Ruth Bader Ginsburg Distinguished Lecture
On Women and the Law

WHAT A JUDGE SHOULD KNOW

by Linda Greenhouse
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Of Note

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IFTIKHAR MUHAMMAD CHAUDHRY, WHO WAS REMOVED AS PAKISTAN’S Chief Justice by former President Pervez Musharraf and became a symbol of the movement for judicial and lawyer independence in Pakistan, was presented with an honorary membership, November 17, at the New York City Bar.

The award was bestowed in absentia last January, as Chaudhry was under house arrest after his ouster and the suspension of the Pakistani Constitution by President Musharraf on November 3rd, 2007. On November 14, 2007, the City and State Bars, along with several other bar organizations, organized a rally of some 700 lawyers on the steps of the New York County Supreme Court in Manhattan in support of Chief Justice Chaudhry and the Pakistan Lawyers Movement.

Despite the election of a new President in Pakistan, Chaudhry and a number of superior court judges have yet to be restored.

The award of Honorary Membership recognizes Chief Justice Chaudhry’s efforts to uphold Pakistan’s independent judiciary. In March 2009, Chief Justice Chaudhry was returned to his post.

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JUAN J. BOUCHON, A CHILEAN FOREIGN ASSOCIATE AT SKADDEN, ARPS, Slate, Meagher & Flom LL, and Lawrence J. Lee, a litigation associate at Debevoise & Plimpton LLP, received the inaugural Cyrus R. Vance Access to Justice Award, November 11, 2008, at the New York City Bar.

The award is being bestowed by the Cyrus R. Vance Center for International Justice of the New York City Bar in recognition of individuals who have made a significant contribution to international pro bono through the Vance Center’s Global Pro Bono Clearinghouse and Amicus Network.

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THE NEW YORK CITY BAR ASSOCIATION HOSTED ITS FOURTH THOMAS E. Dewey Medal Presentation Ceremony on December 2, 2008. The award
is given every year to an outstanding assistant district attorney in each of
the city's District Attorney's offices. In addition, this is the first year that
there is a winner from the Special Narcotics Prosecutor's office. The medal
winners this year are:

Terry A. Gottlieb, Bronx County; Charles M. Guria, Kings County;
Joel Seidemann, New York County; James Clark Quinn, Queens County;
Paul A. Capofari, Richmond County; and Linda DePasquale, Special Nar-
cotics Prosecutor.

Seth Farber, Chair, Dewey Medal Committee moderated the proceed-
ings, Hon. Sterling Johnson, United States District Court Judge, Eastern
District of New York, was the keynote speaker, and President Patricia M.
Hynes presented the medals.

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CHICAGO-KENT COLLEGE OF LAW WON THE FINAL ROUND OF THE
59th Annual National Moot Court Competition at the New York City Bar
on February 6, 2009. The members of the winning team are Andrew Booth,
Brody Dawson and Betsy Gates.

The University of Pennsylvania took second place. Team members
were Steven A. Myers, Allison W. Reimann and Daniel S. Schwei. Best
Brief honors went to Brooklyn Law School and its team members Sparkle
Alexander, Jason Braiman and Sara Moser-Cohen. The University of Penn-
sylvania took second-place brief honors.

The members of the final bench were: Hon. Barrington D. Parker, Jr.
U.S. Court of Appeals for the 2nd Circuit (presided); Hon. Jonathan
Lippman, then Presiding Justice-Appellate Division 1st Dept. and now Chief
Judge of the Court of Appeals; Hon. Cheryl E. Chambers, New York State
Supreme Court Appellate Division, Second Department; Hon. John Gleeson;
U.S. District Court, Eastern District of New York; Hon. Shira A. Scheindlin,
U.S. District Court, Southern District of New York; John J. Dalton, Presi-
dent, American College of Trial Lawyers; and Patricia M. Hynes, President,
New York City Bar Association.
Recent Committee Reports

**AIDS**
Letter to the U.S. Department of Health and Human Services urging that HIV be removed from the list of “communicable diseases of public health significance.” The recent signing of the Emergency Plan for AIDS Relief gives the Department the authority to remove the statutory prohibition against travel and immigration by people with HIV.

**Arbitration/International Commercial Disputes**
Secretaries to International Arbitral Tribunals. The report addresses the uses of tribunal-appointed secretaries in international arbitration, the responsibilities of arbitral secretaries and the rules and guidelines concerning the appointment of arbitral secretaries. The report concludes that secretaries perform a useful and desirable function in international arbitration provided that the tribunal discloses, and the parties consent to, both the appointment of and functions to be performed by the secretary. The report makes a number of recommendations and suggested guidelines for arbitral tribunals to follow when seeking to appoint a secretary.

**Capital Punishment**
Report to the Obama transition team regarding application of the federal death penalty, urging that the Obama administration 1) return to the earlier policy that the Attorney General should review only those cases in which U.S. Attorneys request authorization to seek the death penalty; 2) not seek the death penalty in states without death penalty laws, except in cases with substantial federal issues and 3) monitor racial data in federal capital cases and correct disparities that arise.

**Children, Council on**
Letter to Governor Paterson urging that New York State take steps to ensure that in an effort to maintain the State budget, necessary financial reductions do not unduly impact the needs of at-risk children, youth and families.
Letter to the ABA Section on Litigation commenting on the ABA’s draft Model Act Governing Representation of Children in Abuse and Neglect Proceedings. The letter supports the draft’s intention to codify a professional attorney-client model for the representation of children but offers a number of suggestions to strengthen the language to: 1) clarify that these rules affect all attorney-client relationships and 2) ensure it does not undermine strides that have been made toward professionalizing the attorney-client relationship for lawyers representing children.

Report urging passage of the Kinship Guardianship Assistance Law for New York. The report argues that subsidized kinship guardianship would create an important permanency option for many children by enabling kinship caregivers to become permanent guardians outside the foster care system, while maintaining a subsidy to care for the child without having to adopt. Subsidized kinship guardianship would also alleviate child welfare agency administrative costs, free up Family Court resources and enable the family constellation to be free from government interventions and home visits.

Report to the Obama transition team regarding the delivery of health and human services to at-risk children and families. The report urges that the administration treat the needs of America’s children and families as critical and focuses its recommendations on four key areas—foster care, juvenile justice, housing and child abuse prevention.

Civil Court
Letter to the Office of Court Administration offering comments on the Board of Judges of the NY C Civil Court’s legislative proposal submitted to OCA, which is meant to help the Civil Court cope with the growing number of consumer debt filings.

Civil Court of the City of New York/Consumer Affairs
Report expressing support for Intro. 660, which would amend the Administrative Code of the City of New York to clarify that debt buyers, including those entities that refer debts to other agencies for collection and/or litigation, are considered “debt collection agencies” under local law and accordingly must be licensed by the New York City Department of Consumer Affairs in order to collect debts from New York City residents.

Civil Rights
Letter to the Commissioner of the NYS Division of Human Rights noting
that as drafted, portions of the State Human Rights Law currently diminish rather than advance human rights. The report urges that Chapter 133, which concerns the use of service animals, and Chapter 394, which defines places of public accommodation, be repealed or modified as both of these Chapters diminish the rights of people with disabilities.

Amicus Brief: Amnesty International USA v. McConnell, filed with the U.S. District Court, Southern District of New York. The brief argues that the FISA Amendments Act of 2008's express authorization of the government to acquire the constitutionally protected communications of Americans, without individualized warrants, meaningful judicial oversight and meaningful limitations on the dissemination of acquired information will have a chilling effect on constitutionally protected speech, including communications between attorneys and their clients, and undermines the right to, and need for, effective assistance of counsel that is fundamental to the rule of law.

Report to the Obama Transition Team re: Reviewing the Civil Rights Division. The report says that recently the Civil Rights Division of the Justice Department has strayed away from its original objective of enforcing civil rights legislation and urges that the new administration work to restore the Division's original objective, choose experienced and effective leaders, reset the priorities of the Division through thoughtful selection of areas of emphasis and the development of resources that have the greatest impact, depoliticize the hiring of new attorneys and enhance the Division's law enforcement mission by making key legislative changes.

Civil Rights
Report expressing support for City Council Intro. No. 826, the Access to Reproductive Health Care Facilities Act, which would balance the protection of protesters' rights to peaceful expression against the rights of clinic patients, doctors and other staff to access and deliver health care services without being subjected to threatening harassment or physical assault. The bill would amend New York City law by eliminating the current requirement that prosecutors must prove that protest activities are undertaken with the specific intent to prevent a patient from obtaining, or clinic staff from rendering, reproductive health care services; expanding the definition of protected premises to include the parking lots, driveways, entryways and exits of reproductive health care facilities; clearly defining prohibited conduct as obstructing clinic access, including by
unwanted physical contact, threatening physical harm, or physically damaging or interfering with the operations of a clinic; and prohibiting the following and harassing of any individual within 15 feet of a reproductive health clinic.

**Construction Law**
Comments to the State Asset Maximization Commission: Modernizing Public Construction Procurement for New York’s Public Owners—If Not Now, When? The report states that now is the time to review, reform and modernize New York’s public construction procurement laws and urges the Commission to consider the ABA’s 2007 Model Code for Public Infrastructure Procurement as a prototype.

**Corrections**
Report to the Obama transition team urging the administration to consider measures to ease the transition of the previously incarcerated into society.

**Criminal Justice Operations**
Report recommending that Section 440.10 of the Criminal Procedure Law, which governs motions to vacate judgments, be amended to allow all ineffective assistance of trial counsel claims (IAC claims) to be raised on collateral review: first, because some IAC claims are subject to reasonable disagreement as to whether they are reviewable on the record, defendants can be unfairly subjected to procedural bars if they choose the wrong forum; second, the trial court, which presided over the trial, is often in a better position to make the first assessment of trial counsel’s performance; third, the current scheme requires piece-meal litigation of IAC claims that are, in part, record based and, in part, non-record based; and fourth, when trial counsel serves as counsel on appeal, a defendant effectively waives any IAC claims that are based on the record. The proposed amendment would encourage that IAC claims be brought in the preferable forum, prevent piecemeal litigation and avoid causing defendants who have the same lawyer at trial and on appeal to forfeit IAC claims. The report includes suggested draft legislation.

**Criminal Law**
Report expressing support for A.4552, which would permit the conditional sealing of certain drug and marijuana convictions. Conditional sealing of the designated convictions will allow many New Yorkers the opportu-
nity to secure housing, employment, education and vocational training that would otherwise be unavailable by virtue of convictions. The report offers two suggested amendments to the bill: first, to permit the disclosure of the sealed record to Family Court or any other court that may be dealing with any issues regarding the care, custody or visitation of children where the petitioner is involved, and second, to allow a person to reply in the negative to the question “Have you ever been convicted of a felony or misdemeanor?” where the only convictions on the person’s record have been conditionally sealed.

Energy
Letter to Congress arguing that current tax credit programs that serve as the primary federal incentive for renewable power are no longer adequate in encouraging private investment and that they should be modified to permit the renewable energy industry to continue to help drive U.S. economic and job growth.

Environmental Law
A Guide to Understanding Climate Change Legislation. The report recommends ways to reduce the emissions of greenhouse gases through legislation that imposes a cap-and-trade or carbon tax approach. In addition, the report discusses the criteria by which such legislation can be evaluated, summarizes various pieces of climate change legislation pending in Congress, introduces the Regional Greenhouse Gas Initiative and discusses the practical experience that the European Union has gained with its Emissions Trading Scheme, presents local-level initiatives that can be part of a comprehensive climate change portfolio, and concludes by an approach to greenhouse gas emissions reduction that would be the most effective in achieving the necessary emissions reductions.

Report to the Obama transition team highlighting environmental issues important to New York City, including: 1) funding and development of mass transit, 2) showcasing sustainable building technologies, 3) establishing more stringent fuel economy standards, 4) supporting improvements to maximize the environmental and social benefits of maritime transport and 5) strict federal standards for ship discharges.

Comments to the New York State Department on Environmental Conservation on the Department’s Draft Guide for Assessing Energy Use and Greenhouse Gas Emission in Environmental Impact Statements. The com-
ments commend DEC in moving forward on addressing climate change and taking a leadership role in developing regional programs that could serve as a model nationally, while offering a number of suggested changes.

**Estate and Gift Taxation**
Letter to the IRS providing comments on the proposed revenue ruling regarding the estate, gift, generation-skipping transfer and income-tax issues that are associated with the establishment and administration of trust companies that are family-owned or controlled (private trust companies). The letter makes a number of suggestions for clarification, including that the IRS’s objective of confirming certain tax consequences of the use of a private trust company that are not more restrictive than the consequences that could have been achieved by a taxpayer directly can best be attained if the Service’s guidance is limited to transfer tax issues.

**Financial Reporting**
Letter to the Financial Accounting Standards Board commenting on the Board’s proposal to provide greater disclosure of certain loss contingencies. Although the letter supports efforts for greater disclosure, it argues that the interests of financial statement users in increased disclosure must be balanced with the legitimate interest of companies in preserving their rights in connection with pending or threatened litigation. As currently drafted, the potential adverse consequences of the proposal to both issuers and their investors outweigh the benefits. The letter urges the Board to reformulate the proposal with this in mind.

**Financial Services Committees**
Report to the Obama transition team urging that the administration seek a new model to regulate financial services and markets. Additional recommendations include: 1) the regulatory approach should evolve from one based on form to one based on substance, 2) consider consolidating regulatory responsibilities into fewer federal agencies, 3) enhance disclosure and transparency and improve communication between the industry and regulators and 4) coordinate regulation globally.

**Futures and Derivatives Regulation**
Letter to the Commodity Futures Trading Commission expressing concerns about proposed amendments to Commission rules 4.26 and 4.36, re: electronic filing of disclosure documents by commodity pool operators and commodity trading advisors.
Letter to the Federal Trade Commission offering comments on a proposal by the FTC regarding market manipulation and false information. The letter commends the Commission’s commitment to promulgating a clear legal standard for market manipulation while offering a number of comments, including: the proposed rule should clarify the intent element that would apply to the instance of frauds deemed to be market manipulation; the effect of allegedly manipulative conduct on market prices can in some circumstances be relevant to the determination of a violation; and the Commission should refrain from asserting jurisdiction over Commodity and Futures Trading Commission-regulated commodity futures transactions and prices.

Health Law
Report supporting S.6210-A, which would allow for Expedited Partner Therapy by adding a new section 2312 to the Public Health Law authorizing a health care practitioner to provide antibiotic drugs for the partner of a patient diagnosed with sexually transmitted Chlamydia. Successful prevention of re-infection, the report argues, requires adequate treatment of partners.

International Human Rights
Letter to the President of the Republic of Belarus expressing concern over the detention and physical mistreatment of Emanuel Zeltser, an American attorney, and the detention of his assistant, Vladlena Funk, a permanent resident of the United States, in Belarus. Such actions, the letter argues, are inconsistent with Belarus’s obligations under international agreements, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment (CAT).

Letter to Congress and the Ambassador of War Crimes at the U.S. State Department urging that they press the government of Senegal to move forward to prosecute the former dictator of Chad, Hissène Habré, for crimes against humanity, torture and other very serious crimes under international law committed during his rule.

Report to the Obama transition team regarding improving the relationship between the United States government and the International Criminal Court.

Letter to the Prime Minister of India expressing condolences for and soli-
R E C E N T  C O M M I T T E E  R E P O R T S

darity with the people of India and those visitors terrorized by the November 2008 attacks in Mumbai.

Investment Management Regulation
Letter to the SEC providing suggestions for improved regulatory structure in the financial services industry that have particular relevance to the investment management industry, including coordinating among financial regulators, effectively pursuing investment fraud while also promoting the efficient functioning of the capital markets, increasing transparency by industry participants regarding their financial positions and business activities, increasing fund directors’ effectiveness at carrying out their oversight responsibilities and reviewing regulations that apply to money market funds.

Letter to the SEC providing comments on proposed guidance regarding the duties and responsibilities of investment company boards of directors with respect to investment adviser portfolio trading practices. Though the letter supports the objective of the proposed guidance, to aid fund directors regarding performing their oversight role in the most effective and efficient manner possible, it suggests that there are several aspects of the proposal that should be changed in order to meet its desired goal while not imposing additional burdensome requirements on fund directors.

Legal Issues Affecting People with Disabilities
Report on the United Nations Convention on the Rights of Persons with Disabilities. The report summarizes the Convention’s provisions, which are intended to ensure that persons with disabilities enjoy human rights on an equal basis with others and urges that the United States sign and ratify the Convention as a sign of the U.S.’s commitment to promote disability-inclusive development practices and equality for persons with disabilities both at home and abroad.

The report expresses support for the Medicare Independent Living Act of 2007 (H.R. 1809), which would amend the Social Security Act to provide Medicare coverage for power-operated wheelchairs for persons with disabilities who need such equipment to travel and function independently outside their home and in their communities. Currently Medicare coverage is restricted to wheelchairs used in the patient’s home.

Legal Problems of the Aging
Report expressing concern about certain proposed budget changes in the
New York State 2009 draft budget, including proposed changes to pooled trust remainders and Medicaid and Supplemental Security Income benefits, and the creation of long-term care assessment centers. If enacted, these proposed changes, the report argues, would have a drastic adverse impact on the State’s senior citizens.

Report Regarding Home and Community-Based Medicaid Waiver Services. The report urges that the Centers for Medicare and Medicaid Services (CMS) restore their prior longstanding policy to allow community spouses a reasonable level of income and resources to live on while still receiving Medicaid funding for the nursing home resident. The new policy, which eliminates this option, could impoverish thousands of elderly and disabled people who receive Home and Community-Based (HCBS) Medicaid waiver services pursuant to section 1915(c) of the Social Security Act.

Legal Issues Pertaining to Animals
Report expressing support for the American Horse Slaughter Prevention Act (H.R. 503/S.311), which would amend the Federal Horse Protection Act to prohibit the shipping, transporting, moving, delivering, receiving, possessing, purchasing, selling or donation of horses and other equines to be slaughtered for human consumption and for other purposes.

Report supporting the proposed federal Great Ape Protection Act (H.R. 5852), which would eliminate invasive biomedical research and testing on all great apes and prohibit the use of federal funds for this purpose. The report supports the legislation generally and recommends that the legislation be expanded to cover a prohibition on behavioral research, and argues that the three-year deferral of effectiveness of the proposed statute is not necessary.

Letter to Governor Paterson urging that he sign into law S.5920-A/A.246-B, which would prohibit the issuance of licenses to new slaughterhouses located within 1,500 feet of residential properties.

Report expressing support for S.2439, which would require the National Incident Based Reporting System, the Uniform Crime Reporting Program and the Law Enforcement National Data Exchange Program to list cruelty to animals as a separate offense category, thereby ensuring that the case tracking database relied upon by the FBI includes all animal cruelty offenses.
Letter to the U.S. Department of Agriculture offering recommendations on a variety of topics the Department should consider as it develops policies relating to non-human animals, including the use of animals in research, the slaughter of horses, the use of animals in agriculture and issues affecting companion animals.

Letter to the U.S. State Department of the Interior urging action be taken to prevent or delay the extinction of endangered species and ensure that their habitat is preserved. The letter sets forth a number of recommendations that would help preserve wildlife.

The report expresses opposition to New York City Council bill Intro. No. 653-A with regard to treatment of carriage horses in New York City. While it seeks to improve conditions, the bill would not significantly promote the health, safety and well-being of the carriage horses and does not address the most critical concerns relating to the carriage horse industry; the bill may actually worsen their conditions. The report reiterates continued support for Intro. No. 658-A, which would ban the carriage horse industry altogether in New York City.

Lesbian, Gay, Bisexual and Transgender Rights
Report to the Obama transition team urging: 1) repeal of the Defense of Marriage Act, 2) prohibition of discrimination in employment based on sexual orientation or gender identity, 3) repeal the Don’t Ask, Don’t Tell policy and end the ban on LGBT individuals serving in the military, 4) support of the United American Families Act and 5) support of comprehensive sex education.

Report expressing support for S.1342/A.2856, the Healthy Teens Act, which would establish a grant program to bring comprehensive, age-appropriate and medically accurate sexuality education, taught by qualified professionals, to New York schools. In addition, the report recommends that New York’s Education Law be amended to require the teaching of sex education in public schools and that the curricula be evidence-based, medically accurate and sensitive to the needs and experiences of LGBT youth.

Follow-up report reiterating support for A.3496, Dignity for All Students Act (DASA), which would prohibit harassment and discrimination against students in school based on actual or perceived race, color, national origin, ethnic group, religion, religious practice, disability, sexual orienta-
tion, gender (including gender identity and expression) and sex. The report also notes reservations regarding an alternative bill introduced in August 2008, by the Senate Committee on Rules, the Safe Schools for All Students Act, S. 8739, which employs an overly broad standard that invites the punishment of constitutionally protected speech and expression and weakens the incident reporting provisions of DASA.

Military Affairs and Justice
Letter to the U.S. Department of Veterans Affairs expressing concern with the VA’s reported exclusion of outside non-partisan voter-registration assistance at federally financed nursing homes, rehabilitation centers and shelters for homeless veterans.

National Security Task Force
Amicus Brief: Al-Marri v. Spagone, filed with the U.S. Supreme Court. The brief argues that the existing legal system is capable of handling terrorism prosecutions and that data from the past two decades demonstrate that terrorism prosecutions in the federal courts have overall led to just, reliable results without security breaches or other problems that threaten our nation’s safety, and that terrorism suspects should be afforded the protections given to criminal defendants rather than be indefinitely detained.

New York City Affairs
New York City Bar Statement on Proposals to Change New York City Term Limit Laws. The statement argues that any change to term limits via legislative action, after voters voted for term limits in two referendums, would be bad policy, contrary to the principles of good government and damaging to the City. The Committee urges that fair and open consideration of any proposed change in New York City’s term limits law requires (1) submission to the voters in another referendum, with time for public education and discussion, (2) public hearings and consideration of the matter and the precise ballot language in a wide variety of public forums and (3) full public disclosure of contributions to campaigns for or against changes in the term limits law.

President
Report expressing opposition to A.3866-A, which would amend the statute implementing the constitutional provision for selection of Court of Appeals judges to require the Commission on Judicial Nomination to submit to the Governor all well-qualified persons. Although the report notes that
there are real concerns about diversity among the candidates reported out by the Commission, the proposed legislation, by removing the limitation on the number of names put before the Governor, gives the Governor unfettered discretion to choose whomever he or she wants, and would actually be a setback regarding both the quality of the selection process and its diversity.

Letter to President-Elect Obama offering suggestions on how to handle the detention, treatment and trial of terrorism suspects and follow the rule of law. Since September 11, 2001, the letter notes, certain United States policies have disregarded the rule of law and human rights. The letter urges that the President-Elect work to implement policies that balance civil liberties and national security, and makes specific recommendations in that regard.

President
Letter to the FDIC urging that IOLTA (Interest on Lawyer Trust Accounts) be covered by the Temporary Liquidity Guarantee Program (TLGP) regardless of the amount in the account. This program provides insurance to certain deposit accounts regardless of amount. The letter argues that IOLTA accounts should be covered because they are, in effect, non-interest bearing accounts and because not to include them would greatly reduce a private, widely accepted stream of funds that support legal services for society's most needy.

Professional and Judicial Ethics
Formal Opinion 2008-01 considers what ethical obligations a lawyer has to retain and provide e-mails and other electronic documents relating to a representation. The Opinion concludes that: (1) a lawyer is not under an ethical obligation to organize electronic documents in any particular manner, or to store those documents in any particular storage medium, so long as the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve; (2) a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions, including electronic documents; (3) a lawyer may charge the client a reasonable fee for gathering and producing electronic documents; and (4) it is prudent for lawyer and client to discuss the retention, storage and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.
Formal Opinion 2008-02 considers when inside counsel represent corporate affiliates: (a) under what circumstances must they consider the propriety of representing or continuing to represent those affiliates? (b) may a conflict between those affiliates be waived? and (c) are there steps that can be taken in advance to enhance the possibility that inside counsel may continue to represent some or all of the affiliates after a conflict arises? The opinion describes several steps that inside counsel may take to enhance the possibility that the representation of at least one affiliate, typically the parent corporation, may continue in the face of a conflict with another corporate affiliate.

Formal Opinion 2009-01, which concludes that it is impermissible under DR 7-104(A)(1) to send a letter or email directly to a represented person and simultaneously to her counsel without first obtaining “prior consent” to the direct communication or unless otherwise authorized by law, unless the represented person’s lawyer has provided prior consent to the communication or the communication is otherwise authorized by law. However, express consent is not always required, and a lawyer’s prior consent may be inferred where the represented person’s lawyer has taken some action manifesting her consent. The scope of the implied consent will be determined by subject matter and temporal considerations, based on what a reasonable lawyer would understand was authorized by the represented person’s lawyer.

Formal Opinion 2009-02 considers what a lawyer’s ethical duties are when another party to a litigation or transaction is self-represented. The opinion concludes that DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer’s client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer, undisputed statements of fact or law such as the position of the lawyer’s client on a contested issue and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may also at any time explain or clarify the lawyer’s role to the self-represented litigant and advise that person to obtain counsel. Finally, the opinion notes, the lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer’s role in the matter.

Formal Opinion 2009-03 considers the conflicts that arise when hiring
law-school graduates who work in legal clinics operated by law schools. The opinion concludes that firms must balance a number of competing interests, including the interest of the graduate’s former client in protecting her secrets and confidences, the interests of other clients in being represented by the counsel of their choice and the interests of both law students and law firms in not unduly restricting the students’ employment opportunities.

Professional Responsibility
Report proposing amendments to the Judiciary Law Sections 475 and 475-a (collectively, the “Lien Law”), which govern an attorney’s ability to attach a charging lien to a client’s monetary recovery. As currently written, the Lien Law only permits an attorney to attach a charging lien to a client’s recovery in an “action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor.” The report argues that the Lien Law should be expanded to permit an attorney to file a charging lien for services performed pre-litigation in arbitration proceedings, and proposes new language.

Science and the Law/Health Law
Report on the status of the Persistent Vegetative State Law in New York State. The report sets forth what the law is in New York State with regard to the withdrawal of medical and support care for persons with persistent vegetative state (PVS) and evaluates the relevant medical guidelines, case law and statutes on the topic. The report also makes recommendations for needed legislation and urges that New York State enact the Family Health Care Decisions Act, which would authorize surrogate decision-making by persons close to individuals afflicted with a PVS who have failed to sign an advance directive or healthcare proxy.

Sex and the Law
Report supporting, with certain suggested modifications, the passage of Program Bill No. 16, the Reproductive Health and Privacy Protection Act. The Act would modernize New York law by moving the provisions that regulate abortion and contraception from the New York State Penal Law to the Public Health Law. In addition the Act would: (1) provide that only qualified licensed health care practitioners would be authorized to perform abortions within the parameters of the Act, (2) ensure that unauthorized abortions would be treated as a matter of professional misconduct, (3) provide a fundamental right to privacy with respect to reproduc-
tive decisions and (4) bring New York law into line with United States Supreme Court precedent that requires states to permit termination of a pregnancy even after fetal viability when necessary to protect a woman’s health.

**State Affairs**

Testimony before the New York State Senate Temporary Committee on Rules Reform urging rules reform in Albany through the creation of a healthy and active committee structure, equal and adequate funding for all senators and opening the member item process.

**State Courts of Superior Jurisdiction**

Letter to Chief Administrative Judge Pfau noting that while Judicial Hearing Officers (JHO’s) are valuable in reducing crowded dockets, speeding the pace of resolutions, utilizing the experience of retired judges and managing the court system, certain safeguards should be put in place so that parties and counsel assigned to a JHO will be fully cognizant of the circumstances.

Letter to the Office of Court Administration expressing support for the use of the Supreme Court On-Line Library (SCROLL) and urging that it be continued (it has already been implemented in New York County) and deployed throughout New York State, as it increases productivity of the court system while reducing costs.

Report expressing support for A.10503/S.7079, which would amend CPLR 3025(b) to require that a party moving to amend a pleading attach a copy of the proposed pleading showing clearly the proposed changes. The report argues that the amendment would make it easier for parties, lawyers and judges to understand precisely what changes the moving party is seeking.

**State Courts of Superior Jurisdiction**

Letter to Governor Paterson recommending that he veto A.11715/S.8661, which would provide additional opportunities for review of a trial judge’s voir dire rulings by requiring the Chief Administrator of the Courts to adopt a statewide standard for jury selection and appoint a Supervising Judge in each judicial district to hear appeals during voir dire. The legislation, the letter argues, would unnecessarily delay trials, inconvenience jurors, increase the cost to litigants and consume valuable judicial resources.
Structured Finance
Letter to the American Securitization Forum commenting on the RMBS Disclosure Package. The letter supports the goals of the proposal to establish best practices for industry participants and transparency of disclosure related to securitization transactions, as these will increase confidence of investors in mortgage and asset-backed securities and efficiency in the marketplace. The letter expresses a number of concerns with some of the details in the proposal and offers suggestions for how the proposal can be improved.

Structured Finance/Bankruptcy and Corporate Reorganization
Special Report on the Preparation of Substantive Consolidation Opinions. The report (1) reviews the current process required to deliver a substantive consolidation opinion in structured finance transactions, (2) urges that the parties involved and their lawyers take a fresh look at the opinions that are delivered in connection with the closings of these transactions and (3) provides a form that may be used by firms that are asked to render an opinion of this nature and do not have their own forms, or have their own forms but wish to take a different approach than they have used in the past.

Taxation of Business Entities
Letter to the Informal Consultative Group on the Taxation of Collective Investment Vehicles and Procedures for Tax Relief for Cross-Border Investors discussing its proposed recommendation that a collective investment vehicle ("CIV") that does not otherwise qualify for benefits under existing tax treaty provisions between the source State and the State where the CIV is organized be permitted to qualify in whole or in part if some specified threshold of the CIV’s investors are qualified residents of such State and therefore would have been eligible for such treaty benefits had they invested directly.

Trusts, Estates and Surrogates’ Courts
Report opposing any change in the law to permit pre-mortem probate of a last will and testament in any type of judicial proceeding.

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.
When the City Bar, some months ago, asked what I thought of inviting Linda Greenhouse to deliver tonight’s lecture, my reaction was immediate: Don’t let the day go by before calling her, for Linda’s reporting about the Court has been wise, witty, clairvoyant, and, to borrow another French expression, très sympathique. She knows the Justices need observers and reporters to keep us alert to our human fallibility. But she also knows the Court’s prominent role in our U. S. system, and she regularly demonstrated that knowledge in her caring and respect for the Court as an institution, greater by far than the sum of its individual members at any given time.

In a 1996 Yale Law Journal article, Telling the Court’s Story, Linda described the challenge of working on a beat where no one holds press conferences, and confidentiality is vigilantly guarded. The press corps, she wrote, “is often groping along in the dark, trying to make sense of the shadows on the cave wall.” As a regular reader of Linda’s articles, I have
seen, over a span of three decades, not shadows, but light constantly cast on the Court’s actions and decisions. She explained what we did and said in plain English, thus rendering our dispositions accessible to the interested public. She managed to condense and convey our opinions without skipping over the rough spots. She noticed the nuances and offered the reader not spins, but accurate, honest counts. It takes a bright mind and prodigious preparation to report as she did.

Among accolades Linda has received, one of the best known came from my D. C. Circuit colleague, Laurence H. Silberman. In a 1992 talk to the Federalist Society, Judge Silberman deplored the tendency of certain judges to drift to the left to gain favorable press comment on their “jurisprudential growth.” Judge Silberman reported that some Court watchers called this dangerous tendency the “Greenhouse Effect.” While I cannot say any of my colleagues wrote with Linda’s approval in mind, I have no doubt about the large influence her reporting has had on the quality of press accounts about the Court and its work.

In 1998, Linda Greenhouse was awarded the Pulitzer Prize for beat reporting. It was an honor well earned by our top translator and commenter. Linda has received many other high honors. From the long list, I will mention only one. In 2002, Anthony Lewis and Linda Greenhouse were selected by the American Law Institute for the Henry J. Friendly Medal, awarded for outstanding contributions to the law. Linda and Anthony remain, to this day, I am told, the only non-lawyers granted honorary membership in the ALI.

Linda was the first print reporter to gain access to Justice Harry A. Blackmun’s voluminous papers, housed in the Library of Congress. She said of her first exposure to the half-million documents filling 600 feet of shelf space that she found herself “standing in front of a huge open-faced mine on which seams of precious metals were visible, running in various directions.” Her goal was to work the mine, to locate the most promising seams and see where they led. The result, a masterpiece production in 2005, titled *Becoming Justice Blackmun*. The book tells of the odyssey of a man once called Minnesota twin to his friend from days when they were very young, Chief Justice Warren E. Burger. One main theme of the book is the disintegration of the Burger-Blackmun friendship; another, the impact of the cases that trooped before the Court on the mind and heart of Justice Blackmun. Garrison Keillor, who knew and admired the Justice, called the book “an elegant biography.” Anthony Lewis called it “a thrilling book.” Harvard Law School Professor Laurence Tribe called it “a jewel fully worthy of [Linda’s] reputation as the best journalist ever.
to have covered the work of the Supreme Court.” All who have read the book, I think, would concur in those judgments.

Linda is about to start her life’s next chapter, as Knight Distinguished Journalist-in-Residence and Joseph Goldstein Senior Fellow at Yale Law School. She will teach, help to launch Yale’s Law and Media program, serve as adviser to a Supreme Court litigation clinic, and engage in scholarly pursuits from which, I am confident, people in diverse disciplines will benefit.

With appreciation for the work she has done to date, and great expectations for the productions to come, I now invite you to join me in welcoming Linda Greenhouse to the podium.
Justice Ruth Bader Ginsburg Distinguished Lecture on Women and the Law

What A Judge Should Know

*Linda Greenhouse*

Almost 25 years ago, the great Shirley Abrahamson, currently Chief Justice of Wisconsin, offered some reflections on the day in August 1976 when the governor of Wisconsin named her to the state Supreme Court. With her appointment, she not only became the first woman to serve on Wisconsin’s highest court—a distinction that went without saying in 1976—but she became the *only* woman to sit as a judge at that time anywhere in the state. (Two women, who were no longer sitting, had preceded her in the state system. As a frame of reference, at the time of her appointment, only eight women had ever sat on a federal Article III court anywhere in the country.)

In her brief memoir, later published in the *Golden Gate University Law Review* under the title *The Woman Has Robes*, Justice Abrahamson recalled the questions she was asked at the press conference that, to her considerable surprise, she found herself conducting that day in 1976. These were the questions:

1. Were you appointed because you are a woman?
2. Were you appointed to be a token woman on the bench?
3. Do you view yourself as representing women in the courts?
4. Do you think women judges will make a difference?

Those in the audience who are or who have been judges may well

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have been asked one or more of those questions themselves. If you were, you probably gave answers similar to those that Shirley Abrahamson gave, at least to the first three. Having graduated first in her law school class, she replied that her appointment was obviously based on merit; that she was “not a token anything;” and that she planned to represent “all the people of the state of Wisconsin,” just as she assumed the male members of the judiciary did.

The fourth question was—and remains—the tricky one. Do women judges make a difference? “I always take a deep breath when I hear this question or one of its variants,” Justice Abrahamson said. Here is what she explained:

The questioner usually has a stock list of the wonderful qualities he or she associates with women. Now I’m trapped. Naturally I want to have all these wonderful traits attributed to me . . . But do I believe that? I have spent a lifetime fighting society’s urge to stereotype both men and women . . . So what am I to do now?

What she did tell her questioners was that she would necessarily bring to the bench all her life experiences, including growing up as the child of hard-working immigrants who had little formal education; of having practiced and taught tax and business law; of marriage and parenthood—and yes, of being female. That meant, she said, that she was at once an insider and an outsider, someone who had worked with success inside the system, but who at the same time had demonstrated throughout her life a willingness to act contrary to the expectations of others. All these experiences and qualities would contribute to the kind of judge she would be.

We live today, of course, in a much different world. Shirley Abrahamson was in fact the only woman in her law school class at Indiana University. Today, women make up about half the class in most law schools. Nineteen of the 50 state court chief justices are women—19 and a half if you count Texas, which has a bifurcated appellate court system for civil and criminal cases; a woman, Sharon Keller, is the presiding judge of the Court of Criminal Appeals. And the list of states where women sit at the head of the court system includes some not necessarily known for a position at the cutting edge of social progress: Alabama, Georgia, Missouri, North Carolina, South Carolina, Tennessee, Utah.

In state court systems as a whole, women make up 26 percent of the judiciary. They are 29 percent of judges on the state courts with final
appellate jurisdiction. There are 167 women serving as active Federal District Court judges, one-quarter of the total. Women hold 29 percent of the currently filled active positions on the federal appellate circuit courts. With women now constituting about one-third of all lawyers in the country, these numbers are not far off the mark.

The outlier to this progress, of course, is the United States Supreme Court. Nevertheless, it is no longer the slightest bit unusual to walk into a courtroom anywhere in the United States and find a woman on the bench.

Still, the question of whether it makes a difference remains a delicate one all these years after Shirley Abrahamson held her press conference, and for the very reasons she expressed. We cringe from the stereotyped thinking suggested by the question. Justice Sandra Day O’Connor had her own favorite answer: “At the end of the day, a wise old man and a wise old woman are going to reach the same decision.” And yet how many of us, when we read a retrogressive opinion on reproductive rights written by a judge for whom pregnancy was never even a theoretical possibility, mutter through gritted teeth: “No woman would have come out with that.”

There has been lively academic interest in the question of whether female judges make a difference. But for years, the results of the research were equivocal, due to poor data and faulty models. A recent, as-yet unpublished study, which earlier this year won a prestigious award for the best paper presented at the annual meeting of the Midwest Political Science Association, makes a persuasive and nuanced case that in one area of the law, sex discrimination, the presence of a female judge does make a difference. While there is no discernible difference in other areas, women rule in favor of a sex-discrimination claimant significantly more often than male judges do, and male judges themselves become more favorably inclined toward sex-discrimination claimants when sitting on appellate panels with at least one woman.

I won’t go into further details of this study because the precise data don’t really matter for the larger point I wish to make. Neither do the data themselves provide an explanation for why the presence of a female judge should matter to the outcome of sex discrimination cases. In fact, the data raise more questions than they answer. Are the male judges who become more open to sex-discrimination claims when serving with a female colleague just being polite or politically correct? That hardly seems likely. Can it be that they actually learn something from the women?

And what about the women themselves? It hardly takes a lot of fancy numbers-crunching to suppose that women’s life experience may have something to do with the outcome of these cases. These are questions in need of further study. I, for one, would be interested to know whether this study’s retrospective conclusions will also apply prospectively. Will younger women on the bench, who are part of a larger cohort and who may well not see themselves as barrier-breaking pioneers, continue to display the same sensitivity in sex discrimination cases?

Rather than attempting to answer these questions, which I couldn’t do in any event, I would like to use them to frame a larger question. How do judges know what they know—or what they think they know—about discrimination or anything else?

This question is especially pertinent at the appellate level where, when it comes to the facts on which to base a legal conclusion, judges generally are bound by the factual findings below unless they can demonstrate that those findings are “clearly erroneous.” They are largely captives of the information presented to them by the parties and the amici. There was a dramatic example at the Supreme Court this past summer of the limits of appellate judges’ knowledge.

As you may remember, the Supreme Court ruled at the end of its last term that the death penalty is an unconstitutional punishment for the crime of raping a child. Justice Kennedy’s opinion for the 5-to-4 majority relied in considerable part on the conclusion that there was a general consensus in the country against punishing this particular crime by death, and that capital punishment for the rape of a child was therefore “cruel and unusual” within the meaning of the Eighth Amendment. Justice Kennedy noted that only six states made child rape a capital offense. And he also observed that while Congress expanded the reach of the federal death penalty during the mid-1990’s, child rape was not included among the new capital crimes.

There was just one problem. Congress in fact had acted in 2006 to make child rape subject to the death penalty under the Uniform Code of Military Justice. True, this new provision applied only to crimes committed by military service members, and its relevance to the Court’s Eighth Amendment jurisprudence was far from obvious. But what was obvious


4. Section 552(b) of the National Defense Authorization Act, Pub. L. No. 109-163, 119 Stat. 3136, 3263 (2006). “For an offense under subsection (a) (rape) or subsection (b) (rape of a child), death or such other punishment as a court-martial may direct.”
was that the majority’s assertion that there was no federal law on the books that made the rape of a child a capital offense was simply untrue.

This case, *Kennedy v. Louisiana*, was one of the most high-profile cases on the Supreme Court’s docket during the last term. Yet no one—not the parties, not their amici, not the federal government itself—had thought to bring the recent legislation to the Justices’ attention. The government, in fact, filed no brief in the case, a clear sign that the Solicitor General saw no federal interest at stake. Obviously, no one involved in this case at any level was even aware of the new law. It came to light only as the result of a post on a blog devoted to military law, written by a civilian specialist in the military death penalty three days after the Court’s ruling.5

There followed a flurry of activity as both the state of Louisiana and the United States Solicitor General filed briefs asking the Court to reconsider its decision.6 Ultimately, the request was denied and the decision reaffirmed.7 Here, surely, was an instance when judges did not know what they thought they knew.

It might be tempting to assume that judges would be on safer ground if only they could watch a video and see for themselves what really happened in a case that they are reviewing. Factual ambiguities would be dispelled and judges would know what they need to know. Not quite so fast. A Supreme Court case from two terms ago illustrates the weaknesses of that assumption. The question in *Scott v. Harris*8 was whether police officers acted reasonably in chasing and forcing a speeding driver off the road. The driver, a teenager who was not suspected of any offense other than driving dangerously, was rendered a quadriplegic by the ensuing accident and sued the police officers for violating his right to due process. A video camera mounted on the dashboard of the police car recorded the chase. The Justices watched the video, and then posted it on the Court’s Web site as part of that majority opinion, which concluded that the fleeing driver was so obviously a menace to public safety that “no reasonable juror” would have quailed with the officers’ decision to use deadly force.


to “take him out.”9 And indeed, the video showed a scary drive at breakneck speed on a dark and winding country road.

The vote in Scott v. Harris was not unanimous, however. It was 8 to 1. The dissenter was Justice John Paul Stevens. Certainly Justice Stevens is a reasonable man—or at least, as reasonable as his Supreme Court colleagues. He had, in fact, learned to drive many years ago on dark and winding roads, and he did not view the driver’s behavior as justifying deadly force. His own life experience, in other words, determined his view of the facts in this case.

Professor Dan Kahan of Yale Law School was sufficiently intrigued by this case to conduct a social science experiment. He showed the tape to a sample of 1,350 people and studied their reactions.10 While it turned out that most people thought the Supreme Court was correct, not everyone did, and the demographic portrait of the two groups proved to be quite distinct. Those who agreed with the Court were most likely to be white, male, and from the South or West. Those who disagreed were more likely to be nonwhite, female, and from the Northeast. In other words, responses to the video on which the Court based its conclusion turned out to be, at least to some measurable degree, culturally determined. So who is the reasonable juror, or the reasonable Justice? How do judges know what they know?

In April of last year, the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003.11 This decision, Gonzales v. Carhart,12 was based on a remarkable collection of premises indulged in by the 5-to-4 majority and by the author of the majority opinion, Justice Kennedy. One premise was that while any abortion is the occasion for sorrow and regret, “it is self-evident” that a woman whose doctor performs her abortion by the method that this statute criminalizes “must struggle with grief more anguished and sorrow more profound” when she realizes what has happened.13 What is quite amazing here—and I won’t even try to top the eloquence of Justice Ginsburg’s dissenting opinion—is not only the patronizing assumption that reduces a woman seeking to terminate a pregnancy to a child-like state of ignorance, but also that Justice Kennedy offers no citation, no factual backup, for his assertion about what goes on in a woman’s heart and head. It is simply “self-evident.” He and the

9. Id. at 1776.
13. Id. at 1634.
others in the majority buy into the myth of the existence of a “post-abortion syndrome” that has been abundantly discredited in the psychological literature, as described in briefs presented to the Court by medical organizations as long ago as 1989.\footnote{Webster v. Reproductive Health Services, 492 U.S. 490 (1989), amicus brief of the American Psychological Association, at 19-20.} An editorial in the medical journal Obstetrics and Gynecology criticized Justice Kennedy for “his rejection of evidence-based practice by failing to include a single medical reference in support of his opinion.”\footnote{Editorial, The Supreme Court Joins the Multispecialty Group Practice of the Congress and the President, Obstetrics and Gynecology, Vol. 110, No. 2 (August 2007), p. 226.}

How do judges know what they know?

The Supreme Court’s abundant encounters with the subject of abortion offer a more heartening example of the trajectory of judicial knowledge. The year after Justice O’Connor’s arrival, the Supreme Court was faced with deciding the constitutionality of restrictions on access to abortion that had been adopted by the city of Akron, Ohio.\footnote{Akron v. Akron Center for Reproductive Health, Inc. 462 U.S. 416 (1983).} The majority declared these restrictions unconstitutional on the basis of Roe v. Wade, which had been decided just 10 years earlier.\footnote{Roe v. Wade, 410 U.S. 113 (1973).}

Justice O’Connor, confronting her first abortion case on the Supreme Court, dissented in an opinion that was a broadside attack on Roe itself. Noting that premature infants were being saved at younger and younger gestational ages, “it is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future,” Justice O’Connor said. “The Roe framework, then, is clearly on a collision course with itself,” she concluded, as “the point of viability is moved further back toward conception.”

Whatever one thought about Roe v. Wade as law, Justice O’Connor’s “reasonable” belief was simply incorrect as a matter of obstetrics and neonatology. There is no prospect of fetal viability moving back into the first trimester. The medical community made it its business to inform Justice O’Connor of this fact six years later, in a subsequent case in which the Court’s continued adherence to Roe v. Wade appeared to be directly at issue. In this case, Webster v. Reproductive Health Services,\footnote{Webster v. Reproductive Health Services, 492 U.S. 490 (1989).} the American Medical Association, the American Academy of Pediatrics, and other organizations filed a brief explaining the “anatomic threshold” that makes...
survival before about 24 weeks of pregnancy impossible, even with mechanically-assisted respiration, due to the incapacity of the fetal lungs. “Improvements are not expected in the foreseeable future,” the brief concluded.19

Neither in *Webster* nor in any subsequent opinion did Justice O’Connor refer to this brief. But she never mentioned the so-called collision course of *Roe v. Wade* again and, as everyone in this room knows, she came to play a key role in preserving the constitutional right to abortion.20 A good judge is not necessarily one who starts out knowing everything, but one who is willing to learn.

Which brings us back to the question of sex discrimination. One of the most notable, indeed notorious, decisions of a notorious Supreme Court term, October Term 2006, was the Title VII pay discrimination case of *Lilly Ledbetter v. Goodyear Tire & Rubber Company*.21 I am sure you know this case well. Lilly Ledbetter, the underpaid tire-manufacturing plant supervisor whose Title VII claim was foreclosed by the Supreme Court’s interpretation of what constitutes an act of discrimination, has become a symbol of the Roberts Court’s parsimonious attitude toward access to court for citizens other than corporations. As you recall from her appearance at the Democratic National Convention, she has carried that undesired role with grace.

Just to refresh your recollection of the facts of this case of statutory interpretation, the question was how to apply Title VII’s 180-day statute of limitations in the context of a claim of pay discrimination. Was the “discriminatory act”—the unlawful employment practice—the initial pay-setting decision or was it the issuance of each subsequent paycheck that reflected and, more to the point, perpetuated the initial discrimination? The Equal Employment Opportunity Commission’s longstanding “paycheck accrual” rule embodied the latter definition, but this policy was repudiated in the Supreme Court by the Bush administration, which entered the case on behalf of the employer. The company won, by a vote of 5 to 4. The Court held that Ms. Ledbetter’s claim was time-barred because she should have filed her charge not during the year she left the company, which is when she became aware that her monthly pay was as much as 40 percent lower than that of the men she worked with, but many years earlier when her pay and that of her co-workers began to diverge. She was, by the way, the only woman of her rank at the plant.

My purpose is not to rehash the argument in this case. The next Congress will have an opportunity to fix the problem that this decision created. Rather, my point is to examine this decision through the lens I have just used to look at some other recent cases. What do judges know?

As manifested in Justice Samuel Alito’s majority opinion, they don’t appear to know much about the workplace, or at least the private sector. I don’t believe that Justice Alito has ever cashed a paycheck in his adult life that was not issued by the federal government. Federal employees—whether Justice Department lawyers, prosecutors, or judges, and he has worked as all three—are paid according to published schedules. There may well be secrets in the federal workplace, but who gets paid what is not among them. The private sector, of course, is very different. Many of us in this room, myself included, could tell stories of learning only long after the fact of pay disparities that defied any benign explanation.

In any event, Justice Alito’s majority opinion began by asserting that Ms. Ledbetter’s case was governed by “established precedent in a slightly different context.” The “established precedent” holds that the 180-day charging period runs from any “discrete act of discrimination,” such as a “termination, failure to promote, denial of transfer, [or] refusal to hire.” All the majority did was to add a “pay-setting decision” to this list. That was the “slightly different context.” Basically, that was the end of the case.

But as Justice Ginsburg’s dissenting opinion pointed out, the “realities of the workplace” showed that the majority had made a category error. Pay discrimination did not occur in a “slightly different context.” It was completely different from the public, or at least the immediately ascertainable, events of termination, failure to promote, or refusal to hire. “Compensation disparities, in contrast, are often hidden from sight,” Justice Ginsburg wrote. She noted that this very employer kept salaries confidential, as do some 90 percent of all private employers. Justice Ginsburg also observed that if a female employee receives periodic raises, as Lilly Ledbetter did, she might well assume that she is moving up along with the others, despite the fact that without her knowledge, a disparity that initially might have been too small to complain about is growing with each passing year, because future percentage increases rest on a smaller base. The majority’s failure to understand this reality, Justice Ginsburg said, meant that “the Court has strayed from interpretation of Title VII with fidelity to the Act’s core purpose.”

How do judges know what they know and recognize what they still need to learn? As we move forward into a time of challenge and change for our courts, we can only hope for judges—women and men—with the wisdom, and humility, to know the difference.
Commentary on New York’s Ethics Rules Governing Lawyer Advertising and Solicitations

The Committee on Professional Responsibility and the Committee on Professional and Judicial Ethics

I. Introduction

II. The History of the New Lawyer Advertising and Solicitation Ethics Rules
   A. The Bar Associations’ Recommended Changes to New York’s Ethics Rules Concerning Lawyer Advertising and Solicitation
   B. Summary of the June 14, 2006 Draft Rules

III. The Proper Interpretation and Application of the Lawyer Advertising and Solicitation Ethics Rules
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   1. Definition—What is covered?
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Commentary on New York’s Ethics Rules Governing Lawyer Advertising and Solicitation

The Committee on Professional Responsibility and the Committee on Professional and Judicial Ethics

I. INTRODUCTION

On February 1, 2007, amendments to New York’s ethics rules governing lawyer advertising and solicitation (the “Rules”) went into effect. The Rules make substantial changes to the ways in which attorneys subject to regulation under New York’s Rules of Professional Conduct may advertise and solicit business. The Rules were the product of an unusual and extended public comment period during which the Presiding Justices of the Appellate Division’s four departments received over 100 comments from lawyers, law firms, bar associations and others, including the Federal Trade
Commission, concerning the original draft rules published on June 14, 2006. Although the Rules that went into effect on February 1, 2007 (as slightly modified by the new Rules of Professional Conduct, effective April 1, 2009) are arguably less content-restrictive and attempt to define more clearly the type of conduct they seek to regulate than the draft proposal of June 14, 2006, the final Rules nonetheless remain complicated and ambiguous in many respects. Consequently, lawyers are left with the difficult task of attempting to interpret and apply these Rules in an environment that is rapidly changing as a result of, among other things, the increasing use of electronic mail and the Internet by lawyers as a means of communicating with, or making information available to, the public and current and prospective clients.

Moreover, the Rules potentially infringe on a lawyer's constitutional right to engage in commercial speech. Indeed, as discussed below, a federal district court has ruled that certain provisions of the Rules are unconstitutional, and the enforcement of these provisions has been enjoined. At the time of the publication of this report, the district court's decision is on appeal in the United States Court of Appeals for the Second Circuit.

The primary objective of this report is not to analyze all the potential constitutional infirmities of the Rules, a task that is beyond the scope of this report (and ultimately will be decided by the federal courts), but rather to provide lawyers with guidance as to how the Rules should be interpreted and applied to the wide range of conduct that may fall within their purview (assuming, of course, the Rules are ultimately found to be constitutional).

The report is organized as follows: Section II provides an overview of the history of the Rules and Section III sets forth the City Bar's guidance as to how the Rules should be interpreted and applied by lawyers subject to regulation under the Rules.

II. THE HISTORY OF THE NEW LAWYER ADVERTISING AND SOLICITATION ETHICS RULES

A. The Bar Associations’ Recommended Changes to New York’s Ethics Rules Concerning Lawyer Advertising and Solicitation

In June 2005, as a result of concern about certain lawyer advertising, the New York State Bar Association (the “NYSBA”) created the Task Force on Attorney Advertising (the “Task Force”) to recommend (i) changes to

New York's current ethics rules governing advertising and solicitation, (ii) changes in the manner in which these rules are enforced and (iii) a peer review advertising program. The Task Force’s work was part of a larger effort by the NYSBA’s Committee on Standards of Attorney Conduct (“COSAC”) to assess replacement of the NY Code with new rules in the same format as the Model Rules of Professional Conduct (the “Model Rules”).

On November 5, 2005, the Task Force presented a preliminary report on proposed lawyer advertising and solicitation ethics rules (the “Preliminary Report”) to the NYSBA’s House of Delegates for informational purposes. In its Preliminary Report, the Task Force identified, among other things, the following key issues concerning the current state of lawyer advertising and solicitation in New York:

- Certain instances of potentially false, deceptive or misleading advertisements in print and broadcast media and on the Internet.
- An apparent lack of enforcement of the existing ethics rules concerning lawyer advertising and solicitation.
- The potential role that the NYSBA and local bars could play in addressing advertising and solicitations that violate the ethics rules.
- The perceived need to educate lawyers about the ethics rules relating to advertising and solicitation and to educate potential consumers about these rules and the process of retaining lawyers generally.

In its Preliminary Report, the Task Force generally recommended (among other things) that:

- New York’s current lawyer advertising and solicitation ethics rules should be amended. The Task Force concurred with COSAC’s recommendation that the NYSBA, as well as the New York state courts, adopt the Model Rules format to replace the NY Code.

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4. On September 30, 2005, COSAC issued a comprehensive report recommending, among other things, that the NYSBA approve the change from the NY Code to the Model Rules, and ask the Courts of the State of New York to adopt the proposed change. (COSAC’s report is available at www.nysba.org.) On February 1, 2008, the NYSBA submitted proposed Model Rules to the Presiding Justices of the Appellate Division of the State of New York and, as noted above, on December 17, 2008 it was announced that the NY Rules, adopting many of the NYSBA proposals, would become effective April 1, 2009.
The NYSBA should adopt guidelines concerning lawyer advertising and solicitation ethics rules that would be used to educate (i) the public about retaining a lawyer and the types of lawyer advertising and solicitation that may violate the ethics rules, and (ii) lawyers about the ethics rules on advertising and solicitation.

