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HOW TO REACH THE ASSOCIATION
SOUTH TEXAS COLLEGE OF LAW WAS NAMED THE WINNER OF THE Final Rounds of the 49th Annual National Moot Court Competition held at the Association on January 25-28. The competition is co-sponsored by the Association’s Young Lawyers Committee (Shari Fagen, Chair) and the American College of Trial Lawyers. The University of Texas School of Law was runner-up.

Hon. Albert M. Rosenblatt, Judge of the New York State Court of Appeals, who presided at the final argument, announced the winning team of Kevin G. Cain, Brent M. Cordell and Twila L. Grooms. They will receive the Russell J. Coffin Award, a cash award donated by Mrs. Russell J. Coffin to further the skills of advocacy. The team also received the John C. Knox award, a silver cup upon which the names of the team members will be inscribed. The South Texas team will be the guest of the American College of Trial Lawyers at its spring meeting in Naples, Florida.

The University of Texas School of Law, as runner-up, won the Kathryn and Bernard Newman Bowl. The Award for Best Brief went to Southwestern University School of Law. The University of Texas School of Law received the runner-up award for best brief.

The Best Oral Argument Award went to South Texas School of Law. The Award for Best Speaker went to Twila L. Grooms from South Texas and runner-up was K.C. Allan from University of Texas.

The judges for the Final Rounds were Hon. Albert M. Rosenblatt; Hon. Denise L. Cote, Judge, United States District Court for the Southern District of New York; Hon. John Feikens, Judge, United States District Court for the Eastern District of Michigan; Hon. Robert D. Sack, Judge, United States Court of Appeals for the Second Circuit; E. Osborne Ayscue, Jr., President, American College of Trial Lawyers, and Michael A. Cooper, President of the Association.

AN AMICUS BRIEF WAS FILED BY THE ASSOCIATION IN THE NEW YORK State Court of Appeals in Kassis v. Teacher’s Insurance and Annuity Associa-
OF NOTE

Prepared by the Committee on Professional Responsibility (John B. Harris, Chair), the brief addressed questions surrounding when a law firm can avoid disqualification by creating a “screen” between a conflicted lawyer and other lawyers affiliated with that lawyer. The brief urged the court to reject a blanket rule forbidding screening based on a firm’s small size. As a matter of law, a small firm should not be deprived of the chance to demonstrate that disqualification is unwarranted. Such a blanket rule would be detrimental to the small firm by encouraging tactical use of disqualification motions against small firms, creating disincentives for a lawyer to move to or practice with a small firm and preventing clients from selecting the small firm lawyer of their choice. In addition, the brief argued that it is not self-evident that a small firm dedicated to maintaining an effective screen will invariably be less effective at screening than a large firm. It is the significance of the prohibited lawyer's involvement and knowledge of a former client's confidences that should determine whether or not screening is permissible.

AN AMICUS BRIEF WAS FILED BY THE ASSOCIATION IN THE NEW YORK State Court of Appeals in Karlin v. IVF America, Inc. Prepared by the Committee on Consumer Affairs, (Susan Kassapian, Chair), the brief argued that providers of medical services are not excluded from New York State’s General Business Law Sections 349 and 350, which prohibit deceptive acts and practices and false advertising. The plaintiffs-respondents allege that the defendants disseminated marketing materials such as brochures, orientation seminars, slide presentations and television appearances that exaggerated the statistical probability of success of the fertility treatment and failed to reveal the health risks associated with such treatments. The Appellate Division, Second Department ruled that GBL Sections 349 and 350 did not apply to providers of medical services.

In the brief the Committee argues that both legal precedents and legislative history indicate that the New York Legislature never intended to exclude providers of medical services from the remedial provision of GBL Sections 349 and 350. “Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state” are declared unlawful by GBL Section 349. Section 350 declares unlawful “false advertising in the conduct of any business, trade or commerce in the furnishing of any service in [New York].” The New York Legislature purposefully worded these two statutes broadly to cover all decep-
tive acts or practices and to permit a private right of action for any violation of the sections. The brief notes that in 1992 the Second Circuit in Riordan specifically stated that GBL section 349 contains no exceptions or exemptions for regulated industries. In addition, the brief cites an earlier First Department case Sterling v. Ackerman which held that Section 349 is specifically applicable to providers of medical services. The brief said that, following the reasoning in Genesco Entertainment v. Koch, GBL section 349 seeks to combat deceptive practices which involve “recurring transactions of a consumer type,” not “single shot transactions.” In Karlin the alleged misconduct involves an alleged marketing ploy executed by a publicly traded company through the dissemination of false and misleading brochures and other advertisements, communicated to the consuming public at large to attract potential patients.

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DAVID A. DORFMAN, NOMINATED BY THE ASSOCIATION, HAS BEEN named the 1999 Outstanding Young Lawyer by the New York State Bar Association’s Young Lawyers Section. He was honored at the State Bar’s Annual Meeting for his volunteer work in the Association’s Community Outreach Law Program’s Guardian Ad Litem in Housing Court Project and the Elderlaw Program.

Mr. Dorfman was named the Association’s Volunteer of the Month in February 1998 for his work in the Elderlaw Clinic. He has since become a primary faculty member of the program, conducting volunteer training sessions and serving as a mentor to less experienced attorneys.
Recent Committee Reports

Bankruptcy and Corporate Reorganization

Council on Children
Letter to Senator Bruno with Regard to Legislation Designed to Implement the Adoption and Safe Families Act of 1997

Civil Rights/Capital Punishment
Letter Urging Officials to Grant Clemency to Gary Graham

Civil Rights
Letter to Governor Keating Urging Clemency for Sean Sellers

Consumer Affairs
Amicus Brief, Karlin v. IVF America, Inc.

Continuing Legal Education
Letter Commenting on the Exemption of Judges and Those Who Perform “Quasi-Judicial” Functions From Mandatory CLE Requirements

Corrections
Amicus Brief, Abdul-Matiyn v. Coughlin

Criminal Advocacy
Letter to Chief Administrative Judge Regarding S.3432-A/A. 7035-A, Relating to Counsel Assigned to Represent Indigents

Criminal Courts
Report on Caseload and Trial Capacity Issues in the Criminal Courts of the City of New York

Family Court and Family Law
Letter Commenting on Proposed Federal Regulations for Determining Compliance by the States with the Adoption and Safe Families Act of 1997

Federal Courts
Report of the Commission on Structural Alternatives for the Federal Courts of Appeals
RECENT COMMITTEE REPORTS

Housing and Urban Development
Letter to Governor Pataki and Mayor Giuliani Regarding New York/New York II Proposal to Provide Housing for Homeless Mentally Ill New Yorkers

Immigration and Nationality Law
Letter Regarding Implementation of Section 203 of the Nicaraguan Adjustment and Central American Relief Act

Council on Judicial Administration
Report on Common Interest Privilege

Comments on Draft Report of the Committee of Lawyers to Enhance the Jury Process

Letter Regarding Increase in Judicial Salaries for State Court Judges

Report on Press Interviews of Judges on Subjects Other than Pending Cases

Council on Judicial Administration/Federal Courts
Report and Recommendation on Second Circuit Certification of Determinative Law Issues to the New York Court of Appeals

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Municipal Affairs
Letter to Mayor Giuliani Regarding His Disagreement with Campaign Finance Board on 1998 Campaign Finance Law

Non-Profit Organizations
Letter Commenting on the IRS Proposed Rules Imposing Excise Taxes on Transactions Providing Excess Benefits to Disqualified Persons of Charitable Organizations

President
Statement to the Committee to Promote Public Trust and Confidence in the Legal System

Professional Responsibility
Amicus Brief, Kassis v. Teachers’ Insurance and Annuity Association

Amicus Curiae Brief, Engel v. CBS
Public Service and Education
Letter to the Committee to Promote Public Trust and Confidence in the Legal System

Social Welfare Law
Letter Regarding the Committee to Promote Public Trust and Confidence in the Legal System

Taxation of Corporations
Letter with Comments on Notice 98-38 Regarding the Separate Return Limitation Year Rules
Comments on Proposed “SRLY” Regulations

Transportation
Letter to Speaker of the New York City Council Regarding Transportation of Solid Waste
Letter in Support of the Use of Rail as an Alternative to Moving Freight Over-the-Road

Copies of any of the above reports are available to members by calling (212) 382-6658, or by e-mail, at lyuen@abcny.org.
The Alexis C. Coudert Memorial Lecture

On December 10, 1998, former United States Senator George J. Mitchell delivered the Alexis C. Coudert Memorial Lecture in the Meeting Hall at the House of the Association. The Association took that occasion to bestow on Senator Mitchell honorary membership in the Association in recognition of his public service as United States Attorney, United States District Judge and United States Senator, and “in further recognition of his dedication to the rule of law, international human rights and the search for peace as evidenced by his pivotal role in bringing about a peace accord in Northern Ireland.”

Senator Mitchell’s Coudert Lecture was the keynote address commencing a two-day conference, coordinated by the Association’s Committee on International Human Rights (David Nachman, Chair) and co-sponsored by thirteen metropolitan New York area law schools and the Union Internationale des Avocats, celebrating the fiftieth anniversary of the Universal Declaration of Human Rights.

DAVID NACHMAN

Good evening, everybody. My name is David Nachman. I am very pleased to welcome you to the 50th Anniversary celebration of the Universal Declaration of Human Rights. Tonight truly is a celebration. Fifty years ago this very day the United Nations adopted the Universal Declaration.

In not too many words, this straightforward text sets forth our common aspiration that each human being in the world be treated with dignity and respect.

We have come a long way since December of 1948. The past year in
particular has been a remarkable one for the cause of international human rights. With the notable exception of the United States and a few others, the nations of the world took the extraordinary step of creating an International Criminal Court designed to ensure that crimes against humanity never again go unpunished, and perhaps to create enough of a deterrent that the kind of crimes that took place in Cambodia and Bosnia and Rwanda are never committed again. Just a few weeks ago, the Law Lords of Great Britain ruled that former Chilean President Pinochet does not enjoy immunity for the horrible offenses of which he stands accused.

You know that human rights issues are firmly on the public agenda when even The Economist magazine runs a special survey on human rights law entitled “The World Is Watching.”

Having said all that, there remains a tremendous amount of work to be done, and much of it is lawyers’ work: getting the U.S. Senate to ratify the principal human rights covenants and treaties, filling in the jurisdiction and procedures of the new ICC, wrestling with the immunity and extradition issues that cases like Pinochet raise. Finding ways to enforce the international standards on working conditions that already are embodied in ILO conventions, ending the traffic in child and slave labor. The list goes on and on.

This Association, I am proud to say, has long played an important role in many of these debates. The leadership of the Association has been unfailingly supportive of this work, whether it be our recent mission to Northern Ireland, our efforts to expose and put an end to the systematic use of torture in Turkey, or our recent report calling on the U.S. Senate finally to ratify the Convention to End all Forms of Discrimination against Women.

I would like, at this time, to publicly thank both the Association’s past presidents, several of whom are here tonight, and Michael Cooper, our current president, for the support and encouragement they have extended to the Association’s human rights efforts, including this conference.

I would be remiss if I did not also take this opportunity to thank Louis Henkin, who is here tonight. Just about every lawyer in this city who has been involved in human rights matters learned at the knee of Professor Henkin, and there is no one who has advanced our understanding in this field as much as he has.

Tonight and over the next two days, we will explore the origins of The Universal Declaration, where it has taken us and where we must still go in order to make real the vision contained in that Declaration.
We will hear from those who were there at the creation, giants in the field such as Louis Sohn and those who will be instrumental in the shape of things to come, people like Ken Roth, Trish Armstrong and Winston Nagar. Foreign lawyers will exchange ideas with American historians, diplomats will break bread with philosophers, and one or two judges will be on hand to keep order if things get too far out of hand.

A conference like this couldn’t happen without the support of many people and I would like to mention just a few: First, we are indebted to each of the deans of the law schools that are co-sponsoring this conference with the Association; namely, Brooklyn Law School, Cardozo Law School, Columbia, CUNY, Fordham, Hofstra, New York Law School, NYU, Pace, Rutgers-Newark, Rutgers-Camden, Seton Hall and St. John’s. I would like to extend a special thanks to John Feerick of Fordham, who graciously offered to make Fordham’s facilities available to us tomorrow and Saturday. Thank you, John.

We are grateful, as well, for the work of Steve Hammond, President of the UIA which also is co-sponsoring this event. I said UIA because I can’t pronounce the name in French.

Perhaps most important, this conference would not have been possible without a very generous grant from the Reuters Foundation. I would like especially to thank Doug Curtis and John Reid-Dodick, Assistant General Counsel and General Counsel of Reuters America, who made this conference possible. By the way, Reuters has mounted a very powerful photographic display around the theme of this conference, and you will be able to see that exhibit at Fordham tomorrow and Saturday.

So I am delighted that you all are here, yet I know you came tonight not to hear me speak, but because of our outstanding lecturer. I would like therefore to introduce Ed Matthews of the Coudert Brothers law firm and Chair of the Coudert Lecture Committee, who will say a few words about the Lecture. Thank you.

The Alexis C. Coudert Memorial Lecture on international law was established at this Association in honor of Alexis Coudert following his death in 1980, after having served for 25 years as the Managing Partner of Coudert Brothers.

During his career, Alexis was one America’s foremost international lawyers. International law was at the center of his practice and that of his firm.

“International law,” what an illusive notion. Alexis used to say that
the practice of international law, whether in commercial or private or governmental matters, is essentially the practice of local law for people in different countries. If done well, it fosters truth, trust and understanding, and makes the world a better place.

Alexis would have been pleased to see you all here tonight, although if warned that someone was going to compliment him—so goes the legend of this humble man—he would have asked to leave the room. As he is no longer here, except in spirit, we do not risk his embarrassment when we pay homage to his remarkable qualities.

Those who knew Alexis spoke of his lucid intelligence, his rare simplicity and his patrician grace and charm. His measured ambition and active international view transformed his law firm beyond its ancient limits into a worldwide institution. As others have described him, he was the absolute antithesis of everything acquisitive, self-promotional, narrow or crabbed in our profession or in the world today. But there is much more to his example.

These qualities were not only of an extraordinary human being, but, I submit, still provide us with important guidance as to how the rights of human beings of differing and different cultures and views can be protected on this planet, which is the subject of this lecture and of our concern tonight.

Many still benefit from Alexis’ readiness—quietly and rationally—to examine every thought that came his way, never ignoring human emotions, but subjecting them and the needs from which they came to the same careful scrutiny.

He practiced a humanistic law. For him the law was never just words or rules; rather, it embodied culture, politics, economics, philosophy and multi-faceted human concerns, always requiring judgment in its application.

