freely in arbitration hearings. ABA Model Rule 5.5(c)(3) is presently under consideration.

U. The Current State of the Law in Maryland

Maryland has adopted a rule nearly identical to the current ABA Model Rule 5.5(c)(3). The comments to the Maryland rule, however, complicate the issue by referring to Rule 14 of the Rules Governing Admission to the Bar of Maryland regarding permission to appear in arbitrations. Rule 14 specifically requires a motion for special admission to be filed in a court by Maryland counsel on behalf of out-of-state counsel in an arbitration proceeding. The specially admitted out-of-state attorney may only act as co-counsel with Maryland counsel unless the arbitrator waives the presence of Maryland counsel. To date, however, no decision from the Maryland courts has interpreted the state's rule.

V. The Current State of the Law in Massachusetts

A standing advisory committee on the Massachusetts Rules of Professional Conduct is currently considering adoption of a rule similar to ABA Model Rule 5.5(c)(3). While that committee considers adoption of such a rule, Massachusetts courts have chosen not to take a position on the issue of whether representation of a party by an out-of-state in an arbitration constitutes the unauthorized practice of law.


149. Id. (citing MAINE R. CIV. P. 89; MAINE REV. STAT. ANN. § 807 (2006)).

150. Id. at 4.


152. See id. 5.5, cmt. 17.


154. Id. at 14(d).

In *Superadio Ltd. Partnership v. Winstar Radio, LLC*,\(^{156}\) for example, the plaintiff sought to vacate an arbitration award in favor of the defendant on the grounds that the defendant’s representative during the arbitration was not licensed to practice in Massachusetts but was licensed to practice in New York.\(^ {157}\) The Massachusetts Supreme Court first held that the attorney not being admitted to practice in Massachusetts was not a sufficient reason to vacate the arbitration award.\(^ {158}\) It then held that it could not decide on the issue of whether such representation constituted the unauthorized practice of law in light of the standing advisory committee’s ongoing study of ABA Model Rule 5.5, although it also noted that “[m]any states have adopted a rule of professional conduct similar or identical to ABA Model Rule 5.5(c)(3).”\(^ {159}\)

Similarly, in *Mscisz v. Kashner Davidson Sec. Corp.*, the Massachusetts Supreme Court again chose not to decide on the issue of whether representation of a party by an out-of-state attorney in arbitration constitutes the unauthorized practice of law.\(^ {160}\) In that case, a Florida defendant with New York counsel entered into a National Association of Securities Dealers (“NASD”) arbitration against some Massachusetts plaintiffs. Pursuant to NASD policy, the NASD selected Boston as the location for the arbitration. Before the arbitration began, the plaintiffs filed a motion to disqualify the New York lawyers because they were not licensed to practice in Massachusetts.\(^ {161}\) The Massachusetts trial court, however, held that the New York lawyers would not be engaging in the unauthorized practice of law by representing the defendants at the arbitration hearing.\(^ {162}\)

The arbitration took place, the arbitral panel found in favor of the defendants, and the plaintiffs then challenged the award, again on the grounds that the defendant’s attorneys were not admitted in Massachusetts. The Massachusetts Supreme Court, however, did not address the question of whether the representation constituted the unauthorized practice

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\(^{156}\) 844 N.E. 2d 246 (Mass. 2006).

\(^{157}\) *Id.* at 331.

\(^{158}\) *Id.* at 336.

\(^{159}\) *Id.* The court also observed that “while the Restatement (Third) of the Law Governing Lawyers § 3 (2000) does not expressly address arbitration, it generally permits an out-of-State attorney to ‘provide legal services’ in another jurisdiction to a client so long as the matter is reasonably related to the attorney’s home-State practice.” *Id.*

\(^{160}\) 844 N.E.2d 614 (Mass. 2006).

\(^{161}\) *Id.* at 1009-10.

\(^{162}\) *Id.*
of law. Although it noted that the trial court had held the representation not to constitute the unauthorized practice of law, “even if an out-of-State attorney’s representation of a party at an arbitration proceeding in Massachusetts might constitute the practice of law, the conduct does not provide a basis to vacate the award.” 163

W. The Current State of the Law in Michigan
The Michigan Supreme Court, currently considering adoption of ABA Model Rule 5.5(c)(3), continues to operate under the older version of ABA Model Rule 5.5, which does not specifically address for arbitration. 164 To date, no decision from the Michigan courts has interpreted the state’s rule.

X. The Current State of the Law in Minnesota
The State of Minnesota has adopted Model Rule 5.5(c)(3) verbatim. 165 To date, however, no decision from the Minnesota courts has interpreted the state's rule.

Y. The Current State of the Law in Mississippi
Mississippi currently follows the older version of the ABA Model Rules of Professional Conduct and has not adopted newer ABA Model Rule 5.5(c)(3). 166 To date, no decision from the Mississippi courts has interpreted the state’s rule.

Z. The Current State of the Law in Missouri
Missouri has adopted ABA Model Rule 5.5(c)(3) with some minor changes. 167 In particular, the state requires pro hac vice admission for court annexed arbitration or arbitrations associated with state administrative proceedings. 168 To date, however, no decision from the Missouri courts has interpreted the state's rule.

163. Id. at 1010.
165. See Minn. R. Prof'L Conduct R. 5.5(c)(3) (2005), http://www.courts.state.mn.us/prb/conduct.html#5 (last viewed May 11, 2007).
168. Id. R. 405.5(c)(4).
**AA. The Current State of the Law in Montana**

Montana currently follows the older version of the ABA Model Rules of Professional Conduct and has not adopted newer ABA Model Rule 5.5(c)(3).  To date no decision from the Montana courts has interpreted the state’s rule.

**BB. The Current State of the Law in Nebraska**

Nebraska has adopted Model Rule 5.5(c)(3) essentially unchanged. As in a number of other states (such as Kentucky, Missouri, New Mexico, and North Carolina), a lawyer must obtain admission *pro hac vice* in the case of a court-annexed arbitration, or if the rules otherwise require. To date, however, no decision from the Nebraska courts has interpreted the state’s rule.

**CC. The Current State of the Law in Nevada**

Nevada has adopted a rule similar to ABA Model Rule 5.5(c)(3), but with some different text. In addition to the basic elements of the Model Rule, any attorney subject to Nevada’s version of that rule must register with the State Bar of Nevada and pay a $150 reporting fee annually. To date, however, no decision from the Nevada courts has interpreted the state’s rule.

**DD. The Current State of the Law in New Hampshire**

New Hampshire has not, to date, adopted ABA Model Rule 5.5(c)(3) or any similar rule. Instead, New Hampshire follows older ABA Model Rule 5.5. No decision from the New Hampshire courts appears to have interpreted the state’s rule. The Ethics Committee of the New Hampshire Bar has, however, submitted a new Proposed New Hampshire Rule of Professional Conduct 5 (identical to ABA Model Rule 5.5(c)(3)) to the New

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171. *Id.*, cmt. 12.


173. *Id.* R. 5.5A(c).


Hampshire Supreme Court Advisory Committee on Rules. On March 14, 2007, the Advisory Committee on Rules voted to recommend adoption of that proposed rule (and the others in the Ethics Committee’s report).

**EE. The Current State of the Law in New Jersey**

New Jersey has recently adopted a variation on ABA Model Rule 5.5(c)(3) to permit out-of-state attorneys to represent clients in arbitrations in New Jersey without becoming a member of the New Jersey bar. Somewhat like Florida, however, those rules actually represent a narrowing of prior law.

In 1994, the Unauthorized Practice Committee of the New Jersey state bar had simply held that “an out-of-state attorney’s representation of a party in an arbitration proceeding conducted under the auspices of the [American Arbitration Association] in New Jersey does not constitute the unauthorized practice of law.” A recent opinion from the Committee


178. See, e.g., N.J. R. Prof’l Conduct R. 5.5(b), (c) (2006), http://www.judiciary.state.nj.us/rules/apprpc.htm (last viewed May 11, 2007). Non-New Jersey lawyers may engage in “representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program” if such representation is “on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice.” N.J. R. Prof’l Conduct R. 5.5(b)(3)(ii); see also Kevin H. Michels, New Jersey Attorney Ethics, § 40:10-1 (Gann 2006). The out-of-state attorney must meet five requirements. First, he or she must be in good standing in the jurisdiction of admission (which includes not being the subject of any disciplinary proceedings). N.J. R. Prof’l Conduct R. 5.5(c)(1). Second, he or she must agree to be subject to New Jersey’s ethics rules and the disciplinary authority of the New Jersey Supreme Court. Id. R. 5.5(c)(2). Third, he or she must consent to the appointment of the Clerk of the Supreme Court as agent for service of process. Id. R. 5.5(c)(3). Fourth, he or she must not hold himself or herself out as being admitted to practice in New Jersey. Id. R. 5.5(c)(5). Fifth, he or she must comply with any requirements to maintain a “local office” in New Jersey. Id. R. 5.5(c)(6).

on Unauthorized Practice of Law appointed by the New Jersey Supreme Court, however,\textsuperscript{180} emphasizes that, under New Jersey’s new practice rules, this conclusion depends on the out-of-state attorney complying with the specific limitations of the new rule (which includes some relation to the lawyer’s existing jurisdiction and client in that jurisdiction).\textsuperscript{181} New Jersey has not specifically addressed the issue of unauthorized practice of law in connection with an arbitration in any published court opinion.

**FF. The Current State of the Law in New Mexico**

New Mexico has adopted a rule similar to ABA Model Rule 5.5(c)(3).\textsuperscript{182} The New Mexico version of the rule requires an out-of-state the lawyer to obtain admission \textit{pro hac vice} in the case of a court-annexed arbitration, or otherwise if the court rules or law require.\textsuperscript{183} To date, no decision from the New Mexico courts has interpreted the state’s rule.

**GG. The Current State of the Law in New York**

New York’s law is discussed \textit{supra} at 10-17 and elsewhere throughout this Report.

**HH. The Current State of the Law in North Carolina**

North Carolina has adopted a rule similar to ABA Model Rule 5.5(c)(3).\textsuperscript{184}

\textsuperscript{180} See Unauth. Prac. Comm. Op. 43 (Supplementary Op. 28), 187 N.J.L.J 123 (N.J. Jan 8, 2007), 16 N.J.L. 191 (N.J. Jan. 29, 2007), http://lawlibrary.rutgers.edu/ethics/cuap/cua43_1.html (last viewed May 11, 2007). The new opinion is also notable in at least two other ways: it purports again to apply not only to arbitration, but to mediation and other forms of alternative dispute resolution, \textit{id. at 4}, and it seeks to enlist arbitration providers in monitoring New Jersey’s rules in the form of a “recommendation of this Committee that the AAA and other alternative dispute resolution forums require, as part of the initial filing process, that out-of-state attorneys seeking to practice in New Jersey . . . be required to submit proof of compliance with \textit{RPC} 5.5, particularly proof that they have registered with the Clerk of the Supreme Court and have paid the required fees”, \textit{id. at 5}. The New Jersey committee’s completely unsupported and unexamined argument that mediation is “akin to arbitration” does not seem sufficient to make its comments on mediation deserving of deference. It also seems unlikely that arbitration providers can or should perform the function of policing state ethics rules.

\textsuperscript{181} See N.J. R. Civ. Prac. R. 5.5(b)(3)(ii) and its registration provisions, summarized \textit{supra} at n.176.


\textsuperscript{183} \textit{id.}, cmt. 12.

Under North Carolina's version of that rule, an out-of-state lawyer must obtain admission pro hac vice if the arbitration or mediation is court-annexed or if the court rules or law otherwise requires. To date, no decision from the North Carolina courts has interpreted the state's rule.

II. The Current State of the Law in North Dakota

North Dakota has adopted a rule similar to ABA Model Rule 5.5(c)(3), but also requires that "an out-of-state lawyer who represents a client in an ADR proceeding in North Dakota must register under Admission to Practice R. 3." This pro hac vice rule for alternative dispute resolution (including arbitration) provides that an out-of-state attorney must file an affidavit requesting permission to render legal services with the North Dakota State Board of Bar Examiners, must prove that the attorney is in good standing in the jurisdiction to which the attorney has already been admitted, and must pay an annual fee of (currently) $380. The pro hac vice admission may not be used for more than five years. After five years, the attorney must seek to be admitted to practice law in North Dakota. To date, no decision from the North Dakota courts has interpreted these rules.

JJ. The Current State of the Law in Ohio

Until recently, an attorney not licensed in Ohio could not lawfully represent a party in an arbitration there. In Disciplinary Counsel v. Alexicole, Inc., a lawyer not licensed in Ohio had represented various parties in securities arbitrations held in Ohio. The Ohio Board of Commissioners on the Unauthorized Practice of Law held that this constituted the unauthorized practice of law. The Ohio Supreme Court upheld this decision, concluding that the out-of-state lawyer had unlawfully “render[ed] legal services, including representation on another’s behalf during discovery, settlement negotiations, and pretrial conferences to resolve claims of legal liability. . . .” The court enjoined the out-of-state lawyer from repre-

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185. See id. 5.5, cmt. 6.
187. N.D. R. PROF'S CONDUCT R. 5.5, cmt. 7.
188. N.D. ADMITTANCE TO PRACTICE R. 3.
189. Id.
190. 822 N.E.2d 348, 349 (Ohio 2004).
191. Id.
192. Id at 350.
senting Ohio residents in securities arbitrations; from providing legal advice to any person in Ohio about securities arbitrations, lawsuits, or any “other legal or quasi-legal proceedings”; and from representing any corporation in Ohio before any “legal or quasi-legal body, or in any legal action, settlement, or dispute in the state of Ohio” unless the out-of-state lawyer became an attorney in good standing in Ohio.193

No pro hac vice admission was available to solve the problem created by these decisions in Ohio, because the only available rule applied to court appearances only.194 Therefore, unless an out-of-state attorney was fully licensed to practice law in Ohio, he or she could not represent a party in an arbitration in Ohio without violating its unauthorized practice of law statute.195

In November 2004, however, the Task Force on the Rules of Professional Conduct of the Ohio Supreme Court proposed amendments to those rules following the provisions of new ABA Model Rule 5.5(c)(3).196 The court subsequently adopted those proposed rules, thus substantially mitigating the effects of its earlier Alexicole, Inc. decision.197

**KK. The Current State of the Law in Oklahoma**

On April 9, 2007, the Oklahoma Supreme Court adopted the Oklahoma Bar Association’s Committee on the Rules of Professional Conduct Proposed Rule 5.5(c)(3).198 This rule follows ABA Model Rule 5.5(c)(3).198

193. Id.


195. **OHIO R.C. ANN.**, § 4705.01 (2007). While not a solution to this problem, one Ohio state court had at least held that a violation of the unauthorized practice of law provisions would not void any judgment (or, presumably, arbitration award). See Miami Valley Hospital v. Combs, 695 N.E.2d 308, 310 (Ohio 1997); see also id. at 311 (“the case law and statute evidence no intent to ‘benefit persons against whom legal proceedings might be directed by unlicensed practitioners.’” (citations omitted). The Ohio Government Bar Rules, and the Board of Commissions on the Unauthorized Practice of Law they establish, provide the “exclusive avenue” for complaints about the unauthorized practice of law. Id. at 312; see also **OHIO GOV. BAR R. VII** (2007), http://www.sconet.state.oh.us/rules/govbar/#rulevii (last visited May 11, 2007).


197. See **OHIO R. PROF’L CONDUCT R. 5.5** (2007), http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/rules/default.asp#Rule5_5 (last visited May 11, 2007). Some commentators have not recognized this change, however. See D. Ryan Nayar, supra n.66 at *11-12.

5.5(c)(3),\textsuperscript{199} but also provides that the practice of law by an attorney under the provisions of Rule 5.5(c)(3) will be subject to the provisions of Rule 5.5(a), which states that “a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”\textsuperscript{200} The amended rules will take effect on January 1, 2008. To date, however, no decision from the Oklahoma courts has interpreted the state’s rule.

**LL. The Current State of the Law in Oregon**

Oregon has adopted ABA Model Rule 5.5(c)(3) verbatim.\textsuperscript{201} To date, however, no decision from the Oregon courts has interpreted the state’s rule.

**MM. The Current State of the Law in Pennsylvania**

In April 2004, the Pennsylvania Supreme Court adopted a rule similar to ABA Model Rule 5.5(c)(3).\textsuperscript{202} To date, however, no decision from the Pennsylvania courts has interpreted the state’s rule.

**NN. The Current State of the Law in Rhode Island**

Rhode Island currently follows the older version of the ABA Model Rules of Professional Conduct and has not adopted newer ABA Model Rule 5.5(c)(3).\textsuperscript{203} To date, no decision from the Rhode Island courts has interpreted the state’s rule.

**OO. The Current State of the Law in South Carolina**

South Carolina has adopted a rule similar to ABA Model Rule 5.5(c)(3) to permit out-of-state attorneys to practice law on a “temporary” basis by appearing in arbitrations in South Carolina.\textsuperscript{204} As with the rule in Florida, however, an attorney providing such “temporary” legal services may not appear in more than three matters in any one 365-day period.\textsuperscript{205}


\textsuperscript{200} Id.; see also MODEL RULES PROF’L CONDUCT 5.5(a).


\textsuperscript{205} S.C. R. PROF’L CONDUCT R. 5.5, cmt. 12.
attorney appears in more than three matters, he or she is presumed to be providing legal services on a regular, not temporary, basis, and loses his or her exemption from South Carolina’s provision on the unauthorized practice of law. 206 An attorney providing representation in an arbitration must also file a verified statement with the South Carolina Supreme Court Office of the Bar Admissions stating that the attorney has not filed more than three statements in a 365-day period. 207 To date, no decision from the South Carolina courts has interpreted these rules.

**PP. The Current State of the Law in South Dakota**

South Dakota has adopted a rule similar to ABA Model Rule 5.5(c)(3). 208 The South Dakota rule, however, adds that the out-of-state attorney must obtain a South Dakota sales tax license and tender all applicable taxes pursuant to South Dakota Codified Law 10-45 (which basically provides that any business that sells services or property is subject to tax and must obtain a permit). 209 To date, no decision from the South Dakota courts has interpreted the state’s rule.

**QQ. The Current State of the Law in Tennessee**

Tennessee currently follows the older version of the ABA Model Rules of Professional Conduct and has not adopted newer ABA Model Rule 5.5(c)(3). 210 To date, no decision from the Tennessee courts has interpreted the state’s rule.

**RR. The Current State of the Law in Texas**

The Texas Disciplinary Rules of Professional Conduct (which follow the older ABA Model Rule 5.5) do not currently address the question of whether out-of-state representation in an arbitration constitutes the unauthorized practice of law. 211 The State Bar Disciplinary Rules of Profes-

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207. Id. 404(i). The statement must be accompanied by a fee of $250 and must also be served on opposing counsel. Id.


209. Id. 5.5(c)(5); S.D. Codified Laws § 10-45-1, et seq. (2007).


sional Conduct Committee is currently conducting a review of the ABA’s newer Model Rules on this issue.\textsuperscript{212} To date, no decision a Texas court has interpreted Texas Rule of Professional Conduct 5.5.

\textbf{SS. The Current State of the Law in Utah}

Utah has adopted ABA Model Rule 5.5(c)(3) verbatim.\textsuperscript{213} To date, no decision from the Utah courts has interpreted the state’s rule.

\textbf{TT. The Current State of the Law in Vermont}

Vermont has not yet adopted ABA Model Rule 5.5(c)(3), and continues to use the older ABA Model Rule 5.5 language making no special provision for arbitration.\textsuperscript{214} A proposal to amend the rule to follow ABA Model Rule 5.5(c)(3) verbatim has, however, been submitted to the Vermont Supreme Court for consideration.\textsuperscript{215} To date, no decision from the Vermont courts has interpreted the state’s rule.

\textbf{UU. The Current State of the Law in Virginia}

Virginia continues to use the older language of ABA Model Rule 5.5.\textsuperscript{216} On March 23, 2006, the Virginia State Bar’s Multi-Jurisdictional Practice of Law Task Force petitioned the Supreme Court of Virginia to adopt a new Rule 5.5(d)(4)(iii) similar to ABA Model Rule 5.5(c)(3).\textsuperscript{217} The proposed rule would permit an out-of-state lawyer to provide temporary legal services in the State of Virginia that are “in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Virginia or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer’s practice in a jurisdiction in which the Foreign Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.”\textsuperscript{218}

\textsuperscript{212} ABA Center for Professional Responsibility Implementation Committee,\textsuperscript{ supra} n.60.


\textsuperscript{217} See In re Supreme Court Rules, Part 6, Section II, Rules 5.5 & 8.5, at 1-2 (March 23, 2006), \url{http://www.vsb.org/docs/Rules5_5-8_5.pdf} (last visited May 16, 2007).

\textsuperscript{218} Id.
date, no decision from the Virginia courts has interpreted the state’s rule, although an earlier opinion from the Virginia Committee on Legal Ethics and the Unauthorized Practice of Law has summarily held that “[i]t is not the unauthorized practice of law for a non-Virginia licenses attorney to present evidence and argue matters of law before an arbitration panel of the American Arbitration Association in Virginia.”

**VV. The Current State of the Law in West Virginia**

West Virginia has not adopted new ABA Model Rule 5.5(c)(3) and continues to use the older ABA Model Rule 5.5 language. To date, no decision from the West Virginia has interpreted the state’s rule.

**WW. The Current State of the Law in Wisconsin**

Wisconsin has not adopted new ABA Model Rule 5.5(c)(3) and continues to use the older ABA Model Rule 5.5 language. To date, no decision from the Wisconsin courts has interpreted the state’s rule.

**XX. The Current State of the Law in Wyoming**

Wyoming has adopted a rule similar to ABA Model Rule 5.5(c)(3), but with an additional restriction. As adopted, Wyoming’s rule provides that a “lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in [Wyoming] in a pending proceeding before a tribunal in [Wyoming], if the lawyer is authorized by law or order to appear in such proceeding with a lawyer who is admitted to practice in [Wyoming] and who actively participates in the matter.” The requirement that the out-of-state attorney associate with a lawyer who is admitted to practice in Wyoming (and who actively participates in the matter)

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223. Id.
substantially narrows the ABA Model Rule’s language. To date, however, no decision from the Wyoming courts has interpreted the state’s rule.

**YY. The Current State of the Law in Washington**

Washington has adopted ABA Model Rule 5.5(c)(3) verbatim. To date, no decision from the Washington courts has interpreted the state’s rule.

**SOME INTERNATIONAL CONCERNS**

As the state-by-state summaries above indicate, there is no generally accepted answer in the United States to the question of whether or how a lawyer licensed elsewhere may represent a party in an arbitration held in a state where he or she is not licensed. Looking outside the United States does not seem to hold out the promise of a perfectly consistent answer, either—although there does appear to be good support for the general principle that representation of a party in arbitration should be less restricted than representation of a party in court.

In the late 1980s, for example, Hong Kong faced the issue of lawyers not licensed in the territory representing parties in arbitrations in the territory. According to one commentator, “The outcry was so strong Hong Kong felt it necessary to ‘clarify’ that non-Hong Kong counsel could appear in Hong Kong arbitrations.”

The rules of some international arbitration providers also address the issue of non-lawyers representing parties. In an arbitration under the Rules of Procedure of the Inter-American Arbitration Commission, parties “may be represented or assisted by persons of their choice,” not just “counsel of their choice.” As another example, Article 21.4 of the Rules of Arbitra-

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228. Id. art. 4.
tion of the International Chamber of Commerce provides that “[t]he parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisors.” The rule does not limit either “representatives” or “advisors” to attorneys.

A similar argument may exist in the representation, even in this country, of foreign nationals from countries having bilateral treaties of friendship, commerce, and navigation with the United States, because such treaties may contain provisions on arbitration requiring that they receive “most-favored-nation” treatment.

What Direction Should New York Take?

As the survey of positions above indicates, there is no one approach today to the issue of lawyers licensed in another jurisdiction representing parties in arbitration in a state where those lawyers are not licensed. Against this background, how should New York answer the two questions posed earlier? First, is a narrower approach than the one adopted by this bar association in 1975, and by the federal courts in New York in 1982 and 1991, now appropriate to the question of the unauthorized practice of law by a lawyer not licensed in the state where he or she is representing a party in an arbitration? Second, with the New York Code of Professional Responsibility expected soon to be replaced by some form of the ABA Model Rules of Professional Conduct, is the approach of ABA Model Rule 5.5(c)(3) the right one, or should New York (as have many other states in differing ways) modify or avoid that rule?

A. Is a Narrower Approach Now Appropriate as to Lawyers Not Licensed in New York?

It is not possible to say that the landscape of arbitration has remained unchanged since the 1975 Committee Report. Since 1975 arbitration has obviously become a much more significant element of dispute resolution practice for lawyers. In part, this is because, in case after case since the 1970s, the United States Supreme Court has given expansive readings to the scope of arbitration under the Federal Arbitration Act. Thus, in Southland Corp. v. Keating, the Court could “discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitra-
tion Act: they must be part of a written maritime contract or a contract ‘evidencing a transaction involving commerce’ and can be revoked upon ‘grounds as exist at law or in equity for the revocation of any contract.’ . . . nothing in the Act indicat[es] . . . any additional limitations under state law.”231 That same year, in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., and then again two years later, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, the Court held that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”232 Nor could the federal courts expect to exercise much control around the margins in making these decisions, because where “the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question”, the issue of the scope of arbitration should even more be resolved “in favor of arbitration.”233

Lest states believe that they could easily regulate arbitration, the Court also pronounced, in Doctor’s Associates v. Casarotto, that “[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions.”234 This was because, at it had already held in Allied-Bruce Terminix Co. v. Dobson, “[w]hat states may not do is decide that a contract is fair enough to enforce all its basic terms, price, service, credit, but not fair enough to enforce its arbitration clause.”235 In fact, the Court was only a little more lenient with Congress: all federal statutory claims can be subject to arbitration unless “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”236

The Court also encouraged experimentation and expansion of arbitration by private parties by holding, in Volt Information Sciences v. Board of

233. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451 (2003); see id at 453 (deciding that the issue of whether the parties had agreed to class-wide arbitration was a question for the arbitrators because it was simply a question of “what kind of arbitration proceeding the parties agreed to”); see also Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (consumer party seeking to invalidate arbitration agreement on grounds that arbitration costs are “prohibitively expensive” bears the burden of proof on that issue).
Trustees, that because “[t]he thrust of the federal law is that arbitration is strictly a matter of contract”, the parties to an arbitration agreement should be “at liberty to choose the terms under which they will arbitrate.”237 This meant, for example, that parties are “generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.”238 Thus, in Carnival Cruise Lines v. Shute, the Court did not hesitate to require passengers on a cruise ship to arbitrate thousands of miles from their home based on an arbitration clause on a pre-printed ticket.239 The majority simply held that “[i]ncluding a reasonable forum clause in a form contract of this kind well may be permissible.”240 Similarly, in cases such as Circuit City Stores v. Adams, the Court easily concluded, with respect to mandatory arbitration of private employment disputes by low-paid employees, that “[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.”241

240. Id.
Ever “mindful of the Federal Arbitration Act’s purpose to reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements upon the same footing as other contracts”, by the beginning of this millennium the United States Supreme Court had therefore given arbitration an almost unlimited scope of potential application. Arbitration now reaches well beyond its traditional business-to-business role and into the general consumer fabric of the nation, beyond its traditional union-based labor background and into the largely non-union workforce of the present-day United States, and beyond its previously-assumed limited capacity to handle certain legal issues into the most abstruse substantive and procedural realms, such as antitrust law and class actions.\(^{242}\)

At the same time, there has been a significant expansion of arbitration infrastructure in this country and abroad. Organizations such as the American Arbitration Association, the Better Business Bureau, and the International Chamber of Commerce have all increased in size and scope. So have arbitration service providers such as JAMS, the National Arbitration Forum, the International Institute for Conflict Prevention and Resolution, and the former dispute resolution arms of the NASD and the New York Stock Exchange now combined as the Financial Industry Regulatory Authority, Inc. In short, arbitration is a big business.

One consequence of this vast expansion of arbitration since 1975 is that one of the policy assertions for the conclusions in the 1975 report by the Committee on Labor and Social Security Legislation—the assertion that labor is a unique substantive area—has disappeared. In addition, while arbitration continues to have a separate dispute resolution identity, there are now genuine concerns about arbitration becoming “litigation by another name.”

Other policy concerns, even though not expressly examined in 1975, remain relatively unchanged, however. At the most basic, this Committee believes that party choice should count. If a party wants a lawyer not licensed in New York to represent him, her, or it in an arbitration that happens to be in New York, that should have more than just some weight.\(^{243}\)

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\(^{243}\) As Ethical Consideration 3-9 of the current New York Code of Professional Responsibility provides that “[i]n furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of
a lawyer of the client’s choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.” E.C. 3-9, 22 N.Y. COMP. CODE R. & REGS. § 1200.16 (emphasis added).

244. One logical question is whether New York ethical standards should have any role to play in this at all, particularly if the lawyer’s client is not a New York citizen. There is no reason to believe that a lawyer subject to another jurisdiction’s code or rules of ethics would, in the context of representing a client in New York, not continue to be subject to that jurisdiction’s code or rules. The conventional view is that ethical constraints of a licensing jurisdiction attach to a lawyer by virtue of his or her admission to the bar of that jurisdiction and follow that person around so long as the person is generally admitted to that bar. See ABA Model R. Prof’l Conduct 8.5; Susanna Felleman, Note: Ethical Dilemmas and the Multistate Lawyer, 95 Colum. L. Rev. 1500, 1501 (Oct. 1995). Indeed, if a lawyer is not licensed in New York in any way, it may not be possible for the New York bar itself to discipline him or her. See, e.g., Felleman, supra, at 1515 n.117. There is also still a fine distinction to be made between the 1975 Committee Report, in which appearing in a New York arbitration for a client is “is not the unauthorized practice of law”, and the 1982 position of Judge Weinfeld (relying on the 1975 Committee Report) that such representation “is not the practice of law” at all, see Williamson, 537 F. Supp. 613, 616. Ethics codes or rules apply primarily to the behavior of a lawyer practicing law. But see, e.g., In re O’Toole, 783 N.Y.S.2d 579 (N.Y. App. Div. 2004). Nonetheless, from a policy point of view, the state of New York could legitimately assert that it has a sufficient interest in the behavior of a visiting lawyer so as to seek to apply its own laws to that visitor with respect to that visitor’s activities in the state, whether those activities are undertaken on behalf of a New York citizen or someone else.

245. There also seems to be no good policy reason to believe that representation of a party by an out-of-state lawyer not licensed in New York should become a ground for vacating an arbitration award. Cf., e.g., Superadio, 844 N.E.2d at 253-54. As to the party hiring the out-of-state lawyer, such a rule assumes that it is the fault of that party that a potentially unauthorized practice of law occurred in an arbitration. But it is hard to understand how a rule likely only to be known to lawyers can encourage (much less enable) consumers to know whether a person is licensed as a lawyer in a particular state. As to the party on the other side, such a
rule assumes that a lawyer not licensed in the state somehow represents an unfair advantage to the party employing him or her. This is contrary to all the other policy reasons for requiring state-by-state licensing, and thus makes little sense.

Furthermore, because this state is the center of national (and international) commerce, it is more likely that various specialized disputes will be heard by arbitrators here. Precluding a party from choosing an attorney’s subject matter specialization over his or her state-by-state specialization for an arbitration in New York seems particularly inappropriate as a result. Nor would allowing an out-of-state lawyer not licensed in New York to represent a client in an arbitration in New York necessarily lessen the standard of care for that lawyer. (Such a lawyer may even be at greater risk by acting alone in a New York arbitration (particularly without disclosure to his or her client) than by representing a client in an arbitration only in a state in which such lawyer is licensed.)

For all these reasons, the Committee believes that New York should not adopt a narrower approach to the representation of parties in arbitration by lawyers not licensed here. The position of this Committee’s 1975 predecessor (and its 1991 predecessor) remains valid in the new circumstances of this century.

B. Is ABA Model Rule 5.5(c)(3) the Right Approach for New York as to Lawyers Not Licensed in New York?

Because the Committee believes the approach taken by its predecessor in 1975 remains valid today for New York, the specific words of ABA Model Rule 5.5(c)(3) could matter if they are deemed to represent a narrowing of existing law. The language of the ABA Model Rule, now adopted

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246. The majority of the requests to appear in Florida arbitrations in the year after the new Florida rules went into effect came from New York lawyers. The total number of requests to appear in Florida arbitrations from all jurisdictions was 222. Gary Blankenship, Year Old Bar MJP Rules are Working Smoothly, Fla. Bar News (Nov. 15, 2006).

247. See Fla. R. of Jud. Adm. 2.061 (out-of-state attorneys are not authorized to appear pursuant to the Florida rule on arbitrations if they are engaged in “general practice”, and it is presumed that more than three appearances in one year constitutes “general practice”).

by the NYSBA, is that a lawyer licensed in another state may only “pro-
vide legal services on a temporary basis in this jurisdiction that: . . . (3) are in or reasonably related to a pending or potential arbitration, mediation,
or other alternative dispute resolution proceeding in this or another juris-
diction” and then only “if the services arise out of or are reasonably rel-
ted to the lawyer's practice in a jurisdiction in which the lawyer is ad-
mitted to practice and are not services for which the forum requires pro
hac vice admission . . . .”

A noted above, there does not seem to be a strong link between a
lawyers' practice in another jurisdiction and any particular protected in-
terest of New York with respect to arbitrations in New York. Thus, other
than as a revenue or protectionist measure, it would not seem to make
sense to try to impose a pro hac vice admission test on an arbitration from
outside, and we are not aware that anyone in New York recommends such
a step. If an arbitration provider or an arbitrator does not wish to rec-
ognize the person representing a party, that decision would be the equivalent
to an order denying pro hac vice status by a court. But to the extent arbi-
tration and court are different, it does not make sense to say that rules for
court must necessarily be rules for arbitration—particularly if the rule is
not one to be administered by arbitrators or arbitration providers.

Apart from opposing any future effort to require pro hac vice admis-
sions for arbitrators, however, the Arbitration Committee of the City Bar
Association has no view on the particular wording of the Proposed Rules
of Professional Conduct recommended by the NYSBA, and no view on

249. See, e.g., supra at 17.
250. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3).
251. One of the comments to the Proposed Rules approved by the NYSBA states that a
“lawyer . . . must obtain admission pro hac vice in the case of a court-annexed arbitration or
mediation or otherwise if court rules or law so require.” PROPOSED R. OF PROF'L CONDUCT R.
5.5(c) cmt. 12. To the extent that a “court-annexed arbitration” is an arbitration actively
administered by a relevant court system, not simply an arbitration that happens to concerns a
matter in court, this pro hac vice comment is appropriate. The comment would not properly
extend beyond those circumstances, however (and we do not read it to do so). For example,
a court would not, under the proper interpretation of Proposed Rule 5.5(c)(3), have the
authority to require out-of-state attorneys—hired solely for purposes of privately arbitrating a
dispute already in the New York courts being handled by other counsel admitted in New
York—to obtain pro hac vice admission if such out-of-state attorneys would otherwise satisfy
the Proposed Rule.
252. For a decision holding that arbitrators cannot decide whether opposing counsel must be
disqualified as an ethical matter, see Munich Reinsurance Am., Inc. v. ACE Prop. & Cas. Ins.
whether the New York courts should then adopt that particular wording. For example, not adopting Proposed Rule 5.5(c)(3) would be acceptable in theory. So would adopting language to substitute for Proposed Rule 5.5(c)(3) that expressly states that “representation of a party in an arbitration proceeding by . . . a lawyer from another jurisdiction is not the unauthorized practice of law.”