At the time of its presentation to the NYSBA House of Delegates in November 2005, the Task Force circulated the Preliminary Report for comment to interested sections and committees of the NYSBA and other bar associations, including the City Bar. The City Bar reviewed the Task Force’s Preliminary Report and recommended certain changes and additions to the Task Force’s proposals in its Preliminary Report. As a result of the City Bar’s and others’ comments, the Task Force made changes to its proposed lawyer advertising and solicitation ethics rules. The City Bar supported the Task Force’s proposals (with some exceptions) that were ultimately approved by the NYSBA’s House of Delegates on January 27, 2006. Neither the City Bar nor the NYSBA recommended regulating the content of lawyer advertising. The Task Force’s final report and proposed ethics rules concerning lawyer advertising and solicitation are publicly available.5

B. Summary of the June 14, 2006 Draft Rules

On June 14, 2006—approximately six months after the NYSBA’s Task Force issued its final report and proposed ethics rules—the Presiding Justices of New York’s Appellate Division issued for public comment proposed rules relating to lawyer advertising and solicitation. Although the proposed rules adopted certain of the Task Force’s recommendations, they proposed much greater restrictions than the Task Force’s recommendations, including content-based regulations, and had the potential to place great compliance burdens on lawyers. New York Court of Appeals Judge Eugene F. Pigott Jr., who was Presiding Justice of the Appellate Division, Fourth Department, when the draft rules were proposed, explained that the “new rules grew out of a concern of the presiding justices over the ‘explosion’ of attorney advertising, and their suspicion that some of the ads were not only distasteful but misleading.”6 According to Judge Pigott, the Presiding Justices “were concerned about lawyers who wanted to give

the impression that they are the best, when they were often quite young and inexperienced.” Judge Pigott clearly was concerned about the impression that certain advertising may have on the public. Judge Pigott remarked, at the time, that “[w]hat you and I do as lawyers is serious. And on TV are these pop-ups who make a joke about it.”

Shortly after the draft rules were approved for public comment, then-Chief Administrative Judge Jonathan Lippman (now Chief Judge of the Court of Appeals) called the proposal “the most sweeping reform since 1990” and “unprecedented.” The Presiding Justices initially provided a 90-day public comment period (ending September 15, 2006). In early September 2006, however, the Presiding Justices extended the public comment period to November 15, 2006, and stated that the final rules would take effect on January 15, 2007. The most significant aspects of the draft rules were as follows:

- The draft rules contained definitions of “advertisement” and “solicitation” that were very expansive, as well as a definition of “computer-accessed communication” that was quite broad.
- Proposed Disciplinary Rule (“DR”) 7-111 (now embodied in Rule 4.5), Communication After Incidents Involving Personal Injury or Wrongful Death, would prohibit lawyers from soliciting personal injury and wrongful death clients for 30 days after disasters. A limited exception would permit solicitations within 30 days of the disaster where there is a short notice of claim period (e.g., 15 days).
- Lawyers who file “initiating pleadings” (e.g., a complaint) would be required to certify that the matter was not obtained through “illegal conduct” (or, if it was, that those who engaged in the illegal conduct are not participating in the matter or sharing in any fee therefrom), and that the matter was not obtained in violation of Proposed DR-7-111.
- Out-of-state lawyers who advertised or solicited legal services in New York would be subject to professional disciplinary proceedings within New York if they violated the lawyer advertising and solicitation rules.
- All manner of electronic communications, including web sites,

7. Id.
8. Id.
e-mails and other means of communicating with clients via the Internet, were covered by the draft rules.

• The draft rules recommended imposing expansive new content-based restrictions on lawyer advertising. For example, the draft rules provided that “the content of advertising and solicitation shall be predominantly informational, and shall be designed to increase public awareness of situations in which the need for legal services might arise . . . .” In addition, the draft rules proposed prohibiting lawyers from using current client testimonials, from portraying judges, from re-enacting courtroom or accident scenes and from using courthouses or courtrooms as props. The draft rules proposed that lawyers would be barred from using paid endorsements, and from using recognizable voices of a non-attorney celebrity to tout the lawyer’s skills.

• The draft rules also proposed that lawyers would be required to verify objectively the claims made in advertisements, and to include a disclaimer making clear that their past results for other clients were not a guarantee of future success in other matters.

• The draft rules also included new retention and filing requirements for lawyer advertisements and solicitations. Most advertisements would have been required to have been retained by lawyers for three years. In addition, most advertisements and solicitations would have been required to have been filed with the Disciplinary Committees. Moreover, the draft rules would have required lawyers to retain copies of their web sites every time they changed, regardless of the nature of the change, and then subsequently file a copy of the web site with the Disciplinary Committees.

• The draft rules also proposed that every advertisement and solicitation would have to be labeled “Attorney Advertising” on the first page, and the packaging used to transmit the advertisement or solicitation would have to contain such a label in “red ink.”

As mentioned above, on June 14, 2006, the Presiding Justices’ draft rules were open to a public comment period, which is unusual for amendments to ethics rules. Associate Judge Pigott apparently said that the Presiding Justices were initially reluctant to solicit opinions from the bar in drafting new ethics rules regarding advertising “largely because they had never done so before.” Nonetheless, the Presiding Justices apparently had

10. Caher, supra note 6, at 1.
a change of heart, and decided ultimately to publish the draft rules for public comment because, according to Associate Judge Pigott, the Presiding Justices “‘knew what we didn’t know, and we didn’t really know how it would impact practice.’”

According to public reports, the draft rules generated over 100 comments from lawyers, bar associations, the Federal Trade Commission and others. Although there were numerous particular critiques of the draft rules, those critiques can be placed into two general categories. First, many observed that certain elements of the draft rules would be unworkable as a practical matter or would create a tremendous burden on lawyers without any evidence that they would further the overall objectives of those rules. Second, others argued that the draft rules contained content-based restrictions that would impinge on a lawyer’s First Amendment right to engage in commercial speech, and would prevent consumers from obtaining truthful, non-misleading information about the availability of legal services that would be relevant to consumers’ selection of counsel.

On January 4, 2007, the Presiding Justices issued the final Rules, which took effect on February 1, 2007. The Rules were revised in many respects to address the numerous comments received from members of the bar and others. The Rules were changed, among other things, to attempt to describe more clearly both what type of conduct was permitted and what was prohibited by the rules. In addition, although the revision of the Rules did not address all of the concerns voiced in the comments, they were obviously changed in certain respects to attempt to reduce the compliance burden that would be imposed on lawyers and law firms by the new Rules (e.g., the three-year retention period for virtually all electronic communications was eliminated). In addition, the final Rules are less content-restrictive than the draft rules. On the day the Rules became effective, a

11. Id.


lawsuit was filed in federal court in which it was alleged that the Rules' content-based restrictions violate the Constitutional right of lawyers to engage in commercial speech. On July 23, 2007, the district court permanently enjoined enforcement of a number of the Rules restricting advertising content as violating the United States Constitution, but upheld certain other Rules that were challenged. Because the court's decision remains subject to review on appeal, this Report will analyze how the Rules that have been declared unconstitutional should be interpreted and applied.

Despite the numerous changes made to the draft, the Rules are nonetheless ambiguous and complicated in a number of respects. As a result, attorneys have been confronted with many questions about how the Rules should be interpreted and applied to the myriad circumstances they confront in their everyday practice. In an effort to provide guidance to lawyers, this Report explains how the Rules generally should be interpreted and applied to a wide range of lawyer conduct that is arguably governed by the Rules. While the disciplinary committees and courts will have the final say on how the Rules should be applied, the City Bar is hopeful that this Report will provide some helpful guidance to lawyers, disciplinary committees and the courts on how the Rules ought to be applied to the practical situations that lawyers must confront on a daily basis in their practices.

III. THE PROPER INTERPRETATION AND APPLICATION OF THE LAWYER ADVERTISING AND SOLICITATION ETHICS RULES

A. Rule 8.5 — Disciplinary Authority and Choice of Law

1. New York-Licensed Attorneys Based Within and Outside New York

The threshold issue that a lawyer needs to confront when dealing with the new advertising and solicitation rules is, of course, whether the


16. The City Bar submitted an amicus curiae brief in the Second Circuit supporting the district court's unconstitutionality findings and arguing that the 30-day restriction period for solicitations was unconstitutional to the extent it sought to limit information on web sites and in advertising in the media.

17. The NY Rules (the NY Code, prior to April 1, 2009), promulgated as joint rules of the Appellate Divisions of the Supreme Court effective September 1, 1990, are Part 1200 of Title 22 of the New York Codes, Rules and Regulations ("NYCRR").
lawyer’s conduct is even covered by the Rules. Although the new Rules attempt to supply an answer to this question, the jurisdictional reach of the Rules is not entirely clear, especially given their drafting history. The draft version of DR 1-105 (now codified as Rule 8.5) provided that “[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this state if the lawyer provides or solicits any legal services in this state.” Many bar associations commented that this provision of the draft rules was overbroad. As written, the draft rule arguably could have required New York’s Disciplinary Committees to review Internet advertisements that are available worldwide (including in New York) even though the lawyer that created the Internet advertisement is based, for example, in Montana and never provided any services in New York. Such a rule could have required the lawyer in Montana (in this hypothetical example) to comply with the proposed New York rule. Such a rule plainly would have been overbroad. Apparently responding to these concerns, the Presiding Justices modified this version of Rule 8.5. Thus, it is fair to conclude that the Presiding Justices intended that the extraterritorial reach of the Rules would be limited, unless the Rules expressly state they apply extraterritorially (as they do for solicitations, which are discussed below).

To sort out the jurisdictional reach of the Rules, one needs to consider Rule 8.5, Disciplinary Authority and Choice of Law (22 NYCRR § 1200.5-a). If a lawyer is licensed to practice only in New York, he or she almost always will be subject to the new advertising and solicitation rules. See Rule 8.5(b)(2)(i). To start, a New York-licensed attorney publishing advertisements in New York seeking work from New York residents would unquestionably be governed by the Rules. However, even if a New York licensed-attorney were located in, and advertising out of, the Chicago office of a law firm that had offices in both Chicago and New York, that attorney would be subject to regulation under the new Rules if that attorney was licensed only in New York. Indeed, Rule 8.5(a) states that a “lawyer admitted to practice in this state [sic] is subject to the disciplinary authority of this state [sic], regardless of where the lawyer’s conduct occurs.” (Emphasis added.) Moreover, the lawyer in question cannot be saved by the choice-of-law provisions of Rule 8.5(b) because, even though the lawyer is located in the Chicago office of the New York/Chicago firm, the lawyer is licensed only in New York and is thus subject to New York’s disciplinary rules.

The jurisdictional reach of the Rules potentially changes, however, if an attorney is licensed in both New York and another jurisdiction (e.g.,
According to Rule 8.5(b)(2)(ii), if a lawyer is licensed in New York and another jurisdiction, “the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices.” (Emphasis added.) Thus, if a New York-licensed attorney is also admitted to practice law in California, the new Rules would apply to that attorney’s advertising if the lawyer “principally practices” in New York. If that attorney “principally practices” in California (or any other jurisdiction other than New York), the new advertising Rules generally would not regulate that attorney’s advertising. However, the new Rules may apply to the advertising of the California- and New York-licensed attorney in this hypothetical if the “predominant effect” of the advertising was in New York. Thus, even if an attorney who is licensed in both New York and California is located in California and principally practices in California, the attorney may nonetheless find himself or herself subject to regulation, and potential discipline, in New York for advertising if a Disciplinary Committee in New York were to find that the advertising had a “predominant effect” in New York.18

In determining the jurisdictional reach of the Rules in light of Rule 8.5(b)(2)(ii), one of the issues that attorneys also will need to consider is whether a lawyer is “licensed to practice” in “another jurisdiction.” This issue will not be difficult to resolve when dealing with a lawyer who is admitted to practice law in more than one state in the United States. In the United States, all of the states have a process through which attorneys are granted licenses to practice law. The difficult questions will arise when the lawyer in question is admitted to practice in New York but is located in a law firm’s office outside the United States where he or she is authorized to practice New York law in that jurisdiction. Under such circumstances, although the New York-licensed attorney may not actually receive a “license to practice” law in that jurisdiction, the lawyer often is authorized by the local authorities to practice New York law in that jurisdiction. Under such circumstances, it is reasonable to conclude that the lawyer “principally practices” in that

18. For example, if all of the attorney’s advertising in question was directed to New York and was designed to induce New York residents to retain the attorney, a Disciplinary Committee could find that the attorney’s conduct had a “predominant effect” in New York, and thus, the attorney would be subject to regulation (and potential discipline) in New York under the Rules. Notably, this type of activity if targeted at a defined group of potential clients would also likely be considered a “solicitation” under the new Rules and thus subject to the jurisdictional reach of the new solicitation rules.
jurisdiction, and thus his conduct should be governed by the local ethics rules in that jurisdiction, including any advertising and solicitation rules in that jurisdiction, and not New York's lawyer advertising rules.

2. Solicitations Directed to Clients in New York

The solicitation provisions of the Rules explicitly regulate the activities of out-of-state lawyers and firms soliciting clients in New York. The solicitation provisions of the Rules (see Rule 7.3) specifically apply to “lawyer[s] or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.” Rule 7.3(i). Accordingly, any solicitation activity (as defined by the Rules, which are discussed below) by an out-of-state attorney or firm directed at a New York resident that violates the Rules is prohibited. Such activity will subject the attorney or firm to discipline through the reciprocal discipline rules of the state in which the firm is resident and/or the attorney is admitted.

Although this aspect of the Rules is relatively clear, the application of this Rule may not be so clear where a lawyer not admitted to practice in New York solicits, for example, California-based representatives of a corporation that has its principal place of business in New York. The language of the Rule states that it applies to lawyers not admitted to practice in the “State who solicit retention by residents of this State.” The New-York based corporation in this hypothetical situation is a resident of this state, and thus, it could be argued that the lawyer is soliciting a resident of the state, especially if the client that ultimately retains the lawyer is the same corporate entity that employs the California-based employees. The City Bar believes whether or not the Rule would apply to such a solicitation requires a fact-intensive inquiry. For example, if the lawyer outside New York solicited California-based employees of the New-York based corporation with the intention of being retained for corporate transactions or litigation that is being handled by the California operations of the New-York based corporation, the better view of the new solicitation Rule is that it should not apply to this solicitation because the lawyer was not directly soliciting retention by residents of New York. The solicitation rules should not apply to non-New York lawyers who are soliciting New York-based corporations unless the solicitation is

19. See also Rule 7.3 cmt. [8] (“All of the special solicitation rules, including the special 30-day (or 15-day) rule, apply to solicitations directed to recipients in New York, whether made by a lawyer admitted in New York or a lawyer admitted in any other jurisdiction.”) The former Ethical Considerations of the NY Code have been supplanted by the Comments to the NY Rules.
directed to New York-based employees of the corporation or the lawyers know that the retain decision is being made by New York-based employees of the corporation.

3. Law Firms with Offices in New York

There are many law firms in the United States that have offices in multiple states, including New York. The New York office of many “national” and “international” law firms is not the firm’s principal office, and some such firms do not have any principal office at all. In fact, a large number of “international” law firms have only satellite offices in New York. Law firms that have offices in New York and in other states and/or foreign countries will have to wrestle with whether firm-wide and other advertising has to comply with the Rules.

To tackle a relatively easy issue first, if the New York office of the national or international law firm is running advertising in New York directed at New York residents, the advertisements would be subject to the Rules. The advertising efforts of the New York office of those firms would be required to comply with the Rules, as would the efforts of the firms’ lawyers principally practicing in New York.

The more difficult question to answer is: to what extent would firm-wide advertising campaigns of these national and international law firms or advertising disseminated by non-New York offices of those firms have to comply with the Rules? While the answer to this question will always turn upon the particular facts of each advertisement or advertising campaign, a few general observations can be made. First, to the extent a non-New York office of a national or international law firm disseminates advertising that is not targeted directly or indirectly at New York or New York residents, and does not seek work for the firm’s New York-admitted lawyers or New York office, that advertising should not be subject to regulation under the new Rules. However, to the extent a non-New York office has directed the advertisement at New York, particularly with the purpose of being retained by New York residents, or the advertisement seeks work for the New York office (even if it seeks work for other offices as well), the advertising should comply with the new Rules. Moreover, if there is evidence that the non-New York office directed an advertisement at New York to solicit retention by New York residents, the non-New York office (and its lawyers) would be subject to regulation under the solicitation rules (assuming, of course, that the particular com-

20. See infra at 55 (for discussion regarding the designation of a “principal” office).
munication was within the definition of solicitation, discussed below). See Rule 7.3(i).

Because it appears that the Presiding Justices intended to limit the jurisdictional reach of the advertising provisions of the Rules, it seems that the better interpretation of the Rules is that firm-wide advertising of national and international law firms with New York offices that is not disseminated in New York should not be governed by the Rules. For example, if an international law firm runs an international advertising campaign, the advertising that is disseminated outside New York should not have to comply with New York’s advertising rules. However, if the international law firm (with the New York satellite office) were to run the advertisement directly in a New York-focused publication, such as The New York Post, the better argument is that the advertisement should comply with the New York rules.  

A difficult question arises when a national or international law firm runs an advertising program that is not specifically targeted to New York residents but nonetheless results in advertisements appearing in New York because issues of a national or international publication (for example, The Wall Street Journal) are distributed in New York. Should the law firm that has run this advertisement be required to comply with New York’s new Rules concerning advertising when the advertisement was not specifically directed to New York residents but instead ran nationally and/or internationally in various jurisdictions that do not have advertising requirements similar to New York? The City Bar believes that unless the law firm’s principal office (or one of them) is in New York, such an advertisement should not be governed by the Rules because the advertisement was not specifically directed to New York residents, but rather was run nationally and/or internationally by a law firm that has a national or international focus. Such a conclusion is entirely consistent with the objective of limiting the extraterritorial reach of the Rules to advertisements that are specifically directed at New York.

One final issue that should be addressed concerning the jurisdictional

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21. Communications to other lawyers, including those made in bar association publications and other publications targeted primarily to lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm. Thus, advertisements in such publications as The New York Law Journal or The American Lawyer would not be considered advertisements within the new definition of advertising. See Rule 7.1 cmt. [7] (“[C]ommunications to other lawyers, including those made in bar association publications and other publications targeted primarily to lawyers, are excluded from the special rules governing lawyer advertising, even if their purpose is the retention of the lawyer of law firm.”)
reach of the Rules is whether the Rules apply to the web site of a law firm that has only a satellite office in New York. As an example, if a law firm is based in Los Angeles, should it be required to comply with the Rules’ requirements relating to web sites (assuming, of course, that the web site is an advertisement within the meaning of the Rules)? If the web site merely is accessible to residents of New York, but is not directed specifically to New York residents, then the web site arguably should not be governed by the Rules. For example, if a Los Angeles-based firm has done 99.5% of its work for clients based in California over the past decade, and only .001% for clients based in New York, and it does not presently seek to be retained by New York residents, then that firm should not be required to comply with New York’s new Rules. However, even if a Los Angeles-based firm did as little work for New York residents as just described, where the firm consciously seeks retention by New York residents, the better view of the Rule is that the firm’s web site should comply with the Rules.

In order to provide some guidance to lawyers and law firms that have practices in multiple states, including New York, the City Bar believes that the better interpretation of the Rules is that a lawyer’s or law firm’s web site should comply with the Rules if the lawyer or law firm in question currently solicits or advertises (other than just in national publications) in New York (whether or not the solicitation or advertisement is through a means other than the web site). Under these circumstances, it is fair to require lawyers and law firms to comply with the Rules’ web site requirements because, even if they are not principally based in New York, they are soliciting or advertising in New York.

B. The Advertising Rules—What Is Advertising?

The initial draft of the advertising rules did not contain a definition of “advertising.” Heeding comments from the Bar, one was added. The definition of advertising in the Rules is broad in scope, going far beyond newspaper and billboard ads, handbills, mass mailings, and radio and television commercials, all of which are also included. Rule 1.0(a) defines advertising as follows: “‘Advertisement’ means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.” Rule 1.0(a).

Notably, a public or private communication made by or on behalf of a lawyer or law firm can only be an advertisement if its “primary pur-
pose” is “for the retention of the lawyer or law firm.” Thus, in order to qualify as an advertisement within the Rules, it is not sufficient that the public or private communication have as one of its purposes the “retention of the lawyer or law firm.” Rather, a lawyer’s public or private communication only falls within the definition of advertisement if the “primary” purpose is the retention of the lawyer or law firm.22 In order to be the primary purpose, the retention of the lawyer or law firm must be the principal reason for the communication. For example, when a lawyer speaks at a CLE forum, the lawyer’s communications at the CLE forum should not be considered an advertisement within the meaning of the Rules because their primary purpose is to educate fellow lawyers, even though the speaker may also hope that he or she is retained by someone as the result of the work.23 Likewise, if a lawyer is interviewed by the press about certain legal issues, such a communication should be considered “public” but not an advertisement because the primary purpose of the interview is to educate the public about particular legal issues. This type of communication should not be considered an advertisement merely because the lawyer being interviewed hopes that his or her public exposure may also result in a greater opportunity to be retained by viewers of the interview.24

Focusing on the word “private” in the Rule, a communication from a

22. Comment [6] to Rule 7.1 provides in part that “[n]ot all communications made by lawyers about the lawyer or the law firm’s services are advertising. Advertising by lawyers consists of communications made in any form about the lawyer or the law firm’s services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication.” (Emphasis added.)

23. See Former EC 2-7(b) (“A lawyer’s participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients.”)

24. However, there is a risk that a lawyer could run afoul of the advertising rules if the lawyer circulates a news article about the lawyer to prospective clients. Comment [8] to Rule 7.1 specifically provides that “[t]he circulation or distribution to prospective clients by a lawyer of an article or report published about the lawyer by a third party is advertising if the lawyer’s primary purpose is to obtain retentions. In circulating or distributing such materials the lawyer should include information or disclaimers as necessary to dispel any misconceptions to which the article may give rise.” As an example, if the circulated article contains information that “is reasonably likely to create an expectation about the results the lawyer will achieve in future cases, a disclaimer is required by [Rule 7.1] (e)(3).” In addition, the lawyer has an obligation to make any necessary corrections or qualifications about the circulated article if it contains “misinformation about the lawyer’s qualifications,” even if the incorrect information was “through no fault of the lawyer or because the article is out of date . . . .” Id.
lawyer to one lay person may be considered advertising, depending on its content. A personal letter, fax or e-mail from a lawyer seeking legal work sent to a single businessperson who is a prospective client would be an advertisement. Even a private conversation can be considered advertising assuming it meets the requirements of the advertising definition. Given that private communications may qualify as advertisements, it might be argued that responses to requests for proposals, commonly called “RFPs,” even though they are specifically excluded from the definition of “solicitation” (Rule 7.3(b)), could be advertisements. However, Comment [7] to Rule 7.1 makes clear that RFPs are not advertisements:

Communications such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer’s services are not advertising. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer’s response to a prospective client who has asked the lawyer to outline the lawyer’s qualifications to undertake a proposed retention or the terms of a potential retention.

See Rule 7.1 cmt. [7] (emphasis added). Because the lawyer or law firm is merely responding to a request from a prospective client, such communications do not logically fall within the traditional definition of advertising. In addition, sending information to clients would not be an advertisement because communications of any sort with “existing” clients are not considered advertisements.25 Comment [6] to Rule 7.1 states that “[a] client who is a current client on any matter is an existing client for all purposes of these Rules.” If the RFP is sent to inside counsel only, it also would not be considered advertising for an additional reason: communications with other lawyers fall outside the definition of advertisement.26 This latter exclusion was no doubt added because it was felt that other lawyers know what is and is not advertising and are unlikely to be misled by what fellow lawyers say in an attempt to be retained. Put simply, other lawyers do not need the protection of the advertising rules. There, unfor-

25. See Rule 7.1 cmt. [6] (“By definition, communications to existing clients are excluded from the Rules governing advertising.”)

26. Id. (“Likewise, communications to other lawyers, including those made in bar association publications and other publications targeted primarily to lawyers, are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm.”).
Fortunately, is no exclusion for sophisticated buyers of legal services (e.g., a corporate executive who regularly retains counsel), even though they too do not need the protection of the lawyer advertising Rules. The City Bar has taken the position that it believes such an exception should be created.

Can communications with the subsidiary of an existing client that the lawyer has never represented be considered client communications and thus not advertising? Under some circumstances, as a number of ethics opinions have explained, see NY County Lawyers Op. 684 (1991), a lawyer may be considered to represent various corporate affiliates of the corporation for which the lawyer is performing legal services. If a lawyer considers an affiliate of a client to be a client for the purpose of avoiding the application of the advertising rules, is there a risk that the lawyer would have to deem the affiliate a current client for conflict purposes? Similarly, could considering a client for whom the lawyer has performed no services for a substantial period of time to be an existing client for purposes of the advertising rules be viewed as an admission that the client is a current and not former client under the conflict rules? Comment [6] to Rule 7.1 provides that “[w]hether a client is a current client for purposes of conflicts of interest and other issues may depend on other considerations,” and that “the term ‘current client’ for purposes of the advertising exemption should be interpreted more broadly than it is for determining whether a client is a ‘current client’ for purposes of a conflict of interest analysis.” Thus, Comment [6] acknowledged that the meaning of “current” or “existing” client for the purposes of the advertising rules is not necessarily synonymous with the meaning of “current client” under other ethics rules. The City Bar believes that corporate affiliates of clients and persons and entities not currently being represented but with whom the lawyer maintains an ongoing relationship may be considered “current clients” for purposes of the advertising rules. Considering a person or corporation a client for purposes of the advertising rules therefore should not be an admission by the lawyer that the person or corporation is a client for conflicts purposes.

Will communications with a prospective client’s in-house counsel, where copies of the communications are simultaneously copied to business people, fall outside the lawyer-communications exception to the Rules? The City Bar believes that communications that are directed primarily to in-house counsel generally should not be considered advertising. In-house lawyers, who are representing the corporate client, are sophisticated consumers of legal services who can represent the interests of the corporation
and the business people who also receive the lawyer communication. Communications, however, that are directed to business people will not fall into the lawyer communication exception even if a copy of the communication is sent simultaneously to in-house counsel.

Another form of lawyer communications that may be considered an advertisement is the now ubiquitous web site. Most web sites have at least some sections that are primarily intended to attract new business, and thus those portions of the web sites will be considered advertisements in New York. However, there are other web sites or sections of a law firm’s web site, such as those that contain employment opportunity information, a list of the attorneys’ names, the location of offices, or scholarly articles on the law, that are not advertisements, and thus should not be considered advertisements under the Rules.

Likewise, brochures created exclusively to recruit law students to join a law firm or legal department would not be a communication “primarily” intended to attract new business. Similarly, neither an invitation to a CLE event at which a lawyer is speaking nor the speech at the CLE event would be considered an advertisement, as long as the invitation or speech also does not describe in a more than summary fashion the firm’s practice. An article published in a legal publication would not be considered an advertisement. However, if the article is no more than a description of the lawyer’s practice or a recitation of how the lawyer was successful in handling the matter that is the subject of the article, the piece would likely cross the line and becoming advertising. An update on legal developments mailed to clients, former clients and prospective clients also should not be considered advertising, again as long as it does not include a detailed discussion of the firm’s practice or tout that the firm handled the particular matter being reported. See Rule 7.1 cmt. [7]. A resume, if used to

27. Indeed, Comment [9] to Rule 7.1 specifically provides that “[a] lawyer’s participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients.” Comment [9] does, however, caution lawyers that educational programs could be considered attorney advertising in certain circumstances: “Such a program might be considered to be advertising if, in addition to its educational component, participants or recipients are expressly encouraged to hire the lawyer or law firm.”

28. See Rule 7.1 cmt. [7] (“Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising.”)

29. See Rule 7.1 cmt. [7] (“However, a newsletter, client alert or blog that provides information or news primarily about the lawyer or law firm (for example, the lawyer or law firm’s cases, personnel, clients or achievements) generally would be considered advertising.”)
obtain new employment, would not be advertising, but if used as part of pitch materials for new business, could be. An advertisement in a benefit journal that was the result of buying tickets to a charitable event would not be considered an advertisement, so long as the advertisement does not include anything more than a cursory description of the firm. Finally, a press release or other communication with members of the press describing an event in which a lawyer or law firm has participated or a change in the lawyer’s or law firm’s practice would not generally be an advertisement. If the press release is sent to a prospective client, on the other hand, such a communication probably would be considered an advertisement.

C. The Labeling of Advertising

Communications that are considered advertisements must now be labeled “Attorney Advertising” under Rule 7.1(f). This label must be placed on the first page of any presentation or document (that does not mean the cover), the home page of a web site, and within self-mailing brochures or postcards. E-mails must state “ATTORNEY ADVERTISING” (in all capital letters) in the subject line. Because of this requirement, it may be prudent to tell prospective clients to search their spam filters for your communications, or to send them via regular mail. Excluded from the labeling requirement are radio and television advertisements, and those appearing in a “directory, newspaper, magazine, or other periodical.” Comment [5] to Rule 7.1 further provides that “[t]he label is not necessary for advertising in newspapers or on television, or similar communications that are self-evidently advertisements, such as billboards or press releases transmitted to news outlets, and as to which there is no risk of such confusion or concern.” Comment [5] to Rule 7.1 cautions, however, that “[a]n advertisement in a newspaper may nevertheless require the label if it is a paid article about a law firm adjacent to other articles written by the newspaper, where there is a reasonable risk that readers will confuse the two. The

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30. A resume sent in response to a request from a prospective client would not be an advertisement. A resume that is included in material considered an advertisement would not need to include a disclaimer or label if the disclaimer or label was included elsewhere in the materials.

31. Comment [10] to Rule 7.1 states that “[a]s members of their communities, lawyers may choose to sponsor or contribute to cultural, sporting, charitable or other events organized by not-for-profit organizations. If information about the lawyer or law firm disseminated in connection with such an event is limited to the identification of the lawyer or law firm, the lawyer’s or law firm’s contact information, a brief description of areas of practice, and the fact of sponsorship or contribution, the communication is not considered advertising.”
ultimate purpose of the label is to inform readers where they might otherwise be confused."

All labels and disclaimers (which are discussed immediately below) mandated by the Rules must be “clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.” Rule 7.1(i). There is no requirement that the label be on every page, be in red ink, or be of a particular size, as in some states. As a practical matter, no one should quibble with the size of the “attorney advertising” label if it is at least the same size type as the smallest type elsewhere in the advertisement.

The Rules require advertisements that create an expectation about the results the lawyer may be able to achieve, compare the lawyer’s services to those offered by other lawyers, include client testimonials or endorsements or describe or characterize the quality of the lawyer’s services—i.e., most advertisements—be accompanied by the following disclaimer: “Prior results do not guarantee a similar outcome.” Rule 7.1(e)(3). The Rules do not indicate where the disclaimer should be located in the advertisement, except to state that the disclaimer should be “clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud.” Rule 7.1(i). For brochures, appearance of the disclaimer once—either on the first page, the last page or the page where the information appears necessitating the disclaimer—should be sufficient. For web sites, it is has become common practice for the disclaimer to appear on the home page. If the disclaimer is on the home page, the disclaimer need not appear on other pages of the web site. As noted above, the disclaimer need only be legible; the lawyer’s disclaimer should avoid any objection under the rule if it is at least in the same size type as the smallest text on the home page.

Advertisements must also include the “name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.” Rule 7.1(h). This Rule has caused a problem for firms that heretofore have had no principal office. For example, some national firms have since had to designate one of their offices as their principal offices for the purpose of New York’s Rules. Comment [17] to Rule 7.1 provides that “[a] law firm that has no office it considers its principal office may comply with [Rule 7.1(h)] by listing one or more offices where a substantial amount of the law firm’s work is performed.”

D. Substantive Limits on the Content of Advertising

The Rules place a number of substantive limits on the content of advertising which are discussed below. As noted above, on July 23, 2007,
the United States District Court for the Northern District of New York held that certain of the Rules’ content-based restrictions violate lawyers’ Constitutional right to engage in commercial speech, and enjoined enforcement of those aspects of the Rules. That decision is currently on appeal in the United States Court of Appeals for the Second Circuit. This report does not analyze whether or not the district court’s decision was correct as a matter of constitutional law. Rather, it explains how lawyers should interpret and apply the Rules assuming they are ultimately found not to violate the New York or U.S. Constitutions.

1. Requirement of Evidence of Claims Made By Attorneys

Rule 7.1(d) states that as long as a lawyer complies with subdivision (e) of the rule, advertisements may contain (1) “statements that are reasonably likely to create an expectation about results the lawyer can achieve,” (2) “statements that compare the lawyer’s services with the services of other lawyers,” (3) “testimonials or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients,” and (4) “statements describing or characterizing the quality of the lawyer’s or law firm’s services.” Rule 7.1(e)(2) provides that advertisements may contain the aforementioned information in subdivision (d) provided that (1) such information does not violate other provisions of the rule, (2) the information “can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated,” and (3) the information contains the appropriate disclaimer (i.e., “Prior results do not guarantee a similar outcome”). See also Rule 7.1 cmt. [11].

The “factual basis” requirement is the aspect of this rule that likely will generate the most confusion about how to comply with Rule 7.1(e)(2). By reviewing the initial draft rules, a lawyer is able to gain some insight into how he or she may comply with this factual basis requirement. The provision in the June 12, 2006 draft of the Rules that the statements must be “objectively provable” was eliminated. Thus, it appears that subjective claims are permitted, provided they can be factually supported. Thus, for example, a law firm brochure may claim that the firm is one of the top ten bankruptcy firms in the state if the firm has facts to support the claim. If the firm states that it has a great record for winning cases, it should have records available to substantiate the claim.

Moreover, Comment [12] to Rule 7.1 explicitly allows for certain subjective claims “even though they cannot be factually supported.” For ex-

ample, Comment [12] states that: “[d]escriptions of characteristics of the lawyer or law firm that are not comparative and do not involve results obtained are permissible, even though they cannot be factually supported. Such statements are understood to be general descriptions and not claims about quality, and would not be likely to mislead potential clients.” (Emphasis added.) Consequently, “a law firm could advertise that it is ‘Hard-Working’ ‘Dedicated’ or ‘Compassionate’ without the necessity to provide factual support for such subjective claims.” See Rule 7.1 cmt. [12].

However, Comments also make clear that lawyers run the risk of violating the Rules if they make comparative statements that cannot be factually supported. Comment [17] provides that “[o]n the other hand, descriptions of characteristics of the law firm that compares its services with those of other law firms are that are not susceptible of being factually supported, could be misleading to potential clients.” Consequently, “a lawyer may not advertise that the lawyer is the ‘Best,’ ‘Most Experienced’ or ‘Hardest Working.’ Similarly, claims that involve results obtained are not susceptible of being factually supported and could be misleading to potential clients. Accordingly, a law firm may not advertise that it will obtain ‘Big $$$,’ ‘Most Money’ or ‘We Win Big.’” Id.33 Thus, lawyers should avoid comparative subjective statements, because such statements will be hard to support with facts.

2. Ratings

Rule 7.1(b)(1) states that advertisements may include information as to “bona fide professional ratings.” Of course, the obvious question to be asked is: what does “bona fide professional rating” mean as used in Rule 7.1(b)(1)? The Rule itself does not supply a definition of “bona fide professional rating.” However, Comment [13] to Rule 7.1 provides useful guidance as to what types of ratings qualify or do not qualify as “bona fide professional ratings.”

As an initial matter, Comment [13] states that “[a]n advertisement may include information regarding bona fide professional ratings by re-

33. Comments also make clear, however, that even “true factual statements may be misleading if presented out of the context of additional information needed to properly understand and evaluate the statements.” Comment [11] to Rule 7.1 provides the following illustrative example: “a truthful statement by a lawyer that the lawyer’s average jury verdict for a given year was $100,000 may be misleading if that average was based on a large number of very small verdicts and one $10,000,000 verdict.” Thus, lawyers must consider carefully whether even true factual statements can be considered to be misleading if the lawyer fails to disclose other information needed to understand and evaluate those statements.
erring to the rating service and how it has rated the lawyer, provided that the advertisement contains the ‘past results’ disclaimer as required under Rule 7.1(d) and (e).” Comment [13] further provides, however, that a “rating is not ‘bona fide’ unless it is unbiased and nondiscriminatory.” While Comment [13] does not provide precise definitions of what “unbiased” and “nondiscriminatory” mean for the purposes of this Rule, Comment [13] states that the rating “must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service’s economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated.” Thus, it seems clear that a lawyer cannot advertise a “rating” the lawyer has received from a “rating service” if the lawyer, or someone on behalf of the lawyer, has paid the rating agency for the rating. In addition, a lawyer would violate the Rules if even though the lawyer did not pay the rating service, the lawyer suggested to the rating service that he or she would direct future business to the rating service, either through his or her own firm or other corporate entities. Such a practice would plainly constitute “improper influence,” and would result in a rating process that was biased and thus a rating that was not “bona fide.”

Before lawyers advertise a professional rating they have received, they will need to determine whether the rating service evaluated the lawyers based on “objective criteria” or “legitimate peer review.” Comment [13] to Rule 7.1 does not explain, however, what would qualify as “objective criteria” or “legitimate peer review.” Despite the lack of guidance, there are a few observations that can be made about this particular aspect of Comment [13].

First, it seems almost beyond legitimate dispute that a lawyer cannot advertise a professional rating he or she has received unless the lawyer knows what “criteria” or “peer review” process was used. Without this information, the lawyer could never determine whether the “criteria” were “objective” or the “peer review” was “legitimate.”

Second, until ethics opinions are issued or court decisions are rendered interpreting the meaning of the “bona fide professional rating,” lawyers will have to make subjective determinations as to whether the “criteria” used by the rating service are “objective” and the “peer review” process is “legitimate.” However, lawyers who make these subjective determinations resulting in a decision to advertise a professional rating they have received will subject themselves to potential second guessing by disciplinary committees as to whether the rating service actually used “objective criteria” or the “peer review” process was legitimate. Thus, the City
Bar believes that lawyers should satisfy themselves that the “criteria” or “peer review” process used is reasonably objective, comprehensive and administered fairly before they advertise the rating.

Comment [13] raises one additional issue that lawyers will need to consider before advertising a professional rating that they have received. Comment [13] states that “the rating service must fairly consider all lawyers within the pool of those who are purported to be covered,” and that “a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.” Thus, it seems clear again that before a lawyer advertises a rating that he or she has received, the lawyer needs to determine whether the rating service has “fairly consider[ed] all lawyers within the pool of those who are purported to be covered.” However, the City Bar believes that assuming the rating service publishes information concerning the pool of lawyers evaluated for the purposes of rating the lawyers, lawyers should be entitled to rely on the representations made by the rating service about whether it applied its criteria “to all lawyers within the geographic area, practice area, or age group” that were evaluated (unless the lawyer is aware of information that undermined or contradicted the rating service’s representations). Indeed, if the rule were otherwise, lawyers would almost never be able to advertise professional ratings they have received because it would be virtually impossible for any lawyer to verify independently whether the rating service applies its criteria to all the lawyers within the particular pool of lawyers covered by the rating service’s evaluation.

3. Specialist/Experts

The Rules did not make any changes to DR 2-105 (now Rule 7.4), Identification of Practice and Specialty. The City Bar and others recommended to the Presiding Justices during the public comment period that lawyers should be able to identify areas of law in which the lawyer “specializes.” It seems beyond serious dispute that lawyers can and do become specialists in particular areas of the law based on repeated experience. Indeed, most lawyers are no longer “general practitioners” providing every sort of legal service to their clients. Moreover, lawyers have a Constitutional right to convey to consumers facts about themselves as lawyers and the services they provide, so that consumers can make an informed decision about whom to retain. For these reasons, the City Bar and others recommended that the advertising rules should be amended to allow lawyers to inform
the public that they specialize or are specialists in particular areas of law if it can be supported as a factual matter, even if based solely on the experience of the lawyer and the lawyer has not received any particular specialist certification. This recommendation was not adopted in the Rules. Thus, lawyers are limited to identifying the specialties set forth in Rule 7.4 with an appropriate disclaimer.

4. Actors, Judges, Fictional Characters, etc.

Rule 7.1(c)(3) states that an advertisement shall not “include the portrayal of a judge, the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case.” This is one of the aspects of the Rules that was found to be unconstitutional in Alexander & Catalano v. Cahill. Putting aside the potential Constitutional issues potentially raised by this Rule, the Rule is relatively straightforward. Thus, assuming this Rule is not ultimately found to be unconstitutional, lawyers should avoid using any of these aforementioned fictional characters in their advertisements.

5. Use of Stock Photos

One seemingly benign rule is Rule 7.1(c)(4), banning advertisements that “use actors to portray the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same.” What immediately comes to mind are television and radio commercials involving actors portraying lawyers and clients, dramatizing heroic moments from the practice of law last seen when “L.A. Law” was on the air. Such advertisements may not be acceptable even with disclosure and disclaimer. What is not obvious is whether the rule will require a disclaimer if a law firm uses stock photographs to illustrate brochures. For example, firms often use such photos to portray “clients” or “scenes” because the firm does not have available photos of actual clients or projects on which the firm has worked. Although the Rule might be read to require disclosure if stock photos are used of buildings, scenery and the like, the better view is that Rule was not meant to require disclosure in such cases and so none should be required. Of course, stock photos may not be used in a manner that is misleading, i.e., when the photograph is useful to suggest the firm has worked on matters that it has not, its employees have a different appearance than they in fact do, or the firm is located where it is not.
6. Use of Monikers

Even when a lawyer is allowed to describe his or her past successes under the Rules—accompanied, of course, by the appropriate disclaimer—a lawyer may not do so using “a nickname, moniker, motto or trade name that implies an ability to obtain results in a matter.” Rule 7.1(c)(7). The limitation on the use of mottos carries no exceptions. Therefore, if a lawyer wants to include a phrase in advertisements to capture the essence of his practice or firm, he should be descriptive of what he does and not how he thinks of himself or his firm.

As noted above, there is a case pending in federal court seeking a declaration that the content-based restrictions of the Rules are unconstitutional. One of the plaintiffs in that case had used a number of advertising techniques regularly used in product advertising, including referring to themselves by a moniker—“heavy hitters.” That nickname arguably “implies an ability to obtain results,” which would violate the Rules. However, the federal district court has ruled that the restriction on the use of monikers is unconstitutional, and that decision is now on appeal in the Second Circuit.

7. Domain Name

Rule 7.5(e) provides that “[a] lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided: (1) all pages of the web site clearly and conspicuously include the name of the lawyer or law firm; (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate [the NY Rules].” Rule 7.5(f) also addresses domain names, providing that a “lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate [the NY Rules].”

These new Rules will undoubtedly affect many lawyers and law firms because thousands of law firms (whether solo practices or international law firms) have created web sites to provide information about their firms. A web site is reached through an Internet address, commonly called a “domain name.” As long as a law firm’s name complies with other disciplinary rules, it is always proper for a law firm to use its own name as its domain name. For example, the law firm of Smith & Jones may use the domain name www.smithandjones.com. Comment [2] to Rule 7.5 states that a law firm can also use “its initials or some abbreviation or variation
of its own name as its domain name.” Thus, Smith & Jones could use www.SJ.com, www.SandJ.com, or www.smijon.com. Lawyers also may prefer to use terms other than the law firm’s name for a variety of reasons (e.g., easier for clients to remember). For example, if Smith & Jones are divorce lawyers, it may prefer to use a domain name such as www.divorce lawyers.com. Accordingly, a law firm may use a domain name for an Internet web site that does not include the name of the law firm provided the domain name meets four conditions. See Rule 7.5 cmt. [2].

First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm. (Pages of the web site created by others, commonly known as “links,” need not include the name of the law firm.)

Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Smith & Jones use the domain name www.divorce lawyers.com, the firm may not advertise that people contemplating divorces should “contact www.divorce lawyers.com” unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement.

Third, the domain name must not imply an ability to obtain results in a matter. For example, Smith & Jones could not use the domain name www.best divorcer terms.com because such a name implies that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances.

Finally, the domain name must not otherwise violate a disciplinary rule. If a domain name meets the three criteria mentioned above but violates other disciplinary rules, then the domain name is improper under this rule as well. For example, if Smith & Jones are solo practitioners who are not partners, they may not jointly establish a web site with the domain name www.smith andjones.com because the two lawyers would be holding themselves out as having a partnership when they are in fact not partners.

The same restrictions that apply to law firms also apply to individual lawyers who create their own web sites, whether the individual lawyers practice as solo practitioners or practice in association with a law firm. However, a lawyer who practices in association with a law firm may create his or her individual web site using his or her individual name as a domain name without mentioning the name of the law firm with which he or she practices. For example, if Smarty Jones is a member of Smith & Jones, he may use the domain name wwwSmarty Jones.com and is not
required to mention his association with Smith & Jones anywhere on the web site.

Some lawyers also may wish to use their domain names as telephone numbers. A lawyer or law firm may use a telephone number that contains a domain name as long as the domain name does not violate a disciplinary rule. Comment [3] to Rule 7.5 states that “lawyers and law firms may always properly use their own names, initials, or combinations of names, initials, numbers and legal words as telephone numbers.” For instance, “the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL.”

Comment [4] to Rule 7.5 allows lawyers to “use telephone numbers that contain a domain name, nickname, moniker, or motto.” Comment [4] warns, however, that “[a] lawyer or law firm may use such telephone numbers as long as they do not violate any disciplinary rules, including those governing domain names.” Therefore, under Comment [4], a personal injury lawyer may use 1-800-ACCIDENT or 1-800-INJURY-LAW, but the lawyer may not use 1-800-WINNERS or 1-800-GET-CASH because those telephone numbers imply an ability to obtain results in a matter. This limitation may be affected by the Second Circuit’s decision in Alexander & Catalano v. Cahill.

8. Identification of Clients

Rule 7.1(b)(2) provides that an advertisement may include information as to the “names of clients regularly represented, provided that the client has given prior written consent.” Thus, in their advertisements, lawyers may use the names of clients that they regularly represent or have regularly represented in the past, provided that a client whose name is used has given prior written consent after full disclosure of the manner in which the client’s name will be used. The use of a client’s name in a lawyer’s advertisement is an implied endorsement of the lawyer’s services.

A potential issue presented by this Rule is whether a lawyer may include the names of clients who they have represented on only one occasion. In draft ECs, COSAC initially took the position that a lawyer or law firm can identify only the client if the lawyer has served the client over an extended period of time in multiple matters.34 One could certainly argue that one-time clients may not be in the best position to assess the quality of the lawyer’s services, in contrast to clients who have used a lawyer or law firm repeatedly. However, as the City Bar conveyed to COSAC,

34. See COSAC EC 2-12 (draft August 31, 2007) [on file with the City Bar].
this reasoning is not persuasive because there is nothing inherent about a one-time engagement that would preclude the client from assessing the quality of the lawyer's services. In response to the City Bar's and others' comments, COSAC agreed that an EC regarding Rule 7.1(b)(2) was unnecessary.

The City Bar believes that the better interpretation of Rule 7.1(b)(2) is that it does not prohibit lawyers from identifying clients in advertisements who they may have represented on one occasion. Indeed, if this Rule were limited to clients who the lawyer has represented on more than one occasion, it seems clear that many lawyers would be prevented from identifying their clients in a significant number of matters they handled. For example, a lawyer who handles matrimonial matters, such as divorce proceedings, would likely be prevented from identifying the names of many clients because most of his or her clients would likely have retained the lawyer on just one occasion. Likewise, many securities and antitrust litigators, as well as bankruptcy lawyers, would be prevented from identifying many clients because most corporations are typically involved in securities and/or antitrust litigation or bankruptcy filings on one occasion in a ten- or twenty-year period. As long as the client has given their written consent as required by the Rule, the lawyer or law firm should be able to identify their one-time client assuming, of course, the advertisement satisfies all the other requirements of the Rules.

Rule 7.1(b)(2) provides a safe harbor. It does not preclude the listing of client names where the client has not given written permission. A client may be listed in advertisements without prior written permission where (i) the fact of the representation is not confidential (such as where the representation was public), (ii) the client does not have a policy against the use of its name by counsel or others, (iii) disclosure of the matter will not embarrass the client or remind the public of an event the client would like the public to forget, and (iv) the client has not told the lawyer that the client does not wish its name to be listed.

9. Sensationalism

Rule 7.1(c)(5) states that an advertisement shall not “rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence.” This Rule has been declared unconstitutional in Alexander & Catalano v. Cahill.

Assuming this Rule is ultimately found to be constitutional, however, the Rule undoubtedly will be difficult for lawyers to apply because it
does not provide any meaningful guidance as to what it means for advertisements to “rely on techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel.” Showing lawyers who exhibit characteristics unrelated to legal competence is cited as the only example. Thus, a lawyer would run the risk of violating this Rule if his or her advertisement depicted a lawyer running faster than a speeding locomotive, or jumping tall buildings in a single bound. While it would be clear to even the most casual observer that these images were only being used to grab the attention of the viewer (and were not really intended to suggest that the lawyer could actually run faster than a locomotive or jump tall buildings), the lawyer who disseminated such advertisements would potentially be found to have violated the Rule because these traits arguably “demonstrate a clear and intentional lack of relevance to the selection of counsel.” Given that the Rule’s standard is entirely subjective—indeed, it is not a stretch to say that the Rule’s standard approximates Justice Potter Stewart’s “I know it when I see it” standard—lawyers will need to consider carefully whether or not techniques they use in their advertisements can be characterized as having a “clear and intentional lack of relevance to the selection of counsel.” It is clear, however, that the rule was not meant to prevent the use of music, color or graphics in advertisements.

10. Endorsements

Rule 7.1(c)(1) provides that an advertisement shall not “include an endorsement of, or testimonial about, a lawyer or law firm from a client with respect to a matter that is still pending.” Rule 7.1(d)(3) states that an advertisement that complies with subdivision (e) of the rule may contain “testimonial or endorsements of clients, where not prohibited by paragraph (c)(1), and of former clients.” This Rule also has been declared unconstitutional by a federal district court, and its enforcement has been enjoined. In any event, even if the Rule were found to be constitutional, the application is relatively straightforward. Based on the plain language of the Rule, lawyers’ advertisements can include the testimonial or endorsement of a current client for matters that are no longer pending, but not for matters that are pending (assuming, of course, the advertisement complies with Rule 7.1(e) as well).

11. Pop-Up Advertisements and Meta Tags

Rule 7.1(g)(1) and (2) respectively provides that a lawyer or law firm shall not use “a pop-up or pop-under advertisement in connection with
computer-accessed communications[35], other than on the lawyer or law firm’s own web site or other internet presence,” and “meta tags or other hidden computer codes that, if displayed, would violate [the NY Rules].” See also Rule 7.1 cmt[14]. While the application of the rule is straightforward, like other aspects of the Rules, a federal district court has declared this Rule unconstitutional, and has enjoined its enforcement.

12. Description of Fees
Accurate information about the fees charged by a lawyer or law firm often assists a prospective client in choosing counsel, especially if the prospective client does not regularly hire attorneys or is not familiar with the ways in which lawyers charge for their services. Rule 7.1(b)(4), 7.1(l) and 7.1(p) provide the relevant framework for analyzing what lawyers need to disclose about their fees and other non-legal services in advertisements.

Rule 7.1(b)(4) provides that an advertisement may include information as to “legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p); range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.”

Rule 7.1(l) reads as follows:

If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

35. “Computer-accessed communication’ means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.” Rule 1.0(c).

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Rule 7.1(p) states that all “advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3).”

Based on the foregoing, lawyers may advertise legal fees for initial consultation; contingent fee rates in civil matters; hourly rates; and fixed fees for specified legal and nonlegal services. Lawyers may also advertise a range of fees for legal and nonlegal services (for example, “uncontested divorces from $300 to $700”), provided that the lawyer makes available to the public, free of charge, a written statement clearly describing the scope of each advertised service.

If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm must not charge more than the advertised fees for the specified services. If a lawyer were to charge more than the top of the range or more than the advertised hourly rate, the advertisement would be false, deceptive, or misleading, and would therefore violate Rule 7.1(a).

Likewise, if lawyers or law firms advertise fixed fees for specified legal or nonlegal services, they must not charge more than the advertised fixed fees for the specified services. But clients who come to lawyers seeking the specified services sometimes need other legal or nonlegal services in addition to, or instead of, the services specified in the advertisement. If the client agrees in writing that the services to be performed are not the legal services referred to or implied in the advertisement, and agrees that a different fee arrangement will apply to the additional or different services, then the lawyer may charge more for the additional or different services than the fixed fee advertised for the other services.

Similarly, during a lawyer’s work on a particular matter, the lawyer may realize that the services actually provided went beyond the scope of the advertised services. If the client agrees in writing that the services that were performed were not the legal services referred to or implied in the advertisement, and agrees to a different fee arrangement for the additional or different services, then the lawyer may charge more for the additional or different services than the fixed fee advertised for the other services.

Lawyers who practice in New York must obey not only the disciplinary rules, but also statutes regulating lawyers, including the New York Judiciary Law. Accordingly, all advertisements that contain information about the fees charged by the lawyer or law firm, including advertisements indicating that in the absence of a recovery, no fee will be charged, shall comply with the provisions of Judiciary Law § 488(3). Under Judiciary Law § 488(3), a lawyer may pay court costs and expenses of litigation
on behalf of an indigent or pro bono client; a lawyer may advance court costs and expenses of litigation, and may make repayment contingent on the outcome of the matter; or a lawyer, in an action in which an attorney’s fee is payable in whole or in part as a percentage of the recovery in the action, may pay the court costs and expenses of litigation and not require repayment.

A lawyer or law firm that offers this financial arrangement, however, must not, either directly or in any advertisement, state or imply that his or her ability to advance or pay costs and expenses of litigation is unique or extraordinary when that is not the case. For example, if an advertisement promises that the law firm will advance the costs and expenses of litigation contingent on the outcome of the matter, or promises that the law firm will pay the costs and expenses of litigation for indigent clients, then the advertisement must not say that such arrangements are “unique in the area” or are “unlike other firms” or are available “only at our firm,” or words to that effect, unless that is in fact the case. See Rule 7.1 cmt. [15].

E. Maintaining Copies of Advertisements

Rule 7.1(k) provides that:

All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

Rule 7.1(k) is substantially less onerous than the filing requirements that were contained in the draft proposal (which would have required that most advertisements be filed with the attorney disciplinary committee, and that almost every change to a web site, regardless of how insignificant, would have to be saved as well). Nonetheless, the Rules do impose a new burden: lawyers now must retain copies of advertisements for a period of three years if in print, and for one year if the advertisement is in a computer-accessed communication.36 (The lawyer does not have to keep the recipient

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36. Notably, if an advertisement is sent by e-mail, that advertisement should probably always also be considered a solicitation because solicitation means “any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.
list for the advertisement unless the advertisement also is a solicitation.)

Comment [16] to Rule 7.1 expressly states that DR 2-101 (now Rule 7.1(k)) allows a lawyer to retain the copy in any medium:

Where these Rules require that a lawyer retain a copy of an advertisement or file a copy of a solicitation or other information, that obligation may be satisfied by any of the following: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

The retention requirements for web sites are discussed immediately below in Section II.F.2.

F. Web Site Rules

1. Labeling

Rule 7.1(f) appears to assume that all law firm web sites constitute “advertising”:

Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled “Attorney Advertising” on the first page, or on the home page in the case of a web site.