Even after 20 years, we remember how he cared for others, especially those younger and less fortunate. Alexis always treated everyone with a gentle, native decency, even in the face of tensions and hostilities which inevitably inject themselves in human affairs.

He always showed an essential tolerance for the ideas of others no matter how strange or, on initial view, how far-fetched. He seemed always, even in heated argument, just to be listening and learning. Alexis received and examined opposing views with a measure of charity that accepted as a given that different cultures produce different people who often do not think alike.

His ideas came into every discussion in a natural and easy way. Usu-
ally his advice was offered under the cover of quiet conversation and just slipped in. Even when costly of his time and energy, he encouraged initiative and self-reliance in those around him.

He shied from intervening in the affairs of others or telling them what to do. When required to do so, he acted minimally, consistent with achieving objectives, but with restrained judgment that was palpable to those affected.

This is the example of Alexis Coudert, this and much more was our gift from this wonderful man, whom we love and remember with this lecture. I would now like to present to you the President of our Association, Michael Cooper, who will introduce Senator Mitchell, who through his own dramatically successful efforts in reestablishing trust and understanding between ever-warring peoples, has practiced international law in the example of Alexis Coudert and made our world a more hopeful, better place. Thank you.

INTRODUCTION BY MICHAEL A. COOPER

Thank you, Ed, and please extend our thanks to your partners for making this lecture possible. I also want to thank David; I happen to be one of the people in the room who knows how hard he has worked to prepare for this conference. And it has started, it's here. Finally, I, too, want to thank the Reuters Foundation and my good friend and former colleague, John Reid-Dodick, General Counsel of Reuters America, who is here.

This is an evening to which I have for several weeks looked forward with anticipation and relish because it's an evening that presents us with a unique opportunity to conjoin, to bring together, three significant occasions.

First, the opening session of a conference celebrating the 50th Anniversary of The Universal Declaration of Human Rights.

Second, the delivery of the Alexis Coudert Memorial Lecture.

And third, our conferral of honorary membership in this Association on the person who will deliver that lecture, George J. Mitchell.

A stranger to this association might reasonably ask why a municipal bar association is co-sponsoring an anniversary celebration for a Universal Declaration of Human Rights, but anyone with even slight familiarity with this Association knows that for decades it has been deeply interested, deeply concerned with human rights on the world scene, not just in this city or even not just in this country.

In 1949 and 1950, the Association’s International Law Committee
issued reports on the draft international covenant on human rights and the genocide convention. The importance that we attribute to international human rights is evidenced by the fact that in 1972, we created a committee to address that subject specifically. That committee, which David now chairs, has issued reports, written letters to foreign officials, filed amicus briefs on a wide range of human rights issues and undertaken missions to other countries to investigate and report on alleged human rights abuses.

Indeed, if you think about it, there is an inseparable link between human rights and the reason this Association was founded 128 years ago: to combat corruption in the judiciary and other branches of government and to elevate the standards of the legal profession. For a legal profession and a judiciary that are truly independent and truly have integrity, are essential bulwarks of the respect for, and enforcement of, human rights.

It was natural to take the opening session of this three-day conference as occasion to give the Alexis Coudert Lecture, for the Coudert firm created that lectureship as a forum for an address on an international law topic of, and I quote, “public importance.”

Coudert lecturers in the past have included former Attorney General Nicholas Katzenbach and former State Department Legal Advisor Abraham Sofaer. This evening’s lecture will be delivered by a man of whom I think I can say without hyperbole that he is truly a hero of our times.

I suspect, Senator Mitchell, that you may be getting a little bit tired now of listening to a recitation of the particulars of your life story, but this audience should know the stages of your remarkable service to your home state, to this country and to the world.

Senator Mitchell was not born to privilege; his father was a school custodian and his mother worked in a woolen mill in Waterville, Maine. After attending Bowdoin College and serving as an officer in the U.S. Army Counter-intelligence Corps he earned his law degree at Georgetown where he studied, as my father did, in the evening division, and worked during the day to support himself as an insurance claims adjuster.

Following graduation, he spent two years in the Department of Justice Antitrust Division and then became Executive Assistant to Senator Edwin Muskie. Senator Mitchell returned to Maine in 1965 and entered private practice, but he remained active in politics, serving as State Chairman of the Maine Democratic Party and a Democratic National Committeeman. He was appointed United States Attorney for Maine in 1977 and two years later, he took the oath as a United States District Judge.

To an outside observer, the critical turning point in George Mitchell’s
career came in 1980 when Senator Muskie, who had been appointed Secretary of State, recommended to the then Governor of Maine that George Mitchell be appointed to complete the remaining two years of Senator Muskie’s Senate term.

The acceptance of that recommendation marked the beginning of George Mitchell’s 14 years in the United States Senate, during which he was elected and then reelected in his own right, so impressing his constituents that when he ran for reelection in 1988, he received 81 percent of the votes cast.

Senator Mitchell swiftly rose to leadership in the Senate. In 1985 and 1986 he was chairman of the Senate Democratic Senatorial Campaign Committee, and two years later, he was elected majority leader, a position he held until he left the Senate. Senator Mitchell’s accomplishments in supporting and securing enactment of landmark legislation alone would earn him a place in history books. He championed the first major Acid Rain Bill, reauthorization of the Clean Air Act and the Americans With Disabilities Act, among others.

There is one moment in George Mitchell’s Senate career that is indelibly imprinted in my memory, and, as I have learned in recent weeks, in the memory of many others as well. As a member of the Select Committee on the Iran-Contra Affair, Senator Mitchell endured, as millions of Americans did, hour after hour of pious testimony by Oliver North, who, with the aid of effective counsel, kept the committee and its counsel at bay.

At least until Senator Mitchell leaned forward and in a quiet voice said to Oliver North, “Please remember that it is possible for an American to disagree with you on aid to the Contras and still love God, and still love this country, just as much as you do. Although he is regularly asked to do so, God does not take sides in American politics.”

I don’t know how many of you heard that statement at the time, as I did, but it was a defining moment in those hearings and remains to me the single most effective statement I have ever heard deflating a self-important witness.

A powerful argument could be made for honoring George Mitchell if he had done nothing of note since leaving the Senate. But far from doing nothing, he has played a pivotal role in helping to resolve one of the most bitter and intractable conflicts of the century.

In 1995, President Clinton appointed him Special Advisor to the President and Secretary of State to consider economic initiatives in Northern Ireland. He was then asked by the British and Irish Governments to chair the International Commission on Disarmament in Northern Ireland.
Commission issued a widely acclaimed report in January 1996, but the end of a 16-month cease fire delayed the peace process.

Senator Mitchell patiently persevered. In June 1996, he was formally installed as Chairman of the Northern Ireland peace talks and after nearly two years of negotiations, on April 10th of this year, a multilateral peace agreement known as the “Good Friday Agreement” was signed, and shortly was supported by public referenda in both Northern Ireland and the Irish Republic.

That Agreement is extraordinarily complex. It addresses relationships within Northern Ireland, between Northern Ireland and the Irish Republic, and between Ireland and the United Kingdom. Significantly for this occasion, the Agreement provides for the incorporation of the European Convention on Human Rights into the law of Northern Ireland and for the establishment of a Human Rights Commission in Northern Ireland.

For his leadership and negotiating skill in bringing an end to three decades of bloody sectarian strife and human suffering, Senator Mitchell was nominated for the Nobel Peace Prize, and he received both the Philadelphia Peace Prize and just last month, one mile north of this building, the Fordham-Stein Prize.

We don’t have a tangible prize to award to Senator Mitchell, but we can pay tribute to his public service here and abroad by conferring on him honorary membership in this Association. Many organizations confer honorary memberships with some frequency. The Association of the Bar of the City of New York does not. Under our Constitution, honorary membership is reserved for judges, justices and members of the legal profession who are of “pre-eminent distinction,” and it is not conferred every year. Senator Mitchell joins an illustrious list of honorary members, including, fittingly, former President of Ireland and now U.N. Commissioner of Human Rights, Mary Robinson.

Senator Mitchell, I would be grateful if you would join me as I read the citation of the certificate awarding you honorary membership in the Association. It says: “The Association of the Bar of the City of New York elects George J. Mitchell to honorary membership.”

Having found him by unanimous vote of the Executive Committee to be of pre-eminent distinction in the legal community.

In recognition of his contributions to the law and social justice, including his service as United States Attorney for Maine,
George J. Mitchell

United States District Judge, United States Senator and Majority Leader of the United States Senate, and in further recognition of his dedication to the rule of law, international human rights and the search for peace as evidenced by his pivotal role in bringing about a peace accord in Northern Ireland, we welcome him as an Honorary Member of the Association on this 10th day of December, 1998.
The Alexis C. Coudert Memorial Lecture

George J. Mitchell

Thank you very much, Michael, for your generous remarks. Thank you, ladies and gentlemen, for your warm reception and for the honor you do me in electing me as an honorary member of your Association.

I feel privileged to participate in this lecture series, marking, as has been noted, the 50th Anniversary of The Universal Declaration of Human Rights. That is, of course, an eloquent and powerful statement, as relevant today as it was when adopted.

I must confess that when I received Michael’s invitation to address this Association at the beginning of your conference on human rights, I hesitated. This Association has an international reputation for interest in and knowledge of human rights. I have always found it intimidating to be asked to speak to a group of people who know more about the subject than I do. But I recalled my first day in the Senate.

As you have heard, I was appointed, and it happened quite suddenly. From the time Senator Muskie resigned until the time I went down to Washington to be sworn in as his successor was no more than just a few days; it was quite unexpected.

I flew down to Washington, took a taxi up to The Capitol—it was in the middle of a legislative session—and I went into the Senate Chamber where a regular session of the Senate was underway, which they interrupted to swear me in. It lasted less than 30 seconds. That was my first major disillusionment in the Senate. After I was sworn in, not knowing what else to do, I walked over to Senator Muskie’s former office, now my
own, and I asked a young, very efficient man who had been Senator Muskie’s chief assistant and was now mine what I did next. He rattled off a long list of instructions, and then he said, “Senator, you have been invited to address a National Convention of Certified Public Accountants who are meeting tonight in Washington, 3,000 of them, they want to hear from you.”

And I said, “gosh, it’s amazing that they would have known I was going to be here this evening because I didn’t know it myself until a few days ago.”

“Oh, no,” he said. “They have had several cancellations and you are the last resort. You are the only person they could think of who might not have anything to do this evening.”
I asked, “well, what do they want me to talk about?” He said, “the Tax Code.” I said, “well, each of them knows much more about it than I do, and so how can I go there and talk about it with no preparation.” This young man drew himself up and said with a great deal of contempt: “Senator, with that attitude, you’ll never get anywhere in politics.”

So I went to speak to the accountants on the Tax Code, and here I am to talk to you about human rights.

Actually, I have been asked to talk about my experience in Northern Ireland and how that relates to the subject of your conference, and I will do that; but I would like to begin by mentioning two other places which influenced me in my role in Northern Ireland. They are the United Kingdom and the United States.

I have spent most of the past four years in the United Kingdom and during that time I have come to know much better and to admire that great country. While Greece is the birthplace of democracy, surely Britain is the home of its modern version. The Parliament Building at Westminster, like the Capitol Building in Washington, is a visible symbol of self-government, of individual liberty, of a free and vibrant people.

These are values of which we are justly proud. Of course, as I regularly remind my British friends, Americans haven’t always used such flattering words in describing our Mother Country.

Two-hundred-and-eleven-years ago, a small group of Americans gathered in Philadelphia in a constitutional convention. Their objective was independence and self-government. They had lived under a British King and they did not want there ever to be an American King. In retrospect, we can see that they were brilliantly successful. The United States has now had 42 presidents and no kings.

The product of that convention was, of course, the American Constitution. The part of it that we call the Bill of Rights is, to me, the most concise and eloquent statement ever written of the right of the individual to be free from oppression by government.

That is one side of the coin of liberty. The other is the need for everyone to have a fair chance to enjoy the blessings of liberty. To a man without a job, to a woman who can’t get good care or education for her child, for the young people who lack the skills needed to compete in the world of technology—they don’t think much about liberty or justice, they worry about coping day to day.

The same is true of people living in a society torn by violence. Without civil order, without physical security, freedom and individual liberty come to be seen as mere concepts, unrelated to the daily task of survival.
Personal safety is a fundamental right expressed clearly in Article 3 of The Universal Declaration which states: “Everyone has the right to life, liberty and the security of person.”

For many years, violence and fear settled over Northern Ireland like a heavy, unyielding fog. The conflict hurt the economy, so unemployment rose with violence in a deadly cycle of escalating misery.

After a half-century of discord and only occasional cooperation, the British and Irish Governments concluded that if there was to be any hope of bringing the conflict of Northern Ireland to an end, they would have to cooperate in a sustained effort to lay the foundation for peace. Despite much difficulty, over many setbacks, the governments persevered. A lot of credit has been handed out to many people who did contribute to the effort to bring about peace in Northern Ireland. The governments deserve much more credit than they have gotten.

After years of effort, they finally were able to get peace negotiations underway in June of 1996. The Prime Ministers of the two countries invited me to serve as chairman. I had been involved in Northern Ireland long enough to know what a daunting and seemingly impossible task that was, but in making my decision, I reflected on my own life.

My father, as you have heard, was the orphan son of Irish immigrants. He was a janitor. My mother, an immigrant from Lebanon, worked nights in a textile mill. Neither had any education. My mother could not read or write. But because of their efforts, because many people gave me a helping hand along the way and, most importantly, because of the openness of American society, our society, their son was able to become the Majority Leader of the United States Senate. So when I, who was helped by so many, was asked by the Prime Ministers of Britain and Ireland to help others, I could not refuse. That the people I was asked to help were in the land of my father’s heritage was just a coincidence; that I could help was what mattered.

The negotiations were the longest, most difficult task I have ever been involved with. Often, no progress seemed possible. But somehow, through tremendous violence, upheaval, uncertainty, over many obstacles, we kept going.

There was an especially bleak, dangerous time in the Christmas season of 1997 and the early months of this year. There was a determined effort by men of violence on both sides to destroy the peace process. In early December, almost exactly a year ago this week, we tried hard to get an agreement on a statement of the key issues to be resolved and the processes for revolving them. Despite intense effort and round the clock
discussion, no agreement was possible. When we adjourned for the Christmas holiday, a year ago next week, the prospects were bleak. If they couldn’t even agree on defining the key issues, I thought, how will they ever agree on solutions to those issues.

Two days after Christmas, a prominent loyalist parliamentary figure was murdered in prison. That touched off a sharp increase in sectarian killings as a vicious cycle of revenge took place; shootings and assassinations occurred on a regular basis over the next several weeks. The negotiations were moved from Northern Ireland to London in January and then to Dublin in February in an effort to encourage progress; but the opposite occurred. The London meeting was largely taken up with the expulsion of a Unionist Party. The Dublin meeting was taken up with the expulsion of a Nationalist Party. The process was moving backward.