In our view, however, the preservation of the current flexible standard for representing a party in an arbitration in New York—a standard that has worked well and been reaffirmed repeatedly—rather than the particular words chosen to accomplish that end, is what is important. It would therefore also be sufficient simply to read Proposed Rule 5.5(c)(3) so that the requirement “if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice” will, among other things, always be satisfied if the lawyer represents or has represented the client involved before, or if the lawyer represents or has ever represented any client in an arbitration “in a jurisdiction in which the lawyer is admitted to practice,” as well as being satisfied under other circumstances when the matter to be arbitrated is reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. This is a natural interpretation of the language of the Proposed Rule. Even if the New York courts or the NYSBA never provide a formal comment to Proposed Rule 5.5(c)(3) that repeats this interpretation, it is still the one that, in any particular case, a court or disciplinary committee should follow.

Conclusion

The changes in the field of arbitration have expanded both the pool of litigants affected, and the subject matters that can be covered, by arbitration clauses. As a result, arbitration is an even more important societal mechanism for dispute resolution today than it was in 1975. Given the basic source of benefits to arbitration—the aims of greater simplicity, speed, and economic efficiency—and the small countervailing benefits to a rigid

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253. See supra at 9.

254. See, e.g., supra at 1-2.


256. Proposed R. of Prof’l Conduct R. 5.5(c)(3); Model R. Prof’l Conduct R. 5.5(c)(3).

257. See supra at 10.

258. As noted earlier, see supra at 9, both this Committee and others encourage the formal adoption of such a comment.
approach to representation in arbitrations, we believe that the conclusions of our predecessor Committee in 1975 remain valid, at least to the extent that representation of a party in an arbitration by a lawyer not licensed in New York should not be considered the unauthorized practice of law in New York.

June 2008

Committee on Arbitration

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259. Special thanks to former Committee member Stephen A. Hochman for his help.

The Committee on International Commercial Disputes

Section 1782 of Title 28 of the United States Code is the mechanism by which the United States provides assistance to foreign or international tribunals in obtaining evidence. It states, in pertinent part, “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . .” This text has led to conflicting decisions and differing views. One such conflict exists over the meaning of the term “foreign or international tribunal” and whether Section 1782


encompasses assistance to foreign private arbitration. The 2004 Supreme Court case *Intel Corporation v. Advanced Micro Devices, Inc.*, along with recent district court cases, revived that debate. This report analyzes the developing jurisprudence and suggests best practices for the application of Section 1782 to international arbitration. It is our opinion that Section 1782 should be available in aid of foreign arbitration. Further, foremost among the best practices that we recommend, we believe that, once the tribunal is constituted, Section 1782 discovery should be granted only if the request comes from the arbitrators or with the consent of the arbitrators and that, therefore, district courts should consider the source of the request as a very important factor in exercising the discretion granted to them by the statute.

I. THE APPLICATION OF SECTION 1782 TO INTERNATIONAL ARBITRATION—FROM BIRTH TO ROZ TRADING

A. The Birth of Section 1782—Statutory Developments in Judicial Assistance from 1855 to 1949

1. Section 1782’s Ancestors—the 1855 and 1863 Acts

The history of Section 1782 begins in 1855, when Congress enacted “An Act to Prevent Mis-Trials in the District and Circuit Courts of the United States, in Certain Cases.” 33 Cong. Ch. 140; 10 Stat. 630 (Mar. 2, 1855). Under Section 2 of that Act, “where letters rogatory shall have [been] addressed, from any court of a foreign country to any circuit court of the United States,” the circuit courts had power to “designate” a “commissioner” to “compel . . . witnesses to appear and depose in the same manner as to appear and testify in court.” Id. § 2. The 1855 Act was apparently enacted in response to a prior opinion by the United States Attorney General to the effect that United States courts lacked statutory authority to execute a letter rogatory submitted by French judicial officials. 4

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3. We would like to acknowledge the authors of the January 2004 Brief for the United States as Amicus Curiae Supporting Affirmance in *Intel* (filed in the United States Court, January 2004) (“U.S. Amicus Br.”), which gives an excellent overview of the legislative history of Section 1782. Appearing on that brief as counsel for the United States were Paul D. Clement, Peter D. Keisler, Michael R. Dreeben, Gregory G. Katsas, Jeffrey P. Minear, James H. Thessin, Jeffrey D. Kovar, Michael Jay Singer and Sushma Soni.

4. See 7 Op. Att’y Gen. 56 (1855); Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 540 (1953) (hereinafter “Jones”). Mr. Jones became the Director of the Commission that drafted the modern version of Section 1782. (See infra.)
Apparently because of indexing errors, the 1855 Act was “buried in oblivion” and was never applied by the United States circuit courts (which were ignorant of its existence). The Act was supplemented in 1863, when Congress passed a further “Act to facilitate the taking of depositions within the United States, to be used in the Courts of Other Countries, and for other purposes.” 37 Cong. Ch. 95; 12 Stat. 769 (Mar. 3, 1863). Under the 1863 Act, district courts were empowered to receive and execute letters rogatory issued in any money or property suit pending in “any court in any foreign country with which the United States [is] at peace,” and, to that end, to order that witnesses be compelled to appear before a designated “officer or commissioner” to “testify in such suit.” Id. § 1. Jurisdiction was conferred on “any district where said witness resides or can be found.” Id. However, the scope of the Act was significantly [restricted] by an express requirement that “the government of such foreign country . . . be a party or have an interest” in the money or property suit in question. Id. Effectively, therefore, this Act only applied to foreign court actions in which a foreign sovereign had an interest.

2. 1948 Legislation Consolidates and Modifies the Previous Laws in the Form of Section 1782

In 1948, Congress significantly broadened the 1863 Act and related legislation—designated as Section 1782—by eliminating the requirement that a foreign sovereign have an interest in the proceeding in question. See Act of June 25, 1948, ch. 646, 1782, 62 Stat. 949. In 1949, Congress further broadened the Act by extending the application of the 1863 Act

5. See Jones, supra note 4, 62 Yale L.J. at 540–41; U.S. Amicus Br. 3.
6. In 1877, Congress modified Revised Statutes § 875 to add language “similar to that used in the Act of March 2, 1855, providing assistance for foreign governments in cases in which they were parties or had an interest.” U.S. Amicus Br. 4 n.1 (citing Act of Bef. 27, 1877, ch. 69, 19 Stat. 241). This statute existed alongside Revised Statutes §§ 4071–4073 (1875 ed.), “drawn from part of the 1863 legislation, [which] set out more limited circumstances in which a foreign government could obtain assistance in United States courts.” U.S. Amicus Br. 4 n.1. “These two sets of statutes remained separate until 1948 when they were revised and consolidated at 28 U.S.C. § 1781 et seq. (62 Stat. 949).” In re Letter Rogatory from Justice Ct., Dist. of Montreal, Can., 523 F.2d 562, 564 n.5 (6th Cir. 1975).

7. From 1948 on, the 1855 and 1863 Acts, and revised statutes modeled thereon, were blended into one consolidated and revised statute (hereinafter “Section 1782”). See supra note 2; see also In re Letter Rogatory, 523 F.2d at 564 n.5.
to any “judicial proceeding.” Act of May 24, 1949, ch. 139, 93, 63 Stat. 103. Previously, the Act had allowed assistance only to a “civil action” involving money or property.

3. Another “Strand” Evolves—the 1930 “I’m Alone” Legislation and its Progeny, Permitting Discovery in Aid of “International Tribunals”

The 1948 version of Section 1782 enabled discovery to be obtained in aid of litigation in foreign courts. At the same time, however, a different “strand” of legislation was evolving,9 which centered around the activities of “international tribunals.”

During the 1920s, the United States and Canada agreed to submit to arbitration before an international “Claims Commission” a then hotly contested international dispute between those two countries—known as the “I’m Alone” case.10 In 1930, to facilitate the taking of evidence in that case, Congress passed a law enabling any member of a tribunal or commission to issue subpoenas. The law provided, in pertinent part:

1. That whenever any claim in which the United States or any of its nationals is interested is pending before an international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments, each member of such tribunal or commission, or the


10. See id. at 1264. The “I’m Alone” case was a prohibition-era controversy arising out of the sinking in 1924, by the U.S. Coast Guard, of a Canadian-flagged ship (the “I’m Alone”) that was allegedly attempting to smuggle liquor into the United States. See id. The proceeding was convened pursuant to a January 23, 1924 Convention between the United Kingdom and the United States “respecting the Regulation of the Liquor Traffic.” See http://www.lexum.umontreal.ca/ca_us/en/cas.1924.509.en.html. Article IV of that Convention provided for the submission of any British claims to a “Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910.” Significantly for present purposes, the 1924 treaty also referred to this “Claims Commission” as a “tribunal.” The ensuing award of this tribunal created important precedent on the right of a state’s vessels to engage in “hot pursuit” of a suspected felon, even if this impinged on another state’s sovereign territory. See I’m Alone (Canada v. United States), 3 U.N. Rep. Int’l Arb. Awards 1609 (1933), 29 Am. J. Int’l L. 326.
clerk or a secretary thereof, shall have authority to administer oaths in all proceedings before the tribunal or commission; and every person knowingly and willfully swearing or affirming falsely in any such proceedings, whether held within or outside the United States, its territories or possessions, shall be deemed guilty of perjury and shall, upon conviction, suffer the punishment provided by the laws of the United States for that offense, when committed in its courts of justice.

2. Any such international tribunal or commission shall have power to require by subpoena the attendance and the testimony of witnesses and the production of documentary evidence relating to any matter pending before it. Any member of the tribunal or commission may sign subpoenas.

4. To afford such international tribunal or commission needed facilities for the disposition of cases pending therein said tribunal or commission is authorized and empowered to appoint competent persons, to be named as commissioners, who shall attend the taking of or take evidence in cases that may be assigned to them severally by the tribunal or commission and make report of the findings in the case to the tribunal or commission. Any such commissioner shall proceed under such rules and regulations as may be promulgated by the tribunal or commission and make report of the findings in the case to the tribunal or commission. Any such commissioner shall proceed under such rules and regulations as may be promulgated by the tribunal or commission and such orders as the tribunal or commission may make in the particular case, and may have and perform the general duties that pertain to special masters in suits in equity. He may fix the times for hearings, administer oaths, examine witnesses, and receive evidence. Either party to the proceeding before the tribunal or commission may appear before the commissioner by attorney, produce evidence, and examine witnesses. Subpoenas for witnesses or for the production of testimony before the commissioner may issue out of the tribunal or commission by the clerk thereof and shall be served by a United States marshal in any judicial district in which they are directed. Subpoenas issued by such tribunal or commission requiring the attendance of witnesses in order to be examined before any person commissioned to take testimony therein shall have the same force as if issued from a district court and compliance therewith shall be compelled under such rules and orders as the tribunal or commission shall establish. Any person
appointed as commissioner may be removed at the pleasure of the tribunal or commission by which he is appointed.

46 Stat. 1005 (1930). 11

The legislative history indicates that the 1930 Act was intended to assist present and future international arbitral tribunals such as the I’m Alone tribunal. In a letter to Congress advocating passage of the bill, then Secretary of State Stimson described the object of what would become the 1930 Act as follows: “As occasions doubtless will arise in the future when it will be desirable to adopt a similar course of procedure in other arbitration cases, the language of the draft bill has been made general, so that its provisions may be made use of in subsequent arbitral proceedings to which the United States is a party.” 12 In a similar vein, the Senate Judiciary Committee found that the proposed Act would be of utility to “arbitral tribunal[s].” 13

In the early 1930s, a further controversy arose in connection with proceedings before the U.S.-German Mixed Claims Commission. 14 During the late 1920s and early 1930s, this Mixed Claims Commission considered claims against Germany brought by U.S. nationals, arising out of the 1916 “Black Tom” explosion at Liberty Island, New Jersey, which (according to the claimants) had been caused by German agents who had infiltrated the New York area. During the initial proceedings, a conflict arose when the American Agent attempted to compel the attendance of certain witnesses, sparking objection by the German Agent. The Commission held that the 1930 Act was inapplicable because it increased the Commission’s powers beyond those agreed upon in the enabling U.S.-German treaty. 15

11. Act of July 3, 1930. See also NBC (SDNY), 1998 U.S. Dist. LEXIS 385, supra note 9, at *12–13; Smit, supra note 9, at 1264.

12. Letter from Secretary of State Henry L. Stimson to the Honorable George W. Norris, Chairman of the Judiciary Committee of the United States Senate, 72 Cong. Rec. 1044 (1929).

13. See Report submitted by the Senate Committee on the Judiciary, indicating the purpose of the bill to operate “in such cases as the I’m Alone in which necessary witnesses might not be disposed to appear voluntarily on the invitation or request of the commission or arbitral tribunal to which it has been or may be referred.” S. Rep. No. 246, 71st Cong., 2d Sess. at 1 (Jan. 6, 1930) (emphasis added).

14. The U.S.-German Mixed Claims Commission was established pursuant to an August 10, 1922 agreement between Germany and the United States, made in order to resolve reparations claims arising out of World War I. See 42 Stat. 2200 (1922). Pursuant to that Agreement a Mixed Claims Commission was to meet in Washington, D.C. and be comprised of two U.S. and German commissioners, plus a third umpire. See id., Arts. II–III.

In 1933, at a later phase of the “Black Tom” proceedings, Congress amended the 1930 Act, redirecting the subpoena power away from the treaty-bound Commission to the American agent. The 1933 amendment created a “present and future remedy” allowing American agents prosecuting claims on behalf of United States citizens in an “international tribunal,” such as the Mixed-Claims Commission, to apply to United States courts for the administration of discovery assistance:

SEC. 5. That the agent of the United States before any international tribunal or commission, whether previously or hereafter established, in which the United States participates as a party whenever he desires to obtain testimony or the production of books and papers by witnesses may apply to the United States district court for the district in which such witness or witnesses reside or may be found, for the issuance of subpoenas to require their attendance and testimony before the United States district court for that district and the production therein of books and papers, relating to any matter or claim in which the United States on its own behalf or on behalf of any of its nationals is concerned as a party claimant or respondent before such international tribunal or commission.

SEC. 6. That any United States district court to which such application shall be made shall have authority to issue or cause to be issued such subpoenas upon the same terms as are applicable to the issuance of subpoenas in suits pending in the United States district court, and the clerk thereof shall have authority to administer oaths respecting testimony given therein, and the marshal thereof shall serve such subpoenas upon the person or persons to whom they are directed. The hearing of witnesses and taking of their testimony and the production of books and papers pursuant to such subpoenas shall be before the United States district court for that district or before a commissioner or referee appointed by it for the taking of such testimony, and the examination may be oral or upon written interrogatories and may be conducted by the agent of the United States to the

16. In 1930, the claims before the Commission were dismissed by the Mixed-Claims Commission for lack of evidence, but granted re-hearing in 1932 upon a finding by United States Supreme Court Justice Owen Roberts (acting as arbiter/umpire based in Washington, D.C.) that the previous award had been obtained by fraud and false evidence. See Lehigh Valley R.R. (U.S. v. Germany), 8 R.I.A.A. 84 (Mixed Cl. Comm’n 1930); Lehigh Valley R.R. (U.S. v. F.R.G.), 8 R.I.A.A. 104 (Mixed Cl. Comm’n 1932) (rehearing granted).

agent or agents of the opposing government or governments concerned in such proceedings who shall have the right to be present in person or by representative and to examine or cross-examine such witnesses at such hearing. A certified transcript of such testimony and any proceedings arising out of the issuance of such subpoenas shall be forwarded by the clerk of the district court to the agent of the United States and also to the agent or agents of the opposing government or governments, without cost.

48 Stat. 117 (1933).  

It can therefore be seen that Congress intended for this strand of legislation to confer broad evidentiary powers on any "international tribunal" in which the United States participated as a party, to compensate for the fact that such tribunals were not part of the U.S. domestic judicial system. Notably, the 1933 amendment empowered a litigant to apply directly to district courts for discovery assistance, thus anticipating the later discovery structure of Section 1782. The Act of July 3, 1930, along with its 1933 amendment, was codified in §§ 270–270g of Title 22 of the United States Code, and was repealed and replaced with the 1964 amendments to § 1782.


In the late 1950s, Congress called for a complete overhaul of Section 1782. The United States Amicus Brief in Intel relates this history:

In 1958, Congress concluded that “[t]he extensive increase in international, commercial and financial transactions involving both individuals and governments and the resulting disputes, leading sometimes to litigation, has pointedly demonstrated the need for comprehensive study of the extent to which international judicial assistance can be obtained.” S. Rep. No. 2392, 85th Cong., 2d Sess. 3 (1958). Congress therefore created

18. See also NBC (SDNY), 1998 U.S. Dist. LEXIS 385, supra note 9, at *13; Smit, supra note 9, at 1264. Ultimately, the “Black Tom” claims by the U.S. claimants were successful. See Lehigh Valley R.R. (U.S. v. Germany), 8 R.I.A.A. 225 (Mixed Cl. Comm’n 1939) (granting claimants’ claims and awarding reparations against Germany based on the “Black Tom” sabotage).


. . . Congress charged the Commission with, inter alia, drafting legislation to render “more readily ascertainable, efficient, economical, and expeditious” those “procedures necessary or incidental to the conduct and settlement of litigation in State and Federal Courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law,” and to accomplish the same result for “the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies.” § 2, 72 Stat. 995, 997.

U.S. Amicus Br. 4–5 & n.9.

The Commission’s work extended over a period of four years, and was conducted with the assistance of the Columbia Law School Project. The Commission rendered a fourth and final report in 1963. In that report, “[t]he Commission drafted and recommended adoption of (1) amendments to the Federal Rules of Civil and Criminal Procedure, (2) amendments to sections of the United States Code, and (3) a Uniform Interstate and International Procedure Act, to be enacted by individual States.”

C. 1964 Legislative Overhaul of Section 1782—Substitution of “Court” with “Foreign or International Tribunal”

In 1964, acting on the recommendations of the Commission, Congress “completely revised” Section 1782(a), substantially expanding the

20. The Commission comprised “a superlative collection of international legal scholars, indicating an intentional decision to entrust the investigation and drafting of legislation essential to the improvement of international judicial assistance to experts in the field, who were selected by Congress.” Amy Jeanne Conway, Note: In re Request for Judicial Assistance from the Federative Republic of Brazil: A Blow to International Judicial Assistance, 41 Cath. U. L. Rev. 545, 555 n.71 (1992).

21. See Smit, supra note 9, at 1264–65 n.7.


judicial assistance available to foreign litigants. The revision blended the concept of assistance to judicial proceedings available in the 1948 Act with the concept of discovery rights conferred directly upon parties to an international tribunal or commission under Sections 270 through 270g. As the legislative history of the 1964 revisions explicitly states, Section 1782 “replaces, and eliminates the undesirable limitations of, the assistance extended by sections 270 through 270g.”

As the reporter of the Commission recounts, the purpose of the revision was “to liberalize in significant measure the assistance rendered by American courts to foreign and international tribunals.” The statute’s “twin aims” were to provide “equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects . . . [and to] invite foreign countries similarly to adjust their procedures.” Reflecting that same policy, the House Committee considering the proposed legislation remarked that:

Until recently, the United States has not engaged itself fully in efforts to improve practices of international cooperation in litigation. The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation.


The full revision of Section 1782 was effected through the strategic replacement of particular terms within the statute. Specifically, Congress replaced the word “court” with “tribunal,” and extended assistance from “any judicial proceeding pending in any court in a foreign country” to the broader “proceeding in a foreign or international tribunal.” There are two key sources of legislative history in interpreting these revisions. A 1963


27. Precursor of Section 1782 (emphasis added).

report by the Commission on International Rules of Judicial Procedure ("1963 Commission Report") reflects the recommendations of a conference of academic, private and government experts for the proposed revision of Section 1782, which "clarifies and liberalizes existing United States procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States." The later report of the Senate Judiciary Committee ("the Senate Report"), which contains substantially the same text, provides the official legislative history of the bill as it was approved by Congress in 1964.

The Senate Report makes clear that the newly introduced language "foreign or international tribunal" includes "administrative and quasi-judicial proceedings," and is "not confined to proceedings before conventional courts." The 1963 Commission Report clarified in its explanatory notes that:

"[t]he word ‘tribunal’ is used to make it clear that assistance is not confined to proceedings before conventional courts. In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court."

As Professor Hans Smit recently recounted, "[t]he substitution of the word ‘tribunal’ for ‘court’ was deliberate, for the drafters wanted to make

30. Id. at 45 (emphasis added).
33. Historical and Explanatory Notes to the proposed bill "To Improve Judicial Procedures for Serving Documents, Obtaining Evidence and Proving Documents in Litigation with International Aspects" (note to subsection (a)), at 45.
34. It continues, "Subsection (a) therefore provides the possibility of United States judicial assistance in connection with all such proceedings." Id.
the assistance provided for available to all bodies with adjudicatory functions.”

35 This recollection is echoed in Professor Smit’s 1965 remark that:

The term tribunal encompasses all bodies that have adjudicatory power, and is intended to include not only civil, criminal, and administrative courts (whether sitting as a panel or composed of a single judge), but also arbitral tribunals or single arbitrators. International tribunals are specifically named in order that in these times of increasing adjudication on the international level an international adjudicatory body should be granted the same assistance as tribunals of individual countries.36

The 1964 reforms emphasized that district courts would have substantial discretion over the application of Section 1782. In discussing subsection (a) of Section 1782, the Senate Report emphasizes that, “[i]n exercising its discretionary power, the court may take into account . . . the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it.”37 This same emphasis on discretion can be seen in the 1963 Commission Report’s notes on the proposed revision to Section 1782.38

It is against this backdrop that the issue has arisen of how far the meaning of “foreign or international tribunal” extends, including whether that term encompasses a private commercial arbitration tribunal sitting abroad.39


38. See supra note 33.

39. See generally Steven A. Hammond, The Art of the Missed Opportunity: How U.S. Courts Declined to Assist Private Arbitral Tribunals under the U.S. Law Authorizing Discovery in Aid of Foreign and International Proceedings, 17 J. INT’L ARB. 131 (2000) (determining that it does and should include international arbitration tribunals); Discovery Assistance and “Private Foreign Arbitrations”: The Second and Fifth Circuit Rule, 10 WORLD ARB. & MEDIATION REP. 119 (1999) (discussing the meaning of “tribunal” in light of various federal court cases and finding that private arbitral tribunals should be included); Review of Court Decisions, Meaning of
D. Related Legislation
Section 1782 was part of a broader package of legislative reforms. As the U.S. Amicus Brief in Intel notes:

The legislation to improve international processes included, *inter alia*, amendments to 28 U.S.C. 1781(b), which authorizes the State Department to receive, and return after execution, both foreign and domestic letters rogatory and similar requests, while making clear that other means of transmittal continue to be available. See § 8, 78 Stat. 996. The legislation also included the new provisions of 28 U.S.C. 1696, which gives district courts discretionary authority to grant or deny requests for assistance in effecting service of documents issued in connection with proceedings in foreign or international tribunals, and 28 U.S.C. 1783(a), which gives district courts discretion, under certain circumstances, to issue a subpoena requiring the appearance of a United States national or resident who is in a foreign country. See §§ 4, 10, 78 Stat. 995, 997.

*Id.* at 5 n.4.

E. 1996 Reforms

F. The Growth of Section 1782 Outside the Arbitration Context
Section 1782, as now enacted, provides:

*Assistance to foreign and international tribunals and to litigants before such tribunals*

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may

be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter [28 USCS §§ 1781 et seq.] does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Section 1782 has come to be a fruitful source of discovery for foreign litigants. A number of significant —indeed unique —features of Section 1782 have come to light in the case law. It has been held, for instance, that, because a Section 1782 application need only be made by an “interested party,” an applicant need not be a named litigant or party to the proceeding before the foreign or international tribunal; as the Supreme Court stated in Intel, the term “interested party” “plainly reaches beyond the universe of persons designated ‘litigant.’” 40 Furthermore, Section 1782 applications may be made on an ex parte basis by a party (or non-party) directly to a district court, without the need to notify in advance the party from whom discovery is sought or the adverse party in the foreign proceeding. 41


41. See, e.g., In re Imanagement Servs. Ltd., No. Misc. 05-89, 2005 U.S. Dist. LEXIS 17025 (E.D.N.Y. Aug. 16, 2005); In re Request for Assistance from Ministry of Legal Affairs, 848 F.2d 1151 (11th Cir. 1989), cert. denied, 488 U.S. 1005 (1989). The court may, however, exercise its discretion to require that notice be given to interested parties prior to granting a section 1782 request: See also In re Merck & Co., 197 F.R.D. 267, 271 (M.D.N.C. 2000).
Moreover, “Section 1782(a) does not limit the provision of judicial assistance to ‘pending’ adjudicative proceedings,” meaning that an “interested person” may utilize Section 1782(a) to seek what is, in essence, pre-action discovery. And in seeking discovery, a Section 1782(a) applicant is not constrained by the fact that the sought-after material or deposition testimony would not have been discoverable, had the proceedings been located in the “foreign tribunal” to which the application relates. Nor may Section 1782 relief be precluded merely because the foreign country does not have reciprocal arrangements with the United States.

Several limitations on Section 1782 have been recognized. For instance, it has been held that Section 1782 does not entitle an applicant to obtain documents outside of the United States. Section 1782 only enables the discovery of evidence for use in an adjudicative proceeding. The Supreme Court has clarified, however, that the proceeding need neither be imminent nor pending for discovery assistance to be available. Rather, courts may make evidence available to administrative bodies as long as a “dispositive ruling . . . , reviewable by the . . . courts, be within reasonable contemplation.” Evidence thus may be submitted to an investigatory body that will not act in an objective adjudicative function, so long as the evidence will eventually be used in a future adjudicatory proceeding.

G. Pre-Intel Case law Disfavoring the Application of Section 1782 to International Arbitration

Until the Supreme Court decision in June 2004, U.S. courts generally refused to extend Section 1782(a) to international arbitration. Notably,

43. Id. at 260.
47. See id.
the Second and Fifth Circuits both interpreted Section 1782(a) as excluding judicial assistance to private arbitration, relying on similar arguments.

Reading Section 1782(a)'s statutory language and legislative history to exclude any reference to arbitration, in addition to relying on some policy arguments against extending 1782(a) assistance to arbitration, the Second and Fifth Circuits held in *NBC v. Bear Stearns & Co.* and *Republic of Kazakhstan v. Biedermann International* that federal district courts are barred from extending Section 1782(a) assistance to arbitral tribunals.

Finding the meaning of a “foreign or international tribunal” to be “sufficiently ambiguous” that they could not conclude whether the plain language of the 1964 revision included arbitral panels, both courts turned to legislative history for guidance.51

In *NBC*, a party to an International Chamber of Commerce arbitration in Mexico City petitioned a federal court in New York to permit discovery from New York-based third parties in furtherance of the Mexican proceedings. The Second Circuit upheld the district court’s conclusion that a tribunal sitting in Mexico City in a private arbitration proceeding was not a “foreign or international tribunal” under Section 1782.52 First,

“foreign or international tribunal[s]” included private international arbitral tribunals but declining to extend Section 1782 assistance where the arbitrators had not indicated their view on whether it was appropriate in the proceeding in question; *In re Medway Power Ltd.*, 985 F. Supp. 402, 403 (S.D.N.Y. 1997) (“I find that an arbitration is not a tribunal for the purposes of Section 1782”); *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) (holding that private international arbitration falls outside Section 1782’s coverage); *Republic of Kazakhstan v. Biedermann Int*l*, 168 F.3d 880 (5th Cir. 1999) (same). In *Quijada v. Unifrutti of Am. Inc.*, No. 2760 April Term, 1989, 1991 Pa. Dist & Cnty. Dec. LEXIS 155 (C.P. Ct. Phila. County May 17, 1991), however, a Pennsylvania state court dealt with an application, pursuant to its state law analog of Section 1782, to render judicial assistance in aid of a Chilean arbitration tribunal. See id. at *4–14. Although the court initially declined that application on discretionary grounds, it noted that “chances [were] good that a Chilean arbitrator is the functional equivalent of a ‘foreign tribunal’” for purposes of the state statute. See id. at *5. Ultimately, the issue was mooted when the Chilean Supreme Court issued letters rogatory requesting that the Pennsylvania state court render judicial assistance to the Chilean arbitration tribunal. See id. at *17–22.

49. See *NBC*, 165 F.3d 184, supra note 48.


51. Id.; *NBC*, 165 F.3d, supra note 48 at 188.

52. See *NBC*, 165 F.3d, supra note 48, at 185. The Second Circuit upheld the finding of the district court in *In re NBC* that Section 1782 does not apply to “private commercial arbitration.” No. M–77, 1998 U.S. Dist. LEXIS 385, at *9–10 (S.D.N.Y. Jan. 16, 1998), aff’d, 165 F.3d 184 (2d Cir. 1999). In reaching this conclusion, the district court relied on the reasoning
The Second Circuit determined that the plain meaning of the phrase “foreign or international tribunal” was ambiguous. The Second Circuit relied on the 1963 congressional commission report to determine that the drafters intended “tribunals” to extend only to “governmental entities . . . acting as state instrumentalities or with the authority of the state.” Moreover, the court did not question the district court’s finding that the Mexican tribunal was not an “international tribunal” because it was not an “intergovernmental tribunal.” Upon finding that the legislative intent was to confine the scope of Section 1782(a) assistance to tribunals established by governments, the Second Circuit determined that the statute’s silence regarding arbitral tribunals indicated that Congress did not intend an extension of the statute in this way.

In *Biedermann*, a sovereign state party to a private arbitration pending in Sweden under the Stockholm arbitration rules sought discovery in aid of the Swedish proceedings from a third party in Texas. Like the Second Circuit, the Fifth Circuit determined that the phrase “foreign or international tribunal” was “ambiguous,” and purported to seek further guidance in the 1963 Commission Report. Instead of relying, however, on the 1964 Senate Report or the language in the 1963 Commission Report expressing the scope of the revision of 1782, the Fifth Circuit relied primarily on the absence of reference to private commercial arbitrations in the legislative history to determine that “tribunal” was not intended to cover private international tribunals.

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53. *NBC*, 165 F.3d, *supra* note 48, at 189. Notably, this intention is not expressly found in the text of the 1963 Commission Report; rather, the Second Circuit inferred this purpose from the “absence of any reference to private dispute resolution proceedings such as arbitration.” *Id.* at 186, 191.

54. *Id.* at 186, 191.

55. *Id.* at 190.

56. *Biedermann*, 168 F.3d, *supra* note 48, at 881 ("As the Second Circuit observed . . . the meaning of ‘foreign or international tribunal’ is ambiguous and must be construed in light of the background and purpose of the statute.")).
H. Intel: The United States Supreme Court
Considers the Meaning of the Term “Tribunal”

The NBC and Biedermann decisions did not “effectively [sound] the death of Section 1782(a) as a tool for private, international arbitration,” as some believed subsequent to those decisions. While the decisions remain legally binding in the Second and Fifth Circuits, the U.S. Supreme Court's ruling in Intel v. Advanced Micro Devices, Inc., decided in 2004, liberalized Section 1782(a), thus casting doubt upon the correctness of NBC and Biedermann.

In Intel, Advanced Micro Devices, Inc. ("AMD") filed an antitrust complaint against Intel Corporation with the European Community's Directorate General for Competition (the "Directorate General"), an administrative body. In pursuit of that grievance, AMD sought an order from the District Court for the Northern District of California, directing Intel Corporation to produce documents for discovery that Intel had previously produced for discovery in a private antitrust suit in an Alabama federal court. At first instance, the district court upheld Intel's objection to this demand, holding that Section 1782 did not apply to the proceeding before the Directorate General. However, the United States Court of Appeals for the Ninth Circuit reversed that determination and remanded the case, instructing the District Court to rule on the merits of AMD's application.

On appeal, the United States Supreme Court agreed with the Ninth Circuit, holding that the Directorate General was a “foreign or international tribunal” within the meaning of Section 1782. In a majority opinion authored by Justice Ginsburg, the Supreme Court extended Section 1782(a)'s application to non-judicial bodies, holding that its reference to “foreign or international tribunals” extended to the Directorate General.

In reaching its decision, the Supreme Court began its analysis with the text of Section 1782: “The district court of the district in which a person resides or is found may order him to give his testimony or state-
ment or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." 62

Although Intel provided an expansive reading of Section 1782 and eliminated some limitations lower courts had previously read into the statute, it did not explicitly address whether international arbitral tribunals may benefit from Section 1782(a) assistance. Nevertheless, in addition to referring to the legislative history of Section 1782, Justice Ginsburg specifically quoted the 1965 article by Professor Smit, stating that, as used in the text of Section 1782, “the term ‘tribunal’ . . . includes . . . arbitral tribunals.” 63 Thus, notwithstanding NBC and Biedermann, 64 the above-quoted language in Intel leaves open, and arguably supports, the argument that the term “tribunal” includes arbitral tribunals. 65

I. Post-Intel Case Law Concluding that the Phrase “Foreign or International Tribunal” Includes a Foreign Arbitration Tribunal

Since Intel, some courts have interpreted Section 1782 as applying to international arbitration. 66 One of those decisions has expressly held that NBC has been overruled by Intel.

In Oxus Gold, a district judge of the United States District Court for the District of New Jersey affirmed a magistrate judge’s ruling granting a Section 1782 application seeking discovery in aid of an international investor-versus-state arbitration being conducted pursuant to a bilateral investment treaty (“BIT”). The applicant was Oxus Gold, an international mining group based in the United Kingdom. Oxus Gold was embroiled in a London-based BIT arbitration against the Kyrgyz Republic, with which Oxus Gold had jointly created a company that was granted a

64. See Losk, supra note 8, at 1028.
license to develop a gold deposit in Kyrgyzstan. The Kyrgyz Republic later annulled the license, and this decision was challenged and upheld in the Kyrgyz courts. In response, Oxus Gold initiated an *ad hoc* international arbitration against Kyrgyzstan pursuant to the UNCITRAL rules, as provided for in the UK-Kyrgyz BIT. In that proceeding, Oxus Gold claimed compensation for the alleged violation of its investment rights under the UK-Kyrgyz BIT. It concurrently commenced a Section 1782 proceeding, seeking to issue a subpoena to a third party for production of various documents.