(Emphasis added.) Thus, despite the numerous exceptions to “advertisement” set forth in the Rules, and the wide variation in web site contents, it appears that this provision could be read as a per se rule that all lawyer web sites are “advertisements” and must have the requisite “Attorney Advertising” label on its home page. The City Bar does not agree that this is the proper reading of the rule. (See discussion supra Section III.B). For web sites that are advertisements—probably the vast majority—the label need not be on any other page (as was contemplated by the proposed Rules). Type size, color and page placement of the label are not specified—and, of course, type size would depend on the size of the computer screen—

It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.” Rule 7.3(b) (emphasis added). Assuming all the other requirements of the solicitation definition are satisfied and one of the exceptions does not apply, an advertisement that is sent by e-mail should be considered a solicitation because it is “directed to, or targeted at, a specific recipient or group of recipients” given that it is always sent to specific e-mail addresses. An advertisement that also is a solicitation will have to comply with the solicitation rules, including the requirement to file it with the pertinent Disciplinary Committee. The solicitation rules are discussed in greater detail below.
but Rule 7.1(i) requires that the label be “clearly legible and capable of being read by the average person.” The “attorney advertising” label should comply with the rule if the type size of the label is at least the same size type as the smallest size type elsewhere in the advertisement.

2. Maintaining Copies

Lawyers and law firms have to retain copies of their web sites which constitute advertisements under certain circumstances. Under Rule 7.1(k), a lawyer must retain a copy of the web site upon initial publication and no less frequently than every 90 days thereafter. In addition, if the web site undergoes a “major web site redesign” or “meaningful and extensive content change,” the lawyer also will be required to retain a copy of that version of the web site regardless of whether the lawyer has been saving a copy of the web site every 90 days.

The Rules do not explain what it means for a web site to undergo a “major web site redesign” or a “meaningful and extensive content change.” Nonetheless, it seems obvious—based on the plain language of the Rule and the fact that draft proposal was changed in the final Rule to address comments concerning the burdens that would have been placed on lawyers by the draft proposal’s requirements that copies of the web sites be retained if any change was made—that minor changes to portions of the web site (such as changes to a lawyer’s biographical information, the types of cases or matters handled by the firm, “current news” about the firm on the web site, etc., or new descriptions of lawyers who have joined the firms, provided that the new lawyers represent a small percentage of the firm’s lawyers) will not require the law firm to save a copy of the web site. However, if the law firm or lawyer engages in a major overhaul of the web site (for example, such as changing the look of the home page and all other pages, the organization of the web site, etc.) or completely re-writes entire sections such that it is fair to characterize the change as “meaningful and extensive,” then the lawyer or law firm would be required under the Rules to retain a copy of the web site and its changes.

Rule 7.1(k) also provides that “[a]ny advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year.” Web sites are not specifically referenced here, but certainly they constitute “computer-accessed communication,” so it should be assumed that the 90-day and web site redesign “snapshots” should be kept for the one-year period. It appears that the immediately preceding sentence of Rule 7.1(k), which provides: “All advertisements shall be pre-approved by the lawyer or law firm and a copy shall be retained for a
period of not less than three years following its initial dissemination,” is
unintentionally broad and is not intended to apply to web sites and other
computer-accessed communication; otherwise, the one-year retention pe-
riod for computer-accessed communication would be meaningless.

Outside contractors that maintain web sites for law firms with New
York offices now should have incorporated these “snapshot” requirements
into their standard procedures. Of course, the law firms themselves are
ultimately responsible for ensuring that they are in compliance, and so
should verify that their contractors are following the retention rules.

G. Solicitation Rules
1. Definition—What is covered?
Under Rule 7.3(b) of the Rules, “solicitation” is defined as:

[A]ny advertisement initiated by or on behalf of a lawyer or law
firm that is directed to, or targeted at, a specific recipient or
group of recipients, or their family members or legal representa-
tives, the primary purpose of which is the retention of the lawyer
or law firm, and a significant motive for which is pecuniary gain.
It does not include a proposal or other writing prepared and deliv-
ered in response to a specific request of a prospective client.

Comment [2] to Rule 7.3 succinctly breaks down the various compo-
nents of what makes a particular lawyer communication a solicitation:

A “solicitation” means any advertisement:

a) that is initiated by a lawyer or law firm (as opposed to a
communication made in response to an inquiry initiated by a
potential client);

b) with a primary purpose of persuading recipients to retain
the lawyer or law firm (as opposed to providing educational
information about the law) (see Rule 7.1, Comment [7];

c) that has as a significant motive for the lawyer to make money
(as opposed to a public interest lawyer offering pro bono ser-

vices); and

d) that is directed to or targeted at a specific recipient or group
of recipients, or their family members or legal representatives.

As an initial matter, it should be noted that while all advertisements
are not solicitations, all solicitations must be advertisements. As Com-
ment [1] to Rule 7.3 explains, “[b]y definition, a communication that is
not an advertisement is not a solicitation.” However, if the lawyer’s com-
munication does satisfy the definition of solicitation, not only would that communication be subject to “all of the Rules governing advertising,” but it also would be subject to the additional requirements imposed upon solicitations. See Rule 7.3 cmt [1].

As noted above, the New York rules regarding solicitation apply to all solicitations sent to someone in New York, whether or not that sender is admitted to practice in the state. Rule 7.3(i). Thus, if a pitch for business is narrowly targeted to specific New York recipients, the advertisements takes on a host of additional restrictions if it meets the definition of solicitation in New York.

2. Requirements Relating to Solicitations

The requirements for solicitations are as follows. First, all solicitations must include the name of the lawyer or law firm and the office address, and telephone number of the lawyer or the principal law office of the law firm whose services are being offered. Rule 7.3(h). The method of sending a written solicitation cannot require a recipient to travel to a location where the recipient does not ordinarily receive business or personal mail. Rule 7.3(d). In addition, a lawyer cannot require a signature from the recipient to receive the solicitation. Id.

If a lawyer provides a retainer agreement with the solicitation, the retainer agreement must be labeled “SAMPLE” in red ink in a type size equal to the largest type size in the retainer agreement, and “DO NOT SIGN” on the signature line. Rule 7.3(g).

A lawyer who makes solicitations to recipients in New York State must file a copy of the solicitation at the time of its dissemination with the attorney disciplinary committee. Rule 7.3(c)(1). If the solicitation was via radio or television, then the attorney must file a transcript of the audio portion. Rule 7.3(c)(1)(ii). If the solicitation was in a language other than English, then the attorney must file an accurate English translation of it. Rule 7.3(c)(1)(iii). A solicitation may not make reference to the fact of filing. Rule 7.3(c)(2). Any filed solicitation is open to public inspection. Rule 7.3(c)(4).

If the solicitation was directed to predetermined recipients, then the lawyer must make a list of the recipients’ names and addresses. The lawyer must retain this list for at least three years after the last day the solicitation was disseminated. Rule 7.3(c)(3).

A lawyer is not subject to the filing requirement and does not have to keep a list of the recipients if the solicitation was directed to a close friend, relative, former client, or existing client (as discussed below in Section G.4(a), although in person solicitations are prohibited by the Rules, such
solicitations to close friends, relatives, former clients and existing clients are permitted, assuming, of course, that the solicitation otherwise complies with all other applicable Rules). Rule 7.3(c)(5)(i). The sending of professional notices, as defined by the Rules, also is exempt from the solicitation list and filing requirements. Rule 7.3(c)(5)(iii). If a portion of a law firm’s web site was designed to target a prospective client affected by an identifiable occurrence, or to target an identifiable prospective client, then the lawyer must comply with the filing and list requirements. Rule 7.3(c)(5)(iii). For example, sections of a web site meant to attract potential class plaintiffs for a lawsuit the law firm has filed, or plans to file, would be a solicitation. In all instances where a lawyer makes any written or computer-accessed solicitation to a predetermined recipient because of a specific occurrence, the lawyer must explain in the solicitation how he or she obtained the identity of the recipient and learned about the recipient’s potential legal need. Rule 7.3(f).

3. RFPs and Other Information Sent Upon Request Are Not Solicitations

An explicit exclusion from the definition of solicitation in New York is “a proposal or other writing prepared and delivered in response to a specific request of a prospective client.” Rule 7.3(b). In other words, responses to requests for proposal (“RFPs”) are excluded from the definition of solicitation. Indeed, as discussed above, any information sent by the lawyer at the request of a prospective client is not considered an advertisement and so cannot be a solicitation.

4. Limits on the Form of Solicitations

a) In-Person and Telephone Solicitations Are Prohibited Unless Made To a Close Friend, Relative, or Former or Existing Client

Rule 7.3(a) expressly prohibits lawyers from engaging in “solicitation: (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former or existing client.” Comment [9] to Rule 7.3 explains the rationale for this nearly absolute bar on certain forms of in-person solicitation as follows: “in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the attorney without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and regulated in the same manner.” Rule 7.3 cmt. [9]. But an in-person solicitation of a close friend, relative, or
The reach of the term “client” is discussed above in Section III.B. A former officer of a corporation with whom the lawyer regularly deals with when representing the corporation should be considered a “former client” for purposes of the solicitation rules. The issue of whether or not a person falls within the category of “close friend” may present difficulty. Neither the Rules nor Comments provide a definition of “close friend.” Thus, before lawyers decide to rely on the “close friend” exception to the in-person solicitation bar, they should make sure that they have factual support for their conclusion that the person subject to the in-person solicitation was actually a “close friend.” For example, a lawyer will be hard-pressed to prove to a disciplinary committee that his in-person solicitation was not prohibited because the individual subject to the solicitation was a “close friend,” if the lawyer had recently met the individual at a cocktail party and only corresponded or spoke with that individual on a few occasions or the individual has to be reminded who the lawyer was. On the other hand, it seems clear that a lawyer may engage in an in-person solicitation of a person the lawyer has known from school or childhood, who may be considered a close friend. In general, a person with whom the lawyer has had in-person communications over an extended period of a social nature may be considered a “close friend.”

b) Real-Time Electronic Communications

Under the new Rules, lawyers are prohibited from engaging in solicitation by “real-time or interactive computer-accessed communication.” Although the rules do not provide definitions for “real-time” or “interactive” communications, Comment [9] to Rule 7.3 provides helpful guidance. First, Comment [9] states that “[o]rdinary email and web-sites are not considered to be real time or interactive communication.” Thus, lawyers are not prohibited from sending an email solicitation, assuming, of course, the email solicitation complies with the applicable solicitation and advertising rules. In addition, “automated pop-up advertisements on a web-site that are not a live response are not considered to be real time or interactive communication.” However, Comment [9] to Rule 7.3 makes clear that “[i]nstant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real time or interactive communication.” Thus, a lawyer cannot engage in a solicitation in an internet chat room, unless the individual being
solicited is among the group of individuals who can be solicited in-person (e.g., relative, close friend, former or existing client).

c) Other Limitations

Rule 7.3(a)(2)(i)-(v) contains a number of absolute prohibitions. A lawyer shall not engage in solicitation employing false, deceptive, or misleading information, or where the solicitation would otherwise violate the Rules. Additionally, a lawyer may not solicit a recipient who has indicated to the lawyer that he or she does not want to be solicited by the lawyer. Solicitation involving coercion, duress, or harassment is prohibited. If a lawyer knows or should reasonably know that a person’s age, or physical, emotional, or mental state makes it unlikely that the individual will be able to exercise reasonable judgment to retaining counsel, then the lawyer is prohibited from soliciting that person. A lawyer who expects to use another lawyer, not affiliated with the soliciting lawyer as a partner, associate, or of counsel, to handle the representation, and does not disclose this fact, is prohibiting from soliciting a recipient by any means.

5. “Directed to or Targeted at”

In order to qualify as a solicitation, the communication must be, among other things, “directed to, or targeted at, a specific recipient or group of recipients . . . .” While this language is obviously susceptible to numerous and competing interpretations, Comment [3] provides guidance, specifically stating that an “advertisement may be considered to be directed to or targeted at a specific recipient or recipients in two different ways.”

First, an advertisement “is considered ‘directed to or targeted at’ a specific recipient or recipients if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication or if it is addressed so that it will be delivered to the specific recipient or recipients or their families or agents (as with letters, emails, express packages).” Rule 7.3 [3].

According to Comment [3] to Rule 7.3, the second way an advertisement can be “directed to, or targeted at” specific recipients is if a public medium, such as a newspaper, television, billboard or web site, “makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers.” (The term “specific incident” is defined in Comment [5] to Rule 7.3 and is discussed below in Section III.G.7) For example, if a lawyer uses a billboard to solicit those injured in a particular airplane or industrial acci-
dent, the billboard advertisement would be deemed a solicitation and thus be subject to the applicable solicitation rules.

Comment [4] to Rule 7.3 explains, however, that “an advertisement in a public medium is not directed to or targeted at ‘a specific recipient or group of recipients’ simply because it is intended to attract potential clients with needs in a specified area of law.” For example, “a lawyer could advertise in the local newspaper that the lawyer is available to assist homeowners in reducing property tax assessments,” or “an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared towards inventors.” Id. Comment [4] concludes: the “fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into a solicitation.” Id.

6. Exception for Certain Legal Services Organizations

The Rules are less restrictive with respect to a lawyer’s interaction with a legal aid office, or public defender office, as defined by the Rules, military legal assistance office, qualified lawyer referral service, as defined by the Rules, and any organization providing legal services to its members, as defined by and meeting the requirements outlined in the Rules. See Rule 7.2(b). As long as there is no interference with the independent judgment that those organizations exercise on behalf of their respective clients, a lawyer may request that those organizations recommend and promote the use of the lawyer’s services as a private practitioner. Also, those organizations may employ the lawyer, his or her partner, associate, or any other affiliated lawyer.

7. Limitations on Contacts in the Case of Personal Injury and Wrongful Death Cases

Rules 4.5(b) and 7.3(e) prohibit lawyers from disseminating (or having disseminated on their behalf, see Rule 7.3(b)) any solicitation relating to a specific incident involving personal injury or wrongful death, until at least 30 days after the incident, in most instances. According to Comment [5] to Rule 7.3, this restriction applied even where the recipient of the solicitation was “a close friend, relative, or former client, but not where the recipient is an current client.” However, the Rules provide an exception to the 30-day time limit for cases where a filing must be made on the victim’s behalf as a legal prerequisite to claim in less than 30 days. In those situations, the Rules imposes a 15-day moratorium on communications with victims, their families and legal representatives. See Rule 7.3(e).

The prohibition’s primary purpose apparently is to provide a cool-
ing-off period during which victims, their families and legal representatives can remain undisturbed by unseemly lawyer solicitations. While the Rule arguably benefits victims, their families and legal representatives by protecting them from aggressive lawyer solicitations during an emotionally vulnerable period, it also has the potential to harm the victims of accidents. For example, injured parties may not have existing counsel or knowledge of who to turn to for representation, and in such cases, solicitation may be the best way for the party to find a lawyer quickly enough to protect their rights. In addition, even though the Rule provides a 15-day limit in the case of necessary filings, this can still give the client very little time to retain a lawyer to ensure that the client's interests and rights are protected.

In an attempt to level the playing field between the plaintiff and defense bar, Rule 4.5(a) essentially imposes the no-contact provisions of Rule 7.3(e) to lawyers representing defendants in such specific incidents. Rule 4.5(a) provides, in relevant part, that, in the event of a specific incident involving potential claims for personal injury or wrongful death, “no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants” within the same 30-day period (or 15-day period where there is a looming filing deadline) applicable to plaintiffs’ lawyers in Rule 7.3(e). See Rule 4.5(a). This provision prevents defense lawyers from exploiting the ban on plaintiffs’ lawyers’ solicitations. Defense counsel and their agents are prohibited from approaching victims or their families or representatives to resolve claims before the victims or their families or representatives have had the opportunity to hear from lawyers seeking to represent them concerning the accident. However, though defendant counsel and their agents may not contact injured parties, there is nothing stopping the defendant or its, his or her insurers from contacting the potential, unrepresented plaintiffs and resolving the case before the plaintiff has found a lawyer to advise the plaintiff of its, his or her rights.

Comment [5] to Rule 7.3 provides some guidance as to what “incidents” are covered by Rules 4.5 and 7.3(e). Comment [5] states that a “‘specific incident’ is a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people.” For example, “[s]pecific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like.”
Comment [6] to Rule 7.3 explains, however, that “specific incident”
is not intended to cover situations where potential claimants may have
been injured over a period of years from defective products, such as medica-
tion or asbestos. Comment [6] states:

A solicitation that is intended to attract potential claims for
personal injury or wrongful death arising from a common cause
but at disparate times and places, does not relate to a specific
incident and is not subject to the special 30-day (or 15-day)
rule, even though it is addressed so that it will be delivered to
specific recipients or their families or agents (as with letters,
e-mails, express packages), or is made in a public medium such
as newspapers, television, billboards, web sites or the like and
makes reference to a specific person or group of people (see
Comments [3]-[4].

Thus, for example, “solicitations intended to be of interest only to
potential claimants injured over a period of years by a defective medical
device or medication do not relate to a specific incident and are not sub-
ject to the special 30-day (or 15-day) rule.”

Comment [7] to Rule 7.3 notes that advertisements from personal
injury lawyers that generally advertise the types of plaintiffs they help or
types of cases handled will not typically run afoul of Rule 4.5. Specifi-
cally, Comment [7] states that “[a]n advertisement in the public media
that makes no express reference to a specific incident does not become a
solicitation subject to the 30-day (or 15-day) rule solely because a specific
incident has occurred within the last 30 (or 15) days.” For instance, “a
law firm that advertises on television or in newspapers that it can ‘help
injured people explore their legal rights’ is not violating the 30-day (or
15-day) rule by running or continuing to run its advertisements even though
a mass disaster injured many people within hours or days before the ad-
vertisement appeared.” Indeed, “[u]nless an advertisement in the public
media explicitly refers to a specific incident, it is not a solicitation subject
to the 30-day (or 15-day) blackout period.”

Finally, “if a lawyer causes an advertisement to be delivered (whether
by mail, email, express package, courier, or any other form of direct
delivery) to a specific recipient (i) with knowledge that the addressee is
either a person killed or injured in a specific incident or that person’s
family member or agent, and (ii) with the intent to communicate with
that person because of that knowledge, then the advertisement is a solici-
tation subject to the 30-day (or 15-day) rule even though it makes no
H. Certification Rules and Implications

As part of the lawyer advertising amendments, Part 130 of the Rules of the Chief Administrator was also amended to include a provision that a lawyer signing a complaint (or other “initiating pleading”) certifies that he or she did not obtain the engagement through “illegal conduct” or that if the case was obtained in violation of the Rules, those responsible for the illegal conduct will not be involved in the matter and will not receive any fee as a result of it. See Rules of Chief Admin. § 130-1.1-a(b). Similarly, the lawyer certifies that he or she did not receive the engagement in violation of Rule 4.5 (the moratorium rule applicable to accident cases). Id. at § 130-1.1-a(b)(1)(ii).

This is a particularly powerful provision. Under this rule, an interested litigant—as opposed to a disinterested governmental body—is empowered to prosecute disciplinary rule violations by seeking sanctions (which could presumably include reimbursement of all attorneys’ fees and costs incurred in defending an action brought in violation of Rule 4.5). It is not unusual for private litigants to police disciplinary violations, most notably through disqualification motions or lawsuits for breach of fiduciary duty. Here, however, even a defendant that is indisputably liable in a personal injury or wrongful death action arguably could seek sanctions under this Rule against a lawyer who represents a successful plaintiff, solely because the lawyer solicited the engagement before Rule 4.5’s “cooling off” period expired. Even more than disqualification motions, the opportunities for gamesmanship are clear.

The use of the term “illegal conduct” could, if broadly interpreted, compound this problem. Specifically, “illegal conduct” should not, in the opinion of the City Bar, include disciplinary rule violations for at least three reasons. First, purely as a statutory interpretation matter, if “illegal conduct” embraced violations of the disciplinary rules, then § 130-1.1-a(b)(2)(ii) of Part 130 (concerning violations of Rule 4.5) would be superfluous. Second, “illegal conduct” generally includes that which is prohibited by law, whereas unethical conduct (i.e., Rules violations) is that which is prohibited by the NY Rules. Courts generally treat the two differently. Third, courts are reluctant to sanction lawyers, and in keeping with that tradition, they should narrowly construe this provision to prevent it from incorporating the entire NY Rules into the Part 130 certification.
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Mary Cecilia A. Sweeney
Frank H. Wohl

*Principal author of the report, along with David G. Keyko, former chair of the Committee on Professional Responsibility.

THE RECORD

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INTRODUCTION

The term “persistent vegetative state” (PVS) was coined almost 30 years ago to describe the medical condition in which brain-damaged patients surviving their injuries remain in a sleeplike state, periodically awakening and not conforming to the usual notions of consciousness or coma.1 Such patients did not exhibit the ability to intelligibly communicate complex issues, leading the authors to muse in what has become a prophetic statement that “if it were possible to predict soon after the brain damage had been sustained that, in the event of survival, the outcome would be a vegetative mindless state, then the wisdom of continuing supportive measures could be discussed.”2

PVS patients now survive for prolonged periods of time due to technological advances allowing for extended support of vital bodily functions. Medical reports indicate that many individuals in PVS can live for months or years under such circumstances.3 Given the increased survival


2. Stupor and Coma, supra note 1, at 737.

of these individuals and heightened awareness of the diagnosis, it is no wonder that significant financial, emotional and legal challenges arise for families and caregivers considering long term care for PVS patients.\(^4\)

The purpose of this Report it to set forth what the law in New York State is with regard to the withdrawal of medical and support care for persons with PVS. The Report evaluates the relevant medical guidelines, case law and statutes on the topic. The Report's goals are to educate the bar, bench, healthcare practitioners and relatives/close friends of those afflicted with a PVS on the subject and to make recommendations on needed legislation.

Section I sets forth the diagnostic criteria for PVS and reviews current controversies regarding prognoses for individuals afflicted with PVS, as new medical technologies facilitate diagnosis and management. Section II discusses the development of medical guidelines for withdrawal of care which are influential in the development of law in the area and actual practice by physicians. Section III discusses how withdrawal of care issues are analyzed for individual cases based upon the definitions of “PVS” that courts apply. This section also compares judicial use of the term “PVS” to the use of “neocortical death” or “brain death” in clinically similar cases. Section IV summarizes case law and statutes which govern the withdrawal of care for persons with PVS. The Report proposes in Section V that New York State enact the Family Health Care Decisions Act which would authorize surrogate decision making by persons close to individuals afflicted with a PVS who have failed to sign an advance directive or healthcare proxy.

I. PVS STANDARDS IN MEDICAL LITERATURE

A. CHARACTERISTICS OF PVS

The vegetative state heralds a patient's return to wakefulness that usually

\(^4\) In 1983, the President’s Commission estimated that there were fewer than 5,000 PVS patients within the United States, but by 1990, the estimate had been raised to at least twenty times the earlier figure. See President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 176, n.15 (1983) [hereinafter President’s Commission] (cited in Meisel A, The Right to Die 636 (2d ed. 1995)), and Brief of Amici Curiae, Am. Med. Ass’n at 11-12, Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990). A separate estimate, however, placed this latter figure at 20,000 patients. See Joint Council on Scientific Affairs & Council on Ethical & Judicial Affairs and the Council on Scientific Affairs, A-89, Persistent Vegetative State and the Decision to Withdraw or Withhold Life Support, 263 JAMA, 426, 427 (19 Jan 1990) [hereinafter AMA Joint Report], available at http://www.ama-assn.org/ama1/pub.
occurs within two to four weeks from the onset of sleep-like coma\(^5\) following severe brain injury, either traumatic or ischemic in origin, accompanied by an apparent lack of cognitive function. Once the patient manifests sleep-wake cycles, it is incorrect to apply the term “coma” to describe this state.\(^6\)

1. MEDICAL DEFINITIONS

The American Academy of Neurology (AAN) has defined PVS as:

a form of eyes-open permanent unconsciousness in which the patient has periods of wakefulness and physiological sleep/wake cycles, but at no time is the patient aware of him or herself or the environment. Neurologically, being awake but unaware is the result of a functioning brainstem and a total loss of cerebral cortical functioning.\(^7\)

In its Joint Report on Ethical and Judicial Affairs,\(^8\) the AMA describes PVS as that condition in which

\[
\text{[p]ersons with overwhelming damage to the cerebral hemispheres commonly pass into a chronic state of unconsciousness called}
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5. Coma is defined as “a state of prolonged unconsciousness, including a lack of response to stimuli, from which it is impossible to rouse a person.” Random House Webster’s College Dictionary 261 (2d ed. 1997); Stedman’s, supra note 1, at 414. Plum and Posner amplify this definition by describing coma as “a state of unarouseable psychologic unresponsiveness in which the subject lies with eyes closed. Subjects in a coma show no psychologically understandable response to external stimulus or inner need.” Stupor and Coma, supra note 1, at 5. This definition of a sleep-like coma leaves open the possibility that a patient in a vegetative state may not be able to communicate his needs comprehensibly. See Owen AM & Coleman MR. Detecting awareness in the vegetative state, 1129 Ann NY Acad Sci 130-38 (2008).


the vegetative state in which the body cyclically awakens and sleeps but expresses no behavioral or cerebral metabolic evidence of possessing cognitive function or of being able to respond in a learned manner to external events or stimuli. When such cognitive loss lasts for more than a few weeks, the condition has been termed a persistent vegetative state (PVS) because the body retains the functions necessary to sustain vegetative survival.9

Many of these patients demonstrate an “alert demeanor” or an “unconscious wakefulness” characterized by behaviors such as spontaneous eye opening, blinking, unintelligible sounds such as grunts or screams, intermittent smiling, sporadic facial movements and movements of the extremities, chewing movements or clenching of the teeth and turning the head or the eyes toward a sound.10

The definitions as applied here do not address reported cases in which patients presumed to be vegetative regain cognition and alertness,11 nor do they address the concerns peculiar to pediatric patients who may be congenitally vegetative.

2. CAUSES AND ANATOMICAL SUBSTRATES OF PVS

Causes of PVS in the adult include: ischemic or hemorrhagic stroke;12 traumatic shearing brain injuries;13 brain tumors; demyelinating diseases,
such as multiple sclerosis; encephalitis and/or meningitis, profound and prolonged hypoglycemia, acute drug intoxication, and chronic processes such as amyotrophic lateral sclerosis and dementia.

Widespread bilateral damage of the cerebral cortex leaves most patients “neocortically dead,” but leaves most involuntary brainstem functions intact. Damage to the thalamus is common, although there are instances in which the thalamus is spared and capable of function, possibly resulting in an ability to perceive pain on some level. Other studies

14. Demyelinating diseases are characterized by a loss of the myelin sheath on nerves, which is critical for normal conduction of nerve impulses. See Stedman’s, supra note 1, at 509. One example is multiple sclerosis.

15. Encephalitis is a brain infection or inflammation. See Stedman’s, supra note 1, at 633-34. Meningitis is an infection or inflammation of the cerebrospinal fluid. See Stedman’s, supra note 1, at 1183.

16. Low blood sugar (glucose) levels are called hypoglycemia. Id. at 681.


19. The neocortex consists of six cell layers in the cerebral hemispheres which are critical for higher mental function and sophisticated thought processes. The neocortex receives input from the thalamus, which is crucial for pain perception. The thalamus connects to the frontal and parietal lobes of the brain and gives sensations of pain greater detail, see Jack Degroot, Correlative Neuroanatomy 89-92 (21st ed. 1991); see also Stedman’s, supra note 1, at 1003.

20. Those involuntary brainstem functions that remain intact in these patients include chewing, swallowing, breathing and control of blood circulation. Brainstem function can be tested by evaluating oculocephalic reflexes (“doll’s eyes”), a condition in which the patient’s eyes turn away from the direction the head is turned; or oculovestibular reflexes (“calorics”), the evaluation of lateral eye movements in response to stimuli. See Stupor and Coma, supra note 1, at 7, 54.

21. The thalamus connects to the frontal and parietal lobes of the brain and gives sensations of pain greater detail. See Degroot, supra note 19, at 89. In many PVS cases, the thalamus is severely damaged, so that the perception of pain is altered. See Meisel, supra note 4, at 639. See generally Kinney HC et al., Neuropathological Findings in the Brain of Karen Ann Quinlan: The Role of the Thalamus in the Persistent Vegetative State, 330 New Eng. J. Med. 1469 (1994). In such situations, however, it is unclear if actual suffering occurs when a PVS patient is subjected to what might otherwise be a painful stimulus. Whether or not PVS patients can process painful stimuli at some level reaching the threshold for conscious experience (whether or not they can communicate it) is still a subject of considerable debate. See Schnakers C & Zasler ND, Pain assessment and management in disorders of consciousness, Curr Opin Neurol 20(6): 620-26 (Dec. 2007). See also Bekinschtein T & Manes F, Evaluating brain function in patients with disorders of consciousness, 75 Suppl 2 Cleve Clin J Med 571-76 (Mar 2008).

22. Pain thresholds, emotion, and affect experience affect the severity of the pain perceived. Electrical stimulation of the brainstem, thalamus, and deep temporal areas evokes responses to pain.
also suggest that cognition is not isolated to just the cerebrum, but that other parts of the brain may be involved in this critical function. One question that arises here may be whether a vegetative patient with a functional thalamus simply does not have the ability to communicate his suffering in ways that an observer might understand, rather than that a vegetative patient does not feel pain or suffer from it.

B. DIAGNOSTIC DIFFICULTIES

1. CLINICAL DISCREPANCIES

Paralyzed and mute patients who suffer from some illnesses may be conscious, but unable to communicate their awareness to others in a meaningful manner. One can only infer self-awareness by an individual’s responsiveness and actions; therefore, it is unclear whether a patient’s apparent consciousness encompasses conscious appreciation of sensations, such as pain. Where prolongation of care becomes an

Stimulation of the cerebral cortex does not produce this response, suggesting that pain perception does not depend upon the cerebral cortex alone, but includes the thalamus and the brainstem. The specific stimulus responsible for producing pain may not be clearly identified and pain pathways may not coincide with pathways for consciousness, although there may be some overlap. A patient’s responses to stimuli are discernible when the individual communicates his experiences. Emotional reactions to pain may be communicated in nonverbal patients by grimacing or flushing, withdrawal from pain, and increases in blood pressure or heart rate; however, facial movements and other signs may also result from primitive subcortical and brainstem activity, rather than conscious human suffering. While some PVS patients appear to react to painful stimuli, they may not experience pain as the same type of discomfort that a conscious patient feels. There is no way, however, to confirm this, because the patients are nonverbal. See McQuillen MP, Can People Who Are Unconscious or in the “Vegetative State” Perceive Pain?, 6 Issues in Law & Med. 372, 378 (1991); see also Katayama Y et al., Characterization and Modification of Brain Activity with Deep Brain Stimulation in Patients in a Persistent Vegetative State: Pain-Related Late Positive Component of Cerebral Evolved Potential, 14 Pacing & Clin Electrophysiol 116, 116 (1991). See updated commentaries regarding possible pain perception in patients diagnosed as being in a persistent vegetative state, including Panksepp J et al., Does any aspect of mind survive brain damage that typically leads to a persistent vegetative state? 2 Philos Ethics Humanit Med 32 (17 Dec 2007). However, there also exist debates as to whether or not processing of emotionally and/or socially significant information are important in understanding what constitutes the mind. See Goukon A et al., Is processing emotional signals necessary for performance on tasks requiring understanding a “theory of mind,” 101(2) Psychol Rep 469-74 (Oct 2007).

issue, this is a concern because the PVS patient cannot communicate meaningfully.\textsuperscript{24}

By way of example, the \textit{locked-in syndrome} involves complete paralysis of the extremities and the cranial nerves that control swallowing and speech functions. The paralysis prevents the individual from communicating by speech or body movements without interfering with consciousness, although some individuals can blink to communicate their awareness of stimuli, including responses to verbal cues and pain.\textsuperscript{25} To the unwary, despite the presence of consciousness, the combination of extremity paralysis and the lack of speech may be confused with coma or PVS.\textsuperscript{26} Other terms synonymous with the locked-in state, include \textit{pseudocoma, ventral pontine syndrome, daefferent state,} and \textit{cerebromedullospinal disconnection.}\textsuperscript{27}

It is understood that certain vegetative functions require only preserved brainstem mechanisms, such as control of heartbeat and respiration, and sleep-wake cycles that may be expressed by behavior resembling

\textsuperscript{24} Recent technological advances suggest that some patients with damage to the peripheral motor system may not be able to respond overtly to stimuli despite residual cognitive function, patients who might be assumed to be in a persistent vegetative state. See Owen AM et al, \textit{Using functional magnetic resonance imaging to detect covert awareness in the vegetative state,} 64(8) Arch Neurol 1098 (Aug 2007); Owen AM & Coleman MR, \textit{Functional neuroimaging of the vegetative state,} 9(3) Nat Rev Neurosci 235-43 (Mar 2008); Chatelle C et al., \textit{Pain assessment in non-communicative patients,} 63(5-6) Rev Med Liege 429-37 (May-June 2008). It is also unclear at this point if some patients assumed to be vegetative may actually retained enough cognitive function to respond to verbal stimuli. See Coleman MR et al, \textit{Do vegetative patients retain aspects of language comprehension? Evidence from fMRI,} 130 (Pt. 10) Brain 2492-507 (Oct 2007); Schnakers C et al., \textit{Diagnostic and prognostic use of bispectral index in coma, vegetative state and related disorders,} 22(12) Brain Inj 926-31 (Nov 2008).

\textsuperscript{25} \textit{Locked-in syndrome} is defined as, “a paralytic condition in which a person may be conscious and alert but unable to communicate except by eye movements or blinking. Bilateral destruction of the medulla oblongata orpons has rendered the individual unable to speak or move any of the limbs.” Mosby’s, supra note 12, at 954. In one study, locked-in patients were called “normal controls” because their level of consciousness was normal. Severely disabled, nonvegetative coma survivors, who were able to think and experience pain, were not included as “normal controls.” As such, it is unclear if their glucose utilization was similarly decreased. See De Giorgio, supra note 7, at 368. See also Feldman MH, \textit{Physiological Observations in a Chronic Case of “Locked-in” Syndrome,} 21 Neurology 459, 459 (1971); McQuillen, supra note 22, at 375. See also Levy DE et al, \textit{Differences in Cerebral Blood Flow and Glucose Utilization in Vegetative Versus Locked-in Patients,} 22(6) Annals Neurol 673-82 (Dec 1987).

\textsuperscript{26} See Levy, supra note 25, at 673. See also Schnakers C et al., \textit{Detecting consciousness in a total locked-in syndrome: An active event-related paradigm,} Neurocase 1-7 (25 Feb 2009)[Epub ahead of print].

\textsuperscript{27} Rengachary, supra note 6, at 3.12.
intermittent wakefulness and consciousness. However, reversible conditions causing similar states, or those conditions in which consciousness is intact despite the external appearance of unconsciousness, must be ruled out. This distinction is particularly important in situations where decision-makers may decline life-sustaining treatment on the basis of mistaken assumptions about a patient’s diagnosis or prognosis.

A potentially reversible condition that may be mistaken for PVS is akinetic mutism. Patients are silent but appear to be alert while immobile, with intact sleep-wake cycles but no obvious evidence of mental activity. The patient’s eyes are usually closed, but he may arouse himself, creating a wakeful appearance, with little or no vocalization. No recognizable evidence of awareness exists because there is little skeletal muscle movement, even in response to pain or other disagreeable stimuli. There are several potentially reversible causes of akinetic mutism, including brain tumors,

28. Altered consciousness or level of awareness is due to bilateral injury to the cerebral cortex or lesions of the brainstem reticular activating system (RAS), the area of the brain that controls consciousness. The brainstem regulates wakefulness, muscle reflexes, posture, pain, and autonomic functions, such as cardiovascular function and respiration. Pain fibers connect to the RAS, which connects with the thalamus and cerebral cortex. The RAS integrates sensory stimuli and alters transmission to the thalamus and cerebral cortex. While brainstem injuries often result in coma, strategically placed lesions may not affect consciousness if RAS neurons are intact. This means that if RAS function is intact, the individual may be affected by transmissions from and to the thalamus, and consequently be affected by pain. See Stupor and Coma, supra note 1, at 8. See also Walsh v. Staten Island Obstetrics & Gynecology Assoc., P.C., 598 N.Y.S.2d 17, 19 (N.Y. App. Div. 1993) (infant “cried when he received a painful stimuli and smiled and laughed at pleasurable stimuli”; although in a vegetative state, the infant “clearly had some level of awareness”).

29. While this Report addresses adult PVS patients, it should be noted that children born without cerebral hemispheres are considered “developmentally vegetative.” These little patients may have normal life spans and are not expected to die of medical complications as are many adult or older individuals in PVS. See Shewmon DA et al., Consciousness in congenitally decorticate children: developmental vegetative state as a self-fulfilling prophecy, 41 Dev. Med. & Child Neurol. 364, 364 (1999). See generally In re Quinlan, 355 A.2d 647 (N.J. 1972). But also see Ashwal S, Recovery of consciousness and life expectancy of children in a vegetative state, 15(3-4) Neuropsychol Rehabil 190-97 (Jul-Sep 2005). Also note that medical advances give rise to further speculation regarding the identification of consciousness in adult PVS patients presumed to be unconscious. Cauda F et al., Disrupted intrinsic functional connectivity in the vegetative state, 80(4) J Neurol Neurosurg Psychiatr 429-31 (Apr 2009); Schnakers C et al., Voluntary brain processing in disorders of consciousness, 71(20) Neurol 1614-20 (Nov 2008); Panksepp, supra note 22, at 32.

30. Stupor and Coma, supra note 1, at 7.

31. Id. See Cairns H, Disturbances of Consciousness with Lesions of the Brain-Stem and Diencephalon, 75 Brain 135-37 (1952).
hydrocephalus, stroke, head injury, hypoglycemia, and carbon monoxide poisoning.

2. DIAGNOSTIC TESTING

No objective studies exist to confirm a diagnosis of PVS. Some techniques, such as computerized tomography (CT) or magnetic resonance imaging (MRI), show extensive damage of the cerebrum consistent with PVS, but “there is no universal CT or MRI abnormality that is absolutely diagnostic of the vegetative state.” Positron emission tomography (PET) of PVS patients suggests decreased metabolism in various parts of the cere-
bral cortex, as well as the subcortical areas. Somatosensory evoked potential (SEP) testing of PVS patients reveals deficiencies in the cortical potentials, the electrical responses elicited from the brain's surface. Electroencephalography (EEG) in PVS shows a wide range of wave abnormalities, including what appears to be normal electrical activity in some cases.

38. Position emission tomography (PET) refers to computer-generated images of the body using “local metabolic and physiological functions in tissues.” Stedman’s, supra note 1, at 1997, B14-15. Brain PET measures the rates of oxygen and glucose utilization in various areas, resulting in a composite color image of the brain. Different colors represent different metabolic rates that may indicate disease. In PET studies of one PVS patient who occasionally uttered intelligible sounds and intermittently spoke a limited, four to five word vocabulary, metabolic activity in the right hemisphere was reduced to 40% of normal. Metabolic and physiologic activity, however, were preserved in some cortical and subcortical areas. See Plum F et al., Coordinated Expression in Chronically Unconscious Persons, 353 PHIL Transactions Royal Soc’y London Series B 1929, 1931 (1998). See also Levy, supra note 25, at 673; Giacino JT et al., Functional neuroimaging applications for assessment and rehabilitation planning in patients with disorders of consciousness, 87 (12 Suppl 2) Arch Phys Med Rehabil 567-76 (Dec 2006); Owen AM et al., Residual auditory function in persistent vegetative state: a combined PET and fMRI study, 15(3-4) Neuropsychol Rehabil 290-306 (Jul-Sep 2005).

39. Somatosensory evoked potentials (SEPs) are evoked electrical potentials elicited by repeated stimulation of the pain and touch systems, usually at the wrist and ankle. Mosby’s, supra note 12, at 1513; Friedman WA, Evoked Potentials in Neurosurgery, in Neurological Surgery: A Comprehensive Reference Guide to the Diagnosis and Management of Neurosurgical Problems 1005, 1005 (Julian R. Youmans ed., 3d ed. 1990). See also Schnakers C et al., Voluntary brain processing in disorders of consciousness, 71(20) Neurology 1614-20 (11 Nov 2008)(suggesting that active evoked-related potentials paradigms may permit detection of voluntary brain function in patients with severe brain damage who present with a disorder of consciousness, even when the patient may present with very limited to questionably any signs of awareness).


41. Electroencephalography is the process of recording brain wave activity with electrodes attached to the scalp. Mosby’s, supra note 12, at 543. It is useful in localizing intracranial lesions and distinguishing between diffuse (generalized) and focal (discrete, localized) brain lesions. Stedman’s Medical Dictionary 450 (24th ed. 1982).

42. McQuillen, supra note 22, at 375. See also Stupor and Coma, supra note 1, at 19. When PVS patients develop sleep-wake cycles, their behavior and their EEG findings may suggest stages of sleep typical of healthy individuals. Sleep has been defined as a “cyclic loss of consciousness reversible with stimulation.” Rengachary & Duke, supra note 6, at 3.2. See other updated studies utilizing this modality, including Kulkarni VP et al., EEG findings in the persistent vegetative state, 24(6) J. Clin. Neurophysiol 433-37 (Dec. 2007); Keller I et al., The influence of acoustic and tactile stimulation on vegetative parameters and EEG in persistent vegetative state, 22(3) Func Neurol 159-63 (Jul-Sep 2007).
Because of the lack of specificity of these diagnostic tests, confusion can arise if a vegetative patient is considered comatose based upon results of such studies without clinical correlation by physicians experienced in neurology and vegetative states.

Even though PET scanning was utilized to assist in the diagnosis of PVS in the Jobes case, coma experts had difficulty in clinically diagnosing her PVS. The conflicting testimony of the three acknowledged neurological experts who examined her provides a good illustration of this problem. Dr. Fred Plum, who coined the term “persistent vegetative state,” testified that Nancy Jobes was in a persistent, irreversible vegetative state. A second expert, Dr. Maurice Victor, testified that, although Jobes suffered irreversible cerebral damage, she was not vegetative because she expressed emotion and obeyed simple commands, by lifting her head, moving her legs, and sticking out her tongue in response to his requests. A third expert, Dr. Allan Ropper, concluded that Jobes fell “slightly outside of [his] operational definition of the persistent vegetative state,” defining PVS as a state in which the patient “is in or has sleep/wake cycles, is to-

43. Specificity of diagnostic testing is defined medically as the ability of a test to tell that a disease is not present (as opposed to sensitivity of a test, which is the ability of the test to detect disease when it is present). Brawley OW & Kramer BS, Prevention and early detection of cancer, in Harrison’s Principles of Internal Medicine, 16th Ed., at 444 (Dennis L. Kasper et al., eds. 2005).

44. In re Jobes 529 A.2d 434 (N.J. 1987). Jobes’ cerebral blood flow and metabolism were said to between 30% and 40% of a normal cognitive brain, interpreted as a “level of brain activity . . . found in persons under very deep anesthesia and those who have suffered a massive loss in brain function.” Id. at 439.

45. See De Giorgio, supra note 7, at 370.

46. Dr. Fred Plum co-authored Diagnosis of Stupor and Coma, which is referenced throughout this Article. See Stupor and Coma, supra note 1. He is Professor and former Chairman of the Department of Neurology at the Weill Medical College of Cornell University, New York, New York.

47. In re Jobes, 529 A.2d at 438. See Quinlan, 355 A.2d at 654 (Dr. Plum’s testimony).


49. Jobes, 529 A.2d at 439.

50. At the time, Dr. Allen H. Ropper was Associate Professor of Medicine at Harvard Medical School and Director of the Neurosurgery-Neurology Intensive Care Unit at Massachusetts General Hospital. Id.

51. Id. at 440.
tally incapable of responding and is totally unaware of environment or self.\textsuperscript{52} Dr. Ropper testified that:

\begin{quote}
[g]enerally vegetative patients . . . have a very narrow range of stereotyped movements that are repeated. In general, moving a limb away from the body is not one of them. Certainly lifting an arm off a recliner or a bed wouldn’t be one of them. So higher level movements of that sort or more complicated movements, lifting the head up, moving it to one side and then putting it back, to me, are against the vegetative state.\textsuperscript{53}
\end{quote}

Despite the observation that similarly educated physicians may choose different clinical criteria to diagnose PVS patients, medical management of these cases generally remains the same. When judges apply the term “PVS” uniformly to patients with various clinical features, however, their legal decisions may have different repercussions, especially with respect to the long-term management of such cases. Depending on the court’s decision, subsequent treatment could range from aggressive care, supportive care, or complete withdrawal of life-prolonging treatment resulting in the patient’s death.

3. CONFUSING TERMINOLOGY

Clinicians apply many terms to the medical status of patients who display vegetative traits, but no consensus exists concerning which term to use. The term “neocortical death” has been applied to PVS most often.\textsuperscript{54} Other terms less often used within the medical community include “pseudocoma,”\textsuperscript{55} “coma vigil,”\textsuperscript{56} “cognitive death,”\textsuperscript{57} the “apallic syndrome,” and “total dementia.”\textsuperscript{58} All of these diagnoses, including “neocortical death,” involve restored sleep-wake cycles and a lack of cognition. The term “per-

\begin{footnotes}
52. \textit{Id.} Primitive reflex responses to external stimuli would exclude a patient from PVS under Dr. Ropper’s definition, but not under Dr. Plum’s. The \textit{Quinlan} court accepted Dr. Ropper’s definition. See \textit{Quinlan}, 355 A.2d at 654.
58. Rengachary & Duke, \textit{supra} note 6, at 3.11.
\end{footnotes}
manent unconsciousness,” as used by the President’s Commission\textsuperscript{59} may encompass both comatose and PVS patients. Harvard Medical School originally applied the term “irreversible coma” to “brain death,” but the term has subsequently been used to describe PVS patients, such as Karen Quinlan.\textsuperscript{60} Furthermore, the term “cerebral death”\textsuperscript{61} could be extended to include “brain death,” although they also are not the same condition.\textsuperscript{62}

Beyond these discrepancies in terminology, physicians appear to have different opinions about the management of PVS patients, based upon their understanding of the condition itself. A national survey of physicians conducted in 1996 revealed some disturbing contradictions.\textsuperscript{63} For

\begin{itemize}
  \item [59.] The President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, a Congressionally mandated group, was formed in 1978, succeeding the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. It worked independently from January 1980 to March 1983 on such topics as defining death, protecting medical subjects, genetics, internal review board (IRB) guidelines, healthcare decisions and deciding when to forego life-prolonging medical treatment. See http://www.bioethics.gov/reports/past_commissions/index.html.
  \item [60.] See Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, A definition of irreversible coma: report of the Ad Hoc Committee of the Harvard Medical School to examine the definition of brain death, 205 JAMA 337, 337 (1968)[hereinafter Ad Hoc Committee]; Cranford RE, The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight), 18 Hastings Ctr. Rep. 27, 28 (Feb./Mar. 1988).
  \item [61.] Cerebral death is described as the “irreversible destruction of both cerebral hemispheres exclusive of the brainstem and cerebellum.” Stupor and Coma, supra note 1, at 313 (citing Korrein J, Brain Death: Intereated Medical and Social Issues, 315 Annals N.Y. Acad. Sci. 454 (1978)). It has also been defined as a clinical syndrome characterized by the permanent loss of cerebral and brainstem function, manifested by the absence of responsiveness to external stimuli, absence of cephalic reflexes, and apnea. An isoelectric electroencephalogram for at least 30 minutes in the absence of hypothermia and poisoning by central nervous system depressants supports the diagnosis. See Stedman’s, supra note 1, at 495. Brain death is described as a global loss of all brain function. See Ropper AH, Acute confusional states and coma, in Harrison’s Principles of Internal Medicine (16th Ed. 2005), at 1630. There are strict parameters by which brain death is diagnosed, clinical requirements that PVS patients do not satisfy. See Practice parameters for determining brain death in adults: summary statement, Report of the Quality Standards Subcommittee of the American Academy of Neurology, in Practice Handbook: American Academy of Neurology (1994). See also, Ad Hoc Committee, supra note 60, at 337-40. There are several discussions regarding the difference between these two conditions. See Shann F, A personal comment: whole brain death versus cortical death, 23 Anesth. Intensive. Care 14-15 (1995); Taylor RM, Reexamining the delinition and criteria of death, 17 Semin. Neurol. 265-70 (1997).
  \item [63.] Payne K et al., Physicians’ attitudes about the care of patients in the persistent vegetative
\end{itemize}
the sake of the study, PVS was defined as “an irreversible condition characterized by an apparent total lack of awareness with preserved sleep-wake cycles,” conforming to the 1989 position of the AAN64 defining PVS as an irreversible and permanent state. Of the 500 participants, 68% were neurologists and 60% were medical directors. Thirteen percent believed that PVS patients had awareness and experienced hunger and thirst. Thirty percent believed that PVS patients experienced pain. However, 89% felt that it was ethical to withdraw artificial hydration and nutrition. Additionally, almost two-thirds of the respondents believed that it would be ethical to use vital organs from PVS patients for organ transplantation and 20% believed that it would be ethical to hasten the patient’s death by lethal injection.65

Not only do physicians apply different terms to PVS patients or have different ideas of what constitutes PVS, but courts also use confusing terminology in similar cases, which suggests that diagnoses may not be so clear-cut or that courts do not understand the distinctions between mental states like coma and PVS.66 Vegetative patients have been labeled as “terminal,” even though there was no evidence of progressive or fatal disease.67 Other patients have been described as being in a “coma vigil.”68 In some situations, patients diagnosed as being in PVS were said to be in an irreversible coma,69 described subsequently as a “persistent vegetative state [where] . . . The patient [was] awake but unconscious.”70

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65. See Payne, supra note 63, at 104.
68. In re Tavel, 661 A.2d, at 1065.
70. Id. Unfortunately, even media coverage of the current debate regarding PVS and end-of-life decision-making continues to make matters more confusing, as was evident in the lay discussion of the Schiavo case. Racine E et al., Media coverage of the persistent vegetative state and end-of-life decision-making, 71(13) Neurol 964-65 (Sep 2008).
The aforementioned cases demonstrate that courts face a confusing array of terms with which to describe PVS patients and sometimes seem unclear as to how to apply them. Misunderstandings regarding prognoses arise where different labels are applied, and legal decisions regarding long-term management will vary significantly for individuals in similar—if not identical—situations.  

C. CONTROVERSIES IN PROGNOSIS
   
   1. BASED ON CAUSES OF PVS

Most persistently vegetative patients do not recover outward manifestations of higher mental activity and sophisticated thought processes. However, much of the controversy regarding prognoses in PVS surrounds the multiple causes and pathophysiologic changes associated with the condition, in addition to the patient’s age, medical care, and the time elapsed between the onset of PVS and determination of the patient’s prognosis. As noted earlier, no laboratory tests exist to reliably confirm that a patient’s vegetative state is irreversible. Furthermore, newer diagnostic modalities are being forwarded as being capable of predicting recovery in some vegetative state cases.

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71. Rifkinson-Mann S, Legal consequences and ethical dilemmas of pain perception in persistent vegetative states, 36 J. Health L. 523 (Fall 2003). Note that the research performed in the Journal of Health Law article was used as background for this report. The copyright for that research material belongs to the American Health Lawyers Association (AHLA), with whose permission it is being reprinted here.

72. See Higashi, supra note 3.


74. De Giorgio, supra note 7, at 370. See also L.W. v. L.E. Phillips Car. Dev. Ctr., 482 N.W.2d 60, 78 n.11 (Wis. 1992) (Steinmetz, J., dissenting) (“Interestingly, neither the American Academy of Neurology nor the AMA has suggested laboratory tests that can reliably confirm that a patient’s vegetative state is irreversible.”); The Quality Standards Subcommittee of the American Academy of Neurology, Practice parameters: Assessment and management of patients in the persistent vegetative state, 45 Neurol. 1015-8 (1996) (noting that the definition of a permanent vegetative state is based upon probabilities and not absolutes). See also Gill-Thwaites H, Lotteries, loopholes and luck: misdiagnosis in the vegetative state patient, 20(13-14) Brain Inj 1321-28 (Dec 2006).

75. Wijnen VJ et al., Mismatch negativity predicts recovery from the vegetative state, 118(3) Clin Neurophysiol 597-605 (Mar 2007). “Mismatch negativity” (“MMN”) refers to a measurable auditory-event related negative potential (“ERP”) when a person hears a mismatch in sounds. The individual does not actually register the syllables; rather, the brain processes the sounds and builds a neural template based upon those sounds, which causes a specific pattern of neuroelectrical impulses. When there is a change in the syllables or sounds, the brain...
Some studies suggest that prognoses cannot be judged until the third week following onset of coma, while others indicate that a twelve-month waiting period—or even a two-year period—is mandatory, because improvement in mentation can occur within that time. The Multi-Society Task Force concluded that when PVS is due to trauma, the condition can registers a “mismatch” and gives off a different pattern of neuroelectrical impulses, referred to as the MMN. See Näätänen R & Winkler I, The concept of auditory stimulus representation in cognitive neuroscience, 125 Psychol Bull 826-59 (1999); Winkler I et al., Adaptive modeling of the unattended acoustic environment reflected in the mismatch negativity event-related potential, 742 Brain Res 239-52 (1996); Zarza-Luciáñez D et al., Mismatch negativity and conscience level in severe traumatic brain injury, 44(8) Rev Neurol 465-8 (Apr 2007) (English abstract). See also Kotchoubey B, Event-related potentials predict the outcome of the vegetative state, Clin Neurophysiol 118(3): 477-79 (Mar 2007); Almaraz AC et al., Serum neuron specific enolase to predict neurological outcomes after cardiopulmonary resuscitation: a critically appraised topic, 15(1) Neurologist 44-8 (Jan 2009); Babiloni C et al., Cortical sources of resting-state alpha rhythms are abnormal in persistent vegetative state patients, Clin Neurophysiol 2009 Mar 17 [Epub ahead of print]; Di H et al., Neuroimaging activation studies in the vegetative state: predictors of recovery? 8(5) Clin Med 502-7 (Oct 2008).

76. See, e.g., Stupor and Coma, supra note 1, at 340, n 80.
77. Celesia, supra note 73, at 226.
79. See In re Colyer, 660 P.2d 738, 752 (Wash. 1983) (Dore, J., dissenting) (criticizing the Washington Supreme Court for its willingness to accept the uncontroverted diagnosis that a patient who had been comatose for twenty-five days was in PVS in view of the fact that “a 4 to 6-month comatose period is used to determine whether there is any improvement in the incompetent”). The court’s willingness to accept a twenty-five-day waiting period, rather than the six-month waiting period accepted by neurological specialists, suggests that a timely resolution of the issue of prolonging supportive care was considered instead of the patient’s best interest.
80. The Multi-Society Task Force on PVS was established in 1991 and charged with the creation of a consensus statement regarding persistent vegetative states. The entities participating in this collaborative effort included the American Academy of Neurology, Child Neurology Society, American Neurological Association, American Association of Neurological Surgeons, and American Academy of Pediatrics. The documents generated by the task force are available through the American Academy of Neurology at 2221 University Ave., S.E., Minneapolis, MN 55414. The members of the task force were Stephen Ashwal, M.D., co-chairman (Loma Linda University School of Medicine, Loma Linda, CA), Child Neurology Society; Ronald Cranford, M.D., co-chairman (Hennepin County Medical Center, Minneapolis, MN), American Academy of Neurology; James L. Bernat, M.D. (Dartmouth Medical School, Hanover, NH), American Academy of Neurology; Gastone Celesia, M.D. (Loyola University Stritch
be judged permanent twelve months after the occurrence of the injury, because recovery after a year is rare. In other scenarios, patients who appear to be vegetative at three months may become less neurologically impaired over time, so that determining that a patient is persistently vegetative at three months may be inappropriate. However, some studies indicate that lack of recovery after six months prognosticates significant disability or inability to recover further irrespective of the cause of brain injury. Such discrepancies can cause confusion in the courts when prognoses are being considered for purposes of deciding issues regarding long-term care for PVS patients.