It was in February on a flight from Dublin back here to New York that I began to devise a plan to establish an early deadline to end the talks. I was convinced that the absence of such a deadline guaranteed failure. The existence of a deadline didn’t guarantee success, but I believed that it made it possible.

It took me over a month to put the plan together and to persuade all of the participants. By late March, they were ready. I recommended a final deadline of midnight, Thursday, April 9th. They all agreed. They wanted to reach an agreement and recognized that there had to be a deadline to force them to make a decision.

As we neared the deadline, there were non-stop negotiations. Prime Ministers Blair of the United Kingdom, and Ahern of the Republic of Ireland came to Belfast and they showed true leadership. There wouldn’t have been an agreement without their personal involvement. They didn’t just supervise the negotiations, they conducted them.

President Clinton made an important contribution, as well. He stayed up all night at the White House on the last crucial day, telephoning several of the delegates at critical times in the final hours. So in a tight time frame, a powerful focus was brought to bear and it produced the right result. But the very fact that getting an agreement took such an extraordinary effort was a clear warning signal of the difficulties that would follow when implementation of the agreement was to take place.

Finally, in the late afternoon of April 10th of this year, Good Friday, an agreement was reached. It’s important to recognize that the agreement does not, by itself, provide or guarantee a durable peace, or political stability, or reconciliation. It makes them possible, but there will have to be a lot of effort in good faith for a long time to achieve those goals.
I believe that the agreement will endure because it’s fair and balanced. It requires the use of exclusively democratic and peaceful means to resolve political differences. It commits all of the parties to the total disarmament of all paramilitary organizations. It stresses the need for mutual respect and tolerance between the communities, and it’s based on the principle that the future of Northern Ireland should be decided by the people of Northern Ireland.

It also includes constitutional change in both Ireland and the United Kingdom. It creates new democratic institutions to provide self-government in Northern Ireland and to encourage cooperation between the North and the South for their mutual benefit, and it explicitly repudiates the use or the threat of violence for any political purpose.

Most importantly for its survival, the agreement was overwhelmingly endorsed by the people of Ireland, North and South, in a free and democratic election. On May 22nd, about six weeks after the agreement was reached, in the first all-Ireland vote in 80 years, 71 percent of the voters in the North and 95 percent of the voters in the South approved the agreement. That’s a strong statement by the people. It sends a powerful message to political leaders that the people want peace and they support the agreement as the way to get it.

In the past few months, I have been asked often what lessons Northern Ireland may hold for other conflicts. I will try briefly to respond to that question now.

I begin with caution. Each individual is unique; each society is unique; and it follows logically, therefore, that no two conflicts are the same. Much as we would like it, there is no magic formula which, once discovered, can be used to end all conflicts. But there are certain principles which I learned from my experience in Northern Ireland which I believe are universal.

First, I concluded my experience in Northern Ireland with the unshakeable conviction that there is no such thing as a conflict which can’t be ended. Conflicts are created and sustained by human beings. They can be ended by human beings. No matter how ancient the conflict, no matter how much harm or hurt has been done, peace can prevail if pursued with sufficient determination and vigor.

When I arrived in Northern Ireland, I found, to my dismay, a widespread feeling of pessimism among the public and the political leaders. It’s a small, well-informed society where I quickly became known. Every day, people stopped me on the street, in an airport, in a restaurant, dozens and dozens of people. They always began with kind words, “thank you, Senator, God bless you, we appreciate what you are doing.” And
they also always ended with despair, "you are wasting your time, this conflict can't be ended, we have been killing each other for centuries, we are doomed to go on forever."

One week before the agreement was reached, 87 percent of the people in a poll expressed the belief that no agreement was possible.

As best I could, I worked to reverse such attitudes, particularly among the delegates to the negotiations. This, it seems to me, is the special responsibility of political leaders from whom many in the public take their cue. Leaders must lead. One way is to create an attitude of success, the belief that problems can be solved, that conflicts can be ended, that things can be better. Not in a foolish or unrealistic way, but in a way that creates hope and inspires confidence among the people.

A second need is for a clear and determined policy not to yield to the men of violence. Over and over they tried to destroy the peace process of Northern Ireland and at times they very nearly succeeded. In July of this year, after the agreement was reached and approved by the people, three young Catholic boys aged 6, 10 and 12 were burned to death as they slept in their beds. In August, a devastating bomb in the town of Omagh killed 29 people and injured 300, Protestant and Catholic alike.

Those were acts of appalling ignorance and hatred. They must be totally condemned. But to succumb to retaliation would give the criminals what they wanted, escalating sectarian violence and an end to the peace process. The way to respond is to swiftly bring these criminals to justice and to go forward in peace. That means there must be an endless supply of patience and perseverance.

Sometimes the mountains seem so high and the rivers seem so wide that it's hard to continue the journey, but no matter how bleak the outlook, the search for peace must go on. Seeking an end to conflict is not for the timid or tentative; it takes courage, it takes perseverance, it takes steady nerves in the face of horrible violence.

I believe it a mistake to say in advance that if acts of violence occur, the peace process will stop. That's an invitation to those who use violence to destroy the process, and it transfers control of the agenda from the peaceful majority to the violent minority.

A third need is a willingness to compromise. Peace and political stability can't be achieved in sharply divided societies unless there is a genuine willingness to understand the other point of view and to enter into principled compromise. It's easy to say, but very hard to do, because it requires of political leaders that they take risks for peace.

Most political leaders dislike risk-taking of any kind. Most of them
get to be leaders by minimizing risk. It’s asking a lot to ask of them that they be bold in the most difficult and dangerous of circumstances. But it must be asked and they must respond if there is to be any hope for peace.

I know it can be done because I saw it firsthand in Northern Ireland. Men and women, some of whom had never met, never before spoken, who had spent their entire lives in conflict, several of them had been targets of assassination attempts, had been shot; several of them have served prison terms for killing people in the other community. But they came together in an agreement for peace.

Admittedly, it was long and difficult, but it did happen and if it happened there, it can happen elsewhere.

A fourth principle is to recognize that the implementation of peace agreements is as difficult and as important as reaching them. That should be self-evident. But often just getting an agreement is so difficult that the natural tendency is to celebrate, then go home and turn to other matters. But as we are now seeing, not just in Northern Ireland, but also in the Balkans and Middle East, getting it done is often harder than agreeing to do it.

Once again, patience and perseverance are necessary.

It is especially important that Americans, busy at home and all across the world, not be distracted or become complacent by the good feeling created by a highly-publicized agreement. If a conflict is important enough for us to get involved in, we must see it through all the way to a fair and successful conclusion.

Right now, as we speak, the governments and the parties so far have been unable to resolve issues relating to the formation of the Executive of the new Northern Ireland Assembly or the decommissioning of arms by the paramilitary organizations.

There is widespread uneasiness among some about the continuing release of prisoners, and next year there will be further intense controversy when reports are received from independent commissions on policing and the criminal justice system. It will take extraordinary determination and commitment to get safely through all of these problems, but I believe that it can be done and I pray that it will be done.

It would be an immense tragedy for this process to fail. The British and Irish Governments and the people of Northern Ireland have come too far to let peace slip away now. The people of Northern Ireland deserve better than the troubles they have had over the past several decades. Peace and political stability are not a lot to ask for; indeed, they are the minimal needs in a decent and caring society.
There is one final point that is so important to me that it extends beyond open conflict. I recall clearly that my first day in Northern Ireland, nearly four years ago, I saw for the first time the huge wall which physically separates the two communities in Belfast. Thirty feet high, topped in some places with barbed wire, it’s an ugly reminder of the intensity and the duration of the conflict.

Ironically, it’s called the Peace Line. On that first morning, I met with Catholics on their side of the wall, in the afternoon with Protestants on their side. Their messages had not been coordinated, but they were the same. In Belfast and in the other urban areas of Northern Ireland, they told me, there is a high correlation between unemployment and violence. They told me that when men and women have no opportunity, no hope, they are more likely to take the path of violence.

As I sat and listened to them, I thought that I could just as easily be in Chicago, or in Calcutta, or Johannesburg, or the Middle East. Despair is the fuel for conflict and instability everywhere in the world. Hope and opportunity are essential to peace and stability. Men and women everywhere need the income to support their families, and they need the satisfaction of doing something worthwhile and meaningful with their lives.

The Universal Declaration also recognizes this as a basic right. Article 23 begins with the words, “Everyone has the right to work.” The conflict in Northern Ireland is obviously not exclusively or even primarily economic. It involves religion and national identity. The Unionists identify with and want to remain part of the United Kingdom; Nationalists identify with and want to become part of a United Ireland. The Good Friday Agreement acknowledges the legitimacy of both aspirations and it creates the possibility that economic prosperity will flow from and contribute to a lasting peace.

My most fervent hope is that history will record that the conflict, which has come to be known there as the “Troubles,” ended on August 15th 1998 at Omagh, that the bomb which shattered the town that warm summer afternoon was in fact the last spasm of violence in a long and violent conflict. Amidst the death and destruction there was laid bare the utter senselessness of trying to solve the political problems of Northern Ireland by violence. It won’t work. It will only make things worse.

Two weeks later, I accompanied Prime Minister Blair and President Clinton to Omagh to meet with the survivors and with the relatives of those killed. There were hundreds of people present. Among those with whom I spoke, there were two whom I will never forget. Claire Gallagher is fifteen-years-old, tall and lovely, an aspiring pianist. She lost both of
her eyes. As we spoke, she sat with two large white patches where her eyes used to be, an exemplar of grace and courage.

Michael Monahan is thirty-three-years-old. In the blast he lost his wife, who was pregnant, their eighteen-month-old daughter and his wife's mother—three generations wiped out in a single, brutal, senseless moment. Michael was left with three children under the age of five, and he told me that one of them, his son Patrick, two-years-old, asks his father every day, “Daddy, when is Mommy coming home?”

Despite their terrible and irreparable losses, both Claire and Michael told me that what they wanted most was for the peace process to go forward. Their determination gave me resolve and their courage gave me hope.

I am not objective. I am deeply biased in favor of the people of Northern Ireland. I spent nearly four years among them. I came to like and admire them. While they are quarrelsome and quick to take offense, they are warm and generous, energetic and productive. They made mistakes, but they are learning from them. They are learning that violence won’t solve their problems, they are learning that Unionists and Nationalists have more in common than their differences, and they are learning that knowledge of history is a good thing, but being chained to the past is not.

There will be many setbacks along the way, but the direction for Northern Ireland was firmly set when the people approved the Good Friday Agreement. The people of Ireland are sick of war. They are sick of so many funerals, especially those involving the small, white coffins of children prematurely laid in the rolling green fields of their beautiful countryside.

They want peace and I pray that they can keep it.

When the agreement was reached on the evening of April 10th, we had been in negotiations for nearly two years, and we had been in session continuously for about forty hours. We were all elated, but totally exhausted. There was a great deal of emotion and tears flowed—tears of exhaustion, tears of relief, tears of joy.

In my parting comment to the men and women with whom I spent two very long and difficult years, I told them that for me the agreement was the realization of a dream, a dream that had sustained me through three-and-a-half difficult years.

Now, I said, I have a new dream. My new dream is to return to Northern Ireland in a few years with my young son. We will travel the country—it’s a beautiful country—and we will meet and talk with the warm and generous people there. Then on a rainy afternoon, we will drive to the building which houses the Northern Ireland Assembly and we will sit
quietly in the visitors’ gallery. There we will watch and listen as the mem-
bers of that Assembly debate the ordinary issues of life in a democratic
society: education, healthcare, tourism, agriculture.

There will be no talk of war, for the war will have long been over. There will be no talk of peace, for peace will be taken for granted. On that
day, on the day when peace is taken for granted in Northern Ireland, I
will be truly fulfilled, and people of goodwill everywhere will rejoice.

Thank you for your attention.

MICHAEL A. COOPER

I think, Senator Mitchell, that I and others here understand better
now than we did earlier in the evening how you were able to accomplish
what you did and what a magnificent person it took to achieve that ac-
complishment. We conferred honorary membership on you, and you hon-
ored us by being here. Thank you for it. There will be a reception in the
reception area across the hall. Come join us. Thank you.
States and Cities as Laboratories of Democracy

Frederick A.O. Schwarz, Jr.1

The following presentation was given by Frederick A.O. Schwarz, Jr., as the lead-off speaker at the Association’s conference, “From the Ground Up: Local Lessons for National Reform,” which was held on November 9, 1998. The conference examined existing campaign finance reforms at the state and local levels with an eye to identifying those reforms that could be implemented on the federal level. It was co-sponsored by the Association’s Commission on Campaign Finance Reform and the New York City Campaign Finance Board.

I am indebted to Justice Brandeis for the title of my remarks today. It was he who, in the 1932 case of New State Ice Co. v. Liebmann,2 in dissent, charged his fellow justices with stymying the potential progress of the nation by striking down Oklahoma’s licensing requirement for sellers of ice.

Defending the right of state governments to tailor legislation to local needs, Brandeis opined: “it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”3

1. Alexandra Wald, an associate at Cravath, provided research and help on this paper.
3. Id at 311 (Brandeis, J., dissenting).
Just such a happy experiment is the New York City Campaign Finance Act. Passed in the wake of grim findings by the Sovern Commission on Integrity in Government of vast opportunities for abuse, influence peddling and other improprieties, the law has—as Mayor Koch predicted in signing it—"achieved a more equitable and open system of financing candidates who seek elective office in New York City."4

With its sensitivity to New York's unique concentration of wealth and power, its increased accountability to the people through disclosure, and its creative, voluntary, incentive-creating structure of participation, the Campaign Finance Act embodies the best spirit of local inventiveness. In keeping with Justice Brandeis' wise assessment of the utility of state experiment, New York City's success has led the way for reform in other localities—as it hopefully will eventually do nationwide.

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Later panels today will examine the valuable lessons of our city's law in depth. My project, by contrast, as the day's opening speaker, is to provide a more general overview of the role of state and local governments in inspiring widespread change. Thus, the aim of my remarks today is first to trace some of the substantial and invaluable contributions of the states to national policy throughout American history, starting from the very beginning and into the present day. I recognize the critical part the states historically have played, and continue to play, in pioneering institutional process reforms—for example, state constitutional amendments or campaign financing—as well as their invaluable role as pioneers of substantive, social or economic changes. Next, I examine some of the benefits of using localities as a proving ground for social experiments. Finally, I question how such state and local experiments relate to the core values of federalism and, in particular, how these experiments bear upon minority interests. In this connection, it is important to note that historically, too many states and localities have been retrogressive—not progressive—on issues of race.