This application prompted an inquiry as to whether the London BIT arbitration, conducted under UNCITRAL rules, was “a proceeding in a foreign or international tribunal” under Section 1782. Applying *Intel*, the *Oxus Gold* Court held that it was. But in doing so, it avoided addressing whether *NBC* had been overruled. Instead, it held that *NBC* and *Biedermann* were distinguishable because they only applied to private commercial arbitration. In contrast, the district court held, an investor’s right to arbitrate under a BIT stems from a binding treaty between two countries. In those circumstances, the arbitration panel constituted a non-private “tribunal” for the purposes of Section 1782, since the proceedings were conducted within a framework defined by a bilateral treaty and were governed by the UNCITRAL Rules (a creation of the United Nations). Such proceedings, it held, are not “created exclusively by private parties” as was the case in *NBC* and *Biedermann*. The *Oxus Gold* decision therefore

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69. *Id.* at *1–2.
70. *Id.* at *2, *7.
71. *Id.* at *5.
72. *In re Oxus Gold*, 2007 WL 1037387, *supra* note 67, at *5; *In re Oxus Gold*, 2006 WL 2927615, *supra* note 66, at *6 (“The arbitration is not the result of a contract or agreement between private parties as in *NBC*, but instead are . . . proceedings . . . authorized by the sovereign states of the United Kingdom and the Kyrgyz Republic for the purpose of adjudicating disputes under the [BIT].”).
75. *Id.* at *5 (“The Arbitration at issue in this case, between two admittedly private litigants, is thus being conducted within a framework defined by two nations and is governed by [UNCITRAL]. In light of these facts, this Court concludes that the Magistrate Judge’s holding that the arbitration panel in the case at bar constituted a “foreign tribunal” for purposes of a 28 U.S.C. § 1782 analysis was not clearly erroneous or contrary to law.”).
does not discuss whether a private commercial arbitration qualifies for Section 1782 treatment after *Intel*, much less suggests that *NBC* was incorrectly decided—especially if the BIT tribunal was indeed an “intergovernmental” tribunal in the sense that term was used in *NBC*. Indeed, *Oxus Gold* expressly provides that it was dealing with an “intergovernmental” tribunal which, according to *NBC*, falls within Section 1782: the BIT tribunal was set up pursuant to an intergovernmental treaty akin to the treaties establishing the *I'm Alone* and *Black Tom* arbitral tribunals.\(^77\) Even so, *Oxus Gold* suggests that *Intel* permits a more liberal approach to the use of Section 1782 in an arbitration context.\(^78\)

In *Roz Trading*, the District Court for the Northern District of Georgia went even further, upholding the use of Section 1782 in purely private international arbitration, demonstrating a bolder liberalization of Section 1782 than seen in *Oxus Gold*.\(^79\) In *Roz Trading*, Roz Trading, Ltd., a Cayman Islands company in a dispute with the Coca-Cola Company, commenced a Section 1782 proceeding to compel the Coca-Cola Company to produce documents for use in private arbitration proceedings in Vienna.\(^80\) In determining whether such an arbitral panel fell under the scope of Section 1782, the court analyzed the meaning of the phrase “foreign or international tribunal” in light of the Supreme Court’s reasoning in *Intel*.\(^81\) Although the *Intel* Court did not explicitly define whether private arbitration panels qualify as “tribunals” within the meaning of Section 1782, the *Roz Trading* court noted that the Court “provided sufficient guidance for [it] to determine that arbitral panels . . . are ‘tribunals’ within the statute’s scope.”\(^82\) First, the court noted that the Supreme Court expressly stated, albeit in dictum, that “‘the term ‘tribunal’ . . . includes . . . arbitral tribunals.’”\(^83\) It then turned to the statutory construction of Section 1782(a).

Starting “with the words of the statutory provision,” the court found

\(^77\) See supra Section 1(a)(3).

\(^78\) Barry H. Garfinkel & Timothy G. Nelson, *Eureka! The Oxus Gold Decision Holds That Section 1782 Authorizes a U.S. Court to Grant Discovery in Aid of a Foreign Investment Arbitration*, MEALEY’S INT’L ARB. REP. (Nov. 2006).

\(^79\) In re *Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1229–30 (N.D. Ga. 2006) (concluding that Roz Trading “meets the requirements of the statute, and is, thus, entitled . . . to seek judicial assistance for use in the foreign proceeding”).

\(^80\) Id. at 1221–26.

\(^81\) Id. at 1227–28.

\(^82\) Id. at 1224.

\(^83\) Id. (quoting *Intel*, 542 U.S. supra note 61, at 248) (emphasis added).
that the words were unambiguous, such that further analysis or limitation by the court would be inappropriate: "[w]hen the words of a statute are unambiguous[,] . . . judicial inquiry is complete." 84 The common usage and widely accepted definition of “tribunal” includes arbitral bodies. 85 Finally, because the language was unambiguous, and there was no clearly expressed legislative intent that the term “tribunal” does not include arbitral panels, the court ruled that there was no reason to construe the term in any other way than it is commonly defined. 86 The court noted that it would be improper to consider the legislative history or impose its own limitations on the term. 87

Roz Trading went so far as to criticize the NBC and Biedermann decisions: “those opinions are inconsistent with the Supreme Court’s guidance in Intel, impose impermissible judicial limitations into the unambiguous text of 1782(a), and conduct legislative history analyses that are both unnecessary and unpersuasive, particularly in light of Intel.” 88 This decision is currently on appeal before the Eleventh Circuit Court of Appeals, which is expected to rule on the availability of Section 1782 for use in foreign private arbitration in the coming months. 89

II. Section 1782 Discovery Should Be Available in Aid of a Foreign Arbitration Pursuant to Section 1782

As stated in the Introduction, this Report’s focus is on the question whether Section 1782 envisages assistance to a private arbitral tribunal located abroad. The text of the statute provides specifically that it applies to “proceeding[s] in a foreign or international tribunal.” Our Committee believes that this language should be construed to include both arbitral tribunals located abroad, as well as all international arbitral tribunals, irrespective of location. Set forth below are arguments that have been marshaled most often in favor of this interpretation of the statute and which, on balance, we find persuasive.

84. Id. at 1225 (citation omitted).
85. Id. at 1228.
86. Id. at 1226.
87. Id.
A. The Plain Meaning of the Text of Section 1782 in Light of Intel

Even before Roz Trading, many courts and commentators analyzed the plain meaning of the phrase “for use in a proceeding in a foreign or international tribunal” and urged that it be interpreted to permit discovery in aid of private international arbitration. 90 Foremost among these commentators is the reporter of the Commission on International Rules of Judicial Procedure, which drafted the 1964 revisions to Section 1782, 91 Professor Hans Smit. Professor Smit expressed the belief that the federal policy in support of arbitration demands judicial assistance and that the orderly operation of international litigation requires such assistance. 92

As Professor Smit has stated, “[t]he statutory text [of Section 1782] is straightforward and clear.” 93 Indeed, U.S. courts have consistently interpreted the word “tribunal” in this common usage, 94 and the word “tribunal” is often considered to include private commercial arbitral tribunals. 95 The New York Code of Professional Responsibility, as another example, defines “tribunal” to include arbitrators. 96

Under such a plain meaning analysis, the inquiry likely should stop there. 97 “[A]n canon of statutory construction . . . requires that the words of a statute be given their ordinary meaning. . . . If . . . there [is] a plain

91. The Second Circuit has recognized Professor Smit as the “chief architect of Section 1782.” In re Euromepa S.A., 51 F.3d 1095, 1099 (2d Cir. 1995).
93. Id. at 2.
95. Black’s Law Dictionary 1544 (8th ed. 2004) (defining “tribunal” as a “court or other adjudicatory body”); Webster’s Third New International Dictionary 2441 (1993) (defining “tribunal” as including “a person or body of persons having authority to hear and decide disputes so as to bind the disputants; [and] . . . something that decides or judges; something that determines or directs a judgment or course of action”).
96. New York Lawyer’s Code of Professional Responsibility §1200.1(6): “‘Tribunal’ includes all courts, arbitrators and other adjudicatory bodies.”
97. Biedermann, 168 F.3d, supra note 48, at 881 (“If this language [within a statute] is unambiguous, the inquiry is ended.”).
and common sense meaning to [a phrase, then [courts] would . . . only . . . apply this meaning, without further analysis, to decide [a] case.”98 Justice Scalia’s concurrence in Intel noted this: the plain meaning of the text of the statute provides all the answers, and any references to legislative history and academic commentary are unnecessary.99 Accordingly, the text of Section 1782, standing alone, affords support for the view that a private commercial arbitral tribunal, located overseas, is a “foreign . . . tribunal” and/or a “foreign or international tribunal” for purposes of Section 1782.100

B. The Intel Decision

Intel is the only Supreme Court decision to address Section 1782. Although the “tribunal” at issue in Intel was not an arbitration tribunal, the decision does provide guidance. Intel interpreted the term “a proceeding in a foreign or international tribunal” to extend to a quasi-judicial agency that serves as a “first-instance decisionmaker.”101 An arbitral tribunal clearly acts as a “first-instance decisionmaker” with judicial powers.102 Indeed, the Supreme Court has long explicitly proclaimed that “arbitration is now the functional equivalent of the courts.”103 Moreover, under the conventional wisdom that the New York Convention provides for nearly global enforcement of arbitration awards but for those limited exceptions enumerated in the Convention, arbitral tribunals are actually the “final decisionmaker” in the overwhelming majority of arbitrations. It is therefore relatively straightforward to conclude that, under the plain meaning of the word “tribunal,” as reinforced with the Supreme Court’s interpretation, foreign arbitral tribunals qualify as a Section 1782 “tribunal.”

C. The Legislative History

Prior to the 1964 revisions, Section 1782 offered limited assistance to proceedings before a foreign “court.” The current version extends to assistance to a “proceeding in a foreign or international tribunal.” Beyond conventional courts, the revised version broadened assistance to include gathering evidence for use in “proceedings before a foreign administra-

98. Hammond, supra note 39, at 131.
100. See infra Part III.B. for a discussion of the differences in meaning between “foreign” and “international” tribunals.
102. Losk, supra note 8, at 1049.
tion tribunal or quasi-judicial agency.” The 1963 Committee Report explains that the change was designed to bring “the United States to the forefront of nations adjusting their procedures to those of other sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.” As Professor Smit put it, “[t]he 1964 revision of Section 1782 was a drastic one.”

As the U.S. Supreme Court emphasized in Intel, giving district courts discretion in evaluating the merits of requests for assistance under Section 1782 was Congress’ means of achieving Section 1782’s legislative purpose. Categorical rules were disfavored. Indeed, the Committee Report references district court discretion. Importantly, Congress explicitly left to district court discretion the determination of whether a given “international tribunal” qualifies for assistance under Section 1782. This bolsters the Intel Court’s vehement rejection of “categorical limitations . . . on the statute’s reach.”

D. Recognized Status of International Arbitration Under U.S. Law

Arbitral tribunals owe their legal existence to agreements between private parties to create such tribunals. But arbitral tribunals derive their legitimacy and efficacy from international conventions, national laws and the courts. In the United States, the wellspring of this statutory authority is the Federal Arbitration Act of 1925, 9 U.S.C. § 1 et seq. Comparable legislation exists in numerous other countries, often pursuant to internationally-sanctioned model statutes.

105. Id.; see also Fonseca v. Blumenthal, 620 F.2d 322, 323 (2d Cir. 1980).
109. See, e.g., Arbitration Act 1996 (UK). Numerous other countries have implemented legislation based on the UNCITRAL Model Law on International Commercial Arbitration (1985), which contains detailed provisions to facilitate and regulate the conduct of international arbitration proceedings, and to enforce awards arising from those proceedings. According to an online review, legislation based on the UNCITRAL Model Law has been enacted in Australia, Azerbaijan, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong, Hungary, India, Iran, Ireland, Jordan, Kenya, Lithuania, Macau, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Paraguay, Peru, Korea, Russia, Singapore, Sri Lanka, Tunisia, Ukraine, Zambia and Zimbabwe. See http://www.jus.uio.no/lm/un.conventions.membership. status/1.html#122.
One of the critical legal features of a foreign private commercial arbitration tribunal is that its award is legally binding—not just as a matter of domestic arbitral law of the seat of arbitration but also pursuant to the New York, Panama and other Conventions. These conventions also have the status of law, both under international law and under the local laws implementing them in each contracting state. See, e.g., 9 U.S.C. §§ 201, 301 (implementing the New York and Panama Conventions, respectively). Therefore the deliberations and workings of an arbitration tribunal are the subject of an express grant of legal authority from the state. These policy considerations militate in favor of applying Section 1782 to foreign arbitrations.

III. Recommended Best Practices for Applying Section 1782 to Private Commercial Arbitration

For the reasons just discussed, this Report takes the position that arbitration tribunals are “tribunals” within the meaning of Section 1782. Our position in that regard is informed in part by the fact that Section 1782 vests much discretion in the district court in its disposition of Section 1782 applications. Indeed, Congress explicitly left to district court discretion the determination of whether a given “international tribunal” qualifies for assistance under Section 1782. It is well established in Section 1782 jurisprudence that a district court is not required to grant a Section 1782 application simply because it has the authority to do so. United Kingdom v. United States, 238 F.3d 1312, 1319 (11th Cir. 2001) ("a district court's compliance with a §1782 request is not mandatory"). Rather, “the permissive language of § 1782 vests district courts with discretion to grant, limit or deny discovery." Metallgesellschaft A.G. v. Hodapp, 121 F.3d 77, 79 (2d Cir. 1997).

We believe that district courts faced with Section 1782 applications related to foreign arbitrations should utilize that discretion, and this section suggests “best practices” for how district courts might exercise their discretion. As discussed in greater detail in the next section of the Report, these best practices for exercising the court’s discretion address many of the concerns raised against the statute’s application to foreign arbitrations. District courts exercising discretion in a particular way when faced with a Section 1782 application relating to arbitration matters, which

110. See 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration, 1975 (also known as the "Panama Convention").

differs from the way that they might exercise such discretion concerning other matters before international tribunals, is entirely consistent with the Supreme Court’s statement in Intel that the courts take into account the nature of the foreign tribunal.

A. Recommendation that U.S. Courts Observe Comity by Seeking to Grant Discovery Only to the Extent Consistent with the Wishes of the Arbitral Tribunal (Once Appointed)

We recommend that Section 1782 discovery be granted only if the request is made by the arbitrators or with the consent of the arbitrators and that, therefore, district courts consider the source of the request as a very important factor in exercising its discretion. Section 1782 should assist international arbitration, not distort it. As Professor Smit commented: “The purpose of Section 1782 is to provide liberal assistance to foreign and international tribunals, but this assistance should not be provided when it would interfere with the orderly processes of the foreign or international tribunal.”112

The first of Section 1782’s “twin aims” is to provide “efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects . . . .”113 In order for assistance to tribunals to be quick and efficient, the application of Section 1782 should be simple.114 This decision should be left to the arbitrators so as to minimize the intrusion of courts into the sphere of arbitration.115 Additionally, a litigant will likely determine whether it can use the evidence before it spends the energy and expense required to seek Section 1782 assistance.116 Relying on arbitrators to make or approve this decision would generally prevent inefficient and wasteful situations wherein the foreign tribunal rejects the documents gathered in connection with the discovery request.117

112. Smit, supra note 35, at 8.


114. See Smit, supra note 35, at 8. (“Recourse to Section 1782 should be left as simple as possible in order to keep the provision of assistance to foreign and international [tribunals] speedy and efficient.”).

115. Id.

116. Id. (“And it may also safely be assumed that a litigant before a foreign or international tribunal will carefully consider whether it will be able to use the evidence in the foreign or international tribunal before it expends the effort and expense involved in seeking evidence pursuant to Section 1782.”).

Moreover, leaving this decision to the arbitrators allows the tribunal and the litigants to tailor the scope of discovery to the particular needs of the individual case—one of the advantages of arbitration.118 The parties and the tribunal will undoubtedly have a better understanding than will a national court of what would best serve the interests of the arbitrating parties, and thus the decision should be left to them.

Certainly, in the case of international arbitration, there is a real threat that arbitral parties might use Section 1782 in order to obtain U.S.-style discovery in a manner that would not have been permitted by the foreign arbitral tribunal. But U.S. courts have long been accustomed to managing discovery issues differently in the context of arbitration and to being more deferential to the will of the arbitrators. This should not change in their application of Section 1782. As a matter of policy, courts should defer to the arbitrators to manage the proceedings.

Finally, it is interesting to note that this result was portended by the very first reported decision on the issue of whether Section 1782 could be used in arbitration. In In re Technostroyexport,119 the district court held that the term “foreign or international tribunal[s]” included private international arbitral tribunals but declined to grant the Section 1782 application assistance because the parties had “made no effort to obtain any ruling from the arbitrators.” 120 In support for its qualified denial of assistance, the court wrote “[w]hether or not there is to be pre-hearing discovery is a matter governed by the applicable arbitration rules (as distinct from courts rules) and by what the arbitrators decide.” 121 The court, however, provided that its “ruling [was] without prejudice to a future application based on the ruling” of the arbitrators.122

B. Foreign versus International Tribunal
To date, no case has definitively addressed whether there is a distinction between a “foreign” tribunal and an “international” tribunal. Whereas the 1930 Act empowered an “international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments,” to gather evidence, the 1964 amendments blended this concept together with the 1863 Act’s conception of

118. See Smit, supra note 35, at 8.
120. Id. at 697.
121. Id. at 698.
122. Id. at 699.
“foreign” courts, into the phrase “foreign or international tribunal.” A plausible argument can be made that the phrase “foreign or international tribunals” is a composite phrase, and that the words are not intended to be parsed. Some support for this view is found in the Commission’s desire for legislation to “benefit . . . tribunals and litigants involved in litigation with international aspects.” Another view, however, is that Section 1782’s references to a “foreign . . . tribunal” are to any “tribunal” located overseas—whereas the phrase “international tribunal” is intended to connote what that phrase meant in the 1930 and 1933 Acts, i.e., any commission or arbitral tribunal created pursuant to a treaty or inter-state agreement. Under this latter view, which finds some support in the legislative history,123 certain arbitration bodies created by treaty, and sitting within the United States, might fall within the reach of Section 1782.124 This point remains for the courts to resolve.

Should Section 1782 apply to an arbitration that, for example, is seated in New York and involves a Canadian party engaged in a dispute with a U.S. party concerning a construction project in Toronto? There is jurisprudence that has already developed in the context of the New York Convention’s treatment of foreign and “non-domestic” awards rendered in the United States that would suggest that the award in this hypothetical could be considered foreign and thus subject to the New York Convention.125 Should this considerable body of law be used as a framework for Section 1782?

123. The Second Circuit’s decision in NBC is consistent with the view that an “international tribunal” is an “intergovernmental tribunal.” NBC, 165 F.3d, supra note 48, at 189–90 (“[T]he legislative history reveals that when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.”). The Oxus Gold decision is also consistent with this approach. Oxus Gold, 2007 U.S. Dist. LEXIS 24061, at *13–14.

124. An example might include an international “ICSID” arbitration based at the World Bank’s headquarters in Washington, D.C., as such a category of proceeding arises out of a treaty, and is therefore comparable to, indeed arguably the lineal descendant of, the kind that qualified as “international tribunal” under the 1930 and 1933 Acts. By contrast, private arbitrations conducted within the U.S. that have international aspects would almost certainly fall outside the scope of Section 1782 (even if they might be regarded as “international” arbitrations for purposes of Chapters I and II of the FAA), because nothing in the 1930 Act or the other legislative history of Section 1782 indicated any intention to expand the scope of the term “international tribunals” to embrace U.S.-based arbitral proceedings.

125. See e.g., 9 U.S.C. § 202 (2007); Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983); Yusuf Alghanim & Sons v. Toys ‘R’ Us, Inc., 126 F.3d 15, 18–19 (2d Cir. 1997); Lander Co. v. MMP Inv., Inc., 107 F.3d 476, 481–82 (7th Cir. 1997).
On the one hand, one can argue that, in the case of this hypothetical, the resultant award would be one that, under the Bergesen standard, would qualify as an award subject to the New York Convention. If so, then should it not also be considered an international award at the discovery phase, when one is seeking to apply Section 1782? The fact that Section 1782 would not be available for the same arbitration taking place in New York between domestic parties relating to a project in Buffalo can be ignored because that is the result mandated by the statute (as discussed in greater detail in Section IV, infra).

The other side of that argument is that the Bergesen line of cases is based on an analysis of the specific language and history of the New York Convention and that, therefore, it should not be extended to Section 1782. Furthermore, according to this side of the argument, a tribunal seated in the United States is not “foreign” as that term is used in Section 1782, nor is it “international” because it was not created pursuant to a treaty (as discussed in greater detail in the Section I description of the history of the statute). Also weighing in on this side of the argument is that the Supreme Court stated in Intel that “[Section] 1782 is a provision for assistance to tribunals abroad,”126 whereas the Tribunal in the hypothetical is seated in New York.

The argument is a close one. It is, however, the opinion of a majority of this Committee that the jurisprudence developed with respect to the New York Convention should not be extended to Section 1782 and that discovery in aid of foreign arbitration should be available only if the seat of the arbitration is outside the United States. Our decision in this regard is informed in no small part by recognizing that Section 1782 applications should be as streamlined as possible and that, especially in the case of arbitration, where the parties have evinced a desire to stay out of national courts, litigation over the application of Section 1782 should be avoided. Thus, a bright-line, objective test that looks to the seat of the arbitration is preferable to the Bergesen standard, which can include an analysis of various factors in a more subjective manner. Under this view, if an arbitration tribunal is sitting in the United States, the parties should have the same rights to discovery as are available in a domestic arbitration.

C. Treatment of Applications Prior to the Appointment of a Tribunal

One of the significant changes in the 1964 revision of Section 1782 is that Congress deleted the requirement that a proceeding be “pending.”

126. See Intel, 542 U.S. supra note 61 at 263 (emphasis added).
Therefore, under Section 1782, the proceeding with respect to which Section 1782 assistance is sought need not have been started at the time a Section 1782 application is brought. In Intel, the Court noted that “Section 1782 does not limit the provision of judicial assistance to pending adjudicative proceedings.”127 The Court read the 1964 revision to mean that Section 1782 assistance only requires that a dispositive ruling “be within reasonable contemplation.”128 Professor Smit also supports this view.129

Under our first suggested best practice, namely, that any Section 1782 application in aid of a foreign arbitration should be made by or with the approval of the arbitrators, it would be impossible to obtain Section 1782 assistance prior to the time the tribunal is constituted. As a general matter, we believe that district courts should exercise their discretion to achieve that result. However, there will be times—such as the imminent death of a witness or situations where there is a risk of irreparable harm—in which discovery might be needed before the arbitral tribunal is constituted. We suggest a best practice in which Section 1782 discovery in aid of foreign arbitration be limited to these emergency situations.

D. Applications by Persons Who are Not Party to the Arbitration

If district courts in fact exercise their discretion in favor of requiring that the Section 1782 application come from, or with the approval of, the arbitrator, it seems unlikely that there would be a non-party who could bring a Section 1782 application in aid of foreign arbitration because such a non-party would have no standing to seek an order from the arbitrators. Because arbitration is a consensual proceeding arising out of a contractual agreement among the parties to the arbitration, Section 1782 applications from non-parties should in fact be disfavored.

IV. Addressing the Arguments Against the Application of Section 1782 to Foreign Arbitration

Courts and scholars have made various arguments against the application of Section 1782 to foreign arbitration. On balance, we do not believe that these arguments provide a sufficient basis for concluding that Section 1782 discovery should not be available in aid of foreign arbitra-

127. Intel, 542 U.S. supra note 61, at 258 (quotations marks omitted).
128. Id. at 259.
129. See Smit, supra note 35, at 1026 (“It is not necessary . . . for the [adjudicative] proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.”).
tion. Furthermore, we believe that the “best practices” suggested above address many of the more important concerns raised by these arguments. The most prevalent arguments are discussed below.

**A. Inconsistency With Section 7 of the Federal Arbitration Act**

In domestic arbitrations, discovery is governed by Section 7 of the Federal Arbitration Act (“FAA”). On its face, 9 U.S.C. § 7 is more limited in scope than is the discovery that is available under Section 1782. The subpoena power under Section 7 is available only to the arbitrators, whereas “interested persons” (including the parties to the arbitration) may bring applications under Section 1782. Enforcement of Section 7 powers is limited to the district court at the place of arbitration. And, while the courts are split on the issue whether Section 7 permits pre-hearing document

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130. Some state laws permit third party discovery in domestic cases in excess of the scope of Section 7. See, e.g., Tex. Civ. Prac. & Rem. Code 171.051 (Vernon 2005) (expressly granting arbitrators the power to compel third party attendance at depositions); Delaware Code, Title 10, § 5708 (authorizing arbitrators to permit depositions). In light of Congress’ broad exercise of its commerce power in drafting the FAA, however, it is unclear the circumstances in which such state statutes are not preempted by Section 7 of the FAA. Cf. Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 55 (2003) (FAA preempts contrary state law with regard to all activities which, “in the aggregate . . . would represent a general practice . . . subject to federal control.”). Nonetheless, state statutes, which expand rather than limit the enforceability of arbitration contracts, are found not to be preempted by the FAA. See, e.g., Davis v. ECI Eagle Global Logistics LP, No. 06-31019, 2007 U.S. App. LEXIS 16324, at *10–11 (5th Cir. 2007) (“For the FAA to preempt [state law], state law must refuse to enforce an arbitration agreement that the FAA would enforce.” (citing In re D. Wilson Constr. Co., 196 S.W.3d 774 (Tex. 2006))); see also, Penn Va. Oil & Gas Corp. v. CNX Gas Co., LLC, No. 1:06 cv0090, 2007 U.S. Dist. LEXIS 12206, at *17 (D. Va. 2007) (surveying decisions in other circuits finding that the FAA does not preempt state law which furthers the cause of arbitration); Miller v. Cotter, 448 Mass. 671, 679 (2007) (“[E]ven when federal law applies to an arbitration agreement, the Federal Act has never been construed to preempt all state law on arbitration. Only those State acts that seek to limit the enforceability of arbitration contracts are preempted by the Federal Act.” (citing New England Energy Inc. v. Keystone Shipping Co., 855 F.2d 1, 4 (1st Cir. 1988), cert. denied, 489 U.S. 1077 (1989)). The Uniform Arbitration Act, which has been highly influential on many states’ arbitration legislation, also allows a broader scope of third-party discovery than that available under the FAA. See, e.g., Section 17 of the Revised Uniform Arbitration Act (RUAA) (allowing arbitrators subpoena powers, and allowing both the arbitrators and the parties to seek judicial assistance in case of a party’s non-compliance); see also Sebastien Besson, The Utility of State Laws Regulating International Commercial Arbitration and Their Compatibility with the FAA, 11 Am. Rev. Int’l Arb. 211, 212–13 (2000). As Section 7 of the FAA does not purport to preempt more inclusive parallel statutes that allow third party discovery in aid of arbitration, it would be illogical to suggest that Section 7 should restrain the more inclusive provisions of Section 1782.
discovery, and hold generally that it does not permit pre-hearing deposition testimony, both of those are permitted under Section 1782.\textsuperscript{131}

In their decisions holding that Section 1782 does not apply to private international arbitral tribunals, both the Second and Fifth Circuits relied in part on the fact that there is no similar assistance available to domestic tribunals under the FAA.\textsuperscript{132} In \textit{Biedermann}, the court noted that it was unlikely that Congress “would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded to its domestic dispute-resolution counterpart.”\textsuperscript{133}

The strongest retort to these points is that the text of Section 1782 requires these asymmetries. The statute is clear about the assistance that it provides to tribunals abroad, regardless of the current state of domestic law. The plain meaning of Section 1782 should not be strained to create consistency with Section 7 of the FAA or with U.S. case law. Nor should the inconsistency be allowed to cloud the question of whether Section 1782 assistance should be available altogether in foreign arbitrations. As a matter of principle, these two issues are separate.

In addition, the Supreme Court in \textit{Intel} rejected the idea that there must be discovery in domestic litigation analogous to that sought in aid of foreign litigation.\textsuperscript{134} It noted that “[Section] 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to

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\textsuperscript{132. See \textit{NBC}, 165 F.3d supra note 140, at 191; \textit{Biedermann}, 168 F.3d supra note 48, at 882–83.

\textsuperscript{133. \textit{Biedermann}, 168 F.3d supra note 48, at 883.

\textsuperscript{134. See \textit{Intel}, 542 U.S. supra note 61, at 263 (“We also reject Intel’s suggestion that a Section 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding.”).

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engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger." Section 1782 speaks to tribunals abroad, not domestic. Likewise, the argument about potential inconsistency between discovery assistance to domestic and foreign arbitrations is no more persuasive.

Moreover, some commentators have argued that the absence of parallel assistance under domestic law should not act as a bar to the application of Section 1782, but as a catalyst for changing the scope of discovery available in aid of domestic arbitrations, which they argue is insufficient. While this argument only advises that Congress should change the scope of the FAA and does not inform judicial interpretation of Section 1782, it reminds us that the argument for greater congruity between discovery in foreign and domestic proceedings is a matter for Congress and not for the courts.

Finally, we note that courts, which follow the suggested best practice of requiring that Section 1782 requests be made by, or with the consent of, the arbitrators, will effectively nullify the criticism concerning the distinction between the two statutes on the issue of who may seek the discovery.

B. “Discovery” Is Not Necessarily Inconsistent With Arbitration

Another objection to the use of Section 1782 in international arbitration is that the broad discovery potentially available under Section
1782 is inconsistent with arbitration, in that it would undermine the “efficiency and cost-effectiveness” of arbitration. Discovery is inherently time-consuming and expensive. Allowing arbitrators or the arbitrating parties to seek discovery under Section 1782, they argue, would burden the arbitral process and increase the cost of arbitration. As the Fifth Circuit emphasized in *Biedermann*: “Empowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution. The course of the litigation before us suggests that arbitration’s principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.”

Although there is still a marked difference between the “discovery” available in international arbitration and U.S.-style discovery of the type used in U.S. litigation, it is incorrect to say that there is no discovery in arbitration. Indeed, the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which are being used with increasing frequency in international arbitration, specifically contemplate document disclosure. Perhaps the more important issue is whether the parties control the discovery or the arbitrators (as under the IBA Rules).

Concerns about broad-based discovery infecting international arbitration may be obviated if the district courts exercise their discretion by requiring that the Section 1782 requests be made by or with the consent of the arbitrators. So long as district courts do not abandon their traditional respect for arbitrator autonomy, the matter of discovery remains within the hands of arbitrators who “govern their own proceedings.” Accordingly, extending discovery assistance to foreign arbitrations would have no impact on arbitrators’ control of their proceedings. As some commentators have argued, it would be paternalistic for a court to deny a discovery request brought under Section 1782 on the grounds that the court has a superior understanding of what would best serve the interests of the arbitrating parties than the parties and the tribunal themselves.


141. See *Biedermann*, 168 F.3d supra note 48, at 883.

142. Id.


144. See *Chukwumerije*, supra note 94, at 678.
Indeed, as Professor Smit noted, when an arbitrator requests Section 1782 assistance, compliance with the request would further the arbitral process, not frustrate it.\footnote{In \textit{In re Medway Power Ltd.}, 985 F. Supp. 402, 403 (S.D.N.Y. 1997), the arbitrator requested Section 1782 assistance, yet Judge Duffy rejected the request. Professor Smit pointed out that Judge Duffy's reasoning here was flawed because compliance with the Section 1782 request "would . . . further, rather than frustrate, the arbitral process." \textit{Smit, supra} note 35, at 6.}

The alternative approach to allowing the district courts to exercise discretion, for example such as in accordance with the best practices in this Report, is the holdings by the Second and Fifth Circuits that a private international arbitration tribunal is not a "tribunal" for purposes of Section 1782. Under that holding, however, the U.S. federal courts would not be in a position to assist arbitrators who specifically seek the assistance of a U.S. court in obtaining evidence located in the United States.

\textbf{C. Lack of Reciprocity}

One of the most consistent objections raised against Section 1782 has been the lack of reciprocity in discovery assistance between the United States and other countries. Applying Section 1782 to foreign arbitration would mean that foreign tribunals have access to a procedure that is not reciprocated by legislation in other jurisdictions.\footnote{See Eric Schwartz & Alan Howard, \textit{Outside Counsel, International Arbitration Discovery Applications to Rise?}, N.Y.L.J., May 4, 2007, at 4 (arguing that persons who are found within the jurisdiction of a U.S. district court are at a "distinct disadvantage").} Since parties outside the jurisdiction of a U.S. district court typically are not subject to any comparable procedures,\footnote{See Schwartz & Howard, \textit{supra} note 146, at 4 ("Section 1782 therefore is a one-way street.").} foreign companies would have a "weapon" against U.S. companies that U.S. companies would typically not have against those foreign companies.\footnote{\textit{Id.}}

Many of the arguments against applying Section 1782 to foreign arbitration have been made, and rejected, in the litigation context. The lack of reciprocity between the United States and other countries exists already in the litigation context. For example, there is no reciprocal legislation in the U.K. or France allowing discovery in connection with U.S. litigation,\footnote{See, e.g., \textit{Euromepa S.A. v. R. Esmerian, Inc.}, 155 F.R.D. 80, 84 (S.D.N.Y. 1994) (pre-
\textit{Intel} case where the district court engaged in a review of French law and concluded that the discovery would not be allowed under French law), \textit{rev'd}, 51 F.3d 1095 (2d Cir. 1995).}
yet U.S. courts are empowered to grant discovery in aid of English or French litigation. 150

The Supreme Court ruled in Intel on this issue of foreign-discoverability, namely whether Section 1782 “bar[s] a district court from ordering production of documents when the foreign tribunal or the ‘interested person’ would not be able to obtain the documents if they were located in the foreign jurisdiction.” 151 It held that there was no such foreign-discoverability requirement. 152 While district courts may consider comity and parity issues when exercising their discretion in individual cases, the Court refused to insert a foreign-discoverability rule into Section 1782. 153 In that sense, there is no meaningful difference between international arbitration and foreign commercial litigation, 154 and the fact that third parties in the U.S. may be affected by foreign arbitrations is merely an extension of this state of affairs.

In rejecting foreign discoverability requirements, the Second Circuit has noted that, absent clear statutory language to the contrary, the matter of providing greater discovery assistance in U.S. courts than is available abroad remains within the discretion of the district courts. 155 This approach translates readily to the arbitration context, where district courts are already accustomed to deferring to the findings of arbitrators. As the power to grant discovery is within the discretion of the arbitrators, absent an express negation of the right to discovery in the arbitration clause, district courts may yield to the arbitrator’s ruling on discovery matters,

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151. Id. at 259–60.
152. See id. at 260 (“[N]othing in the text of Section 1782 limits a district court’s production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there. ‘If Congress had intended to impose such a sweeping restriction on the district court’s discretion, at a time when enacting liberalizing amendments to the statute, it would have included statutory language to that effect.’” (citation omitted)). See also Smit, supra note 35, at 13 (“Section 1782 does not make discoverability or admissibility under foreign law a prerequisite to proper recourse to Section 1782 . . .”).
153. See id. at 261 (“While comity and parity concerns may be important as touchstones for a district court’s exercise of direction in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of Section 1782(a).”).
155. See Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79 (2d Cir. 2004); In re Aldunate, 3 F.3d 54, 59 (2d Cir. 1993) (“If Congress had intended to impose such a sweeping restriction on the district court’s discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect”).
thereby furthering the general policy of promoting arbitral autonomy. Furthermore, in order to “level the playing field” that may be tipped against a U.S. party that cannot obtain elsewhere discovery like that available under Section 1782, both the arbitrators and the court can deal with the issue, as suggested in *Intel*, by “condition[ing] relief upon that person’s reciprocal exchange of information.”156

V. CONCLUSION

Much has been written over the past few years, especially since the *Intel* decision, about whether Section 1782 should be available for use in connection with private international arbitration. In this Report, we have reviewed the history of the Section 1782 statute and related case law. We have also discussed the arguments in favor and against the use of Section 1782 in aid of arbitration.