While this report addresses the management of adult PVS patients, there is a subset of children born without functional cerebral hemispheres,
labeled as “congenitally vegetative,” whose clinical course may differ somewhat, although they are considered to be persistently vegetative. Causes of this condition can include brain malformations, such as anencephaly, and anoxic birth injuries and the subsequent development of cerebral palsy. Decisions regarding these little patients may be quite difficult. Some studies have reported that these children can develop the ability to discriminate familiar from unfamiliar people and environments, to interact socially and to express musical preferences and appropriate affective responses, including pain reflexes. The authors of these studies posit that “unconsciousness” in these children may be due to the tendency to see this developmentally vegetative state as a self-fulfilling prophesy, suggesting that such children will never be able to learn because they are “vegetative” and not expected to improve in terms of function or potential. However, these children may in fact be able to learn new behaviors by “associative learning,” associating new behaviors with rewards or other stimuli provided in their environment, prompting them to repeat these behaviors in response to the stimulus given.
This observation suggests that congenitally vegetative children may be able to learn to communicate in some meaningful way, just as normal infants—who are not considered unconscious by any means—ultimately learn to communicate, albeit differently. A logical extension of this observation is that if the existence of consciousness (upon which a diagnosis of PVS is predicated) requires the ability to communicate, any infant who has not yet learned to communicate in an intelligible fashion would be labeled “unconscious” just like a vegetative child, since neither can communicate in a verbally significant manner. This does not prove that vegetative children cannot experience aspects of their environment in meaningful ways. It also is not inconceivable that some vegetative adult patients may experience aspects of their environment in ways that we cannot understand but that are equally valid. Such an observation should not be disregarded.

2. POSSIBLE MISDIAGNOSIS OF PVS

The critical problem in diagnosing PVS is differentiating it from other medical conditions that may be reversible. It may be difficult to determine whether vocalization or movement in an apparently vegetative patient represents some sort of response to an external or internal stimulus, or whether the response actually represents a reflex action. Furthermore, in some cases, individuals presumably diagnosed as PVS regain consciousness. Remarkable stories of recovery from presumed coma or vegetative states have been reported in the medical literature, the lay press, or passed on by word of mouth. In such cases, assuming the absence of pain and suffering, further maintenance of life may be justified by the remote possibility that a patient might recover after a prolonged period.

of apparent PVS, even though most of these patients remain severely neurologically disabled.

Those rare cases of locked-in syndrome that may develop upon a patient’s recovering from a coma may be misdiagnosed as PVS. These patients have intact cognitive function, but are unable to move or speak and may only be able to communicate their thoughts, needs and discomfort by blinking their eyes. Such patients do not have cortical damage, and as such, do not satisfy the criteria for PVS.

3. IMPROVED TECHNOLOGY/MEDICAL CARE

With cardiopulmonary resuscitation, ventilator support, and aggressive critical care, survival rates are increasing for PVS patients. The presence of gag, cough, and other defensive reflexes that enhance the body’s natural resistance to infection can also prolong survival rates for indi-


95. See generally Task Force on PVS, supra note 6. See also Brophy v. New England Sinai Hospital, 398 Mass. 417, 497 N.E.2d 626 (1986); In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987). It should be noted while there appears to be no cure for PVS, research continues in surgical and rehabilitative medicine fields with an eye to enhancing some form recovery from aspects of this devastating condition. See Morita I et al., Dorsal column stimulation for persistent vegetative state, 97 (Pt 1) Acta Neurochir Suppl 455-59 (2007); Richard I & Menei P, Intrathecal baclofen in the treatment of spasticity, dystonia and vegetative disorders, 97(pt 1) Acta Neurochir Suppl 213-18 (2007); Whyte J, Treatments to enhance recovery from the vegetative and minimally conscious states: ethical issues surrounding efficacy studies, 86(2) Am J Phys Med Rehabil 86-92 (Feb 2007).


98. See AMA Joint Report, supra note 8. See also Cranford, supra note 60, at 30-31. See also DeGrella v. Elston, 858 S.W.2d 698, 702 (Ky. 1993) (While irreversible brain damage destroyed Sue DeGrella’s higher brain functioning, her brainstem remained intact; thus, “with continued feeding she may live many years. However, her brain and her body will continue to wither.”). There are reports of some PVS patients surviving for over 30 years without recovering any neurologic function. This increased rate of survival among PVS patients has engendered debate regarding the right to refuse life-sustaining treatment among physicians,
Generally, however, the outlook for full recovery among adults who are vegetative for more than one month is poor. Life expectancy is only two to five years, with survival beyond ten years uncommon. Furthermore, older patients are more likely to develop medical complications from immobility and its concomitant diseases that can significantly shorten survival or any potential recovery (if such exists). For children, the prognosis for regaining consciousness depends upon the cause of the PVS, while overall bodily survival is less of an issue usually because of the lack of concomitant disease or medical complications in the younger patient population that might impair rehabilitation and treatment.

II. MEDICAL GUIDELINES FOR WITHDRAWAL OF CARE

A. PRESIDENT’S COMMISSION

In 1983, the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research produced its report entitled Deciding to Forego Life-Sustaining Treatment. The topic of prolonging support care and life-sustaining therapy for patients for whom neurological recovery was deemed impossible was not the mandate of the Commission.


99. See Cranford, supra note 11, at 31. See also Pence GE, Comas: Quinlan and Cruzan, in Classic Cases in Medical Ethics (4th ed. 2004) at 16 (noting that Karen Ann Quinlan survived ten years after she was weaned from her breathing tube).

100. See Task Force on PVS, supra note 6, at 24.

101. See id. See also The Quality Standards Subcommittee of the American Academy of Neurology, Practice parameters: Assessment and management of patients in the persistent vegetative state, 45 Neurol. 1015-8 (1996).

102. See Cranford, supra note 11, at 31.

103. See Heindl UT & Laub MC, Outcome of Persistent Vegetative State Following Hypoxic or Traumatic Brain Injury in Children and Adolescents, 27 Neuropsychiatr 94, 98-99 (1996). See also Eilander HJ et al., Children and young adults in a prolonged unconscious state after severe brain injury: long-term functional outcome as measured by the DRS and the GOS after early intensive neurorehabilitation, 21(1) Brain Inj 53-61 (Jan 2007).

104. President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 189-96 (1983).

105. See id.
cision-making about medical treatments and allocation of healthcare resources. It recommended that better options and other alternatives be made available to those who refuse life-sustaining therapy and that healthcare providers be better educated about these issues. Additionally, the report suggested that ethics committees were an alternative to judicial approval in rendering decisions about withdrawal of support care and advocated that the substituted judgment or the best interests standards be applied in these cases.

The Commission’s report also was preceded by several discussions in the peer-reviewed medical literature, among which were a 1976 article from Massachusetts General Hospital which proposed a classification system for patients according to the level of medical care they would be afforded, and a 1987 report from Presbyterian University Hospital of Pittsburgh, in which medical decisions regarding life-sustaining treatments could be implemented only with the patient’s or the family’s consent.

B. AMERICAN MEDICAL ASSOCIATION

The Judicial Council of the AMA proposed two consensus statements in 1982 regarding the quality of life in newborn and adult patients, and another regarding medical care for the terminally ill. Both statements emphasized the importance of those who speak for the rights of the patients, although parents of newborns were identified as “decision-makers,” while the wishes of family speaking on behalf of adult pa-


110. The protocol implemented by the critical care medicine team divided patients into four categories consisting of (1) total ICU support; (2) support but no CPR; (3) no extraordinary measures, including ICU care, parenteral nutrition, etc.; and (4) no care for dead patients. *Id.*


patients were considered factors to be integrated by physicians who made the healthcare decisions in those cases.113

The AMA Association issued its Joint Report entitled “Persistent Vegetative State and the Decision to Withdraw or Withhold Life Support” in June 1989,114 noting that the correct diagnosis of PVS and the estimation of a probable prognosis represents the basis for any treatment decisions with respect to vegetative patients who are unlikely to improve. The Report emphasized that clinical criteria for the diagnosis of PVS were strongly supported by scientific data, and that the calculation of prognostic probabilities was available from several sources. It supported the view that PVS patients were unconscious but not brain dead. The Joint Report went on to express concern that physicians were at risk of involving their own personal attitudes about the ethical and legal ramifications of their treatment decisions and of advocating a particular choice based on their own principles and interpretations of the facts. The Report emphasized that it was for this very reason that the main legal concern was to try to discern what the patient would have chosen, and not what physicians or other caretakers believed would be desirable.

The AMA supported using the best interests standard in cases where there are no previously expressed desires on the part of the patient or substituted judgment which is made on the basis of the patient’s perceived preferences and values, with the decision made by the family or legal representative. As noted below, under this test a third party decides what is best for the patient in view of the diagnosis, prognosis and the burden of the proposed treatments. See p. 31, infra, fns. 201-02.

C. AMERICAN COLLEGE OF PHYSICIANS

The American College of Physicians (ACP)115 updated its Ethics Manual in 1998 so as to address ethical dilemmas faced by its physician membership in dealing with medical decisions that might have a societal impact.


114. AMA Joint Report, supra note 4, at 426-30.

115. The American College of Physicians (ACP) is the nation’s largest medical specialty society. Its membership includes about 120,000 members, including physicians in general internal medicine and related subspecialties, including cardiology, gastroenterology, nephrology, endocrinology, hematology, rheumatology, neurology, pulmonary disease, oncology, infectious diseases, allergy and immunology, and geriatrics. It merged with the American Society of Internal Medicine in 1998. See ACP website, accessed at http://www.acponline.org/index.html.
The ACP stated that the patient’s right to determine his or her own healthcare management is based on the philosophical concept of respect for autonomy, the common-law right of self-determination, and the patient’s liberty interest under the U.S. Constitution.\textsuperscript{116}

The Ethics Manual, in its section on “Irreversible Loss of Consciousness,” describes the persistent vegetative state as a condition in which the patient is unconscious but not brain dead, and notes that such patients are not terminally ill.\textsuperscript{117} The Manual also observes that while physicians and medical societies believe that there are no medical indications for life-prolonging treatment for PVS patients and that care should be withdrawn,\textsuperscript{118} the Manual states that many patients or families value life in and of itself regardless of neurologic state and that for these reasons, decisions about life-prolonging treatment for PVS patients should be made in the same manner as for other patients without decision-making capacity.\textsuperscript{119}

The Manual emphasizes that patients without decision-making capacity have the same rights concerning life-sustaining treatment decisions as mentally competent patients. Treatment should conform to what the patient would want on the basis of written or oral advance directives. If these instructions are not available, care decisions should be based on the best evidence of what the patient would have chosen (substituted judgment) or, failing that, on the best interests of the patient.\textsuperscript{120}

D. AMERICAN ACADEMY OF NEUROLOGY

In the 1989 position paper of the AAN, PVS was described as an irreversible, permanent condition,\textsuperscript{121} thereby supporting withdrawal of support care from such patients. The Academy’s view differentiates it from those positions advocated by the AMA\textsuperscript{122} (see discussion above) and the


\textsuperscript{119} Id.

\textsuperscript{120} Id.

\textsuperscript{121} American Academy of Neurology, Position of the American Academy of Neurology on certain aspects of the care and management of the persistent vegetative state patient, Adopted by the Executive Board, American Academy of Neurology, Apr. 21, 1988, Cincinnati, Ohio, 39 Neurol. 125-6 (1989).

\textsuperscript{122} AMA Joint Report, supra note 4, at 426-30 (1990).
American Neurological Association\textsuperscript{123} suggesting that decisions regarding support care depend upon the goals of treatment and families’ wishes. Because these patients were not brain dead, they were deserving of care in much the same manner as other patients without decision-making capacity. A subsequent paper regarding the management of the PVS patient was published by the AAN in 1995, reiterating that management would be dictated by the permanence of the vegetative state.\textsuperscript{124}

That document differentiates a persistent vegetative state from a permanent vegetative state, noting that the \textit{persistent vegetative state} must be present for at least one month, as compared to the \textit{permanent vegetative state}, which is defined as:

\begin{quote}
 an irreversible state, a definition, as with all clinical diagnoses in medicine, based on probabilities, not absolutes. A PVS patient becomes permanently vegetative when the diagnosis of irreversibility can be established with a high degree of clinical certainty, i.e., when the chance of regaining consciousness is exceedingly rare.\textsuperscript{125}
\end{quote}

The management guidelines specify that when a patient has been diagnosed as being in PVS, physicians have the responsibility of discussing with the family or surrogates the probabilities of the patient’s recovering and that both physicians and family or surrogates must determine appropriate levels of treatment relative to the administration or withdrawal of medications, antibiotic use, supplemental oxygen, dialysis and other organ-sustaining treatments, administration of blood products and artificial hydration and nutrition.\textsuperscript{126}

\textsuperscript{123} ANA Committee on Ethical Affairs, \textit{Persistent vegetative state: report of the American Neurological Association Committee on Ethical Affairs}, 33 Ann. Neurol. 386-90 (1993). The American Neurological Association maintains that a persistently vegetative patient is unconscious but is not brain dead.

\textsuperscript{124} The Quality Standards Subcommittee of the American Academy of Neurology, \textit{Practice parameters: Assessment and management of patients in the persistent vegetative state}, 45 Neurol. 1015-8 (1995). This document included input from the American Society of Internal Medicine, the American College of Physicians, the American Academy of Family Practice, the American Association of Physical Medicine and Rehabilitation, the Society of Critical Care Medicine, the American Academy of Pediatrics, the Child Neurology Society, the American Neurological Association and the American Association of Neurological Surgeons. The background paper was provided by the Multi-Society Task Force on PVS. See also Task Force on PVS, \textit{supra} note 6, \textit{Part I} and \textit{Part II}, 330 N. Engl. J. Med 1572-79 (1994).

\textsuperscript{125} Id.

\textsuperscript{126} Id.
E. HASTINGS CENTER GUIDELINES

The Hastings Center for Bioethics also issued guidelines on the termination of life-prolonging treatment and support care for the dying patient.127 The Hastings Center Guidelines define life-sustaining treatment as “any medical intervention that is administered to a patient in order to prolong life and delay death.”128 These guidelines have been incorporated in a consensus statement including the President’s Commission and the AMA and promulgated in the AMA's Joint Report, recommending that:

[Physicians should honor the patient’s previously expressed desires regarding the use of life support.... However, in many cases, the patient will not have indicated his or her desires before becoming permanently unconscious. In such cases, the decision whether to use life support should be based on the patient’s perceived preferences and values, and the decision should be made by the family or legal representative. If the patient’s preferences or values are not ascertainable, the family or legal representative should decide on the basis of the patient’s best interests.129

III. PVS STANDARDS IN LEGAL LITERATURE
A. DEFINITIONS USED IN WITHDRAWAL OF CARE CASES

Until Schiavo,130 most legal commentators looked to Cruzan131 for a more comprehensive medicolegal understanding of PVS. Before Cruzan, a persistently vegetative individual was thought to be like Karen Ann Quinlan, described as one who “blinks, cries out and does things of that sort but is still totally unaware of anyone or anything around her.”132 In Cruzan, the definition became somewhat more specific in that the individual’s state of consciousness was considered to be part of the definition. PVS patients were described as “devoid of thought, emotion and sensation; they are permanently and completely unconscious.”133 Leading legal commentaries

128. See id.
129. See AMA Joint Report, supra note 4.
133. Cruzan, 497 U.S. at 309-10.
described PVS patients as those who “. . . can breathe, digest food and eliminate waste . . . open or close their eyes suggesting periods of sleep and waking . . . and manifest other reflex responses to external stimuli, such as coughing, gagging, or moving their limbs. But these patients, though occasionally appearing to give conscious responses, do not feel pain . . . They have irretrievably lost consciousness.”

In other cases, such as In re L.W., courts have utilized the Guidelines for State Court Decision Making in Life-Sustaining Medical Treatment Cases to define PVS as the “irreversible loss of all neocortical functions; brainstem functions intact,” a condition in which reasonable medical judgment finds “complete, chronic and irreversible cessation of all cognitive functioning and consciousness and a complete lack of behavioral responses that indicate cognitive functioning, although autonomic functions continue.” The patient in L.W. was described as not suffering in any manner, “awake, but unaware; eyes-open unconsciousness; sleep/wake cycles present; respirator independence.” The court observed that a diagnosis of PVS could be determined “with a High Degree of Certainty” after one to three months in hypoxic-ischemic cases and after six to twelve months in cases of head trauma, and noted that PVS patients were capable of living for a relatively long time after their brain injury.

In some situations, PVS has been defined based upon the medical expert testimony offered in court. In the case of In re Fiori, the court has described the “vegetative state” as referring to:

a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and


135. In re L.W., 167 Wis. 2d 53, 482 N.W.2d 60 (1992).C


137. In re L.W., 482 N.W.2d at 64 n.1 (citing the National Center for State Courts 1991, Appendix B, “Major Neurological Syndromes in LSMT Cases”).

138. Id. at 84 n.15.

139. Id. at 64 n.1.

140. Id.

pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.\textsuperscript{142}

\textbf{B. CONFUSING TERMINOLOGY IN WITHDRAWAL OF CARE CASES}

Different commentators have argued that “brain death” definitions now should be applied to all cases in which the upper brain no longer functions, whether presently characterized as PVS or “neocortical death,”\textsuperscript{143} and even to less debilitated, minimally conscious patients.\textsuperscript{144} However, the definition of “brain death” differs from that of “neocortical death” in profoundly significant ways.\textsuperscript{145} “Brain death” is the only type of brain damage that is recognized as equivalent to death.\textsuperscript{146} That damage is char-

\textsuperscript{142} Id. at 908 (quoting Cruzan, 497 U.S. at 267 n.1).


\textsuperscript{144} See Giacino JT et al., Development of Practice Guidelines for Assessment and Management of the Vegetative and Minimally Conscious States, 12 J. Head Trauma Rehab. 79, 83 (1997) (the minimally conscious state has been described as a “distinct clinical entity that may occur as a transitional condition for patients evolving to or from [the vegetative state], or a clinical end point for those with very severe brain damage”). See also Cranford, supra note 11, at 20; Bernat JL & Rottenberg DA, Conscious awareness in PVS and MCS: the borderlands of neurology, 68(12) Neurol 885-86 (20 Mar 2007). Several different clinical scales have been proposed to differentiate PVS from MCS. See Vanhaudenhuyse A et al., Behavioural assessment and functional neuro-imaging in vegetative state patients, 62 Spec No. Rev Med Liege 15-20 (2007). See also Noirhomme Q et al., A twitch of consciousness: defining the boundaries of vegetative and minimally conscious states, 79(7) J Neurol Neurosurg Psychiatr 741-2 (Jul 2008).

\textsuperscript{145} Brain death has been defined as the irreversible cessation of all functions of the entire brain, including the brainstem, even if circulatory and respiratory functions remain intact as a result of artificial life support. Patients must demonstrate absence of cerebral function (unresponsive to all external stimuli) and brainstem functions (i.e., unreactive pupils, absent ocular movement to head turning or ice water irrigation of ear canals, positive apnea test demonstrating no drive to breathe. Absence of brain function must have an established cause and be permanent without possibility of recovery (e.g., must confirm the absence of sedative effect, hypothermia, hypoxemia, neuromuscular paralysis or severe hypotension). Cerebral blood flow studies and EEG are used most often as confirmatory tests. See Kress JP & Hall JB, Principles of Critical Care Medicine, in Harrison’s Principles of Internal Medicine, 16th Ed. (Dennis L. Kasper et al., eds. 2005): 1581, 1587.

\textsuperscript{146} Ropper AH, Acute Confusional States and Coma, in Harrison’s Principles of Internal Medicine, 16th Ed. (Dennis L. Kasper et al., eds. 2005): 1624, 1630.
acterized by three essential elements: (1) widespread cortical destruction as evidenced by deep coma and complete unresponsiveness to all stimuli; (2) complete brainstem destruction as shown by absence of pupillary reaction to light and loss of corneal and oculovestibular reflexes; and (3) destruction of the medulla as evidenced by apnea (complete lack of respiratory drive). This differs from PVS anatomically in that brainstem functions are intact, and hence, the entire brain is not “dead.”

Otherwise, the concept of “death” is dynamic and has evolved over time based upon advances in medical technology and changes in social attitudes. Whereas “death” once was defined simply as the cessation of respiration and pulsation, the idea of “death” has been supplanted by the “brain death” definition discussed earlier, which proposes that the entire brain must be dead, the “total brain death” definition. The development of intensive care units with life support equipment has made the loss of cardiorespiratory function no longer an absolute indication that cessation of the individual’s life (i.e., death) has occurred, for which reason the “brain death” definition was developed.

147. Id.


150. Initial efforts to define death in this age of technological advancement included development of the Harvard criteria in 1968 by an ad hoc committee on brain death at Harvard Medical School. See Ad Hoc Committee, supra note 60, at 337-340. These criteria described determination of a condition known as “irreversible coma,” “cerebral death,” or brain death. Id. Since the initial introduction of these criteria, the Uniform Determination of Death Act, promulgated in 1980 and supported by the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, has served as a model statute for the adoption of state legislation that defines death. See also Guidelines for the determination of death: report of the medical consultants on the diagnosis of death to the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. 246 JAMA 2184-86 (1981). The Act asserts that, “An individual, who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible...
One dilemma that arises concerns the idea that medicolegal definitions of “brain death” and “neocortical death” may be based upon the view that consciousness is required for human existence. If that were proven to be so, then a permanently “unconscious” individual, one who might be diagnosed as “neocortically dead,” could be declared legally “dead.” In this situation, would a “permanently unconscious” or a “neocortically dead” individual (i.e., PVS) be considered “brain dead,” thereby allowing for withdrawal of care without judicial review? Should PVS be included in the definition of “whole” brain death? As we have seen in some cases, if the upper brain dies, the individual presumably has no consciousness. Some neurologists consider pain and suffering as “attributes of consciousness requiring cerebral cortical functioning.”

1. PATIENT’S BEST INTERESTS TEST

One standard applied in limited exceptions in New York is the “patient’s best interests” test whereby a third party decides what is best for the patient in view of the diagnosis, prognosis and the burden of contemplated treatments.
If the patient, while competent, did not express his or her explicit wishes, or if the patient was never competent, then life-sustaining medical treatment may be withheld or withdrawn absent an overriding state interest if doing so would advance the patient’s best interests.156

The best interests standard was applied in the influential case of In re Claire Conroy, 98 N.J. 321, 486 A.2d 1209 (N.J. 1985). In Conroy, the hospital had placed a feeding tube in the incompetent patient, which the guardian, the patient’s nephew, wished to remove. Id. The guardian sought permission from the court to authorize the removal of the tube. Id. The court observed that the case of a terminal illness is inherently different from the case of a PVS patient as decided in Quinlan, and that the Quinlan standard does not apply to a chronically ill patient. Id. at 358-60. The rights of a competent individual include the right to define life-sustaining treatment. Id. But where a patient is incompetent, her guardian and the court have an obligation to see that her wishes are fulfilled; this requires the court to discern the wishes of the individual patient, either by a subjective standard (where the surrogate knows exactly that the patient would have done—clear and convincing evidence such as a living will, oral directive or durable power of attorney or Healthcare Proxy), or by the limited objective test—some trustworthy evidence of patient’s wishes plus the burden of continuing treatment outweighing the benefits of continuing life. Id. at 364-68.

If neither of these standards can be met, the pure objective standard (where there is no probative evidence of the patient’s opinion but the net burdens of the patient’s life with the treatment clearly and markedly outweigh the benefits derived) must be met before life sustaining treatment can be withheld. Id. In In re Wanglie, PX-91-283 (Minn., Hennepin County, July 1991), the husband of a vegetative patient, who also was her guardian, successfully fought to maintain artificial nutrition and hydration for his permanently unconscious eighty-six-year-old wife after the hospital had sought a court order to remove him as guardian on the basis that he was improperly insisting on “futile” care for his wife. Id. The court upheld the husband’s guardianship because he purported to be implementing his wife’s articulated religious belief that all life is sacred and ought to be preserved. Id. As such, the court determined that the patient’s husband was the most suitable and best qualified guardian of his wife’s interests, rather than a court-appointed guardian. Id.

The court in the matter In Re Barry, 445 So.2d 365 (Court of Appeals of Florida, Second District 1984), applied the best interests standard where the rights of an infant were called into question. In Barry, the court held that it is the right and obligation of the parents of a terminally ill child who is wholly lacking in cognitive brain functioning, completely unaware of his surroundings and with no hope of development of any awareness, to exercise the responsibility and prerogative of making an informed decision as to whether extraordinary life prolonging measures should be continued. Id. at 371-72.

The most recent compendium of cases exemplifying application of the best interests standard is In re Guardianship of Theresa Marie Schiavo, Incapacitated, 780 So.2d 176 (Fla. 2d DCA 2001), cert. denied, 789 So.2d 348 (Fla. 2001); In re Guardianship of Theresa Marie Schiavo, Incapacitated, 792 So.2d 551 (Fla. 2d DCA 2001); In re Guardianship of Theresa Marie Schiavo, Incapacitated, 800 So. 2d 640 (Fla. 2d DCA 2001), cert. denied, 816 So.2d 127 (Fla. 2002); In re Guardianship of Theresa Marie Schiavo, Incapacitated, 851 So.2d 182 (Fla. 2d DCA 2003).

IV. PVS STANDARDS IN NEW YORK STATE

A. SUMMARY OF CASE LAW

1. LEGAL TESTS

Courts in several jurisdictions have addressed cases in which caretakers sought authority to withhold or withdraw ventilators or nutritional support from patients who were permanently unconscious. While many of these rulings have approved requests to end life support, there have been notable exceptions in several states, including New York.

Several general principles have been used to guide the courts in their decisions regarding withdrawal of support care. Mentally competent patients have a general right to determine what medical treatment they will allow\(^\text{157}\) and to refuse medical treatment, even at the risk of death.\(^\text{158}\) If a person has indicated whether life-sustaining treatment should be administered or withheld in the event of permanent unconsciousness, the courts will respect the person’s previously expressed desires.\(^\text{159}\)

However, there are instances in which the courts discount a person’s prior statements on the pretext that they were uttered in an informal setting, on a casual basis, or in a situation in which the person expressing those wishes was healthy and had not yet been exposed to a situation in which those wishes were to be interpreted as healthcare directives.\(^\text{160}\)

New York state case law, after In the Matter of Storar/Matter of Eichner v. Dillon\(^\text{161}\) and In the Matter of Westchester County Medical Center on behalf of Mary O’Connor\(^\text{162}\) would appear to set one of the highest standards of

\(^{157}\) See Schloendorff v. Society of New York Hospital, 211 N.Y., 125, 129-30, 105 N.E. 92, 93 (1914).

\(^{158}\) See Bouvia v. Superior Court, 225 Cal.Rptr. 297, 300 (1986); In re Conroy 98 N.J. 321, 486 A.2d 1209, 1222 (1985) cited by AMA Joint Report, supra note 4, at 4. See also John F. Kennedy Memorial Hospital Inc. v. Bludworth, 452 So.2d 921, 923-24 (Fla. 1984) (holding that there is no recognized basis for drawing a constitutional line between the protections afforded to competent persons and incompetent persons); In re Guardianship of Browning, 568 So.2d 4, 10 (Fla. 1990) (a patient can refuse treatment on the basis of his or her right of self-determination and not what is thought to be in the patient’s best interests).

\(^{159}\) See In re O’Connor, 72 N.Y.2d 517, 531 N.E.2d 607, 613 (1988); Conroy, 486 A.2d at 1229, cited by AMA Joint Report, supra note 4, at 4.

\(^{160}\) In re Colyer, 660 P.2d at 748; In re Jobes, 529 A.2d at 443, cited by AMA Joint Report, supra note 4, at 4.


proof of the patient’s prior intent in order that a surrogate be allowed to make decisions on end-of-life issues absent an advance directive or Health Care Proxy.

In determining whether or not to terminate life-sustaining treatment, the New York courts balance the patient’s right to refuse medical treatment and the State’s interest in preservation of life. In analyzing the facts of individual cases for this standard, New York courts in general have held that life-sustaining treatment of an incompetent patient can only be terminated or withheld in the presence of “clear and convincing proof” that the patient would have refused such treatment if competent, based on the expressed wishes of the patient as communicated prior to becoming incompetent, a right that included the removal or withholding of artificial means of nutrition and hydration.

In 1988, the New York Court of Appeals reaffirmed the position that decisions to limit life-prolonging treatment for incompetent patients required clear and convincing evidence that the patient would have requested those limitations in the very circumstances and situation being considered, rather than surrogate-substituted judgment or surrogate judgments made in the patient’s best interests.163

a. CLEAR AND CONVINCING EVIDENCE TEST

In order to ensure that the patient truly would have wanted life-sustaining treatment to be withheld or withdrawn, many states require a showing that the patient’s desires were “clearly and convincingly” expressed.164 However, in the absence of formal documentation or of repeated


164. In re O’Connor, 531 N.E.2d at 613, cited by AMA Joint Report, supra note 4, at 4. The Court held that under the State’s law, a conservator may not withhold artificial nutrition and hydration from:

- a conscious conservatee who is not terminally ill, comatose, or in a persistent vegetative state, and who has not left formal instructions for healthcare or appointed an agent or surrogate for healthcare decisions . . . absent clear and convincing evidence the conservator’s decision is in accordance with either the conservatee’s own wishes or best interest.


The seminal United States Supreme Court case in the field of the withdrawal or withholding of life-sustaining treatment is Cruzan v. Director, Missouri Dep’t of Health, 497 US 261 (1990),
expression so in the setting of formal discussions, courts may find the patient's wishes were not clearly expressed. In such situations, the court may find it necessary to relax the hearsay rule so as to determine the wishes of a currently incompetent patient from oral statements made by the patient when that patient was competent. The patient's lifestyle or other experiential conduct also may be used as evidence of the patient's wishes, in the absence of other evidence, or to supplement any written or oral evidence of a patient's wishes.

Courts impose a very high standard for satisfying the "clear and convincing proof" test. Evidence of the patient's past oral or written statements must unequivocally express the patient's firm and settled desire not to have artificial life support continued under specific circumstances similar to those in the case at hand. Without evidence of the patient's wishes where the Court upheld the clear and convincing evidence standard. In *Cruzan*, the United States Supreme Court established refusal of care as a liberty interest under the Fourteenth Amendment of the United States Constitution. Prior to *Cruzan*, withdrawal of care cases interpreted the refusal of care as part of the patient's autonomy interests and the individual's right of privacy with respect to medical treatment. The *Cruzan* case established critical principles for surrogate decision-making with respect to PVS patients in particular. Although the right to refuse therapy was found to be a liberty interest, the Court balanced that right against the State's interest in preserving life. See also Mareiniss DP, *Comparison of Cruzan and Schiavo: the burden of proof, due process, and autonomy in the persistently vegetative patient*, 23 J. Legal Med. 233, 234 (Jun. 2005).

165. In making a determination of the patient's wishes based upon a written document, the court determines whether that document meets the legal requirements for such documents to be considered bona fide. If such a document does not meet these requirements, this may reduce the weight the court gives to that document, but that should not preclude the parties from introducing the document as evidence of the patient's wishes. See Coordinating Council on Life-Sustaining Medical Treatment Decision Making by the Courts. Guideline 13: Written Evidence of a Patient's Wishes, in Guidelines for State Court Decision Making in Life-Sustaining Medical Treatment Cases (2d Ed. 1993) at 81-82.


168. *In re Fiori*, supra note 146. The minority of states requires that there be "clear and convincing evidence of the patient's intent to withdraw life support. This standard requires "[n]othing less than unequivocal proof" of the patient's express wishes as to the decision to terminate life support is at issue. In *re Westchester County Medical Center (O'Connor)*, 531 N.E.2d 607, 612 (N.Y. 1988); *See also Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), aff'd, *Cruzan v. Director, MO. Health Dept.*, 497 U.S. 261 (1990) (court found that PVS patient's expressions to a roommate that she would not want to be maintained on life support
that meets these high standards of persistence, documentation and specificity, life support may not be withheld or withdrawn.

The key New York state cases defining this standard are described in more detail below. The key companion cases illustrating the application of the clear and convincing evidence standard are *In the Matter of Storar/Matter of Eichner v. Dillon.* 169 In this consolidated case, the guardians of incompetent patients (diagnosed as fatally ill with no hope of recovery) objected to the continued use of life-prolonging medical intervention.

In the *Storar* case, 170 the New York Court of Appeals rejected a decision authorizing a denial of life-prolonging blood transfusions to an incompetent adult. The case was significant in that the Court was unwilling to rely on a surrogate’s judgment about the patient’s best interests.

John Storar was a severely retarded fifty-two-year-old man with terminal cancer, whose mother and legal guardian refused consent to his receipt of blood transfusions on the grounds that such treatment would only prolong his discomfort and would be against his wishes if he were competent. Storar, a resident of a State facility, was alert and aware of his environment but experts agreed that he had the mental capacity of an infant and was unable to make his own decisions regarding his treatment.

In the *Eichner* case, 171 the New York Court of Appeals upheld a decision that a respirator could be removed from a PVS patient who had expressed his wishes that he not receive life-prolonging therapy in such a situation. The decision was important in that the Court recognized a living will as clear and convincing evidence of the patient’s previously expressed wishes, rather than relying upon substituted judgments about what the patient would have wished.

The case involves Brother Fox, an eighty-three-year-old man maintained in a permanent vegetative state by a respirator. His legal guardian applied to have the respirator removed on the ground that it was against the patient’s expressed wishes. 172 As a teacher, Brother Fox had formally

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170. *Id.* See also *In the Matter of John Storar,* 78 A.D.2d 103, 434 N.Y.S.2d 46, 47 (1980).


stated his opposition to the result in the Quinlan case and several years later reiterated his opinion on a more personal level, stating that he would not want any extraordinary measures taken for him if there were no reasonable hope of his recovery. All experts who testified in the case agreed that there was no reasonable likelihood that Brother Fox would ever emerge from PVS or recover cognitive ability. The court held that:

> clear and convincing proof should also be required in cases where it is claimed that a person, now incompetent, left instructions to terminate life sustaining procedures where there is no hope of recovery . . . . In this case the proof was compelling . . . . The finding that [Brother Fox] carefully reflected on the subject, expressed his views and concluded not to have his life prolonged by medical means if there were not hope of recovery is supported by his religious beliefs and is not inconsistent with his life of unselfish religious devotion.

In both cases, the trial courts and Appellate Divisions entered decisions permitting discontinuation of treatment, but the treatments continued pending appeals. Both patients had died prior to this decision being rendered, but the cases were reviewable since the underlying issues are of public importance, are recurring in other courts throughout the State and are likely to otherwise escape full appellate review even when appeals have been expedited.

The issue was whether, and under what circumstances, a surrogate decision can be made on behalf of an incompetent patient, where the patient has been diagnosed as terminally ill, and where the decision relates to the withholding or withdrawal of extraordinary life support medical procedures.

The Court of Appeals of New York held that life sustaining measures should have been discontinued for Brother Fox because there was “clear and convincing proof” that, prior to becoming incompetent, the patient had expressed his desire not to be placed on a respirator to maintain him in a permanent vegetative state. This decision relied on the common-law right of a competent adult to refuse medical treatment, even where such treatment is necessary to save the patient’s life.

173. In re Eichner, 420 N.E.2d at 68.
174. Id.
176. In re Eichner, 420 N.E.2d at 66.
177. Id. at 67.
178. Id. at 72.
179. Id.
In contrast, the Court held that Mr. Storar’s guardian could not make the determination to decline treatment because no such “clear and convincing proof” of the patient’s wishes could possibly exist since he had always lacked decision-making capacity. The rationale for this decision is that a parent may not deprive a child of life-saving treatment, and that this principle applies equally to someone such as Mr. Storar with the mental capacity of an infant. The decision also seems to rely on the facts that the blood transfusions allowed the patient to maintain his usual level of physical and mental activity, did not cause excessive pain and were necessary for his treatment.

The end result of these cases is that life-sustaining treatment of an incompetent patient can only be terminated or withheld in the presence of “clear and convincing proof” that the patient would have refused such treatment if competent, based on the expressed wishes of the patient as communicated prior to becoming incompetent. This evidence can never be found for severely mentally-retarded adults who, like children, have never been competent to express their reasonable wishes regarding their treatment.

In Delio v. Westchester County Medical Center, the Appellate Division found that the strict clear and convincing evidence test had been met where repeated oral statements on the termination of life support had been expressed. In this case, physicians determined that Daniel Delio, a thirty-three-year-old patient in a persistent vegetative state had no hope of recovery. He had suffered such substantial brain damage that he was diagnosed “neocortically dead . . . while he retains a portion of his brainstem functions which regulate certain reflex activity such as breathing, he no longer possesses any higher brain activity and, thus, has no awareness, thoughts or feelings.”

Julianne Delio, his wife, petitioned the court to discontinue feeding and hydration, on the grounds that such a decision was in accordance with the patient’s prior clearly expressed wishes. Mr. and Mrs. Delio both

180. Id. at 72-3.
181. Id. at 73.
182. Id.
183. Id. at 72.
185. Delio, 129 A.D.2d at 3.
186. Id.
had PhDs in exercise physiology, were particularly knowledgeable regarding the functioning of the body and had, in the course of their scientific studies, specifically discussed “Right to Die” issues. As part of such discussions, Mr. Delio even made his wife promise that if he were ever in a persistent vegetative state, that she would take every possible step to prevent the preservation of his life by artificial means. He reiterated this opinion repeatedly to his wife and his physicians, constituting unquestionable, well-documented proof that Mr. Delio would have refused any life-sustaining treatment if he had been competent to do so.

The lower court refused to authorize the removal of feeding tubes, relying on three key distinctions from the facts in Eichner: (1) Brother Fox was elderly, while Mr. Delio was only thirty-three years old; (2) Brother Fox was terminally ill, while Mr. Delio’s condition was due to a tragic accident and he suffered from no underlying disease; and (3) Brother Fox was maintained on a respirator, while Mr. Delio could breathe on his own and was maintained by nutrition and hydration tubes.

The issue was whether the common-law right to decline medical treatment encompasses a right to remove or withhold artificial means of nourishment and hydration to an individual in a permanent vegetative state with no hope of recovery.

The Supreme Court, Appellate Division, held that the common-law right to refuse medical treatment does apply to the removal or withholding of artificial means of nutrition and hydration and directed that all life-sustaining treatment be discontinued. The Court applied the test from the “seminal” combined case of In re Storar and In re Eichner and relied on the trial court’s finding of “clear and convincing evidence” that the patient, if competent, would have rejected nutrition and hydration. The Court analyzed each of the distinctions from the facts in the Storar/Eichner case and found none of them to be dispositive so as to warrant a different outcome than in that case. The court instead found that the facts presented in this case are more similar to those in Eichner than those in Storar because there was sufficient evidence of Mr. Delio’s wishes, as there was for those of Brother Fox.
In re Westchester County Medical Center ex rel Mary O’Connor,\textsuperscript{192} addressed what type of evidence was required to constitute “clear and convincing proof” of a patient’s wishes in order to support a surrogate’s request to withhold or terminate life-sustaining treatment. In this case, Mary O’Connor was a seventy-seven-year-old mentally incompetent patient who suffered from dementia and impaired cognitive ability. She was not in a coma or a persistent vegetative state, but instead was sensitive to pain, responded to stimuli, and was responsive to questions. She had no terminal illness, but relied on feeding tubes for artificial means of nutrition and hydration as it was impossible for her to swallow without medical assistance.\textsuperscript{193} Her daughters objected to the insertion of nutrition and hydration tubes on the grounds that the patient had previously expressed a desire, on several occasions, not to be kept alive by artificial means if she were unable to care for herself and to let nature take its course.\textsuperscript{194}

The issue was what type of evidence is required to constitute “clear and convincing proof” of a patient’s wishes in order to support a surrogate’s request to withhold or terminate life-sustaining treatment. The Court of Appeals of New York held that the hospital could insert a nasogastric tube despite the family’s objections and patients’ prior statements because such statements were insufficient to establish “clear and convincing” evidence of the patient’s wishes as expressed while she was competent.\textsuperscript{195}

The patient’s prior comments were not made in contemplation of her specific condition, but were instead generally prompted in response to her experiences with other persons who suffered from a terminal illness. Consequently, the Court held that:

the clear and convincing evidence standard requires proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented . . . . The persistence of the individual’s statements, the seriousness with which those statements were made, and the inferences, if any, that may be drawn from the surrounding circumstances are among the factors to be considered . . . . [W]e must always remain open to applications such as this, which are based upon the repeated oral expressions of the patients.\textsuperscript{196}

\begin{thebibliography}{1}
\bibitem{192} \textit{In re Westchester County Med. Ctr. ex rel O’Connor}, 531 N.E.2d 607 (1988).
\bibitem{193} \textit{Id.} at 609.
\bibitem{194} \textit{Id.}
\bibitem{195} \textit{Id.} at 608.
\bibitem{196} See \textit{In re O’Connor}, 72 N.Y.2d at 531-32, 531 N.E.2d at 613-14 (1988).
\end{thebibliography}
The end result of this case was to impose a very high standard for satisfying the “clear and convincing proof” test established by Storar.\textsuperscript{197} The Court held that evidence of the patient’s past oral or written statements must \textit{unequivocally express the patient’s firm and settled desire not to have artificial life support continued under specific circumstances similar to those in the case at hand}.\textsuperscript{198} Without evidence of the patient’s wishes that meets these high standards of persistence, documentation and specificity, life support may not be withheld or withdrawn.\textsuperscript{199}

The Court rejected the “substituted judgment” approach adopted by other states such as Massachusetts in \textit{Brophy v. New England Sinai Hosp.}\textsuperscript{200}, which would apply an objective test to determine what a reasonable person would desire in similar circumstances, and instead reiterated New York’s reliance on a subjective test that relies entirely on the patient’s previously-expressed wishes.\textsuperscript{201} The decision also stands for the public policy position that if an error regarding determining the wishes of an incompetent person is to occur, the error should be made on the side of life. Since \textit{O’Connor} was a Court of Appeals decision, it is currently the law in New York State, at least for patients in similar situations.

Another case addressing the type of evidence needed to constitute “clear and convincing proof” of a patient’s wishes regarding the prolongation of life-sustaining treatment is \textit{In re Christopher}.\textsuperscript{202} In this case, Parkway Hospital sought to insert a feeding tube in a seventy-nine-year-old woman with Alzheimer’s disease. Her son opposed the procedure, stating his mother would not have wanted it.\textsuperscript{203} While not in a persistent vegetative state, the court noted that “for all intents and purposes she was ‘brain-dead,’ unable to walk, incontinent, and in pain.”\textsuperscript{204} The court determined that the evidence of the patient’s wishes (one statement made ten years earlier to her son while they were watching a television show) was “unequivocal” and that it constituted “clear and convincing evidence that the use of such artificial means to prolong her life is against her

\textsuperscript{197} \textit{In re Storar}, 420 N.E.2d 64 (N.Y. 1981).
\textsuperscript{198} \textit{In re O’Connor}, 531 N.E.2d at 608, 615.
\textsuperscript{199} \textit{In re O’Connor}, 531 N.E.2d at 615.
\textsuperscript{201} \textit{In re O’Connor}, 531 N.E.2d at 615.
\textsuperscript{202} \textit{In re Christopher}, 177 Misc. 2d 352 (Sup. Ct. Queens. 1998).
\textsuperscript{203} \textit{Id.} at 354.
\textsuperscript{204} \textit{Id.} at 356.
A similar holding is that in the case of Elbaum v. Grace Plaza of Great Neck et al.207. In this case, the plaintiff conservator sought an injunction on behalf of his wife, the conservatee, who was in a persistent vegetative state, seeking to restrain defendant nursing home from providing nutrition and hydration to her and to direct defendant to cease providing any other life-sustaining treatment. The Supreme Court in Nassau County denied the request for an injunction and dismissed plaintiff's complaint. The Appellate Court reversed the lower court's decision and ordered that the gastrointestinal tube that was sustaining plaintiff be removed in accordance with her wishes. The court found that there was sufficient evidence presented to show that plaintiff made a firm and settled decision, while competent, to decline such treatment under her present circumstances, holding that:

contrary to the conclusion reached by the Supreme Court, we find the fact that Mrs. Elbaum, while competent, repeatedly extracted a series of promises from her husband and family members to be highly significant since it reflects a serious and consistent purpose of mind and an intent to bind others to effectuate her desires in future.208

The court ordered that if plaintiff was unable to be transferred to a suitable nursing home that would accede to her wishes, defendant was ordered to comply with plaintiff's wishes to have the gastrointestinal tube removed.209

Another example of the clear and convincing test is Matter of Hall Hospital.210 The court denied a petition by the hospital for an order to continue extraordinary life sustaining treatment (hemodialysis treatment) for patient Peter Cinque, a forty-one year unmarried man who during his hospital stay became comatose, and suffered irreversible brain damage. Mr. Cinque was also afflicted with juvenile diabetes mellitus since age

205. Id. at 355.
206. Id.
208. See Elbaum, 544 N.Y.S. 2d at 846.
209. Id. at 848.
five, end stage renal disease, blindness, and bilateral amputations to both
legs. Testimony was introduced that Mr. Cinque had told his family, priest
and physician that due to the pain which he was suffering that he wanted
dialysis to be discontinued. Also introduced into evidence was a form
initialed by Mr. Cinque refusing dialysis and written progress records from
his hospital record indicating that he refused such treatment. The court
held that “by clear and convincing evidence, indeed, beyond a reason-
able doubt, that Peter Cinque made an informed, rational and knowing
decision. To forego dialysis treatments….”

An additional example of the clear and convincing test is Matter of
Strauss,

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involved an application by the family of an eighty-five year old
man afflicted with severely advanced Alzheimer’s disease who was resid-
ing in a nursing home, with no mental cognition and no ability to feel
pain or discomfort, to be appointed the Committee of his person with
the power to make all medical decisions including the removal of a feed-
ing tube. The court noted that under the Storar and Delio cases that “make
an individual’s intention the controlling factor in the determination of
treatment.” Testimony was submitted that the patient had told his family
that it was his intention that if he was ever in a non-cognitive, no recov-
erable state that he would refuse all treatment including feeding and medici-
ation. The court stated that in such cases the intent of the patient is
proved “through the testimony of relative as to the patient’s expressed
wishes and beliefs. There is rarely any objective evidence in the form of a
written document or the evidence of impartial observers. Inevitably, there
are bound to concerns about the reliability of the testimony presented
where the only witnesses are the proponents.” However, the court was
impressed with the family’s testimony and found by clear and convincing
evidence that the patient would have wanted the feeding tube removed
in this circumstance and issued an order appointing the family the com-
mittee of the person with such powers.

A further example of the clear and convincing test is Matter of Saunders,
where the court was presented with declaratory judgment action regard-
ing the validity and effectiveness of the living will of a seventy year old
woman suffering from both terminal emphysema and lung cancer. The
court decided to render an opinion in the case since the New Y ork State
Legislature had yet to enact a statute on the validity of Living Wills or
prescribe the means to execute them. The court found “that this right of

211. Id. at 488.

212. Matter of Strauss, NYLJ, 7/30/87 at 12, col. 3 (Sup. Ct. NY Co.).
terminally ill competent patients to refuse or to discontinue extraordinary medical treatment is not lost when and if they suffer irreversible brain damage, become comatose, and are no longer able to personally express their wishes to refuse or discontinue the use of extraordinary artificial support systems.\textsuperscript{213} The court declared that it deemed the Living Will to be “an informed medical consent statement authorizing the refusal or discontinuance of further medical treatment in petitioner’s case by artificial means and devices.”\textsuperscript{214}

b. BEST INTERESTS TEST

In the case of a minor, “clear and convincing” evidence that a decision is in the best interests of a child can be found, in lieu of proof of the patient’s expressed wishes, in the personal judgment of parents as natural guardians who bear the legal, moral and ethical responsibility for the care of their children. The parents of children in a persistent vegetative state have the authority to decide whether to terminate or withhold life-sustaining treatment in the best interest of the child, without the need to seek judicial approval, so long as there are no extraordinary circumstances such as incapacity, conflict of interest, or disagreement between parents. Nonetheless, some trial level courts have applied a best interests standard where an incompetent, comatose, elderly individual was involved who had never expresses her views on this issue.\textsuperscript{215}

The best interests standard was applied in a case that appears to be an exception to the clear and convincing evidence test in New York, the case of \textit{In re Beth Israel Medical Center}.\textsuperscript{216} The trial court stated that “in a proper case that a life-prolonging procedure may be withheld from an incompetent who may not have declared himself on the issue . . . ”\textsuperscript{217} In this situation, Sadie Weinstein, a woman who had suffered two strokes and had little cognitive function developed a gangrenous extremity. The hospital sought the authority to perform an emergency amputation, in order to avoid her death from the spread of gangrene.\textsuperscript{218}

The court held that incompetent patients do not lose constitutional right to privacy merely due to their incompetency, and the right to refuse

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  \item \textsuperscript{213} Matter of Saunders, 129 Misc2d 45, 492 NYS2d 510, 515 (Sup. Ct. Nassau Co. 1985).
  \item \textsuperscript{214} Id.
  \item \textsuperscript{215} See Mtr. of Beth Israel Medical Center, 136 Misc. 2d 931 (Sup. Ct. NY Co. 1987).
  \item \textsuperscript{216} \textit{In re Beth Israel Medical Center for Weinstein}, 136 Misc. 2d 931 (1987).
  \item \textsuperscript{217} \textit{In re Beth Israel Medical Center}, 136 Misc. 2d 931, 938 (N.Y. Misc. 1987).
  \item \textsuperscript{218} Id. at 932.
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life prolonging or life sustaining procedures may be exercised on their behalf as an aspect of that right. Thus, in view of her underlying condition, her limited life expectancy, and the risk of death during surgery, the court refused to order emergency surgery for the incompetent patient, noting that surgery would “at best unnecessarily prolong the natural process of her dying” and that there was “no human or humane benefit to be gained” from its performance.

*In re AB,* is a case that addresses whether a parent is authorized to withhold life support from a minor child in PVS. In *In re AB* involves a three-year-old child in PVS with no hope of recovery, whose mother petitioned the court to remove her from a mechanical respirator on the grounds that she has no quality of life and that it was in her best interests to allow her to die in peace. The child’s guardian *ad litem* supported the mother’s petition on the grounds that the medical intervention being employed was futile and invasive and deprived the child of her dignity and respect, and that prolonging this situation would have a devastating effect on the child’s family and would not be in the child’s best interests.

The issue was whether a parent is permitted to exercise her discretion, wholly supported by the other parent and the child’s treating physicians, to withhold life support to her minor child diagnosed as being in a permanent vegetative state. The Court granted the petitioner authority to consent to the removal of mechanical ventilation for her child and ordered the hospital to honor the mother’s wishes as mother and natural guardian to terminate mechanical ventilation for her child. The opinion contains a detailed discussion of New York case law, citing *In re Westchester County Medical Center, ex rel O’Connor,* *In re Beth Israel Medical Center,* and *In re Storar* and reviews the law in other jurisdictions regarding the decision to withhold or terminate life-sustaining treatment for patients without capacity.

The Court relied heavily on the reasoning behind New York’s recent enactment of the Health Care Decisions Act for Persons with Mental Retardation (HCDA), which went into effect in March 2003. The HCDA
grants to guardians of mentally retarded persons the “authority to make any and all healthcare decisions on behalf of the mentally retarded person” including “decisions to withhold or withdraw life-sustaining treatment” when it is in the “best interests” of such persons. The Court recognizes that this legislation applies only to the mentally retarded and not to children, but reasons by analogy that the same arguments apply and that the patient’s best interest should be assessed using the same considerations as those set forth in the HCDA, i.e. the patient’s dignity, possibility for improvement, relief of suffering, and the patient’s entire medical condition. The opinion argues that using these guidelines, there is a stronger case for allowing guardians of children in a permanent vegetative state to remove or withhold treatment than exists for guardians of mentally retarded persons, who have some quality of life and the ability to interact with their environment. The opinion also relies on the AMA Guidelines supporting the withdrawal of life-supporting treatment from patients in a permanent vegetative state, as well as AMA Guidelines concerning treatment of seriously ill newborns, and concludes that the decision to withhold mechanical ventilation in this case satisfies the best interest standard promoted by the AMA in these policies.

The end result of this case is that it grants a parent of a minor child in a persistent vegetative state the authority to decide whether to terminate or withhold life-sustaining treatment in the best interest of the child, without the need to seek judicial approval, so long as there are no extraordinary circumstances such as incapacity, conflict of interest, or disagreement between parents. The opinion stands for the proposition that “clear and convincing” evidence that a decision is in the best interests of a child can be found, in lieu of proof of the patient’s expressed wishes, in the personal judgment of parents as natural guardians who bear the legal, moral and ethical responsibility for the care of their children.

In a different case, In re Chantel R., the constitutionality of the HCDA was challenged. Surrogate Judge Eve Preminger granted the petition of Pamela R. for appointment as guardian of her mentally retarded daughter’s person over the objections of the Mental Hygiene Legal Service who challenged the constitutionality of the Health Care Decisions Act for Persons with Mental Retardation. The Mental Hygiene Legal Service objected that guardianship includes authority to withhold or withdraw life-sustaining treatment under SPCA 1750-b. Justice Preminger held that the protections

225. SCPA 1750-b(1).
included in the HCDA, including a determination by an attending physician to a reasonable degree of medical certainty that the patient’s medical state was terminal or consisted of permanent unconsciousness and that the prognosis was one of an irreversible medical condition requiring life-sustaining treatment, expressed wishes and “extraordinary burden” language afforded sufficient protection of the mentally retarded person’s rights.

c. SUBSTITUTED JUDGMENT TEST

New York has rejected the substituted judgment test approach adopted by other states, and relies on a subjective test that relies entirely on the patient’s previously-expressed wishes. This test provides patients who have not expressed their wishes clearly and convincingly the right to have family members or other guardians make treatment decisions on their behalf or on the basis of what they believe the patient would have chosen if competent to decide.\(^227\) This “substituted judgment” standard assumes the surrogate bases the decision on what is known of the patient’s preferences and general values regarding healthcare, life-extension and overall manner of living.\(^228\)

\(^{227}\) See John F. Kennedy Memorial Hospital v. Bludworth,, 452 So.2d at 926; Jobes, 529 A.2d at 444-47; In re L.H.R., 321 S.E.2d 716, 723 (Ga. 1984), cited by AMA Joint Report, supra note 4 at 5. See also Skene L. The Schiavo and Korp cases: conceptualizing end-of-life decision-making, 13(2) J Law Med 223-39 (Nov 2005). The substituted judgment standard also was applied by the court in Superintendent of Belchertown State School v Saikewitz, 373 Mass. 728, 370 N.E.2d 417 (Mass. 1977). While the Saikewitz case differed in that the Supreme Judicial Council of Massachusetts held that decisions involving incompetent patients must be brought before a court, that decision incorporated a patient’s right to refuse therapy into the patient’s right to privacy and self-determination. Id. at 758-59. Just as important in this holding was the decision that incompetent patients have the same right to refuse treatment as do competent patients, although the process by which this refusal was recognized would differ in that substituted judgment would be the standard used in the decision to refuse further medical care. Id. at 755-59. In Brophy v. New England Sinai Hospital, Supreme Judicial Court of Massachusetts, 398 Mass. 417, 497 N.E.2d 626 (Mass. 1986) the court applied a substituted judgment analysis, holding that food and hydration could be withheld from a comatose adult. Factors utilized in upholding the lower court decision included: (1) the patient’s expressed preferences; (2) his religious convictions and their relation to refusal of treatment; (3) the impact on his family; (4) the probability of adverse side effects; and (5) the prognosis, both with and without treatment. Id. at 631. It was held that the “State’s interest in the preservation of life does not overcome [the patient’s] right to discontinue treatment,” and that such a position is not contrary to the “State’s interest in the prevention of suicide.” Id. at 638.