I must preface my survey by noting that the critical importance of state innovation to the well-being of the federation was, of course, well established when Brandeis made his famous statement in 1932. De Tocqueville, a perceptive observer on this as many other subjects, had

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4. Hearing on Local Laws (February 29, 1988) (statement of Mayor Koch) (quoted in Jeffrey D. Friedlander et al., The New York City Campaign Finance Act, 16 Hofstra L. Rev. 345, 345 n.2 (1988)).
observed a century earlier that: “In large centralized nations the lawgiver is bound to give the laws a uniform character which does not fit the diversity of places and of mores...” In keeping with de Tocqueville’s call for diversity, the history of American federal law in every era has reflected the adoption of the best—and occasionally the worst—of experiments first implemented in the laboratory of the states. From the birth of our most fundamental freedoms to the victims’ rights and environmental reforms of recent decades, the federal government frequently has followed in the footsteps of trailblazing states and cities.

For example, the laboratory model was much in evidence when the Federal Constitution was drafted, as the Founders drew upon lessons taught by the constitutions of the original states. In fact, the constitution of our own state proved particularly influential as a model for the Federal Constitution. Alexander Hamilton pointed proudly to the New York constitution in the very first number of The Federalist, where he assured New Yorkers that the new Federal Constitution for which he sought support was an “analogy to your own State constitution ....”

In fact, it is the original states to which the nation owes many of those freedoms that define what it is to be an American. Free exercise of religion, restrictions on search, seizure, and quartering of troops, freedom of the press, and safeguards against cruel and unusual punishment appeared in state constitutions before their enactment in our national Bill of Rights. Many states, most particularly Massachusetts, Virginia, and our own, considered these rights so critical that only the promise of amendment procured ratification of a Constitution without the Bill of Rights.

During the early years of the American federation, the nation witnessed legislative state experiments both for the good, and for the terrible in the area of race. The legislature of Pennsylvania outlawed slavery in 1780, and our own state followed suit in 1799. Massachusetts outstripped every other state when, in 1783, it interpreted its state constitution to require the abolition of slavery. By 1804, the last Northern state had freed its slaves. Until the passage of the regressive federal Fugitive Slave Act of 1850, moreover, these same states further enacted new personal liberty laws to enforce the rights of fleeing slaves.

During the last three decades of the nineteenth century, after a federal attempt at civil rights legislation had been declared invalid, virtually every northern state, as well as a number of western states, prohibited

school segregation by statute. When called upon, the courts of these states stood behind those statutes by requiring school integration, to some extent at least.

I do not suggest that the civil rights record of the northern states was perfect. And, of course, the story was altogether different in the South, with a terrible cost to the union. But the experiments of those states that abolished slavery yielded empirical evidence that liberty was something that could be had, that it worked, and that it was something to praise rather than decry.

The states also paved the way for the national government's recognition of another crucial freedom, suffrage for women. Much as the Northern states had been pioneers in expanding rights for people of color, it was the state legislatures, especially in the west and north, that set a national example by according women the vote. Wyoming enacted women's suffrage in 1869, and twenty-four states already had followed when the Nineteenth Amendment became national law in 1920.

During the decades that followed, the states continued to reinvent the landscape of American rights. For example, New York passed the nation's first worker's compensation law in 1910, and other states soon followed. Massachusetts pioneered the first minimum-wage legislation in 1912. Though thirteen states, the District of Columbia, and Puerto Rico, had enacted minimum-wage programs by 1920, the nation's Congress did not follow suit until Franklin Roosevelt's New Deal.

However, these state experiments at worker protection were frustrated during the early decades of the twentieth century, when, as you all know, the Supreme Court applied the now-discredited doctrine of freedom of contract to strike down hundreds of progressive state laws involving minimum wages and maximum hours. The best-known example of this, of course, being the Supreme Court's Lochner decision in 1905.\(^7\)

The trend away from state and local experimentation that had begun in the 1930s acquired a new dimension in 1942, when Supreme Court decisions vastly expanded the preemptive power of federal legislation. During the New Deal, as well as the Truman, Eisenhower, Kennedy and Johnson administrations, of course, national attention focused on national programs, opening doors to social security, urban housing, education, and voting and other civil rights. With the Southern defiance of Brown v. the Board of Education,\(^8\) attention focused, quite properly, on reforms at the

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national level. But it should not be thought that these national changes put an end to state innovations in the area of rights.

For example, during this period, New York City continued to be a trailblazer. New York City passed its first housing discrimination law in 1939. In 1957, the New York City Council—generally derided in those days and not as good as it is today—passed the first law in the nation prohibiting discrimination in privately-owned housing.

Today, a renewed vigor of reform is thriving in states and localities. The value of state innovation has reasserted itself increasingly in recent decades. For example, California, the first state to adopt motor vehicle emission standards, led the way long before federal statutes regulating air pollution. National work on the environment remains vital, but an editorial just today in the New York Times shows that states and cities are again leading the way in pressing for even greater environmental improvements.

Cities and states—again, particularly New York City—likewise have been standard bearers in the area of gay rights, although, as you know, this issue is one that has proven that state experiments can go in both directions. In 1986, this city passed a landmark gay rights law under then-Mayor Koch, and just this past June New York City enacted a domestic partnership law, providing an opportunity to experience such a law in action. As of 1998, ten states and the District of Columbia have enacted civil rights protections for people who are gay, far outstripping the provisions made by the federal government.

It is not only the legislative and executive branches of state and local governments that have made strides in recent years. Since Justice William Brennan’s influential speech on state constitutions and individual rights, the state courts have assumed the role of guardians of individual freedoms even as the United States Supreme Court has begun to pull back from the landmark decisions of the Warren Era. Our own Chief Judge Kaye, speaking in this bar association in one of the Cardozo Lectures, has asserted the importance of the state courts as trailblazers in protecting individual freedoms.

Thus, from the genesis of the Bill of Rights to the ongoing invention of new rights today, state experiments have contributed to the good of

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the nation. Just as Justice Brandeis predicted, the states have served as laboratories in which to culture seeds of freedom.

Just as important as state innovations in the area of rights, state experiments in developing our system of government also have been invaluable to national progress. In the same way that the nation’s vision of rights has benefited from the experiments of daring states, state institutional reforms like the campaign finance changes we celebrate today historically have changed the landscape of American government. It is, for example, to the Massachusetts constitution that we owe the fundamental concepts of separation of powers and our tri-partite system of government. The Federal Constitution’s provision for the trial of impeachments was modeled after the manner in which the New York state constitution dealt with the same issue.

Many concepts vital to today’s political discourse trace their lineage back to the early part of this century, to the Progressive Era, when the so-called Progressive Movement sought creative solutions to ensure the protection of the public against “special interests,” and boss-led machine politics. It is open to debate whether some of the Progressive innovations such as initiatives, referenda, recall, term limits, direct primaries, and special prosecutors affect the political system in ways that prove perverse rather than benign. But subjecting these measures to trial at the local level enables the nation to decide whether they are for the good, or they are not. The power of such experiments is proven by the enactment of the Seventeenth Amendment in 1913, which endorsed the Progressive spirit on a national level by providing for the direct popular election of United States senators instead of the previous system of election by the state legislatures.

As later panels will discuss in more detail, today’s headlines reflect a renewed commitment to democratic reform. A second Progressive Era might be upon us. States and localities are concentrating—as they know they must concentrate—on dealing with the failings of big government, the miring of the federal government in gridlock and the overly dominant effects of big money in our politics.

Campaign finance reform, the topic of the day, is one solution that a number of local areas are vigorously supporting. As you know, in referenda held over the last two years in Maine, Massachusetts and Arizona, the public voted in favor of campaign finance reform. Today’s conference suggests that we may see more and more experiments that hopefully will prompt federal legislators to believe they must do the same thing.

Then there are efforts in Oregon to conduct elections entirely by mail,
and, in Texas, to permit voting by computer. All these “experiments” are part of this country’s constant effort to perfect its democracy. The chance to judge the success of such reforms in states and localities can only be healthy for the nation.

Of course, in addition to electoral changes, the laboratories of the states are conducting exciting experiments in improving government efficiency. If you read the wonderful book Reinventing Government, by David Osborne and Ted Gaebler, you will be familiar with dozens of examples where local entities here in New York City, and, for example, in Arizona and Wisconsin, have, in fact, undertaken experiments to make their governments more efficient.

Tests like these permit us to see whether programs like the New York City Scorecard program, which evaluates, for example, street cleanliness, can have the beneficial effect of making the government do better by informing the public where it has or has not done well.

Let’s take the instance of school vouchers as one possibly important opportunity for experimentation. You know that is a very, very controversial subject. And one can argue powerfully against school vouchers as being something that dilutes the public schools; in fact, my own gut instinct would go that way. On the other hand, it’s an idea—it seems to me—with sufficient possible power to reform the public schools that it is worthwhile to see how, in fact, it works in practice. Thus we gain the benefit of an actual experiment in a few localities, rather than pure rhetoric.

The practical and democratic benefits of experimentation at the state and local level are undeniable. However, inasmuch as Justice Brandeis postulated that the states might experiment without risk to the rest of the country, this discussion of his idea would not be complete if I did not pause to recognize that it is the rare experiment that is truly without danger. Institutional process reforms must not run afoul of the limits of the Constitution, especially those ensuring the value of every person’s vote. However, it is primarily with respect to substantive economic and social changes that one must sound a note of caution about whether one embraces experimentation as always being sensible.

Inherent in the New Federalism is a belief in a distinct local identity. But the extent to which certain types of differences between localities are a healthy side effect of experimentation is a matter for debate. Caution warns against the over-localization of human rights, and against a retreat from established protections in the name of experiment. As Professor Charles Black reminds us: “Anything concerning the equal protection
of a child in Arkansas is just as legitimate a concern of mine as it is of the citizen of Little Rock. The matters of the Constitution—all of them, not just some of them—are national matters.” In this respect, one can take abortion as an example and say that some of the proposed experiments recently defeated at the polls were ones that were dangerous to Constitutional rights.

Related to these questions about the importance of national safeguards is a concern about the effects of local experimentation upon those in the local or regional minority. State and local experiments present us with a dilemma, in that sometimes it is states and localities that lead the way in expanding protection of minorities. Yet we have to recognize that, as a matter of theory as well as a matter of practice, there can be no retreat from strong national standards for the protection of minorities.

Going back to James Madison in the Federalist Number 10, Madison pointed out that national government serving a diverse group of citizens can protect unpopular minority groups more effectively than can the government of a small homogeneous state. In revising the City Charter in 1989, for example, one of the constraints that we felt in decentralizing land use, for example, to too great an extent, was the fear of giving insular groups too much power to exclude people who do not look like them.

So it comes as no surprise that some of the experiments at the state level recently have been targeted at turning back the rights of those who have less voting power, the rights of minorities. And you all know examples that I am talking about.

Moreover, when we speak of “experiment,” we must bear in mind that, as history is said to be written by the victors, so in some measure must the success or failure of state experiments be determined subjectively. For example, bare statistics reflecting declining welfare rolls or school performance may conceal individual misery and failure. And though theoretical advocates of ever-greater state and local experimentation point to the possibility of exit from the state, the logistic and economic difficulties of moving from state to state have potentially grave consequences for individuals who are poor and individuals who do not have power. And some worry about the possibility of a “race to the bottom” among governments competing to do less for the disadvantaged—and thus reducing taxes (at least for the short term).

Of course, in the area of campaign finance reform, one doesn’t have

to worry about a race to the bottom. This is so because the federal election system is already at the bottom. So what is going on in campaign finance reform is not a race to the bottom, but an effort to aspire to the top.

In other areas, however, we must heed the lesson that not all state experiments have been for the best in light of history. To quote Henry Steele Commager, “the Massachusetts legislature imposed loyalty oaths on teachers, the Oregon legislature outlawed private schools, and . . . the Tennessee legislature prohibited the teaching of evolution . . . the list could be extended indefinitely.”

Fortunately, however, the laboratory of state experimentation is not a sealed room. Laws passed at the state and local level remain subject to the limits of state constitutional requirements as well as of federal law and the Federal Constitution. As Justice Douglas wrote in Monroe v. Pape, discussing the purpose of section 1983 of the Civil Rights Act, the federal government is a complement to state legislation, with a threefold purpose: (1) to override certain kinds of state laws; (2) to provide a remedy where state law is inadequate; and (3) to provide a federal remedy where the state remedy, though adequate in theory, is not available in practice. So the genius of “Our Federalism” lies not only in the creative power of cities and states, but in the Constitution’s guarantee of a floor and a larger, legislative and Constitutional context for reform.

* * *

Those powers reserved to the states and local governments should not be left to collect dust through disuse or excessive caution. Those who operate at the local level must implement changes wisely, but our dual system of federalism demands that they think about change, and then implement wise changes. We are duty bound to continue to search for better solutions. As I have tried to show, to do so can be in keeping with the best of our nation’s historical legacy and aspirations as well as our civic mandate. And to do so in the area of campaign finance reform confirms our city as a true laboratory, in the most honorable sense, engaged in an experiment of honest, informed, creative—and long over-due—improvements in democracy.


Report and Recommendation with Regard to the Statement of Goals for Increasing Minority Representation and Retention

Task Force on Minorities and The Committee to Enhance Diversity in the Profession

INTRODUCTION

In September 1991 the Association, acting through its newly formed Committee to Enhance Professional Opportunities for Minorities in the Profession,1 adopted a “Statement of Goals of New York Law Firms and Corporate Legal Departments For Increasing Minority Representation and Retention” (the “Statement”), which established goals for hiring Minority lawyers for the six-year period ending December 31, 1997, and specified additional steps to be taken to increase retention and promotion rates in each of the law firms and corporate legal departments that were signatories to the Statement (the “Signatories”).

1. The Committee to Enhance Professional Opportunities for Minorities in the Profession (the “Committee”) was organized in 1990 and took its present name, the Committee to Enhance Diversity in the Profession, in 1994. It was initially chaired by Cyrus Vance and consisted of the managing or presiding partners of 35 large law firms in New York City that were the original Signatories.

2. “Minority lawyers” was defined in the Statement to include African-American, Hispanic-American, Asian-American and Native American lawyers.
Adoption of the Statement was a signal act in the history of the Association, and represented public commitments on the part of the Association and the senior managements of law firms and corporate legal departments represented within the Association on an issue of great public importance. Ultimately, 144 New York law firms and the legal departments of 42 corporations became Signatories to the Statement.

In the Statement, the Signatories agreed to the following goals:

• achieving “participation of Minority lawyers at all professional levels in its law firm or corporate legal department.” (Emphasis added.)

• achieving the goal of hiring Minority lawyers “equal to 10 percent of the total number of all lawyers hired by such firm or corporate legal department during the period 1992-1997.”