It is this Committee’s opinion that the better position—based on the plain meaning of the statute, the Supreme Court’s decision in *Intel*, the legislative history and policy considerations—is that Section 1782 discovery should be available in private, international arbitration seated outside the United States. We also suggest that district courts respond to such Section 1782 applications using the best practices described in Section III of this Report, which will effectively address certain of the more compelling arguments that have been made against using Section 1782 in the arbitration realm.

*September 2008*

156. *Intel*, 542 U.S. at 262.
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The Prospects, Policy and Politics of Federal Tax Reform

John Buckley

I have worked for the Congress for more than 30 years. During that period of time, I have been part of a large group of individuals involved in the tax legislative process.

It goes without saying, that the most important individuals in that group are the elected Members of Congress, particularly the Members of the tax-writing committees—the Committee on Ways and Means in the House and the Committee on Finance in the Senate. The Chairmen of the two tax-writing committees, Representative Charles B. Rangel from New York and Senator Max Baucus from Montana, play the lead role in the process. In consultation with the House and Senate Leadership, they set the tax agenda. On each of their Committees, they develop the legislation and build the consensus among the Members for the bill. Normally, the Treasury Department is part of the collaborative process.

There are large Congressional and Treasury staffs involved in the process. The staffs can suggest and influence legislation. They work with Members to build support. But at the end of the day, the staffs have the responsibility of implementing the decisions made by the elected Members of Congress. They turn the Committee decisions into statutory language and prepare the Committee reports and other materials for the Floor.
Tonight, I will offer my perspective on Federal tax reform. It is a perspective shaped by lessons learned in each of the three different jobs that I have held during my career.

- During my 20 years as a legislative drafter, I developed what I consider to be a healthy sense of skepticism when it comes to new ideas. My everyday experience reinforced the notion that it is often quite difficult to translate new ideas into workable statutory language.
- My short period of time, as Chief of Staff of the Joint Committee on Taxation, introduced me to the revenue estimating process and the economic analysis that is a large part of the formulation of tax policy.
- As the Democratic Chief Tax Counsel for the Committee on Ways and Means, I see, at close hand, the difficult policy and political trade-offs involved in the development of tax legislation. For the Democratic Members of the Committee, the task of resolving those conflicts became more serious and difficult after the Democrats took control of the House last year.

In my business, both time and attention spans are quite often short. Therefore, I have developed the habit of stating my conclusions first and, if asked, my reasons second. Not intending to break that habit tonight, let me start with my conclusions.

- First, I believe that major changes to our tax law are inevitable. A quotation from Winston Churchill is an apt summary of my thoughts. He said “you can count on Americans to do the right thing, after they have tried all the other options.” When it comes to our tax system, I believe that we have tried all the other options. As a result, we have a system with structural and fiscal problems that are so large that they can only be handled in the context of a major reform of our tax system.
- Second, I believe that the reform efforts will be in the context of our current income tax system. Our problems and frustrations with our current income tax lead many to conclude that there must be a better way. Even a brief examination of the alternatives, leads me to the firm conclusion that an income tax, like the democratic form of government, is the least bad of the alternatives.
- Third, some believe that tax reform should be designed with-
out regard to politics. I disagree. If we want a successful and sustainable tax reform plan, politics must play a large role.

Now, let me explain the reasons for those conclusions, starting with why I believe we have tried all the other options.

II. PRESSURES FOR REFORM
   A. Structural Issues

Even if you set aside the fiscal problems facing this country, there are ample reasons for a reform of our current tax structure. For the sake of convenience, I call those problems structural issues.

In the individual income tax, the largest structural issue obviously is the growing reach of the alternative minimum tax (AMT). Increasingly, millions of Americans are required to compute their tax under two separate systems in order to determine their ultimate liability. In our corporate tax, we have high marginal rates compared to other countries, but a narrow base, a situation that no economist would view as optimal.

The fact that I highlighted those two issues should be no surprise since they are the main focus of the tax reform bill introduced by Ways and Means Committee Chairman Charles Rangel. But, there are other issues as well.

Too often individuals are faced with a bewildering array of tax benefits addressing the same concern. For college expenses, there are two tax credits and a deduction for tuition expenses, there are 3 tax-exempt savings vehicles, and a deduction for interest on student loans. There is no reason why there could not be more uniform, simple rules in this area. There is a similar array of benefits for retirement savings.

Our tax system has not kept up with innovations in the financial markets. We continue to rely on a “cubbyhole” system of taxing financial products. As a result, as one commentator noted “you can get any result you wish.” Unfortunately both the Treasury and the Congress have responded on an ad hoc basis. The results are extraordinarily complicated rules designed to reach the least bad result.

Also, recent changes in our tax law have added to the growing income equality in this country. When I started working on tax legislation, wages and other earned income had preferential tax rates, a maximum 50% rate compared to the 70% rate for dividends, interest, and other investment earnings. Due to a complicated set of rules, the maximum tax rate on capital gains was just short of 50%. Now the situation has re-
versed, effective tax rates on wages and other earned income are greater than the effective rates on investment earnings.

B. Fiscal Issues

That is not intended to be an exhaustive list of structural issues. I am sure that many individuals in this room have suggestions for areas where our tax system needs improvement. I believe that those structural issues are important and will be part of any tax reform effort. However, I believe it will be the fiscal problems that trigger serious discussions of tax reform.

The current budget projections are fairly positive, although there are some indications that revenue collections may not meet projections. To the extent the projections are positive, it is due to (1) large and temporarily growing surpluses in the Social Security system and other Federal retirement systems that we all know will disappear, (2) enormous receipts projected from the AMT, well over $100 billion next year, reaching over $250 billion in the out years if the Bush tax cuts are extended, and (3) a pretense that the large number of temporary tax provisions now on the books will not be extended. The combination of those issues has the potential for creating the “perfect storm” that makes tax reform inevitable. Therefore, I will discuss each of them in some detail starting with Social Security.

i. Social Security Surpluses

If one only looks at the broad budget numbers, one might conclude that the tax-writing committees were relatively quiescent over the last 30 years. In 1979, federal taxes were approximately 18.5%, of our economy, last year they were approximately 18.8% of our total economy.

We all know that the stability implied by those numbers is misleading. Since 1979, there have been major marginal rate reductions, the maximum rate for earned income has dropped from 50% to 35%, for dividends from 70% to 15%, for interest from 70 to 35% and for capital gain income from approximately 50% to 15% . There also are major new benefits like 401(k) plans and cafeteria plans that have removed large amounts of wage income from our tax base.

The question is how could a system that has changed so dramatically still raise approximately the same amount of revenue as a percentage of our economy. There are several answers to that question. Growing income inequality has clearly played a role.

In a progressive income tax structure, income inequality is revenue efficient because it results in more income being taxed at the higher rates.
Today, items like capital gains, Social Security benefits, and retirement distributions are a larger part of taxable income than in the past. Those items are not taken into account in calculations of the size of our economy with the result that taxes on those items, even at lower rates, shows up as an increase in the percent of our economy collected in taxes. Also and perhaps most importantly, there has been a significant shift in the composition of our receipts, with social security and other payroll taxes playing a more important role than in the past.

In 1979, individual and corporate income taxes accounted for approximately 61% of total federal revenues. If you adjust for the recent increases in corporate income taxes that are projected to be temporary, those taxes would account for approximately 54% of the revenues today. The decline in the contribution of income taxes to our overall revenues has been offset by an almost identical increase in the percentage of our revenues that come from payroll taxes, largely social security and Medicare taxes. Today, those taxes account for approximately 37% of total receipts up from 30% in 1979. The increase in the share of receipts coming from payroll taxes is even more dramatic when you take into account the fact that the amount of wage income subject to social security taxes (the largest payroll tax) is a smaller portion of our overall economy than it was in 1979.

This increase in payroll taxes is largely attributable to the 1983 Social Security solvency legislation. That legislation spectacularly succeeded in its goal of building up reserves in the Social Security system to handle the retirement of the "baby-boom" generation. In 1983, the Social Security system teetered on insolvency. Now it has trust fund reserves of over $2.4 trillion and those reserves are projected to reach $3.6 trillion in 2018. The Social Security system may face problems twenty to thirty years in the future, but now, and for many years to come, it is the most solvent part of the federal government.

In the past, the federal budget deficit reflected the difference between general fund taxes (taxes other than Social Security) and general fund expenditures. Social Security was on a pay-as-you-go basis with small annual deficits or surpluses. That all changed in 1983. Regressive payroll taxes became the crutch that supported a budget struggling with the results of reductions in progressive income taxes. Last year was surprisingly good year from a budget standpoint. The ultimate deficit was far less than what was predicted earlier in the year. However, even with the strong revenue growth reflecting what was then a healthy economy, general fund taxes last year only covered approximately 85% of general fund expenditures.

The Social Security system will continue to run enormous surpluses...
for the next ten years, increasing from $195 billion this year to an estimated $254 billion in 2015. At that point, the surpluses in the Social Security system begin to decline and the party will be over. The Federal budget will lose the crutch that has supported it since 1983.

ii. Alternative Minimum Tax

Just as we know that the Social Security surpluses will disappear, we also know that the Congress will not permit projected receipts from the AMT to be collected. The political price of allowing tens of millions of individuals to be subject to AMT liabilities would be too high.

When I started my congressional career, a robust minimum tax was the dream of tax reformers. Now we have a robust minimum tax, and it is a nightmare for everyone.

For those, like me, who supported the minimum tax concept in the past, I would note that the minimum tax that we have today is quite different than the one envisioned in 1986. Initially, the Alternative Minimum Tax (AMT) covered a small number of individuals (approximately 140,000 in 1987) and business-related preferences were the primary reason why those few individuals paid the tax.

In contrast, over 4 million American families were subject to the AMT last year even with the temporary increase in the AMT exemption. This year over 24 million taxpayers will pay the AMT if Congress does not act before the end of the year. Most of the business-related preferences have been removed from the AMT. Now, the disallowance of three tax benefits account for over 90% of the total AMT adjustments. Those items are the deduction for state and local taxes, personal exemptions, and miscellaneous itemized deductions in the excess of the 2% floor. The disallowance of the standard deduction under the minimum tax has an impact that is three times greater than all the remaining business-related adjustments.

The AMT has taken on a new role as the “grandest budget gimmick” of all time. In 2001 and 2003, Congress enacted major reductions in the regular tax, knowing that much of the benefits promised in the big print of those bills would be taken back by the fine print of AMT. Congress did this knowingly in an attempt to reduce the advertised budget cost of the tax reductions.

Now, we are facing the consequences of that budget gimmick.

iii. Temporary Tax Benefits

Before 1939, our tax laws were contained in various Revenue Acts. In some respects, the tax-writing process was similar to the current process
for spending programs where Congress authorizes and funds the programs on an annual or other periodic basis.

In 1939, Congress enacted the first codification of our internal revenue laws. Presumably, that codification was enacted out of a desire to create a stable body of law so that taxpayers had some certainty when planning their affairs.

In many respects, our tax laws have reverted to their pre-1939 state. Major components of our law are temporary and are extended on an annual basis. When I first began in this field, there was one temporary tax provision, the investment tax credit that had been used as a countercyclical tool. Recently, the Congressional Budget Office published a list of temporary tax benefits and the cost of making them permanent. That chart ran for six pages. The total cost over the next ten years of permanently extending all of those tax benefits was over $3.8 trillion. Only slightly more than half of that amount is due to the Bush tax cuts. Extender legislation used to be a noncontroversial, low-cost item. Now, a simple one-year extender bill would cost over $80 billion.

Those costs are real but are not reflected in budget projections.

III. INCOME TAX WILL REMAIN MAJOR COMPONENT OF OUR TAX SYSTEM

If I am correct, the combination of those structural and fiscal issues will be the impetus for major tax reform efforts. I believe that the reform will be in the context of our current income tax, not a shift to a consumption-based tax.

A. Arguments for Fundamental Restructuring

The arguments for abandoning the income tax and substituting a consumption-based tax have changed little since the mid 1980s.

Those in favor of consumption taxes argue that they would be far more simple than our current income tax and they would have positive economic effects.

It is difficult to argue with the proposition that consumption taxes (whether direct consumption taxes like a value added tax or indirect consumption taxes like flat tax proposals) are simpler in their pure form than our current income tax structure. However, the question is whether they can remain simpler if adjusted to mitigate their regressive nature. Also, it is important to note that much of their apparent simplicity is due to elimination of benefits for families with children, housing, and healthcare; benefits that have broad support.
Discussions of complexity and the need to simplify our tax laws are familiar to most lawyers. However, the economic arguments for consumption-based taxes are more difficult for many of us.

Most believe the economic gains projected from consumption taxes are due to the fact that they encourage savings. That is part of the story, but not the major part. We do not have a pure income tax system. Its large number of tax-deferred savings vehicles has created a system that approaches a consumption tax for most individuals. Moving from an income tax with all of those tax benefits to a pure consumption tax would not substantially increase the tax incentives for savings for most individuals.

The projections of increased economic growth from consumption taxes also are based on three other factors. First, they would reduce or eliminate current law benefits for housing, healthcare, and State and local governments. Most economists believe that those benefits distort allocations of resources, resulting in over consumption of those items.

Second, they reduce or eliminate the double taxation of corporate earnings, a feature of our system that many economists believe results in underinvestment in the corporate sector. Finally, they impose large tax increases on existing savings and investments.

In a direct consumption tax like a VAT, the tax increase on existing assets occurs when assets accumulated under the income tax are taxed again when spent under the VAT. In an indirect consumption tax, the increased tax occurs at the business level by disallowing depreciation deductions for existing assets and by denying interest deductions for existing debt. The additional revenues from the taxes on existing assets are then used to finance incentives for new savings and investments. It may not be fair, but economists see it as efficient. Without those revenues, the consumption tax rates would be so high that they could reduce, not increase, economic growth.

In my opinion, you have to wonder about the accuracy of the economic models that are being used to predict robust growth from the adoption of consumption taxes. Last year, the Ways and Means Committee had a hearing on climate change. It was a rare hearing for the Committee since only scientists were witnesses, no tax attorneys or economists. One of the witnesses at the hearing said that the climate has cooperated with the scientific theories about climate change. All of the changes we are now seeing in our climate are consistent with the predictions made by climate change models several years ago.

You cannot say the same about the economic models that have predicted robust economic growth and increased savings from marginal rate
reductions and tax incentives for savings. The economy has not cooperated with those predictions.

The savings rate has constantly dropped even in the light of major marginal rate reductions and major tax incentives for savings enacted since the 1970s. After the capital gain and dividend tax reductions were enacted in 2003, the saving rate went negative. However, the size of the financial sector has grown to take into account the increasingly complex manner in which we hold our investment assets to realize those tax savings. Labor force participation (the labor supply) rose following the rate increases enacted in 1993, but fell after the rate reductions enacted in 2001. According to standard economic theory, the opposite should have occurred.

![Personal Saving as a Percentage of Disposable Personal Income, Selected Years, 1950-2005](chart)

The economic models are complex, but you have to believe that human behavior and motivation are even more complex. We work and save for reasons that have little to do with tax rates. For example, many of us may have responded to the lower tax rates on investment earnings by reducing our saving, because we no longer needed to save as much to reach our goals.

There are many reasons why we should reform our tax laws, but the growth predicted by those economic models is not one of those reasons.
B. Consumption Tax Alternatives

In the mid-1980s, the Committee on Ways and Means held a series of hearings on tax reform. One of the witnesses at those hearings was former New York State Governor Mario Coumo. He started his testimony with a story about Abraham Lincoln being sent a book containing recommendations for improvements to our constitution. Later the author of the book had the opportunity to meet the President and asked his opinion about the book. President Lincoln responded by saying the book was in part both good and original. But the good parts were not original and the original parts were not good.

You could not start the debate today with that story, because there are no original ideas. All of the consumption tax proposals being discussed today are essentially identical to the ones analyzed and rejected in the 1980s. Those proposals fall into 3 broad categories: total replacement of the income tax with a value added tax or retail sales tax, a return-based consumption tax such as the flat tax or the growth and investment tax plan recommended by the Bush Tax Reform Panel, and a hybrid system that would contain both an income tax and a VAT.

i. Total Replacement with Retail Sales Tax or Value Added Tax

I believe that it is fairly easy to dismiss proposals for replacing the entire income tax with a retail sales tax or value added tax. The report of Presidents Bush Tax Reform Panel set forth the reasons for that conclusion quite well. According to their report:

- To be revenue neutral, the replacement tax would have to have a rate of at least 22%, even if there were no attempt to address the regressive nature of the consumption tax.
- Attempting to maintain the current distribution of tax burden would require a system of rebates or credits of somewhere between $600 to $780 billion per year, which would constitute the largest Federal program in American history.
- Financing the cost of those rebates would require a rate of at least 34%, which in combination with State and local retail sales taxes would result in consumption taxes at rates not seen anywhere else in the world.
- Those rates are based on the assumption that the tax would have an extremely broad base, applying to food, housing, health care and government purchases. I doubt that Congress would ever enact enormous consumption taxes on those items. Indeed,
there is a serious constitutional issue as to whether the Federal Government can impose taxes on purchases of goods and services by State and local governments.

- Also, consumption taxes at those levels would require all of the existing resources of the Internal Revenue Services to enforce. The argument that a retail sales tax could result in the abolition of the IRS has no basis.

ii. Indirect Consumption Taxes

The second category of consumption tax proposals, consists of indirect consumption taxes collected on a return like our current income taxes. In their pure form, these proposals contain a tax on wage income collected from individuals in the same way that our current income tax is collected. The tax on wage income may include exemptions or graduated rates to make the tax more progressive. There also would be a cash flow tax on businesses. Taxable cash flow would equal gross receipts minus the cost of purchased goods and services, with expensing of capital investments. The business level tax would permit a deduction for wages since the tax on wages is collected directly from the individual. No deduction would be allowed for employee fringe benefits, State or local taxes, interest or depreciation of existing assets.

These proposals have the same base as a value-added tax and most economists view them as equivalent to a VAT. But their design does result in some important differences.

Unlike a VAT, most believe that these taxes will not be passed on in higher prices. In part, that is because our current trade agreements would not permit these taxes to be adjusted at the border. The other reason is due to the fact that labor income is taxed on the individual return not part of the business tax. A VAT taxes labor income as part of the taxable value added. Since most assume that businesses would not be able to reduce wages, businesses would have to pass the VAT on in higher prices.

The fact that these indirect consumption taxes are not passed on in higher prices has one important benefit. Providing progressivity does not require a large system of rebates and credits.

However, businesses view these taxes as modified versions of our corporate income tax. They provide one large benefit, expensing. That timing difference comes at a high price, permanent tax increases through the loss of major deductions.

In these taxes, the increased tax on existing investments occurs at the business level with no depreciation deductions for existing assets and no
deduction for interest on existing debt. Economists may view those increased taxes as efficient. I think they could be quite disruptive, potentially bankrupting major corporations.

There are many other issues, such as what would be the effect of a business tax that is totally different from the traditional income tax systems overseas. Rather than discuss those issues, let me simply note that I have never been contacted by a corporate lobbyist urging me to consider these proposals and I do not expect that to change.

iii. Hybrid System

Finally, there are proposals for using a value-added tax to replace a substantial portion of the income tax.

The argument for such an approach at first blush seems appealing. Why would you want to retain our current structure if you could eliminate the burden of filing tax returns from 100 million families and still raise the same amount of revenue without shifting the burden of the tax?

The arguments for such an approach are appealing and created Congressional interest in developing and drafting legislation establishing a hybrid system, starting with former Ways and Means Committee Chairman Al Ullman who introduced such a proposal in the late 1970s. Although I may have been sympathetic to the approach at first, I changed my mind as I learned the difficulties of attempting to develop workable legislation. I would note that the politics are not easy; Chairman Ullman was defeated in the first election following his introduction of the bill. Also, the numbers do not work:

- Partial replacement proposals would require much higher VAT rates than proponents acknowledge. This is true even if they have a very broad base that includes food, housing, and healthcare.
- Even with that broad base, replacing 50% of our current income taxes would require a 11% VAT rate if there were no attempt to maintain the current distribution of tax burden.
- Replacing the progressive income tax with a regressive VAT would require an unprecedented program of credits and rebates to prevent a massive downward shift of tax burden.
- Financing the cost of that program would require an even higher VAT rate which in turn would require a larger program of credits and rebates.
- Such a hybrid system would dramatically increase the complexity and intrusiveness of our tax system.
A. Businesses would pay two taxes, a reduced corporate tax and the VAT.

B. To prevent massive fraud, the system of credits and rebates would require essentially the same system of annual returns, and enforcement utilized to collect the current income tax.

• Tens of millions of individual’s not currently filing tax returns would be brought into the system to claim their rebates. It is worth noting that the economic stimulus legislation recently enacted will result in 20 million additional tax returns this year.

C. The Reagan Treasury Was Correct

To summarize my view of these consumption taxes, I would simply say that the Reagan Treasury was correct. In 1984, the Reagan Treasury Department issued a massive report on tax reform. It remains the most comprehensive and thoughtful analysis of the topic that I have ever seen. All of the current proposals for consumption taxes were analyzed and rejected in that report because of their regressive nature, transition problems, and incompatibility with the tax system of other countries. Their reasoning is as valid today as it was in 1984.

IV. POLITICS OF TAX REFORM

I would offer two observations about the politics of tax reform.

A. Tax Reform Will Be Far More Difficult than in the Past

First, a future tax reform effort will be far more difficult than the 1986 Tax Reform Act. In 1986, Congress financed a reduction of tax rates through a broadening of the tax base. Now, we would need a broadening of the tax base or increased rates merely to finance the relief that already has been implicitly promised to the American people. Remember, there is over $3.8 trillion in temporary relief. That relief has implicitly been promised, but it is not reflected in congressional budget projections.

One need only look at the recent recommendations of the President’s Tax Reform panel to see how contentious the debate could be. The panel’s goal was a revenue-neutral tax reform plan that preserved the rate reductions enacted in 2001 and 2003. To accomplish that goal, the panel recommended sharp reductions in the mortgage interest deduction, repeal of the deduction for State and local taxes, a floor on the charitable de-
duction, taxation of employer-provided health insurance, and repeal of many smaller benefits like the casualty-loss deduction and medical expense deduction. The plan was declared dead the day it was announced.

B. Politics Have a Crucial Role

Finally, I believe that politics are crucial to the success of tax reform. The most seductive idea in discussions of tax reform is the notion that our goal should be an ideal tax reform plan designed without regard for politics. That was the goal of the President’s tax reform panel and the fact that their proposal was dead on arrival is evidence of why we should be more realistic.

Almost all of my education in tax law occurred while employed by the United States Congress. In retrospect, probably the most important lesson that I learned about tax reform came in my first tax class in law school. The professor began the class by discussing his experience of working as a Peace Corps volunteer in Latin America. He was a consultant that assisted a country in reforming its tax laws. The professor was quite proud of the tax reform act that country had enacted. According to him, it was designed without regard to politics, it eliminated many of the subsidies that did not belong in an income tax system, and it simplified the law by choosing rough justice over individualized relief measures.

Regrettably, the law was repealed, _ab initio_, as if it had never been enacted. The repeal occurred within a short period of time after its enactment. In a democracy, politics often reflect, perhaps imperfectly, the will of the people. Laws enacted without regard to politics seldom last long. Rough justice does not work well in a democracy where those who are treated roughly can petition their legislators for redress. Repealing preferences for healthcare or other social needs is not sustainable unless replacement programs are enacted.

The true goal of tax reform should be developing improvements to our tax system with full regard to politics. That is what occurred in the mid-1980s and it is the example we should attempt to emulate in the future.
everyone wants peace of mind when their financial assets are concerned. Retirement plan assets can easily be the largest part of many estates, what with the migration of middle-class investing to tax-benefited form and the growth of the mass affluent class of estate planning clients. Only the superrich save in taxable form, and planning techniques for them are unsuitable for core affluent and mass affluent clients.

Yet estate planners have been the last to learn how to handle important income tax questions of retirement accounts passing at death. Instead they cling to tried-and-true transfer tax minimization techniques that are more suitable for the superrich, and often bite the clients back when income tax rules act on the retirement assets. Then they throw themselves and their clients at the mercy of the IRS for relief from the entirely foreseeable income tax consequences.

Retirement planners and financial intermediaries, who as custodians of retirement accounts are forced to think about these questions, have an entirely different perspective. They don’t go around doing things that produce undesirable results under the income tax rules. So their advice sometimes conflicts with standard wealth preservation and estate planning advice. (Slott, *The Retirement Savings Time Bomb and How to Defuse It* (Penguin 2004).)
An excellent book on the subject, written by an estate planner, is *Life and Death Planning for Retirement Benefits* by Natalie Choate (Ataxplan Publications 2006). And the good news is that the IRS has done a lot of thinking about these questions lately, though it is likely to be more forgiving on the transfer tax rules than the minimum required distribution rules. In letter rulings, the IRS is acting to bail estate plans out of quite a few mistakes.

Why do estate planners want to be in the position of having to ask for rulings to cure foreseeable and avoidable problems? Here’s your takeaway point: The minimum required distribution rules for retirement accounts can complicate and conflict with estate planning goals. Keeping plan assets free of transfer tax is not enough.

Estate planners have to learn the minimum distribution rules and take them into account when advising on the disposition of retirement assets. Ooh, ick! It’s like wearing sunblock. You have to do it. No arguments.

**Minimum Distribution Rules**

**Learn the minimum distribution rules.** The penalty for failing to take a minimum required distribution is 50 percent of the amount of the required distribution. (Section 4974(a).) Throwing oneself on the mercy of the IRS to get relief from this penalty is unbecoming for sophisticated practitioners with rich clients. (Section 4974(d).)

The section 401(a)(9) minimum distribution rules apply to all qualified plans described in section 401(a). That means individual account plans like IRAs, Roth IRAs (after death) and section 401(k), 403(b), and 457 plans, in addition to employer-sponsored defined benefit and defined contribution plans.

The rationale for the minimum distribution rules was to end the income tax deferral during the participant’s life by requiring distribution. There is no maximum distribution; a participant or beneficiary can always take more. But section 401(a)(9) allows distributions to be stretched out long after the life of the participant if the beneficiary of the account is a spouse or other designated beneficiary. (Section 401(a)(9)(E), reg. section 1.409(a)(9)-4.)

Designated beneficiary is a defined term. A designated beneficiary must be an individual. The participant must designate the beneficiary, who must be identifiable, but need not be named. The employer, executor, or spouse cannot do it, though a default provision in the retirement plan can do it. If the beneficiary is not an individual, then the account is treated as having no designated beneficiary, meaning a five-year required
distribution. If several beneficiaries are named but any one is not an individual, the account is treated as having no designated beneficiary.

What happens after the participant dies depends on whether he was already collecting retirement benefits and who the beneficiary is. If the participant dies before distributions have begun, distributions of the entire account must be made over five years, unless there is a designated beneficiary, in which case distributions must be made over the life expectancy of the latter. (Reg. section 1.401(a)(9)-3.)

If the sole beneficiary is the surviving spouse, distributions are not required to begin before the participant would have been age 70-1/2. That is a good thing for those desiring deferral, because the usual commencement date is the end of the year after the participant’s death. (Section 401(a)(9)(B)(iv).) This later commencement date produces greater deferral. If the beneficiary is an estate, then the entire account has to be distributed within five years. (Reg. section 1.401(a)(9)-4. See Notice 2007-7, 2007-5 IRB 395, Doc 2007-841, 2007 TNT 8-7.)

If the beneficiary is a trust that meets administrative criteria, however, the IRS will look through the trust to the individual beneficiaries of the trust. (Reg. section 1.401(a)(9)-4.) When there is more than one trust beneficiary, the life of the oldest beneficiary will be used to determine the period over which the account must be distributed. (Reg. section 1.401(a)(9)-5.) Separate accounts within a retirement account, which can be difficult to set up, can be used to enable each beneficiary to use his or her own life expectancy. (Reg. section 1.401(a)(9)-8, LTR 200646027, Doc 2006-23377, 2006 TNT 223-33.)

If the participant dies after distributions have begun, distributions are made over the designated beneficiary’s life expectancy if it is longer than the participant’s. (Reg. section 1.401(a)(9)-5.) Each year’s minimum required distribution is the quotient of the entire account balance (valued at the end of the previous year) divided by the applicable distribution period, that is, the participant or spouse’s remaining life expectancy using the annuity table in reg. section 1.401(a)(9)-9.

There is no annual recalculation of remaining life expectancy if the beneficiary is not the surviving spouse; a fixed term is used. An annuity contract may be substituted if it complies with the minimum distribution rules. If there is no designated beneficiary—the beneficiary is an estate or ineligible trust—then distributions must continue based on the participant’s life expectancy. (Reg. section 1.401(a)(9)-5.)

If the sole beneficiary is the spouse, the applicable distribution period for the participant is the joint life expectancy of the participant and
the spouse. This means minimum required distributions can be much smaller during the participant’s life, especially if the spouse is much younger. But when the participant dies, if the participant’s surviving spouse is the sole beneficiary, the spouse’s annually recalculated life expectancy is substituted if it is longer than the participant’s.

There is no credit in a subsequent year for an excess distribution in a prior year, nor is there a way to make up for failure to make a distribution. But the failure to make minimum distributions for some years will not affect distributions required in subsequent years. (LTR 200811028, Doc 2008-5667, 2008 TNT 52-24.) The only sure way to beat the minimum required distribution penalty is to distribute the entire account within five years of the participant’s death. (Reg. section 54.4974-2.) If a qualified plan is at fault, there is a mechanism to cure the failure. (Rev. Proc. 2006-27, 2006-22 IRB 945, Doc 2006-8815, 2006 TNT 88-37.)

**Spouses**

**Make the spouse the sole beneficiary of retirement accounts.** The minimum distribution rules basically demand this, by lengthening the possible deferral when the beneficiary is the spouse.

Frequently, especially in cases of serial marriages, rich folks don’t trust their spouses. Despite the unlimited marital deduction, they are often reluctant to leave property outright to a spouse. They also fret about the estate tax unified credit, which can easily be forfeited.

“It is most common, and generally advisable, to designate the spouse as beneficiary of qualified plan and IRA benefits,” says Bruce Steiner of Kleinberg, Kaplan, Wolff & Cohen. “If you name a QTIP trust as beneficiary, you’re giving up a great deal of income tax benefit in exchange for a moderate increase in control.”

“The tax laws generally, though not always, favor naming the participant’s surviving spouse, personally, as designated beneficiary of retirement benefits and using other assets to fund a credit shelter trust,” Choate echoes. A credit shelter trust is a trust funded with the unified credit effective exemption amount, and is intended to preserve the unified credit in the estate of the first to die.

The surviving spouse can roll benefits of an inherited retirement account into her own account, stepping into the shoes of the participant. (Section 402(c)(9).) Rollovers are permitted even when the spouse is not the sole beneficiary of the account. If the account is an IRA, the spouse can elect to treat the participant’s inherited IRA as her own IRA, provided she is the sole beneficiary. (Section 408(d), reg. section 1.408-8, LTRs 9311037 and 9237038.)
Rollover is what most want to do, even when the spouse is already the designated beneficiary, because participant status for the spouse can prolong the deferral further. Rollover can prolong the deferral beyond the life of the spouse if she designates her own beneficiary. Rollover is also invoked to correct beneficiary designation mistakes.

Unfortunately, standard estate planning makes rollovers more complicated than they need to be. People like to put things in trusts, and a spouse can roll over a retirement account left to her in trust only if she has a full power of withdrawal and exercises it. Rollover is permitted when no one other than the spouse has discretion over the retirement plan assets.

This is an administrative practice developed in letter rulings. No rollover is permitted when the spouse has no power to withdraw the plan assets from the trust. (LTR 9445029, 94 TNT 222-29; LTR 200314029, Doc 2003-8529, 2003 TNT 66-23.) Steiner points out that the IRS has been generous in this ruling policy. (LTR 200807025, Doc 2008-3317, 2008 TNT 33-25.)

The Tax Analysts letter ruling file shows numerous decedents’ representatives asking to be allowed to roll retirement accounts over to a spouse when the account had been left to an estate or trust instead. The rulings ask that the distribution of retirement plan assets from the estate or trust to the surviving spouse incident to the rollover into the spouse’s own IRA not be taxable income to the spouse in the interim under sections 402(c)(1) and 402(c)(9).

Typical is LTR 200603036, Doc 2006-1166, 2006 TNT 14-22. The decedent left his retirement plan to a trust of which his surviving spouse was primary beneficiary and sole trustee. The trust was divided into two subtrusts, one of which was to be allocated the retirement plan benefits. The spouse was to be paid the income of this latter trust, but had the power to invade principal. The trust instrument stated a desire to minimize income tax on plan assets. Hence the spouse had the power, under the trust instrument and state law, to distribute the entire plan assets to herself.

Why do surviving spouses have to ask for this comfort ruling? The qualified plan rules are very literal. Technically, the trust would not be ignored, and the spouse receiving a distribution from a trust would not be eligible for the rollover protection of section 401(c)(9).

So in these rulings the IRS magnanimously blesses the rollover coming through a trust over which the surviving spouse has power. There is no business plan item to obviate these comfort rulings. (Doc 2007-18743, 2007 TNT 157-18.) Steiner notes that a ruling might facilitate dealings with the financial intermediary that is custodian of the retirement account.
Choate points to LTR 200615032, Doc 2006-7198, 2006 TNT 73-27, a marital trust rollover situation in which the spouse did not have the sole power to distribute the decedent’s retirement plan benefits to herself. Too-clever planning had given the trustee the power to divide the decedent’s assets between a marital trust and a credit shelter trust. The surviving spouse had the power to distribute all the assets of the marital trust to herself, but the trustee decided which assets went into which trust.

That was the situation on the date of death. The parties repaired the problem by having the trustee appoint the spouse as cotrustee, giving her the sole power to decide which assets went where. Then they threw themselves on the mercy of the IRS. The IRS blessed the postmortem patch job, despite the discretionary postmortem act by a third party used to arrive at the desired result. (See also LTR 200703047, Doc 2007-1500, 2007 TNT 14-47, and LTR 200704033, Doc 2007-2203, 2007 TNT 19-30.)

“Could you please prod the IRS to issue authoritative rulings (rather than dozens of expensively-obtained but worthless-as-precedent LTRs) confirming that a surviving spouse can roll over benefits she’s entitled to receive through a trust or estate, and that a trust or estate can transfer a retirement plan, intact, to the beneficiaries of the trust or estate?” Choate asked rhetorically in the introduction to her book.

Choate is an estate planner. Perhaps she should be asking why the retirement accounts went into the estates or trusts in the first place, when the executors or trustees will just have to extricate the accounts and hand them over to the spouse after the participant’s death.