\(^{228}\) See Coordinating Council on Life-Sustaining Medical Treatment Decision Making by the Courts. Guideline 12: Standards for Surrogate Decision Makers, in Guidelines for State Court Decision Making in Life-Sustaining Medical Treatment Cases (2d Ed. 1993) at 75-76.
2. MEDICAL FUTILITY CASES

Two cases exemplify the concept of medical futility, which has been applied in cases pertaining to withholding of medical care. The concept of medical futility has not yet been discussed in New York case law, but may well be in the future. One such case, which demonstrates the conflict between family and hospitals regarding the prolongation of life-sustaining treatment, is that of Gilgunn v Massachusetts General Hospital. In Gilgunn, a hospital and physicians were sued for medical malpractice where they removed a ventilator from an elderly seventy-two year old patient who had become comatose due to irreversible brain damage over the objection of one of her daughters. The patient’s daughter said that her mother had always wanted that everything medically possible be done if she became incompetent, noting that, “[b]oth my mother and I are devout Catholics. This is against everything that we believe.” Nonetheless, the defendants were held by the jury not to be liable. Despite the jury’s decision in this one case, to proceed in such a manner without court approval would appear to be ill-advised and outlandish.

Legal scholars have written that courts in medical futility cases will almost uniformly side with parents who are in favor of medical treatment and against hospitals who want to withhold it. Such a position is exemplified In re Baby K. Baby K addressed the applicability of the Emergency Medical Treatment and Active Labor Act (EMTALA) to the continued aggressive treatment of an anencephalic infant, treatment demanded by the parents but opposed by the hospital as medically and ethically inappropriate.

230. Id. at fn. 13. See also Kolata G, Court Ruling Limits Rights of Patients, N.Y.TIMES, Apr. 22, 1995 at 6; Mulvihill M, Docs’ conduct at issue in landmark lawsuit, BOSTON HERALD, Apr. 5, 1995 at 6.
232. Mulvihill M, MGH faces suit in mom’s death; Daughter claims docs pulled life support without her consent, BOSTON HERALD, Apr. 4, 2006, at 1.
233. Id.
236. Id.
The court held that EMTALA did not carve out any exception for anencephalic infants in respiratory distress any more than it carved out an exception for comatose patients, those with lung cancer, or those with muscular dystrophy—all of whom might repeatedly seek emergency stabilizing treatment for respiratory distress despite an underlying medical condition severely affecting their quality of life and survival.

In dissent, 4th Circuit Judge Sprouse wrote he did not believe Congress, in enacting EMTALA, meant for the judiciary to superintend the sensitive decision-making process between family and physicians at the bedside of a helpless and terminally ill patient under the circumstances of this case, and that tragic end-of-life hospital dramas such as this one do not represent phenomena susceptible to uniform legal control.

In my view, Congress, even in its weakest moments, would not have attempted to impose federal control in this sensitive, private area . . . In my view, considering the discrete factual circumstances of Baby ‘K’s condition and previous treatment, if she is transferred again from the nursing home to the hospital in respiratory distress, that condition should be considered integral to the anencephalic condition, and I would hold that there has been no violation of EMTALA.

Subsequently, Baby K was shuffled back and forth between the nursing home and the hospital six times until she died, shortly after her second birthday.

B. NEW YORK STATUTES

The President’s Commission report was preceded by other states passing legislation addressing right-to-die decisions, including Arkansas, California, Idaho and North Carolina, whose statutes noted that life-prolonging treatment could be withheld because a patient had a right to refuse it. The Arkansas statute specifies that patients have a right to refuse therapy as well as the right to request it. The North Carolina statute defines the patient’s right to refuse life-sustaining treatment as the

238. Id.
239. Id. at 599.
right to a peaceful and natural death. Arkansas and North Carolina both provide for surrogate decision-making on behalf of incompetent patients. Importantly, all of these statutes allow healthcare providers to rely upon directives without judicial intervention.

1. ADVANCED DIRECTIVES

While there are significant debates regarding advanced healthcare directives, it is evident that many problems in making medical treatment decisions might be avoided if a patient, while competent, has made decisions about what treatment he or she wants or does not want.

There are two types of formal, written advance directives. One type is referred to as a “living will” or “instruction directives,” in which a person states his or her wishes about how much and what type of care he or she would want to receive, especially when the prospect of recovery is small or death would follow from non-treatment. While most states and the District of Columbia have statutes recognizing living wills, New York does not have such a statute. Courts have, however, recognized them, as set forth in In Matter of Saunders. Furthermore, by regulation, health care facilities must recognize advance directives other than a health care proxy.

241. See Rich BA, Personhood, patienthood, and clinical practice: reassessing advanced directives, 4(3) Psychol Public Policy Law 610-28 (Sep 1998) (arguing that—despite the argument that the moral authority of an advanced directive is undercut by the loss of personal identity at the time decisional capacity is lost and that the requisite elements of informed consent are absent—the integration of advanced directives into clinical medical practice will avoid ambiguity and encourage their implementation). See also Rich BA, The tyranny of judicial formalism: oral directives and clear and convincing evidence standard, 11(3) Camb Q Health Ethics 292-302 (Summer 2002); Stone J, Pascal’s Wager and the persistent vegetative state, 21(2) Bioethics 84-92 (Feb 2007).

242. See O’Connor, 72 N.Y.2d 517, 531 N.E.2d at 613-14 (holding that “the ideal situation is one in which the patient’s wishes were expressed in some form of a writing, perhaps a ‘living will,’ while he or she was still competent.”). See also Mappes TA, Persistent vegetative state, prospective thinking, and advance directives, 13(2) Kennedy Inst Ethics J 119-39 (Jun 2003); Eiser AR & Seiden DJ, Discontinuing dialysis in persistent vegetative state: the roles of autonomy, community, and professional moral agency, 30(2) Am J Kidney Dis 291-96 (Aug 1997).


244. A pending bill (A.8995/S.5270) would amend Article 29-C of the New York Public Health Law to expressly authorize living wills if passed into law.

245. See In Matter of Saunders, supra note 223.

246. See 1-17 NY Practice Guide, Probate & Estate Amin. § 17.11, 10 NYCRR 400.21, 700.5, 14 NYCRR 527.7.
Finally, state law regarding the appointment of a guardian specifically mentions the term “living will” and provides that:

(b) No guardian may:

1. consent to the voluntary formal or informal admission of the incapacitated person to a mental hygiene facility under Article Nine or Fifteen of this chapter or to a chemical dependency facility under Article Twenty-Two of this chapter;

2. revoke any appointment or delegation made by the incapacitated person pursuant to sections 5-1501, 5-1601 and 5-1602 of the General Obligations Law, Sections Two Thousand Nine Hundred Sixty Five and Two Thousand Nine Hundred Eighty One of the Public Health Law, or any living will.

NYS CLS Men Hyg § 81/22 (emphasis added).

The second type of advance directive is an “appointment directive” authorized by statute recognizing health care proxies and durable powers of attorney. In New York, the durable power of attorney is specific to health care decisions for the incompetent patient and the principal must have made his or her wishes “reasonably known” regarding nutrition and hydration.247

Where advance directives have been made orally or which do not meet the legal requirements for written directives, courts may still consider them useful in establishing the patient’s intent.248 Furthermore, the

247. This special durable power of attorney must satisfy special institutional requirements. Two witnesses are required for its execution, exclusive of the agent. Neither the patient’s physician or healthcare provider, or the facility or institution where the patient is situated, can serve as an agent. See NYPHL § 2980-2994 (McKinney Supp. 1992).

248. See Eichner, 52 N.Y.2d at 379-80, 420 N.E.2d at 72, 438 N.Y.S.2d at 274 (1981) (holding that “clear and convincing proof should also be required in cases where it is claimed that a person, now incompetent, left instructions to terminate life sustaining procedures where there is no hope of recovery . . . . In this case the proof was compelling . . . the finding that [Brother Fox] carefully reflected on the subject, expressed his views and concluded not to have his life prolonged by medical means if there were not hope of recovery is supported by his religious beliefs and is not inconsistent with his life of unsellish religious devotion.”). See also In re O’Connor, 72 N.Y.2d at 531-32, 531 N.E.2d at 613-14 (1988) (holding that “the clear and convincing evidence standard requires proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented . . . . The persistence of the individual’s statements, the seriousness with which those statements were made, and the inferences, if any, that may be drawn from the surrounding circumstances are among the factors to be considered . . . . [W]e
President's Commission Report\textsuperscript{249} the American Bar Association\textsuperscript{250} and the AMA\textsuperscript{251} have encouraged acceptance of advance directives.

Currently in New York, there is no statute that allows family members to make healthcare decisions regarding withdrawal of care on behalf of their incapacitated loved ones. Surrogate decision-making and maintenance of life-sustaining treatment in particular is problematic, since Court of Appeals rulings have required clear and convincing evidence that an incapacitated patient had specifically refused the treatment being considered, a requirement that could be satisfied by advance directives and living wills, if no health care proxy was named.\textsuperscript{252} The legislative efforts to address these issues include the Do Not Resuscitate (DNR) law, passed in 1987,\textsuperscript{253} the Health Care Proxy Law which became effective in

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1990,254 and the Health Care Agents and Proxies Law, signed into law in
1991.255 The Health Care Decisions Act for Persons with Mental Retarda-
tion (HCDA) went into effect on March 16, 2003.256

2. DO NOT RESUSCITATE (“DNR”) LAW (1987)

In 1982, the Medical Society of the State of New York issued a set of
guidelines on DNR orders, recommending that the decision to implement
a DNR order be made by the physician and the patient or the patient’s
guardian or family, in the event that the patient was not capable of mak-
ing that decision.257 The guidelines, however, did not address withdrawing
or refusing life-sustaining treatments, the use of advance directives or the
recognition of surrogate decision-making.

Also prior to the passage of the DNR law in New York State, a grand
jury in Queens reviewed a hospital’s DNR policy that relied upon a system
of purple dots that were placed on the charts of patients that were not to
be resuscitated, rather than explicit written medical orders to that effect.
The grand jury issued a report supporting the institution of DNR orders
with procedural safeguards in place and called for regulations governing
their use.258

Article 29-B of the Public Health Law permits guardians and a hierar-
chy of family members to approve the placing of a “Do not resuscitate”
order for a patient when cardiopulmonary resuscitation would be medi-
cally inappropriate on a “best interests” basis. There must be a finding
“to a reasonable degree of medical certainty (i) the patient has a terminal
condition; or (ii) the patient is permanently unconscious; or (iii) resusci-
tation would be medically futile; or (iv) resuscitation would impose an
extraordinary burden on the patient in light of the patient’s medical con-
dition and the expected outcome of resuscitation for the patient . . . ”
The attending physician of a patient in a hospital for whom a DNR has
been issued is supposed to review the patient’s condition to see if the DNR
is still warranted. PHL 2970(1).

254. NYPHL Article 19-C.
256. NYS Office of Mental Retardation and Developmental Disabilities. Governor Pataki
www.omr.state.ny.us/wt/wt_health_care.jsp.
257. McClung JA & Kaner RS, Legislative ethics: Implications of New York’s Do-Not-Resusci-
258. Id.
Public Health Law Sec 2967 (3) indicates that parents have the right to sign “Do Not Resuscitate” orders for their minor children who are permanently unconscious.

3. HEALTH CARE PROXY LAW (1990)

Health Care Agents and Proxies Law, Article 29-C of the Public Health Law, effective January 18, 1991 permits an agent designated by the principal to make healthcare decisions (a) in accordance with the principal's wishes, including the principal's religions and moral beliefs; or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests; provided, however, that if the principals’ wishes regarding the administration of artificial nutrition and hydration are not reasonably known and cannot with reasonable diligence be ascertained, the agent shall not have the authority to make decisions regarding these measures” (Section 2982(4)). The statute thus provides that the principal's preferences regarding artificial nutrition and hydration must be specified before his or her agent is deemed to have the authority to decide these questions. New York's statute is similar to those sister State statutes which provide that if a patient does not clearly indicate in an advance directive that nutrition and hydration are to be withheld or withdrawn, nutrition and hydration must be provided.


The Health Care Decisions Act for Persons with Mental Retardation was signed by then New York State Governor George Pataki in September 2002 and went into effect in March 2003. The Act specifically addresses guardians of individuals appointed under article 17-A of the Surrogate's Court Procedure Act and reflects an evolving consensus in this state that the law must better allow healthcare practitioners, patients, and their families to make decisions in the best interest of their children when faced with tragic circumstances (see Justice Ling-Cohan who used this statute in her decision In re AB, discussed above). The Health Care Decisions Act for Persons with Mental Retardation was amended in October 2005 to also include developmentally disabled persons. Section 1750-b authorizes the appointment of a guardian to act on behalf of a mentally retarded person and who “shall have the authority to make any and all healthcare decisions on behalf of the mentally retarded person that such person could make if

259. See NYLJ 1/19/06 CR Radigan, Amendments to Article 17-A: Life-Sustaining Treatment.
such person had capacity” including “decisions to withhold or withdraw
life-sustaining treatment”. The guardian is to base all decision making on
the best interest of the mentally retarded person and when reasonably
known or ascertainable, with reasonable diligence, on the mentally re-
tarded persons’ wishes. SCPA 1750-b (2)(a). Assessment of “best interest”
must include the following: “(i) the dignity and uniqueness of every per-
son; (ii) the preservation, improvement or restoration of the mentally
retarded person’s health; (iii) the relief of the mentally retarded person’s
suffering by means of palliative care and pain management; (iv) the unique
nature of artificially provided nutrition or hydration, and the effect it
may have on the mentally retarded persons; and (v) the entire medical
condition of the person.” SCPA Sec 1750-b (2)(b).

SCPA 1750-b(4)(b)(i) requires certain additional steps: that there be a
diagnosis, confirmed by two physicians with a reasonable degree of medi-
cal certainty, that the patient has one of the following conditions: (A) a
terminal medical condition; (B) permanent unconsciousness; or (C) an
irreversible condition which will continue indefinitely. Section 1750-b
(4)(b)(ii) requires that the life sustaining treatment imposes an extraordi-
nary burden on the patient in light of his/her medical condition and
expected outcome of the treatment. Section 1750-b(4)(c) requires that the
decision of the guardian be made in writing or orally and Section b(4)(d)
that this request be entered into the patient’s chart.

V. LEGISLATIVE CONSIDERATIONS

The problem of surrogate decision-making is hardly a new one. With
advances in medical technology and treatment, it has only grown more
complex and requires that legislation be passed to help swing the pendu-
lum of decision-making from the courts to the opposite direction, giving
back families the power to make decisions of extending or ending the life
of their loved one. Several states have enacted legislation that addresses
this problem, basing their healthcare statutes on the Uniform Health-
Care Decisions Act drafted by the National Conference of Commissioners
on Uniform State Laws in 1993.260 Statutes such as Tennessee’s Health Care
Decision Act261 are at the forefront of recent legislation in this area. But
while other states have taken steps forward, New York still lags behind.


The Committee on Science and the Law, the Committee on Health Law and the Committee on Bioethical Issues of the New York City Bar Association endorse the passage of the Family Health Care Decision Act\(^\text{262}\) in New York which would permit surrogate decision-making where either individuals in a persistent vegetative state had failed to sign an advance directive or where the surrogate was unavailable.

**A. FAMILY HEALTH CARE DECISIONS ACT**

A Family Health Care Decisions Act has still to be passed by the New York State legislature. As was recognized on the floor during the vote for the new above law regarding the mentally retarded: “[S]imilar legislation is also urgently needed dealing with health care decision-making for the rest of New Yorkers . . . ”\(^\text{263}\)

**1. DESCRIPTION OF THE ACT**

Current law in New York State provides competent adults with the legal means to control medical treatment applied to them even if they lose decision-making capacity. However, the means provided by Article 29-C depends on the person having the forethought to appoint someone to make medical decisions on their behalf in advance of an incapacitating event. The proposed Article 29-CC, aka the Family Health Care Decisions Act (FHCDA), would provide methods to accomplish medical decisions when a patient has become incapacitated and no appointee has been made.

According to the legislative intent, the bill proposes to establish “a procedure to facilitate responsible decision-making by surrogates on behalf of patients who do not have capacity to make their own health care decisions.”\(^\text{264}\)

Some key issues addressed by the statute with respect to patients in PVS:

(a) Is the PVS truly persistent? The proposed statute provides several safeguards to insure that patients’ judged incapacitated of making medical decisions for themselves are truly incapacitated, especially when the medical decisions left to a surrogate involve the withholding or withdrawing of life-sustaining treatment.

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264. 2005 Bill Text NY A.B. 5406 (proposed § 2994(c)(1)).
If at any time the patient regains decision-making capacity or the patient’s condition improves, procedures to withhold or withdraw life-sustaining treatment is immediately suspended.

(b) How is the surrogate determined? Assembly Bill 5406 establishes a hierarchy of persons eligible to act as a surrogate decision-maker on behalf of persons judged to be incapable of making medical decisions on their own and who had not assigned a person to act as their agent for health care decisions before the incapacitating event.

(c) Can domestic partners act as surrogates? Yes; the proposed statute recognizes domestic partners as potential surrogates for making health-care decisions.

While not addressing the persistent vegetative state by name, the statute provides procedures and requirements for (1) determining patients as legally incapable of making medical decisions and (2) re-assessing the incapacity of the patient should the decision arise involving the withholding or withdrawal of life-sustaining treatment.

A summary of elements of the proposed statute relevant to persons in PVS follows.

Capacity to make one’s own health care decisions is assumed for any adult unless determined otherwise by a court order, a guardian authorized to decide health care matters according to article 81 of the Mental Hygiene Law, or a determination by the patient’s attending physician. A physician’s determination must include both an assessment of the cause and extent of the patient’s incapacity and the likelihood the patient will ever regain decision-making capacity (to a reasonable degree of certainty). If the matter at hand concerns the withdrawal or withholding of life-sustaining treatment, a second opinion of incapacity by a health or social services practitioner is required. Furthermore, before health care decisions concerning the withholding or withdrawal of life-sustaining treatment may be made on an incapacitated person’s behalf, an attending physician, plus a concurring opinion, must confirm a continued lack of decision-making capacity.

Health care decisions are made on behalf of the incapacitated person

265. Id.
266. Id.
267. See proposed § 2994(c)(3)(a).
268. See proposed § 2994(c)(7).
by a surrogate. Surrogates are defined as persons reasonably available, willing, and competent to act. The Act lists a number of qualifications for those who would be surrogates, in an ascending order. The list is as follows:

(a) A guardian authorized to decide about health care pursuant to article eighty-one (81) of the Mental Hygiene Law or a guardian appointed under article seventeen-A (17-A) of the Surrogate’s Court Procedure Act;
(b) One designated by another who otherwise would be chosen to act as a surrogate according to this method, so long as no person in higher class of priority than the one designated objects;
(c) The spouse (if not legally separated from the patient) or the domestic partner;
(d) A son or daughter (provided they are 18 years or older);
(e) A parent;
(f) A brother or sister (provided they are 18 years or older);
(g) A close friend or close relative (provided they are 18 years or older).269

Hospital workers at the hospital facility attending to the incapacitated patient, including operators, administrators, employees, physicians with privileges at the hospital and health care providers under contract with the hospital may not be surrogates except where such individual is either related to the patient either by blood, marriage, or adoption, or a close friend of the patient and the friendship preceded the patient’s admission to the hospital.270

If a physician serves as a surrogate, the physician cannot also serve as the patient’s attending physician after the authority of surrogate attaches, including for purposes of determining capacity.271

The surrogate’s authority commences upon the determination that the patient lacks decision-making capacity and ceases in the event an attending physician determines that the patient has regained decision-making capacity.272 Where a surrogate directs the provision of life-sustain-
ing treatment, the denial of which would, in reasonable medical judgment, likely result in the death of the patient, a hospital or health care providers must comply even where it does not wish to provide such service, pending either transfer of the patient to a hospital or individual health care provider that does not object to providing the treatment or judicial review.273

The surrogate always has the right to receive medical information, including medical and clinical records necessary to make informed decisions about the patient’s health care, notwithstanding any law to the contrary, and health care providers must provide such information, including (but not limited to) the patient’s diagnosis, prognosis, the nature and consequences of proposed health care, and the risks, benefits, and alternatives to proposed health care.274

Surrogates are bound to act in accordance with the patient’s wishes when making health care decisions on behalf of the incapacitated. Surrogates must also consider any likelihood that the patient will regain decision-making capacity. Best interests, as defined in the statute, include the following:

(a) Consideration of the dignity and uniqueness of every person
(b) The possibility and extent of preserving the patient’s life
(c) The preservation, improvement or restoration of the patient’s health or functioning
(d) the relief of the patient’s suffering
(e) any medical condition and such other concerns and values as a reasonable person in the patient’s circumstances would wish to consider.275

Where the surrogate’s health care decision involves the withholding or withdrawing of life-sustaining treatment, surrogates are authorized only under certain circumstances. Where the treatment would be an excessive burden to the patient, the surrogate is authorized only if either the patient has an illness or injury that can be expected to cause death within six months, whether or not treatment is provided, or if the patient is permanently unconscious.276 Surrogates may also be authorized where the provision of the treatment in question would involve such pain, suffer-

273. See proposed § 2994(f)(3).
274. See proposed § 2994(d)(3)(c).
ing or other burden that it would reasonably be deemed inhumane or excessively burdensome under the circumstances, and the patient’s condition is irreversible or incurable (as determined by an attending physician with the concurrence of a second physician to a reasonable degree of medical certainty and in accord with accepted medical standards).\textsuperscript{277} Such decisions made by the surrogate may be made orally or in writing.\textsuperscript{278}

In situations where the withholding of life-sustaining treatment is at stake, the proposed law makes a distinction between patients in a residential health care facility and those under the care of a general hospital. Where the patient is in a \textit{residential health care facility}, the surrogate requires authorization from the ethics review committee, including at least one physician who is not directly responsible for the patient’s care, or a court of competent jurisdiction.\textsuperscript{279} Where the patient is in a \textit{general hospital}, and the attending physician \textit{objects} to the surrogate’s decision to withhold or withdraw nutrition and hydration by means of medical intervention, the decision must be reviewed by the ethics review committee, including at least one physician not directly responsible for the patient’s care, or a court of competent jurisdiction, and determines that the decision meets the standards of the patient’s best interests as outlined above.\textsuperscript{280}

A court of competent jurisdiction may authorize the withholding or withdrawal of life-sustaining treatment from a person if the court determines that the person lacks decision-making capacity, and either the patient is permanently unconscious, the patient’s injury can be expected to cause death within six months regardless of treatment, or the provision of treatment would involve inhumane or excessively burdensome pain, suffering, or burden where the condition it irreversible or incurable.\textsuperscript{281}

Where the patient is a minor, decisions regarding the withholding or withdrawal of life-sustaining treatment to a minor are placed under the authority of the parent or guardian, subject to the same provisions as for adults.\textsuperscript{282} Incapacity of the minor in such circumstances is determined by an attending physician in consultation with the parent or guardian.\textsuperscript{283} Attending physicians with a reasonable belief that a parent of a minor

\textsuperscript{277.} Id.  
\textsuperscript{278.} See proposed § 2994(d)(5)(e).  
\textsuperscript{279.} See proposed § 2994(d)(5)(b).  
\textsuperscript{280.} See proposed § 2994(d)(5)(e).  
\textsuperscript{281.} See proposed § 2994(d)(5).  
\textsuperscript{282.} See proposed § 2994(e)(2).  
\textsuperscript{283.} See proposed § 2994(e)(2)(a).
patient, including a non-custodial parent, has not been informed of a decision to withhold or withdraw life-sustaining treatment must make reasonable efforts to determine if the parent has maintained substantial and continuous contact with the minor and, if so, make diligent efforts to notify that parent prior to implementing the decision. 284 Where the minor patient is emancipated but incapacitated, hospitals must notify the parents or guardians of the patients where the identity of such may be readily ascertained. 285

In situations where no surrogate is available, it becomes the hospital’s duty to find one or, in failing to do so, to identify on its own any recorded or written wishes, preferences, or values of the patient about any pending health care decisions. Where the treatment is routine, the attending physician may make medical decisions on an incapacitated patient’s behalf. Where major medical treatment is concerned, medical decisions must be made by the attending physician, in consultation with hospital staff responsible for the patient’s care, and one other physician. In cases where the facility is a residential health care facility and not a general hospital, the attending physician’s decision must be accompanied by that of the medical director of the facility or another physician designated by the director.

Where a surrogate is unavailable and the medical decision involves the withholding or withdrawal of life-sustaining treatment, a court of competent jurisdiction may make the decision on behalf of an incapacitated adult patient. But where the provision of health care that provides no medical benefit, excepting treatment that alleviates pain or discomfort, the attending physician, with the concurrence of a second, designated physician, may withdraw such treatment without judicial approval if, to a reasonable degree of medical certainty, they determine the life-sustaining treatment offers the patient no medical benefit because the patient will die imminently, even if the treatment is provided, and the provision of life-sustaining treatment would violate accepted medical standards. 286

A patient, surrogate, or parent or guardian of a minor patient may at any time revoke his or her consent to withhold or withdraw life-sustaining treatment; physicians informed of a revocation of consent must terminate any orders or plans of care implementing the decision to withhold or withdraw treatment. 287

284. See proposed § 2994(e)(2)(b).
285. See proposed § 2994(e)(3).
286. See proposed § 2994(g).
287. See proposed § 2994(j).
Where a patient has regained decision-making capacity or otherwise experiences an improvement in medical condition, the physician must cancel any orders or plans of care implementing the decision to withhold or withdraw life-sustaining treatment and notify the person who made the decision to withhold or withdraw treatment.\(^{288}\)

Sometimes, a patient with an order or plan of care to withhold or withdraw life-sustaining treatment is transferred to another facility, such as from a mental hygiene facility or a general hospital to a different hospital. In such a case, the order or plan remains in effect until an attending physician first examines the transferred patient, whereupon an attending physician must either issue instructions to carry out the order or plan (without having to repeat the process of obtaining consent), or cancel the order or plan, after making reasonable efforts to notify the person who made the decision.\(^{289}\)

As to conscience objections pertaining to implementing health care decisions, neither private hospitals nor individual health care providers are required to honor health care decisions if the decision is contrary to the individual or institute’s sincerely held religious beliefs, moral convictions or policies, so long as the hospital or health care providers informs the decision-maker of the refusal and promptly transfers responsibility for the patient to another hospital or individual health care provider willing to honor the decision.\(^{290}\)

CONCLUSION

It is evident that PVS is a term that has been applied to a host of different conditions and certainly covers a broad range of human experiences. The medical understanding of the diagnosis and the prognosis for patients in PVS continues to change as diagnostic tools become more sophisticated. Advances in medical technology allow for support of these patients, thereby extending their life expectancy, and create more opportunities to treat conditions that may be mistaken for PVS.

With respect to withdrawal of life support for incapacitated patients, including PVS cases, New York State law is inadequate as a guide for making medical decisions for those patients who do not have health care proxies. The law is in need of legislative reform, for which reason legislation in the form of the Family Health Care Decisions Act would be appropriate.

October 2008

\(^{288}\) See proposed § 2994(k).
\(^{289}\) See proposed § 2994(l).
\(^{290}\) See proposed § 2994(n)
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Ling Zeng
Brandon M. Zlotnick

†Editor-in-chief of the report.
*Co-author of the report.

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Checks and Balances:  
Congressional Restriction of Federal Court Jurisdiction

*The Committee on Federal Legislation*

“For the individual, therefore, who stands at the center of every definition of liberty, the struggle for constitutional government is a struggle for good laws indeed, but also for intelligent, independent, and impartial courts.” —Justice Sandra Day O’Connor

The American Constitutional system is based on checks and balances. Throughout our history, competing branches of government have struggled to define their own respective jurisdictions, to prevent encroachments on that power by other branches, and even to seek the expansion of their own authority at the expense of other branches. This struggle is particularly acute today as Congress has attempted, through the enactment of legislation, to divest the courts of their jurisdiction over specific subjects and even over specific cases. This congressional action, often referred to as “court stripping,” reflects Congress’ disagreement with the way the courts have resolved particular issues, or its desire to keep certain

groups of litigants from seeking redress in the federal courts. This legislation may, in some cases, disrupt the delicate and essential system of checks and balances that is central to our nation’s democracy.

The extent to which Congress can control the federal courts’ jurisdiction has been the subject of a number of prominent legal articles. The scholarly debate over the propriety of court stripping legislation tends to focus, however, on the technical constitutionality of particular legislative measures. Legal scholars have measured legislative enactments against the text of Article III and other constitutional mandates. This focus is overly narrow. It is well established that Congress has the constitutional power to expand the federal courts’ jurisdiction in certain circumstances. Likewise, it has the authority to remove jurisdiction from the courts within the confines of the U.S. Constitution. For example, Congress expands the federal courts’ jurisdiction every time it creates a new federal cause of action, and it limits their jurisdiction every time it increases the amount in controversy requirement for diversity purposes.

The fundamental question, therefore, is not whether Congress can strip the federal courts of their jurisdiction. It is instead when and under what circumstances it is permissible and advisable for Congress to restrict the role of the judiciary on a set of issues or for a set of litigants.

This paper reviews the constitutional framework setting the balance of power between Congress and the federal courts, examines recent legislation proposed or enacted by Congress that restricts the federal courts’ jurisdiction, and recommends a set of legal and policy considerations for Congress to consider before enacting legislation that further restricts the courts’ jurisdiction.


3. See Palmore v. United States, 411 U.S. 389, 401 (1973) (“The judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.”) (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)).

4. Id.
I. THE CONSTITUTIONAL FRAMEWORK FOR CONSIDERING COURT STRIPPING LEGISLATION

The text of Article III of the United States Constitution, the Equal Protection and Due Process Clauses, and the overall system of checks and balances together constitute the legal framework for considering whether Congress has the authority to restrict federal court jurisdiction.

A. Article III Defines the Scope of Federal Court Jurisdiction and the Authority of Congress to Limit that Power

Article III extends certain powers to Congress to create and define the scope of judicial power, and simultaneously imposes constraints on Congress’ power over the federal courts. It contains three paragraphs. Each paragraph contains both explicit and implicit language defining Congress’ power over the judicial branch of government.

Article III, Section 1 establishes the federal courts:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office.

This section, known as the “Madisonian Compromise,” is generally understood to grant Congress discretion over the establishment of lower federal courts. The use of the word “may” in the first sentence, as opposed to the word “shall,” suggests that Congress has discretion over whether “from time to time” it will “ordain and establish” lower federal courts. Presumably, if Congress can create the lower courts when it deems appropriate, it also has the power to decide what powers those lower courts should or should not have. In other words, Congress can create the lower federal courts, vesting in them some portion of the full power that the Constitution potentially authorizes.

Indeed, through the years, from the very first Judiciary Act in 1789, Congress has provided the lower federal courts with less than the entire judicial power available under Article III. Congress has removed jurisdic-


6. See id.
tion from the federal courts in numerous types of cases where the basis for such divestiture—outside the text of Article III, Section 1—is found nowhere in the Constitution. Complete diversity and amount in controversy requirements are just two such examples.\(^7\)

Article III, Section 2, Clause 1 defines the power and reach of the federal courts:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This clause defines nine categories of cases and controversies to which the “the judicial Power shall extend.” This paragraph suggests that some federal court must possess the “judicial Power” therein created. Otherwise, Congress could simply eviscerate the federal courts’ jurisdiction entirely—leaving the “judicial Power” little more than an empty shell. In short, this text operates as a limitation on the broad authority granted to Congress in Article III, Section 1.

Article III, Section 2, Clause 2 sets forth the Supreme Court’s original and appellate jurisdiction:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

This paragraph suggests that Congress has the plenary power to make “exceptions” to the Supreme Court’s jurisdiction, but not with respect to

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7. There was also, with one brief exception, no general federal question jurisdiction until 1875, and even then such jurisdiction was subject to an amount in controversy requirement until 1980. See Sosa v. Alvarez-Machain, 542 U.S. 692, 745 n.* (2004) (Scalia, J., concurring). Diversity jurisdiction is also narrowed by the non-constitutional complete diversity requirement set forth in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
those cases over which Article III expressly gives the Court original jurisdiction.\(^8\)

The text does not state, however, how far Congress can go in making these “exceptions” to the Supreme Court’s appellate jurisdiction. Some constitutional scholars argue that “an exception must be a small subset of a general rule and thus that Congress’s power to make exceptions to the appellate jurisdiction is rather limited.”\(^9\) Others take this argument even a step further, suggesting that the “exceptions clause” simply permits Congress “to shift some categories of cases from the Court’s appellate to its original jurisdiction,” but not to eliminate the Court’s jurisdiction entirely.\(^10\)

Many scholars believe that Article III effectively wraps the core functions of the federal courts—considered the “essential functions”—in an extra layer of protection from encroachment. Scholars suggest that there “must be some federal judicial forum for the enforcement of federal Constitutional rights—either a lower federal court or the Supreme Court,” meaning that “Congress may bar either the Supreme Court or the lower federal court reexamination of state adjudications of federal constitutional issues, but not both.”\(^11\) These scholars suggest that, notwithstanding Congress’ authority to make exceptions, it cannot take away any of the Supreme Court’s “essential” functions.\(^12\) These “essential functions” are, according to legal scholars, inherent in our system of government, and include protecting individual rights and interpreting the Constitution. Hamilton himself “suggested that judges must guard ‘the constitution and the rights of individuals’ to prevent ‘dangerous innovations in the government, and serious oppression of the minor party in the community.’”\(^13\)

In sum, Congress has broad authority to set up the federal courts and extend or withdraw their jurisdiction over cases and controversies with several key exceptions. Congress may not interfere with the essential functions of the court to protect constitutional rights, and may not re-

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8. Indeed, until 1914, Congress did not give the Supreme Court jurisdiction to review state court decisions upholding federal rights, see Pub. L. No. 224, 38 Stat. 790 (current version at 28 U.S.C. § 1257(a) (2000)), and it has never granted the Supreme Court jurisdiction to review state court decisions on the basis of diversity of citizenship.


10. Id. at 129 (emphasis added).


12. Strasser, supra note 9, at 136.

13. Id. at 137 (citing The Federalist No. 78, at 400 (Alexander Hamilton) (Max Beloff ed. 1987)).
move the Supreme Court’s original jurisdiction over parties and matters identified in Article III.

B. Constitutional and Historical Bases to Protect Federal Court Jurisdiction

The constitutional structure contains provisions that many scholars argue would be meaningless without the ability to seek redress in federal court. Additionally, scholars suggest that beyond the explicit rights afforded in the Constitution, and the implicit rights identified by the courts, there is a history of the federal courts’ involvement in certain matters that must be respected.

First, the Equal Protection Clause of the Fourteenth Amendment could be read to require that Congress have, at a minimum, a rational basis for allowing some litigants to seek redress in federal court and not others. In other words, Congress cannot discriminate against certain types of litigants by taking jurisdiction away from the courts to hear the litigants’ claims. Legal scholars have reasoned, in fact, that “Congress cannot single out constitutional issues and exclude them from federal court jurisdiction without a sufficient reason, and hostility to the substantive rights at issue is not a sufficient reason.”

Second, the Due Process Clauses of the Fifth and Fourteenth Amendments may also restrict Congress’ authority to enact “court stripping” legislation. Some argue that these due process rights, at their most basic level, “assure access to some judicial forum in many circumstances.” Others have argued, however, that it is not necessarily the case that litigants must have access to a federal forum for due process to be satisfied; a state court forum may suffice.

Third, the structure of the Constitution itself, with the system of checks and balances and the independence of the judiciary, poses a further constraint on the power of Congress vis-à-vis the federal courts. If Congress may enact a law and then immunize it from judicial review, the ability of the courts to act as a check on congressional power would be fundamentally eviscerated.

15. Gunther, note 2, supra, at 915.
16. See id. Compare Martin H. Redish, Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager, 77 Nw. U. L. Rev. 143, 164-66 (1982) (state courts may lack a certain amount of judicial independence required of due process because the judges do not have the same independence safeguards provided for federal judges by Article III).
17. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (explaining that it is a “permanent and indispens-
ances created by the Framers is the notion of three independent and co-equal branches of government. Judicial independence would be seriously compromised if federal judges were to become hesitant either to strike down congressional enactments—even those that clearly run afoul of constitutional protections—or to render politically unpopular rulings compelled by the Constitution, on the ground that such decisions may result in further reductions in federal court jurisdiction.

The Framers of our Constitution envisioned judicial independence as an important restraint on congressional power. As described by one scholar:

In The Federalist Nos. 78 and 79, Hamilton focused on the need to assure judicial independence. Arguing that the judiciary was “the weakest of the three departments of power,” possessing neither the powers of the legislature to control the purse nor the enforcement authority of the Executive (“the sword of the community”), Hamilton asserted “that all possible care is requisite to enable it to defend itself against their attacks.” He then proceeded to argue that complete independence of the judiciary was necessary, since that department exercised the check of judicial review on the other branches of government, and “the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments.”

The judicial “check” envisioned by the Framers would be vitiated if Congress could simply, on a political whim, abolish the courts’ jurisdiction as it sees fit.

The legendary “switch in time that saved nine” is a classic example of the dangers posed to the independence of our judiciary when the political branches attempt to influence judicial decisions—even by means that do not run afoul of any express provision of Article III. In 1937, after the conservative Supreme Court had issued a series of decisions striking down New Deal legislation, President Franklin D. Roosevelt introduced and promoted a bill to pack the Court with additional justices who would be sympathetic to the New Deal. Less than two months after the introduction of this “court packing” bill, the Supreme Court decided West Coast Hotel Co. v. Parrish, which declined to overturn the Washington State minimum wage law.

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giving the appearance that conservative Justice Owen J. Roberts had switched his vote to join the “liberal wing” of the Court consisting of Chief Justice Charles Evans Hughes, Justices Louis Brandeis, Benjamin N. Cardozo and Harlan Fiske Stone. This “switch in time”—along with the resignation of conservative Justice Willis Van Devanter—contributed to the ultimate defeat of the court packing bill in Congress, thus saving “the nine” justices of the Supreme Court.

Significantly, only historical practice—not the Constitution’s text—established the number of Supreme Court justices, and no provision of the Constitution expressly prohibited Roosevelt’s court packing legislation. But the assault on the independence of the judiciary was no less significant. Indeed, legal scholars have suggested that the sanctity of federal court jurisdiction over cases involving individual rights and liberties and other matters is rooted not only in the Constitution, but also in our country’s history and tradition.

II. RECENT LEGISLATION RESTRICTING FEDERAL COURT JURISDICTION

Congress has a long history of enacting legislation dictating the confines of federal court jurisdiction. As early as 1867, Congress repealed the “1867 Act” that formed the basis of a Civil War detention case that was then pending in the Supreme Court. The Supreme Court allowed this congressional assault on its own jurisdiction, holding that the Court could no longer decide the pending case before it. The second major pre-mod-

20. The Senate Judiciary Committee made the following observation in its consideration of the court packing bill:

Courts and the judges thereof should be free from a subservient attitude of mind, and this must be true whether a question of constitutional construction or one of popular activity is involved. If the court of last resort is to be made to respond to a prevalent sentiment of a current hour, politically imposed, that Court must ultimately become subservient to the pressure of public opinion of the hour, which might at the moment embrace mob passion abhorrent to a more calm, lasting consideration.


21. Ex parte McCordle, 74 U.S. (7 Wall.) 506, 514-515 (1869) (“[W]hen an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed. And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court . . . no judgment [can] be rendered in a suit after the repeal of the act under which it was brought and prosecuted.” (internal quotation marks omitted)).
ern piece of court stripping legislation was the Norris-LaGuardia Act—Roosevelt-era labor legislation limiting the lower federal courts’ power to issue injunctions in labor dispute cases.22

In recent decades, however, congressional court stripping efforts have gained momentum and signal an increasing trend to limit: (1) the independence of the judiciary; (2) the cases that the federal courts can review; and (3) in some instances, the standard of review. Court stripping legislation seems to be propelled by a dissatisfaction on the part of Congress with federal court opinions. In 1996 alone, for example, Congress passed three legislative proposals aimed at curtailing the jurisdiction of the federal courts: the Prison Litigation Reform Act (which limits remedies judges can provide in civil suits over prison conditions); the Antiterrorism and Effective Death Penalty Act (which limits federal court jurisdiction in habeas corpus suits); and the Illegal Immigration Reform and Immigrant Responsibility Act (which limits the role of federal courts in reviewing decisions involving, among other things, deportation).23 Federal courts have upheld all three acts.24

Congress continues to consider and pass legislation that would limit the power and jurisdiction of the Supreme Court and the lower federal courts and, in some cases, abolish well-established jurisprudence. The following are recent examples of the significant changes in federal jurisdiction (and the power and role of the courts) that Congress is considering or has adopted into law.

First, Congress has proposed reversing Supreme Court decisions. The Congressional Accountability for Judicial Activism Act of 2005 would grant Congress the power to reverse future Supreme Court rulings concerning the constitutionality of a Congressional Act by a two-thirds vote.25 This

22. See Lauf v. E. G. Shinner & Co., 303 U.S. 323, 329-30 (1938) (holding the lower court lacked jurisdiction to issue injunction because it failed to make the requisite findings under the Norris-LaGuardia Act).


would reverse the centuries old bedrock of our judicial system—articulated by the Supreme Court over two hundred years ago in *Marbury v. Madison*—that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”

Second, Congress has sought to divest the federal courts of jurisdiction over constitutional claims. The Pledge Protection Act—which was passed by the full House in 2004 and reintroduced in 2005—would strip all the federal courts of their jurisdiction to decide constitutional challenges to the “under God” clause of the Pledge of Allegiance. Similarly, the Constitution Restoration Act of 2005 (“2005 Restoration Act”) would prohibit the Supreme Court and other federal courts from exercising jurisdiction over any matter in which relief is sought against any government, entity, or officer for the acknowledgement of God as the sovereign source of law, liberty, or government.

Third, Congress has proposed limiting the dicta and decisions that the federal courts may rely on. Section 201 of the 2005 Restoration Act would limit the federal courts’ ability to use international materials in interpret-
ing the Constitution.29 If adopted, this Act would prohibit all courts from relying on any foreign law sources, including foreign laws, international conventions, European court rulings, etc. (other than old English common law sources), in interpreting the Constitution.30 Federal judges who choose to rely upon foreign sources in their decisions would be subject to discipline.

Fourth, Congress has sought to preclude judicial review of specific issues and particular laws. The Marriage Protection Act—which was passed by the House in 2004 and reintroduced in 2005—would strip the federal courts of the power to require states to recognize same-sex marriages entered into in other states.31 The legislation proposes an amendment to the Defense of Marriage Act (“DOMA”)32 to prevent the application of the “full faith and credit” doctrine to state court judgments recognizing same-sex marriages. DOMA essentially says that each state may decide on its own whether to recognize same-sex marriage. Yet, not only would the Marriage Protection Act strip the federal courts of their jurisdiction over DOMA-related questions, it would also divest all federal courts of their jurisdiction to decide on the constitutionality of the Marriage Protection Act itself. Thus, the proposed legislation would not only strip the federal courts of their jurisdiction over a particular subject, but would insulate the court stripping legislation itself from Constitutional scrutiny in the federal courts.

Fifth, Congress has attempted to prevent particular individuals from accessing the federal courts to seek relief. The Detainee Treatment Act of 2005 (“DTA”) became law in December 2005.33 The DTA amended the federal habeas statute, 28 U.S.C. § 2241(e), to limit the courts’ ability to enforce that proscription, providing that “no court, justice or judge shall have jurisdiction to hear or consider” applications for habeas corpus or other actions against the United States brought by aliens detained at Guantanamo Bay.34 The DTA also conferred exclusive jurisdiction in the United States Court of Appeals for the District of Columbia to review final decisions of the Combatant Status Review Tribunals (“CSRT”), which classify detainees as enemy combatants. Consequently, all jurisdiction was


30. See id.


withdrawn from the federal district and other appellate courts, allowing detainees to challenge only their "status determination" (i.e., as "enemy combatants") or their conviction of a war crime. The DTA left no route whatsoever for: (a) challenges to the military tribunals themselves (e.g., that their procedures or mere existence violate U.S. law); (b) habeas petitions by detainees not yet classified or tried by the government (e.g., if a detainee is never put before the military tribunal, he can never reach the D.C. Circuit, thereby allowing the government to unilaterally keep specific individuals out of the courts entirely); or (c) court challenges by detainees who claim mistreatment.

On June 29, 2006, the Supreme Court reviewed the constitutionality of the DTA in *Hamdan v. Rumsfeld*. The Court held that the DTA's habeas stripping provisions did not apply to cases pending at the time the DTA was enacted. It also invalidated the military tribunals, finding that while the President could convene military commissions where justified under the Constitution and laws, the military commissions established to try Hamdan were violative of the Uniform Code of Military Justice, the American common law of war, and all four 1949 Geneva Conventions. As the concurring justices noted, the Court's decision sent the clear message that in enacting the DTA, Congress did not issue the Executive a "blank check" regarding military commissions, but "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."

At the Court's invitation, the President and Congress promptly revisited the issue of military commissions. In response to *Hamdan*, Congress passed and the President signed into law on October 17, 2006, the Military Commissions Act of 2006 ("MCA"), which expressly grants the President authority to prosecute terror suspects by military tribunal. It also amended Section 2241 of the habeas corpus statute to eliminate the federal courts' jurisdiction over any petition or action filed by a detained alien who has been designated or is awaiting designation as an enemy combatant. Congress expressly provided that the MCA "shall apply to

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36. Id. at 2769.
37. Id. at 2775, 2786.
38. Id. at 2799 (Breyer, J., concurring).
41. MCA § 7(a).
all cases without exception, pending on or after the date enactment.”42 In enacting the MCA, Congress made no secret that one of its primary purposes was to overrule Hamdan and strip the federal courts of their jurisdiction over pending Guantanamo detainee habeas corpus petitions. Senator Graham acknowledged this motive when he stated: “[T]he only reason we are here is because of the Hamdan decision [which] did not apply to the [DTA] retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now.”43

On June 12, 2008, in Boumediene v. Bush, the Supreme Court invalidated the habeas stripping provisions of the MCA as an unconstitutional suspension of the writ of habeas corpus.44 Boumediene held that non-citizens detained as enemy combatants at Guantanamo have the right to challenge their detentions under the Suspension Clause and that the procedures established under the DTA for review of CSRT enemy combatant determinations were an inadequate habeas substitute, thereby rendering Section 7 of the MCA unconstitutional.45 The Court made clear from the onset that its analysis was grounded in separation-of-powers and checks

42. MCA § 7(b).
44. Boumediene v. Bush, 128 S. Ct. 2229, 2274 (2008). In February 2007, the D.C. Circuit Court of Appeals held that the MCA required dismissal of 63 pending habeas corpus petitions of Guantanamo detainees, reasoning that the Suspension Clause did not deprive Congress of the power to deny habeas corpus to the detainees because, as aliens detained outside the sovereign territory of the United States, those individuals do not have a constitutional right to habeas corpus or, indeed, any other constitutional rights. On April 2, 2007, the U.S. Supreme Court denied certiorari in Boumediene, leaving the DTA and MCA in full effect, but the Court subsequently vacated that denial and granted rehearing. See Boumediene v. Bush, 476 F.3d 981, 989-94 (D.C. Cir.), cert. denied, 127 S. Ct. 1478 (2007), order vacated & reh’g granted, 127 S. Ct. 3078 (2007). This development was quite surprising, as the Court rarely grants such motions for reconsideration. In fact, some experts of Supreme Court procedure said they knew of no similar reversal by the court in decades. William Glaberson, In Shift, Justices Agree to Review Detainees’ Case, N.Y. Times, June 30, 2007, available at http://www.nytimes.com/2007/06/30/washington/30scotus.html.
45. Boumediene, 128 S. Ct. at 2275. Note, however, a discrepancy exists as to whether Boumediene held that MCA § 7 in its entirety was unconstitutional or only as it relates to the ability of detainees to challenge the legality of their detention. Judge Hogan recently held in Latifi v. Gates that Section of the MCA §7(a)(2) remains valid to strip federal courts’ jurisdiction over detainees’ claims relating to aspects of detention, transfer, treatment, trial, or conditions of confinement. Hogan reasoned that Boumediene stated explicitly: ‘[W]e need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.’ Latifi v. Gates, No. 04-cv-1254 (D. D.C. Sept. 22, 2008) (ordering denying an emergency motion to compel access to medical records). At this time, the Latifi decision has not been appealed.
and balances principles, stating: “in our own system, the suspension clause is designed to protect against cyclical abuses” of the writ by the political branches, and “ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty.”

The Court fashioned a three-factor test to determine whether the constitutional privilege of habeas corpus reached abroad to Guantanamo detainees: (1) “the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;” (2) “the nature of the sites where apprehension and then detention took place;” and (3) “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” Applying this test, the Court held that petitioners were entitled to the writ because: (1) the detainees’ status was in controversy, and the CSRTs used to classify them fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review,” (2) the place of detention was “[i]n every practical sense . . . not abroad” because of the Government’s indefinite, exclusive and plenary authority over Guantanamo, and (3) the “Government present[ed] no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims.”

The Court then analyzed whether the DTA constituted an adequate and effective habeas substitute. It established that for the writ to be effective in this case, the reviewing court must have the power to correct the CSRT’s errors, including some ability to assess the sufficiency of the Government’s evidence as well as the authority to admit and consider relevant exculpatory evidence not introduced during the CSRT.

46. Boumediene, 128 S. Ct. at 2247 (internal citations and quotations omitted).
47. Id. at 2259. In reaching its decision, the Court rejected the Government’s sovereignty-based habeas test, noting it would create serious separation-of-powers problems. A review of Guantanamo’s history showed that the United States had maintained “plenary control” over the island since the end of the Spanish-American War in 1898. The Government argued habeas did not extend to Guantanamo because “the United States disclaimed sovereignty in the formal sense of the word.” Nevertheless, the Court said: “[T]o hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.” The Court concluded that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.” Id. at 2258-59.
48. Id. at 2260-61.
49. Id. at 2262.
50. Id. at 2270. The Court found that CSRTs’ deficiencies constrained the detainee’s ability to rebut the Government’s enemy combatant assertion, such as the lack of counsel, limited
DTA failed to allow the Court of Appeals to admit and consider previously unavailable exculpatory evidence, the DTA's review of the CSRT was constitutionally inadequate. Therefore, the Court deemed Section 7 of the MCA an unconstitutional suspension of the writ.

III. EVALUATING LEGISLATION THAT TAKES AWAY FEDERAL COURT JURISDICTION

Changing the jurisdiction of the federal courts affects the balance of power among the different branches of government. By its very nature, such action should be done through a contemplative process. Congress should, as part of that process, consider a series of questions about any proposal that would limit the federal courts’ jurisdiction, discretion or authority, and adopt only those measures that satisfy a strict set of criteria.

First, Congress should determine what kinds of cases or controversies the proposed legislation would affect. If the legislation would affect litigants seeking redress for a violation of a right that is spelled out in the Constitution, then this action would likely interfere with the essential functions of the federal courts and exceed Congress’ authority under Article III of the Constitution. The Pledge Protection Act’s effort to eliminate jurisdiction over one type of First Amendment claim is the type of legislation that would seem to run afoul of this principle.

means to find or present evidence to challenge the Government’s case, being unaware of the most critical allegations underlying his detention, and, because of limitless admissibility of hearsay, only a “theoretical” opportunity to confront witnesses against him. However, “even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact … [a]nd given that the consequence of error may be detention of persons for the duration of the hostilities that may last a generation or more, this is a risk too significant to ignore.” 51. Id. at 2269-2270.

51. Id. at 2273-74.

52. Id. at 2274.

53. See, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that authority to pronounce constitutional law lies exclusively with the judicial branch of the federal government, which possesses “the duty to say what the law is”) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (affirming that the federal judiciary must be “supreme in the exposition of the law of the Constitution”); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943, 1946 (2003) (reviewing Rehnquist Court decisions striking down legislation under Section 5 of the Fourteenth Amendment by which Congress sought to implement its own interpretation of the Constitution); see also Strasser, supra note 9, at 136.

54. See p. 8 and note 27, supra.
Furthermore, if legislation would affect litigants seeking protection of constitutional rights identified by the courts, then Congress should, at a minimum, ensure that litigants are able to redress the violation in an appropriate forum, preferably a federal court. In Boumediene, the Supreme Court found that the MCA denied litigants access to a proper forum to protect against being held in custody by the federal government in violation of their constitutional rights. In order for the MCA to constitutionally avoid the Suspension Clause, Congress had to provide an adequate substitute procedure for habeas corpus. In addition, Boumediene instructs that when Congress seeks to enact jurisdiction-stripping legislation, it should include a savings clause or some security mechanism to ensure that the traditional protections are available if the alternative process proved inadequate or ineffective.

When Congress considers legislation that would restrict a group of litigants from seeking redress of a statutorily created right, the threshold is lower, but Congress should still ensure that litigants have a mechanism to enforce the statutory right. Additionally, there should be a rationale for singling out a group of litigants.

55. See Bartlett v. Bowen, 816 F.2d 695, 703 (D.C. Cir. 1987) (stating that a statutory provision that precludes all judicial review of constitutional issues deprives an individual of an independent forum for the adjudication of a claim of constitutional right and would undoubtedly be an infringement of due process (citing Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 27 (1980))).

56. Boumediene, 128 S. Ct at 2274.

57. Boumediene at 2262. The Court did not offer a comprehensive summary of the requisites for an effective habeas substitute, but it declared certain guarantees uncontroversial, i.e., the “meaningful opportunity” for a prisoner to demonstrate he is being held unlawfully. In addition, it recognized that the considerable deference owed to judgments of a court of record is not appropriate in circumstances of detention by executive order, but an effective writ did not require that “habeas proceedings . . . resemble a criminal trial even when detention is by executive order.” Id. at 2266, 2269.

58. Id. at 2264-65 (“[I]n the two leading cases addressing habeas substitutes . . . the statutes at issue had a savings clause, providing that the writ of habeas corpus would be available if the alternative process proved inadequate or ineffective. The Court placed explicit reliance upon these provisions in upholding the statutes against constitutional challenges.”) (internal citations omitted)).

59. See Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (finding that a complete denial of a judicial forum to adjudicate the rights granted by the Portal-to-Portal Act was a violation of due process and that “the exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment.”); see also Bartlett, 816 F.2d at 704 (finding that due process places limits on Congress’ power and “that these limits are broached when Congress denies any forum-federal, state or agency-for the resolution of a federal constitutional claim.”).

60. See Lindsey v. Normet, 405 U.S. 56, 77 (1972) (stating that access to judicial relief
Second, to avoid disrupting the system of checks and balances in the Constitution, Congress should consider whether its law would prevent the courts from interpreting federal law or serving as the final arbiter on the constitutionality of a law. The concept that the federal courts—and the Supreme Court in particular—should be the “ultimate interpreter” of constitutional protections is a concept almost as old as the Constitution itself. If federal courts are prohibited from deciding select federal law and constitutional issues, the “certainty and definition that come from nationwide uniformity of decision” will be forfeited. A prohibition on the federal courts’ interpretation of federal laws and their constitutionality may result in the interpretive responsibility falling primarily to state courts, with the potential outcome of multiple conflicting constitutional interpretations without a definitive federal resolution. State courts and legislative bodies are arguably in the position to reflect contemporary societal views on federal questions; however, the Constitution’s safeguard of checks and balances anticipates dialogue between the legislative and judicial branches, and legislation that strips jurisdiction from the judiciary is “a peculiar way to carry on any sort of dialogue.”