• promoting or inviting to partnership or senior corporate counsel positions Minority lawyers who meet the Signatory’s requisite criteria so that “the number of Minority partners and senior corporate counsel will correspond more closely to the percentage of Minority lawyers hired by the firm or corporate legal department.”

These are lofty goals indeed, and the Association and the Signatories can be rightly proud of their participation in this historic undertaking in the cause of equal opportunity and the promotion of greater diversity within the Bar.

Aside from adoption of the Statement, the Committee formed a Subcommittee on Recruitment and Retention, chaired by Ira Millstein, which issued a report in May 1992. The Subcommittee conducted a survey of Minority lawyers at firms represented on the Committee, including Minority lawyers who had recently left such firms. In general, the Subcommittee reported that, while a substantial majority of all Minority lawyers reported that their work experiences, their relations with non-Minority lawyers, and the firms’ evaluation of their performance were not different from those of their non-Minority colleagues, African-American associates, in particular, perceived that their experiences were substantially different from those of their non-Minority colleagues.

The Subcommittee concluded that African-American lawyers as a group perceive far more race-related barriers to their professional development than do other lawyers, and noted that these perceptions apparently are contributing to or causing disparate levels of retention among different groups of Minorities.
The Subcommittee recommended that firms give serious consideration to a number of steps to address these problems, such as diversity training, establishing an internal diversity committee to deal with diversity issues, enhancing orientation training for new associates and re-examining current evaluation processes to ensure clarity and consistency in evaluating Minority and non-Minority associates.³

In June 1994 the Committee, then under the chairmanship of Ira Millstein, was reorganized to serve as an umbrella committee to coordinate the efforts of other Association committees concerned with diversity issues, including a newly organized Task Force on Minorities, chaired by Vaughn C. Williams, and a Task Force on Women, chaired by Katherine Darrow.⁴ On June 17, 1998, the Task Force on Minorities issued a Report, "The Statement of Goals—Six and One-Half Years Later," evaluating the experiences of Minority employment in law firms since the adoption of the Statement. The Report concludes that the Statement was successful in focusing attention on Minority hiring in the profession, but that its overall success in terms of increasing Minority representation and retention has been mixed. The Task Force concluded that:

- The Signatories as a group appear to have met the 10% Minority hiring goal. According to surveys conducted by the New York Law Journal, the average percentage of Minorities hired by the 25 largest firms in New York City, as a group, increased from 13.2% in 1992 to 17.5% for the period 1992 to 1997.⁵

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³ The Subcommittee also recommended the appointment of a special diversity assistant to the President of the Association. The first such assistant was hired in November 1992.

⁴ Subsequently, the Committee on Women in the Profession and the Task Force on Women developed, in collaboration with this Committee, a Statement of Goals of New York Law Firms and Legal Departments for the Retention and Promotion of Women, which was similar in many respects to the Statement. The Statement of Goals for Women was promulgated by the Association in April 1998.

The two task forces have since been merged into the Committee on Minorities in the Profession and the Committee on Women in the Profession, respectively.

⁵ The numbers and percentages in the Task Force Report do not relate precisely to the Signatories as a group, but they are thought to be highly indicative of the results for the Signatories. The Task Force relied principally on two sources: (1) Since 1991, the New York Law Journal has published an annual survey of minority hiring by the 25 largest law firms in New York City; these firms are all among the Signatories. (2) The Task Force also created a database of annual employment statistics for minority groups in the 1990-1997 period at 86 of the Signatories that report such statistics to the National Association for Law Placement (NALP); these 86 firms constituted 62% of the Signatories, but some began reporting statistics...
• The Statement apparently has not yet had any significant impact on the promotion of Minority lawyers to partnership. While the absolute number or Minority partners in the surveyed firms increased from 44 to 125, the percentage of Minority partners increased only from 2% to 3%.6

• Anecdotal data suggest that improvements in Minority hiring are being eroded to some degree by higher attrition rates for Minority lawyers as opposed to non-Minority lawyers, although available survey data do not explicitly document the phenomenon. A 1994 survey by the New York Law Journal found the average attrition rate for Minority lawyers at the 25 largest firms in New York was 52%, compared to 46% for non-Minority lawyers.

The percentage of Minority lawyers employed (as a percentage of all lawyers) appears to have increased over the period, and the number of Signatory firms at which Minority lawyers accounted for 10% or more of all lawyers employed increased from 10 in 1992 to 29 in 1996. The NALP statistics surveyed by the Task Force indicate that Minority employment increased from 6% in 1990 to 9% in 1996, but there is evidence that different Minority groups have had different experiences. For example, the percentage of African-American and Hispanic associates remained at 2% throughout the period, while the percentage of Asian-American associates increased from 3% to 7%.

In view of this experience, the Task Force Report recommended that:

• the Goals be readopted for another five-year period.
• the 10% hiring goal be replaced by a goal of achieving Minority employment among professionals equal to at least 10% of the total number of lawyers employed by the Firm, to encourage signatory firms to focus more attention on retention of Minority lawyers.

6. It is worth noting that the Statement, which was adopted in December 1991, would have had its initial impact on the hiring of law students in the fall of 1992 for clerkship positions in the summer of 1993; most of these students would have graduated from law school in the spring of 1994. At firms where the partnership track is at least 7 or 8 years, which would likely include most of the firms that are Signatories, these lawyers would not yet be considered eligible for partnership consideration.
The sources cited by the Task Force did not contain statistically significant data with respect to the impact of the goals in corporate legal departments, but there is some evidence that the data with respect to law firms may be comparable to the experience of corporate law departments. See "Diversity in Hiring: NAACP Has Blunt Message for Corporate America," New York Law Journal, July 16, 1998.

• the Association publish an annual or at least an interim report on the status of Minority hiring, drawing on the annual retention survey which has been developed by the Committee on Recruitment and Retention.

• the Goals be amended to strengthen the respective commitments of the Association and signatories with regard to the promotion of Minority lawyers to partnership or senior corporate counsel status. In particular, the Task Force recommended that this commitment be phrased in terms of the period of time covered by the readopted goals.

The Committee has reviewed the Report and recommendation of the Task Force and shares the concern of the Task Force that improved hiring rates may not be resulting in a correspondingly larger Minority population within law firms and corporate legal departments. Although the conclusion of the Task Force Report that the Signatories have met or exceeded the 10% Minority hiring goals for 1992-97 period is an encouraging sign that greater participation of Minorities at all levels in law firms and corporate legal departments may soon become a reality, available evidence, though inconclusive and to some extent anecdotal, suggests that Minority retention programs have been less successful than Minority hiring.

Moreover, as noted above, the evidence cited in the Task Force Report suggests that different Minority groups have had different experiences, with Asian-American associates increasing at a more rapid rate than African-American and Hispanic associates.

These reports and anecdotal evidence appear to confirm that, consistent with the findings of the Subcommittee on Recruitment and Retention in 1992, retention of associates remains a serious obstacle to wider participation of Minorities in law firms and corporate legal departments, and that this phenomenon is particularly evident with respect to African-American and Hispanic-American associates.

The Committee, therefore, believes it is important in restating and extending the Statement to emphasize the critical nature of retention programs to ensure that the goal of increased Minority participation in

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7. The sources cited by the Task Force did not contain statistically significant data with respect to the impact of the goals in corporate legal departments, but there is some evidence that the data with respect to law firms may be comparable to the experience of corporate law departments. See "Diversity in Hiring: NAACP Has Blunt Message for Corporate America," New York Law Journal, July 16, 1998.
If Minority lawyers are experiencing lower success rates and higher attrition rates than their non-Minority colleagues, then the fact that the Signatories have achieved and even exceeded the 10% Minority hiring goal adopted in 1991 may suggest that more progress has been made in achieving the overall objective of the Statement than is in fact the case. Similarly, it may well be that the statistics with regard to Minority hiring as a whole are not indicative of the hiring rates for African-Americans and Hispanic-Americans during the Statement period. Thus, it is unclear whether smaller increases in employment levels for African-Americans and Hispanic-Americans are attributable to lower hiring rates or higher attrition rates, or a combination of the two.

Moreover, in Section IV of the Statement, each of the Signatories pledged to continue to pursue the goal of increasing retention and promotion rates for Minority lawyers by taking a number of enumerated steps to ensure that, among other things, the working environment for Minorities be as hospitable as the working environment for non-Minorities, that Minorities have equal opportunities to engage in significant work assignments for important clients, and receive equal training, mentoring, guidance and opportunities to grow professionally and to succeed. In seeking to encourage increased Minority representation and retention at all levels, each of the Signatories pledged to promote or invite to partnership or senior corporate counsel Minority lawyers who meet the firm’s or legal department’s requisite criteria for those positions.

COMMITTEE RECOMMENDATIONS

1. The Committee recommends initially that the Statement be renewed for an additional six-year period. Although much has been accomplished in affording greater opportunities to Minorities in the legal profession, the Task Force report and the survey data upon which it relied compel the conclusion that a great deal more remains to be accomplished.

2. The Committee recommends that in addition to renewing the Statement for an additional period of time, the goals should be restated to provide additional emphasis on the need to enhance retention programs in an effort to reduce the higher rates of attrition that appear to have prevailed with respect to Minority associates in general and African-American and Hispanic associates in particular. The proposed amended Statement thus contains a new Section II(c) to the effect that each of the Signatories will seek to achieve the goal within the 1999-2004 period that Minority
lawyers employed by firms and corporate legal departments will equal at least 10% of the total number of lawyers employed at such firm or corporate legal department. It is, of course, understood that, once achieved, Signatories will, to the extent practicable, seek to maintain such minimum levels of Minority employment, across all levels of associate seniority.

3. The Task Force Report recommended that the Committee issue an annual or other interim report on the status of Minority employment and promotion by the Signatories. Such a report should soon be feasible on the basis of data now being collected under the Attorney Retention Tracking Program (ART) initiated by the Association’s Committee on Recruitment and Retention, which will yield more specific information than is currently available.8

The Committee concurs with this recommendation and will in the future cause annual or other periodic reports on the level of Minority employment in law firms and corporate legal departments to be issued. The newly available, more specific data should provide a clearer picture of the extent of progress in this regard and will thus provide a basis for determining if further steps are necessary to achieve the goals of increased retention and participation of Minorities in our profession.

4. The Task Force also recommended that the Statement be further amended to strengthen the Signatories’ commitment with regard to the promotion of Minorities to partnership or senior corporate counsel positions, noting that the present goals contain no time limit for achieving this goal and no quantification of the goal.

The Committee has given serious consideration to the objective of increased representation of Minorities at the partner and senior corporate counsel levels. This is a difficult and complex issue. On the one hand, it has been observed that large law firms are so overwhelmingly non-Minority in numbers and culture as to be inhospitable places of employment for many Minority lawyers9 and that only the fuller integration of Minorities as partners and senior counsel of law firms and corporate legal departments will ultimately eradicate the problems of latent prejudice, racial stereotypes and interracial stress and discomfort that affect so many Minority lawyers. On the other hand, many firms strongly believe in decid-

8. ART is a program operated in conjunction with Andersen Worldwide to track the various employment changes of law firm associates. The program will generate reports showing attrition rates among law firm associates and will examine reasons for attrition and variations in attrition rates among various associate groups, such as women and minorities.

ing on the admission of new partners that their ability to make necessarily subjective and individual judgments on the basis of non-discriminatory qualifications and criteria is essential to their future success and ultimate survival. Anything that leads to surrendering those judgments to externally-imposed numerical goals is seen as a serious threat, and unacceptable.

It was also suggested that the undertaking in Section II(d) of the Statement, to admit or invite to partnership or senior corporate counsel Minority lawyers who meet the “requisite criteria” of the law form or corporate legal department, should instead refer to Minority lawyers who are “qualified” for such positions. While undoubtedly all of the Signatories would like to admit all “qualified” Minorities as partners or senior corporate counsel, such a formulation of the goal ignores the myriad other factors (such as overall and specific practice area needs, economic conditions, etc.) that must be considered in making such decisions. As a consequence, reaching a consensus to change the Statement to impose a more rigidly formulated commitment to admit Minority partners is, at least at present, difficult if not impossible.

As noted above, it is still too early to determine the impact of the Statement on the admission of Minority lawyers as partners, given the length of the partnership track at most firms that are Signatories. In lieu of any change in the specific wording of the Signatories’ commitments at this time, the Committee has opted to give greater emphasis to the importance of careful attention to the committed steps enumerated in Section IV of the Statement in furtherance of the goal of increasing the retention and promotion rates for Minority lawyers. It continues to be the Committee’s belief that effective retention and training programs for Minority lawyers will in time result in increased Minority participation at all levels of law firms and corporate legal departments.

The Committee will continue to direct its attention to achieving this goal.

5. The Committee also wishes to emphasize the importance of increasing the participation of corporate law departments as signatories to the Statement of Goals. Corporate law departments can play a key role in supporting and encouraging the profession to achieve the objectives of the Goals; a number of corporations currently request their outside law firms to assign minority lawyers to their matters. This encouragement provides significant additional incentive for law firms to recruit, retain and promote minorities. As corporate law departments improve their own recruitment, retention and promotion of minority attorneys, the Committee believes it appropriate for them to encourage their outside counsel to do the same.
I. PREAMBLE

1. The Association can take pride in the initiatives it has taken to increase participation by Minorities (African-Americans, Hispanic-Americans, Asian-Americans and Native American lawyers) in all levels of our profession. In particular, in 1991, the Association adopted the Statement of Goals of New York Law Firms and Corporate Legal Departments for Increasing Minority Representation and Retention, and the Statement of Goals has been subscribed to by 144 New York law firms and 42 corporate legal departments. Moreover, the goal that Signatories would hire Minority lawyers equal to at least 10% of the total number of lawyers hired by them in the period 1992-1997 appears to have been met or exceeded.

2. Despite this fact, the overall level of Minority employment in the law firms that are Signatories (data with respect to corporate legal departments are not available) appears not to have increased as much as was hoped. The number of Minority lawyers (especially African-American and Hispanic lawyers) practicing in law firms in the City of New York remains small in relation to the total number of lawyers employed by such firms.

1. At press time, 30 law firms and 7 corporate legal departments have signed on to the Statement of Goals. Additional signatures are being sought.