Yes, of course the IRS should publish authoritative guidance on common questions, but is it the tax administrator’s job to correct foreseeable and avoidable mistakes? Do estate planners have a lot of shoes chewed by their pets?

**Trusts**

Don’t name trusts as beneficiaries of retirement accounts. Trusts are about control, as in the decedent leaving control of assets after death to someone trusted to handle them because the beneficiary cannot be trusted. Rich people don’t seem to trust anyone but their financial advisers, and they don’t know who they’re going to be married to when they die, so they leave their retirement accounts and everything else to trusts.

As desirable as trusts are for rich folks wishing to exercise control beyond the grave, the problem is that putting retirement plan assets in them seriously conflicts with the minimum distribution rules. This is why retirement planners and more-astute estate planners routinely advise against
naming trusts as beneficiaries of retirement accounts. Unless the only beneficiaries are children, in which case Steiner advocates trusts for both transfer tax and protective reasons.

Retirement plans are about retirement. Congress wanted the participant to consume the account during retirement by taking required minimum distributions. Congress further wanted the beneficiary of the account to pick up the slack, that is, to continue taking minimum distributions. Retirement accounts were not intended to be preserved beyond death. (The exception is Roth IRAs, for which lifetime distributions are not required.)

Trusts are about keeping the assets away from the wife. More charitably, trusts are about preservation of the trust property for the remainderman, the beneficiary who comes after the life tenant. The idea is that the life tenant will take only distributions necessary to live on, with the hope that trust income and not principal will be used for this purpose, so that the bulk of the trust assets will be preserved to the remainderman.

But if the trust asset is a retirement account, the minimum distribution rules will act to consume the trust assets. Those rules tell you to make the surviving spouse the direct beneficiary of the retirement accounts. Testamentary planning tells you to tie up the money—and keep it away from the wife—to preserve it for future generations. So the income tax rules call the standard estate planning into question. The conflict is obvious.

What would be the point of putting retirement plan assets in a trust? The only point of leaving a retirement account to a trust is maintenance of control over the assets, but getting around the minimum distribution rules requires some forfeiture of control.

The minimum distribution rules prevent the trust from being used as a blocker between the retirement account and the beneficiaries, which is the normal function of trusts. Retirement planners advise having the trust pay required minimum distributions directly to the beneficiaries, instead of trying to accumulate them at the trust level, where they would be taxed at a higher rate than that of all but the richest beneficiaries. This is called a conduit trust. “The conduit trust rarely if ever makes sense,” Steiner comments.

Moreover, the minimum distribution rules bite if there is an attempt to accumulate retirement benefits in a trust. Because of the way they are calculated, minimum distributions can easily exceed trust income, which is all that most marital trusts require to be distributed to the life beneficiary.

Example 1 of reg. section 1.401(a)(9)-5, Q&A-7, illustrates the dilemma. The participant in a defined contribution plan died at 55, leaving his account to a testamentary trust. The life beneficiary was his 50-year-old wife, and the remaindermen were his children.
The wife had the power to compel the trustee to distribute the trust income to her. The trustee elected for the trust to receive the minimum required distribution from the plan. But under state law, the trustee need only distribute the amount representing the trust income to the wife, meaning that some of the minimum distribution would be accumulated in the trust.

Sounds reasonable to an estate planner, but not to the minimum distribution rules. Because amounts representing minimum distributions were being accumulated in the trust, the spouse was not considered the sole beneficiary. That means that the special rules of section 401(a)(9)(B)(iv) did not apply—those being the rules that produce the greatest deferral—and the regular rules applied. In the example, the trust had to take distributions based on the wife's life expectancy, and those must commence the year after the participant's death, not 15-1/2 years later.

The IRS basically is telling planners how to draft trust instruments as conduit trusts. In Example 2, on the same facts, the trust calls for any amount distributed from the plan to the trust to be distributed directly to the wife. That way there is no accumulation in the trust, the special rules apply, and commencement of distributions can be delayed for 15-1/2 years.

Even if the parties have chosen to accumulate in the trust, however, the minimum distributions do not have to be made to the spouse. (Reg. section 1.401(a)(9)-8.) The point is that the trustee has to take the minimum required distribution from a retirement plan of which the trust is beneficiary regardless of what then happens to that money—unless the spousal interest in the trust is supposed to qualify for the marital deduction.

For the marital deduction, the spouse has to be entitled to all the income, which usually will be less than the minimum required distribution. Most rich men would prefer to use a normal QTIP trust—life income to the wife, discretionary power to the trustee to invade principal for the wife's needs, remainder to the children. QTIP was a fairly sexist solution to the question of how little a man can leave his wife and still obtain the marital deduction.

In Rev. Rul. 2006-26, 2006-22 IRB 939, Doc 2006-8653, 2006 TNT 87-10, the IRS bailed existing trusts and their drafters out of the untoward effects of state law. The ruling considered the definition of income when a marital trust was the beneficiary of an IRA. The question was whether the spouse had a qualifying income interest in the account so that it could be QTIP. The trust was a typical marital trust similar to the one described in the above examples. The trustee could withdraw the greater of the trust income...
income or the minimum required distribution from the IRA, and distribute the income to the wife. (See also Rev. Rul. 2000-2, 2000-1 C.B. 305, Doc 2000-793, 2000 TNT 3-6.)

In situation 1, the relevant state law, like that of many states, contained section 104(a) of the Uniform Principal and Income Act (UPIA), allowing the trustee to make adjustments between income and principal to treat beneficiaries impartially. Section 409(c) of UPIA requires the trustee to allocate 90 percent of a minimum required distribution to principal and 10 percent to income. But section 409(d) of UPIA allows the trustee to allocate more to income if necessary for the marital deduction.

This jeopardizes the QTIP election, because the amount allocated to income under section 409(c) of UPIA is not the real income. And section 409(d) of UPIA does not cure this problem, in the IRS's view. Section 409(c) has the effect of allocating a large part of each minimum required distribution to trust principal. The IRS concluded that the QTIP qualifying income interest criteria were not satisfied. But if the trustee is required to pay the spouse the retirement plan income payable to the trust, not the UPIA amount, then the QTIP election may be made.

Again, because the trustee is not required to distribute the entire minimum distribution to the wife, she is not the sole beneficiary, and the special rules of section 401(a)(9)(B)(iv) do not apply. Basically, the IRS gave a pass on the QTIP question, saving trusts from having to be amended because of UPIA, but it does not budge on the minimum distribution rules. The ruling even concludes with a warning about those rules.

On top of all this, unless the retirement plan is some sort of self-created plan like an IRA, the Retirement Equity Act of 1984 requires spousal consent to make it payable to a trust. If it's not the best idea to put retirement accounts in trusts, how is it they end up in them? Because the dead hand overrules the potentially larger tax bill.

Yes, the transfer tax laws tolerate and facilitate maintenance of control, but the income tax rules do not. So the decedent would die with the illusion of control, but then the combination of the QTIP rules and the minimum distribution rules will require that the surviving spouse be given a substantial amount of control to preclude an enlarged tax bill.

The only good thing about tying up retirement plan assets in a trust is that the participant will be happy while he is sitting in the lawyer's office, and he will be dead when the arrangement has to be undone and the wife has to be given more powers than he would have wanted her to have. Sometimes the trust tactic seems to be more about the new boyfriend driving the decedent's car than it is about transfer tax minimization.
tion. What estate planners do, in terms of family drama, is not dissimilar to what divorce lawyers do.

**Disclaimers**

Can you disclaim your way out of trouble? **Don’t count on disclaimers to undo mistakes under the minimum distribution rules.** Don’t plan affirmatively for disclaimers to be made.

“The apparent flexibility of disclaimers can tempt planners to rely excessively on future disclaimers as a way of carrying out the estate plan,” Choate warns. “Disclaimers are not a simple solution.”

For clients wanting credit shelter trusts, Steiner suggested making the surviving spouse the beneficiary of the retirement plan, and the credit shelter trust as contingent beneficiary. The idea is that the spouse will disclaim if it is decided that the estate tax benefits of the credit shelter trust are more desirable than the income tax benefits of the spouse as beneficiary. (See LTR 200522012, Doc 2005-12182, 2005 TNT 107-31; LTR 200521033, Doc 2005-11743, 2005 TNT 103-42; and LTR 9320015, 93 TNT 110-55.)

The fly in this ointment is that the spouse may not want to disclaim, but at least this tees up the question that planners should be asking themselves about the choice between the spouse as beneficiary and a credit shelter trust. Another fly in this ointment is that some plan administrators may not respect a disclaimer. (Or may be confused by a change in payee. LTR 200634052, Doc 2006-16292, 2006 TNT 167-35.)

Plan administrators can argue that the plan does not authorize payment of benefits to anyone but the beneficiary named by the participant in the plan document. Choate argues that a trust is a trust, and state law applies, so a plan administrator cannot ignore a valid disclaimer. But she notes that the Supreme Court sees it differently. In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2000), relying on ERISA preemption, the Court sustained a plan administrator’s refusal to void a beneficiary designation of the participant’s ex-spouse. (A reason for keeping those up to date.)

Disclaimers are often used to remove a beneficiary to achieve a better minimum distribution result. Disclaimers have even been used to facilitate spousal rollover of retirement accounts, although this can be messy, involving a lot of steps. (LTR 200505030, Doc 2005-2300, 2005 TNT 24-32; LTR 199913048, Doc 1999-12268, 1999 TNT 64-28; LTR 9450041, 94 TNT 247-52.)

The IRS has evidenced a willingness to permit disclaimers to clean up planning mistakes. In Rev. Rul. 2005-36, 2005-1 C.B. 1368, Doc 2005-13783, 2005 TNT 122-6, the IRS allowed a disclaimer of a decedent’s IRA to be a
A qualified disclaimer under section 2518, even though the beneficiary had already received a minimum required distribution from it for the year of death.

Under section 2518, a disclaimer is not valid if the disclaimant has made an affirmative act of acceptance of the property, such as taking a distribution of income from it. (Reg. section 25.2518-2(d).) The IRS would not allow the beneficiary to disclaim the distribution, but based the ruling on the idea that the beneficiary was making a partial disclaimer of the rest of the account.

Moreover, designated beneficiary status operates on the basis of who is a designated beneficiary on September 30 of the year following the year of the participant’s death. (Reg. section 1.401(a)(9)-4.) So if the disclaimer is made by September 30 of the year following the year of the participant’s death, then the disclaiming beneficiary will be considered never to have existed as a designated beneficiary. But the disclaimer deadline under section 2518(b)(2) is sooner, nine months after the date of death.

Even if the disclaimer is successful, the ultimate beneficiary may not necessarily be recognized as a designated beneficiary for purposes of the minimum required distribution rules. Multiple transfers add to the risk that an undesired result will obtain. The moral: Don’t get cute with disclaimers.

In LTR 200327059, Doc 2003-15949, 2003 TNT 129-24, the IRS ruled that distributions from a disclaimed portion of the decedent’s IRA were subject to the five-year distribution rule. As the sole beneficiary, the decedent’s surviving spouse had disclaimed part of his IRAs in favor of the decedent’s residuary estate, which was to go to a trust having individual beneficiaries and satisfying the requirements of reg. section 1.401(a)(9)-4. But the IRS recognized the estate, rather than the trust, as the beneficiary after the disclaimer, so that the IRA was treated as having no designated beneficiary.
# A Guide to Understanding Climate Change Legislation

*The Committee on Environmental Law*

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Section 1—Introduction

The Earth’s climate has varied throughout the planet’s history, with events ranging from ice ages to periods of long warmth. These variations typically are the result of natural forces such as volcanic eruptions, changes in the Earth’s orbit, and changes in the amount of energy released from the sun. However, human activities, especially those resulting in release of greenhouse gases, have also had dramatic effects on the Earth’s climate.

Greenhouse gases are necessary to life as we know it. They trap heat in the atmosphere—preventing it from escaping to space—and keep the Earth’s surface warmer than it would be without them. But as the concentrations of these gases have consistently increased over the last 200 years, they have caused an “enhanced greenhouse effect,” and Earth’s temperature has climbed above normal levels. Between 1900 and 2005, temperatures have increased by an estimated 1.4°F (0.8°C), and eleven of the last twelve years are among the warmest twelve years since 1850.

This warming cannot be adequately explained by natural phenomena, and the international scientific community now agrees that it is

primarily the result of human activities. In 2007, the Intergovernmental Panel on Climate Change (IPCC) concluded that “human activity is the ‘main driver’ of global warming,” especially activities such as fossil fuel combustion and land-use changes. The IPCC’s finding was supported by 113 countries, including the United States and the IPCC was awarded the 2007 Nobel Peace Prize for its work to raise awareness about global warming.

Changes made today to the atmosphere will affect the climate decades or centuries into the future, and efforts made now to reduce future change will likely have an effect on a similar timescale. Some effects of climate change are already inevitable, and even if greenhouse gas concentrations could be maintained at current levels, the heat already contained in the ocean will continue to warm the atmosphere 1°F by the end of the 21st century. If the rise in greenhouse gas emissions continues unchanged, however, predictions suggest that temperatures may rise by as much as 10°F by the year 2100. “Most projections of future impacts do not address what could happen if warming continues beyond 2100, which is inevitable if steps to reduce emissions are not taken, or if the rate of change accelerates.”

The effects of climate change will be widespread and diverse. Snow and ice will melt, causing water sources to shrink or disappear. Coastal areas and their populations will be threatened by rising sea levels. Droughts and floods could become more frequent and more severe. Weather patterns could change, and hurricanes and other storms will become more severe. Climate change will also affect human health by impacting agri-

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4. *Pew Center on Global Climate Change, Climate Change 101: Understanding and Responding to Global Climate Change, The Science and Impacts 3*, http://www.pewclimate.org/docUploads/101_Science_Impacts.pdf ("There is no doubt among scientists that the recent spike in carbon dioxide and other greenhouse gases in the atmosphere is the result of human activities.").


7. *Pew Center on Global Climate Change, supra note 4, at 1.*

8. *Pew Center on Global Climate Change, supra note 1, at 1.*

cultural production and the spread of disease, as well as inflict severe damage to ecosystems that support all forms of life.\textsuperscript{10} Some estimate that greenhouse gas emissions must be reduced 50%-80% by 2050 to avoid the worst of these effects.\textsuperscript{11} Addressing global climate change is an unprecedented challenge that will require extraordinary cooperation at the local, national, and international levels, and while no single solution will completely solve the problem of climate change, many tools already exist that can be used to address the issue.

In the absence of a strong federal policy, U.S. leaders of business and government have begun taking steps to address climate change. Businesses have begun voluntary measures to reduce their impact on climate change. Additionally, many states have sought their own solutions, implementing a broad spectrum of regional initiatives, such as the West Coast Governors’ Initiative and the Regional Greenhouse Gas Initiative. On a local level, cities are working to implement their own solutions to reduce greenhouse gas emissions, which range from implementing transportation policies, adding green measures to building codes, to tree planting.

In the U.S., energy-related activities account for three-quarters of human-generated greenhouse gas emissions, mostly in the form of carbon dioxide emissions from burning fossil fuels.\textsuperscript{12} More than half the energy-related emissions come from large stationary sources such as power plants, while about a third comes from transportation.\textsuperscript{13} Industrial processes (such as the production of cement, steel, and aluminum), agriculture, forestry, other land use, and waste management are also important sources of greenhouse gas emissions.\textsuperscript{14} While these sources, and others, produce a number of species of greenhouse gases, carbon dioxide accounts for approximately 85% warming effect of these gases,\textsuperscript{15} and reducing emissions of that gas will be the focus of this Report.

This Report will present ways to reduce the emissions of greenhouse gases, with a focus on legislation that will impose either a cap-and-trade approach or a carbon tax approach. Section 2 of this Report will introduce the concepts of cap-and-trade and carbon tax in non-technical terms.

10. \textit{Pew Center on Global Climate Change}, supra note 4, at 6-7.
11. \textit{Pew Center on Global Climate Change}, supra note 1, at 1.
13. Id.
14. Id.
Section 3 will discuss the criteria by which legislation can be evaluated. Section 4 will introduce and summarize various pieces of climate change legislation pending in the 110th Congress. Some of these bills would establish a mandatory cap-and-trade program for multiple sectors of the economy, while others would reduce greenhouse gas emissions by imposing a carbon tax. Still other bills would address climate change through conventional regulatory approaches. Section 5 will introduce the Regional Greenhouse Gas Initiative and discuss the practical experience that the European Union has gained with its Emissions Trading Scheme. Section 6 will present local-level initiatives that can be part of a comprehensive climate change portfolio. In Section 7, the Report concludes by embracing a portfolio approach to greenhouse gas emissions reduction and suggests that such a comprehensive approach will be most effective in achieving the necessary emissions reductions, without making recommendations on any of the pending bills.

Section 2—In Plain English:
Cap-and-Trade and Carbon Tax Summarized
Most of the pending federal bills call for a cap-and-trade system of regulating carbon dioxide and greenhouse gas emissions, and the legislative momentum appears to support a cap-and-trade system over a carbon tax system. Both schemes deserve careful consideration. Proponents of a carbon tax system assert that it is simpler and results in a more stable energy price, while proponents of a cap-and-trade system contend that it is a less costly way to ensure emissions reductions.

Both systems involve complex concepts relating to the science of global warming, and both have economic policy implications. Therefore, a basic introduction is required before comparing the two systems.

2.1 Cap-and-Trade
Cap-and-trade is a market-based policy tool to reduce emissions of carbon in a cost-effective and flexible manner. Under a cap-and-trade program, the environmental regulator establishes a cap that limits the total...
tons of emissions that can be emitted. The emissions allowed under the cap, sometimes called allowances, are divided among emitting sources by a number of different formulas, including auction or sale by the entity that documents and tracks the allowances. The allowances represent the right to emit a certain amount of pollution. One allowance typically equals one metric ton of carbon dioxide (CO₂) emissions. Because the cap restricts the amount of a pollutant emitted into the air, the allowances take on financial value.

If a source reduces its emissions below its allowance level, it may sell its extra allowances to another source. Alternatively, if a source finds it expensive to reduce the amount of its emissions to its allowance level, it may purchase allowances from another source. Thus, while the emissions cap is set by a regulatory agency, individual sources are free to choose how or if they will reduce their emissions.

The Union of Concerned Scientists (UCS) presents a good, small-scale example of how a cap-and-trade system works. Let's say that Plant A emits 600 tons per year (tpy) of CO₂ and Plant B emits 400 tpy for a combined total of 1,000 tpy. A government agency establishes an annual CO₂ emissions cap of 700 tpy, resulting in a 30 percent reduction of CO₂.

Under traditional command and control permitting requirements, both plants may be ordered to reduce emissions by 30 percent to realize the 300 tpy reduction that the agency seeks. Since the cost for each plant to make emission reductions varies (based on fuel type and equipment efficiency), imagine that it would cost Plant A $50 per ton and Plant B $25 per ton of reductions. The total cost for the 300 tpy reductions under the command and control approach would be $12,000.

In a cap-and-trade system, each plant seeks out the most economical way to reduce emissions. Since Plant B would be able to reduce its emissions at a lower cost than Plant A, Plant B can sell some of its allowances to A. However, the more Plant B reduces its emissions, the more expensive it becomes to reduce emissions further and so Plant B will not be likely to make all of the 300 tpy reductions itself. In theory, both plants will reach

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17. Buyers and sellers can bank their unused allowances for future use.


19. Many environmental laws, like the Clean Water Act and Clean Air Act, are considered “command and control” legislation, which means that they impose specific numeric limitations on pollution sources.

20. Plant A’s 180 tpy reduction at $50 per ton would cost $9,000 and Plant B’s 120 tpy reduction at $25 per ton would cost $3,000.
a point where their costs to reduce an additional ton of emissions are equal. Under the cap-and-trade system, the two plants are able to reach the total 300 tpy reductions at a lower cost than command and control permitting. In the UCS’s example, one result may be that total cost of cap-and-trade control is $9,000—a 25 percent savings. 21

Some of the key concepts in implementing a cap-and-trade program include:

_Emission reduction targets._ These are the regulatory caps that limit the total tons of carbon dioxide that can be emitted.

_Carbon Dioxide Equivalents._ There are six gases that are generally recognized as contributing to global warming. The United Nations Framework Convention on Climate Change identifies the greenhouse gases as carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorcarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF₆). Each of these gases contribute differently to global warming. For greenhouse gases, the term “carbon dioxide equivalent” generally is defined as the amount of the greenhouse gas that makes the same contribution to global warming as one metric ton of carbon dioxide.

_Allocation and Distribution of Allowances._ The terms “allowance” or “emission allowance” generally mean authorization to emit one metric ton of carbon dioxide or an amount of another greenhouse gas that causes the same warming effect as one metric ton of carbon dioxide. Allowances may be distributed either through auctions or without charge.

_Upstream vs. Downstream._ These terms refer to the point in the distribution process where emissions are measured and regulated. For cap-and-trade programs, upstream generally refers to a program in which emissions are capped and allowances are required at the point of production, importation or sale of a greenhouse-gas-producing product. Downstream generally refers to a program in which emissions are capped and allowances are required at the point of emissions.

_Safety Valves._ The term “safety valve” generally refers to a cost control mechanism designed to control the price of reducing greenhouse gas emissions under a cap-and-trade program. If the market price for allowances becomes too high, the cap is bro-

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21. In one plausible scenario, Plant A would reduce 60 tpy at $50 per ton, costing $3,000, and Plant B would reduce 240 tpy at $25 per ton, costing $6,000. Assume that Plant B would sell some of its allowances to Plant A to offset its emissions reductions costs.
ken and allowances can be purchased for a fixed price. An example is a provision allowing a greenhouse gas emitter to buy allowances at a set price rather than reduce emissions. Another example is a provision allowing the government to extend compliance deadlines.

Banking. The term “banking” generally refers to allowing a covered entity with unused allowances to sell, exchange or use the allowance in the future. Banking is an integral part of all cap-and-trade programs.

Borrowing. The term “borrowing” generally refers to allowing a covered entity to borrow allowances or credits from the government, use the borrowed allowances or credits to satisfy compliance obligations in the current year, and repay the borrowed allowances or credits in a future year.

Offsets. The term “offset” generally refers to allowing a covered entity to satisfy allowance requirements by using emission credits or other alternatives based on activities not directly related to reducing emissions at the source. An example is allowing the use of carbon sequestration to satisfy the allowances required for emissions from a stationary source.

International Reserve Allowances. The term “international reserve allowance” generally refers to an allowance purchased from a special reserve of allowances and used to meet requirements for imports of certain goods from certain foreign countries. Programs that incorporate them are designed to ensure that emissions from foreign countries do not undermine the objectives of the United States in addressing global climate change.

2.2 Carbon Tax

A carbon tax is a tax on a source that emits CO₂ based on the amount of CO₂ that it emits. Or, as the Carbon Tax Center describes it, “A carbon tax is a tax on the carbon content of fuels—effectively a tax on the carbon dioxide emissions of burning fossil fuels.”²² The theory behind a carbon tax is that by setting a price for CO₂ emissions, emitting large quantities of it will be uneconomical. Since the carbon content of every form of fossil fuel is known, a carbon tax may be levied with some precision and without the volatility that may accompany a cap-and-trade program. A carbon tax would probably be assessed “upstream,” or at the point where

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the fuel is extracted and enters the commerce stream. Thus, fossil fuel suppliers would pass along the cost to consumers to the extent that market conditions allow.

The UCS example is simpler when considered under a carbon tax system. No emissions targets, like a 300 tpy reduction, would be set under a carbon tax. A carbon tax law would provide uniform fees for burning fossil fuels without the need for an allowance bank. Thus, if Plants A and B burned the same fuel in generating their product, let’s say they both burn oil, they would be subject to the same tax. However, if either plant burns a “dirtier” fuel, like coal, that emits more CO₂ per unit of energy produced, or a “cleaner” fuel like natural gas that emits less CO₂ per unit of energy produced, the tax would be proportionate to the amount of CO₂ emitted per unit of energy produced. The carbon tax would encourage the plants to maximize efficiency and consider alternate fuels, including “cleaner” fossil fuels, to reduce the amount of the tax and CO₂ emissions to the atmosphere.

There is some overlap between the key concepts used for cap-and-trade systems and the key concepts used in carbon tax systems. Carbon tax systems can incorporate carbon dioxide equivalents, upstream v. downstream imposition of taxes, and offsets.

Section 3—Criteria for a Solution

The criteria by which cap-and-trade systems and carbon tax systems can be evaluated fall into broad categories of efficiency and equity.

3.1 Efficiency
3.1.1 Meaningful reductions in greenhouse gases

Efficiency requires that there be a meaningful reduction in greenhouse gas emissions. All the money spent on controlling greenhouse gases is wasted if there are not sufficient reductions to combat climate degradation. For example, money spent cost-effectively in the early years of a cap-and-trade program will not be effectively spent if the emissions control program is abandoned before it can achieve enough of an effect to avoid a catastrophe. As climate change science matures, we may develop a better understanding of what reductions are adequate. Thus, there must be

some periodic review to ensure that the carbon control system consistently applies the best science.\textsuperscript{24}

\section*{3.1.2 Effective use of money}

Tremendous societal resources will be required to forestall or combat climate change, and those resources must be used efficiently to maximize the return on those resources and ensure that adequate resources are available to reach the objective. To be fiscally efficient, a carbon control system must have breadth, flexibility and continuity.\textsuperscript{25}

\textbf{3.1.2.1 Breadth}

Breadth is having a system that reaches the entire economy. If carbon control modifies behavior in only a segment of the economy, that segment will shoulder a disproportionate share of the burden and will suffer relative to the unburdened segments. Purchasers will look to markets where the activity is not regulated and the costs are lower. When purchasers obtain products from a jurisdiction that does not regulate the activity, leakage occurs. For example, when coal-fired power plants in states that participate in a cap-and-trade program must purchase emissions allowances to operate, it may be relatively less expensive for utilities to purchase power from coal-fired power plants in states such as Pennsylvania that are not participating in any regional compacts. Greenhouse gas emissions are not curbed when there is leakage; they are merely shifted to a new location. The leakage problem is fixed when the entire industry is regulated.

\textbf{3.1.2.2 Flexibility}

An efficient system must also provide flexibility for industry to manage how it will achieve the emissions reductions. Each industry will have its own sui generis energy issues, and is in the best position to cost-effec-

\textsuperscript{24} The Superfund program provides a good example of a requirement to update regulatory responses to take new scientific developments into account. If a site is cleaned up, but hazardous substances remain on the site and the site is not subject to a use restriction, then the Environmental Protection Agency (“EPA”) must review the remedy every five years to ensure that the remedy is still protective of human health and the environment. 42 U.S.C. § 121(c); 40 C.F.R. 300.430(h)(4)(ii).


\textsuperscript{25} John Anda, \textit{A Bet on Climate}, \textit{Euromoney}, Sept. 2007.
tively reduce emissions from its own sources. A trading program will allow this same cost-effective allocation to take place across industries, and if the trading is international the allocation can be made even more effectively. No matter where the cheapest savings can be achieved, a flexible system will seek out those savings first. Flexibility is also needed to ensure that any emissions control program can be adjusted to increase reductions or decrease the cost to the economy depending on cumulative experience with the program.

Another aspect of flexibility requires implementing the low cost solutions first. That would allow capital intensive actions to be taken in the future, when more efficient technologies may be available and the same expenditure may have a greater emissions reduction impact. 26

3.1.2.3 Continuity
Continuity of gradual annual reductions is also an element of an efficient system. In the early years, the lowest cost emissions reductions will be implemented. Early reductions are important given the cumulative effect of greenhouse gas emissions and their long residence time in the atmosphere. Continued reductions are also important to achieve the ultimate goals, and before greenhouse gas emitters should be expected to invest in the higher cost emissions reductions, they should have the assurance that the program will continue, and will justify those more capital intensive expenditures.

3.2 Equity
The hardships caused by rising fuel prices have been widely documented in the press. Any system of controlling greenhouse gas emissions will necessarily raise prices even further. While it is reasonable, and required, to raise prices to encourage people to reduce their energy consumption, there are many people who cannot afford to pay the increased prices. That group of people needs assistance to pay for higher energy costs, and to minimize the risk of losing jobs or basic services.

The assistance need not be in the form of a direct energy subsidy, which would work against the emissions reductions objectives. New York City Mayor Michael R. Bloomberg has praised the concept of using the

26. Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 875 (2006) (noting that people may be “extremely averse” to incurring costs to address a problem that will present threats in the distant future, and that politicians have an incentive to delay expenditures to combat global warming because the people who are expected to benefit are not today’s voters).
proceeds of a carbon control system to reduce payroll taxes,\textsuperscript{27} which would not only reward working but also direct the carbon control revenues to those who will be more affected by increased energy costs.

3.3 Ease of Implementation

Another objective for any system of carbon emissions control is that it be feasible to implement. Any system that will be effective must be capable of being implemented in a reasonable time, and without so much political opposition that it cannot be implemented at all.

3.4 International Cooperation

As mentioned earlier, global warming is a pressing problem affecting the future of the planet. To address the global nature of this problem, it will be critical for nations to work together for solutions. When adopting a program to reduce CO\(_2\) emissions, it will be important to consider the extent to which a program can work with other systems in the world and allow nations to coordinate their efforts, share best practices, leverage their resources to reduce emissions and minimize leakage.

3.5 Convergence—either system can meet many of the goals, and there are some differences

3.5.1 Similarities

There are several areas in which the elements of a cap-and-trade system and a carbon tax system converge, and in those areas both systems will have the same potentials and the same drawbacks when it comes to achieving the performance criteria discussed above.

Both a cap-and-trade system and a carbon tax system can be designed to have sufficient breadth to avoid leakage, assuming there is action on a national and international scale instead of the regional responses that the US has implemented to date.

Both a cap-and-trade system and a carbon tax system can incorporate periodic review to ensure that the best science is applied to the problem. In either system, that would entail a flexible regulatory scheme that incorporates a framework for analyzing and applying scientific advances.\textsuperscript{28}


\textsuperscript{28} It may be more politically difficult to continually adjust a tax program than to adjust a cap-and-trade program.
Both a cap-and-trade system and a carbon tax system can be designed to generate revenue for the government to use for beneficial purposes. In a carbon tax system, all taxes collected go to the government.\(^29\) In a cap-and-trade system, either some or all allowances can be given to industry without charge, or some or all emissions allowances can be auctioned and the revenue paid to the government.\(^30\) It is then up to the government to determine whether the money is used for general funds, to reduce other taxes, or for environmental purposes.\(^31\) In either system it is feasible to allocate a portion of the revenue for relief to people who cannot afford increased energy costs. This criterion does not distinguish cap-and-trade from a carbon tax because revenue can be generated by either system, and can be put to any use.

On first glance, it would appear that the cost of carbon emissions would vary widely from year to year in a cap-and-trade system, but not in a carbon tax system. In fact, this is another area in which the two systems converge, and both have the same drawbacks. As part of ensuring continuity and efficiency to encourage long term capital investments, the costs of carbon emissions should remain predictable. As discussed in Section 5.1 below, the European experience with its cap-and-trade program demonstrates that auction prices can be quite volatile if complete and accurate baseline emissions data is not available by the time trading begins. In a carbon tax system, the tax per unit of carbon does equal a set price, but only for a limited time. The value of the tax should be reset often or the system will not be able to maintain a balance between over-taxation and achieving enough emissions reductions. As a result, both systems have the drawback of price volatility, although in a cap-and-trade system the management challenge is to even out the volatility and in a tax system the management challenge is to permit enough variation.\(^32\)


\(^{30}\) RGGI states have an option of auctioning any percentage of the available carbon emissions allowances. New York has decided to auction almost 100% of the allowances, guaranteeing that all of the value of the allowances will be collected by the state. New York State Department of Environmental Conservation, Notice of Pre-Proposal of New York RGGI Rule, Notice of Release and Call for Comments, (Dec. 5, 2006), http://www.dec.ny.gov/regulations/26450.html. See also Section 5.2 infra. This is an area in which US regulators have an opportunity to build upon and improve the EU experience.

\(^{31}\) Some commentators have suggested that a carbon tax should be revenue neutral, meaning that the revenue generated should not be put into the general fund, but should be either returned by way of lower taxes or used to subsidize individuals who are adversely affected by rising fuel prices.

\(^{32}\) Various forms of safety valves have been proposed to level out the volatility of a cap-and-
In either a cap-and-trade or carbon tax system, some activities will be specifically encouraged to further reduce carbon emissions. In a cap-and-trade system, those activities will be encouraged through offsets. In a carbon tax system, those activities can be encouraged through tax credits. Both paradigms can be designed to achieve further reductions by directing behavior towards favored activities, and the two systems converge on this point also.33

Both a cap-and-trade system and a carbon tax system can be designed to be transparent and permit clear tracking of the costs and benefits involved.

3.5.2 Differences

There remain some differences between cap-and-trade and carbon tax programs, where the two systems do not converge.

Although both systems have the potential to reduce carbon emissions, cap-and-trade sets an environmental cap on emissions unlike carbon tax programs, assuming there are no safety valves that permit breaking the cap. Having a cap on how much carbon can be emitted provides a clear environmental goal for all emitters, promotes transparency and could help companies in their long-term planning for capital investments.

Proponents of carbon tax systems point out that taxes can be imposed relatively quickly and the infrastructure for collecting taxes already exists. The states’ experience with cap-and-trade programs shows that they require a lead time of several years and the establishment of regulatory structures and markets that do not currently exist.

Carbon tax systems are widely perceived to have more significant political barriers than cap-and-trade programs.34

Both a cap-and-trade system and a carbon tax system can allow for flexibility to implement the low cost solutions first, if they require price increases phased in over time. However, cap-and-trade systems are generally recognized as more economically flexible than tax systems.

With respect to international cooperation, a cap-and-trade program has a definite edge over a carbon tax system. Clearly, there is a growing consensus in the international community to implement cap-and-trade programs. Not only has the European Union with its 25 member states adopted the world’s largest greenhouse gas cap-and-trade program (see Section 5.1),

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34. See Mayor Bloomberg’s Keynote Address, supra note 27.
but Canada, Australia, and Japan are also moving towards cap-and-trade systems. Furthermore, the International Carbon Action Partnership (ICAP) is developing into a large international network of governments that have either adopted or are pursuing cap-and-trade programs. Members of ICAP include the European Commission, several EU members (i.e., France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Spain, United Kingdom), New Zealand, Norway and 12 U.S. States which are members of the Regional Greenhouse Gas Initiative (RGGI) and the Western Climate Initiative (WCI). As members of ICAP, these governments are able to share knowledge, best practices and explore opportunities to link their cap-and-trade program with compatible trading schemes of other countries. Finally, it is worth noting that six pending bills in Congress propose “economy-wide” or “multi-sector” cap-and-trade programs, versus only two carbon tax bills.

Section 4—Legislation Pending in Congress

This section discusses climate change legislation pending in the 110th Congress. Subsection 4.1 discusses six specific bills that would establish a mandatory cap-and-trade program for multiple sectors of the economy. Subsection 4.2 compares two bills designed to reduce greenhouse gas emissions by imposing a carbon tax on fuels. Subsection 4.3 discusses bills that address climate change through conventional regulatory approaches, such as performance standards and technology-based emission requirements. We note that the bills described below continue to evolve and thus the summaries below reflect such bills as of March 2008.