*“cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.”*).


63. See Caprice L. Roberts, Jurisdiction Stripping in Three Acts: A Three String Serenade, 51 VILL. L. REV. 593, 652 (2006) (“If each state’s highest judge, while ostensibly bound by the text of the Constitution, interprets the text in a conflicting manner, then Congress, through stripping appellate jurisdiction of our Court, will have eviscerated the Court’s ability to resolve the conflict . . . . The conflict then leaves a question mark hanging over what the Constitution means and accordingly obliterates the Constitution’s function as supreme law of the land.”).

64. Paul Brest, Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine, 21 GA. L. REV. 57, 103 n.148 (1986) (“Withdrawing jurisdiction seems a peculiar way to carry on any sort of dialogue . . . . Participants in ‘dialogue’ usually talk rather than choke each other. Dialogue might be better facilitated if Congress directly addressed the judicial doctrines it disagreed with.”).
Third, Congress should assess whether the proposed law would remove the courts from acting on matters where the courts have historically played a significant role. The Suspension Clause protects the writ as it existed in 1789 and “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” The DTA and the MCA were clearly intended by Congress to circumscribe traditional habeas review. However, the Court’s holding in Boumediene reaffirmed in no uncertain terms that despite the need for the political branches to secure national security, “[s]ecurity subsists, too, in fidelity to freedom’s first principles; chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.”

Finally, Congress should assess how the proposed enactment would effect the development of jurisprudence and the orderly interpretation of laws through the federal court system. Generally, a federal law that is subject to each different state’s interpretation would prove unworkable, because there would be no uniformity and a greater risk of forum-shopping for constitutional and federal rights.

If Congress cannot answer each of these questions in a way that protects the system of government designed by Framers of the Constitution, then it should reject a legislative proposal that strips the courts of jurisdiction on a particular matter.

IV. CONCLUSION

The Framers of our Constitution designed a judiciary that would be independent of political influence, and foresaw the precariousness of a federal system of governance. A federal system is weaker than a single national system of governance, but the Framers minimized its weakness by specifying that a federal system of governance would be subject to national review by the federal courts. The Framers thus designed a federal system of governance by specifying that the courts would have a role in reviewing the actions of the political branches of government. The Framers thus designed a federal system of governance by specifying that the courts would have a role in reviewing the actions of the political branches of government.

65. See note 47, supra.
67. Boumediene at 2265.
68. Id. at 2277.
69. See, e.g., A&I Commc’ns of the S. Cent. States, Inc. v. Bellsouth Telecomm., Inc., 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998) (“it is not appropriate to defer to state agency’s interpretations of federal law because fifty state commissions could apply the Telecommunications Act in fifty different ways; there would be no uniformity.”)
judiciary that was subservient to the power of the political branches. Under our Constitutional structure, the “judicial Power” acts as a check against the influence of politics precisely because—in the words of Alexander Hamilton in Federalist 78—the judiciary is subject to the ever-present risk of being “overpowered, awed, or influenced by its co-ordinate branches.” Hamilton stressed that, as a society, we should scrupulously guard the province of our courts with “all possible care.” By adhering to a set of legal and policy considerations when enacting legislation that dictates the federal courts’ jurisdiction, Congress will strengthen the our government’s entire Constitutional system.

December 2008

The Committee on Federal Legislation

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70. The Federalist No. 78, at 400 (Alexander Hamilton) (Max Beloff ed. 1987).
Regarding Proposals for Accounting Treatment of Interest on Non-Performing Loans

*The Committee on Taxation of Business Entities*

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Regarding Proposals for Accounting Treatment of Interest on Non-Performing Loans

The Committee on Taxation of Business Entities

This Report, which is submitted on behalf of the New York City Bar, by its Committee on Taxation of Business Entities, considers various aspects of how interest is accrued on non-performing loans. The Report recommends guidance and, in various instances, clarifications and changes regarding the application of the general interest accrual, OID and market discount rules, respectively, to non-performing loans and also recommends proposals.¹

I. INTRODUCTION

A. GENERAL BACKGROUND

Due to the current turmoil in the debt markets and general recessionary concerns, there has been an increased focus on the tax issues associated with distressed debt.² Accordingly, this Report identifies several areas where

¹ The Report was prepared by an ad hoc committee of the Committee on Taxation of Business Entities of the New York City Bar. The authors of the report are Jill Darrow, Daniel Dunn, Amanda Nussbaum, Ray Simon and Alan Tarr. Significant assistance was provided by Mark Stone and Isaac Tendler. Helpful comments were provided by Marc Teitlebaum, Adam Mukamal and Deborah Goldstein.

² See, e.g., Sheppard, News Analysis: Questions Raised by Distressed Debt, Tax Notes Today (May 27, 2008); Willens, Of Corporate Interest: No Doubtful Collectability Exception for OID, 120 Tax Notes 163 (July 14, 2008).
the Committee believes there is a need for changes in the law and regulations regarding the tax treatment of certain aspects of distressed debt.

There are two reasons for the proposed changes. First, the Committee believes generally that there is a need for greater clarity respecting the interest accrual and market discount rules in the distressed debt context. Second, although the Committee is comprised of attorneys, and not economists or bankers, the Committee has witnessed through the collective practices of its members a substantial dislocation in the liquidity of the debt markets, and has seen many clients struggle under these current market conditions. While there are certainly economic and market forces that are predominantly shaping these developments, the Committee has found that the tax rules relevant to distressed debt are contributing to the problem by creating uncertainty, confusion, and in some cases, punitive consequences for market participants. In short, the Committee is concerned that ambiguity in the law, and the potentially harsh results of applying certain of the rules, is having a deleterious effect on the liquidity of the secondary market for distressed debt. The Committee urges Congress and Treasury to take action and proactively shape tax policy in this area.

In particular, the Report focuses on the appropriate treatment of interest on non-performing loans (“NPLs”). For purposes of this Report, NPLs refer to debt instruments in respect of which the debtor (i) is in payment default (i.e., has missed a payment), or (ii) is in material default (without having missed a payment), such that the creditors in either case could provide notice of default, and, if not cured, could accelerate the debt and demand full repayment or cause other comparably significant consequences.

The Report examines four aspects of the treatment of interest accruing on NPLs. In the second section, the Report examines the treatment of interest, other than OID, accruing on NPLs. In the next section, the Report analyzes the treatment of OID accruing on NPLs. Section four examines the appropriate treatment of interest that has been included in income by the creditor, but that later proves to be uncollectible. Finally, in section five, the Report reviews the market discount rules as applied to NPLs.

**B. SUMMARY OF RECOMMENDATIONS**

In examining what the Committee believes should be the appropriate treatment for interest on distressed debt, the Committee has generally concluded that the tax reporting of interest with respect to indebtedness—accrual of interest, economic accrual of interest and market discount rules—
all involve methods of accounting that are based upon the premise that the debt instrument will be paid according to its terms. The fundamental issue with NPLs is that the premise no longer applies, and thus, the method of accounting must be altered as the Report sets forth.

Because the recommendations principally implicate accounting issues, the Committee believes that Treasury has the authority to make most if not all of the recommendations made in the Report. However, due to Treasury's concern over its authority in this area, particularly in the OID context, the Committee has submitted the Report to Congress as well as Treasury, urging that the recommendations be acted upon by one body or the other.

Ultimately, the Committee identified certain common events with respect to NPLs that demonstrate a genuine need for special rules of accounting regarding the taxation of those NPLs, regardless of whether the applicable rules are the traditional interest accrual rules, the OID rules or the market discount rules.

First, the Committee believes that upon the bankruptcy filing of the debtor, the application of the normal rules of interest accrual, OID and market discount should not apply. For all types of debt instruments covered by this Report, the Committee recommends that the debtor and creditors be required to convert to the cash method of accounting for interest and OID on the debt following a bankruptcy of the issuer.3

Second, the Committee believes that when non-payment on a debt has continued beyond a reasonable period, the normal rules of interest accrual, OID and market discount should not apply. In such case, taxpayers would generally be required to convert to the cash method of accounting (although special rules are proposed with respect to distressed market discount debt). The Committee struggled to identify the right period of time after which different rules should apply. While in some circumstances, one month might be adequate to determine that the debt will never be repaid, in other cases, it could take years. The applicable period also appears to be different for different types of debt—for example, a shorter period of payment default might be appropriate for consumer debt, and a relatively longer period might be desirable for asset-based loans. Ultimately, the Committee agreed that a fixed period not to exceed two years was a rational period of time.4 The Committee believes that Congress and the

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3. The Committee recognizes that special rules may need to apply in the case of “debtor-in-possession” loans and so-called “pre-packaged” bankruptcies when the extent to which a creditor's right will be impaired can be known.

4. The two-year period is consistent with the period of forbearance identified in Treas. Reg. §1.1001-3(c)(4)(ii) as the period of non-payment permitted before a modification is deemed to occur.
Treasury are in the best position to balance the desire for certainty against the perceived need to allow debtors and creditors sufficient time to suspend payments in order to permit a debtor to solve what might be a temporary cash liquidity problem. Regardless of the time period selected, the Committee also believes that the doctrine of “doubtful collectability” should still be available, and that the proposed safe harbor and this doctrine are not mutually exclusive.

In the case of market discount rules, additional “safe harbors” are proposed, and different accounting recommendations are made, because these approaches seem more appropriate for the market discount rules. Accordingly, while filing of bankruptcy and acquiring a debt that is in payment default for more than a reasonable period are identified as events that would affect the application of the market discount rules, additional events are also proposed as safe harbors in the market discount context, but not in the interest or OID accrual context. For example, the Committee recommends different treatment for market discount debts which have been accelerated or have not been paid at maturity, since there is no period over which to include the market discount. The Committee also recommends that the market discount rules should apply differently to debt that is purchased at a substantial discount (that should not be less than 50%) from the then outstanding balance of the debt (including accrued but unpaid interest) or the revised issue price (in the case of OID debt), in either case unless the discount is primarily the result of changes in prevailing interest rates from the issue date to the acquisition date. Moreover, the proposed accounting changes differed in the market discount context due to the somewhat differing policy concerns underlying the market discount rules.

The Committee considered at length other events that could be used as “safe harbors” of sorts (e.g., events the occurrence of which would permit different interest, OID and market discount accrual rules to apply). For example, the Committee considered whether financial accounting rules should be followed, but ultimately decided against it since those rules serve a different purpose. The Committee’s near final draft of recommendations also included an acceleration of the debt for material default (including non-payment) as a basis for suspending the standard rules for interest accrual and OID. Only after lengthy discussion did the Committee agree not to include such a recommendation. Principally, the Committee was concerned that there might be numerous reasons and motives for creditors to accelerate or not accelerate a debt that do not necessarily reflect a serious risk that the debt will not be repaid. Accordingly, the
Committee decided not to treat acceleration of a debt instrument as a "safe harbor" event.

II. NON-OID INTEREST

The rules for determining when interest on an NPL is no longer required to be accrued as income by a lender, or may no longer be deducted by the debtor, have developed through a long history of case law. Before discussing possible concerns over these rules and possible recommendations regarding the continued application of these rules, the Committee thought it would be helpful to provide a summary of the current statutory and case law.

A. LENDER

1. Income accrual on non-performing loans

Under the accrual method of accounting, income is includable in gross income when all events fixing the right to receive such income have occurred and the amount thereof can be determined with reasonable accuracy (otherwise known as the "all-events" test). A fixed right to receive income occurs when (1) the required performance takes place, and either (2) payment is due or (3) payment is made, whichever occurs first. Thus, for an accrual-basis-taxpayer, inclusion of income may precede the receipt of the related cash.

The "all-events" test is subject to an exception in the case of accruing interest income if the income is "of doubtful collectibility or it is reasonably certain it will not be collected." In determining whether there is doubtful collectibility of an item of income, courts have considered whether the debtor was insolvent, in bankruptcy, or in receivership.

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7. Spring City Foundry Co. v. Comr., 292 U.S. 182, 184-85 (1934); H. Liebes & Co. v. Comr., 90 F.2d 932, 938 (9th Cir. 1937); European American Bank and Trust Co. v. United States, 20 Cl. Ct. 594, 605 (1990), aff’d, 940 F.2d 677 (Fed. Cir. 1991); Koehring Co. v. United States, 421 F.2d 715, 721 (Ct. Cl. 1970).
9. See Harmont Plaza v. Comr., 64 T.C. 632 (1975) (The court acknowledged that the doubtful collectibility of income exception to the "all events" test, "has typically been applied where the debtor is insolvent or in fact bankrupt").
2. Insolvency

In *Jones Lumber Co. v. Commissioner*, the court required accrual-basis taxpayers holding secured notes to include interest as accrued on the notes. The court held that the taxpayers failed to prove the existence of events sufficient to justify overriding the general rule requiring accrual. To allow an accrual-basis taxpayer not to accrue income, “there must be a definite showing that an unresolved and allegedly intervening legal right makes receipt contingent or that the insolvency of [the] debtor makes it improbable.”

3. Receivership

In *Corn Exchange Bank v. United States*, an accrual-basis taxpayer was not required to include interest accruing on a loan made to a corporation that went into receivership during the year in which the loan was made. The court held that “it would be an injustice to the taxpayer” to impose a tax on accrued income “where it is of doubtful collectibility or it is reasonably certain [that such income] will not be collected.”

4. Other factors

Another factor the courts have used to determine whether an item of income is of doubtful collectibility is whether the creditor can be expected to receive payments within a reasonable period of time after the item accrues.

By contrast, the mere postponement of an interest payment or temporary financial difficulties of a debtor generally are insufficient to allow a creditor not to accrue interest income.

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10. 404 F.2d 764 (6th Cir. 1968).
11. *Georgia School-Book Depository, Inc. v. Comr.*, 1 T.C. 463 (1943); *Jones Lumber*, at 766; also see Rev. Rul. 80-361 (The IRS held that a creditor was required to accrue interest income up until the date the debtor became insolvent, after which date no accrual was required).
12. 37 F.2d 34 (2nd Cir. 1930).
13. *Id.* (The court further held that “when a tax is lawfully imposed on income not actually received, it is upon the basis of a reasonable expectancy of its receipt, but a taxpayer should not be required to pay a tax when it is reasonably certain that such alleged accrued income will not be received and when, in point of fact, it never was received.”)
14. *Chicago & Northwestern Ry. Co. v. Comr.*, 29 T.C. 989 (1958) (The court held that because the debtor was hopelessly insolvent, owed a large amount of past due indebtedness to the creditor, and had no assets producing current cash flow, there was no reasonable expectancy that the interest would be paid to the taxpayer within a reasonable period of time, and thus, the taxpayer was not required to accrue such interest income).
15. *Georgia School-Book*, at 469; *Jones Lumber*, at 766; *European American*, at 605.
B. DEBTOR

Section 163(a) allows a deduction for “all interest paid or accrued within the taxable year on indebtedness.” Under the accrual method of accounting, an expense is deductible in the taxable year in which all events have occurred that establish the fact of liability, the amount thereof can be determined with reasonable accuracy, and economic performance has occurred. In the case of interest expense, economic performance generally occurs with the passage of time.

However, the courts are divided on the issue of whether an accrual-basis taxpayer may claim a deduction for interest expense if there is no realistic expectation that such interest will ever be paid.

1. Debtor outside bankruptcy

In Panhandle Refining Co. v. Commissioner, the Tax Court allowed the deduction of accrued interest where there was a possibility, “which in no event can be said to be more than a probability, and is obviously not a certainty,” that the debtor would never be able to pay the interest.

Then, in Zimmerman Steel Co. v. Commissioner, the Tax Court held that an accrual-method taxpayer may not deduct an interest expense from gross income if there is “no reasonable probability that such interest would ever be paid.” The holding was reversed by the United States Court of Appeals for the Eighth Circuit, which held:

The law is that if a method of bookkeeping employed by a taxpayer “does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income” (Sec-
tion 41), and the real facts, not forms of entry, must measure the tax. But where interest actually accrues on a debt of a taxpayer in a tax year the statute plainly says he may deduct it. That he has no intention or expectation of paying it, but must go into bankruptcy as this taxpayer was obliged to do, can not of itself justify denial of deduction in computing the taxpayer's net income.24

In *Brainard v. Commissioner*,25 the Tax Court adhered to its decision in *Zimmerman*. In affirming the disallowance of the debtor's interest deductions, the court held that, “[s]ince we have found that there was no likelihood that the items accrued would ever be paid, it follows that, on the authority of [the Tax Court’s opinion in] *Zimmerman*, supra, the deficiency should to that extent be approved.” 26

However, the Tax Court in *Cohen v. Commissioner*27 limited the holding in *Brainard* to circumstances where, at the time of accrual, it was clear that payment would not be made.28

In *Fahs v. Martin*,29 the Fifth Circuit, relying in part on the Eighth Circuit's holding in *Zimmerman*, held that accrued interest is deductible by an accrual-basis taxpayer, notwithstanding that there was a realistic possibility that it may not be paid.30

The Fifth Circuit in *Mooney Aircraft, Inc. v. United States*30 disallowed a taxpayer’s deduction based on the length of time between the incurrence of the liability and the eventual payment of the obligation, even though the expense accrual satisfied the “all-events” test.31

24. *Id.*
25. 7 T.C. 1180, 1183 (1946).
26. *Id.* at 1184.
28. *Id.* at 856 (In upholding the taxpayer’s interest deductions, the court held that “deductions for accrued interest are proper where it can not be ‘categorically’ said at the time these deductions were claimed that the interest would not be paid, even though the course of conduct of the parties indicated that the likelihood of payment of any part of the disallowed portion was extremely doubtful”).
29. 224 F.2d 387, 393 (5th Cir. 1954).
30. 420 F.2d 400, 409-410 (5th Cir. 1970).
31. *Id.* at 409 (In *Mooney*, the time difference between the incurrence of the liability and the eventual payment of the obligation was between 15 and 30 years. The court held that even where a liability is fixed and certain to occur, “if the time between when the deduction is claimed and the events that give rise to the deduction occur are so distant...as to completely
Nevertheless, the Tax Court in *Southeastern Mail Transport, Inc. v. Commissioner*, 32 held that “[i]n the Fifth Circuit, and presumably in the Eleventh Circuit also, the rule is that improbability of payment does not preclude accrual and deduction.” 33

2. Debtor in bankruptcy

Generally, a deduction for post-petition interest by an accrual basis debtor in bankruptcy is permitted when the liability for post-petition interest is “fixed and absolute,” 34 and “unconditional.” 35 Thus, a taxpayer may not deduct a liability that is contingent. 36 That said, courts have held that post-petition interest, for which an accrual-basis taxpayer is presently and unconditionally liable, but which is unlikely to be paid by reason of its insolvency, is still deductible. 37

33. Id.; see *Tampa & Gulf Coast*, at 263; *Fahs*, at 393; *Zimmerman*, at 1012.
35. Id. (quoting *Lucas v. North Texas Lumber Co.*, 281 U.S. 11, 13 (1930)).
37. *Fahs*, at 393 (Taxpayer, a railway corporation, filed a section 77 bankruptcy petition claiming that it was insolvent and unable to meet its obligations, which included $45 million worth of first and refunding mortgage gold bonds secured by a mortgage on the taxpayer's property. In the case of a default on the bonds, the taxpayer was obligated to pay a penalty interest on the overdue installments of interest on the bonds. The question in this case was whether the taxpayer was entitled to accrue and deduct the penalty interest, when it was very unlikely that such interest would ever be paid. The Fifth Circuit held that interest legally owed is deductible by an accrual-basis taxpayer, notwithstanding the probability that it would not be paid. “Interest is recognized as a legal obligation whether all, part, or none of it will be recovered in bankruptcy proceedings; for example, consider the rule that a promise to pay a debt barred in bankruptcy is enforceable without considerations—the law recognizes that some kind of obligation still exists.” Thus, the court held that the taxpayer was unconditionally liable to pay the penalty interest, and therefore, affirmed the district courts determination that the interest was accruable and deductible, despite the unlikeliness that the penalty interest would eventually be paid.); *West Texas Mktg. Corp. v. United States*, 54 F.3d 1194, 1197 (5th Cir. 1995); *In re Dow Coming Corp.*, 88 A.F.T.R. 2d 2001-7262, 2001-7269 (2001); Rev. Rul. 70-367, 1970-2 C.B. 37 (In this ruling, the IRS confronted the question of “whether the full amount of interest accrued during the year 1969 on the obligations of a railroad corporation that uses the accrual method of accounting is deductible from gross income for Federal income tax purposes, when the financial condition of the corporation is such that there is no
reasonable expectancy that it will pay the accrued interest in full.” It answered that question
in the affirmative, stating that “doubt as to the payment of such interest is not a contingency of
a kind that postpones the accrual of the liability until the contingency is resolved.”; also see
Rev. Rul. 72-34, 1972-1 C.B. 132 (“It is the position of the Internal Revenue Service that
where there exists a contingency as to payment of an obligation, and such contingency relates
to other than the ability of the obligor to pay, it cannot be said that the obligation is fixed
within the meaning of section 1.461-1(a)(2) of the regulations. In such cases it cannot be said
that all the events have occurred that fix the taxpayer's liability and obligation to pay, and,
therefore, no deduction is currently allowable for Federal income tax purposes.”); Rev. Rul.
38. 54 F.3d 1194, 1197 (5th Cir. 1995).
39. Id. (The taxpayer filed a voluntary bankruptcy petition under Chapter 11 of the Bank-
ruptcy Code, which the Bankruptcy Court converted to a Chapter 7 liquidation. The question
presented to the court was whether the trustee was entitled to accrue and deduct post-petition
interest on undisputed and resolved general unsecured claims. The Fifth Circuit held that the
fact that it was extremely unlikely that the taxpayer would be able to pay such claims was not
dispositive. The issue was whether the taxpayer’s liability for post-petition interest was fixed,
absolute, unconditional, or not subject to any contingency. The court relied upon the five
aspects of an obligation, set forth in Guardian Investment Corp. v. Phinney, (253 F.2d 326
(5th Cir. 1958)) for determining the contingent nature of a taxpayer’s liability for post-petition
interest: (1) Is there a fixed and determinable date of maturity? (2) Is the obligation owed only
upon the happening of a condition? (3) Is the happening of that condition uncertain? (4) Is that
condition to occur in the future? and (5) Is there a fixed or determinable liability? The court
held: “implicit in the obligation under [Bankruptcy Code] §726 to pay post-petition interest
on unsecured claims is the necessary condition that sufficient assets remain following distri-
butions under [Bankruptcy Code] §726(a)(1)-(4). These distributions could not occur during
the taxable years at issue, and there is no fixed or determinable date when these distributions
will occur; the condition is in futuro. Because [the taxpayer] seeks to deduct post-petition
interest on undisputed claims, the amount of such liability can easily be determined.” Conside-
ring the aggregate of the five factors listed in Guardian Investments, the court concluded that
under the “all-events test,” the taxpayer’s liability for post-petition interest was not estab-
lished, and thus was not accruable and deductible. This result was not due to the fact that
payment became impossible, but because the condition necessary to create the liability for the
post-petition interest (i.e., sufficient assets remaining post distributions under a confirmed
plan) had not occurred. Therefore, the trustee was not allowed to deduct the interest. How-
ever, the dissent criticized the majority opinion for not following its own precedent in Fahs,
where the court held that an expense such as interest legally owed, may be deducted imme-
diately by an accrual-basis taxpayer, notwithstanding the improbability of payment. “No distinction is made between a debt backed by the full faith and credit of the United States and one owed by a creditor who has not only tottered at the brink of bankruptcy but has fallen into the chasm.” The dissent started its analysis with the proposition that “the obligation to pay interest for debts owed on contracts and accounts is a creation of the [state] law of contracts…The federal law of bankruptcy is not designed to create debts among parties but to determine how existing debts should be distributed to creditors fairly.” The dissent concluded that the debtor’s obligation to pay its creditors interest continues throughout the bankruptcy proceedings, and “[o]nly upon discharge…is the state law obligation to pay extinguished.” The dissent then noted that the majority’s opinion created an exception to the rule in *Fahs*, namely, “where there is no possibility of eventual payment, no obligation is fixed, and therefore an interest deduction is improper.”

West Texas, at 1200-06). See also *In re Cajun Electric Power Coop., Inc.*, 185 F.3d 446, 455 (5th Cir. 1999) (in a Chapter 11 bankruptcy proceeding, the Fifth Circuit, following the dissent’s analysis in *West Texas*, held that “a debtor’s obligation with respect to post-petition interest terminates only ‘if and when’ the debtor obtains a discharge from the Bankruptcy Court…A debtor’s obligation to pay interest during bankruptcy ‘is not extinguished, but, for purposes of the bankruptcy proceedings, is ignored until the time the court determined whether the debtor’s assets can meet the obligation. Only upon discharge, see [Bankruptcy Code] §727, is the state law obligation to pay extinguished.’” (quoting the dissent opinion in *West Texas,* at 1200-06)); *Dow Corning*, at 2001-7269, 7270 (Court held that in a Chapter 11 bankruptcy proceeding, the right to post-petition interest on trade debt arose under Bankruptcy Code §726(a) rather than by contract. Therefore, that right would not be “fixed” until distributions were made under a confirmed plan. However, a debtor’s obligation with regards to post-petition interest on institutional debt (e.g., debt that provides for an interest rate in the debt contract) terminates only “if and when” the debtor receives a discharge from the Bankruptcy Court; Chief Counsel Advice 200801039 (Sep. 24, 2007) (The IRS appeared to reconcile the Fifth Circuit’s opinions in *West Texas* and *Cajun Electric* by stating that *West Texas* was a Chapter 7 case where the post-petition interest that the trustee sought to deduct would become fixed by Bankruptcy Code §726(a)(5) only if there remained sufficient assets following distributions made under a confirmed plan. Conversely, in *Cajun Electric*, the debtor’s obligation to pay post-petition interest was fixed by the pre-petition contract, and would terminate only “if and when” the debtor obtained a discharge from the Bankruptcy Court).  


41. Id. (The court held: “The ‘rule’ against post petition interest—a rule which 502(b)(2) of the Bankruptcy Code embodies...—has no ramifications outside of the bankruptcy context...A claim for such interest therefore retains its validity even if it has been disallowed. So, while it is true that, as against the estate, “interest stops accruing at the date of the filing of the petition,” (H.R. Rep. 95-595, 95th Cong., 1st Sess. at 333 (1977)), post-petition interest can accrue against the debtor notwithstanding 502(b)(2).”.

**TAXATION OF BUSINESS ENTITIES**

In *In re Dow Corning Corp.*, the Bankruptcy Court dismissed a similar argument by the government that Bankruptcy Code § 502(b)(2), which precludes unsecured creditors from claiming unmatured interest after the filing of a bankruptcy petition, also precludes a creditor’s right to accrue post-petition interest for federal income tax purposes. The court held that
disallowance of interest under Bankruptcy Code § 502(b)(2), does not render an interest obligation contingent and does not prevent accrual.42

Additionally, in In re Continental Vending Machine Corp.,43 the court held, that where the debtor is insolvent and in bankruptcy, and there is a remote chance that interest will ever be paid, post-petition interest is not accruable and deductible.44

C. SUMMARY

The rules for determining when interest on an NPL is no longer required to be accrued as income by a lender, or may no longer be deducted by the debtor, focus on the facts and circumstances surrounding each taxpayer. However, in short, the rules can be summarized as follows, subject to the numerous court holdings and varied rationales:

Lenders must accrue interest income until there is “doubtful collectibility” regarding that interest.

Debtors may generally continue to deduct interest as long as there is an unconditional obligation to pay the interest, although when insolvency, bankruptcy or other factors show certainty (or near certainty) that the interest will not be paid, the deductibility of the interest has been denied.

D. RECOMMENDATIONS REGARDING NON-OID INSTRUMENTS

The Committee recommends requiring debtors and creditors of an NPL to adopt the cash method of accounting with respect to prospective accruals of interest under certain specified and limited circumstances. We have suggested two possible events, which we have called “cash method events.” Upon the occurrence of either of the following “cash method” events, the debtor and creditors would adopt the cash method of accounting:

1. A debt instrument has gone into payment default, and such payment default continues for a specified period that should not exceed two years;45 or
2. The obligor of a debt instrument has filed for bankruptcy.

The Committee believes the Treasury Department has the authority

42. Id.; see also Chief Counsel Advice 200801039.
44. Id.
45. See Summary of Recommendations.
to make this proposed change pursuant to Section 446. If Treasury does not act, the Committee urges Congress to make the change.

If the Treasury Department and Congress decline to make such a change, the Committee does not recommend any changes except for the promulgation of administrative guidance establishing objective standards under which holders of NPLs could cease accruing interest income. In any event, the Committee recommends that Treasury or the Internal Revenue Service ("IRS") should formally acknowledge the application of the "doubtful collectibility" rule.

While the Committee considered proposing a rule requiring symmetry of accruing the interest income and interest deductions, as is currently the case under the OID regime, the Committee ultimately decided that such a rule was not advisable. As a matter of administration, it seemed that there were only two likely ways to do this.

A bright line rule could apply, such as in the OID context, where accruals would continue, for example, until the filing of a bankruptcy proceeding. However, the Committee thought such an approach would be inappropriate given the case law that has developed (e.g., the doubtful collectibility exception to accrual). Alternatively, accruals could cease upon a determination of doubtful collectibility. However, under such an approach, the only practicable person to make such a determination would be the debtor, and the Committee was concerned that, for both business and tax reasons, the debtor would likely postpone such a determination inappropriately to avoid admitting insolvency (and giving up the interest deductions).

Accordingly, if the proposal to the conversion to cash method of accounting is rejected, the Committee would propose that the following safe harbors be provided pursuant to which lenders could conclude that the debt instruments are of "doubtful collectibility," and cease accruing interest income:

1. A debt instrument has gone into payment default, and such payment default continues for a specified period that should not exceed two years; or
2. The obligor of a debt instrument has filed for bankruptcy.

III. ORIGINAL ISSUE DISCOUNT

This section of the Report argues that the existing rules that require current inclusion of OID for distressed debt may not be the best
approach, and proposes that the rules for OID be conformed with the rules for stated interest.

1. CURRENT LAW

The IRS has taken the position in a technical advice memorandum that holders of debt instruments with OID are required to continue to accrue OID regardless of the financial condition of the issuer. TAM 9538007 concluded that holders must continue to accrue OID for so long as they hold the debt instruments. It also provided that holders could not deduct the unpaid OID in the year of the exchange of the debentures for stock in a tax-free reorganization.

The only relief to this rule was provided in a 1996 litigation guideline, which concluded that a creditor is not required to include in income any accrued OID on pre-petition unsecured debt for periods in which the issuer is in bankruptcy. However, the reasoning for this conclusion is that under the Bankruptcy Code, OID ceases to accrue on the debtor’s obligations upon the filing of the petition. In the event post-petition OID is awarded as part of the bankruptcy proceedings, such amount would be includible and deductible at that time.

B. IRS POSITION FOR REQUIRING ACCRUAL

TAM 9538007 involved a married couple who owned junior subordinated debentures issued by a corporation. The debentures provided for interest at a stated rate to be paid semiannually either in cash, or, at the corporation’s option, in-kind with additional debentures (“PIK bonds”). The debentures were treated as being issued with OID since the corporation had the right to defer the cash payment of the interest through the

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47. Technical Advice Memorandum 9538007 (June 13, 1995). For a critique of TAM 9538007, see, Pollack, Goldring and Gelbfish, Uncollectible Original Issue Discount: To Accrue or Not to Accrue, 84 J. Tax’n 157 (1996); Henderson and Goldring, Tax Planning for Troubled Corporations (2008 Ed. CCH), §304 at 25. See also New York State Bar Association, Tax Section Report on Proposed Legislation to Amend the Market Discount Rules of Sections 1276-78 (June 22, 1999), at n.24 (“We disagree with the position taken in TAM 9538007 (June 13, 1995) that the common law ‘doubtful collectibility’ exception for accrual basis taxpayers . . . does not apply to accrual of OID”).

48. For the same position as to the non-deductibility of a loss from unpaid OID, see PLR 200345049 (Aug. 2, 2002) (Ruling 16).


issuance of PIK bonds. For all three years at issue, the corporation issued PIK bonds in lieu of making interest payments in cash. During the course of these three years, the corporation defaulted on its senior debt and the debentures traded at less than 10% of their face value. In the third year, the corporation underwent a bankruptcy reorganization. Accordingly, the taxpayers took the position that the OID was uncollectible and excluded most of the OID from their income.

The IRS did not question the taxpayers’ claim that the OID was uncollectible. Rather, the IRS required that taxpayers to accrue the OID for all three years at issue based on the conclusion that the doubtful collectibility exception that applies under the general accrual rules does not apply to OID.

The IRS justified this conclusion on the following grounds:

1. OID accrual rules of Section 1272 generally require holders, regardless of accounting method, to currently include in income OID on debt instruments having OID. According to the IRS, while Sections 1271 through 1275 provide a number of specific and limited exceptions from current OID accrual, there is no exception in these provisions for doubtful collectibility.

2. While the OID provisions may be similar in operation to the accrual method, it does not follow that the doubtful collectibility exception to the accrual method should apply to OID accrual.

3. Citing the legislative history to the OID provisions, the IRS stated that, in contrast to the normal accrual of interest:

   [OID] is not included in income in advance of receipt; it is included in lieu of receipt. The OID provisions treat the OID transaction as occurring in two steps: First, interest is deemed paid to the holder. Section 1272(a)(1). Second, the holder is deemed to relend the same amount to the issuer.... As OID is accrued, the holder is, in effect, receiving current interest and extending additional credit.\(^{51}\)

4. The application of the doubtful collectibility doctrine to OID without simultaneously denying issuers a deduction for such OID would result in a significant mismatching of income and expenses and thereby undermine one of the primary purposes for the OID provisions.

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C. RESPONSE TO THE IRS POSITION

The reasoning behind the IRS position in TAM 9538807 is inconsistent with the legislative history to the OID rules, which provides that the OID rules “will require the issuer of the debt instrument to use the accrual method of accounting for any interest.” Accordingly, the OID rules should be read as simply providing certain specific rules pursuant to which the accrual method is required, but not as superseding the common law rules regarding the accrual method such as doubtful collectibility. In addition, in light of the fact that the doubtful collectibility doctrine is not listed as a statutory exception in the accrual accounting rules, the fact that the doubtful collectibility doctrine is not listed as an exception under Sections 1271 through 1275 is not compelling.

Also, the Committee believes the IRS concern with Congressional intent to prevent the mismatch of the holder’s income for the OID and the issuer’s deduction is misplaced. The mismatch at which the OID legislation was directed was the mismatch between cash-method holders and accrual-method issuers, rather than the difference between the legal standards as to when an accrual-method holder stops accruing interest income and an accrual-method issuer stops deducting interest. This latter difference is common to all debt instruments. If Congress had intended to correct the mismatch between an accrual-method holder and an accrual-method issuer in the situation of a financially-troubled issuer, Con-

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Section 267(a)(2) was enacted to deal with the same mismatch. Under this rule, an accrual-method borrower is not permitted to deduct interest if the amount payable is not actually paid within the borrower’s taxable year or 2 1/2 months thereafter, and the lender accounts for the interest on the cash basis. However, this rule is narrower in its application in that it only applies if the borrower and lender are related in specified ways (e.g., parent and child, corporation and controlling shareholder).

54. The IRS has previously limited the deduction for OID that is available to an issuer. In General Counsel Memorandum 39668 (Sep. 24, 1987), the IRS took the view that OID on a nonrecourse debt is deductible only to the extent the value of the property exceeds the outstanding amount of the debt at the time of the accrual. The IRS did not take this GCM, which created some type of doubtful collectibility exception, into account in TAM 9538007.
gress would have eliminated the mismatch with respect to all debt instruments, rather than solely OID instruments. 55

Further, the IRS concern that taxpayers will take inconsistent positions with respect to accruals on debt seems misplaced. Financially-troubled debtors may not derive any tax benefit from interest deductions because they are often in a loss position. 56

If the holder is required to continue to accrue OID, more is at stake than just timing. Rather, the character of the underlying income or loss is also affected. As described in Part III below, if the debt instrument is a capital asset, a security (within the meaning of Section 165(g)(2), and the holder includes OID in its income that is not eventually collected, the taxpayer generally will not be able to take a bad debt loss for the uncollected interest and instead will have a capital loss when the security is sold or becomes wholly worthless. In addition, the use of such capital losses can be subject to certain limitations. 57

Accordingly, the better view is that the doubtful collectibility exception should be a valid exception to OID accrual.

D. RECOMMENDATIONS REGARDING OID INSTRUMENTS

The Committee recommends that Treasury and the IRS abandon the position set forth in TAM 9538007 and formally adopt the position that the doubtful collectibility exception applies to OID instruments. The Committee believes the Treasury Department and IRS have the authority to make this change. However, in the event that the Treasury Department and IRS do not agree with that conclusion, the Committee would request that Congress effect the requested changes.

To provide clear, administrative guidance, the Committee recommends the adoption of rules pursuant to which the holder of an OID instrument would be permitted to cease accruing OID, and the debtor would cease deducting the OID, interest under either of the following circumstances:

1. The OID instrument has gone into payment default, and such payment default continues for a specified period that should not exceed two years; 58 or
2. The obligor of the OID instrument has filed for bankruptcy.

55. See Pollack, Uncollectible Original Issue Discount: To Accrue or Not to Accrue, 84 J. Tax’n at 161.

56. See Garlock, Federal Income Taxation of Debt Instruments (5th Ed. CCH), §1602.01 at 16,004.

57. Sections 165(f), 1211.

58. See Summary of Recommendations.
In addition, given the IRS focus on the mismatch issue, the Committee recommends the following to address the IRS concerns:

1. A holder of an OID instrument that wishes to cease to accrue OID based on the doubtful collectibility exception should be required to provide notice of such to the IRS, with a copy to the issuer, by filing a statement with such holder’s federal income tax return for the first taxable year in which the taxpayer determines that collection is doubtful, setting forth in detail why collection is doubtful; 59 and

2. In cases where the issuer’s financial condition is such that there is no reasonable expectation of ever paying the interest, the issuer should be precluded from deducting OID.

As stated above, the Committee believes that, based on the foregoing, Treasury has the authority for the suggested changes. However, given Treasury’s previously stated view on this issue, we are also addressing these comments to Congress.

IV. CHARACTER OF LOSSES ATTRIBUTABLE TO UNCOLLECTIBLE ACCRUE INTEREST INCOME

A. SUMMARY OF CURRENT TAX RULES

With certain limited exceptions, interest is includible by the holder of a debt instrument in gross income as ordinary income. 60 The character of a loss for previously accrued interest income on a debt instrument depends on the circumstances of the loss and the nature of the holder. If the debt instrument is held as a capital asset and is sold at a loss, the loss is a capital loss, 61 the deductibility of which is limited. Upon worthless of the debt, the loss is generally a capital loss as well. 62

B. POSSIBLE CHARACTER MISMATCH

On one level, it seems inappropriate that a taxpayer may be required


60. Treas. Reg. §1.61-7.

61. Sections 165(f), 1211.

62. Section 165(g). For a robust discussion of the various character and related issues respecting debt instruments, see Blanchard and Garlock, Worthless Stock and Debt Losses, Taxes (Mar. 2005).
to include interest in gross income as ordinary income and then, upon failing to collect the income, that taxpayer would be limited to a capital loss. However, this is the case under many circumstances outside of the debt context. For example, losses on Pay-In-Kind ("PIK") dividends on preferred stock, which are ordinary income when received (although currently taxed at the capital gains rate), would generally yield a capital loss upon a later worthlessness. Property received as compensation is also be includible as ordinary income, although a later loss or worthlessness would give rise to a capital loss (assuming the property was held as a capital asset).

When the debtor is not troubled, and there is no concern about the ultimate collectibility of the interest, the character mismatch for debt instruments is not materially different than in the examples above, and it is not clear that there should be any policy reason for deviating from that approach in the case of such debt instruments. Thus, the accrual of interest as ordinary income that subsequently turns out to be uncollectible, and capital loss treatment to that extent, is probably the appropriate treatment.

However, there may be more of a divergence, and debt instruments may be distinguishable from other instruments, where interest is required to be accrued when its collectibility is doubtful. As discussed above, there are many instances where the interest is fully includible in income, with no adjustments to take into account the financial weakness or insolvency of the debtor. In similar circumstances where PIK preferred dividends or compensatory transfers of the debtor's stock are involved and there is a question of the issuer's creditworthiness, the income inclusion would typically be considerably less because the value of the stock received would reflect the creditworthiness concern. Under TAM 9538007, there is no comparable mechanism for the accrual of OID interest when the debt is of doubtful collectibility.

In the foregoing circumstances, requiring inclusion of interest income beyond the point when it is reasonable to expect any payment of the accrued interest will likely result in a character mismatch that imposes a hardship on taxpayers that seems difficult to support on policy grounds.

C. RECOMMENDATIONS REGARDING CHARACTER

If the Committee's recommendations respecting OID instruments (discussed above) are adopted, there would be no need to address this mismatch issue. Taxpayers would no longer be required to include interest of doubtful collectibility into income. However, in the event the OID rules continue to require inclusion of interest into income beyond the
point where the interest is of doubtful collectibility, the Committee believes that it would be appropriate to permit an ordinary loss for OID interest accrued after that point in time, but only upon worthlessness of the debt.

While an argument could be made that ordinary loss treatment is also appropriate upon a sale or exchange (or satisfaction) of a debt instrument, to the extent the loss is attributable to accrued and unpaid interest, this approach may be difficult to administer, as it would require a determination of the extent to which the loss is not simply attributable to market forces. Due to ambiguity over the extent to which Treasury has authority under § 166 to address this issue of character, the Committee addresses this recommendation to Congress.

V. MARKET DISCOUNT RULES AS APPLIED TO DISTRESSED DEBT

This section of the Report argues that existing market discount rules are ill-equipped to deal with distressed debt, and proposes certain clarifications to existing market discount rules as applied to distressed debt.

A. CURRENT LAW

The market discount rules were enacted to prevent a purchaser of an outstanding bond at a discount from realizing capital gain on the discount in situations where the market discount is merely a substitute for stated interest (e.g., where a debt is purchased after the market interest rate increases). In such case, from the standpoint of the holder, the market discount is indistinguishable from OID. The holder receives part of his return in the form of price appreciation when the debt is sold or redeemed at par at maturity. Unlike OID debt, however, the market discount rules apply only to the holder; the issuer is unaffected. In addition, Congress wanted to prevent a taxpayer who finances the purchase of discounted debt from obtaining a tax benefit by currently deducting the interest expense but not currently recognizing market discount income. Tax shelter transactions had arisen based on such ability to convert the character and defer recognition of income.

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The market discount rules apply generally to bonds, debentures, notes, certificates and other debt instruments that are acquired with market discount, as defined (“MD Debt”). Subject to a de minimis rule, market discount equals the amount that the holder’s tax basis in the MD Debt immediately after it is acquired by the holder is less than either the MD Debt’s stated redemption price at maturity (i.e., its principal amount) or, if the MD Debt is OID debt, the revised issue price of the MD Debt.

Under the market discount rules, any gain realized upon a taxable disposition of an MD Debt, including any gain realized at maturity, is treated as ordinary income to the extent of the accrued market discount with respect to the debt instrument. If a partial payment of principal is made on MD Debt, the payment is treated first as a payment of accrued market discount, resulting in ordinary income, and then as a non-taxable recovery of principal. Accrued market discount is determined either on a straight-line (ratable) basis from the date of acquisition to maturity or, if elected by the holder, on a constant yield-to-maturity basis over such period. To prevent double counting, appropriate adjustments are made to the tax basis of the MD Debt to reflect the gain recognized under the
market discount rules. In addition, the deduction of any “net direct interest expense” (generally, interest expense in excess of interest income) with respect to an MD Debt is deferred until the accrued market discount is recognized. (However, these rules do not apply if the holder elects to include market discount in income as it accrues.) Thus, the market discount rules operate so as to prevent the conversion of ordinary (market discount) income into capital gain and, in the case of a leveraged purchase of an MD Debt, the current deduction of interest relating to accrued market discount that has not yet been recognized.

In enacting the market discount rules, Congress also recognized that administrability is more important than theoretical correctness. Although current inclusion in the holder’s income over the remaining term of the obligation might be correct in theory, applying such a rule would have been administratively complex.

Although the statute was enacted in 1984 and various provisions refer to rules as provided in regulations, to date, no regulations have been promulgated or proposed under the market discount rules.

B. PROBLEMS WITH APPLYING EXISTING RULES TO DISTRESSED DEBT

The fundamental problem with applying the existing market discount rules to distressed debt acquired at a discount is that the rules fail to distinguish between discount which is essentially a substitute for stated interest, as contemplated by the existing rules, and discount reflecting marketplace concern about the collectability of the debt, which is qualitatively different from a return in the nature of interest. In some instances, such as MD Debt that was not paid at maturity or has been accelerated as a result of a prior default, it is difficult to know how to apply the market discount rules, because there is no remaining term over which to calculate the amount of the accrued market discount in the hands of the purchaser. The mere fact that the debt is past due does not permit retesting the nature or character of an instrument.

Accordingly, a different method is needed to deal with this issue.

72. Section 1276(d)(2).

73. Section 1277(a). This rule does not apply to tax-exempt MD Debt. Section 1278(a)(1)(C).

74. See, generally, Section 1278(b). The election is made in the manner described at n.71. Like the OID rules, the income inclusion increases the basis in the MD Debt.


76. Treas. Reg. §1.1001-3(c)(4). The failure of an issuer to perform its obligations under a debt...
In other situations, such as where market discount is attributable to marketplace recognition that the debt instrument is unlikely to be repaid in full due to the debtor’s weak financial condition, applying the existing market discount rules will likely result in the purchaser’s having to treat a greater portion of each payment (if any) made by the debtor as interest income than would be the case where repayment is virtually assured. In other words, the greater the discount at which a debt is purchased due to the risk that the debt is unlikely to be repaid in full, the greater the amount of income that the purchaser will have to recognize under the market discount rules each time a partial payment is made. Moreover, unless the purchaser is a dealer in securities or a financial institution, any loss subsequently recognized by the holder when the MD Debt is sold or retired at a discount will be a capital loss which cannot reduce ordinary income. The Committee, like the American Bar Association Tax Section, considers these results anomalous and not defensible from a tax policy standpoint.

It is important for the market discount rules to take into account and deal with distressed debt. It is especially important in the current economic climate. Discouraging prospective purchasers of distressed debt merely exacerbates the problem. Rather, the tax rules should encourage (or at least be neutral with respect to) such purchases.

C. AUTHORITY FOR TREATING MARKET DISCOUNT ON DISTRESSED DEBT DIFFERENTLY

Prior to the enactment of the market discount rules, several cases held that a buyer of high-risk debt acquired at a significant (over 30%) discount does not recognize income on account of principal payments until the payments exceed the buyer’s purchase price. The Liftin court succinctly instrument is not itself an alteration of a legal right or obligation and is not a modification. Moreover, absent an agreement to alter other terms of the debt instrument, a holder’s temporary forbearance of collection or acceleration (including a waiver of such right) does not become a modification for at least two years following the issuer’s failure to perform.

77. Sections 165(g)(1), 166(e).
78. Section 1211. A minor exception for noncorporate taxpayers allows capital losses in excess of capital gains to reduce ordinary income up to $3,000 ($1,500 in the case of a married individual filing separately) a year. Section 1211(b)(1).
79. American Bar Association, Section of Taxation, Comments Regarding Application of Market Discount Rules to Speculative Bonds, 91 TNT 113 (May 23, 1991), Part II.A.
stated the legal principle underlying the decision to allow the taxpayer to recover his purchase price before recognizing income, as follows:

[w]here it is shown that the amount of realizable discount gain is uncertain or that there is “doubt whether the contract [will] be completely carried out,” the payments should be considered as a return of cost until the full amount thereof has been recovered, and no allocation should be made as between such cost and discount income.81

The legislative history of the Deficit Reduction Act of 1984 strongly suggests that Congress did not have distressed debt in mind when it enacted the market discount rules. Both the House Ways and Means Committee Report and the General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984 prepared by the Joint Committee on Taxation (the “Joint Committee Explanation”) states that “[market] discount is a substitute for stated interest, and the holder of the obligation receives some of his return in the form of price appreciation when the bond is redeemed at par upon maturity.”82 Distressed debt, however, is unlikely to be redeemed at par upon maturity; indeed, it may already be past due. The Joint Committee Explanation further explains that “Congress also believed that it is appropriate to provide tax treatment for market discount on bonds that is more closely comparable to the tax treatment of OID,” and that “[c]apital gain treatment should not be afforded to a largely predictable return (such as that available on the typical purchase of a market discount bond).”83 The return on distressed debt, especially past due debt, is unlikely to be “largely predictable” and might not be predictable at all.

The Joint Committee Explanation also indicates that Congress did not intend to apply the market discount rules to an obligation that was demand debt when issued, for the simple reason that such debt “is insusceptible to treatment under the rules prescribed for computing accrued market discount (which rules are applied by reference to a maturity date).”84 We note that the same difficulty is present in the case of an MD Debt that is past due or that has been accelerated as a result of an ongoing uncured event of default.

81. Liftin, at 911.


84. Id. at 95.
Congress anticipated that demand debt would be exempted from the market discount rules in forthcoming regulations.85 Twenty-four years after the enactment of the market discount rules, however, such regulations still have not been issued.

In another context, the Treasury Department recognized that distressed debt is qualitatively different from debt obligations generally. For purposes of determining whether an entity is a “taxable mortgage pool,” as defined in the Code, real estate mortgages that are seriously impaired are not treated as debt obligations.86 For this purpose, whether a debt is seriously impaired is based on all the facts and circumstances, including but not limited to the number of days delinquent, the loan-to-value ratio, the debt service coverage (based upon the operating income from the property), and the debtor’s financial position and stake in the property.87 Although the Regulations state that no one factor in and of itself is determinative of whether a loan is seriously impaired,88 they provide a safe harbor that treats a mortgage debt as seriously impaired if the debt is more than a certain number of days delinquent, unless the entity holding the mortgage debt is receiving or anticipates receiving, among other payments, principal and interest payments that are substantial and relatively certain as to amount.89

The Committee believes that special rules are required to deal with market discount on distressed debt because such debt, when purchased, entails substantial uncertainty as to the amount and timing of the borrower’s payments.90

D. DEFINING “DISTRESSED MARKET DISCOUNT DEBT”

In this section of the Report, we have been contrasting “distressed” MD Debt with non-distressed MD Debt. By distressed MD Debt, we mean

85. Id.
86. Treas. Reg. § 301.7701(i)-1(c)(5)(i).
87. Id.
88. Id.
89. Treas. Reg. § 301.7701(i)-1(c)(5)(ii)(B).
90. See also Preamble to Proposed FASIT Regulations, 65 Fed. Reg. No. 25, Explanation of Provision, Rules Applicable to the FASIT, Assets That May Be Held by a FASIT (Permitted Assets), 4. Debt Instruments in General (Feb. 7, 2000), to the effect that FASITs could not hold debts that are in payment default which are not reasonably expected to be cured within 90 days. According to the preamble to the proposed regulations, the reason for such prohibition is that distressed debts may take on the character of equity.

THE RECORD
MD Debt as to which there is substantial uncertainty as to the amount and timing of the borrower's payments, and as a result, sell at a significant discount. Such distressed MD Debt generally is expected to be discharged primarily by non-scheduled payments. The determination as to whether MD Debt is (or is not) likely to be discharged primarily by non-scheduled payments should be based on objective facts. Factors might include the following:

- the existence of an uncured continuing payment default and the length of such period;
- the bankruptcy or insolvency of the obligor, or other exigencies indicating that the obligor's ability to meet its payment obligations under the MD Debt is primarily speculative;
- a rating by an established rating agency that is below a specified level; and
- the size of the market discount;
- whether the MD Debt is seriously impaired within the meaning of Treasury Regulation § 301.7701(i)-1(c)(5)(ii)(A) (but without regard to any requirement that the debt be secured by a mortgage on real estate); and
- whether the obligor's capacity to meet the payment obligations under the MD Debt is primarily speculative within the meaning of Treasury Regulation § 1.1001-3(e)(4)(vi).

In addition to a “facts and circumstances” test, the Committee recommends the following safe harbors:

1. MD Debt that has been accelerated or that was not satisfied at maturity (i.e., past due debt);
2. MD Debt (a) that has gone into payment default, and such payment default has continued for a specific period that should not exceed two years,91 or (b) the obligor of which is bankrupt (i.e., MD Debt for which a “cash method” event, as recommended above, has occurred); and
3. MD Debt that is purchased at a discount greater than a specified percentage (that should not be less than 50%) of the then outstanding balance of the debt (including any accrued but unpaid interest) or the revised issue price (in the case of OID

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91. See Summary of Recommendations.
debt), in either case unless the discount is primarily the result of changes in the prevailing interest rates from the issue date to the acquisition date.

The Committee believes it is important to have a bright-line safe harbor based on the amount of the discount both as a matter of administrative convenience and tax policy. Although the Committee believes such discount should not be less than 50%, the Committee is not able to recommend a specific percentage.

The safe harbor under (3) above would include debt which, although not currently in payment default, is substantially discounted because of the market’s concern about the issuer’s ability to continue making payments in the future. In such case, the purchaser likely would not expect to be repaid the full amount of the debt. Because of the speculative nature of the debt, the purchaser’s expected return may be more like that of an investor, rather than a creditor. Under the current market discount rules, however, the larger the discount, the more ordinary income the purchaser is required to include, even though he does not expect to receive these amounts.

The Committee also recognizes that market discount attributable to significant changes in prevailing interest rates might be captured by a proposed safe harbor that is based solely on the size of the discount. Accordingly, the safe harbor proposed in (3) above contains an exclusion for debt the discount on which results primarily from changes in prevailing interest rates.

The Committee recognizes that such a safe harbor is not perfect. For example, there may be instances where publicly traded debt fluctuates above and below the threshold, so that the purchaser’s tax treatment will depend on the exact time he bought the debt. The Committee also understands that such a safe harbor may have an impact on the trading of debt that is valued near the safe harbor discount. If the Treasury determines it is necessary, we believe that much of the deleterious effect, if any, of this safe harbor could be ameliorated by treating the safe harbor under (3) as a presumption which can be rebutted by the IRS.92

References in the balance of this section of the Report to “distressed MD Debt” mean MD Debt which is distressed based on the facts and circumstances test described above or by virtue of satisfying one of the safe harbors proposed above. We contemplate that distressed MD Debt

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92. Treasury has used rebuttable presumption safe harbors in other areas. See, e.g., Treas. Reg. §1.707-3(d) (with respect to disguised sales between a partner and his partnership).
would generally be expected to be discharged primarily by non-scheduled payments.

E. RECOMMENDATIONS REGARDING MARKET DISCOUNT ON DISTRESSED MARKET DISCOUNT DEBT

The Committee recommends that, with respect to distressed MD Debt, the Treasury clarify the existing market discount rules as follows:

1. Past Due Debt

The Committee believes that the market discount rules should not apply to MD Debt that has been accelerated or whose maturity date has passed prior to being purchased (in either case, a "past due debt"). Such debt is equivalent to demand debt, in that it is impossible to calculate the accrued market discount in the hands of the purchaser. As indicated, the Joint Committee Explanation of the market discount provisions enacted in 1984 states that “[i]t is expected that Treasury regulations will provide that the term ‘market discount bond’ does not include an obligation that was demand debt when issued.”93 We believe that an MD Debt which is past due debt when purchased comes within the spirit, if not the letter, of the exception contemplated by Congress. In order to avoid any abuse of the market discount rules, we would limit this exception to MD Debt that is past due debt when purchased by the applicable holder.