RESTATEMENT AND REAFFIRMATION OF GOALS OF NEW YORK LAW FIRMS AND CORPORATE LEGAL DEPARTMENTS FOR INCREASING MINORITY REPRESENTATION AND RETENTION

I. LAW FIRMS

Battle Fowler, LLP; Brown & Wood LLP; Cadwalader Wickersham & Taft; Carter Ledyard & Milburn; Cleary Gottlieb Steen & Hamilton; Cravath Swaine & Moore; Davis Polk & Wardwell; Debevoise & Plimpton; Fried Frank Harris Shriver & Jacobson; Howard Smith & Levin LLP; Hughes Hubbard & Reed LLP; Kaye Scholer Fieiman Hays & Handler LLP; LeBoeuf Lamb Greene & MacRae; Milbank Tweed Hadley & McCloy LLP; Morrison Cohen Singer & Weinstein LLP; Morrison & Foerster LLP; Paul Weiss Rifkind Wharton & Garrison; Proskauer Rose LLP; Rogers & Wells LLP; Schulte Roth & Zabel LLP; Shearman & Sterling; Simpson Thacher & Bartlett; Skadden Arps Slate Meagher & Flom LLP; Stroock & Stroock & Lavan LLP; Sullivan & Cromwell; Weachtell Lipton Rosen & Katz; Weil Gotshal & Manges; White & Case LLP; Willkie Farr & Gallagher; and Winthrop Stimson Putnam & Roberts.

I. CORPORATE LEGAL DEPARTMENTS

These facts indicate that issues of retention and promotion of Minorities are not being successfully addressed.

3. In view of the historical role of our profession in the continuing struggle for equal opportunity under law, which the Association and the Signatories have agreed to pursue, it is essential that we continue and redouble our efforts to achieve greater participation of Minority lawyers at all levels in our firms and corporate legal departments.

4. The increased hiring of Minorities by law firms and legal departments has not yet been reflected in similarly increased numbers of Minorities who are partners of law firms or senior corporate counsel in corporate legal departments. Only if retention programs are more successful than they have been in the past will the number of Minority lawyers who are partners and senior corporate counsel come to correspond more closely to the percentage of Minority lawyers hired by law firms and corporate legal departments.

Retaining and promoting more Minority lawyers to partnership and senior corporate counsel positions will require conscious commitment to the goals and the specific steps enumerated in Section IV below.

* * * * * * * * * *

Accordingly, the Signatories now restate and reaffirm the goals for increasing Minority representation at all levels of law firms and corporate legal departments as follows:

II. Statement of Goals for Increasing Minority Representation at All Levels of Law Firms and Corporate Legal Departments

Each signatory pledges to pursue the following goals:

(a) Full and Equal Participation of Minorities: To achieve participation of Minority lawyers at all professional levels in its law firm or corporate legal department.

(b) Minority Hiring: To achieve the goal of hiring in each of the years 1999 through 2004 a number of Minority lawyers amounting to at least 10% of the total number of all lawyers hired by such firm or corporate legal department. In light of our experience in the period 1992-1997, and the increased number of qualified Minority law students, we believe that this goal is attainable if the steps recommended in Section III are contin-

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2. The Statement of Goals is intended to be applicable only to the United States offices of signatory firms and corporate legal departments, inasmuch as the concept of “minority” may differ in other countries.
ued or are taken and the pool of Minority law school graduates from which the law firm or corporate legal department recruits remains at an adequate level.

(c) Minority Employment and Retention: To seek to achieve the goal that the number of Minority lawyers employed by the firm or corporate legal department will equal at least 10% of the total number of lawyers employed at such firm or corporate legal department by the year 2004. It is, of course, understood that, once achieved, Signatories will, to the extent practicable, seek to maintain such minimum levels of Minority employment, across all levels of associate seniority. In light of the hiring experience of Signatories in the 1992-1997 period, the increased number of qualified Minority law students, and the steps to increase Minority retention and promotion set forth in Section IV below, we believe this goal will be attainable.

(d) Minority Partners and Senior Corporate Counsel: To promote or to invite to partnership in each law firm and to senior corporate counsel in each corporate legal department Minority lawyers who meet the firm's or legal department's requisite criteria for partnership or senior counsel. We believe that if the hiring goals continue to be met, and if the steps enumerated in Section IV are followed, over time the number of Minority partners and senior corporate counsel will increase so as to correspond more closely to the percentage of Minority lawyers hired by the firm or corporate legal department.

III. Steps to be Taken by Firms and Corporate Legal Departments in the Recruitment Process

Each Signatory pledges to pursue the goal of increasing the number of Minority lawyers hired by taking all or some of the following steps:

(a) Continuing to utilize hiring criteria for all lawyers (Minority and non-Minority) that include academic grades, communication skills, leadership, integrity, judgment, resourcefulness and other factors which indicate potential for success in the law firm or corporate legal department.

(b) Increasing the pool of Minority law student applicants who meet the firm's or corporate legal department's hiring criteria by:

(i) augmenting interviewing efforts at law schools with significant numbers of Minority law students; and

(ii) identifying Minority students through placement administrators, faculty members, former summer associates and Minor-
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...ity law student organizations at law schools and by job forums, receptions and other activities for law students.

(c) To the extent that a law firm or corporate legal department engages in lateral hiring, increasing the lateral Minority attorney applicant pool by:

(i) requesting professional recruiters, when used, to include Minority candidates in their searches;
(ii) requesting Minority bar associations for referrals; and
(iii) requesting Minority partners of law firms for referrals.

(d) Recruiting Minority applicants by involving partners and senior corporate counsel in the recruitment process.

(e) Communicating to all lawyers the firm’s or legal department’s commitment to the goals set forth in this statement.

IV. Steps to be Taken by Firms and Corporate Legal Departments for Retention and Promotion of Minority Lawyers to Partnership and Management Positions

Each Signatory pledges to continue to pursue the goal of increasing retention and promotion rates for Minority lawyers by doing the following:

(a) Exercising diligence and sensitivity further to ensure that the opportunities for Minority lawyers are equivalent to those provided to non-Minority lawyers in the assignment of work on a consistent basis, of the type necessary to develop skills and acquire experience for success and advancement;
(b) Enhancing programs aimed at increasing retention rates for all attorneys, focusing on such matters as allocation of interesting work, training and guidance, relationships with partners and senior corporate counsel, client contacts, feedback and pro bono commitment;
(c) Exercising diligence and sensitivity further to ensure that the work environment is as hospitable for Minority lawyers as it is for non-Minority lawyers by providing that:

Minority lawyers receive equal opportunity to perform significant work assignments for important clients;

Minority lawyers receive equal training, mentoring, guidance, feedback and opportunities to grow and succeed;
Minority lawyers are fully included in work-related social activities with other lawyers and clients;

Policies are adopted that prohibit law firm or legal department sponsored functions at private clubs that discriminate on the basis of race, creed, religion or sex;

(d) Ensuring equal opportunities for Minority lawyers to achieve partnership or senior corporate counsel status by:

Using the same criteria for Minority and non-Minority lawyers to achieve partnership or senior corporate counsel status;

Guiding the development of Minority lawyers in the same manner as non-Minority lawyers;

As Minority lawyers near consideration for partnership or senior corporate counsel, assigning responsibility for important client matters to senior Minority lawyers in the same manner and extent that such matters are assigned to senior non-Minority lawyers.

December 1998
MINORITY REPRESENTATION AND RETENTION

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A Suggestion for a More Equitable Retaining Lien

Committees on Professional Responsibility and Professional Discipline

New York, like many states, has a statutory charging lien permitting attorneys to satisfy unpaid fees and expenses incurred on behalf of a client from the litigation proceeds resulting from that representation.\(^1\)

By contrast, the retaining lien, which permits an attorney to retain client files until fees and expenses are paid, remains an uncodified feature of the common law in New York. As such, the retaining lien in New York is poorly defined, poorly regulated, and sometimes abused. In this joint report, we propose that the attorney's retaining lien be embodied in a statute, with significant clarifications as to the scope of the lien and the circumstances under which it can be used and challenged.

Retaining liens are an unusual legal device. The retaining lien permits an attorney pursuing a fee to disrupt the client's litigation effort. "Except for the fact that a lawyer has a legal right to do so, asserting a retaining lien would be extortionate."\(^2\) As stated in one recent decision, "[t]he lien is valuable in proportion as denial of access to the papers causes

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1. N.Y. Judiciary Law § 475.
inconvenience to the client." The "inconvenience" stems from the inability of the client's new counsel to represent the client easily, well, or with required speed without the case file. From this perspective, the retaining lien is very different from the charging lien, which is used after the litigation is over and threatens the client's wallet, but not the client's litigation prospects. It is the Committees' understanding, based upon anecdotal evidence and complaints to grievance committees, that the power afforded the attorney by the retaining lien has resulted in overreaching by some attorneys, intentionally or not, that can and should be addressed formally.

The very basic conflict of interest between attorney and client inherent in enforcement of the retaining lien has made codification of the retaining lien difficult. The difficulties are palpable in the amendments to the Massachusetts disciplinary rules concerning the retaining lien. Massachusetts DR 2-110 (A) (4) (d) provides that “[i]f the attorney and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the attorney’s work product . . . for which the client has paid.” Yet, Massachusetts’ DR 2-110 (A) (4) (g) states that, “[n]otwithstanding anything in this Disciplinary Rule to the contrary, [an attorney is required] to make available materials in the client’s file when retention would prejudice the client unfairly.” Recognizing the conflict between subsection (d) and subsection (g), the Massachusetts Board of Bar Overseers explained with respect to subsection (g) that the inconsistency was the by-product of compromise:

The Board too had some concern that this might be an exception that could swallow the rule, and it was for that reason that it was not included in the draft originally submitted to the Court. After the issue was raised by the Court’s Rules Committee . . . ,


If a retaining lien were to become an even moderately foreseeable possibility in federal question litigation, sophisticated litigants would insist on having their own copies of all papers to protect themselves against potential withholding of files. This would defeat the lien and at the same time increase the cost of litigation. These concerns do not apply to retention of funds, as opposed to files, where the retention would not obstruct the course of litigation.

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the Board determined to add the paragraph on the ground that protection of the client's interest must remain paramount.5

In New York, even more extreme steps have been proposed to avoid the problems inherent in the retaining lien. In 1993, a state commission headed by Justice Leo Milonas proposed the abolition of the retaining lien altogether in matrimonial representation in New York (requiring the turnover of files within 30 days), but the proposal was ultimately dropped after considerable opposition and reported concern that the common law retaining lien could be abolished only by statute, not court rule.6

It is the aim of this joint report to propose clear and specific statutory language that will accommodate these conflicting interests, and provide guidance to both attorneys and clients as to their rights with regard to retaining liens.

COMMON LAW ROOTS

The attorney's retaining lien is a possessory lien established long ago in the common law.7 Common law liens in general arise with respect to personal property and permit the lienor to retain possession until a debt secured by the property is paid.8 Common law liens are founded on possession. The lienor must properly and exclusively possess the property in order to enforce the lien.9 Once possession is relinquished, the lien is lost for all purposes.10 Virtually every existing common law lien has been codified in New York save one: the attorney’s retaining lien.

THE CASE LAW

Current case law in New York recognizes the common law retaining lien. “A common-law retaining lien, also known as a general possessory lien, entitles the attorney 'to retain all papers, securities or money be-

5. August 13, 1991 letter from the Board of Bar Overseers to the Supreme Judicial Court.

6. The committees share this concern. This proposal seeks only to modify a common law rule and not abolish it, and therefore may not require enactment of a statute. In the interest of clarity, however, we have proposed statutory language and believe that the proposal would be better effectuated as a statute.


A MORE EQUITABLE RETAINING LIEN

longing to the client that come into the attorney’s possession in the course of the representation, as security for payment of attorneys’ fees.” The retaining lien is enforceable only by possession. The lien “is extinguished only when the court, which controls the functioning of the lien, orders turnover of the file in exchange for payment of the lawyer’s fee or the posting of an adequate security therefor following a hearing.”

The case law has identified various circumstances under which the retaining lien will not be applied. The lien will not be applied if the client is demonstrably impecunious or if enforcement of the lien will cause undue hardship. Nor does it apply to claims for future contractual damages, as opposed to actual earned fees. The lien may not be permitted when the “papers are necessary to defend an ongoing criminal prosecution and a client who lacks the means to pay the lawyer’s fee will see his or her defense seriously prejudiced without access to the papers in the attorney’s possession.” There is disagreement as to whether the lien should not be applied when there is a contingent fee arrangement because the contingent event has not yet occurred, or whether the lien should be applied when there is a contingent fee relationship to the extent of the quantum meruit claim against the client. Indeed, some cases appear to

15. Cohen, 584 N.Y.S.2d at 118 (“When a client has made an unrefuted or uncontroverted showing of ‘decisive circumstances,’ such as indigence, the court will relegate the outgoing attorney to a charging lien on the proceeds of the action . . . .”).
19. See High Images, Inc. v. Generali, 1993 WL 178209 at *1 (S.D.N.Y. 1993) (“there is nothing inequitable in recognizing a retaining lien here for the fair value of counsel’s service, since plaintiff is a corporation with substantial assets and there is no claim that it lacks the funds to pay what is owed.”).
indicate that enforcement of the lien is wholly discretionary with the
court.20 Some cases require in order to invalidate an asserted retaining lien
that there be an expedited evidentiary hearing with respect to whether
the attorney was discharged for cause and, if not, the amount of the fees
due.21 Other cases address the conditions under which other types of security
for the debt to the attorney might be substituted for the retaining lien.22

Possible expansion of the scope of the retaining lien was explored in
one recent case, which raised the issue of a third party's duty to respect an
attorney's retaining lien.23 In that case, the court, deciding to “protect the
retaining lien,” withdrew its “so ordered” approval of opposing counsel’s offer to provide to new counsel documents withheld by departing counsel pursuant to a retaining lien.24

Under New York law, the scope of an attorney’s retaining lien has
few limits. The Court of Appeals has stressed that a retaining lien permits
an attorney to hold “all papers, securities or money belonging to
the client that come into the attorney’s possession in the course of the
representation as security for payment of attorneys’ fees.”25 The lien covers
the entire client file,26 including not just court papers and attorney
work product, but also documents which the attorney received from the

20. See Bankers Trust Co. v. Hogan, 187 A.D.2d 305, 589 N.Y.S.2d 338, 339 (1st Dep’t
1992) (“The appellant’s retaining lien, however, is denied, and the matter of an appropriate
fee due, if any, is remanded to the Supreme Court for a hearing in accordance with its
procedures, at which hearing the reasonableness of such fees can be explored.”); see also
Franklin, Weinrib, Rudell & Vassallo, P.C. v. Stellato, 240 A.D.2d 301, 658 N.Y.S.2d 622,
623 (1st Dep’t 1997) (“Concerning defendant’s document demand, plaintiff’s retaining lien
cannot justify a refusal to disclose documents clearly needed by defendant to prosecute her
counterclaim for malpractice . . . .”).
21. See Cohen, 584 N.Y.S.2d at 118; Andreiev v. Keller, 168 A.D.2d 528, 563 N.Y.S.2d 88,
89 (2d Dep’t 1990).
22. See Manes v. Manes, ___ A.D.2d ___, 669 N.Y.S.2d 899, 900 (2d Dep’t 1998); Demeulenaere
v. Rockwell Manufacturing Co., 275 F.2d 572, 574 (2d Cir. 1960).
(ordering attorney to turn over “his client’s file in the matrimonial action”); Petrillo v. Petrillo,
87 A.D.2d 607, 448 N.Y.S.2d 44, 45 (2d Dep’t 1982) (retaining lien covers “all papers” in
attorney’s possession); Gamble v. Gamble, 78 A.D.2d 673, 432 N.Y.S.2d 405, 406 (2d Dep’t
1980) (directing transfer of “entire litigation file”).
client.  Indeed, the retaining lien has explicitly been applied to key client
documents that constitute direct evidence in the ongoing litigation.  The
only limitation is that, according to most courts, the documents or other
property over which the lien is asserted must be in the attorney’s posses-
sion; an attorney cannot use the lien to restrain property being held by
third parties.