4.1 Cap-and-Trade Bills

4.1.1 Overview

The following bills in the 110th Congress are designed to reduce
greenhouse gas emissions by setting emissions caps for multiple sectors of the economy and mandating a market-based system of tradeable allowances:

<table>
<thead>
<tr>
<th>Bill</th>
<th>Sponsors</th>
<th>Date Introduced</th>
</tr>
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<tbody>
<tr>
<td>S.280</td>
<td>Lieberman-McCain</td>
<td>1/12/2007</td>
</tr>
<tr>
<td>S.485</td>
<td>Kerry-Snowe</td>
<td>2/1/2007</td>
</tr>
<tr>
<td>H.R. 620</td>
<td>Oliver-Gilcrest</td>
<td>1/22/2007</td>
</tr>
</tbody>
</table>

Each of these bills has much in common, and each by definition permits banking and trading allowances. Each covers all six greenhouse gases identified in the United Nations Framework Convention on Climate Change. Each bill sets emission reduction targets, but the targets differ in their start dates and levels and rates of emission reductions.

They differ in other areas. Some but not all establish emission reduction targets in units of carbon dioxide equivalents. Some bills apply emission caps upstream for some sectors and downstream for other sectors. Other bills require EPA to establish the best approach for implementing a cap-and-trade program either upstream or downstream. Some of the bills have safety valves and others do not.

Some bills permit borrowing of allowances and some bills permit the use of offsets or offset allowances. Only some of them establish international reserve allowance programs.

The bills contain different enforcement provisions and some bills require revenues from penalties to be deposited in restricted-use funds.

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38. As stated supra, Section 2.1, these are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.

39. Two other bills would permit or require a cap-and-trade system. S. 309, introduced by Senator Sanders, would allow but not require EPA to establish a cap-and-trade system. S. 317, introduced by Senator Feinstein, would require EPA to establish a cap-and-trade system for certain electricity generating facilities, but not for other sectors of the economy. These bills are omitted from this discussion to provide a more in depth discussion of bills that mandate a cap-and-trade system for multiple sectors of the economy. All eight cap-and-trade bills in the 110th Congress are reviewed in CRS Report RL33846, Greenhouse Gas Reduction: Cap-and-Trade bills in the 110th Congress, by Larry Parker and Brent D. Yacobucci, updated November 5, 2007.
4.1.2 Comparison of Specific Bills

S.2191 was introduced by Senator Lieberman and cosponsored by Senator Warner. This bill passed the Senate Committee on Environment and Public Works by a vote of 11 to 8 on December 5, 2007 and will be considered by the full Senate in 2008. The bill’s emission reduction provisions apply downstream for stationary sources and upstream for fuels and specific chemicals. Covered facilities consist of (i) any facility that uses more than 5,000 tons of coal in a year; (ii) any facility that produces or imports petroleum or coal-based liquid or gaseous fuel that emits certain greenhouse gases, assuming no capture and sequestration of that gas; (iii) any facility that produces or imports more than 10,000 carbon dioxide equivalents of certain greenhouse gases, assuming no capture and sequestration of that gas; and (iv) any facility that emits 10,000 carbon dioxide equivalents of hydrochlorofluorocarbons as a byproduct of the manufacture of hydrofluorocarbons. EPA would have discretion to add additional covered facilities, including vehicle fleets with more than 10,000 carbon dioxide equivalents. Emission allowances would begin in 2012 and the number of emission allowances would be reduced annually until 2050. The bill is projected to reduce greenhouse gas emissions in the United States to between 81 and 85% of 2005 levels by 2020 (4% below the 1990 level in 2020), and to between 30% and 37% of 2005 levels by 2050. EPA would be required to issue regulations to implement the issuance and trading of emission allowances. The bill provides for a detailed allocation scheme (including specific percent of allocations to the states, mass transit, electric customers, natural gas consumers, etc.) with increasing auctions over time, beginning with the auctioning of 21.5% of allowances in 2012 and reaching the auctioning of 69.5% of the allowances in 2050. Facilities would also be able to buy or earn offsets in several different ways, including by reducing greenhouse gas emissions associated with agriculture, preventing international deforestation and other land-use products such as altered tillage practices, winter cover cropping, conversion of cropland to rangeland or grassland, reduction of nitrogen fertilizer use and forest management, among others. Up to 15 percent of allowances could also be obtained on a foreign greenhouse gas emissions trading market where EPA has certified such market. The bill would establish a

Carbon Market Efficiency Board to monitor allowance trading and potential impacts to the economy.

S. 280 was introduced by Senator Lieberman and co-sponsored by Senator McCain. Some of the bill’s cap-and-trade provisions resemble the provisions of S. 2191. These include provisions establishing the Climate Change Credit Corporation (CCCC), providing the CCCC with the authority to buy and sell tradeable allowances, using revenues from the sale of allowances for new technology, adaptation programs and mitigation assistance programs, and permitting the banking and borrowing of allowances. The bill differs from S. 2191 in other areas, including the scope of coverage, the emission targets, the nature and extent of the authority delegated to EPA, the use of offsets, and enforcement. Covered entities would include: (i) stationary sources in the electric power, industrial or commercial sectors of the economy which emits over 10,000 metric tons of greenhouse gases per year; (ii) refiners or importers of petroleum or petroleum products which when combusted will emit over 10,000 metric tons of greenhouse gases per year; and (iii) producers and importers of fluorinated gases and other gases which when used will emit over 10,000 metric tons of greenhouse gases per year. The emissions cap and the emissions allowance requirements would take effect in 2012. The number of allowances would be reduced in 2020, 2030 and 2050. The bill covers about 85% of U.S. greenhouse gas emissions and is projected to reduce emissions to 2004 levels by 2012, 1990 levels by 2020, 78% of 1990 levels by 2030, and 40% of the 1990 emission level by 2050. 41 EPA would determine the number of allowances to be allocated to each covered sector and to the CCCC. Up to 30 percent of the allowances could be satisfied by offsets based on carbon sequestration or certain other greenhouse gas reduction activities. Entities that fail to submit sufficient allowances are liable for civil penalties equal to three times the market price for the necessary allowances on the last day of the violation year.

S. 485 was introduced by Senator Kerry and co-sponsored by Senator Snowe. The bill would amend the Clean Air Act to direct EPA to issue regulations necessary to achieve emission reduction targets through emission caps and a cap-and-trade program. Emission reduction targets or caps would begin in 2010 and would be established by EPA so as to reduce emissions to 1990 levels by 2020, and then to further reduce emissions by at least an additional 2.5% annually from 2021 to 2030 and 3.5% annually from 2031 to 2050.

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ally from 2031 to 2050. The bill is projected to reduce total emissions to between 35% and 40% of 1990 levels by 2050.\footnote{See U.S. EPA, Office of Atmospheric Programs, EPA Analysis of Bingaman-Specter Request on Global CO2 Concentrations (Oct. 1, 2007), http://www.epa.gov/climatechange/downloads/s1766analysispart1.pdf.} EPA would determine the number of allowances to be issued and the sectors and sources that would be subject to the emission caps and allowance requirements. The President would be required to provide Congress with a plan for distributing allowances through auctions and would be allowed to issue allowances without charge under certain conditions. Entities with excess emissions would be required to submit allowances for the excess emissions during the following year and to pay a civil penalty equal to twice the market price for allowances on the last day of the violation year without demand by EPA. Penalties paid to EPA and amounts collected from auctioning of allowances would be deposited in a special fund established in the Treasury and used to carry out the emission reduction goals of the bill.

S. 1766 was introduced by Senator Bingaman and co-sponsored by Senator Specter. Emissions would be controlled upstream for petroleum, natural gas and non-carbon dioxide greenhouse gases, and downstream for coal facilities that use over 5,000 tons of coal per year. Covered entities would be required to submit allowances or credits to the President based on the amount of their greenhouse gas emissions or make a payment at a fixed price in lieu of submitting allowances or credits. The price of the fixed payment, known as the Technology Accelerator Payment (TAP), begins at $12 per metric ton of greenhouse gas emissions in 2012 and increases annually. Emissions targets begin in 2012 and decline each year until 2030. The bill is projected to reduce greenhouse gas emissions to 2006 levels by 2020 and to 1990 levels by 2030.\footnote{ENERGY INFORMATION ADMINISTRATION, ENERGY MARKET AND ECONOMIC IMPACTS OF S. 1766, THE LOW CARBON ECONOMY ACT OF 2007 v, 1 (Jan. 2008), available at http://www.eia.doe.gov/oiaf/servicerept/lcea/pdf/sroiaf(2007)06.pdf.} Further reductions to at least 40% of 2006 levels by 2050 would be contingent on international cooperation. This bill provides for smaller emission reductions for covered sectors than are proposed by S. 280, but it has broader coverage. As a result, EPA projects that the net effect of these two bills will be similar.\footnote{U.S. EPA, Office of Atmospheric Programs, supra note 42.} The two bills also differ with respect to the role of EPA. While S. 280 directs EPA to issue allowances, S. 1766 provides for the allowances to be issued by the President. Auctioning of allowances would increase over time, beginning with the auctioning of 24% of allowances in 2012 and
reaching 53% of the allowances in 2030. Nine percent of the allowances would be distributed to States, which would be required to use a portion of their allowances or the revenues from the sale of their allowances to mitigate impacts of climate change, promote technology or energy efficiency, and enhance energy security. Five percent of the allowances would be reserved for farmers and entities that carry out agricultural sequestration projects and another eight percent of the allowances would be reserved for entities that implement geological sequestration projects. Credits would be issued for carbon sequestration projects, activities that take greenhouse gas precursors out of commerce, and other specified offset projects. Revenue generated by auctioning of allowance or submissions of fixed payments in lieu of allowances would be used to fund new technologies. Auction revenues also would be used to fund climate change adaptation measures and assistance programs for low-income households. Starting in 2020, importers of goods from countries that do not have comparable emission reduction programs may be required to purchase special international reserve allowances to cover the carbon content of their products. Entities that fail to submit allowances or credits or make the necessary payments in lieu of allowances or credits for the calendar year are required to make a payment in the subsequent year equal to three times the TAP price. The enforcement provisions also include civil penalties of up to $25,000 per day for any violation and criminal penalties for willful violations.

H.R. 620 was introduced by Representative Oliver of Massachusetts and is sometimes referred to as the Oliver-Gilcrest bill. Most of the key cap-and-trade provisions of this bill are similar to the provisions of S. 280, except that the emissions cap in 2050 decline to 70% below 1990 levels under H.R. 620, compared to 60% below 1990 levels under S. 280.45

H.R. 1590 was introduced by Representative Waxman of California. Emission reduction targets would begin in 2010. They would be reduced by 2% each year until 2020 and then reduced by 5% each year until 2050. The bill caps total greenhouse gas emissions in the United States at 1990 emission levels by 2020 and 20% of 1990 levels by 2050. EPA would be allowed to extend the compliance deadlines falling in or before 2011 by one or two additional years. The other key provisions of the cap-and-trade program are similar to the provisions described above for S. 485.

### 4.2 Carbon Tax Bills

The following bills in the 110th Congress are designed to reduce green-
house gas emissions by imposing a carbon tax on fossil fuels based on the fuel’s carbon content:

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<th>Bill</th>
<th>Sponsors</th>
<th>Date Introduced</th>
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Both bills cover coal, natural gas, petroleum and petroleum products which are extracted, manufactured or produced in the United States or imported for consumption, use or warehousing. Under both bills, the tax would be imposed on fuel manufacturers, producers and importers. Tax credits or refunds would be provided for qualifying carbon sequestration projects. The bills differ on issues such as tax rates and the use of the tax revenues.

H.R. 2069, introduced by Congressman Stark of California and co-sponsored by Congressman McDermott, would impose a tax beginning at a rate of $10 per metric ton of carbon content of the fuel. Tax rates would increase annually by an additional $10 per ton until the total carbon dioxide emissions in the United States are reduced to no more than 20 percent of emissions level in 1990. All tax revenues would be paid to the U.S. Treasury. The bill does not contain specific programs for promoting technology or assisting impacted segments of the economy.

H.R. 3416, introduced by Congressman Larson of Connecticut, would impose a tax beginning at a rate of $15 per metric ton of carbon dioxide content of the fuel and increasing annually at a rate of 10 percent plus a cost of living adjustment. The bill would allow tax refunds for carbon sequestration projects in the United States and for other domestic projects that reduce greenhouse gas emissions or destroy hydrofluorocarbons (HFCs). Revenues received from the tax would be available for tax credits for clean energy technology, industry transition assistance, and payroll tax rebates.

### 4.3 Bills and Legislation with Conventional Regulatory Programs

The cap-and-trade bills discussed above also contain a variety of provisions that reflect conventional regulatory approaches for reducing greenhouse gas emissions:

- **Renewable Electricity Standards.** S. 485 and H.R.1590 would require retail electricity suppliers to generate certain minimum quantities of electricity from renewable energy.
Energy Efficiency Performance Standards for Utilities. S. 485 would require retail electricity suppliers to achieve statutory targets for reductions in electricity use and peak demands. H.R. 1590 would establish end-user targets for both retail electricity suppliers and natural gas suppliers. Both bills would allow suppliers to achieve the targets through a market-based trading system.

Building Energy Efficiency Codes. S. 2191 would require the States to review and update the provisions of their residential and commercial building codes regarding energy efficiency.

Appliance Efficiency Standards. S. 2191 would require that boilers manufactured after September 2012 to meet certain standards. This bill would likewise provide additional standards to space heating and air conditioning products.

Vehicle Emissions Standards. S. 485 and H.R. 1590 would direct EPA to issue greenhouse gas vehicle emissions standards that equal or exceed the standards adopted in 2004 by the California Air Resources Board.

Biofuels Infrastructure. S. 485 would require major oil companies to install pumps for dispensing E-85 fuel (a blend of gasoline with 85% of its contents derived from ethanol).

Additional environmental regulations and standards. S. 485 and H.R. 1590 would allow EPA to issue additional regulations to reduce greenhouse gas emissions from any source or sector, regardless of whether the source or sector is covered by the cap-and-trade program, through emission performance standards, efficiency performance standards, best management practices and technology-based requirements.

Securities Regulations. S. 485 would require issuers of certain securities to inform investors of financial and economic risks from global warming.

New legislation designed to reduce global warming through conventional regulatory approaches also became law on December 19, 2007. This newly enacted law, known as The Energy Independence and Security Act of 2007: (i) increases Corporate Average Fuel Economy (CAFE) standards

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47. Section 5101 of S. 2191 would amend Section 325(f) of the Energy Policy and Conservation Act.

for vehicles by 40 percent to 35 miles per gallon by 2020; (ii) amends the Energy Policy and Conservation Act of 2005 to set new energy efficiency standards for lighting and strengthen energy efficiency standards for numerous consumer products; and (iii) amends the Clean Air Act to require increased amounts of renewable biofuels used in motor vehicles. The renewable fuel standards also require the use of specific amounts of advanced biofuels that reduce greenhouse gas emission by at least 50 percent compared to gasoline or diesel. It also includes a grant program for local governments.49 Renewable energy requirements for electric utilities were initially included but later removed from this legislation. Congressman Dingell has predicted that renewable electricity standards and low carbon fuel standards will be addressed in 2008 under comprehensive climate change legislation.50

Section 5—Established Cap-and-Trade Programs

This section describes international programs and programs by the states here at home.

5.1 The European Union Emissions Trading Scheme

On January 1, 2005, the European Union Emission Trading Scheme (hereinafter ETS) began operating in 25 EU member states as the world’s largest greenhouse gas emission trading scheme.51 Designed as a mandatory cap-and-trade program to implement emission cuts committed under the Kyoto Protocol, the ETS requires member states to set caps for CO2 emissions and allocate these emissions to various sectors through national allocation plans (NAPs). Currently, the ETS covers about 11,500 installations, mainly large emitters such as power and heat generation industries and selected energy-intensive sectors.52 These emitters represent approxi-

49. Local governments may qualify for funding under various federal grant programs, including an Energy Efficiency and Conservation Block Grant (EECBG) Program established by the Energy Independence and Security Act of 2007. The purpose of the EECBG Program is to assist States, eligible local governments and Indian tribes in implementing energy efficiency and conservation strategies. Additional information on the EECBG Program is available from the U.S. Conference of Mayor’s Climate Protection Center at http://www.usmayors.org/climateprotection/documents/eecebghandout.pdf. Other grant and loan programs are administered by the U.S. Department of Energy and the U.S. Environmental Protection Agency.
52. For example, combustion plants, oil refineries, coke ovens, iron and steel plants and factories making cement, glass, lime, bricks, ceramics, pulp and paper. European Commission, EU Action Against Climate Change: EU Emissions Trading-An Open Scheme Promoting Global Innovation 7 (2005).
mately 45 percent of EU’s total CO$_2$ emissions—or 30 percent of EU’s overall greenhouse gas emissions. Each sector can satisfy its commitments either by reducing its emissions, buying credits from other companies, or earning credits through Kyoto’s project-based mechanisms (i.e. joint implementation (JI), the clean development mechanism (CDM)).

Although the ETS has already been criticized for being inefficient in reducing CO$_2$ emissions, these complaints are premature given the scheme’s implementation timeline. The ETS has two implementation phases, Phase I (2005-2007) and Phase II (2008-2012). Phase I was intended to be a trial period to work out various issues in this new system and prepare the EU to meet its Kyoto commitments during Phase II. At the end of 2006, the EU Commission reviewed how well the ETS was working and projected that the glitches during Phase I would be resolved for Phase II. The following outlines some of the key issues that the U.S. can learn from if it develops a national cap-and-trade program.

5.1.1 Baseline Emissions Data

When the ETS came online in 2005, member states drastically improved reporting of their 2005 emissions with the release of verified emissions data in May 2006. However, Phase I caps and NAPs were based on pre-ETS data, which, for many nations, proved incomplete and distorted. With such lack of reliable baseline data, speculation on the price of allowances was high. Once the 2005 emissions data became public mid-2006 and indicated lower emission levels than anticipated, the market was flooded with allowances. This caused the price of allowances to decline significantly, fueling concerns about price volatility. Although volatility

53. Id. at 7.


56. Id. at 3. The Commission indicated that 8,980 installations fulfilled their reporting obligations regarding 2005 emissions by the compliance deadline of April 30, 2006. It notes that “[t]hese installations account for more than 99% of allowances allocated to installations in the 21 member states with functioning electronic registries.” Id.


58. The price for an allowance (1 metric ton of CO$_2$) fell from 30 euros during mid-2006 to less than 2 euros in March 2007. Goldstein, supra note 54.
was an issue during Phase I, the EU is better prepared for Phase II. Verified emissions data for 2005 and electronic registries active in all member states provided a solid basis to determine Phase II allowances and a higher price for allowances. 59

5.1.2 Timing of Allocation Plans
Another reason for excessive price volatility in Phase I was that the NAPs were not all approved before the ETS came online. Many NAPs continued to enter the market during 2005 and well into 2006, causing uncertainty as to the total level of allowances available. To avoid this in Phase II, the EU required that states submit their NAPs by June 30, 2006, more than a year before the second trading period.

5.1.3 Auctioning Allowances
Perhaps the only true flaw of the ETS is that it gave away the vast majority of allowances to polluters. 60 This represents a lost opportunity to raise revenues for beneficial purposes such as energy innovation and efficiency programs, tax cuts to offset higher energy prices and transitional assistance for workers in affected industries.

5.1.4 Trading
Trading under the ETS has grown steadily from 6.5 billion euros in 2005 to 14.7 billion euros of traded volume by mid-2007. 61 New businesses are developing rapidly from carbon traders, carbon finance specialists, carbon management specialists, carbon auditors and verifiers. 62 A valuable lesson for the U.S. is that adopting a cap-and-trade program will create thousands of new jobs.

5.1.5 Compliance
The ETS incorporates a robust compliance framework, including monitoring and reporting guidelines, a standardized and secured system of registries, independent verification of emissions, and dissuasive

59. The price for a Phase II allowance on the futures market is €16.35, or $21.75. Kopp, supra note 57, at 3.
60. In Phase II, the ETS increased the auction limit to 10% of allowances (compared to 5% in Phase I). Kopp, supra note 57, at 2.
62. EUROPEAN COMMISSION, supra note 52, at 4.
fines. The system of registries is overseen by a central administrator at EU level who can check each transaction through an independent transaction log. To further enhance compliance with the Kyoto Protocol, a recent Commission regulation urges the EU to connect its log with the independent transaction log of the UN Framework Convention on Climate Change by December 1, 2007.

5.1.6 The European Blended Approach

The EU ETS is one of the components of the Second European Climate Change Program (ECCP II). The ECCP II includes other work groups dealing with the aviation sector (to be integrated in the ETS in 2011), fuel efficiency standards for passenger cars and light commercial vehicles, technology for carbon capture and geological storage, and adaptation to climate change. While the EU is considering expanding the ETS to other greenhouse gases and other sectors (i.e. combustion installations and small installations) after 2012, it recognizes the need for a “policy mix” to address climate change. In a recent Green Paper, the EU Commission is seriously considering the use of other complimentary market-based approaches, particularly energy taxation, which some countries have reportedly begun implementing to meet their Kyoto commitments. The EU perspective clearly demonstrates that carbon taxation and cap-and-trade need not be mutually exclusive for an effective climate change policy.

5.2 The Regional Greenhouse Gas Initiative

In the absence of a mandatory Federal climate change program and based on the European Union Emissions Trading Scheme, many states have begun to take the lead in developing their own programs to reduce greenhouse gas emissions. The most advanced program is the Regional Greenhouse Gas Initiative (RGGI), sponsored by ten northeastern and mid-Atlantic states, that proposes to reduce carbon dioxide emissions from the member states ten percent below current levels by 2019.

The member states include Connecticut, Delaware, Maine, Massachusetts, Maryland, New Hampshire, New Jersey, New York, Rhode Island and

63. Id. at 12-13.
65. For more information on the European Climate Change Program, see http://ec.europa.eu/environment/climat/eccpii.htm.
Vermont. The collective carbon dioxide emission cap for the states is 188 million metric tons per year. New York will have an initial emissions cap of 64.3 million tons. Maryland, which only joined RGGI on April 20, 2007, will have an initial cap of 37.5 million tons. While the member states have all signed a memorandum of understanding and have prepared a model RGGI rule, each state is still responsible for developing its own set of regulations to implement the program.68

The New York State Department of Environmental Conservation (NYSDEC) released its draft RGGI regulations along with a draft generic environmental impact statement last fall and the comment period ended December 24, 2007.69 There are few surprises in the regulations since they reflect the model RGGI rule. Power plants that produce 25 megawatts of electricity or more will need to annually acquire sufficient emissions allowances to cover their carbon dioxide emissions, beginning on January 1, 2009. The New York State Energy Research and Development Authority (NYSERDA) will annually auction allowances for most of the state’s emissions cap of 64.3 million tons. The available allowances will slowly decrease between 2009 and 2019, when New York’s emissions cap will drop to approximately 57.9 million tons. NYSERDA will use revenue generated by the auctions to promote energy efficiency and renewable energy. At the end of each three-year compliance period (the initial period is 2009 through 2011) regulated power plants will need to possess enough allowances to cover their emissions. As New York’s carbon dioxide emissions cap decreases, regulated sources will need to reduce their carbon dioxide emissions, compete for a reduced number of allowances or, potentially, reduce or end operations.

As the regulations are drafted, regulated entities may cover as much as 3.3 percent of their emissions using offsets in the following categories:

- landfill methane capture and destruction projects (methane can be burned to produce energy or used in place of natural gas in homes);
- reductions in sulfur hexafluoride emissions (often contained in electronic equipment);
- sequestration of carbon dioxide due to afforestation (on land that has not been forested for at least ten years);

68. Information on RGGI is available at www.rggi.org.
reduce or avoidance of carbon dioxide emissions from natural gas, oil or propane end-use combustion due to increased end-use energy efficiency (in existing buildings, new buildings that will replace existing buildings, or zero net energy buildings); and

- avoided methane emissions from agricultural manure management operations (capturing methane, including for energy production).

If the price of emissions allowances rises to seven dollars per ton, regulated entities may cover five percent of their emissions with offsets. If the price rises to ten dollars per ton, regulated sources may cover up to ten percent of their emission with offsets. Offset projects may be located in any RGGI state or other U.S. jurisdiction that has executed an agreement with the RGGI states to comply with certain regulatory requirements. If the price of RGGI allowance reaches ten dollars per ton, however, NYSDEC may award allowances for the “retirement” of emissions credits issued pursuant to the United Nations Framework Convention on Climate Change.

Other members of RGGI have proposed or adopted regulations. Maryland, for example, has released a lengthy draft rule to implement a cap-and-trade program. Unlike New York and other states, Maryland would require only 25 percent of emissions allowances to be auctioned, although this level may rise. Funds from the auction will support energy efficiency programs, renewable energy and possible mitigation of increased rates.

Section 6—Local Action

The focus of this report has been on federal climate change legislation. Cities and local governments also are playing a crucial role in responding to the challenges of global warming. This section summarizes some of the actions underway at the local level to reduce greenhouse gas emissions and respond to the challenges of climate change.

6.1 Mayors Encourage Congress to Adopt Federal Legislation

A common initial step for local communities wishing to address climate change is to become a signatory to the Mayor’s Climate Change Protection Agreement. This agreement was drafted by Seattle’s Mayor Greg

70. Information on Maryland’s RGGI program is available at http://www.mde.state.md.us/Air/RGGI.asp.
Nickels and was announced on February 16, 2005, the day the Kyoto Protocol took effect in 141 counties. The U.S. Conference of Mayors administers and tracks the agreement. Participating cities commit to urge the U.S. Congress to pass bipartisan greenhouse gas reduction legislation that includes clear timetables and emission limits and a flexible, market-based system of tradeable allowances. In addition, participating cities commit to taking action in their own operations and communities to meet or exceed the Kyoto Protocol targets for reducing greenhouse gas emissions in the United States to 7% below 1990 levels by 2012. As of February 22, 2008, 800 United States mayors had signed the Mayor’s Climate Change Protection Agreement. New York City Mayor Michael Bloomberg is one of thirty mayors in the State of New York to sign the agreement.

The U.S. Conference of Mayors Climate Protection Summits have provided a forum for mayors and local governments to debate the merits of a cap-and-trade system and a carbon tax approach. While the Mayor’s Climate Change Protection Agreement endorses federal cap-and-trade legislation, Mayor Bloomberg has encouraged both Congress and the U.S. Conference of Mayors to consider a direct fee or carbon tax approach.71

In December of 2007, several organizations at the United Nations

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71. On November 2, 2007, Mayor Bloomberg provided the following testimony at a hearing of the House Select Committee of Energy and Global Warming: “The primary flaw of cap-and-trade is economic—price uncertainty, which could have harmful economic effects; while the primary flaw of a pollution fee is political—because proposing new fees is unpopular. But make no mistake: The costs are the same under either system—and if anything, costs might be higher under cap-and-trade, because middlemen would make money off the trades. By charging a direct fee, we could use that revenue to offer a tax cut—for instance, by cutting the payroll tax. I’ve never been one to let short-term politics get in the way of long-term success, and I hope that this committee, as it considers the indirect cap-and-trade approach, will also consider the direct fee approach.” The Mayor’s entire testimony before Congress is available on the Mayor’s Climate Protection web page at: http://www.usmayors.org/climateprotection/documents/testimony/20071102-bloomberg.pdf.

At the U.S. Conference of Mayors Climate Protection Summit, also held on November 2, 2007, Mayor Bloomberg stated: “From where I sit, having spent 15 years on Wall Street and 20 years running my own company, the certainty of a pollution fee—coupled with a tax cut for all Americans—is a much better deal. It would be better for the economy, better for taxpayers, and—given the experiences so far in Europe—it would be better for the environment. The costs are the same under either plan—and if anything, they will be higher under cap-and-trade, because middle-men will be making money off the trades. For the money, a direct fee will generate more long-term savings for consumers, and greater carbon reductions for the environment.” The Mayor’s entire testimony at the Climate Protection Summit is available on the Mayors Climate Protection web page at: http://www.usmayors.org/climateprotection/documents/20071102-bloomberg-speech.pdf.
Climate Change Conference in Bali, Indonesia announced a new agreement known as the World Mayors and Local Governments Climate Protection Agreement. Mayors and local governments that sign this agreement commit to taking additional action to address climate change, including: (i) working to reduce greenhouse gas emissions worldwide by 60% from 1990 levels and in industrial countries by 80% from 1990 levels; and (ii) encouraging their national governments to adopt binding carbon limits to reduce greenhouse gas emissions by at least 60% worldwide below 1990 levels by 2050. Salt Lake City’s Mayor Ross C. “Rocky” Anderson has become the first U.S. mayor to sign this agreement.  

6.2 Preparing a Local Greenhouse Gas Inventory

Another initial step for cities and local governments wishing to take action to address climate change is to perform a local greenhouse gas inventory. Local inventories are intended to identify the largest local sources of greenhouse gases, show trends that may need corrections at the local level, and show impacts of actions taken by local governments.

Over 800 local governments worldwide, including New York City, participate in the Cities for Climate Change Campaign (CCC), a program of the International Council for Local Environmental Initiatives (ICLEI). Among other things, this program provides technical assistance to local governments for conducting community-wide greenhouse gas emission inventories, measuring the impacts of local actions, and developing community strategies for further reducing greenhouse gas emissions. ICLEI reports that greenhouse gas emissions have been reduced by more than 23 million metric tons annually as a result of local climate protection plans and initiatives.

New York City completed a comprehensive inventory of greenhouse gas emissions for both the city as a whole and government operations. The City published the results in April 2007. In 2005 the total emission...
of greenhouse gases in the City equaled 58.3 million metric tons of carbon dioxide equivalents. Although on a per capita basis city residents produce less than one third of the emissions of the average American, the total emissions in the city exceed the emissions of countries such as Norway and Switzerland and represent almost 0.25% of the world’s total greenhouse gases. Between 2000 and 2005, the total emissions in the city increased by almost five percent. Buildings in the city account for 69% of the total emissions, compared to 32% nationally. Transportation accounts for 23% of the total emissions city-wide.

6.3 Planning and Implementing Local Initiatives

Local initiatives to address climate change generally fall into one or more of the following categories: (i) controlling sprawl through land use plans and zoning rules; (ii) influencing energy supplies through control of utilities or negotiations of energy supply agreements; (iii) improving energy efficiency through building codes, grant programs and procurement policies; and (iv) reducing emissions from transportation through investments in public transportation systems, transportation infrastructure, and advanced vehicle technologies.

The Mayors Climate Change Protection Agreement lists twelve specific actions that local governments can take to reduce global warming pollution levels:

1. Inventory global warming emissions in the community, set reduction targets and create an action plan.
2. Adopt and enforce land-use policies that reduce sprawl, preserve open space and create compact, workable urban communities.
3. Promote transportation options such as bicycle trails, commute trip reduction programs, incentives for car pooling and public transit.
4. Increase the use of clean, alternative energy by, for example, investing in “green tags,” advocating for the development of renewable energy resources, recovering landfill methane for energy production, and supporting the use of waste to energy technology.
5. Make energy efficiency a priority through building code improvements, retrofitting city facilities with energy efficient lighting and urging employees to conserve energy and save money.
6. Purchase only Energy Star equipment and appliances for City use.
7. Practice and promote sustainable building practices using U.S. Green Building Council’s LEED\textsuperscript{75} program or a similar system.
8. Increase the average fuel economy of municipal fleet vehicles; reduce the number of vehicles; launch an employee education program including anti-idling messages; and convert diesel vehicles to biodiesel.
9. Evaluate opportunities to increase pump efficiency in water and wastewater systems, and recover wastewater treatment methane for energy production.
10. Increase recycling rates in City operations and in the community.
11. Maintain healthy urban forests and promote tree planting to increase shading and to absorb carbon dioxide.
12. Help educate the public, schools, other jurisdictions, professional associations, businesses and industry about reducing global warming pollution.

New York City’s Plan for reducing greenhouse gas emissions is part of the broader plan announced for the City by Mayor Bloomberg in April 2007. Known as PlaNYC, the plan includes initiatives for both reducing greenhouse gas and adapting to climate change. Because buildings were the largest single category of greenhouse gas emitters, much of the City’s plan for reducing emissions focuses on buildings. Approximately 50% of the reductions under the City’s plan will come from efficiencies in buildings. The plan also seeks to reduce emissions by 32% from improved power generation and 18% from sustainable transportation programs. The overall goal of New York City’s plan is to reduce citywide carbon emissions by 30% below 2005 levels by 2030. The specific elements of the plan to reduce greenhouse gas emissions are:

1. Avoid Sprawl
   - Create sustainable, affordable housing
   - Provide parks near all New Yorkers
   - Expand and improve mass transit
   - Reclaim contaminated land

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- Open waterways to recreation
- Ensure a reliable water and energy supply
- Plant trees to create a healthier and more beautiful public realm

2. Clean Power
   - Replace inefficient power plants with state-of-the-art technology
   - Expand Clean Distributed Generation
   - Promote Renewable Power

3. Efficient Buildings
   - Improve energy efficiency of existing buildings
   - Require efficient new buildings
   - Increase efficiency in appliances
   - Green the City’s building and energy codes
   - Increase energy awareness through education and training

4. Sustainable Transportation
   - Reduce vehicle use by improved public transit
   - Improve the efficiency of private vehicles, taxis, and black cars
   - Decrease carbon dioxide intensity of fuels

New York City also is one of five U.S. cities participating in the Clinton Climate Change Initiative (CCI), which was launched by Former President Clinton in August 2006. CCI applies a business-oriented approach to respond to climate change in practical, measurable, and significant ways. Other participating U.S. cities include Los Angeles, Chicago, Philadelphia and Houston. Initially CCI has focused on: (1) creating purchasing consortiums to pool the buying power of cities in order to lower the price of energy-efficient products and to accelerate the development of new energy-saving technologies; (ii) mobilizing experts and creating local capacity to develop and implement programs to reduce energy use and greenhouse gas emissions; and (iii) developing common measurements and information tools that will enable cities to track the effectiveness of their programs. In May of 2007 CCI launched its Energy Efficient Building Retrofit Program. This program is a joint effort of city governments, major financial institutions, energy service companies, product suppliers, and green building organizations aimed at significantly reducing energy use in buildings. CCI has partnered with the New York City Housing Au-
authority to retrofit public housing units in order to make them more energy efficient. 76

Actions taken in other cities to address climate changes are described in the U.S. Conference of Mayor's Climate Protection Strategies and Best Practices Guide, 2007 Mayors Climate Protection Summit Edition,77 and in publications by the Pew Center on Climate Change.78

Section 7—Conclusions

Although momentum in the U.S. as well as other countries seems to favor cap-and-trade programs as a market-based mechanism, experiences with many U.S. states and local governments, as well as the European Union demonstrate that a portfolio of carbon control initiatives is necessary to reduce greenhouse gas emissions. Any future federal climate change policy will need to recognize this and allow a blended approach. For example, cap-and-trade and carbon taxation can play an integral role with cap-and-trade programs limited to upstream energy producers while carbon taxes could be imposed downstream on a different sector of the economy. Further, the inherent gaps in any one system could be addressed by another system and inequalities in any one system could be corrected by making all market sectors bear their fair share of a response to climate change. For example, if emissions limits in a cap-and-trade system are not reduced quickly enough, those shortfalls in achieving objectives may be addressed by a renewable energy requirement or by lowered CAFE standards.