2. Distressed MD Debt Other Than Past Due Debt

The Committee is most concerned with the application of Section 1276(a)(3) to MD Debt that is distressed debt, because the existing rules may cause the holder to recognize income in excess of the holder’s ultimate economic income from the investment. Although the holder will ultimately recognize a loss with respect to such excess income, the loss generally will be a capital loss, which might not be usable by the holder. Sections 1276(b)(3) and 1278(c) each authorize the Treasury Department to prescribe regulations determining the amount of market discount to be recognized on account of principal payments. The Committee believes that the Treasury therefore has the authority to implement the recommendation described below.

The Committee recommends that the market discount rules provide that a holder’s accrued market discount shall be deemed to be zero for purposes of applying Section 1276(a)(3) to payments on distressed MD

Debt (that is not past due debt), until the payments equal the holder's tax basis in the debt. Under this proposal, the holder would not recognize ordinary income under the market discount rules unless the payments made to the holder (including payments at maturity) exceed the holder's tax basis in the debt. The same result should obtain if the holder sells the debt rather than holding it to maturity. These very limited clarifications would avoid the potential for ordinary income recognition and subsequent capital loss recognition that arises under the current rules. The Committee believes that such clarification is consistent with the authority granted to Treasury by Sections 1276(b)(3) and 1278(c), and can be made without any statutory changes. If Treasury declines to exempt past due MD from the market discount rules as recommended in (1) above, then we likewise recommend that the holder of such debt should not be required to recognize income in advance of recovering its tax basis in the debt.

The Committee concluded that a “wait and see” approach, while generally disfavored by the IRS and Treasury, is reasonable in the limited circumstances of distressed MD Debt. Specifically, the Committee considered and rejected an approach that would require market discount to be recognized based on the holder’s projected payment schedule but otherwise using the non-contingent bond method applicable to certain contingent payment debt instruments. The contingent payment rules were developed with a view to putting both holders and issuers of contingent payment debt instruments on a consistent schedule for accruing and deducting interest. As originally proposed in 1986, Treasury Regulation § 1.1275-4 employed a “wait and see” approach to the accrual of interest on contingent payments. This approach was criticized as resulting in a significant back-loading of interest to the detriment of the obligor, leading Treasury to adopt the current rules requiring accrual based on a projected payment schedule. However, the need for consistency between the obligor and the holder of the debt instrument does not present an obstacle to the adoption of a “wait and see” approach in the context of accounting for market discount on distressed debt.

Unlike an original issue situation, it is significantly more difficult (if not impossible) to determine a comparable yield and projected payment
schedule for distressed MD Debt that is supported by contemporaneous reliable, complete and accurate data. It is unlikely such data exists or is obtainable with respect to distressed MD Debt. In addition, because the treatment of MD Debt affects only the holder, a projected payment schedule prepared by the holder would lack the arm’s-length check imposed by the OID rules, which (unlike the market discount rules) require consistent treatment between the issuer and the holder. Requiring current accruals of amounts that the marketplace has determined are unlikely to be collected would create a strong disincentive to purchasing distressed MD Debt.

The Committee also considered and rejected an approach that would require market discount to be recognized on a basis that assumes the holder will receive a return of at least a specified rate. In the case of distressed MD Debt, the Committee believes that the definition of distressed MD Debt is intended to (and should) be limited to those debt instruments as to which there is substantial uncertainty as to payment. Accordingly, it is not appropriate to require any minimum accrual on the part of a holder of such debt. We note that our conclusion on this issue echoes the conclusion reached by the New York State Bar Association Tax Section in its report concerning a proposal by the Clinton administration to require accrual-basis taxpayers who purchase market discount debt to include market discount in income as it accrues. The Tax Section stated that “where a large amount of market discount reflects a troubled obligation on which there is no reasonable expectation of payment, the holder should not be required to accrue income.”

Until the payments received by the holder of a distressed MD Debt equal the holder’s tax basis in the debt, the amount of the accrued market discount on the debt and, hence, the amount of ordinary income required to be recognized by the holder, should be zero. However, once the holder recovers its purchase price, the Committee believes that, except in the case of past due debt, the Treasury might reasonably determine that it is appropriate to require ordinary income treatment of 100% of each dollar subsequently received by the holder, up to the amount of the market discount that accrued during the holder’s holding period as determined under the existing market discount rules.

In the case of past due debt, there is no guidance for determining how to calculate the amount of market discount accruing during the holder’s

Such treatment is consistent with the tax treatment of payments of defaulted interest accrued before the date of purchase on bonds purchased "flat," as a return of capital rather than interest income. Treas. Reg. §1.61-7(c); see also Estate of Rickaby v. Comr., 27 T.C. 886 (1957).

VI. CONCLUSION

The Committee has endeavored to set forth the current state of the law as it pertains to accounting for interest on non-performing loans, and to make recommendations for changes or clarifications in the law, where merited, so as to provide for a more coherent implementation of what the Committee genuinely thinks would be sound fiscal policy. Members of the Senate Finance Committee, the House Ways and Means Committee and the Treasury Department are invited to contact the Committee to discuss any aspects of the foregoing Report. We appreciate your consideration of our recommendations.

July 2008

The Committee on Taxation of Business Entities

Mark Stone, Chair
David A. Sausen, Secretary


98. Such treatment is consistent with the tax treatment of payments of defaulted interest accrued before the date of purchase on bonds purchased “flat,” as a return of capital rather than interest income. Treas. Reg. §1.61-7(c); see also Estate of Rickaby v. Comr., 27 T.C. 886 (1957).
Formal Opinion 2008-02

Corporate Legal Departments and Conflicts of Interest Between Represented Corporate Affiliates

The Committee on Professional and Judicial Ethics

QUESTIONS
When inside counsel represent corporate affiliates: (a) under what circumstances must they consider the propriety, under DR 5-105 and DR 5-108, of representing or continuing to represent those affiliates? (b) may a conflict between those affiliates be waived? (c) are there steps that can be taken in advance that will enhance the possibility that inside counsel may continue to represent some or all of the affiliates after a conflict arises?

SUMMARY OF OPINION
Inside counsel representing corporate affiliates must consider possible conflicts between those affiliates under DR 5-105 and DR 5-108. This Opinion describes several steps that inside counsel may take to enhance the possibility that the representation of at least one affiliate, typically

1. As used in this Opinion, “affiliate” has the same meaning as in Rule 405 of the General Rules and Regulations under the Securities Act of 1933. Rule 405, 17 C.F.R. § 230.405, defines “[a]n affiliate of, or person affiliated with, a specified person [as] a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.”
the parent corporation, may continue, in the face of a conflict with another corporate affiliate.

I. INTRODUCTION

It can scarcely be debated that inside counsel play a critical role in advising their corporate clients. See, e.g., In re Teleglobe Commc’ns Corp., 493 F.3d 345, 369 (3rd Cir. 2007) (observing that there has been “‘rapid growth in both importance and size of in-house, or corporate counsel’” and that “the primary advantages of in-house (rather than outside) counsel are the breadth of their knowledge of the corporation and their ability to begin advising senior management on important transactions at the earliest possible stage, often well before anyone would think to hire a law firm”) (citation omitted); Carl D. Liggio, The Changing Role of Corporate Counsel, 46 Emory L.J. 1201, 1207 (1997) (“This decade [the 1990s] is seeing a markedly different legal profession in which employed counsel are playing the dominant role. They are supplanting retained counsel as the primary legal advisors to management. Law firms, whose role will become increasingly episodic in the services that they provide, will be primarily transaction dependent, providing legal services only on those matters specifically referred to them by the general counsel’s office.”)

In fulfilling this critical role, inside counsel are subject to the same ethical responsibilities as outside counsel. In particular, New York’s Code of Professional Responsibility (the “Code”) defines a law firm to include a corporate legal department. 22 NYCRR Part 1200.12

The caselaw has begun to address conflicts arising when inside counsel represent corporate affiliates and has focused on the erosion of a parent’s attorney-client privilege when an affiliate is acquired by a hostile third party. See, e.g., In re Teleglobe Commc’ns Corp., 493 F.3d at 373:

It is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the outcome of Polycast [Tech. Corp. v. Uniroyal, Inc.], 125 F.R.D. [47, 49 (S.D.N.Y. 1989)], and Medcom [Holding Co. v. Baxter Travenol Lab.], 689 F. Supp. [842, 844 (N.D. Ill. 1988)]—both cases in which parent companies were forced to turn over

2. We leave for another day the question whether a corporate legal department should be defined to be a law firm.
documents to their former subsidiaries in adverse litigation—not to mention the attorneys’ potential for running afoul of conflict rules.

This Opinion will address conflicts facing inside counsel more broadly.

II. CONFLICTS AND THE CORPORATE LEGAL DEPARTMENT

In analyzing the conflicts facing inside counsel that represent corporate affiliates, it is important to divide the discussion into two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent’s wholly owned affiliates. The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent.

In the first scenario, inside counsel's representation is not of entities whose interests may differ because the parent’s interests completely preempt those of its wholly owned affiliates. As a matter of corporate law, “in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.” Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988). See also Aviall, Inc. v. Ryder Sys., Inc., 913 F. Supp. 826, 832 (S.D.N.Y. 1996) (“Because the officers and directors of a parent company owe allegiance only to that company and not to a wholly owned subsidiary, it is reasonable to conclude that a parent corporation itself is under no obligation to provide the subsidiary with independent representation .... It would be anomalous to impose a duty upon the corporation, an artificial person, when all the natural persons who are its officers and directors have no such duty, and there is no natural person to take up the duty.”), aff'd, 110 F.3d 892 (2d Cir. 1997).

The analysis changes in the second scenario. In that scenario, inside

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3. This Opinion assumes that inside counsel for the parent provide legal services to the entire corporate “family.” But the analysis in this Opinion holds equally true when affiliates within the corporate family have their own legal departments that in turn report to a single lawyer, typically the general counsel of the parent. Under this circumstance, the conflicts of the parent’s legal department become those of each affiliate’s legal department, and vice versa. See, e.g., ABCNY Formal Op. 2007-2; N.Y. State 793 (2006).

4. In Aviall, the court rejected a claim by a former subsidiary arising out of its former parent having dictated all the terms of the spin-off agreement, having failed to provide the former subsidiary with independent counsel, and having had an officer of the former parent sign the spin-off agreement on behalf of the former subsidiary.
counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983) (when the parent does not wholly own the affiliate, the joint directors of both parent and affiliate, “owe the same duty of good management to both” companies, and “this duty is to be exercised in light of what is best for both companies.”) This is so even when the parent “has sufficient ownership or influence to exercise working control of the [affiliate]” *Restatement (Third) of the Law Governing Lawyers.* §131, cmt. d. (2000).

In the second scenario, when inside counsel determine a conflict may exist between the parent and its represented affiliates, or between represented affiliates, inside counsel should consider whether joint representation of some or all of their clients comports with the Code. There are two principal Disciplinary Rules that apply: DR 5-105 and DR 5-108. DR 5-105(A) articulates when a lawyer must decline joint representation, and DR 5-105(B) articulates when a lawyer must discontinue joint representation. DR 5-105(C) sets forth two conditions that, when met, permit the lawyer and the law firm to undertake or continue an otherwise conflicted representation. DR 5-105 (A)—(C) provide:

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24](C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24](C).

C. In the situations covered by DR 5-105 [1200.24](A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

DR 5-108, which governs “former client” conflicts, applies when a conflict develops between the parent and its represented affiliates, or be-
between represented affiliates, and inside counsel seek to continue representing certain of the clients, while ceasing to represent the others. DR 5-108(A)(1) precludes a lawyer from representing another person “in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client.”

Inside counsel should consider carefully these conflict-of-interest rules. Sometimes, a potential conflict will be apparent from the outset of the representation. At other times, the conflict may not become apparent until after the joint representation has begun. To pick just one example, at the outset of a litigation in which a parent and a majority-owned affiliate have been sued, their positions may appear identical and they may choose to be jointly represented by inside counsel. Then discovery may unexpectedly reveal that there is a basis for the parent to offload responsibility onto the affiliate.

III. THE EFFECT OF A CONFLICT OF INTEREST

Once it has been determined that a conflict of interest exists between represented corporate clients, inside counsel must withdraw from the representation, unless the Code otherwise permits. If the Code does not, the entire corporate legal department is barred from the representation because DR 5-105(D) provides that conflicts are imputed in a law firm:

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101 [1200.20] (A), DR 5-105 [1200.24] (A) or (B), DR 5-108 [1200.27] (A) or (B), or DR 9-101 [1200.45] (B) except as otherwise provided therein.5

A. DR 5-105(C)

1. The Disinterested Lawyer Test

The first test under DR 5-105(C) is whether a “disinterested lawyer” would conclude that all affected clients can be competently represented if the conflicted representation were undertaken or continued. This is an “objective” test. It is not the subjective view of the individual lawyer, but what a “disinterested lawyer” would think. See, Restatement (Third) of the Law Governing Lawyers §122(2)(c) (2000). Professor Simon has defined the

5. DR 5-101 (personal conflicts between lawyer and client) and DR 9-101(B) (representations by former government lawyers) are irrelevant to this Opinion.
“disinterested lawyer,” for purposes of DR 5-105(C), as “an imaginary, hypothetical independent lawyer who has no personal or financial interest in continuing the representation of the client—a lawyer whose only aim is to give the client the best advice possible about whether the client should or should not consent to a conflict.” Roy Simon, Simon’s New York Code of Prof’l Responsibility Annotated 857 (2007). Furthermore, “[i]f a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client’s consent.” EC 5-16. For an analysis of the considerations involved in the disinterested-lawyer test, see ABCNY Formal Op. 2004-2.

Given the inclination toward joint representation, inside counsel may conclude in some circumstances that they should engage independent counsel to conduct that analysis.

2. Informed Consent

DR 5-105(C) also requires the informed consent to the representation of the clients whose interests differ.

It is impossible to define fully the elements that make up informed consent. Rule 1.0(e) of the American Bar Association’s Model Rules of Professional Conduct describes informed consent as:

...denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.6

The Restatement provides that:

[i]nformed consent requires that each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision.

Restatement (Third) of the Law Governing Lawyers §122, cmt. c(i) (2000). In any event, inside counsel must ensure that all affected clients are fully

informed of the advantages and risks of joint representation. We have previously underscored that a client’s sophistication is an important determinant of the degree of disclosure required to obtain informed consent, and when it comes to the advantages of being jointly represented by inside counsel, their clients will likely need little disclosure. At some corporations, especially large, multi-national corporations, inside counsel may have acquired sufficiently deep and broad relationships with the corporation to allow them to provide advice that considers all the different constituencies and issues that impact a complex organization’s decisions on important matters. At the same time, these clients will also likely need little disclosure about at least certain of the risks of joint representation. Included among these are that the centralized legal department regularly represents members of the corporate family and may be motivated in part by a desire to maintain consistent positions across the corporate family, that the department’s principal loyalty is to the parent, and that it is likely to take instruction from the parent, even if the parent is not a party to the particular representation. In the final analysis, given the value placed by some corporate clients on inside counsel’s advice, those clients may be willing to give informed consent to a joint representation by inside counsel that those clients would reject if proffered by outside counsel.

Given the inclination toward joint representation, inside counsel may conclude in some circumstances that they should engage independent counsel to obtain informed consent.

Who, on behalf of an affiliate, has the degree of independence required to give informed consent under DR 5-105 is a question of corporate law beyond the scope of this Opinion.

IV. NAVIGATING CONFLICTS
Two useful mechanisms that a corporate legal department may employ in navigating conflicts between represented affiliates are an advance conflict waiver and limiting the joint representation to avoid conflicts.

A. Advance Conflict Waivers

7. See page 202, below.
Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate, the advance waiver should:

- Identify for the clients the potential or existing conflicts with as much specificity as possible;
- Make clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and
- Obtain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate.

As we said in ABCNY Formal Op. 2006-1, the validity of an advance waiver must be measured against DR 5-105.

With respect to the disinterested lawyer test, we wrote:

The disinterested lawyer test should be applied both when the advance waiver is given and again when the subsequent adverse matter arises. In the first instance, the lawyer examines the type of representation and prospective client that is anticipated and the potential adversity of interests. In the second instance, the lawyer examines the actual client and matter and the actual adversity that has developed. If the actual conflict is materially different from the conflict envisioned by the waiver, the waiver will be ineffective. If the actual conflict is not materially different, the waiver will also be ineffective if the actual conflict is nonconsentable.

With respect to the informed-consent test, we wrote:

The “adequacy of disclosure and consent” will depend upon the circumstances of each case. We agree with NYCLA Ethics Opinion No. 724 that, in general, “the client or prospective client should be advised of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients or matters that may present such conflicts.” Some opinions have emphasized the sophistication of the cli-
ent in judging the degree of required disclosure, and this too is an important consideration. Sophisticated clients need less disclosure of the “implications,” “advantages,” and “risks” of advance waivers before being able to provide informed consent. Similarly, Comment 22 to ABA Model Rule 1.7, with which we also agree, observes that the effectiveness of advance waivers is determined “by the extent to which the client reasonably understands the material risk that the waiver entails,” placing the emphasis, for the sophisticated client, on the client’s understanding of risks rather than detailed disclosure by the lawyer. For the sophisticated clients described above, blanket or open-ended advance waivers that are accompanied by relatively limited disclosure about the prospective conflicting matters should nevertheless be enforceable. (citations omitted)

Consistently with the discussion on pages seven and nine above, in connection with the advance waiver, inside counsel may conclude in some circumstances that they should engage independent counsel to conduct the disinterested lawyer analysis and to obtain informed consent. It also bears emphasis, as stated above, that the person giving informed consent to the advance waiver on behalf of the affiliate must have the degree of independence from the parent, or from other affected affiliates, required by applicable corporate law.

B. Limiting Representation to Avoid Conflicts

Alternatively, inside counsel can limit the representation of one or more affiliates to avoid conflicts. This Committee explored at length the conditions for doing this in ABCNY Formal Op. 2001-3, in which we concluded:

[T]hat a representation may be limited to eliminate adversity and avoid a conflict of interest, as long as the lawyer’s continuing representation of the client is not so restricted that it renders her counsel inadequate and the client for whom the lawyer will provide the limited representation consents to the limitation. In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that separate counsel may need to be retained, which could result in additional expense, and delay or complicate the rendition of legal services.
Limiting the representation of an affiliate is at times accompanied by retaining other counsel—for example, outside counsel—to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate’s interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients.

**CONCLUSION**

In analyzing the conflicts facing inside counsel that represent corporate affiliates, this Opinion describes two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent’s wholly owned affiliates. The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent.

In the first scenario, inside counsel’s representation is not of entities whose interests may differ, as a matter of corporate law. In the second scenario, inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests. In the second scenario, when inside counsel determine that a conflict may exist between corporate affiliates that they jointly represent, or intend to jointly represent, inside counsel should consider whether joint representation comports with the requirements of DR 5-105(C), or whether independent counsel should be engaged to represent at least some of the clients. If inside counsel conclude that joint representation may pass muster, they may also conclude in some circumstances that they should engage independent counsel to help satisfy the “disinterested lawyer” and “informed consent” tests required by DR 5-105(C). In all events, a robust consent process should be employed, emphasizing a full explanation of the advantages and disadvantages of joint representation. The propriety of joint representation should be revisited as circumstances change.

Two potentially useful mechanisms that can help inside counsel navigate conflicts are an advance conflict waiver and limiting their representation to avoid conflicts.

Sensitivity to conflicts between represented affiliates will help forestall judicial criticism and avoid unnecessary curtailment of inside counsel’s continued functioning in their expected capacity.

*September 2008*
 Formal Opinion 2009-01

The No-Contact Rule and Communications Sent Simultaneously to Represented Persons and Their Lawyers

The Committee on Professional and Judicial Ethics

TOPIC: The no-contact rule and communications sent simultaneously to represented persons and their counsel; implied consent to such communications.

DIGEST: The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining “prior consent” to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person’s lawyer, a lawyer communicating with a represented person without securing the other lawyer’s express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication.

CODE: DR 7-104
QUESTIONS

(1) When a lawyer sends a letter or an email directly to a person known to be represented by counsel, can the lawyer satisfy the prior consent requirement of DR 7-104(A)(1) by simultaneously sending a copy of the letter or email to the represented person’s lawyer?

(2) In the context of an email chain involving lawyers and represented persons, does the prior consent requirement of DR 7-104(A)(1) require express consent for a “reply to all” communication or may consent be implied?

OPINION

I. Sending Simultaneous Correspondence to a Represented Person and Her Lawyer Without Prior Consent Violates the No-Contact Rule Unless Otherwise Authorized by Law

The “no-contact rule,” DR 7-104 of the Code of Professional Responsibility (the “Code”), provides that a lawyer shall not “[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.” DR 7-104(A)(1).

We have been asked whether simultaneously sending a letter or email to a represented person and her lawyer, by itself, satisfies the prior consent requirement. We believe this question is readily answered in the negative by both the text and purpose of the no-contact rule.

At the outset, it is clear that a letter or an email is a “communication” covered by DR 7-104(A)(1). As the New York State Bar Association has noted, “[t]he Code does not define the word ‘communicate,’ but the plain and ordinary meaning of the word—to ‘impert,’ ‘convey,’ ‘inform,’ ‘transmit,’ or ‘make known,’ Webster’s Third New International Dictionary (Unabridged) 460 (1993); see Black’s Law Dictionary 253 (5th ed. 1979)—all presuppose some form of transmission of information.” N.Y. State 768 (2003).

The no-contact rule, by its terms, requires that a lawyer have the “prior consent” of a represented person’s lawyer before communicating directly with that person. Simultaneously sending a letter or email to a represented person and her lawyer does not satisfy this “prior consent” requirement. Prior consent means just that—consent obtained in advance.

1. The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (“the Rules”), which will become effective and replace the Code on April 1, 2009. Under the new Rules, DR 7-104(A)(1) of the Code has been adopted almost verbatim as Rule 4.2(a).
of the communication. A lawyer receiving a copy of a letter or email sent to her client has not, by virtue of receiving the copy, consented to the direct communication with her client.2

Our conclusion is supported by a recent case and prior ethics opinions. In *AIU Ins. Co. v. The Robert Plan Corp.*, 17 Misc. 3d 1104(A), 851 N.Y.S.2d 56, 2007 WL 2811366, at *14 (Sup. Ct. N.Y. County 2007), the plaintiffs' lawyers sent a letter to the directors of the defendant corporation with a copy to the company's counsel. Under New York law, the directors of a corporate client are included in the definition of “party” for purposes of DR 7-104. See *AIU Ins. Co.*, 2007 WL 2811366, at *14 (citing *Niesig v. Team I*, 76 N.Y.2d 363 (1990)). The court concluded that sending a letter to the directors, even with a copy sent to the company's counsel, violated DR 7-104 and enjoined plaintiffs' lawyers from any further contact with the directors.

In the same vein, the American Bar Association (the “ABA”) has addressed the situation where a lawyer fears that opposing counsel has failed to relay a settlement offer to her client. The ABA concluded that sending the settlement offer directly to the represented party is improper, absent the other lawyer's consent or specific legal authority to do so. See ABA Formal Op. 92-362 (offering party's lawyer not permitted to communicate with opposing party about settlement offer absent consent of other lawyer or unless authorized by law), ABA Informal Op. 1348 (offering party's lawyer not permitted to send opposing party carbon copy of settlement offer sent to opposing party's lawyer).

Our conclusion that the no-contact rule forbids sending simultaneous communications to client and counsel is bolstered by consideration of the rule's purpose. As the Court of Appeals explained in *Niesig*, DR 7-104(A)(1)

fundamentally embodies principles of fairness. “The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party’s attorney theoretically neutralizes the contact.” *(Wright v Group Health Hosp.*, 103 Wash. 2d 192, 197, 691 P.2d 564, 567.) By preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-ad-

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2. This opinion applies equally to simultaneous communications (i) addressed to the lawyer and “cc’d” to the client, (ii) addressed to the client and “cc’d” to the lawyer, and (iii) addressed to both lawyer and client.
vised disclosures and unwarranted concessions (see 1 Hazard & Hodes, Lawyering, at 434-435 [1989 Supp.]; Wolfram, Modern Legal Ethics § 11.6, at 613 [Practitioner’s ed. 1986]; Leubsdorf, Communicating with Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interests, 127 U. Pa. L. Rev. 683, 686 [1979]).

Niesig, 76 N.Y.2d at 370; see also ABA Formal Op. 95-396 (“[T]he anti-contact rules provide protection of the represented person against overreaching by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests.”).

It could be argued that the purpose of DR 7-104(A)(1) is satisfied when a copy of a communication sent by counsel to a represented person also is sent to the represented person’s lawyer. Under that theory, the represented person would be adequately protected because her lawyer would be aware of the communication and could consult with her client before responding to it. We do not agree with this view. While it is true that sending a copy of the communication to counsel reduces the risk that the represented person will be subject to overreaching, the risk is not eliminated. In practical terms, there is no assurance that a letter or email sent simultaneously to a lawyer and her client will be received by them at the same time. For any number of reasons—the vagaries of the postal or computer system, the lawyer’s work or travel schedule, or delays in the distribution of mail at the lawyer’s office—the lawyer might not receive her copy of the communication until after the client has received it and made a direct unculated response. The risk is magnified with email communications, where a response by the client can be made with the touch of a button on a keyboard.

More fundamentally, permitting a lawyer to communicate directly with a represented person by letter or email, even if a copy is also sent to counsel, would undermine the role of the represented person’s lawyer as spokesperson, intermediary and buffer. Under DR 7-104(A)(1), a represented person is entitled to be insulated from any direct communications from opposing counsel, aside from direct communications otherwise authorized by law. All other communications relating to the subject matter of the representation, whether in person, by letter or via email, must proceed through the represented person’s lawyer absent prior consent.

II. “Prior Consent” to the Simultaneous Communication may be Inferred From the Lawyer’s Participation in the Communication and Other Surrounding Facts and Circumstances

While the “prior consent” of a represented person’s lawyer is required
for direct communications with the client (as set forth above), the question remains whether the consent must be express or may be inferred from the circumstances. In this age of instantaneous electronic communications, the issue of implied consent often presents itself in the context of group email communications involving multiple clients and their lawyers. For example, does the fact that a lawyer copies her own client on an email constitute implied consent to a “reply to all” responsive email from the recipient attorney?\(^3\)

While there is a surprising dearth of authority addressing the issue of implied consent in the context of the no-contact rule, a comment to the Restatement of the Law Governing Lawyers sensibly explains that a lawyer “may communicate with a represented non-client when that person’s lawyer has consented to or acquiesced in the communication. An opposing lawyer may acquiesce, for example, by being present at a meeting and observing the communication. Similarly, consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests.” Rest. (Third) of Law Governing Lawyers § 99 cmt. j.

We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to “reply to all” communications may sometimes be inferred from the facts and circumstances presented. While it is not possible to provide an exhaustive list, two important considerations are (1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting.

**Initiation of communication:** It is useful to consider how the group communication is initiated. For example, is there a meeting where the lawyers and their clients agree to await a communication to be circulated to all participants? If so, and no one objects to the circulation of correspondence to all in attendance, it is reasonable to infer that the lawyers have consented by their silence to inclusion of their clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel’s consent to a “reply to all” response from any one of the email’s recipients.

**Adversarial context:** The risk of prejudice and overreaching posed by

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\(^3\) An attorney who sends an email to another attorney can eliminate the possibility of being found to have provided such implied consent by simply removing the client as a “cc” on the email—the sending attorney can instead use the “bcc” or blind copy feature to send the email to the client or can forward to the client a copy of the email sent to the other lawyer.
direct communications with represented persons is greater in an adversarial setting, where any statement by a party may be used against her as an admission. If a lawyer threatens opposing counsel with litigation and copies her client on the threatening letter, the “cc” cannot reasonably be viewed as implicit consent to opposing counsel sending a response addressed or copied to the represented party. By contrast, in a collaborative non-litigation context, one could readily imagine a lawyer circulating a draft of a press release simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to “reply to all” communications.

The critical question in any case is whether, based on objective indicia, the represented person’s lawyer has manifested her consent to the “reply to all” communication. Accord ABCNY Formal Op. 2007-1 (setting forth objective indicia to determine whether in-house counsel is acting as a lawyer for purposes of DR 7-104(A)(1)). Using an objective test, express consent is preferable, but not invariably required, because actual consent may be inferred from counsel’s conduct.

Even when consent is implied, it is not unlimited. Its scope will depend on the statements or conduct of the represented person’s lawyer, and it will have both subject matter and temporal limitations. An email sent by a lawyer to opposing counsel, with a copy to the client, would imply the lawyer’s consent to a “reply to all” response limited to the subject matter of the initial email (unless otherwise clearly indicated). And the duration of the implied consent would last only for a reasonable period of time based on the particular circumstances. It bears emphasis that an attorney who has previously consented to a direct communication with her client, or who has not explicitly objected to it, can make clear at any time that she does not consent. Consent, whether express or implied, can be revoked at any time by a clear statement to that effect.

The implied consent endorsed here is limited to those situations where a lawyer has initiated contact with other counsel and has done something to manifest consent to a response from counsel addressed to the initiating lawyer’s client. This situation is to be distinguished from that presented in ABCNY Formal Op. 2005-4, where we were unwilling to recognize implied consent because the lawyer had not engaged in any conduct from which consent could be implied. In that opinion, we evaluated whether a lawyer was permitted to speak directly with a non-lawyer insurance adjuster where the insurance adjuster represented that counsel had
consented to the communication. We noted that the other lawyer could not rely on the insurance adjuster's representation and that consent could not be implied in that situation. We reasoned:

The plain language of DR 7-104(A)(1) requires that opposing counsel receive notice and provide actual consent before an attorney may participate in such communications with a non-lawyer representative. We further conclude that the opposing counsel's consent cannot be inferred from the circumstances, and that the consent must be conveyed in some form by opposing counsel to the attorney.

* * *

Because the rule requires the consent of opposing counsel, the safest course is to obtain that consent orally or in writing from counsel. A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client’s assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent.


In the foregoing opinion, the Committee found no adequate indication of consent where the allegedly consenting lawyer was not a party to the communication in question and did nothing from which consent could be inferred. The type of implied consent recognized here, by contrast, presupposes that the lawyer is a party to the email exchange and has manifested consent to the direct communication.

A cautionary note is in order. An attorney who relies on “implied consent” to satisfy DR 7-104(A)(1) runs the risk that the represented person's lawyer has not consented to the direct communication. To avoid any possibility of running afoul of the no-contact rule, the prudent course is to secure express consent. However, the absence of express consent does not necessarily establish a violation of DR 7-104(A)(1) if the represented person's lawyer otherwise has manifested her consent to the communication.

We are mindful that the ease and convenience of email communications (particularly “reply to all” emails) sometimes facilitate inadvertent contacts with represented persons without their lawyers’ prior consent. Given the potential consequences of violating DR 7-104(A)(1), counsel are advised to exercise care and diligence in reviewing the email addressees to avoid sending emails to represented persons whose counsel have not consented to the direct communication.
CONCLUSION

We conclude that sending a letter or email to a represented person, and simultaneously sending a copy of the communication to counsel, is impermissible under DR 7-104(A)(1) unless the represented person’s lawyer has provided prior consent to the communication or the communication is otherwise authorized by law.

We further conclude that express consent to such simultaneous communication, while preferred, is not always required. A lawyer’s prior consent may be inferred where the represented person’s lawyer has taken some action manifesting her consent. The scope of the implied consent will be determined by subject matter and temporal considerations, based on what a reasonable lawyer would understand was authorized by the represented person’s lawyer. The safest course always is to obtain express prior consent.

*January 2009*
Ethical Duties Concerning Self-Represented Persons

The Committee on Professional and Judicial Ethics

QUESTION
Ethical duties concerning self-represented persons. DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter. DR 1-102; 4-101; 7-104; 7-106; EC 2-7; 7-13; 7-14; 7-18; 7-23; 9-4; Canons 4-7; Rule 4.3. What are a lawyer's ethical duties when another party to a litigation or transaction is self-represented? Does the Code of Professional Responsibility limit what a lawyer may say to a self-represented person?

OPINION
I. Introduction
Among the many changes to courts in the State of New York in the past two decades has been a sharp increase in the number of self-repre-
There are nearly 1.8 million self-represented litigants in the New York State Unified Court System, according to a recent estimate. 


Undoubtedly, the widespread foreclosure and credit crises will further increase that number as more people, unable to afford legal representation, must nonetheless come to court to protect and assert their rights. Cf. Margery A. Gibbs, More Americans serving as their own lawyers, Associated Press News Wire, Nov. 11/25/08 (discussing the increasing numbers of self-represented litigants in domestic disputes).

Self-represented litigants provide many and varied challenges for tribunals. Some self-represented persons may have difficulty comprehending the rules and procedures of a tribunal. Others may not be able to adequately articulate facts, causes of action, or the relief they seek. Some may even misapprehend the respective roles of judicial officers, court personnel, or opposing counsel. The inexperience of self-represented persons can lead to additional litigation or motion practice, resulting in cost and delay for all parties, and sometimes an order setting aside an executed agreement. See, e.g., Cabbad v. Melendez, 81 A.D.2d 626, 626 (2d Dep’t 1981) (vacating consent judgment “inadvertently, unadvisably or improvidently entered into” by self-represented, non-English-speaking tenant (citation omitted)); 600 Hylan Assocs. v. Polishak, 17 Misc.3d 134(A) (2d Dep’t 2007) (table decision), text available at 2007 WL 4165282; see also Schaffer Holding LLC v. Fleming, 1 Misc.3d 131(A) (2d Dep’t 2003) (table decision), text available at 2003 WL 23169883 (affirming order vacating stipulation).

1. Persons proceeding in legal matters without an attorney are often interchangeably referred to as “pro se,” “self-represented,” or “unrepresented.” This opinion uses the term “self-represented person/party” to refer to non-attorneys who are representing themselves in a litigation or transaction in which one or more other persons are represented by counsel. Corporations may not appear self-represented in court in New York.

2. Informal surveys of court managers in the New York City Housing Court and New York City Family Court in 2003 revealed that “most litigants (Family Court, approximately 75%; Housing Court, approximately 90%) appear without a lawyer for critical types of cases: evictions; domestic violence; child custody; guardianship; visitation; support; and paternity.” Office of the Deputy Chief Administrative Judge for Justice Initiatives, New York State Unified Court System, Self-Represented Litigants in the New York City Family Court and New York City Housing Court at 1, in Self-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys (Dec. 2005), available at http://www.nycourts.gov/reports/AJJ_SellRep06.pdf. Similarly, survey respondents at the Town and Village Courts estimated in 2003 that 78% of litigants appeared without a lawyer “almost all or most of the time in small claims matters, 77% in vehicle and traffic cases, 47% in housing cases, 38% in civil cases, and 15% in criminal cases.” Id., Services for the Self-Represented in the Town and Village Courts at 3 (emphasis in original).
Judicial response to the increase in self-represented litigants is ongoing and evolving. For example, state and federal courts in New York have opened offices to aid self-represented individuals appearing in their courtrooms. Courses relating to self-represented litigants are now included in judicial training seminars.

There has, however, been little discussion of a lawyer's role when communicating with self-represented persons in the litigation and transactional contexts. This opinion considers whether the lawyer's duties to the court (e.g., DR 7-106, EC 7-13, EC 7-23, EC 9-4), the administration of justice (e.g., DR 1-102(A)(4)-(5), EC 2-7), and the lawyer's own client (Canons 4-7), require the lawyer to take proactive measures when dealing with an unrepresented person. We first address what communications between lawyers and their self-represented adversaries are permitted, and then articulate, consistent with the New York Code of Professional Responsibility (the “Code”), the newly-approved New York Rules of Professional Conduct and past precedent, a duty to warn self-represented persons who have objectively manifested their confusion about the opposing lawyer's role in a matter.

II. DISCUSSION

A. What Communications Are Permissible Under DR 7-104(A)(2)

The Code explicitly recognizes that lawyers' encounters with self-represented litigants are inevitable. Indeed, Ethical Consideration 7-18 rec-
ognizes that attorneys acting on behalf of a client “may have to deal directly with” self-represented persons in a wide variety of transactional and litigation contexts.

The primary guidance the Code offers for managing these interactions is found in DR 7-104(A)(2) which provides in pertinent part:

During the course of representation of a client a lawyer shall not . . . . [g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.

See also EC 7-18 (extending this obligation to an unrepresented “person”).

Even when the interests of a self-represented person “conflict with the interests of the lawyer’s client,” ethics opinions have construed this Code provision to permit more than a simple statement that the self-represented person should obtain counsel. For example, the New York State Bar Association Committee on Professional Ethics concluded that an executor of a will could, but was not required to, advise an unrepresented surviving spouse of the need to obtain a lawyer to address a legal issue, and also could identify the relevant issue (the spouse’s potential right to take an election against the estate) to be addressed by the lawyer. See N.Y. State 477 (1977). Even though the executor might take a contrary position on that issue, the opinion concluded that “to remain silent in the face of the surviving spouse’s expressed dissatisfaction with his testamentary share might seem somewhat unfair and could, under certain circumstances, tend to mislead.” The opinion further stated that it would be permissible for a lawyer to freely provide to a self-represented non-client information that is “purely a matter of fact and non-privileged,” so long

5. The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the “Rules”), which will become effective and replace the Code on April 1, 2009. Rule 4.3 provides: “In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.” Although the term “legal advice” in Rule 4.3 suggests a narrower scope than the term “advice” in DR 7-104(A)(2), we see no need to discuss or resolve a possible distinction for the purposes of this opinion.
as it otherwise would be ethically permissible to do so (e.g., no confidences or secrets would be revealed in violation of DR 4-101).

The New York County Lawyers’ Association addressed a lawyer’s ability to negotiate a settlement with an adverse party who had discharged her attorney. See N.Y. Cty 708 (1995). The opinion concluded that once an attorney had verified that the adverse party was no longer represented, she could communicate with the adverse party directly about the lawsuit and continue the negotiations—but could not render any advice other than to secure counsel. The opinion cautioned, however, that under the circumstances presented, the attorney had an affirmative duty to advise the self-represented party to seek counsel while flagging a particular legal issue:

At the outset of their dealings, . . . inquirer should advise [the unrepresented] plaintiff that there may be legal issues, such as the possible [discharged] attorney’s charging lien, affecting plaintiff’s right to recovery under whatever settlement is reached and that plaintiff should consult a lawyer to advise him about such issues because inquirer is barred from doing so.

The inquiring attorney had expressed her concern that any settlement she reached with the unrepresented person might be affected by the charging lien of the former lawyer. Thus, it appeared that the inquirer’s client could have been adversely affected had the unrepresented person failed to consider the impact of a potential charging lien before agreeing to a settlement.

More recently, the New York State Bar Association Committee on Professional Ethics recognized that in a governmental investigation, a government lawyer speaking to a self-represented person may, but is not required to, inform her of the need to retain counsel and alert her to the right against self-incrimination. See N.Y. State 728 (2000). The opinion reasoned that “the rule [DR 7-104(A)(2)] has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel.” Id. (citing N.Y. State 477 (1977) and N.Y. State 708 (1998); see also ABCNY Formal Op. 2004-3 (government lawyer “may advise” an unrepresented agency constituent of the “non-controvertible” legal proposition that “under no circumstances may the constituent testify falsely”). Concluding that the right against self-incrimination was such “non-controvertible information,” and recognizing that a government attorney has a duty to “seek justice” even in civil matters (EC 7-14), the opinion

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stated that a government attorney “might reasonably conclude” that the
government’s “interest in dealing fairly with the public” warrants advis-
ing the unrepresented person to retain a lawyer even if a private attorney
would be “disinclined” to do so.

Finally, the New York State Bar Association Committee on Professional
Ethics examined the duties of a government lawyer when the other party
to pending negotiations, although represented, was unaccompanied by
its lawyers at a meeting. See N.Y. State 768 (2003). The opinion also con-
sidered the related issue of what a lawyer may do when she does not know
that the other party is represented by counsel. Addressing a situation analo-
gous to the lawyer who negotiates with a self-represented party, the opin-
ion concluded that it would be permissible for the lawyer to describe her
client’s own position in negotiations. It further found that the lawyer
would not violate DR 7-104(A)(2) by providing certain indisputable infor-
mation to the unrepresented party, such as the filing requirements of the
lawyer’s agency client. See id.

The teachings of these opinions are, essentially, three-fold. First, a
lawyer may, but need not, advise a self-represented party to retain counsel
and identify the legal issues that could be usefully addressed by counsel.
Second, the lawyer may be obligated to render this advice when it would
advance the interests of her own client to do so. Third, the lawyer may,
but need not, provide certain incontrovertible factual or legal informa-
tion to the self-represented party, such as her client’s own position in
negotiations, non-negotiable procedural requirements for doing business,
or the existence of a legal right such as the right against self-incrimina-
tion. We concur with each of these conclusions.

We also identify an additional option for matters pending before a
court or other tribunal. In light of the efforts of a growing number of courts
to provide support for self-represented litigants, we conclude that it is also
appropriate for a lawyer to direct a self-represented adversary to any avail-
able court facilities designed to aid those litigants, such as an Office of
the Self-Represented, or to a clerk or other court employee designated to
orient the self-represented person through the litigation process.6

6. Although we believe that interactions between lawyers and self-represented persons typi-
cally will be far different than the relationship between a corporation’s lawyer and the
corporation’s unrepresented employees that we addressed in ABCNY Formal Op. 2004-2, we
acknowledge that there may be situations where a lawyer should not advise a nonclient to
seek counsel. Indeed, we conclude that a lawyer is obligated to render such advice only where
it is in the interest of the lawyer’s client to do so, or the self-represented person has demon-
strated confusion about the lawyer’s role.
B. Duty To Clarify the Lawyer’s Role

A lawyer engaging in any of these permissible communications, or choosing not to make them, should remain mindful of the need to avoid misleading the self-represented party. See DR 1-102(A)(4) (forbidding “conduct involving dishonesty, fraud, deceit, or misrepresentation”); DR 7-102(A)(5) (forbidding a lawyer from “[k]nowingly mak[ing] a false statement of law or fact” in representing a client); Restatement (Third) of the Law Governing Lawyers (hereafter, “Restatement”) § 103(1) (2000) (in dealing with a constituent of the lawyer’s organizational client who is not represented by counsel, a lawyer “may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents”); cf. Niesig v. Team I, 76 N.Y.2d 363, 376 (1990) (stating, in the context of permissible interviews with self-represented employees of a lawyer’s corporate client who could not bind the corporation, that “it is of course assumed that attorneys would make their identity and interest known to interviewees” and otherwise comport themselves ethically).

Refraining from misleading or deceptive conduct, however, may not be sufficient to satisfy the requirements of the Code in all dealings with self-represented persons. For some self-represented persons, further action may be necessary. In that regard, we conclude that a lawyer should be ready, when dealing with a self-represented person, to clarify when needed that the lawyer (a) does not and cannot represent the self-represented person; (b) represents another party in the matter who may have (or does have) interests adverse to the self-represented person; and (c) cannot give the self-represented person any advice, other than to secure counsel, or, as described above, to consult an available court facility designed to assist self-represented persons.

The lawyer may provide this clarification at any time without violating DR 7-104(A)(2), but we conclude that she must do so whenever she knows or has reason to know that the self-represented person misapprehends the lawyer’s role in the matter. This may require the lawyer to repeat the clarification more than once. If the represented side of a case or transaction involves multiple individual attorneys, each attorney may have to explain her role in the matter. If the lawyer believes it necessary under the circumstances, the lawyer should also ask the self-represented person to confirm that she understands what the lawyer has told her.

Although research has not revealed any New York authority previously recognizing this duty to a self-represented person, we believe it is supported by existing ethics principles. The Restatement, for example, specifically recognizes the need to correct misunderstandings between lawyers...
and self-represented individuals when an organization’s attorney deals with an unrepresented constituent of the organization. Restatement, § 103(2) (“[W]hen the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer’s role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient.”); see also ABCNY Formal Op. 2004-3 (“When a lawyer . . . retained by an organization is dealing with the organization’s . . . constituents, and it appears that the organization’s interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents”) (citing DR 5-109(A). The nuances of client identity and the lawyer’s role are easily misunderstood when the lawyer is representing an organizational client. However, we believe the same logic compels clarification whenever a self-represented person objectively manifests her misunderstanding of a lawyer’s role. We therefore believe the duty should be extended as discussed in this opinion.

We depart from the Restatement’s “material prejudice” standard, however, and conclude that a stronger approach is appropriate under the Code (and the newly-approved Rules). When a self-represented nonclient objectively manifests a belief that an attorney for an adverse or potentially adverse party is also acting as her own counsel, or attempts to solicit or accept guidance from that attorney on legal issues, there is an inherent risk of material prejudice to the nonclient and an element of unfairness that warrants a clear affirmative statement by the lawyer that she is not the nonclient’s attorney. Moreover, we note, as the Restatement itself does, that failure to intercede when the self-represented person is acting under a misapprehension may adversely affect the interests of the lawyer’s client. For example, there could be prejudicial delay or additional expense if, as the result of a failure to correct a material misimpression, issues need to be re-litigated, agreements set aside, or attorneys disqualified. Cf. Restatement § 103 cmt. e (“Failing to clarify the lawyer’s role and the client’s interests may redound to the disadvantage of the [client] if the lawyer, even if unwittingly, thereby undertakes concurrent representation . . . .”).

In reaching this conclusion, we are mindful that not all self-represented persons are alike. Some may be highly sophisticated and experienced business people, capable of handling delicate negotiations or maneuvering through the court system unaided. Others may be relatively uneducated and intimidated by the procedures of our legal system. The lawyer should consider where a specific self-represented person falls along
that continuum in evaluating whether she has a duty to explain or clarify her role.

A lawyer also should determine, based on the facts and circumstances presented, whether the explanation to be provided to the self-represented person should be in writing. Relevant factors include, but are not limited to, the extent to which self-represented person has demonstrated her misunderstanding of the lawyer's role, and the existence or threat of litigation, where failure to make a clear record of communications could be prejudicial to the lawyer's client.

III. CONCLUSION

DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time, explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel.7 The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

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7. Nothing in this opinion alters a lawyer’s duties under DR 7-106(B)(1) and EC 7-23, generally requiring a lawyer to advise the tribunal of controlling legal authority not cited by any other party, regardless of whether it is adverse to her client’s position.
Conflicts Arising When Hiring Law School Graduates Who Participate in Law School Legal Clinics

The Committee on Professional and Judicial Ethics

**TOPIC:** Addressing conflicts faced by law firms when hiring law school graduates who work in legal clinics operated by law schools.

**DIGEST:** Upon hiring a law school graduate, law firms generally may accept or continue representations adverse to clients of the clinic where the graduate worked. When the firm’s representation involves a matter substantially related to the one previously handled by the graduate at the clinic, or the graduate acquired confidential information from her client that is material to the matter handled by the firm, the firm should implement adequate measures to screen the graduate upon commencement of employment to protect the confidences and secrets of her former client.

**CODE:** DR 4-101; DR 5-101a; DR 5-105; DR 5-108; DR 9-101
QUESTION

What are a law firm’s ethical obligations when addressing conflicts that arise in connection with hiring a law school graduate who previously provided legal services to a client under the auspices of her school’s legal clinic?

OPINION

I. INTRODUCTION

Most law schools run clinics offering free legal services to eligible clients. According to a recent survey, 85 percent of American law schools sponsor at least one clinic, and many operate multiple clinics covering a wide variety of legal fields ranging from family law to securities arbitration.1

The law students who staff the clinics gain invaluable real world experience helping clients resolve their legal problems. But this “on-the-job” training may create conflicts of interest once the students seek to parlay their academic achievements and practice skills into employment with law firms. For example, if the student’s clinical experience included representation of a client with interests adverse to a client of the law firm she hopes to join, the provisions of DR 5-108 of the Code of Professional Responsibility (the “Code”) would be implicated, requiring the firm to determine whether it can hire the student and continue to represent its client without violating the rule. This opinion provides guidance to firms for addressing that question.

II. APPLICATION OF DR 5-108 AND DR 5-105

When hiring a law school graduate who worked at her school’s legal clinic, a law firm must consider conflicts of interest that may arise once the graduate commences employment with the firm. See N.Y. State 774 (2004); N.Y. State 720 (1999); DR 5-105(E). This conflicts screening process necessarily would include consideration of the potential applicability of DR 5-108,2 which imposes certain restrictions on, among other things, representations affecting the interests of former clients of newly-hired lawyers joining the firm. DR 5-108(A) provides:


2. The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the “Rules”), which will become effective and replace the Code on April 1, 2009. New Rule 1.9 is substantially identical to DR 5-108.
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A. Except as provided in DR 9-101(B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

1. Thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client.

2. Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret becomes generally known.

In addition, DR 5-108(B) further provides:

B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

1. Whose interests are materially adverse to that person; and

2. About whom the lawyer had acquired information protected by DR 4-101(B) that is material to the matter.

In situations where DR 5-108 prohibits a lawyer from continuing or commencing the representation of a client, DR 5-105(B) prohibits the other lawyers associated in the same law firm from undertaking the representation. DR 5-105(B) provides in pertinent part:

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under . . . DR 5-108(A) or (B) . . . .

3. DR 9-101(B) in general provides that when a government lawyer accepts employment with a private law firm, other lawyers at the firm may represent a client in connection with a matter previously handled by the government lawyer, provided that the lawyer is effectively screened from any participation in the matter.

4. DR 4-101(B) provides in pertinent part that “a lawyer shall not knowingly: 1. Reveal a confidence or secret of a client. 2. Use a confidence or secret of a client to the disadvantage of the client. 3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.”

5. Rule 1.10 sets forth the provisions governing imputation of conflicts under the new Rules. Rule 1.10 effects no change to DR 5-105(B) altering the analysis of this opinion.
The provisions of the Code generally, and DR 5-108 and DR 5-105(B) in particular, are addressed to and regulate the conduct of “lawyers,” i.e., individuals admitted to the Bar, and do not specifically purport to regulate the activities of law students. Nevertheless, the provisions of the Code have been found applicable “to law students functioning as lawyers in clinical education programs.” ABCNY Formal Op. 1991-1, see also ABCNY Formal Op. 79-37 (same). Moreover, “unless the Code otherwise provides, the rules governing law firms are equally applicable to [a] law school’s legal clinic.” N.Y. State 794 (2006). Consequently, if a law student, L, worked at a clinic representing client C in a wage dispute with C’s employer, Company A, and law firm F represented Company A in that dispute, then absent the prior consent of C, DR 5-108(A) generally would impose the following restrictions following F’s employment of L: (i) L could not represent Company A in the wage dispute with C, and no other lawyer employed by F could continue to represent Company A in that dispute; and (ii) neither L nor any other lawyer at the firm would be able to represent any firm client with interests materially adverse to any client of the clinic, unless L could show that she did not personally represent the adverse clinic client and did not acquire any material confidential information regarding the client while working at the clinic.

III. SCREENING LAW SCHOOL GRADUATES

As noted, in general, the Disciplinary Rules of the Code do “not apply to non-lawyers.” NY Code of Prof’l Responsibility (prelim. stmt.). Nevertheless, the Code (and the newly adopted Rules) “do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment.” Id.

Law students, of course, are not members of the bar. Yet, when working in a legal clinic, a law student typically “will be functioning as a lawyer, [and] the clients involved justifiably will regard the student as a lawyer.” ABCNY Formal Op. 79-37. Mindful of this dual status, we must also consider the salutary objective of encouraging practical legal train-
ing without unduly limiting a student’s prospects for employment. Balancing the two, we believe that the conflicts rules can and should be applied to protect client confidences without unduly hampering students’ mobility following graduation.

In this connection, we note that the level of student involvement, and thus access to client confidences, varies among clinics. In many cases, the services rendered by law students may be substantial and ongoing when, for example, the students have primary responsibility for representing pro bono clients over an extended period of time. In those situations, a law firm/employer must take appropriate precautions whenever the interests of the student’s client are materially adverse to those of the client of the firm, the matters in question are substantially related, and/or the pro bono client has divulged confidences or secrets to the student that, if disclosed, would be material to the matter handled by the firm. In that event, the law firm employing the student following graduation should use an ethical screen to rebut any presumption (and eliminate any risk) that the new hire would share any confidences and secrets of her former pro bono client with other lawyers at the firm.

While the Code “specifically endorses the use of screens only in cases involving government attorneys and judges,” ABCNY Formal Op. 2006-2, the Code’s failure to mention screens with respect to law students is not dispositive. (See id.) As noted above, the Code does not specifically regulate the conduct of individuals, such as law students, occurring prior to their admission to the bar. Moreover, the New York Court of Appeals has refused to adopt an irrebuttable presumption that all lawyers in a law firm have knowledge of all confidences or secrets disclosed to any one lawyer in the firm. Indeed, the court has held that such a rule “unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of [a] former client’s confidences and secrets.” Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 309 (1994). It therefore has found that a firm may in appropriate circumstances avoid imputation of the knowledge of a disqualified lawyer by “erect[ing] adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation.” Kassis v. Teacher’s Insurance & Annuity Ass’n, 93 N.Y.2d 611, 618 (1999). We believe that such measures are appropriate in this context and will be effective in achieving the salutary objective of protecting the confidences and secrets of affected clients without unduly restricting students’ employment opportunities.

The propriety of screening law school graduates finds support in the American Bar Association’s construction of its own imputed disqualifica-
tion rule, Rule 1.10(a), which is substantially identical to DR 5-101(D). Indeed, the ABA specifically has recognized that screening is an appropriate procedure to ensure that law students refrain from communicating confidences or secrets learned from the clients they represented while still in law school. As explained in the Comment to Rule 1.10 of the ABA Model Rules:

[The imputed disqualification rule] [does not] prohibit representation [by the law firm] if the [conflicted] lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter [handled by the firm] to avoid communications to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect.

See also Mulhern v. Calder, 196 Misc. 2d 818, 823 (Sup. Ct. Albany County 2003) (denying motion to disqualify law firm where firm screened potentially tainted non-lawyer from any involvement in matters handled by non-lawyer’s prior employer, an adversary of the firm); Restatement (Third) of The Law Governing Lawyers, § 123, Comment f (2000) (for purposes of the imputed disqualification rules, absent special circumstances, law students who clerk in law firms should be considered non-lawyer employees of the firm whose duties of confidentiality are not imputed to subsequent employers); D.C. Rules of Prof. Conduct, Rule 1.10(b) (2007) (“When a lawyer becomes associated with a firm . . ., [t]he firm is not disqualified if the lawyer participated in a previous [adverse] representation . . . prior to becoming a lawyer in the course of providing assistance to another lawyer”).