The broad approach to the retaining lien taken by New York state
courts stands in marked contrast to the approach sometimes taken by the
federal courts sitting in this state. In Resolution Trust Corp. v. Elman, the
Second Circuit made clear that attorneys may not assert a retaining lien
based on New York common law in litigations involving the Financial
Institutions Reform, Recovery and Enforcement Act of 1989 (“FIRREA”),
holding that attorneys’ rights to be paid had to give way before the strong
federal policy to resolve quickly claims against insolvent financial institu-
tions. Another court went even further, stating that attorneys represent-
ing plaintiffs in lawsuits brought under federal civil rights statutes with
fee award and/or fee shifting provisions waived their rights “to obstruct
the course of the litigation” by seeking to enforce retaining liens. Based
on these examples, federal courts seem unafraid to limit the retaining lien

27. See Bronx Jewish Boys v. Uniglobe, Inc., 166 Misc. 2d 347, 633 N.Y.S.2d 711, 713 (Sup.
 Ct. N.Y. County 1995) (retaining lien covers all client files, including documents which
belong to client).
(S.D.N.Y. 1984) (requiring attorney who had asserted lien to turn over documents to former
client’s adversary, but prohibiting former client from seeing them until fee issue resolved);
Manfred & Sons, Inc. v. Martillaro, 69 A.D.2d 1019, 416 N.Y.S.2d 156, 157 (4th Dep’t
1979) (requiring attorney to produce client documents called for in another litigation upon
client posting adequate security for unpaid fees); Yaron v. Yaron, 58 A.D.2d 752, 396 N.Y.S.2d
225, 226 (1st Dep’t 1977) (applying retaining lien to certain exhibits).
29. First National Bank & Trust Co. v. Hyman Novick Realty Corp., 72 A.D.2d 858, 421
N.Y.S.2d 733, 734 (3d Dep’t 1979) (“[a] retaining lien is dependent upon the attorney’s
physical possession of the client’s property”); but see Rivkin, 1996 WL 633217 at *4 (raising
possibility of enforcing lien with respect to copies held by third parties).
30. 949 F.2d 624, 627 (2d Cir. 1991).
32. See In re First City National Bank & Trust Co., 759 F. Supp. 1048, 1053 (S.D.N.Y. 1991);
("[p]ermitting attorneys to enforce retaining or charging liens in the courts in derogation of
FIRREA’s administrative procedures would work considerable prejudice to [the] public inter-
est")
in “federal question” cases, where a strong countervailing federal policy can be invoked.

ABUSE OF THE LIEN

The lien can be used by attorneys to gain unfair advantage over clients with whom they have a dispute. First, there is nothing to regulate when the lien may be enforced, apart from the requirement, discussed below, that the attorney asserting the lien no longer be acting as counsel for the client. Thus an attorney may assert the lien even though the attorney’s position with respect to the fees owing is unreasonable or in bad faith. Furthermore, the attorney may arguably enforce the lien on the entire client file no matter how small the disputed amount in relation to the total fees paid.

Second, there is no readily available avenue for the client to seek redress against the attorney for improper withholding of the files. This problem is particularly acute when the representation is on a contingent fee basis and the client lacks sufficient funds to hire a new attorney to prosecute the underlying action and to litigate the lien with the former attorney. In fact, a client lacking any documents may be unable to find any new attorney to take the case on a contingency.

Third, an attorney asserting a retaining lien may withhold from the client items that are personal to the client and that may not be closely related to the services provided by the attorney to the client, as in the case of an immigration lawyer’s holding a client’s birth certificate or a criminal lawyer’s holding a client’s passport. Such items may have come to the attorney incidentally or, perhaps, unnecessarily.

Fourth, in some lawsuits, the delay caused by the dispute over the retaining lien may cause the client’s interests grave, perhaps irreparable, harm.

As seen in the case law cited above, courts often hold hearings with respect to the enforcement of retaining liens. It is unclear, however, what damage an attorney unreasonably enforcing the retaining lien may do before the dispute is heard or, in the case of a client without funds to pay for such a hearing or who capitulates by paying an undeserved fee, if the dispute is never heard.

THE ATTORNEY’S OBLIGATIONS

As noted above, the retaining lien pits the attorney against the client in the course of litigation. The attorney through the retaining lien attempts to hinder the litigation effort. Such behavior by the attorney in
the course of the representation would be antithetical to zealous representation under DR 7-101. Presumably, therefore, an attorney cannot apply the retaining lien until after the representation has terminated.

Even in the event of withdrawal, however, the retaining lien is problematic. DR 2-110 requires that an attorney not withdraw until “the lawyer has taken steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client . . . .” Among the examples provided by DR 2-110 for steps that should be taken to avoid prejudicing the client before withdrawal is “delivering to the client all papers and property to which the client is entitled.” DR 2-110(a) (2). Of course, by virtue of the retaining lien itself, the client is arguably not “entitled” to the files. Yet, since these are steps that are to be taken before the attorney withdraws and, as stated above, withdrawal apparently must precede applying the retaining lien by virtue of the attorney’s duties of zealous representation, the retaining lien presents an ethical dilemma.

THE NATURE OF THE COMPROMISE

Because the retaining lien resides at the intersection of the attorney’s right to payment and the client’s right to loyal representation, the nature of the compromise of these rights will define the scope of the lien. As discussed above, Massachusetts has apparently defined its lien in a way that gives full expression to the client’s rights and little support for the attorney’s rights. Other states’ ethics committees have adopted similar approaches, including those of Alaska, Michigan, Ohio, and Virginia.

In a similar vein, a recent draft of the Restatement of the Law Gov-

34. DR 7-101 (22 NYCRR § 1200.32) provides in part that “(a) A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the disciplinary rules . . . . (2) Fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted . . . . (3) Prejudice or damage the client during the course of the professional relationship, except as required under section 1200.33 of this Part.” At least one court appears to have applied DR 7-101 (a) (3) to an attorney’s refusal to cooperate with successor counsel. See Matter of Reichert, 205 A.D.2d 5, 617 N.Y.S.2d 255, 256 (4th Dep’t 1994).

35. See DR 5-103 (a) (1) (Lawyer may acquire a “lien granted by law to secure the lawyer’s fee or expenses”).

erning Lawyers provides that except as allowed by agreement or by statute, “a lawyer does not acquire a lien entitling the lawyer to retain the client's property in the lawyer's possession in order to secure payment of the lawyer's fees and disbursements.” 37 The lawyer may withhold only documents “prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client.” 38 The comments to the draft provision recognize that the proposal is contrary to the law in the majority of jurisdictions in refusing to recognize a broad retaining lien. The comments state that “[t]he use of the client's papers against the client is in tension with the fiduciary responsibilities of lawyers. A broad retaining lien could impose pressure on a client disproportionate to the size or validity of the lawyer's fee claim.” 39

One Pennsylvania committee has taken a position that is closer to a midpoint. The Pennsylvania committee defined two concepts, “substantial prejudice” and “prejudice.” 40 “Substantial prejudice” means “detriment to the client's interest in a material matter of clear and weighty importance.” The illustration of substantial prejudice given by the committee is “the retention of a unique document that is only in the possession of the discharged lawyer or where trial or a real estate closing is so proximate in time that it would be impossible to obtain copies of pleadings, transcripts and other necessary documents.” “Prejudice” is that prejudice which is not substantial. The illustration of prejudice is the detriment to a client from not having “pleadings turned over to the client or the client's new lawyer after discharging the client's prior lawyer,” since “pleadings, deposition transcripts and the like are readily available from other sources ....” The committee opined that it is permissible for an attorney to enforce a retaining lien that causes “prejudice” but not “substantial prejudice” to the client.

As noted above, New York courts have also recognized instances in

38. Id.
which the retaining lien will not be enforced because the prejudice on the client is too great. A distinction like the distinction between substantial prejudice and prejudice is better stated as a legal rule than an ethical rule. Such a distinction is too difficult to define to provide a guide for professional conduct. It is the type of distinction that invites judicial discretion.

At least one state has codified the attorney’s retaining lien and judicial procedures regulating it in order to mediate the conflict. Oregon provides a broad attorney’s retaining lien in O.R.S. § 87.430:

An attorney has a lien for compensation whether specially agreed upon or implied, upon all papers, personal property and money of the client in the possession of the attorney for services rendered to the client. The attorney may retain the papers, personal property and money until the lien created by this section, and the claim based thereon, is satisfied, and the attorney may apply the money retained to the satisfaction of the lien and claim.

The owner of the documents subject to the lien apparently has two courses available apart from settling with the attorney. The owner may file with the county a bond or letter of credit for 150% of the amount claimed in the lien, at which point the lien is discharged. O.R.S. § 87.435. The parties may then litigate the validity of the lien. In the alternative, the owner may move by order to show cause to require the attorney to deliver the withheld documents.

When an attorney refuses to deliver over money or papers to a person from whom or for whom the attorney has received them in the course of professional employment, the attorney may be required by an order of the court in which a judicial proceeding was prosecuted or defended, or if none were prosecuted or defended, then by an order of the circuit court or judge thereof for the county where such attorney resides or may be found, to do so within a specified time, or show cause why the attorney should not be punished for a contempt.

O.R.S. § 9.360. The attorney may assert the lien in defense of the motion brought on by the owner:

If an attorney claims a lien, under the provisions of ORS 87.430,
upon the money or papers subject to deliver under ORS 9.360, the court shall:

1. Impose, as a condition of making the order, the requirement that the client give security, in form and amount to be directed, to satisfy the lien when determined in an action or suit; or
2. Summarily inquire into the facts on which the claim of a lien is founded, and determine the same; or
3. Direct the trial of the controversy by a jury, or refer it, and upon the verdict or report, determine the same as in other cases.


PROPOSED LANGUAGE

The Committees propose the following statute to codify the retaining lien:

A. An attorney shall have a retaining lien with respect to a client’s files to the extent that they are within the attorney’s possession or control, except that such lien shall not apply to the client’s passport, driver’s license, birth certificate, marriage certificate, green card, or other officially issued document personal to the client found therein unless such officially issued document was paid for by the attorney and the payment is reimbursable by the client. The attorney may assert a retaining lien on such files as of the date of sending the notice set forth in subsection 2 below if all of the following obtain:

1. the attorney believes in good faith that the client is obligated to pay the attorney for services rendered or for disbursements on the client’s behalf and the amounts due have been identified in one or more written invoices sent to the client;
2. the attorney has sent written notice to the client of the attorney’s decision to assert the retaining lien and, if the representation has not already terminated, to seek termination of the representation;
3. within 10 business days of sending such notice, or within
such longer period as requested by the client, and unless the client has already done so, the attorney will have filed an order to show cause with the court within New York State in which the attorney prosecuted or defended a proceeding on the client's behalf or, if there is no such court, the attorney will have filed a declaratory judgment action under CPLR 3001 with respect to the validity of the retaining lien and the extent of the client's liability, if any, together with an order to show cause seeking an expedited hearing with respect to the assertion of the retaining lien, in the Supreme Court of the State of New York in the county in which the attorney's principal place of business is found; and

4. the client has not filed with the clerk of the court within New York State in which the attorney prosecuted or defended in a proceeding on the client's behalf or, if there is no such court, the Supreme Court of the State of New York a bond or letter of credit in an amount not less than 100% of the amount identified in written invoices sent by the attorney and unpaid by the client, or in such other amount as may be determined by the court.

B. At the hearing on the order to show cause, the court shall determine whether the retaining lien is properly to be enforced under the circumstances. The court shall enforce the lien if the attorney has satisfied the provisions of section A above unless the client shows that enforcement of the lien would cause the client severe and unwarranted prejudice. If at such hearing the court believes that it cannot make a determination without the presentation of further evidence, it shall uphold the retaining lien pending further hearing unless the client files a bond or letter of credit in an amount not less than 100% of the amount identified in written invoices sent by the attorney and unpaid by the client, or in such other amount as may be determined by the court.

C. At all such hearings, the court shall take any measures that are necessary to preserve the confidential nature of attorney-client communications and attorney's work product.
This proposal addresses the practical and ethical problems connected with the common law retaining lien. As it has developed in our case law, the retaining lien may put the attorney in too strong a position, enabling the attorney to take advantage of the client. Permitting an attorney to act against the client’s interests when the client believes that the attorney is acting zealously on the client’s behalf conjures images of unfaithful fiduciaries. Although it is obviously improper for the withdrawing attorney to cooperate with the client’s adversary, the retaining lien may indirectly achieve the same effect.

The problems are exacerbated by the self-help nature of the remedy. It is possible that an attorney could enforce the lien on the basis of an inflated fee or an unreasonably small balance due. The attorney need not invoke any official process in order to use the lien, and thus if the client is wronged it is up to the client to marshal the resources to focus the court’s attention on the attorney’s acts. Accordingly, in determining when the lien can be used, our proposal seeks to balance the potential prejudice to the client and the amount the client owes the attorney.

For these reasons, we believe that clearly setting forth the retaining lien’s parameters and limiting the self-help aspects of enforcement of the lien would relieve the ethical quandary and prevent overreaching.

As discussed above, the disciplinary rules provide the practitioner enforcing a retaining line with a dilemma. Zealous representation requires terminating the representation before enforcing the lien, yet the files must be released before the representation is terminated. Notwithstanding, given the alternatives of requiring termination of the representation before enforcing the lien or not, the clear choice is to require termination first in order to uphold zealous advocacy. The statute itself can provide an exception to the requirement to return such files before the representation is terminated.