While Congress debates appropriate legislation on climate change, it is important that it builds on the successes of U.S. states and local governments, as well as the lessons to be learned from the rest of the international community. For instance, the European experience can inform our design of a federal cap-and-trade program to avoid price volatility. The ETS price volatility that resulted from distorted information could be avoided by collecting complete and accurate baseline emissions data well before trading begins. Price volatility could also be contained if the total number of allowances reflecting reduction targets are finalized and known before trading begins. Another factor affecting market stability includes the length of the trading period which should be as long-term as pos-

77. U.S. Conference of Mayor’s Reports referenced in this chapter are available from the Mayor’s Climate Protection Center’s web page at http://www.usmayors.org/climateprotection.
78. See PEW CENTER ON GLOBAL CLIMATE CHANGE, supra note 73.
sible.\(^{79}\) Most if not all allowances in a cap-and-trade program should be auctioned as proposed in the RGGI system, in which New York, Massachusetts, Maine and Vermont committed to auctioning almost 100% of allowances. Given that many U.S. states and local governments have led the way to reduce emissions, through such measures as renewable portfolio standards in effect in 25 states,\(^{80}\) research into new carbon control methods, and the use of offsets such as carbon sequestration and reforestation, Congress should examine how it can build on and support promising state and local efforts.

Other pollutants are currently regulated under a command and control system of traditional regulations that mandate the emissions limits or technologies that must be used to limit emissions. The drawback of a command and control system is that some industry sectors are required to use expensive control methods while other industry sectors are not required to implement even inexpensive methods.\(^{81}\) As a result, a command and control system is widely viewed as the least cost effective way of reducing carbon emissions. However, command and control systems are easily understood and have public support. In a poll conducted in 2007, Stanford University, New Scientist and Resources for the Future researchers found that the American public has a preference for command and control regulation rather than either cap-and-trade or carbon taxation.\(^{82}\) While the study did not confirm the reasons, it suggests that command and control solutions should not be ignored.

While we make no recommendation on the use of nuclear energy, it is worth noting that there is renewed interest in nuclear generation because it does not result in greenhouse gas emissions.

May 2008

\(^{79}\) This view is shared by several U.S. climate policy experts, including Resources for the Future and the Center for American Progress.


Committee on Environmental Law

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EXECUTIVE SUMMARY

- The Construction Law Committee, like other Committees before it, believes that mandatory multiple prime contracting has no place in modern public construction and that the entire statutory scheme for public procurement must be overhauled to promote flexibility and innovation and reflect contemporary trends in service delivery methodology.

- This Committee, however, further believes the State must engage in a rigorous review of the entire statutory scheme for construction and its products, both publicly and privately financed, to bring New York’s construction industry into the 21st century, unleashing its economic potential.

- In view of the changed political landscape, evidenced by the proposed amendments to the Wicks Law, the Construction Law Committee urges the State Legislature and the Governor to convene a multi-disciplinary, professionalized task force to study the entire statutory scheme covering construction in New York with a view to proposing reforms to help make the industry more efficient for the benefit of the State and local economies.

- This report initially summarizes areas untouched by the proposed amendments to the Wicks Bill that create opportunities for reform and increased efficiencies. The objectives sought by New York’s construction laws, many adopted long before the end of the last century, are valid and worthwhile. Well-inten-
tioned provisions unexamined over time, however, can have unintended, and unaffordable, negative economic consequences.

- The following section describes the close relation of the construction industry to the economy and how the various roles of government give rise to opportunities for the State to increase the efficiency of the construction industry as one way to increase the efficiency of the State and local economies. The fragmented nature of the construction industry makes government action a necessary condition for significant improvement.

- Committee observations, both past and present, accompany descriptions of the provisions of the proposed Wicks Law reform in the third section. What was true in 1986, when the Municipal Law Committee noted that “[t]he construction industry has changed dramatically in the past sixty-five years,” is truer still today, some 22 years later.

- The State of New York, in its economic policy role, should strive to permit the State and its local governments, in their role as owner and client, to have flexibility in deciding, like private owners, what service delivery method is appropriate for their various capital projects. Public procurement law is not an efficient tool for regulating the economics of the industry, and the fourth section discusses possible public procurement reforms beyond the proposed reform of the Wicks Law. As a model for change in this area, the Construction Law Committee suggests review and consideration of the 2000 Update to the American Bar Association’s Model Procurement Code.

- The construction industry is an important component of overall economic performance and competitiveness, and appropriate governmental intervention can help to increase its efficiency, as discussed in the final section. Achieving the greatest possible level of efficiency will require review and reform of all regulations affecting construction industry performance. To that end, the Construction Law Committee suggests consideration of the recent approach taken in Great Britain.

Untapped Opportunities for Economic Growth Beyond Wicks Bill

The Governor’s 2007 Program Bill 37 R-1, which initially sought to raise the threshold amount triggering the application of the Wicks Law,¹

¹. The Wicks Law, named after State Senator Alfred H. Wicks, is a collective reference to three separate laws requiring multiple prime contracting. The multiple prime contractor requirement first became effective for the State in 1909, and, after an interim repeal, it was re-enacted.
was introduced in the Senate and the Assembly on April 26, 2007. On June 14, 2007, the Governor, the Assembly Speaker and the Senate Majority Leader announced an agreement to amend Wicks Law provisions (the “Wicks Bill”).\(^2\) While the Assembly passed the Wicks Bill, the Senate did not.\(^3\) Part of the Governor’s 2008 program legislation, introduced in the Senate and the Assembly on January 22, 2008, repeats the elements the Wicks Bill and adds other provisions collectively aimed at facilitating “local government cost saving efforts by providing relief from certain State mandates.”\(^4\)


2. The following discussion of the Wicks Bill is derived from the 2007 negotiated version, which has been incorporated in its entirety into the Governor’s 2008 program legislation. Unless otherwise noted, the source for the following discussion of the particulars of the Wicks Bill is the memorandum accompanying the program legislation.


4. Senate Bill 6808/Assembly Bill 9806, Public Protection and General Government, Part Q (“2008 Proposal”), §§ 1-19; Memorandum in Support. The Governor established the Commission on Local Government Efficiency and Competitiveness in April 2007 to “make recommendations on the measures we must adopt to facilitate and expedite partnership among State and local governments to improve the effectiveness and efficiency of local governments.” (From Governor’s letter, dated April 23, 2007, to local government officials.)

Other provisions of the 2008 Proposal would raise, from $10,000 to $50,000, the threshold requiring that awards for public works contracts be made to the lowest responsible bidder after advertisement for sealed bids; as well as raise from $10,000 to $20,000, the threshold requiring the same for purchase contracts. (§ 21)

The 2008 Proposal would also permit, for purchase contracts but not for construction, local governments to make an award based on best value instead of lowest responsible price, taking other factors such as quality and efficiency into account. (§ 22; see State Finance Law, § 163).

A few other states, however, permit awards for construction based on some conception of value that is broader than price. Kansas permits the state, for competitively bid construction projects, to consider cost factors other than the initial purchase price when determining the lowest bidder and may consider a “cost-value” model that includes factors such as compatibility, capability, growth and contractor support. Minnesota permits the state to award construction contracts on the basis of best value, taking into account, among other factors, environmental considerations, quality and vendor performance, in addition to price. And, Texas permits the state and some local governments to use best value to determine which of several available service delivery methods/procurement methods to use for construction projects.

(Source: Love, Michael K. and Douglas L. Patin, editors. State Public Construction Law Source Book. (Chicago: CCH Incorporated, 2002)). The survey of the 50 states in this report was limited to review of this volume, published in 2002; thus, any discussion, in this report, of construction law outside New York does not reflect any changes in law since 2002. To the
The State’s multiple prime contractor requirement, a variation of the design-bid-build service delivery model, is one part of an overall set of procurement procedures for public construction projects that is old and inflexible, inefficient and costly, and that often fails to meet the needs of the construction projects themselves and their public owners. While most states permit multiple prime contractor bidding, New York State is one of a handful of states that mandate such bidding on public works.

New York State expresses public procurement of construction services in terms of “contracts for public works.” (See General Municipal Law, § 103) This particular expression linked to the requirement of lowest price reduces the construction of infrastructure or a structure to a standard commodity or good, the price of which is the only meaningful distinguishing feature. The reality behind this view of construction was much truer when these provisions were adopted than they are today. When building technology was much simpler than it is now, it was more likely that final detailed plans and drawings upon which the bids were made were sufficiently complete and accurate to render unnecessary any further application of discretion, skill and professional judgment on the part of the contractor. Modern building technology has made final specifications, upon which the bids are made, relatively less final and complete, exposing the contractor to the risk of having to apply professional skills and make judgments for which it is not compensated in the lowest price procurement model. Further, it should be noted that protecting the public fisc over the period of time a project is constructed and operating requires an evaluation of costs, in addition to the initial construction costs, that are directly related to the quality of design and construction.

5. Multiple prime contracting is a variation on the design-bid-build model of construction service delivery, in which the owner holds separate contracts with specialized contractors and has the responsibility of managing, or hiring someone to manage the project schedule and budget. Benefits of multiple prime contracting can include facilitating “fast-tracking” and flexibility because contracts can be awarded as soon as respective aspect of design is complete, giving the owner more control over project schedule because owner can set bidding schedule and avoiding contractor mark up because the owner can directly procure major material items. The disadvantages, in the multiple prime arrangement, flow from the general contractor’s lack of contractual responsibility to coordinate work among trades, which often impacts the schedule, generating delay; in addition, the final project cost cannot known until last prime contract is awarded. (Source: AECOM materials on Program Management Overview, November 30, 2005, and the Construction Management Association of America (CMAA) website (http://www.cmaanet.org) Choosing the Best Delivery Method for Your Project.)

6. Nevada, North Dakota, Ohio and Pennsylvania mandate multiple prime contracts for public works in a manner similar to that of New York. Most states have no statutes on the issue and thus expressly neither authorize nor prohibit multiple prime contracting. Delaware allows it where appropriate, and recent state authorization of alternatives to competitive bidding is thought to permit it in Maine. New Jersey and North Carolina expressly authorize multiple prime contracting as an option. Illinois authorizes it, but the supervening principle...
Public procurement accounts for such a large proportion of the total work of the construction industry\(^7\) that it is understandable to focus initially on reforming public procurement to fix what many think is wrong with the construction industry and unleash its potential economic activity and growth. As a reform of a small, but counterproductive, part of the public procurement process, the Wicks Bill represents advancement in the right direction.\(^8\) Within the context of public construction, however, the State must do more for itself and its localities to make public capital programs more efficient, especially when economic forecasts forecast lower revenues and recent infrastructure assessments forecast increased capital needs.\(^9\) Broader and deeper reform of the public procurement processes would enable the State and its localities to avoid future costs related to construction delays and inefficiencies now caused by such processes. They would thus be able to stretch available resources to meet capital needs and reduce pressure on long-term sources of revenue, such as real property taxes, used to pay the debt that finances project costs. The Wicks Bill is a good starting point for broader and deeper reform of the entire public procurement statutory scheme. As described in further detail in this report, the 2000 Update to Model Procurement Code\(^10\) provides an approach of competitive bidding requires that multiple awards not be made when it is clear that a single award would fully serve state needs. In Kansas, which also authorizes multiple prime contracting, one of the multiple primes must be designated the prime contractor who is responsible for coordinating all the work. (Source: Love and Patin).


8. In the related press release, dated June 14, 2007, the Governor noted that the Wicks Bill was “a positive step forward in addressing the underlying structural problems that have negatively impacted our state’s competitiveness.” The Governor claimed that this recalibration would automatically exempt “more than 70 percent public works projects” in the State.


we suggest the Legislature and Governor review to deepen reform of the statutory scheme for public procurement of construction. A summary of the 2000 Update is included in Appendix A.

Without minimizing the impact of the State’s antiquated public procurement scheme on the economy, there is, however, more to the statutory scheme for the construction industry than public procurement alone. The State and its local governments regulate construction industry participants and the products of construction for various public policy objectives including occupational and public safety concerns, environmental impacts, professional and trade standards and licensing, business qualifications, and insurance requirements. In view of the close connection among the construction industry, its products and the economy, all laws and regulations—whether State or local—that govern both public and private construction participants and products present rich opportunities for the State to improve the productivity of the construction industry in New York to benefit the State’s economy and competitive position, and those of the regions within it.11 Per-worker productivity within the nation’s construction industry has been declining since 1964, in contrast to the aggregate industrial productivity increase.12 Government intervention may reduce or remove many suspected causes of this decrease in productivity. As described in further detail in this report, the British have been engaged in a multi-disciplinary review, which includes economic analysis, of the construction industry and its products. This experience provides an approach, as well as a treasure trove of analytical work, that we suggest the Legislature and Governor review to commence reform of the construction industry in New York.13 A summary of the British approach is included in Appendix B.

11. Construction projects are, from an economic perspective, products of the construction industry. The products of construction consist of structures, ranging from private residential and commercial buildings to public building of all kinds, and infrastructure, ranging from private and public utility facilities to roads and highways. The intuitive sense that constructed projects can have a positive impact on the related economy underlies economic development programs and law. Yet, there has been less quantitative analysis of the relationship between the products of construction and the economy than of the relationship between the construction sector and the economy, which is fairly well understood. As a result of the change initiatives sponsored by the British government described in this report, however, the quantity of such analysis has increased.

12. Patton, op. cit., p. 66. “American industries have, in aggregate, increased the productivity of each worker by about 250 percent since 1964, according to the U.S. Bureau of Labor Statistics. But in the same time period, per-worker productivity in the construction industry dropped by 22 percent.” Idem

13. Present use by the New York City’s Department of Design and Construction (DDC) of Design Quality Indicators, quality metrics developed in Great Britain, in DDC’s Design +
The political pragmatism reflected in the Wicks Bill suggests that the political landscape has changed sufficiently to support a long-needed high-level analysis of the economic potential of the construction industry locked within the statutory scheme that governs it. Having waited until now to undertake such a review may actually increase its chances of ultimate success in supporting reform of the entire statutory scheme to reflect 21st century realities. The Wicks Law has long been the poster child for inefficiency in public works procurement, generating such conflict among stakeholders that any discussion about such reform has precluded any discussion about broader reform. The agreement reached last summer may indicate a reduction in the level of conflict since 1994, the last time serious legislation on the Wicks Law was pending, which offers a good opportunity to achieve broader reform as stakeholders are more open to policy analysis and may be more willing to shift positions on the basis of analysis. In addition, moderate levels of agreement on analytical theory, technique and data since 1994 also increase the likelihood of generating feasible options grounded in quantitative analysis.

Construction Excellence program, indicates the transferability of concepts and quantitative data from the British experience for New York State purposes.

14. Beginning in 1981, while the City was in a “control period” under the Financial Emergency Act and subject to rigorous external oversight, the City began to define its construction problem as a Wicks Law problem, in Wicks Law Reform and Effective Management of Public Construction, which was followed in 1984 by Wicks Law Repeal: A Public Construction Necessity. These reports were accompanied by quantitative data. In 1986, the year the City emerged from a control period to a sunset period under the Act, with lower levels of external oversight, the City released Wick$ Waste$. During these years and beyond, reform of the Wicks Law was quantified and inserted into the City’s budget, as a significant part of the City’s Program to Eliminate the Gap and a standard bearer in the City’s legislative agenda with the State. The City’s success in defining the Wicks Law as the sole cause of its problems in executing its capital program was matched by increased levels of conflict among stakeholders on this issue, rendering resolution not then possible.


16. Jenkins-Smith, op. cit., p. 103. For example, analytical work emerging from Great Britain that has begun to quantify intangible benefits to owners and the public of the products of construction, such as added value from excellence in design, has been matched by work here, especially in New York. See Sallette, Marc A. The Economic Value of Investing in Architecture and Design, University of Chicago Graduate School of Business, unpublished paper, March 19, 2003, p. 2; also, Macmillan, Sebastian. “Added Value of Good Design,” Building Research & Information (2006), pp. 258-259, citing Pearce, David. The Social and Economic Value of the Built Environment, Construction Research and Innovation Strategy Panel (2003). See also Schwartz, Amy Ellen, Ingrid Gould Ellen, Michael H. Schill and Ioan Voicu, “The External Effects of Place-
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New York State, in its various roles of "client, regulator, policy-maker and a sponsor of change,"17 has the opportunity, and obligation, to lead the nation by reforming its construction law. "[T]he sheer scale of the problems to be resolved" cannot be underestimated as another factor prohibiting a comprehensive review of the statutory scheme related to construction, despite its close connection to the economy.18 But what was true in 1986, when the Municipal Law Committee noted that "[t]he construction industry has changed dramatically in the past sixty-five years," is truer still today, some 22 years later. Regardless of whether the Wicks Bill provisions are adopted in 2008, we strongly recommend that the Governor and the Legislature establish a non-partisan professionalized task force19 to expand the scope of their initial inquiry beyond the Wicks Bill

17. Myers, op. cit., p. 15.
18. Ibid., p. 159.
19. A policy forum initially limited to participants on the basis of professional or technical competence increases the chance that policy recommendations will be feasible and informed by credible policy analysis because they share common bases to assess analytical claims. Jenkins-Smith, op. cit., p. 103. The British government has used the professionalized task force approach in this area to great effect, as described in greater detail throughout this report.

"A recurring recommendation is the need for the construction process to be viewed in a holistic way by a multidisciplinary team. This reflects the fact that construction draws knowledge from many areas, and an important but undervalued area is economics." Myers, op. cit., p. 7. See also LePatner, Barry B., "Our Dysfunctional Construction Industry: How Did It Ever Get to This," LePatner Report, Volume 26, No. 1 (Spring 2006), p. 2 (from website: http://www.lepatner.com). Members of the design professions, by virtue of their place in the construction supply chain, have an "overview of the entire project," a perspective that would be critical to any such review. Royal Institute of British Architects (RIBA), "Architects and the Changing Construction Industry," p. 3 (leaflet enclosed in July 2000 issue of the RIBA Journal).

While many in New York politics might decry the task force approach as a time-honored way to avoid change, commencing a change effort in the construction industry with a professionalized task force has had some proven success in Great Britain as a way of promoting innovation in this area. "A particular strength of [the British approach] was that they did not try to prescribe what should be done but invited innovation while offering a context in which it can take place, be evaluated and shared." Ibid., p. 3.

Another successful example, closer to home, of the professional task force approach to reform a complex area via analytically-based consensus, has been the New York City Department of Building’s approach to reforming the New York City Building Codes. A construction industry task force in New York could support ongoing work of the Commission on Local Government Efficiency and Competitiveness because much of the existing public procurement process operates as unfunded mandates, as well as the newly proposed property tax...
and use tools of economic analysis, among those of other disciplines, to reform the entire statutory scheme for construction and bring New York’s construction industry into the 21st century, unleashing needed economic potential. The objectives sought by New York’s construction laws, many adopted long before the end of the last century, are valid and worthwhile. Well-intentioned provisions unexamined over time, however, can have unintended, and unaffordable, negative economic consequences.

**Construction and the Economy**

The construction process, its inputs and its products are not solely the subject of legal analysis. The construction industry “…makes an important contribution to a country’s economic, social and environmental well being,” topics well suited to a broad analytical review, so that a prospective legislative framework can increase productive economic efficiency. Not only does the construction industry, however defined, directly contribute to the State’s economy and its gross state product, but...
its processes, employees and products also provide an additional secondary economic impact. For a sense of magnitude, in 2006, according to the U.S. Bureau of Economic Analysis, the output of the construction industry represented approximately 3.1 percent of New York’s gross state product. The secondary impact of construction activity on an economy, termed the “multiplier effect,” is the positive increase in an economy’s income due to the related increase in expenditure. General economic conditions determine the demand for construction services, and fluctuations in the performance of both the general economy and the construction industry share a similar pattern. Thus, legislative changes affecting construction have the potential to impact positively, if thoughtfully analyzed, the future of the State’s long-term economic condition and industrial competitiveness, as well as those of its local governments, all of which are currently concerns of both the Governor and the Legislature.

As discussed in greater detail below, the various roles of State government give rise to many points of opportunity to increase the efficiency of the construction industry as one way to increase the efficiency of the State and local economies. For example, to the extent the State’s public

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23. Lipsey, Richard G. and Peter O. Steiner, Economics, 4/e (New York: Harper & Row, 1975), p. 539. “The change in expenditure might come, for example, from an increase in private investment, from new government spending, or from additional household consumption expenditure accompanied by a decline in household savings.” Idem. Again, for a sense of magnitude, a private industry estimate of the construction industry’s multiplier effects in New York suggests it could be 1.63 in the State and 1.40 in New York City.

24. Construction demand is considered a derived demand, “... in as much as the goods are not necessarily demanded in their own right but for what they can add to the final good or service being produced.” Myers, op. cit., p. 50. Known as “investment goods”, these include both private sector commercial and residential projects, as well as public sector infrastructure and structure projects. State and local governments procure construction as part of effecting their public works—or public goods—programs, generating a significant portion of the construction industry’s work. Thus, the capital programs of all State and local government entities function as a demand management tool for the State. Ibid., pp. 191, 193, 201-203.

25. Ibid., pp. 7, 190. The performance of the construction industry is conceptualized as a building cycle, and it is thought that studying building cycles, in view of the strong relationship between the building and business cycles, “... may contribute to a better understanding of business fluctuations.” Ibid., p. 190. At the same time, however, changes in the building cycle—both expansion and contraction—are thus more volatile than those in the general business cycle, giving statutory changes the potential for great economic impact in both directions. Ibid., pp. 190-191.


27. Myers, op. cit., p. 15.
construction laws limit the efficient provision of social goods through the State and local public works programs, government cannot use its own public capital funds efficiently. As a general matter, government leadership and intervention are necessary to unleash the economic potential within the construction industry due to its particular nature as a fragmented industry.28 Similarly, to the extent that unexamined State and local government regulations create regulatory complexities that operate as inadvertent barriers to effective competition in an already fragmented construction market, they unnecessarily limit the positive impact of construction on the economy. Existing traditional health and safety regulations of the industry and its products present opportunities for government to calibrate regulations aimed at what economists term “externalities” while increasing economic efficiency. Recent developments in the way we understand environmental impacts of construction and its products, as well as the way we understand the impact of design quality on the built environment, provide additional opportunities.

The fragmented nature of the construction industry makes government sponsorship a necessary condition for significant improvement. 29 Since positive change is unlikely in the absence of government intervention, it is important to identify the most effective level of government to undertake this effort. In New York, the state level may be the most appropriate and effective level of government to effect reform of the construction industry and its products to maximize economic effect. From a legal perspective, in states where municipal home rule is either not allowed or, as in the case of New York, not particularly effective, it is necessary for the State to act on behalf of its localities in certain areas, such as, in particular, reforming public procurement. 30 From an economic perspective, the

29. Fairclough, op. cit., p. 14-15. The construction industry “is dominated by a large number of relatively small firms, spread over a vast geographical area.” Myers, p. 7. The construction industry within any jurisdiction “. . . is concerned with producing and maintaining a wide variety of durable buildings and structures, and as a consequence, [contains] many construction markets.” Myers, p. 10. Further, as a highly fragmented market dominated by small firms, “[t]he type of construction—particularly in terms of its size and complexity, its geographical location, and the nature of the client—will define the market in each case.” Myers, op. cit., p. 10, citing Drew and Skitmore (1997: 470).
30. See Cole, James D. “Constitutional Home Rule in New York: The Ghost of Home Rule”, St. John’s Law Review, 1985, Vol. 59, pp. 713-749. For example, were a New York local government, even a large one such as New York, interested in improving its local economy by making its capital program more efficient and effective, existing State law governing public
procurement precludes most local legislation on the topic, thus limiting the scope or effectiveness of such local efforts. Thus, it would be necessary in New York for the State to reform the public construction law for its local governments, as well as for itself.

31. Musgrave and Musgrave, op. cit., pp. 7-9, 54, 446. As an illustrative example of these public economic concepts, optimal levels of research and development in the construction industry are unlikely to occur without government sponsorship because private funders of research and development cannot exclude others from the benefits of resulting research. But, similar to the private sector that cannot contain the benefits of their funded research and development, local government cannot contain such benefits within its jurisdictional boundaries any better and is unlikely to provide for research and development. Thus, a higher level of government, like the State, is a more likely and appropriate level of government to engage in such activity. The State, concerned with quality and improving the value and economic potential of projects and the built environment, can invest in related construction research and development that would benefit not only its own projects and those of all local governments, but also those of the private sector. As important, investments in research and development among appropriate educational institutions around the State would have further positive economic effects within the related communities. Fairclough, op.cit., pp. 14, 19. See also, LePatner, Barry B., “Construction Technology: Adoption is slow, but hope remains,” LePatner Report, Vol. 26, No. 4 (Winter + Spring 2007), pp. 1-2 (from website: http://www.lepatner.com)

Commentary on Proposed 2007 Changes to the Wicks Law

After reviewing the Wicks Bill, this Construction Law Committee shares concerns similar to those expressed in the past by the 1986 Municipal Law Committee and the 1994 Construction Law Committee. The Wicks Bill minimizes some of the inefficiencies that come from the Wicks Law, one small part of the larger statutory scheme that covers construction in New York, but does not repeal the multiple prime contractor requirement. The Committee on Municipal Affairs, in 1986, supported the then governor's proposed legislation that would have largely, though not entirely, eliminated Wicks Law requirements. The title of its report, “The Wicks Law: Repeal it Now,” suggests the preference of that Committee. In 1994, eight years later, three bills were pending in Albany, in the context of the statutory expiration of the New York City School Construction Authority's exemption from the Wicks Law, all of which fell short of complete repeal. The 1994 Construction Law Committee, as befitting its specialization, span of government action should correlate with the physical or spatial dimensions of the positive and negative externalities emanating from the private activities it seeks to correct.  

And, as described in greater detail below, only the State can properly evaluate and mitigate the complexities generated by the various local regulations on the construction industry and products, especially those that contribute to the fragmentation of the industry itself.
expressly identified, as the optimal legislative solution, in addition to repealing the Wicks Law, increasing the ability of public owners to match procurement or “service delivery” methods to actual project construction needs.\textsuperscript{32} The Committee noted “that no single superior procurement method exists, but rather several alternate techniques can be used . . . to optimize [the] chances of successfully obtaining new construction.”\textsuperscript{33}

By 1994, if not before, multiple prime contracting had lost favor as tool within the building industry because the owner’s need to coordinate the prime contractors significantly increases the risk to a project’s schedule and, thus, budget. The risk is exacerbated on projects where the owner does not have internal capacity, or the extra funds to procure outside services, to manage such coordination. This is often the case for public works programs. In New York, the Wicks Law forces public owners to use the multiple prime tool, regardless of internal competencies and capacities, increasing the risk of delay and added costs, in a budget environment of limited resources and increasing needs “to provide and maintain the infrastructure necessary to sustain our economy and permit economic growth.”\textsuperscript{34}

The Wicks Bill would “recalibrate” the threshold amounts that require public owners to bid public works to four separate or “prime” contractors for the following trades—general construction, plumbing, electrical and heating, ventilation and air conditioning. The current threshold of $50,000 applies to all State and local government contracts and was itself a recalibration from 1921, when the Wicks Law was first enacted. The proposed thresholds are: $500,000 for all upstate counties, $1,500,000 for Nassau, Suffolk and Westchester Counties and $3,000,000 for New York City\textsuperscript{35} and are intended to reflect changes in the economy


\textsuperscript{34} Ibid., p. 5.

\textsuperscript{35} Wicks Bill, Sections 1 and 2, amending the General Municipal Law; § 3, amending the State Finance Law; § 4, amending the Public Housing Law; §§ 5 and 6, amending the Education Law; §§ 7 and 8, amending the Public Authorities Law relating to the New York City Water Finance Authority; § 9, amending the Public Authorities Law relating to Westchester County Health Care Corporation; § 10, amending the Public Authorities Law relating to Nassau Health Care Corporation; § 11, amending the Public Authorities Law relating to Clifton-Fine Health Care Corporation; § 12, amending the Public Authorities Law relating to Erie County; § 13, amending Chapter 560 of the Laws of 1980 relating to New York City’s solid waste management plans; and, § 14, amending the Public Authorities Law relating to the Dormitory Authority of the State of New York.
since 1961 and 1964, when they were last adjusted. It is suggested that the lag in adjustment since the 1960s and rising costs of construction and real estate have subjected a larger proportion of projects to the Wicks Law requirements than had been the case when the law was originally adopted and over 40 years ago when it was last adjusted. The 1994 Construction Law Committee deemed raising the threshold via an automatic indexing process an improvement to the then current environment, but noted this provision did nothing to improve procurement efficiency.36

In addition to increasing the proportion of public works automatically exempt from the multiple prime contractor requirement, the Wicks Bill would also create a process for public owners to remove a project, not automatically exempt, from the multiple prime contractor requirement.37 The proposed legislation first would specifically authorize project labor agreements38 and then would authorize a public owner to determine that its interest in achieving expressed standard public procurement objectives is best met by requiring a project labor agreement.39 Following such determination, the public owner would then be able to craft a solicitation for a single general contractor in the context of a mandatory project labor agreement. Any project thus exempt from the multiple prime contractor requirement would be deemed a public works project and subject to prevailing wage requirements, among others. Any contract40 between the public

37. Wicks Bill, § 18.
38. There is currently no statutory authorization for project labor agreements in New York. The court, in New York State Chapter, Inc. v. New York State Thruway Authority, 88 N.Y.2d 56 (1996), held that existing public procurement law did not prohibit project labor agreements, but that such law required public owners to demonstrate that a project labor agreement satisfy the expressed public purposes underlying such statutes; namely, fiscal prudence and prevention of favoritism, improvidence, fraud and corruption. Other decisions have elaborated on various issues related to the consonance of a particular project labor agreement and the expressed public purposes of existing public procurement law.
39. In a project labor agreement, the project owner (public or private) or the contractor and the various trades for required for the project, represented by the relevant unions, agree to various working terms and conditions in advance of bidding for the project. The terms and conditions cover working conditions, including wages and work rules. They also include dispute resolution procedures because they typically include a promise by the unions not to strike. The terms and conditions would apply to all winning bidders for the project regardless of whether their workers are unionized. U.S. Office of Management and Budget, “Statement of John Koskinen, Deputy Director for Management, Before the Committee on Labor and Human Resources, U.S. Senate,” April 30, 1997.
40. Contract would include subcontract, lease, grant, bond, covenant, or other agreement for a project undertaken pursuant to the exemption-from-Wicks process.
owner and general contractor for an exempt project would need to conform to additional statutory provisions, such as those related to the public owner’s review and approval responsibility for project, design and construction standards, payment and performance bonds, standards for selection of contractors and subcontractors, and apprentice training programs.

The exemption of a project from Wicks Law, either via the threshold provision or the project labor provision, would also remove one of two statutory impediments to public owners’ use of a variety of construction management techniques.\footnote{41} For all projects exempt from the Wicks Law requirements, the Wicks Bill would add a listing requirement, similar to those in effect in several other states,\footnote{42} to protect subcontractors from “bid shopping” and “bid negotiation”\footnote{43} by the general contractor. It would require a single prime contractor to submit a separate sealed list naming each subcontractor and related subcontract price with its bid. Upon award to a single prime, the corresponding sealed list would be made public and effective. The single contractor would need to obtain permission from the public owner to change a listed subcontractor or an approved subcontract price based upon showing a “legitimate construction need for such change” which would include, among other things, changes to projects specifications and changes in construction materials costs.\footnote{44} The 1994 Construction Law Committee had surveyed New York case law, revealing a view of the marketplace where bid shopping and bid negotiation are legitimate activities, within certain constraints. Prime contractors use the competitive marketplace to test for best possible prices, which ultimately benefits owners, both private and public.

\footnote{41} The other statutory impediment is the requirement for public bidding and award to the lowest price. (General Municipal Law, Section 103(1))

\footnote{42} Wicks Bill, § 2 with respect to local governments. Many states have some form of subcontractor listing requirements: Alaska, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Nebraska, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, Utah, Washington and West Virginia. Maine has a subcontractor bid depositary system and Massachusetts has a filed sub-bid requirement. (Source: Love and Patin)

\footnote{43} Bid shopping occurs when a general contractor seeks “bids from subcontractors other than the one whose bid amount the general contractor used in calculating its own bid, and often involves the general’s informing the other subcontractor of the amount of the low bid and inviting them to undercut it.” Bid negotiation occurs when the general contractor attempts “to negotiate a lower price than that bid from the subcontractor whose bid figure the general employed in calculating its own bid, frequently by threatening to subcontract the work to a third-party.” Construction Law Committee, op. cit., p. 9.

\footnote{44} This requirement would be similar to that of the New York City School Construction Authority (SCA), except that it would provide a process for changing listed subcontractors while the SCA listing requirement does not. (Public Authorities Law, Section 1735(3))
Under New York law, public owners themselves can also use the competitive marketplace to test for best value under certain circumstances and within certain limits. This view is at odds with that of other jurisdictions, and the 1994 Committee identified several states, which provided statutory protection for subcontractors within a single prime environment. While the Committee reiterated a legitimate basis for bid shopping and bid negotiation by public owners—namely, “achieving the most efficient possible procurement of construction”—it also found that “concern for the fairness of the process would justify some protection for subcontractors against these practices.”

The Wicks Bill would also provide additional protection for all subcontractors by tightening up the existing prompt payment rule, similar to those in several other states, by reducing the number of days, from 15 to seven days after receipt of payment from the public owner, within which the general contractor must pay the subcontractors and materialmen. In addition, the Commissioner of Labor would have the power to enforce compliance with the Wicks Law by issuing a stop bid order whenever he determines that a public owner subject to the multiple prime contractor requirement has failed to prepare separate specifications.

46. Idem. This report summarized New York case law supporting a “Catch 22”-like situation for the subcontractor that is neither correctable under present case law nor subject to collective practices. Subcontractors may be held to their bid and prices quoted in bid to the general contractor under principles of promissory estoppel, but promissory estoppel principles do not bind the general contractor to use the subcontractor who provided the quotes or the quoted figures themselves. One reason for the historical resistance to Wicks reform is that the Wicks Law, while not an economically-based solution to this situation, does provide protection to those contractors subject to its provisions. While subcontractor listing requirements are the typical solution to this situation, decisions in Arizona, Connecticut, Florida and North Carolina have been more sensitive to this “Catch 22”-like situation. (Source: Love and Patin)
47. Construction Law Committee, op. cit., p. 14. The existence of an economic justification for the practices of bid shopping and bid negotiation suggests an opportunity for economic analysis to evaluate and compare the costs and benefits of the existing situation with those of the proposed change.
48. Wicks Bill, §§ 15 and 16, respectively amending General Municipal Law and State Finance Law. Of the majority of states that enumerate the number of days within which the general contractor must pay the subcontractors, ten states require payment within seven or fewer days from receipt by the owner—Arizona, Colorado, Maine, Montana, New Mexico, North Carolina, South Carolina, Texas, Vermont, Virginia and Wisconsin. (Source: Love and Patin) The Wicks Bill would eliminate New York City’s current exemption from the State law prompt payment provision because other New York public owners subject to the Wicks Bill would be following the practice now required of the City.
49. Wicks Bill, § 19.
Finally, in a provision conceptually unrelated to reform of multiple prime contracting, the Wicks Bill would authorize a pre-qualification procedure for local governments, which currently lack general state authorization for pre-qualification of public works contractors.\textsuperscript{50} The benefits of pre-qualifying contractors, within the traditional design-bid-build model, include permitting the owner to consider qualifications, experience and past performance, in addition to price, thus increasing the chance that selected contractors are capable of providing quality construction.\textsuperscript{51} This proposed change is consistent with a small number of states that either require or permit pre-qualification of contractors prior to bidding.\textsuperscript{52}

**Public Procurement Law and Government as Owner and Client**

When assessing the role of government as an owner and client, it is sometimes difficult to disentangle this role from its concurrent and unique roles of economic policy maker and regulator. Government is an owner and client of construction services that implement its capital program. The public works or capital programs of all levels of government are, in essence, work orders for facilities relating to "social" or "public" goods and to "mixed goods" that correct for negative and positive externalities.\textsuperscript{53} In addition, by allocating capital fund resources to public goods

\textsuperscript{50} Wicks Bill, § 1-a, amending the General Municipal Law.