There may be some instances, however, where screening will not adequately protect the secrets and confidences of the law student’s former clients. For example, screening may be insufficient to avoid disqualifying a law firm if the law student had substantial exposure at the clinic to confidential information relevant to a matter handled by the law firm, and the size and structure of the firm make it difficult to effectively screen the law student from the firm lawyers involved in the matter. In that event, the firm may not be able to continue or accept a representation adverse to the law student’s former client unless the firm (a) obtains the informed consent of the former client, (b) does not hire or terminates the employment of the law student, or (c) withdraws from or declines the adverse representation. See N.Y. State 774 (2004).
Of course, if the firm determines that screening would be appropriate, it must adopt measures adequate to isolate the newly-hired lawyer and eliminate any involvement in the matter in question to ensure that confidential client information will not be disclosed by the new lawyer to others at the firm. In ABCNY Formal Op. 2006-2, we discussed the factors considered by courts in determining whether a law firm has effectively screened a conflicted lawyer from the rest of the firm, thereby enabling the firm to represent a client with materially adverse interests to the lawyer’s former client in a substantially related matter. Those factors include, among others, the timeliness of implementing the screen, the size of the law firm, the size of the office space, the accessibility of files and the relative informality of office interaction, including the extent of the disqualified lawyer’s contact with the firm lawyers working on the matter in question. The same factors are appropriately considered when assessing the effectiveness of measures used to screen a law school graduate upon commencement of her employment with the firm.

**IV. APPLICATION OF DR 5-101-A**

Not all clinical representations are substantial and ongoing. Some may be limited and short-term, such as where a law student has only a single meeting with a client who seeks narrowly circumscribed advice regarding, for example, how to respond to a summons. In that event, the provisions of DR 5-101-a may become applicable. Effective as of November 9, 2007, DR 5-101-a creates certain exemptions from the conflict rules of Canon 5 of the Code for lawyers who provide limited representation to pro bono clients under the aegis of a qualified legal assistance organization. That rule provides in pertinent part as follows:

A. A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

1. shall comply with DR 5-101, DR 5-105, and DR 5-108 of these rules concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in this part, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest;
2. shall comply with DR 5-101, DR 5-105 and DR 5-108 only if the lawyer has actual knowledge at the time of commence-
ment of representation that another lawyer associated with
the lawyer in a law firm is affected by those sections.

B. Except as provided in paragraph (A)(2), DR 5-105 and DR 5-108
are inapplicable to a representation governed by this section.

As set forth above, when the conditions of DR 5-101-a(A) are satis-

fied, i.e., a lawyer has no actual knowledge of any conflict upon com-
mencement of a qualifying pro bono representation, neither the lawyer
nor her law firm need comply with DR 5-105 or DR 5-108 to the extent
either rule would otherwise be triggered by the representation. The ques-
tion, then, is whether DR 5-101-a applies to a law school graduate who
provided limited legal services at a clinic operated by her law school. If so,
then when the graduate, L, accepts employment with a law firm, F, any
conflicts resulting from L’s prior work at a legal clinic will not be imputed
to F when she joins the firm, and F will not be disqualified from continu-
or accepting any representation adverse to the clients of the clinic,
provided that L had no actual knowledge of any conflict at the outset of
her representation of C, her client at the clinic. See ABA Model Rules of
Professional Conduct, Rule 6.5, Comment 4 (“a lawyer’s participation in
a short-term limited legal services program will not preclude the lawyer’s
firm from undertaking or continuing the representation of a client
with interests adverse to a client being represented under the program’s
auspices”).

In construing DR 5-101-a, we note that the rule, while “not a model
of draftsmanship,” apparently was not adopted with the clinical training
activities of law students in mind. See Roy Simon, Simon’s Code of Prof’l
Resp. Ann., DR 5-101-a at 771 (West 2008). Rather, it appears principally
intended to encourage pro bono work by relaxing the conflict of interest
rules for members of law firms who, in addition to representing paying
clients, wish to simultaneously provide short term pro bono legal services
through programs sponsored by legal services organizations, courts or
government agencies. Id. To that end, the rule, among other things, per-

7. This conclusion is subject to the proviso, found in DR 5-101-a(E), that the “provisions of
this section shall not apply where the court before which the representation is pending
determines that a conflict of interest exists or, if during the course of the representation, the
attorney providing the services becomes aware of a conflict of interest precluding continued
representation.”

8. ABA Model Rule 6.5, DR 5-101-a and New York Rule 6.5 are substantially identical.
mits lawyers to represent pro bono clients without conducting a conflicts check unless they have “actual knowledge” of a conflict with a firm client upon commencement of the representation. The rule provides this accommodation because the programs to which the rule applies “are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest . . . before undertaking a representation.” Id. (quoting ABA Model Rule 6.5, Comment 1) DR 5-101-a also dispenses with the imputed disqualification rule, DR 5-105(B), because the limited nature of the services provided in a qualifying pro bono program “reduces the risk of conflicts of interest with other matters being handled by the lawyer’s firm.” ABA Model Rule 6.5, Comment 4.

The provision eliminating the need to clear conflicts plainly is designed to facilitate the ability of an admitted lawyer working full time at a law firm to simultaneously represent pro bono clients under the auspices of a qualifying legal services program. Law students, in contrast, typically would not need to rely on this provision when, as is usually the case, they begin their clinical work before receiving or accepting offers of employment from a law firm. But the provision potentially could be applicable where, for example, the student accepts an offer of employment with a firm during her third year of law school while still working at the school’s clinic, albeit without knowledge of any existing conflict.9 We see no reason why in this context a law student should be treated any differently under the rule than an admitted attorney already working at a law firm. Indeed, the student would have, if anything, even greater justification for relying on the rule because until she joins the firm, she would have little, if any, ability to systematically screen for conflicts of interest.

We further note that for the rule to apply to a law school graduate, the graduate’s prior work at the clinic would have to be limited to “short-term limited legal services,” defined to mean the provision of “legal advice or representation free of charge as part of a [qualified legal services] program with no expectation that the assistance will continue beyond

9. We note that if the student had substantial responsibility for representing a client at a clinic and had knowledge of a conflict at the time she sought or considered accepting future employment with a law firm, she could not continue her representation of the pro bono client absent receipt of the client’s consent following full disclosure of the conflict. See ABCNY Formal Op. 1991-1. Conversely, if the law student played a minor role at the clinic, the student might be able to continue the representation while seeking employment with the firm without needing to obtain client consent. See Peter A. Joy and Robert Kuehn, Conflict of Interest and Competency Issues in Law Clinic Practice, 9 Clinical L. Rev. 493, 549 (2002); ABA Formal Op. 96-400.
what is necessary to complete an initial consultation, representation or court appearance." DR 5-101-a(C)\textsuperscript{10} If the clinical assignment meets the definition of "short-term limited legal services," there is less risk that conflicts will arise between the pro bono representation at the clinic and the other matters handled by the law firm that subsequently employs the law student. See ABA Model Rule 6.5, Comment 4.

CONCLUSION

When addressing conflicts that may arise in connection with hiring a law school graduate who represented one or more pro bono clients through participation in her school’s legal clinic(s), law firms must balance a number of competing interests, including: (i) the interest of the graduate’s former client in protecting her secrets and confidences; (ii) the interests of other clients in being represented by the counsel of their choice; and (iii) the interests of both law students and law firms in not unduly restricting the students’ employment opportunities. In most cases, when the interests of the graduate’s former client are directly adverse to a current client of the law firm, the appropriate balance is struck by permitting the law firm to continue representing its client, while effectively screening the graduate from any involvement with the matter in question or from contact with the firm lawyers handling it. There may be instances, however, where screening would not adequately protect the confidentiality interests of the graduate’s former client, such as where the graduate gained significant exposure to the client’s confidences, and the structure and practices of the firm make it difficult, if not impossible, to assure that the confidences will not be shared with others at the firm. In that event, the firm may conclude that it must withdraw from the adverse representation unless it can obtain the former client’s consent to the representation after full disclosure of the conflict.

\textit{February 2009}

\textsuperscript{10} In addition, the legal clinic or law student “must secure the client’s informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of DR 4-101,” i.e., the student will have a continuing obligation to preserve the confidences and secrets of the client during and after the representation. DR 5-101-a(D).
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The United Nations Convention on the Rights of Persons With Disabilities

The Committee on Legal Issues Affecting People With Disabilities

I. INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities ("the Convention" or "CRPD") became binding international law on May 3, 2008, an historic event that promises to improve the lives of some 650 million people with disabilities throughout the world. The Convention has been called "revolutionary" by some commentators for its holistic and visionary approach to disability, rejecting the traditional individual, physical, and medical model for one that views disability as the consequence of the impaired individual's interaction with an unaccommodating society.

The CRPD is noteworthy in several respects: it is the first human rights treaty of the 21st Century, it was negotiated in record time (fewer than five years), and had record input from people with disabilities acting under the umbrella of the International Disability Caucus, an advocacy organization.1 In little more than one year after being opened for signature, having been ratified by more than the requisite twenty nations, the CRPD became a legally-enforceable treaty. As is set forth at Part IV of this

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1. The text of the Convention, reports of the negotiating sessions leading to its completion, lists of the myriad non-governmental organizations participating in the sessions, lists of the countries that have signed and ratified the Convention, and a wealth of additional background information are available at un.org/esa/socdev/enable.
Part II of this report summarizes the CRPD's provisions. Part III compares key provisions of the CRPD with United States law. Part IV discusses the CRPD's significance and concludes with a recommendation that it be ratified by the United States.

II. SUMMARY OF THE CONVENTION'S PROVISIONS

The CRPD consists of a Preamble setting forth its visionary philosophy, and fifty Articles. The first five Articles (sometimes referred to as “Cornerstone Principles”) state the Convention’s purpose, define key terms, articulate fundamental principles, and establish the general obligations of ratifying nations (called “States Parties”). Articles 6 through 30 set goals and mandates regarding civil and political rights (Articles 12 through 20) and economic, social, and cultural rights (Articles 22-30); they also contain several “tailored” provisions covering specific matters such as natural disasters and emergency planning. The remaining Articles address the Convention’s monitoring and enforcement mechanisms and other procedural issues (Articles 31 through 50).

A United Nations oversight committee (“the Committee”) is created at Article 34 to monitor compliance with the Convention. An Optional Protocol accompanying the Convention establishes Committee procedures for addressing complaints of Convention violations made against particular States Parties. By ratifying the Optional Protocol, a State Party consents to the Committee’s jurisdiction to address such complaints; in the absence of such ratification, the Committee will not receive or consider complaints regarding that State Party.

The Convention neither creates a private right of action nor requires State Parties to create such a right. Instead, enforcement of the Convention’s requirements occurs through the reporting and monitoring mechanisms created in Article 34 and—if the Optional Protocol has been ratified by a particular State Party—by the Committee’s responses to complaints against that State Party from individuals or groups.

The Convention was opened for signature by all States (and regional organizations) on March 30, 2007. (Article 42). It then became subject to ratification by signatory States Parties, confirmation by signatory regional organizations, and “accession” by non-signatory States. The Convention

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2. Professor Maya Sabatello lecture, NYC Bar Association, Committee on Legal Issues Affecting People with Disabilities, February 13, 2008 (“Sabatello”).
“entered into force,” i.e., became binding international law, 30 days after ratification or accession by twenty States had occurred (Article 45), and the Optional Protocol also became effective, having been ratified by more than ten States. When this paper went to press, the Convention had been signed by one hundred and thirty-nine States and ratified by forty-four States, and the Optional Protocol had been signed by eighty-two States and ratified by thirty-three States.*

The Convention’s key provisions are summarized below.

The Preamble

Notably, the Convention’s authors were unable—due to philosophical differences—to agree on a definition of “disability.”3 The resulting compromise was to define it parenthetically at paragraph (e) of the Preamble and to offer another non-exhaustive definition in the body of the Convention (see the discussion of Article 1, below). The Preamble states:

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others, . . .

This description of disability as not an individual’s condition but rather the flawed interaction between that impaired condition and society’s adaptation to it, departs radically from conventional thought and is a core concept of the Convention.

The Preamble identifies myriad factors underscoring the need for the Convention, including each individual’s inherent dignity, worth, and right to equality; the importance of mainstreaming disability issues as part of strategic development; the need to fight discrimination and to protect human rights; the need to improve the living conditions of persons with disabilities; the importance of autonomy and self-determination; the particular risks faced by women and children with disabilities; the fact that the majority of persons with disabilities live in poverty; the crucial need to make all spheres of life accessible to persons with disabilities; and the key importance of the family. This recitation culminates in the Preamble’s final paragraph, which expresses the drafters’ confidence in the Convention’s salutary impact:

*The numbers above are current as of the date of the publication of this issue of The Record.
Convinced that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries, . . .

Article 1: Purpose

The Convention's purpose is stated in sweeping language: "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

"Disability" is then partially defined:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 2: Definitions

Five terms are given broad definitions here, including "reasonable accommodation," which is described as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." The concept, critical to the Convention, of "universal design" is defined as the design of products, environments, programs, and services which do not require additional adaptation for use by all persons. Finally, "discrimination on the basis of disability" is defined to include conduct which has the purpose or effect of denying equal rights and freedoms.

Article 3: General principles

Echoing the concepts highlighted in the Preamble, eight core principles of the Convention are identified: Respect for the individual's inherent dignity, autonomy, and independence; non-discrimination; full par...
participation in society; respect for human diversity; equality of opportunity; accessibility; gender equality; and children’s rights.

**Article 4: General obligations**

This Article speaks generally to States Parties’ obligations to prevent discrimination against, promote accessibility by, and work to achieve full realization of economic, social, and cultural rights for persons with disabilities.

**Article 5: Equality and non-discrimination**

The Convention here stresses the right of individuals with disabilities to equal protection and benefit of the law, prohibits discrimination, and requires that reasonable accommodation be provided. Notably, “affirmative action” measures, such as preferential treatment to achieve equality, are explicitly barred from being characterized as (reverse) discrimination. (subsec. 4.)

**Article 6: Women with disabilities; Article 7: Children with disabilities**

These two Articles note that females with disabilities are doubly victimized by discrimination, and that in matters affecting children with disabilities, the best interests of the child should be paramount and the child’s views and preferences should be respected to the extent appropriate.

**Article 8: Awareness-raising**

States Parties are obligated to undertake educational campaigns to eliminate discrimination against and foster respect for persons with disabilities.

**Article 9: Accessibility**

One of the Convention’s key provisions, this Article mandates equal access for persons with disabilities to the physical environment, transportation, information and communication including the Internet, and all facilities open to the public. Braille signage is encouraged, as is early incorporation of accessible technology into technology system design.

Space limitations do not allow for discussion of each of the remaining substantive Articles of the Convention. Section III of the Report highlights specific Articles of particular interest to lawyers in the United States.

The “procedural” Articles require States Parties to collect data on their implementation efforts and report periodically on their progress to the international Committee established in Article 34. The Committee, consisting initially of twelve experts to be elected by the States Parties, in turn makes recommendations to States Parties and submits biennial reports to
the United Nations. (The Committee also addresses complaints made against particular States Parties which have ratified the Optional Protocol.) In addition to the Committee, the Convention also establishes a Conference of States Parties to be held regularly.

With respect to monitoring compliance with the Convention, it is noteworthy that the Convention requires States Parties to ensure full participation of persons with disabilities and their representative organizations in the monitoring process.

Finally, Article 46 permits Reservations to accompany a State’s ratification of the Convention, so long as the Reservations are not incompatible with the Convention’s object and purpose.

III. COMPARISON OF CRPD PROVISIONS WITH U.S. LAW

Article 7. Children’s Rights

Several provisions of the CRPD differ from federal laws in the United States relating to the rights of children with disabilities.

In the realm of education, the CRPD contains a more robust vision for educating children with disabilities than the primary U.S. statute related to education for children with disabilities, the Individuals with Disabilities Education Act (“IDEA”). The CRPD provides that on the basis of equal opportunity, States Parties must ensure an education system directed, inter alia, to developing to their “fullest potential” the mental and physical abilities of persons with disabilities. This systemic objective of developing the child with disabilities’ “fullest potential” is absent from the IDEA (in contrast to its inclusion in other domestic education

5. See, Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities (CRPD) at 20-21. National Council on Disability, May 12, 2008, (“NCD Report”). The NCD is an independent federal agency composed of members appointed by the President of the United States, by and with the advice and consent of the U.S. Senate. The NCD provides advice to the President, Congress, and executive branch agencies to promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

6. UNCRPD, Article 24(1) (“States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education at all levels and lifelong learning directed to...(b) the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential”).
law)\(^7\) and, depending on how it is interpreted, could conceivably have budgetary consequences for school districts. However, in articulating the rights of individual children as opposed to aspirational principles, the CRPD is similar to the IDEA, stating that children with disabilities have the right to “free, quality education.”\(^8\)

Article 7 of the CRPD also contains key concepts drawn directly from the Convention on the Rights of the Child, which was adopted in 1989. These concepts in turn intersect with the CRPD’s core principles of autonomy and independence for persons with disabilities. Children are given the power to express their views on all matters affecting them, albeit weighted in accordance with their age and maturity.\(^9\)

The protections found in Article 7 are meant to be horizontally integrated across all other provisions of the Convention.\(^10\) Thus, the CRPD provides children with disabilities the right to express their views freely and assist in decisions regarding what constitutes an appropriate education. Moreover, importantly, the CRPD specifies that children shall be provided with “disability and age-appropriate assistance to realize that right.”\(^11\)

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\(^7\) See, e.g., No Child Left Behind Act of 2001 §1234(a) (“In carrying out an Even Start program under this subpart, a recipient of funds under this subpart shall use those funds to...assist children in reaching their full potential as learners.”); §1802 (“The purpose of this part is to provide for school dropout prevention and reentry and to raise the academic achievement levels by providing grants that...(1) challenge all children to attain their highest academic potential...”).

\(^8\) UNCRPD, Article 24 (2)(b) (“States Parties shall ensure that...[p]ersons with disabilities can access an inclusive, quality and free primary and secondary education on an equal basis with others in the communities in which they live”). The IDEA similarly grants a “free appropriate public education.” 20 U.S.C. § 1400(d)(1)(A)(2005). The Supreme Court has held that a child’s educational programming need only be calculated to provide some educational benefit to the child, rather than to ensure that the child reaches his or her maximum educational potential. Board of Education v. Rowley, 458 U.S. 176 (1982). Although it is not clear how the CRPD’s language requiring a “quality” education will be interpreted, it appears that the CRPD’s provision regarding “fullest potential” is limited to systemic objectives, and would not apply on an individual rights basis.

\(^9\) UNCRPD, Article 7(3) (“States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right”).


\(^11\) UNCRPD, Article7(3).
This model of “supported” decision-making, as opposed to “substituted” decision-making, is a key component of increased autonomy for persons with disabilities found throughout the CRPD. The CRPD recognizes the importance of developing this decision-making power early in the life of a person with a disability.

Although the IDEA anticipates that students’ interests will be taken into account in planning for the transition from the secondary education system to adulthood, the IDEA generally does not require input from the children with disabilities themselves for aspects of primary or secondary education. For example, under the IDEA students are not required or encouraged to be present at Individualized Education Program (IEP) planning meetings that map out and determine the content and structure of all educational programs and services for the academic year. Multiple considerations are taken into account when formulating this plan, including the concerns of the parent, but the perspective of the child is notably absent. Parents are given directly enforceable rights with respect to the child under the IDEA, and parents are given full decision-making authority until the child reaches the age of majority.

Article 12. Equal recognition before the law

Much like Article 7 (Children’s Rights), Article 12 mandates a “supported decision-making” approach in place of the “substituted decision-making” approach that characterizes prevailing American law in the context of persons with disabilities who are unable to exercise full legal capacity. Were the Convention to gain the force of law in the United States,

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13. Under the IDEA, the child is allowed to participate “whenever appropriate,” however, the child is not a required member of the IEP development team. 20 U.S.C. § 1414(d)(1)(B)(vii). The interests of the child are only taken into account for purposes of developing a transition plan to post-secondary activities and these services begin to be developed at age sixteen. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII) and 20 U.S.C. § 1401(34)(B) (transition services are in part based on “the child’s strengths, preferences, and interests”).


some commentators believe that Article 12 could alter dramatically the landscape of guardianship and other law concerning the representation of persons with disabilities, opining that the Article is “the most revolutionary of the new norms” reflecting a profound paradigm shift in society’s approach to such issues.  

Article 12 affirms that persons with disabilities shall enjoy legal capacity on an equal basis with others in all spheres of life, and requires that States Parties provide “the support they may require” in exercising their legal capacity. It is this phrase that some human rights activists have embraced as prohibiting mandatory guardianships, i.e., the appointment of a guardian against one’s will who then is empowered to make critical decisions for the person with disabilities, and permitting instead only “support” to the person with disabilities. Under this interpretation, it has been argued that the concept of “therapeutic necessity” may no longer justify forced medication or other psychiatric treatment and may no longer prevent those interventions from being considered “torture.”

The Article further requires safeguards to ensure that all measures relating to the exercise of legal capacity “respect the rights, will and preferences of the person,” “are free of conflict of interest and undue influence,” and are proportional to the particular circumstances, limited in duration, and subject to regular review by an independent entity.

Finally, Article 12 mandates the equal right of persons with disabilities to own, keep, and inherit property, control their own financial affairs, and have access to all forms of financial credit.

During the drafting of Article 12, vigorous debate ensued over a footnote that would have limited Article 12’s sweep by restricting the meaning of “legal capacity” in three of the six official U.N. languages to “capacity for rights,” thus excluding “capacity to act”; ultimately the footnote was omitted from the Convention. (However, the countries favoring the footnote may try to achieve a similar result by adding Reservations to the Convention pursuant to Article 46.)

Notwithstanding Article 12’s potential impact on practices throughout the world, it does not appear to differ significantly from the laws concerning legal capacity and guardianship in the United States, at least

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17. Minkowitz.
as it has developed in New York (these areas being creatures of state law). In 1986, the New York Court of Appeals held that the due process clause of the State Constitution affords involuntarily committed mental patients the fundamental right to refuse antipsychotic medication, using language quite similar to that of CRPD's Article 12:

> In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires. . . . This right extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness. 19

Moreover, the Court, citing “the nearly unanimous modern trend in the courts,” rejected the notion that an involuntarily committed mental patient is presumptively incompetent to exercise his or her right to make treatment decisions. 20

Since the overhaul of its laws in 1993, New York has taken a progressive approach to guardianship issues resembling that of Article 12, which stresses the fundamental importance of human autonomy, independence, and self-determination, the need for the least restrictive guardianship as possible, and the need for vigilant oversight. 21 That said however, the powers of a guardian (after appointment in accordance with due process) are sweeping. A guardian appointed to provide for “personal needs” may include the ability to consent to or refuse routine major medical or dental treatment, or choose a place of abode, e.g., a nursing home. 22

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20. Id. at 494 (collecting cases so holding from Ohio, Arizona, Kentucky, Massachusetts, and Oklahoma).

21. Article 81 of New York Mental Hygiene Law; see also, e.g., www.cqc.state.ny.us/counsels_corner/cc40htm.

22. See http://home.rochester.rr.com/rec/guardianship.htm: “Depending on what the evidence shows about the likelihood of harm, the judge then appoints a ‘guardian for property management’ to administer the person’s finances, a ‘guardian for personal needs’ to make decisions about the individual’s personal life, or a ‘guardian of the person and property’ responsible for both finances and personal matters. At times, the court may appoint two
It is unclear how the “supported decision-making” paradigm of CRPD Article 12 will work in practice, particularly in cases where a mentally ill person is found to be unable to make decisions regarding medication, treatment or other matters. As the CRPD is implemented, U.S. policymakers will study with interest the approaches taken by States Parties to resolve these issues.

Article 13. Access to Justice

Article 13 of the Convention addresses access to justice for people with disabilities. It reads:

1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 13’s broad mandates differ in some respects from the piecemeal proscriptions contained in various United States statutes concerning access to justice, namely, the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act (“Section 504”), the Fair Housing Act, and the Architectural Barriers Act. For purposes of this report, Section 504 and the ADA are essentially interchangeable: Section 504 governs the federal government and grantees, while the ADA primarily added coverage to the States and state programs, private employers, and private places of public accommodation.

The ADA protects people with disabilities from discrimination by separate guardians, one for finances and one for personal needs. Although the powers given by the court may be quite sweeping, the guardian must still allow the incapacitated person “the greatest amount of independence and self-determination” in light of the individual’s “functional level,” and “personal wishes, preferences and desires.” Even if authorized to decide where the incapacitated person lives, the guardian cannot have the person transferred to a nursing home unless the court order specifically approved such a transfer. If the guardian concludes that the person should be in a nursing home, the guardian must go back to court for a separate order authorizing admission to a nursing home.”

governmental and private entities in many spheres of life, including access to justice. The ADA’s language is mandatory, though competing financial pressures may excuse governments from redressing problematic situations. Title II of the ADA prohibits exclusion from state and local governmental programs, services, and activities. 42 U.S.C. § 12132 states:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Under the ADA, a “public entity” includes any state or local government, any department, agency, or instrumentality of such government(s) (as well as AMTRAK and commuter rail agencies).24

The Architectural Barriers Act, passed in 1968, requires that new facilities built with federal funds (such as courthouses) be accessible to people with disabilities. The federal government and entities receiving federal financial assistance are also covered under nearly identical language in Section 504 of the Rehabilitation Act of 1973.25 These provisions—requiring “program” but not in all cases architectural accessibility—effectively require a substantial degree of architectural accessibility in buildings built, renovated, purchased, leased, or otherwise used by local and state governments, and (under Section 504 and the Architectural Barriers Act) the federal government, as well as by entities receiving federal financial assistance (frequently schools and universities). A public entity is required to “maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities.”26 These provisions cover a wide array of programs requiring access for people with a broad range of disabilities, including not only mobility impairments, but also hearing, vision and cognitive impairments, to all services provided and to public meetings.

The requirements of Titles I and II of the ADA, and of Section 504,
extend throughout the judicial system, including employment, jury service, trial procedures and court room accessibility. Required modifications, in addition to curing obvious physical impediments, might include provision of sign language interpreters, use of microphones or modifications to acoustic environments for people with communication disabilities, and readers and facilitators for people with visual disabilities. “Implicit and paramount to accessibility is training staff in effective communication styles and disability awareness and on the correct use and maintenance of equipment.”

Two recent Supreme Court decisions have rejected Eleventh Amendment sovereign immunity defenses asserted by states, upholding the ADA’s application to state conduct related to access to justice. In Tennessee v. Lane, the Court held that Congress had gathered sufficient evidence of fundamental rights violations against people with disabilities, including denial of access to a court, to warrant abrogation of Tennessee’s sovereign immunity. Further, the remedy Congress enacted was held “congruent and proportional,” because the “reasonable accommodations” mandated by the ADA were not unduly burdensome and disproportionate to the harm. Id. In Goodman v. Georgia, the Court held that prisoners’ claims brought under Title II of the ADA for damages against a State for conduct actually violative of the Eighth and Fourteenth Amendments are not barred by state sovereign immunity. Thus, although sovereign immunity remains a viable defense to ADA claims challenging other state and municipal conduct under the current Court’s approach, as to injunctive relief for core governmental functions such as providing access to court, public hearings, and corrections, the ADA is on stronger footing.

Falling within the definition of “government programs,” police activity is also covered by the ADA. “The ADA requires law enforcement

29. 544 U.S. 1031 (2005). Addressing the inmates’ allegations of lack of access to various facilities and services, the Court rejected the state’s claim of sovereign immunity as to claims deserving of constitutional protection, but remanded to determine what those were.
30. The Court has rejected the ADA’s reach to protect state employment under the Equal Protection Clause. Bd. of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) (Title I of the ADA was unconstitutional insofar as it allowed states to be sued by private citizens for money damages in employment cases.) Garrett held that Congress had not met the congruent-and-proportional test—i.e., that it had not amassed enough evidence of discrimination on the basis of disability to justify the abrogation of sovereign immunity.
agencies to make reasonable modifications in their policies, practices, and procedures that are necessary to ensure accessibility for individuals with disabilities, unless making such modifications would fundamentally alter the program or service involved.” 31 The DOJ provides materials for police departments to use in their training of officers so that they understand their obligations to people with disabilities. Compliance levels are unknown. Similar requirements apply to prisons. It remains to be seen how effective Goodman, supra, will be in spurring changes in state prisons.

Even if the U.S. were to ratify the CRPD, sovereign immunity would remain an important limitation on its power and that of any implementing legislation, with regard to state conduct. Congress is not authorized under the Treaty Power to abrogate sovereign immunity. Were the United States to enter into the Convention, to fully implement its requirements within each state would require Congress to pass legislation under the Fourteenth Amendment, with the rigorous findings required by the current Supreme Court, to enable effective private enforcement—an unlikely prospect. Instead, in all likelihood, the constraints of sovereign immunity would be noted in the reservations should the United States sign and ratify the treaty.

That said, and notwithstanding the above-described U.S. statutory scheme requiring access to justice, the CRPD would nonetheless strengthen enforcement of these rights. Lax enforcement in general, and the absence of effective retroactive relief under the ADA in particular, have been factors in preventing greater improvements in physical and program accessibility by the states. According to the National Council on Disability, “despite broad protective mandates [in current US domestic law], there are reasons to be concerned about the extent to which individuals with disabilities receive full and meaningful access to justice in practice.” 32 The Convention’s requirement that “States Parties shall ensure effective access to justice” might compel the federal government to exercise more proactively its power to require state compliance than it has under the ADA. Advocates could use these Convention requirements to press for needed changes in state legislatures and Congress, as well as within the federal Department of Justice. The Convention’s reporting requirements could also serve to highlight existing problems. For example, while the federal courts have undertaken reviews of accessibility of federal courts and their

procedures, only a minority of states have undertaken such reviews. Efforts to improve accessibility in courts have therefore been haphazard; while one county may undertake such a review, its neighboring county may not. More muscular federal enforcement—spurred on by the CRPD—could redress this problem.

**Article 19. Living independently and being included in the community**

Article 19 provides a strong, positive enunciation of the right of people with disabilities to live independently within the community. It reads:

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

The holistic approach of Article 19 contrasts dramatically with the piecemeal efforts of the U.S. to encourage inclusion in the community of people with disabilities.

In 1999, the United States Supreme Court held in *Olmstead v. L.C.*, that the unnecessary segregation of individuals with disabilities in institutions may constitute discrimination based on disability. The Court ruled

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that the ADA requires—with some caveats—states to provide community-based services rather than institutional placements for individuals with disabilities.

The ADA and its implementing regulations generally require services to be provided “in the most integrated setting appropriate to the needs of qualified individuals with disabilities,”35 and undue institutionalization qualifies as discrimination “by reason of ... disability.”36 The Olmstead Court therefore required states to provide community-based services where medically appropriate, subject to a “fundamental alteration” defense relating to financial constraints. After Olmstead, states are generally required to provide in community-based settings all services available in institutional settings. These might include medical, psychiatric, vocational, and other services, in addition to housing.

Despite the great promise of Olmstead, few states have made substantial progress in providing more community-based options. Financial policy in the area is complicated, but in short, too frequently federal and state funding remains geared to institutional care.37 Health and Human Services (HHS) has recently begun providing states with funding that “follows the person” rather than paying institutions, an initiative intended to enable states to develop community-based services; the program’s size, however, is limited. “Despite much talk about state and federal efforts to promote community integration after Olmstead, many individuals with disabilities have found that the only means of securing an opportunity to move to more integrated settings in the foreseeable future is through litigation.”38

As recognized by Article 19, community-integrated housing for people with disabilities is equally essential to achieving their full inclusion into

35. 28 CFR § 35.130(d).
Governmental involvement in this area is vital, because affordable accessible private housing is scarce or non-existent. The Fair Housing Act, as amended in 1988, prohibits housing discrimination against persons with disabilities and other protected groups, and covers housing that is privately-owned, receives Federal financial assistance, or is provided by State and local governments. The Fair Housing Act requires owners to make reasonable exceptions in their policies and operations to afford people with disabilities equal housing opportunities. It also requires landlords to allow tenants with disabilities to make reasonable access-related modifications to their private living space, as well as to common use spaces. The landlord is typically not required to pay for reasonable modifications, though federal funding may be available for modifications to common areas. Minimal accessibility requirements apply to new (or otherwise covered) multi-family housing so that it is “usable” by people with disabilities. The Fair Housing Act and the ADA have also been held to bar discriminatory governmental policies and zoning regulations restricting group homes for people with disabilities to certain limited areas.  

Prohibitive housing costs compound the difficulties created by inaccessibility for people with disabilities. The national average rent for a one-bedroom unit climbed to $715 per month and the studio/efficiency unit rent to $633 per month in 2006—both higher than the entire monthly income of people with disabilities who rely on the federal Supplemental Security Income (SSI) program. In many communities, even where states augment the amount, local rents still exceed these supports. Because of the absence of affordable private housing, people with disabilities may be forced to live in supportive housing, and thus too frequently in isolation. While domestic laws do provide tools for addressing the harms caused by exclusion, the CRPD goes further. As expressed by the National Council on Disability, “[u]nlike the CRPD mandate that states [must] ‘take effective and appropriate measures’ to ensure that persons with disabilities
live independently and in the community, the right as enunciated in *Olmstead* is not as strong.  

First, the CRPD does not appear to countenance the “fundamental alteration” defense available to U.S. public entities under *Olmstead*, which allows courts fashioning remedies to consider the costs of converting institutional housing to community-based housing and the conversion’s impact on other state programs. Moreover, *Olmstead’s* mandate does not extend to every individual with a disability but rather depends on such factors as type of disability, income level and other assets, availability of support from family members, and the individual’s domicile. Additionally, *Olmstead* arguably requires states to provide in community-based settings only those services already being provided in institutions. In this context, as currently treated by the courts, the “fundamental alteration” defense offers States an “escape hatch” missing from the CRPD mandate to “take effective and appropriate measures.”

Second, and more importantly, by requiring that States “take effective and appropriate measures,” the CRPD’s positive model of disability embraces a more holistic approach to removing the barriers to integration than the piecemeal measures available under *Olmstead*, the ADA and related statutes. “This is because civil rights laws [like the ADA] can prospectively prevent prejudicial harm, while equality measures are needed to remedy inequities that exist due to past practices.” Because the domestic non-discrimination laws are relatively recent and limited in scope, they cannot address the multitude of impediments—built up over the years and not correctible in the near term—which make living in the community difficult, if not impossible, for people with disabilities. Each of the anti-discrimination laws discussed above takes a discrete approach to a particular problem, and does so only prospectively.

A case in point is the ADA’s and Fair Housing Act’s approach to buildings. Both statutes require current structures to meet certain standards for accessibility, and impose more stringent standards on new structures. The availability of other accessible structures in the same city or neighborhood, however, is simply not a relevant consideration under these statutes, even though the accessible housing stock in the neighborhood or city as a whole is highly relevant to the practical options for people with disabilities. For example, if a city has developed in ways that impede independence, its few physically accessible buildings are likely to be newer, and more expensive. As a result, people with disabilities will likely have a

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41. NCD Report at 18.

42. Stein Overview.
far narrower choice of housing available and be less able to find equivalent housing as cheaply as those without disabilities—yet this global inequality is not addressed by U.S. disability laws.

The lack of accessible transportation, another serious impediment to independent living for people with disabilities, is similarly ignored; the ADA and Fair Housing Act do not consider transportation (or other factors) in determining whether discrimination in housing is occurring, and do not look at “the big picture” necessary to enabling people with disabilities to live independently. Finally, in the context of living independently, the CRPD requirement to provide “personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community” goes farther than Olmstead, which applies only to particular individuals with particular disabilities and mandates community-based settings only for those services formerly provided in institutions. In sum, the Convention’s positive mandate would require States to seek broader, more comprehensive solutions than are currently applied to the interrelated problems preventing many people with disabilities from living independently in an integrated manner in the community.

**Article 27. Employment**

The CRPD offers several critical provisions that are broader than U.S. federal law regarding employment rights of people with disabilities.

Article 27 of the CRPD contains two sections. The second, shorter section requires States to ensure that persons with disabilities are not held in slavery or servitude and are protected from “forced or compulsory labour” on an equal basis with others. Under U.S. law, the Thirteenth Amendment, ratified on December 18, 1865, as part of the post-Civil War Reconstruction era, prohibits slavery in the United States. Forced or compulsory labor is prohibited in the United States primarily by the Fair Labor Standards Act, 29 U.S.C. Ch. 8, and corollary state laws that require payment of minimum wages, mandatory overtime for non-excluded workers and often mandatory rest and meal breaks. There is therefore a very close overlap between the second section of the CRPD and U.S. law.

The first section of Article 27 lists clear obligations of States to protect and enhance the employment rights of persons with disabilities which exceed the protections offered by U.S. law, especially because the CRPD’s definition of “disability,” as noted supra, at pp. 234-235, is so expansive. As described by the CRPD’s authors, by “dismantling attitudinal and environmental barriers—as opposed to treating persons with disabilities as
problems to be fixed—those persons can participate as active members of society and enjoy the full range of their rights.”

The parallel employment protections in the U.S. are found principally in the ADA. Heralded at the time of its passage as the “Emancipation Proclamation” intended to dismantle barriers to full participation in the workforce by persons with disabilities, the ADA’s multi-step definition of a “person with a disability,” and the cramped construction of that definition by the Supreme Court, has severely constricted the statute’s reach. To be a “protected person” under the ADA, one must have a “physical or mental impairment” that “substantially impairs one or more major life activities,” and must also be “qualified” to perform the essential functions of a position either with or without an accommodation.” 42 U.S.C. § 12101. The ADA also borrows from Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, to include within its definition those who are “regarded as” disabled or have a “record of” disability.

In a series of decisions, the Supreme Court has virtually defined out of existence a “qualified individual with a disability.” In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court held that the determination of whether one was “substantially impaired in one or more major life activities” must take into account whether corrective devices such as eyeglasses mitigate the impairment. (As the dissent pointed out, a person without one or more limbs would not be disabled under the majority's opinion, since a prosthetic device could mitigate the impairment.) In *Murphy v. United Parcel Service*, 527 U.S. 516 (1999), the Court held that the petitioner was not “disabled” since he could function normally with blood pressure medicine and work as a mechanic, the job he was hired to perform. Although he was unable to work as a commercial driver, he was not “disabled” because he could perform one task (mechanic)—and to be designated “disabled” an employee must be unable to perform more than one task. And in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the Court held that an individual claiming to be disabled under the ADA must show that the alleged disability (monocular vision) substantially impairs a major life activity and cannot be compensated for by artificial aids such as technical devices or medicine.

Following its narrow interpretation of the ADA in *Sutton*, *Murphy*, and *Albertson's, Inc.*, the Court defined “major life activities” as only those activities that are “of central importance to most people's daily lives,”

and held that an impairment must be permanent or long-term. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002):

We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long term. See 29 CFR §§1630.2(j)(2)(ii)—(iii) (2001).

As a result of these decisions, persons with disabilities found themselves in a perfect “Catch 22:” if they are sufficiently impaired to be considered “disabled,” they may not be “qualified” to perform the essential functions of the job. The ADA’s goal of removing barriers to full participation in the workplace was consequently benefiting fewer and fewer people.

Fortunately, Congress’ response to the Supreme Court’s narrow construction of the terms “disability” and “significantly limits a major life activity” in ways that stripped the ADA of its original intent was to enact the ADA Amendments Act (“ADAAA”) of 2008. The ADAAA was signed into law on September 25, 2008, with an effective date of January 1, 2009. The ADAAA makes several significant changes to the 1990 law. Except in the cases of ordinary eye glasses or contact lenses, it rejects the Sutton holding that mitigating measures must be considered in determining whether an individual has a disability within the meaning of the ADA, by providing that impairments that are episodic (such as seizure disorder) or in remission (such as cancer) are covered disabilities if they “substantially limit[] a major life activity.” In the “rules of construction” section, the ADAAA clarifies that the Act must be “construed in favor of broad coverage of individuals under the Act, to the maximum extent permitted by the terms of this Act,” 42 U.S.C.A. § 12102 (4)(A), and explicitly rejects the overly-restrictive decision in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).

Although the ADAAA does include, as a concession to the business community, a provision that reasonable accommodations need not be provided to persons “regarded as” disabled, for the most part the new statute is a substantial victory for disability and civil rights communities, which will be watching closely its interpretation by the courts. If enforced in accordance with Congress’ clear intent, the ADAAA will bring the U.S. statutory prohibitions against discrimination in the workplace closer in line with the original intent of the 1990 Act, to dismantle barriers to full participation in the workplace by persons with disabilities.
In addition to the ADA, other federal statutes also protect persons with disabilities from employment discrimination. The Rehabilitation Act, *supra*, prohibits federal agencies, federal contractors (with contracts in excess of $10,000), and federal funding recipients from discriminating in employment against persons with disabilities; Section 503 of the Rehabilitation Act imposes a limited affirmative obligation for subcontractors to hire qualified persons with disabilities. 29 U.S.C. § 793 (1993). The Workforce Investment Act, 29 U.S.C. § 794 (“WIA”), prohibits discrimination against persons with disabilities who participate in federal job training and employment programs, and welfare to work programs. The Vietnam Era Victims Readjustment Assistance Act., 38 U.S.C. § 4212 (“VEVRAA”) requires federal contract employers to provide equal employment opportunities for disabled veterans. And finally, the Civil Service Reform Act of 1978, U.S.C. Title 5 (“CSRA”), applicable to most federal agencies, prohibits discrimination against persons with disabilities.

The above-described anti-discrimination laws, and particularly the ADA, do resemble the CRPD in some important respects. First, they prohibit discrimination (in the sense of preventing prejudicial harm, as opposed to remedying inequities). Second, at least the ADA if not all of the cited statutes, prohibits retaliation (via case law and the EEOC Compliance Manual, Section 8 (1998)). Third, the ADA and the Rehabilitation Act embrace the concept of “reasonable accommodation,” requiring employers to take reasonable steps to modify the workplace so that employees with disabilities can perform their duties. The concept of “reasonable accommodation” has been fleshed out by case law decided under these statutes, and by the EEOC Enforcement Guidance, to include such things as flexible work shifts, barrier-lifting accommodations such as large print, and appropriately-sized desks that do not present an “undue hardship” for employers.

Notwithstanding these similarities, the CRPD differs fundamentally from the U.S. statutory scheme. Above all, the CRPD’s holistic concept of disability would implement the right to employment in practical ways (barrier-less transportation and rights to accessible housing and education) which the ADA—even as amended—and related statutes simply do not adequately address.

In addition to its broad interpretation of disability, the CRPD also confers three tangible employment rights which are absent from U.S. law:

1) The Convention envisions “promot[ing] the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incen-
tives and other measures.” There is no comparable federal provision in the U.S. except for some minor requirements applicable to federal contractors set forth in the Rehabilitation Act, despite the impressive successes achieved by using affirmative action in the sphere of race discrimination (whether perjoratively labelled “quotas” or lauded as “goals”), to bring minorities long-excluded from certain positions, into the workforce. Incentives in the form of federal subsidies or tax incentives to employers to train and hire persons with disabilities could also be a valuable technique for improving the dismal employment statistics for this group.44

2) The interrelated nature of the rights specified in the CRPD makes it more likely that the otherwise merely aspirational right to free and open inclusion in the workplace will be realized. For example, a workplace equipped for wheelchair access is of little use to someone facing insurmountable transportation barriers to get there. While Titles II and III of the ADA do require access in public places, the fully integrated concept of “access” under the CRPD (ranging from childhood recreation to education, transportation, and community venues) fills in the interstices that necessarily occur from piecemeal legislation.

3) A critical benefit of the CRPD is that it will connect members of the international community to pursue a common goal, often the first step toward a best practices solution. Given the increasingly global nature of the workforce (and more commuting to work by air carrier), persons with disabilities need uniform laws to protect them in worksites throughout the world. For example, although the ADA applies to American citizens working abroad for U.S. or U.S.-controlled companies, it is limited by the “foreign law defense.” Thus, if a particular accommodation is not permitted in the country where the employer is actually situated, the employer is excused from compliance. Such inconsistency was demonstrated when the U.S. Department of Transportation issued a Notice of Proposed Rulemaking to Implement the Air Carrier Access Act, 49 U.S.C.A. § 41705 designed to dismantle barriers for air travel experienced by persons with disabilities: more than 100 filings by airlines and international airline organizations were made opposing the international sweep of the pro-


In summary, the failure of Title I of the ADA to bring people with disabilities into the workforce in significant numbers demonstrates that despite its admirable intentions, more is needed to wash away long-held prejudices and tear down long-standing barriers—including judicial interpretation consistent with the statutory intent and more energetic enforcement by government. When enforcement depends on the largely voluntary efforts of employers without any real threat of sanctions, little real progress will be achieved. The moral imprimatur bestowed by an international standard is essential to transforming “reasonable accommodations” in the workplace from theory to reality.

IV. CONCLUSION/RECOMMENDATIONS

a. U.S. response to the Convention

As I sat in the observers’ area on the floor of the UN’s General Assembly Hall, delegates from 80 nations and the European Community took their turn at the official signing table to commit their country to the human and civil rights of people with disabilities. At several points, my eyes welled with tears. They should have been tears of joy and pride as an American, as a citizen in the country that had created this world-wide movement for the rights and empowerment of people with disabilities. Instead, they were tears of shame and embarrassment...

John Lancaster, Executive Director of the National Council on Independent Living (NCIL) and President of the United States International Council on Disability (USCID) 45

The U.S. response to the CRPD has been one of selective involvement and ultimate disengagement. Although it participated intermittently throughout the drafting and negotiating process, the U.S. testified early on that it would not sign or ratify the CRPD. 46 From the third through the sixth

45. Quote from John Lancaster’s letter to NCIL members describing his first-hand experience of being present at the UNCRPD signing ceremony, “U.S. Must Come Back to the Table on Disability Treaty, American Association of People with Disabilities (AAPD),” Talking Justice Blog (April 12, 2007).

Ad Hoc Committee sessions, the United States was nominally present at the negotiations, and offered sparse technical assistance to the States’ delegations.\(^47\) The United States did assign a State Department representative to the negotiations for the seventh through ninth Ad Hoc Committee sessions.\(^48\) However, U.S. commentary remained focused on two controversial draft provisions unrelated to disability rights, which sparked discussion because of their political nature.\(^49\)

The primary justification offered by the U.S. government for its refusal to ratify the Convention has been that given the progressive history of disability rights laws and policies in the United States, signing an international convention would offer no added protections and would intrude upon the U.S.’s exclusive realm of national policy and law.\(^50\) In response to an inquiry from a disability rights organization, the U.S. State Department claimed that given the complexity of regulations and enforcement mechanisms needed to ensure equal opportunity for those with disabilities, it would be more productive for nations to pursue reforms at home rather than negotiate a new United Nations convention. For this reason, the U.S. stated that it did not intend to become party to the Convention.\(^51\)

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47. Stein Overview.


51. April 5, 2007 Email Response of the U.S. State Department to Disability Advocate’s Request for Explanation “USUN, Public Affairs” <USUNPublicAffairs@state.gov> 4/5/2007 11:31 AM.
A U.S. Department of Justice attorney who served as an advisor to the U.S. delegation to the UN ad hoc committee claimed that consenting to this international Convention may “potentially conflict with domestic laws” and “could potentially cause havoc within its sovereign borders.”52 Interestingly, this author also notes the U.S. practice of incorporating reservations that “clarify” its position with respect to various provisions when signing or ratifying international treaties, and claims that this method would be “entirely unworkable in this situation.”53 However, no explanation is offered for a potential conflict between the treaty and domestic law, and an explanation for the impossibility of reservations with respect to this treaty are similarly absent.54

The United States’ attitude towards the Convention will likely be reversed under an Obama administration: Obama has pledged to urge speedy ratification of the Convention.55

b. Importance of the Convention

The CRPD is the first human rights treaty to be adopted in the 21st Century and the most rapidly negotiated human rights treaty in the history of international law.56 However, the CRPD is most unique, as noted in Part III of this report, in its holistic and comprehensive approach to disability rights, specifically the integration of other relevant existing human rights instruments into its text. The CRPD combines the anti-discrimination rights found in the International Covenant on Civil and Political Rights (ICCPR) with rights related to an adequate standard of living and equality found in the International Covenant on Economic, Social and Cultural Rights (ICESCR).57 This integration follows the United Nations

52. Justesen.


54. In fact, according to the convention and international law, if a State’s domestic laws surpass and extend beyond the protections of the CRPD, the domestic law will trump the treaty. CRPD, Article 4(4) ("Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities...contained in the law of a State Party..."). In other words, the protection found in the treaty is a floor, not a ceiling.


57. Civil and Political Rights are usually termed first-generation or negative rights, whereas Social, Economic and Cultural Rights are termed positive or second-generation rights. Stein Overview.
“human right to development” theory, which posits that both sets of rights are necessary to development and must be enforced in tandem. For example, civil rights laws prevent prejudicial harm while equality measures remedy inequities that are already in existence as a result of a history of discrimination.

In addition to these international documents which comprise the International Bill of Rights, the CRPD also specifically includes articles related to the rights of women with disabilities and children with disabilities, the core principles of which are found respectively in the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). These articles do not stand on their own, but rather interrelate to all other CRPD Articles and are meant to be horizontally integrated into the Convention.

Also critical to the CRPD’s progressive nature is the replacement of the traditional medical-social welfare model of disability that focuses on the inability of individuals, with the social-human rights model that focuses on capability and inclusion. This approach posits that the real barriers to full participation reside not in the individual, but rather in the “social, attitudinal, architectural, medical, economic, and political environment,” most clearly evidenced by the language of Article 1, which emphasizes that impairments in “interaction with various barriers may hinder...full and effective participation in society on an equal basis with others.”

Finally, the process by which this human rights convention was negotiated was the first of its kind. In place of the traditional state-centric model of treaty negotiation, this process involved a participatory approach targeting the involvement and input of persons with disabilities from across the globe. Prior to the drafting process, in its White Paper on the

58. Stein Overview.
59. Id.
60. The United States has failed to ratify the CRC or CEDAW.
61. Stein Overview.
65. Melish.
UNCRPD the National Council on Disability identified the following significant advantages to the adoption of an international convention:

(i) providing an immediate statement of international legal accountability regarding disability rights; (ii) clarifying the content of human rights principles and their application to people with disabilities; (iii) providing mechanisms for more effective monitoring, including reporting on the enforcement of the convention by governments and non-governmental organizations, supervision by a body of experts mandated by the convention, and possibly the consideration of individual or group complaints under a mechanism to be created by the convention; (v) establishing a useful framework for international cooperation; (vi) providing a fair and common standard assessment and achievement across cultures and levels of economic development; and (vii) providing transformative educative benefits for all participants engaged in the preparatory and formal negotiation phases, and for the public as countries consider ratification of the convention.


67. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”). See also, Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987); The Paquete Habana, 175 U.S 677, 700 (1900) “International law is part of our law,”) Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (U.S. is responsible to other countries for the “conduct of each State, relative to the laws of nations. . .”).

68. See, e.g., Roper v. Simmons, 543 U.S. 551, 575 (2005) (referring “to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments”). See also, Atkins v. Virginia, 536 U.S. 304, 316 n. 21 (2002), (recognizing that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelming...
have been instructive in construing the statutory requirements for raising claims of mistreatment in U.S. prisons. As explicitly mentioned in the Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987), “[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”

d. Recommendation: U.S. Should Sign & Ratify UNCRPD

Compelling considerations tilt the scales in favor of signature and ratification by the United States of this groundbreaking human rights treaty. Although the U.S. has historically led the world in its disability rights policies, practices and laws, there is no question that significant gaps remain and there is much room for improvement on the domestic level. As outlined in prior sections, the CRPD conceptually and substantively exceeds protections found under the ADA and other relevant domestic anti-discrimination laws, including, inter alia, in the areas of employment, education, independent living and community integration, and spheres of justice and legal representation. Furthermore, the social-development model of disability found in the Convention would be of assistance to U.S. law. The absence of this perspective can be most clearly seen in the ADA’s definition of disability, notwithstanding its recent amendment, which continues to focus on the limitations on major life activities faced by the individual rather than the societal barriers that disable the individual.

Critical provisions found in the CRPD—such as the national monitoring system—have been instructive in construing the statutory requirements for raising claims of mistreatment in U.S. prisons. As explicitly mentioned in the Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987), “[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”

69. Weinberger v. Rossi, 456 U.S. 25, 32 (1982) (quoting The Charming Betsy, 2 Cranch 64, 118 (1804)) (“[i]t has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains”).

70. Melish, p. 46. See also, Stein, Overview. The recent passage of the Restoration Act, which seeks to restore “the intent and protections of the Americans with Disabilities Act of 1990,” is itself evidence of the shortcomings of the ADA. The Restoration Act seeks to restore the broad scope of protection under the ADA, specifically with respect to the limited definition of disability which has only been narrowed by recent Supreme Court decisions. Id.

toring and periodic reporting procedures—would provide the oversight and introspection necessary to constantly re-evaluate domestic human rights protections. Ratification would simultaneously mark our long-standing commitment to disability rights advancement while ensuring that the commitment continues into the future.72

Additionally, as the National Council on Disability (NCD) identified in its comprehensive white paper released prior to the drafting process, there are “active forms of discrimination, as well as ‘neutral barriers,’ that inhibit disabled people’s enjoyment of their human rights.”73 Drafters of the CRPD have sought to establish affirmative obligations on the part of States that move beyond mere non-discrimination in order to more effectively combat the myriad levels of injustice in society. For example, Article 24 obligates States to adopt “immediate, effective and appropriate measures” that are designed to “combat stereotypes, prejudices and harmful practices relating to persons with disabilities,” recognizing the importance of awareness-raising in combating discrimination.74 On a macro-level, advocates in the field have also noted the importance of reinvigorating the disability rights movement, particularly given the steady dilution of the ADA’s core principles.75

If adopted, the CRPD’s unique combination of first and second generation rights and holistic approach to equality would inspire a more comprehensive approach within the U.S. to the myriad injustices still suffered by persons with disabilities. Moreover, if the U.S. were to commit to the CRPD, the human rights of other socially excluded groups, such as ethnic and racial minorities, women and people living in poverty would undoubtedly also be advanced.76

Signature and ratification of the CRPD, which would require member States to share best practices and technical assistance, would also signify the commitment of the U.S. to providing critical global leadership on disability rights issues.77 It would ensure that the United States pro-

72. Melish, p. 46.
74. See, e.g., UNCRPD, Article 8.
76. Stein, Beyond Disability. These groups will also benefit from the rights protections found within the Convention because the category of persons with disabilities intersects significantly with other socially marginalized groups. In addition, measures taken to ensure the full breadth of rights located within the UNCRPD will also benefit these other groups. Id.
77. Stein Overview.
motes disability-inclusive development practices at home and abroad, helping to increase equality for persons with disabilities throughout the world, not just within our own country.78

The U.S. disability rights community was invaluable in formulating the CRPD, and domestic grassroots efforts have continued to encourage the U.S. to sign and ratify the Convention.79 In light of the Convention’s recognition that this community, comprised of persons with disabilities and their advocates, deserves a central role in shaping policy, its voice should also be heeded on the question of whether ratifying the Convention would be beneficial to its struggle for equality. In the words that have come to represent the spirit of the new UN Convention on the Rights of Persons with Disabilities: “Nothing about us without us.”80

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78. Stein, Beyond Disability.

79. See, e.g., Ratify Now!, aU.S.-based global grassroots organization that was started by, for, and about people with disabilities in an effort to encourage ratification of the CRPD, including by the U.S. Available at: http://ratifynow.org/us/.

80. This was the campaign slogan of the International Disability Caucus (IDC) during the CRPD negotiation process. See, also, Melish, Footnote 9, p. 45.
The Committee on
Legal Issues Affecting People With Disabilities

Dennis Boyd, Chair
Anna Arstein-Kerslake, Secretary

Konrad Batog
Evan Brustein
Susan Dooha
James G. Felakos, Jr.*
Ted Finkelstein
John P. Herrion
Peter Johnson
Maurice Maitland
Jocelyne Martinez
Kelly J. McAnnany*
Abigail J. Pessen*
Alan Rachlin
Judy S. Skolnick*
Thomas K. Small
John E.H. Stackhouse

Primary authors of the report.