\textsuperscript{51} AECOM, \textit{op. cit.}; CMAA, \textit{op. cit.} This pre-qualification authorization would be permissive in a manner similar to that of the SCA; and, there is substantial overlap between the two sets of criteria for evaluation of contractors for pre-qualification. The Wick’s Bill qualification criteria, however, would place additional emphasis on compliance with equal employment opportunity requirements and health and safety experience, in a manner similar to that of the Coordinated Construction Act for Lower Manhattan. (Unconsolidated Laws of New York, 2004 Regular Session, Chapter 24, § 4)

\textsuperscript{52} Prequalification is required to some degree, most often for highway projects, in many states. Alabama, Colorado, Connecticut, Indiana, Maine, Massachusetts and Washington mandate it in various circumstances, while Kansas permits it. (Source: Love and Patin)

\textsuperscript{53} \textit{Op. cit.}, Musgrave and Musgrave, pp. 5-9, 41-58, 446-453; \textit{op. cit.}, Myers, pp. 39-40, 147-159, 184-186, 191. Public welfare economics deems government to be the appropriate actor to correct for market failures in efficiently producing—or allocating resources for the production of—the politically desired levels of pure social goods and services as well as correcting for negative and positive externalities with mixed social goods and services. One only has to review the State and local governments’ capital budgets to easily identify physical manifestations of pure and mixed social goods.

The practical inability to exclude consumers from the benefits of certain goods or services and the inefficiency of such exclusion because consumption by one does not appreciably diminish others’ ability to consume, renders certain goods and services, such as national defense, public safety, roads, highways and light houses, “social” or “public” goods. The
and mixed social goods, a unique function of government, the State and its local governments can produce economic efficiencies to help to stabilize the State and regional economies. Government performs an active management role in the economy when it increases capital spending or strategically targets existing levels; it can also perform such role, when decreases in capital funds are likely, by reforming the existing statutory scheme, at existing or lower funding levels to increase productivity and efficiency.

54. Government, even as approximated at lower state and local levels, performs a macroeconomic stabilization function when it uses budget policy, including the capital budget, “as a means of maintaining high employment, a reasonable degree of price level stability, and an appropriate rate of economic growth...”. Musgrave and Musgrave, op. cit., pp. 113-129; Myers, op. cit., pp. 181-192.

55. While economic efficiencies are distinct from budget efficiencies, both could come from similar activities. With respect to the budget, to the extent current statutory and regulatory schemes for construction embed unnecessary delays into any part of the process from project inception to completion, they embed unnecessary and avoidable costs that could be unleashed for additional projects or alternative expenditures.

The idea that government regulation reform aimed at both private and public projects can increase economic efficiency is consistent with findings from the seminal 1988 RAND report that studied the outcomes, including cost outcomes, of 52 civilian projects, consisting of government-owned and industry-owned projects, as well as jointly-owned projects. One of the primary findings of this RAND report was that “[c]ost growth and schedule slippage for projects in the megaproject database are driven primarily by conflicts between the projects and the host governments, i.e., institutional problems relating to environmental regulations and opposition, health and safety rules and regulations, and labor practices and procurement controls.” Many recommendations from this report focused on practical, but often forgotten, techniques of project risk management. But echoing the sentiment of “we have met the enemy and he is us,” the RAND study pointed out that while government process is the most significant driver of costs for mega projects, the “host government makes the rules; the host government can change the rules.” Merrow, Edward W. “Understanding the Outcomes of Megaprojects: A Quantitative Analysis of Very Large Civilian Projects” (Santa Monica: The RAND Corporation, 1988), pp. iv, 5, 62. See also, Kelly, Walt. Pogo comic strip.
When exercising its unique policy and regulatory roles, however, government often enacts laws and regulations at odds with its role as client and owner that can diminish its ability to efficiently exploit capital programs as economic tools.

New York, in its economic policy role, should strive to permit the State and its local governments, in their role as owner and client, to have flexibility in deciding, like private owners, what service delivery method is appropriate for its various capital projects. The procurement process is not the most effective way of achieving economic, or other, policy ends related to the construction industry.\(^\text{56}\) In its role as client, government, like all owners, is concerned with budget, schedule, safety and quality, or value.\(^\text{57}\) Government as client, like all owners, should be open to innovative ways to increase the chances of aligning its interests in budget, schedule, safety and quality with the interests of its agents in construction, especially since the construction milieu is the very definition of asymmetric information, which is “a situation where two parties to a transaction involving a good or service have unequal knowledge of the properties or

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56. It is not unusual for government to use the public procurement scheme to effect policies aimed at externalities that are often unrelated to procurement qua procurement. At a basic level, the object of public procurement laws is to authorize government to purchase goods and services with public funds to accomplish its various functions. As these authorizations are typically expressed as a process or set of processes, one public policy objective directly related to procurement qua procurement is that these public processes be fair and open. Since public funds pay for these goods and services, another direct public policy is to establish criteria related to price or value. Finally, procurement law often justifies process rules and price or value criteria as explicit ways of avoiding fraud and abuse, the potential for which exists in all areas of government.

Open competitive bidding for items or services awarded to the lowest bidder can satisfy these procurement-related public policies much of the time, and for many public procurement laws it is an exclusive option, if not the default option. The Model Procurement Code establishes other appropriate mechanisms to satisfy these procurement-related public policies. To the extent the open competitive bidding requirement is a mechanism to approximate best value, it relates to procurement qua procurement and one can debate whether it serves as an appropriate proxy for value in all instances. Open competitive bidding can also be one way to demonstrate a fair process. To the extent an open competitive bidding requirement is intended, however, as a mechanism to assure a competitive construction market in an economic sense, it may fall quite short, in view of the realities of the fragmented construction industry. Other unrelated policy objectives, such as initiatives designed to encourage small or minority business development or sustainability, appended to the procurement scheme, may be economically ineffective or inefficient if enacted at the local government level.

risks involved in making that transaction.” Instead of increasing the alignment, however, government often establishes procurement schemes for itself that limit how it obtains construction related services due to other public policy concerns, such as transparency and fairness, which are of less concern to private owners. Examples of limits government imposes upon itself, that tend to make effective principal-agent alignment less likely, are public competitive bid requirements, awards to the lowest responsive bidder with little discretion to take other factors into account, requirements that bidding documents contain detailed plans and specifications prepared by professional designers and multiple prime bidding requirements, such as the Wicks Law.

While New York is among the few states with a mandatory multiple prime contractor requirement, it is in good company across the nation among states that limit state agencies and/or local governments to use only the traditional design-bid-build method of construction service delivery, primarily or exclusively via the open, publicly-noticed competitive bid process with award to the lowest responsible and responsive bidder. Several states, however, many of which have adopted the 1979 Model Procurement Code, permit public owners procurement flexibility to match project needs, primarily because they permit competitive sealed proposals, or requests for proposals for construction services with an ability to negotiate with the bidders or to award based on best value. A few other states, which have not adopted the 1979 Model Procurement Code, nonetheless


59. With New York, the 26 states that tend to limit capital procurement to the traditional design bid build method awarded to the lowest responsive and responsible bidder include: Alabama, Arkansas, California, Delaware, Georgia, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, Ohio, Oklahoma, Pennsylvania, South Dakota, Washington, Wisconsin and Wyoming. For some of these states, such as California, Delaware, Indiana, Kansas, Louisiana and Wyoming, the requirement that full plans and specifications be prepared prohibits service delivery methods such as design build. For others, such as Kansas, Montana, Nebraska and South Dakota, licensing requirements for architects and engineers prohibits design build. (Source: Love and Patin)

permit public owners to exercise flexibility to match service delivery to project needs via a menu of options, much in the manner found in the recent 2000 Model Procurement Code. The various options include alternatives to the traditional design-bid-build delivery method, such as design-build, construction-manager-at-risk, and alternative methods with approval. The recent 2000 Model Procurement Code updates the 1979 Model Procurement Code primarily to encourage the use of “new forms of project delivery in public procurement, especially in the construction area.” For a more detailed description of the 2000 Model Procurement Code provisions related to construction, please see Appendix A.

Not only does the appropriate service delivery method vary with the project and the competencies of owner staff, but also the methods evolve with use over time. The best solution for the State and its local governments, especially as they are likely to enter a period of increasing budget constraints, is to permit them the flexibility to increase value in public works projects. Freedom to choose the appropriate service delivery method for projects, including the freedom to choose multiple prime contracts when appropriate, and the ability to innovate new service delivery methods in the future would give New York governments appropriate tools to increase public project value and make their capital programs as efficient as possible.

**Government as Regulator and Promoter of Economic Efficiency**

What has become, in Great Britain, a rich and broad endeavor, yielding, among other things, quantitative measures of design value and a process for using them, began with a simple economic proposition. The construction industry was too important to the economy for government to leave it alone. With appropriate intervention to increase its efficiency and without increasing the level of resources committed to it, the industry could increase its productivity.

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61. These include Arizona, North Carolina and Texas. (Source: Love and Patin)


63. Value is created by the interplay between a project’s functions—use and aesthetics, primary and secondary—and the costs of such functions. The interplay is bounded by what the client/user wants and what the client/user is able and/or willing to pay. Lawrence D. Miles, Lawrence D. Techniques of Value Analysis and Engineering, 3rd ed. (Washington, D.C.: Lawrence D. Miles Value Foundation, 1989), pp. 3-5, 12, 14, 17, 25-29.


65. Myers, op. cit., p. 5. This is an example of increasing the efficiency of resource use along the existing production possibility curve. Idem
work within the construction industry, increasing the industry’s efficiency requires reforming public procurement processes as described above. Achieving the greatest possible level of efficiency, however, requires review and reform of all regulations that affect the construction industry’s performance on private and public projects. The relative costs and benefits of regulations change over time as the circumstances they cover change, and the State should periodically review them for opportunities to mitigate unnecessary or unintended drag on the economy. To make the construction industry more efficient in New York, the State should follow a multi-disciplinary approach to review and analysis, similar to the sustained approach taken in Great Britain since 1994, and also take advantage of, and build upon, conceptual and quantitative work produced as a result that work. Please see Appendix B for a more detailed description of the British experience.

Governmental legislation, directly regulating or indirectly affecting the industry, impacts both construction demand and supply, thus impacting the economy, due to the close connection between the economy and the construction industry.66 Government regulates to correct for positive and negative externalities generated by the construction process and its products. For example, conventional regulation of construction seeks to reduce the incidence or scope of unsafe construction practices and products and to increase the incidence or scope of safer ones, at least to the extent the private marketplace produces socially unacceptable levels of either. Government also regulates the industry and its products with respect to its impact on the natural environment and on the built environment, both fields where understanding is changing rapidly.67 There is always potential for the State to increase economic efficiencies by reviewing the more conventional examples of regulation of the construction industry, including occupational and public safety regulation, regulation of environmental impacts, professional and trade standards and licensing, business qualifications, and insurance requirements for both construction projects and participants.68 Recent

67. “Good examples of direct policy within the area of construction economics include building and planning regulations to protect the environment, and specific initiatives such as the Rethinking Construction movement (the Egan Report) and the sustainable construction agenda introduced to change cultural attitudes towards productivity, safety, and the environment. These initiatives are aimed at stimulating growth, stability and environmental performance within the sector.” Myers, op. cit., p. 186.
68. For an excellent example of how a rigorous review of various regulations that individually and cumulatively have a negative impact on a particular segment of the construction industry—affordable housing—yielding many opportunities for targeted reform to improve related
changing analyses on the long-term impacts of construction and its products on the natural and built environments present additional opportunities for the State to further increase economic efficiencies.

To the extent that these unexamined State and local government regulations create regulatory complexity within fragmented markets, they may operate as inadvertent barriers to effective competition and may unnecessarily limit the positive impact of construction on the economy. It is the realistic possibility of competition from other markets that mitigates the negative impacts of these fragmented local markets. In New York, only the highest level of government, the State, would have the interest, resources and authority for undertaking such review and for proposing changes, some of which might impact local practices. Statewide review of State and local regulations, and their interaction with each other and with the industry, may reveal unintended barriers to movement and entry among the fragmented markets. Reform of such regulations, thus, could increase economic efficiency and economic growth within the State.

February 2008
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The ABA 2000 Model Procurement Code

In 2000, the American Bar Association updated its 1979 Model Procurement Code (the “2000 Update”), among other reasons, to support “the new and different forms of project delivery for constructed facilities . . ., such as Design-Build, Design-Build-Operate, and Design-Build-Finance-Operate” made possible by the application, since 1979, of Computer Aided Design (CAD).70 A specific goal of the 2000 Update was to encourage the use of “new forms of project delivery in public procurement, especially in the construction area.”71 This Committee suggests the Governor and Legislature consider the 2000 Model Procurement Code’s Article 5—Procurement of Infrastructure Facilities and Services—as the basis for modernizing New York’s public construction law.

Article 5 authorizes and defines several methods of construction service delivery.72 All of these models depend upon “the prior establishment of functional requirements of a project.”73 These functional requirements, defined as “design requirements,” must be included in the solicitation document74 and include “features, functions, characteristics, qualities and properties that are required by the [State]; the anticipated schedule, including, as a minimum, start, duration, and completion; and estimated budgets (as applicable to the specific procurement) for design, construction, operation and maintenance.”75

The first method, design-bid-build, “is a proven, commonly used public procurement method throughout the United States that was previously authorized under the 1979 Code [and includes] a widely used variation known as construction management at risk.”76 The other methods consist of design-build, design-build-finance-operate-maintain and design-build-operate-maintain and are described further below. The traditional design-

70. ABA 2000 Update, op. cit., p. v. The earlier Model Procurement Code was promulgated in 1979.
71. Ibid., p. iv.
72. Ibid., Sections 5-201 and 5-101(2)-(5), pp. 40-44.
73. Ibid., Sections 5-101(4) and 5-101(5) and related commentary, pp. 40-41.
74. Ibid., Section 5-204(2).
75. Ibid., Section 5-101(6), subparagraph numbering removed, and related commentary, p. 41.
76. Ibid., Section 5-101(2) and related commentary, p. 40.
bid-build model, with its separation of design and construction, creates the potential for “disconnects” during the life of the project, a weakness that the alternative models address by requiring earlier integration of the work of design—architectural and engineering—with the realities of construction. This arbitrary separation appears at odds with converging trends in the various and conceptually related design management techniques that advocate the earliest possible application of techniques aimed at the fullest expression of project scope by the largest number of stakeholders in the most integrated possible manner.

Early integrated application of these techniques in a design-bid-built context can help to mitigate the “disconnects” arising from the separation between the designer and the constructor. In the public sector, however, the arbitrary separation can become a legal one that precludes, or makes more difficult and costly, meaningful contractor involvement during the

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78. The techniques range from functional analysis conceptual design (a variant of value engineering) and multi-disciplinary design optimization to total quality management and lean manufacturing.


80. The earlier application of integrated design management tools illustrates a paradox of control—by embracing and integrating these tools and sharing, if not relinquishing, “power” with the other disciplines and stakeholders during the phase traditionally thought to be the domain of the designer, the designer increases his control over the design until the project’s completion, while increasing the chances the project remains within original budget and schedule parameters. Better integration of these techniques from the beginning will increase the time in conceptual and preliminary design to “capture more knowledge” and “retain more design freedom later in the process in order to act on the new knowledge gained by analysis, experimentation and human reason.” Deremaux, op. cit., p. 1.
design phase to facilitate optimum project scoping and constructability analysis before construction. Early integration of design work with construction is required, however, in the following service delivery methods authorized in the 2000 Update described below:

- In design-build, the public owner “enters into a single contract for design and construction of an infrastructure facility,” which “is a productive, competitive alternative to design-bid-build and construction management at risk when the government has established the functional requirements (design criteria) of a project.”  

- In design-build-finance-operate-maintain, the public owner “enters into a single contract for design, construction, finance, maintenance and operation of an infrastructure facility over a contractually defined period.” This model “is a proven delivery method in common use throughout the world and in American antiquity [that] integrates long-term operation and maintenance, as well as project finance, into a single competition.” The entire competitive bid, including the financing component, must assume there will be no government appropriations during the life of the contract, so that both the government and the private bidders must be assured the project can generate sufficient revenues to pay any debt issued to finance the project as well as the operation and maintenance expenses during the contract term, in addition to the design and construction costs.

- Like the others, a single contract marks the design-build-operate-maintain model, this time for design, construction, operation and management of the facility over the contract term. Unlike design-build-finance-operate-maintain, however, the government may, through appropriations or fees, pay or secure the payment for all or a portion of the funds necessary for the contractor’s services.

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81. ABA 2000 Update, op. cit., Section 5-101(3) and related commentary, p. 40. The 2000 Update defines functional requirements and design criteria as “design requirements”. Ibid., Section 5-101(6), p. 41.


83. Ibid., commentary to Section 5-101(4), p. 40.

84. Idem New York State has often authorized this model in the context of tax-exempt state-created construction and/or tax-exempt financing authorities.

85. Ibid., Section 5-101(5), pp. 40-41.

86. Ibid., commentary to Section 5-101(5), p. 41.
In a critical departure from the past statutory preference, which has favored publicly-noticed competitive sealed bidding for construction services awarded to the lowest responsible and responsive bidder, the 2000 Update specifically authorizes and requires that the design-build, design-build-finance-operate-maintain and design-build-operate-maintain methods described above use competitive sealed proposals instead.\textsuperscript{87} While the kind of procurement flexibility provided above would be a necessary step in the right direction, a simple comparison of the traditional design-bid-build with the design-build service delivery models illustrates the trade-offs between the two methods, and suggests that, even with procurement flexibility permitted by statute, public owners may tend toward using the traditional design-bid-build method. Please see Appendix A-1 for a comparison of design-bid-build and design-build service delivery models.

The categories established in Article 5 and summarized above represent one way of classifying project delivery methods, among many others. There are, at present, no standard and generally accepted definitions of project delivery methods.\textsuperscript{88} The American Institute of Architects (AIA) and the Associated General Contractors of America (AGC), in their jointly produced and issued \textit{Primer on Project Delivery}, noting this lack, also noted that

\[\ldots\] many groups, organizations, and individuals have developed their own. In doing so, they have often used different characteristics to define the delivery methods. The result has been a multiplicity of definitions, none of which is either entirely right or entirely wrong.\textsuperscript{89}

For example, the AIA and AGC classify “three primary delivery methods” as “design-bid-build, design build and construction management at risk.”\textsuperscript{90}

They also make a distinction between project delivery, defined as “the method for assigning responsibility to an organization or an individual for providing design and construction services,” and project management, defined as “the means for coordinating the process of design and construction (planning, staffing, organizing, budgeting, scheduling, monitoring).”\textsuperscript{91}

\begin{footnotes}
\item \textsuperscript{87} \textit{Ibid.}, Section 5-202(3)-(6), pp. 44-45; Section 3-203(3), p. 26.

\item \textsuperscript{88} \textit{AIA and AGC, op. cit.}, p. 1.

\item \textsuperscript{89} \textit{Idem.}

\item \textsuperscript{90} \textit{Idem.}

\item \textsuperscript{91} \textit{Ibid.}, p. 2.
\end{footnotes}
The legal authority to bind the owner differentiates the service delivery models from the models of project management, while the assignment of contractual responsibilities for project delivery becomes the basis for differentiating among the service delivery models. Any task force looking at creating flexibility in public procurement of construction would do well to review alternative classifications of service delivery models, and their underlying rationales, in addition to those put forth in Article 5.

The 2000 Update also provides alternative language to permit quality-based selection process for design-builder selection. As noted earlier, the request for proposal, or solicitation document, must include design requirements and may, under certain circumstances, permit prequalification through a request for qualifications before the request for proposals, creating a short list of responsible bidders to engage in discussions and evaluations or pay stipends to the unsuccessful bidders. Not only does the 2000 Update expressly eliminate an earlier expressed statutory preference for competitive sealed bidding, which remains as a default source selection method, but it also specifically authorizes multi-step sealed bidding within the competitive sealed bid context in order to “provide additional flexibility in meeting the designated public need.” These changes make it possible for public owners to focus on construction quality even within the competitive design-bid-build model.

Other features of the 2000 Update that help public owners increase the quality and, thus, value of public construction include a revised definition of architectural and engineering services and the requirement that bidders for certain design-build, design-build-finance-operate-maintain and design-build-operate-maintain contracts include the services of an independent peer reviewer “whose competence and qualifications to provide such services shall be an additional evaluation factor in the award of the contract.” A revised definition of “architectural and engineering services” conforms to the federal definition in order to “[promote] closer integration of project feasibility and evaluation services with the evaluation of design and project alternatives” which “reflects a growing need for public owners to assess the effects of alternative designs, technologies, projects,

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92. Idem
93. Ibid., commentary to Section 5-202(4), p. 45.
94. Ibid., 5-204(2), pp. 46-47. The 2000 Update’s approach to pre-qualification is not dissimilar to that of the Wick’s Bill.
95. Ibid., p. viii; Section 3-202 (8) and related commentary, pp. 25-26.
96. Ibid., Sections 5-101(1) and 5-204(3)(b), pp. 39, 47-48.
schedules and finance methods on initial and life-cycle quality, costs, and time of delivery of entire collections of infrastructure facilities." 97 The requirement of an independent peer reviewer is intended "to provide the government with independent professional advice and assurance that key design elements of the project are consistent with the function description in the Request for Proposals and with the common law standard of professional care." 98

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97. Ibid., Section 5-101(1) and related commentary, p. 39.
98. Ibid., commentary to Section 5-204, p. 48.
APPENDIX A-1

Comparison of Design-Bid-Build and Design-Build\textsuperscript{99}

\textit{Design-Bid-Build}. In the traditional design-bid-build model, the owner hires a designer, first, to design project, including the preparation of construction drawings, specifications and contract documents, and then submits the design package to general contractors who bid for work on the basis of sealed lump sum, unit-price or cost-plus.\textsuperscript{100} The winning contractor is responsible for constructing project as designed, subcontracting, as needed, with various contractors for specific tasks.\textsuperscript{101} During the construction phase, the interaction of the designer with the contractor can vary from limited oversight, responding to questions about design on behalf of the owner to administering construction contract on behalf of the owner. The virtues of this traditional method derive from its wide applicability and understanding, due to the well-established and clearly defined roles, as well as a level of cost certainty because bids are based on a complete design, with plans and specifications. The drawbacks to this method, however, derive from the same qualities and include a longer schedule,\textsuperscript{102} since the design must be substantially complete before bidding, thus prohibiting overlapping phases to compress the schedule, and a higher potential for an adversarial relationship among owner, designer and contractor. The temporal separation between the designer and the contractor impedes a joint understanding about constructability, schedule and cost implications of the design, the specified materials, the means of construction and costs. The legal relationships, such as the owner’s liability for design, create exposure to contractor claims over design and constructability issues, and the least-cost approach requires increased owner oversight and quality review. These drawbacks contribute to increasing the potential for schedule uncertainty, which can lead to increased costs.

\textit{Design-Build}. In the design/build method,\textsuperscript{103} the owner contracts with a team that is responsible for both project design and construction, often

\textsuperscript{99} AECOM, op. cit.; CMAA, op. cit.; see also AIA and AGC, op. cit.

\textsuperscript{100} In the public sector, the selection of the winning bid is often required by law to be made to the lowest responsive bid. In addition, statutory requirements that bid packages contain detailed plans and specifications prepared by professional architects and engineers have been interpreted to preclude alternative methods of service delivery, such as design-build. (Source: Love and Patin)

\textsuperscript{101} In the public sector, multiple prime contracting may be required.

\textsuperscript{102} As distinct from schedule uncertainty.

\textsuperscript{103} Other variations include design/build/operate and design/build/operate/finance.
a joint venture of a general contractor and a designer, after the owner has approved the preliminary project scope or design. The owner and team negotiate, early in the process, a contract with a fixed price for which the team agrees to perform all functions from post preliminary design to construction and to coordinate the design and construction interface that is often problematic with the design-bid-build model. The method internalizes, within the team, some of the conflicts among the owner, designer and builder, providing the owner with single point of responsibility, as well as providing the opportunity to begin construction earlier, before design is complete, and thus provide the potential to reduce the overall project delivery period. The ability to integrate design and construction professionals earlier in the process permits both professions to benefit each other, increasing the period of design freedom informed by constructability. The ability to overlap phases to decrease construction duration requires the owner’s control of the site and rights of way, which public owners often do not have in the early stages of a project. Further, the advantages come at the cost of a significant loss of the owner’s control and involvement. In order to verify best value as well as the adequacy of the preliminary plans on which price is based, the owner is well advised to hire additional consultant to perform the traditional designer function. Conventional wisdom concludes that this model is best for conventional project types, with defined requirements and widely available expertise such as vertical and above ground projects.104 Since successful implementation of this model also requires a proper balance of design expertise, financial capability, construction experience and experience with this particular model, procurement of the design/build team requires great care, something the public procurement methods may make difficult.

104. The product of construction differs from the products of other manufacturing products in critical ways. They are physically “large, heavy and expensive” objects that are tied to their sites and contexts, facts which limit the ability to replicate them and achieve manufacturing economies. Further, in contrast to the typical manufacturing process where price can be known before fabrication, the construction process “… is complicated further by the fact that for most construction work a price needs to be stated before the activity commences—when all the costs are not yet known.” This atypical pricing feature is further complicated by the typical method of competitive procurement, which “… in turn, makes it difficult for potential contractors supplying their services to take advantage of the market…” Myers, op. cit., p. 65; see also Chicago Architects Oral History Project, Interview of Carol Ross Barney by Deborah A. Burkhart, The Art Institute of Chicago, 2007, p. 8. The 2000 Update provides a menu of procurement vehicles as alternatives to competitive bid, which bring the designer and contractor closer in practical proximity, increasing understanding of the constructability of the design as well as reducing pricing risks.
APPENDIX B

The British Experience
and Increasing the Value of Public Works Programs

Beginning in the 1990s and sustained as of this date, the British government sponsored an initial collaboration between government and the construction industry to improve the performance of the construction industry and its product. This initial effort eventually expanded to generate quantitatively-based analyses and data on the relation among construction, the economy and the quality of life within a built environment. "A particular strength of [the British approach] was that they did not try to prescribe what should be done but invited innovation while offering a context in which it can take place, be evaluated and shared."

This effort received its impetus due to significant planned increases in public capital spending in the face of a universal consensus that much of already-built environment, much of it publicly financed, and the process by which it was achieved were unsatisfactory in almost every way. During the course of this public-private journey:

. . . a succession of government reports investigating the problems of the industry . . . have highlighted the inefficiency caused by the sheer scale and complexity of the construction industry. A recurring recommendation is the need for the construction process to be viewed in a holistic way by a multidisciplinary team. This reflects the fact that construction draws knowledge from many areas, and an important and undervalued area is economics.  

Were the Governor and Legislature to consider looking at the economic impact of construction upon the State and regional economies, as a prelude to revising New York’s statutory scheme governing construction, they might do well first to look at this British experience, as well as the quantitative work produced as a result of it.

The initial round of independent analysis of the construction industry, conducted in 1994 by a group “commissioned by the British govern-

105. RIBA, op. cit., p. 3. Present use by the New York City’s Department of Design and Construction (DDC) of Design Quality Indicators, quality metrics developed in Great Britain, in DDC’s Design + Construction Excellence program, indicates the transferability of concepts, measures and quantitative data from the British experience for New York State purposes.

ment and the construction industry with the support of client bodies,” 107 focused primarily “on the business process of construction rather than its products and their impact.” 108 The conclusion, summarized in the report, “Constructing the Team,” was that “the industry’s traditional methods of procurement and contract management and its adversarial culture caused inefficiency and ineffectiveness.” 109 In the words of the author of the report, “[t]he central message of “Constructing the Team” in 1994 was that the client should be at the core of the construction process.” 110

Four years later, in 1998, a Construction Task Force “was set up to advise the Deputy Prime Minister from the client’s perspective on the opportunities to improve the efficiency and quality of delivery of construction, to reinforce the impetus for change and to make industry more responsive to customer needs.” 111 The resulting report, “Rethinking Construction,” 112 introduced the lean production and continuous improvement concepts, 113 while continuing to focus on the customer as a “driver of change,” 114 although the absence of a “debate on the attributes of the product” continued. 115 This report projected a ten percent increase in productivity without changing the level of resources dedicated to construction as a result of proposals to increase efficiency including reducing restraints on supply. 116

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110. Ibid., p. 1.

111. Ibid., p. 19.

112. Egan, op. cit.

113. The methodology of Lean Thinking forces an industry to “change itself by rethinking the fundamentals of its delivery processes.” RIBA, op. cit, p. 3.


116. Myers, op. cit., p. 5. “Several common sets of problem were identified as the root cause of this inefficiency. First, the industry demonstrated a poor safety record and an inability to
While “Rethinking Construction” did not focus directly on the impact of design on the economy, its implementing entity, the Movement for Innovation (M4I), did. Architects, by virtue of their place in the construction supply chain, have an “overview of the entire project” and are well placed to “synthesize lean construction” and its objectives. A focus on methodologies to quantify intangible externalities emerged in 2000 from the Royal Institute for British Architects (RIBA), which concluded that “the value of design can be, and has to be, measured and demonstrated.” Without quantitative measures of design value, “there is a possibility that the success of construction projects will be measured by the process alone.” RIBA announced its partnership with the Construction Industry Council to devise Design Quality Indicators (DQI) and the process for using them, which has been in use in Great Britain since

Idem.

117. RIBA, op. cit., p. 3. The State Office of General Services practices Total Quality Management principles, another design management technique related to lean manufacturing, as a result of adopting the International Standard Organization (ISO) Quality Management System. OGS Design and Construction Group (D&C) “... provides a full range of architectural, engineering and construction management services to state agencies for approximately $650 million in design and construction projects a year. OGS D&C places a strong focus on the ISO Quality Management System for customer satisfaction, continuous improvement and cost effectiveness. It is the OGS D&C’s policy to establish and maintain a documented Quality System. The Quality System conforms to the sections of ISO standards 9001:2000, which allows the group to obtain and maintain certification and contribute toward the D&C mission. The Quality Systems objectives are: to manage all project requirements in a timely, efficient, responsive and cost effective manner; to continually improve methods used to deliver professional services; and to seek ways to increase clients’ satisfaction with OGS D&C’s performance.” New York State Office of General Services press release, “NYS OGS Design & Construction Receives ISO Certification: Only State Agency to Receive International Organization for Standardization Certification,” dated October 10, 2006.

118. RIBA, op. cit., p. 7.

119. Idem.

120. RIBA embraced industrial design techniques such as Lean Manufacturing to help them measure and demonstrate the value of design so that measures of a project’s success would include the value contributed by design, as well as standard process measures such as budget, schedule and safety. RIBA acknowledged the importance of performance measurement to improving the construction process, including design process, which is the traditional domain of the architect, and the products of construction. DQI covers a spectrum of design
mid-2002. As an indication of the soundness of DQI and the analysis behind it, the “Green Book”, an official publication of the British Treasury, includes design quality as one of the many issues relevant to appraisal and evaluation of new or replacement capital projects or procurement of works from the private sector suppliers.  

In 2002, the British government commissioned another task force to study the government’s research and development policies and practices. “Rethinking Construction Innovation and Research” picked up a thread from the Egan Report which suggested a focused research and development program would be necessary to make many of the earlier recommendations and estimated benefits possible. While the Fairclough Report concluded that the “strategic framework for R&D should be owned and managed by industry,” the fragmented nature of the industry requires government sponsorship and funding to produce socially useful amounts of research and development and to structure a mechanism to capture innovations from institutional learning for future projects across markets and regions.

As a result of all this activity, there has been a resurgence of interest in identifying and quantifying the value of the seeming intangible externalities generated by the products of construction. In 2001, the Commission on the Built Environment released a seminal report—The Value of Urban Design—that catalogued the state of capacity to quantify intangible measures related to a project’s function, its build quality and its impact upon users and the surrounding community. The indicators cover those aspects that are fundamental, those that add value and those that represent excellence (collectively known as FAVE). DQI forms the basis of a structured dialogue among stakeholders at various points in the project process, as well as provide data for later project assessments and analysis. Early in the project, stakeholders engage in a FAVE session to assign project priorities for DQI, performing the critical function of project scoping. The initial collective project scope provides the baseline against which the team can conduct additional FAVE evaluations to measure success during design and at completion. RIBA, op. cit.; see also, Sallette, Marc A. “Design Values,” Urban Land (Washington, D.C.: Urban Land Institute, November/December 2005), pp. 74-80.

122. Fairclough, op. cit.
123. Ibid., p. 6.
124. Ibid., pp. 6, 14.
gible externalities of design in the built environment. While there are difficulties in quantifying intangible externalities arising from construction, they conceptually fit the definition, although it may be necessary to evaluate impacts and costs over a longer period of time than is typical in the investment decision horizon which covers the initial period of construction but not long-term operation. For example, negative consequences of poor design and construction include avoidable maintenance, energy and security expenses, as well as, within the built environment, avoidable costs for “rectifying urban design mistakes.” Positive consequences of design and construction excellence include ‘life giving’ mixed-use environments, urban regeneration, increased marketing opportunities, increased investment opportunities, increased confidence in investment opportunities, better connected, inclusive and accessible urban places, sensitivity to context, enhanced public safety and security, increased energy efficiency. This recent work can inform a review and revision or elimination of existing regulations, as well as provide a foundation for proposing new ones.

126. With respect to the benefits of excellence in design and construction, “[a] widely acknowledged difficulty with many of the benefits associated with good design is that they are hard to measure, or intangible, and this makes it difficult for those who procure buildings to assess how much it is worth investing in design and in construction.” Macmillan, op. cit., p. 264. This recent resurgence of interest builds upon the approach, if not the work, of an earlier architectural determinism sub-discipline from the last century. Ibid., p. 258. As the Commission for Architecture and the Built Environment has stated, “Good design is not just about the aesthetic improvement of our environment, it is as much about improved quality of life, equality of opportunity and economic growth.” Ibid., p. 260. See Footnote 2.


129. Idem.