In New York, the retaining lien applies to “all papers, securities or money belonging to the client.” Nonetheless, some have suggested that the retaining lien be limited to attorneys’ work product. Although a broader

42. For example, Rule 1.8 (i) of the District of Columbia Rules of Professional Conduct provide in part that “[a] lawyer may acquire and enforce a lien granted by law to secure the lawyer’s fees or expenses, but a lawyer shall not impose a lien upon any part of a client’s files, except upon the lawyer’s own work product, and then only to the extent that the work product has not been paid for.” See Restatement (Third) of the Law Governing Lawyers 55 (1), Proposed Final Draft No. 1, March 29, 1996; American Lawyer’s Code of Conduct 5.5.
lien is not inherently abusive, we believe that limiting the retaining lien to exclude personal documents like passports, driver’s licenses, birth certificates, marriage certificates, and green cards can act as a brake against an attorney’s overreaching. 43

There is disagreement within New York case law as to the application of the retaining lien in contingent fee cases. 44 It would appear, however, that any attorney who could assert a retaining lien in a contingency fee representation will have a charging lien available. The charging lien is an appropriate remedy for an attorney with a contingency fee arrangement, who would not be entitled to payment of fees until money is awarded by the court in any event. A retaining lien presumably would be proper, however, with respect to the attorney’s disbursements in the course of a contingency fee representation. 45 In addition, in a mixed contingency/fixed fee arrangement, the lien would be applicable to the fixed portion of the fees.

The distinction made in the opinion of the Pennsylvania Bar Association Committee between prejudice and substantial prejudice we also believe is instructive, and, as mentioned above, may find more reliable application in the hands of a court.

The Oregon statute leaves the onus for inviting judicial scrutiny on the client or owner. Once the client learns that the documents will not be released by the lawyer, it is up to the client either to secure a bond or letter of credit and file it with the county or to make a motion. Unlike the lawyer, the client may not know that she has these options. It would seem more equitable, therefore, to place the onus on the lawyer instead.

The use of the order to show cause in O.R.S. 9.360 in order to have a speedy resolution of a lien dispute between the client and counsel is a salutary feature. So is the ability to discharge the lien preemptively by filing a bond under O.R.S. 87.435. Both features should tend to minimize prejudice to the client by allowing the client to compel production of the

43. See Rule 1.8 (i) of the District of Columbia Rules of Professional Conduct, comment 10.

44. See Stitz v. Equitable Life Assurance Society, 1996 WL 67908 at *2 (S.D.N.Y. 1996); Quinn v. Headley, 637 F. Supp. 707, 709 (S.D.N.Y. 1986) (payment upon condition of receipt of money from any source); see also High Images, Inc. v. Generali, 1993 WL 178209 at *1 (S.D.N.Y. 1993) (“there is nothing inequitable in recognizing a retaining lien here for the fair value of counsel’s services, since plaintiff is a corporation with substantial assets and there is no claim that it lacks the funds to pay what is owed.”).

files and, at the same time, protect the lawyer's pecuniary interest in the services already rendered to the client.

The common law retaining lien was defined by possession. When possession was surrendered, the lien was surrendered. Accordingly, under the common law, a third person given possession of papers that might otherwise be covered by the retaining lien has no obligation to withhold those papers from the client. We see no reason to depart from this practice. Furthermore, allowing the retaining lien to reach into the files of all third parties who might have come into possession of documents also within the attorney's files would make it difficult to ensure that all of the interested parties are in attendance at a hearing with respect to the lien. It would be much easier to provide for workable required hearings if the interested parties comprise only the attorney and the client.

CONCLUSION

There must be an element of realism in regulating the relationship between attorney and client. Attorneys should not be stripped of their traditional remedies out of concern for client protection. Nor should clients be disadvantaged in disputes with their attorneys. Rather, the legitimate interests of both should be balanced. We have attempted such a balance with this proposed statutory language. This language protects the attorney's access to a broad common law retaining lien. The language, however, keeps the lien on a short leash, requiring due notice and immediate judicial scrutiny in proceedings initiated by the attorney.

The proposed statutory language directs judicial scrutiny as to whether the lien was properly asserted and whether enforcement of the lien would cause the client severe and unwarranted prejudice. The court need not necessarily address the underlying claim for fees and disbursements, but might choose to do so upon further hearings. Having the courts regularly take the latter course might encourage the parties to settle their fee disputes before any court intervention whatsoever. Such issues, however, belong to the larger field of attorney-client fee disputes and need not be addressed in an examination of the retaining lien.

Finally, it can be argued that requiring judicial scrutiny of retaining liens invites malpractice claims by the client and thereby makes proper assertion of the lien unproductive for the attorney. That result may be unavoidable in any attempt to protect the lien and at the same time protect clients from overreaching. The assertion of malpractice claims, however, does not free the client from the lien. Under the language proposed in this report, pending resolution of any such claim made in the face of a
properly asserted lien, the attorney will either retain the documents or will be secured by a bond from the client. The assertion of a malpractice claim may preclude the court from rendering a judgment quickly on the underlying dispute over fees and expenses, but will not permit the court to fail to enforce the lien.

For these reasons, we urge the Legislature to codify the retaining lien as outlined above.

May 1998

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# Professional Responsibility and Professional Discipline

## Committee on Professional Discipline

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*members of the subcommittee on retaining lien
Report on Jury Nullification

Committee on Professional Responsibility

Recent cases and academic articles have raised public awareness of the issue of “jury nullification,” usually thought of as a jury reaching a verdict which ignores, or “nullifies” overwhelming evidence that compels a contrary result. The issue arises most frequently in criminal cases, where the court lacks the power to direct a verdict for the prosecution, and where a jury’s not guilty verdict is unreviewable. Although “nullification” has been a part of the American legal tradition for centuries, these recent cases and articles highlight the conflicting issues faced by lawyers in their advocacy to a trier of fact.

This report addresses ethical issues for lawyers raised by the issue of jury nullification: are there ethical constraints which do, or should, prohibit a lawyer from arguing to a jury that it should acquit, regardless of what the evidence is? May the lawyer ethically advocate jury nullification so long as the Court does not prohibit it? As set forth below, the Committee concludes that the rules of ethics do not categorically prohibit lawyers from arguing for nullification, and that—notwithstanding decreasing tolerance of jury nullification by the Courts—no rule of attorney ethics should be propounded to bar an attorney from making such arguments.

WHAT IS “JURY NULLIFICATION”

Jury nullification is commonly thought of as a deliberate decision by a jury to ignore evidence proving beyond a reasonable doubt every element...
ment of a crime charged, and to return a not guilty verdict notwithstanding that evidence. As a controversial recent law review article explained: “Jury nullification occurs when a jury acquits a defendant who it believes is guilty of the crime with which he is charged. In finding the defendant not guilty, the jury refuses to be bound by the facts of the case or the judge’s instructions regarding the law. Instead, the jury votes its conscience.” Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 Yale L.J. 677, 700 (1995).

Accordingly, jury nullification does not involve a situation where a jury finds that a defendant committed all but one element of a crime and therefore acquits. For example, there are cases in which lawyers argue, and juries perhaps find, that while a defendant did the physical acts charged, he lacked the requisite intent and is therefore not guilty. This report therefore does not address a lawyer’s well-accepted right to urge a jury to acquit because, although the defendant may have performed the acts in question, there is insufficient proof that he acted with the necessary degree of criminal intent.

Nor does jury nullification arise when a lawyer argues that a jury should acquit because a witness against the defendant lacks credibility. Accordingly, this report does not address a lawyer’s traditional role to argue against the credibility of opposition witnesses.

Rather, jury nullification arises in the relatively rare circumstance when a jury finds that the prosecution proved beyond a reasonable doubt each element of the crime charged, but still returns a not guilty verdict because, for example, the jury feels sympathy for the defendant. Sympathetic examples are easy to imagine, from acquittals in 19th century cases charging defendants with harboring fugitive slaves, to contemporary cases charging aliens with unlawful entry into the United States where the defendant shows a legitimate fear of persecution and torture in his native country. Equally unsympathetic examples are also easy to imagine, such as when racism leads a jury to acquit a white defendant charged with lynching a black man.

**THE ROOTS OF JURY NULLIFICATION**

The doctrine of jury nullification has its roots in “the common law idea that the function of a jury was, broadly, to decide justice, which included judging the law as well as the facts.” Butler, 105 Yale L.J. at 700. As early as Bushell’s Case, 124 Eng. Rep. 1006 (C.P. 1670), the Court of Common Pleas held that jurors in criminal cases could not be punished...
for voting to acquit, even when the trial judge believed that the verdict contradicted the evidence. The concept of jury nullification became incorporated in the American common law, notably in seditious libel cases, the most well-known of which was the prosecution of John Peter Zenger. Under our law, jurors may not be penalized or even called upon to explain their verdicts, and as a result they have the power to acquit out of compassion or lenity:

As courts have long recognized, several features of our jury trial system act to protect the jury’s power to acquit, regardless of the evidence, when the prosecution’s cases meets with the jury’s ‘moral[] disapprov[al]’. Since the emergence of the general verdict in criminal cases and the famous opinion in Bushell’s Case, 124 Eng. Rep. 1006 (C.P. 1670), freeing a member of the jury arrested for voting to acquit William Penn against the weight of the evidence, nullifying jurors have been protected from being called to account for their verdicts.

U.S. v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997. Moreover, juries may “acquit out of compassion or compromise or because of their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.” Standefer v. United States, 447 U.S. 10, 22 (1980).

SPARF V. UNITED STATES AND THE MODERN “LAW” OF JURY NULLIFICATION

Although courts recognize that juries continue to have the power to nullify, modern courts hold that juries do not have the right to do so. E.g., Thomas, supra, 116 F.3d at 615. This principle is generally expressed in the concept that a judge may not instruct a jury that it may nullify the evidence.

The genesis of this principle can be found in Sparf v. United States, 151 U.S. 51 (1895). In Sparf, the Supreme Court ruled that juries do not have the right to judge and decide the law. Defendants’ counsel in a murder case had requested that the trial judge instruct the jury that it had the option of convicting defendants of the lesser-included offense of manslaughter. The trial court refused, and instead instructed the jury that it “could not, consistently with the law arising from the evidence, find the defendants guilty of manslaughter, or of any offense less than the one charged...” 156 U.S. at 106. Accordingly, the Court held that judges, not juries, decide the law, while juries decide the facts:

The trial was thus conducted upon the theory that it was the
duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights. 156 U.S. at 106.

From this principle has emerged a curious tenet of modern jurisprudence: while juries have the power to nullify the evidence, judges may not tell them that they have that power. E.g., U.S. v. Dougherty, 473 F.2d 1113, 1133-34 (D.C. Cir. 1972); Butler, 105 Yale L.J. at 704: (“Jurors have the power to nullify, but in most jurisdictions they have no right to be informed of this power.”) The concern is that a court instructing a jury that it may nullify the evidence could lead to anarchy. See, e.g., United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970):

To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.

As the Dougherty court concluded:

What makes for health as an occasional medicine would be disastrous as a daily diet. The fact that there is widespread existence of the jury’s prerogative, and approval of its existence as a ‘necessary counter to case-hardened judges and arbitrary prosecutors,’ does not establish as an imperative that the jury must be informed by the judge of that power. On the contrary, it is pragmatically useful to structure instructions in such wise that the jury must feel strongly about the values involved in the case, so strongly that it must itself identify the case as establishing a call of high conscience. 473 F.2d at 1136 (footnote and internal citation omitted).

RELEVANT PROVISIONS OF THE CODE

The argument that lawyers may argue for jury nullification relies on Canon 7 of the Code, which provides that “A Lawyer Should Represent A
Client Zealously Within The Bounds of the Law,” and in particular Disciplinary Rule 7-101(A) which provides: “A lawyer shall not intentionally: Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules...” Proponents of this view argue that Canon 7 and DR 7-101(A) authorize a lawyer to argue for jury nullification if the lawyer believes the argument is necessary and appropriate in the particular case, because the lawyer must seek the lawful objective of his client—an acquittal—and nothing in the law or the disciplinary rules explicitly prohibits arguing for jury nullification.

The argument that lawyers should not be permitted to argue for jury nullification also relies on Canon 7, with a particular emphasis on the “within the bounds of the law” portion of the Canon. This argument highlights Disciplinary Rule 7-102(A)(2), which provides: “In the representation of a client, a lawyer shall not: . . . Knowingly advance a claim or defense that is unwarranted under existing law. . . .” Since a jury does not have the right, so the argument goes, to nullify the evidence (even though it has the power to do so), then arguing that it should do so, without the express permission of the trial court, constitutes advancing a claim or defense that is unwarranted under existing law.

In expressing disapproval of jury nullification, a number of courts have made sweeping pronouncements which seem to suggest that lawyers should not argue for nullification. In U.S. v. Thomas, 116 F.3d 606 (2d Cir. 1997), for example, the Second Circuit reviewed a case in which the District Court had dismissed a juror who it believed was engaging in jury nullification. While the Second Circuit reversed the conviction, finding that “the record raised the possibility that the juror’s view on the merits of the case was motivated by doubts about the defendant’s guilt, rather than by an intent to nullify the law” (116 F.3d at 608), the Court left little doubt of its view that it is a juror’s duty to follow the law:

Inasmuch as no juror has a right to engage in nullification—and, on the contrary, it is a violation of a juror’s sworn duty to follow the law as instructed by the court—trial courts have the duty to forestall or prevent such conduct, whether by firm instruction or admonition or, where it does not interfere with guaranteed rights or the need to protect the secrecy of jury deliberations . . . by dismissal of an offending juror from the venire of the jury. Thomas, 116 F.3d at 616.

See also U.S. v. Bruce, 109 F.3d 323, 327 (7th Cir. 1997): “Defendants. . .
argue that a jury should not be ordered to follow the law because it has the power to nullify the law. This argument has no merit. Jury nullification is ‘not to be positively sanctioned by instructions,’ but it is to be viewed as an ‘aberration under our system.’ “ (quoting U.S. v. Anderson, 716 F.2d 446, 450 (7th Cir. 1983)); Duggan v. State, 483 S.E.2d 373 (Ga. Ct. App. 1997): “The trial court may never direct a verdict of guilty, but it may refuse to charge on the principle of jury nullification and may limit jury argument on that point.” 483 S.E.2d at 377-78.

Thomas is explicit that a nullifying juror is a juror who is not following the law, that there is a “duty and authority of the judge to assure that jurors follow the law” and that “it would be a dereliction of duty for a judge to remain indifferent to reports that a juror is intent on violating his oath.” 116 F.3d at 616. This seems to be the strongest judicial statement to date against jury nullification, and may signal a shift in the uncomfortable balance between the concepts that a jury has the power, but not the right, to nullify. Indeed, although Thomas considers the jury nullification issue as it affects the relationship between judge and jury, its reasoning suggests that courts in the future may be less tolerant of lawyers who appeal to a jury to exercise its power of leniency.

JUDICIAL NULLIFICATION

On the other hand, in one recent controversial case, a judge in a bench trial explicitly engaged in nullification. United States v. Lynch, 952 F.Supp. 167 (S.D.N.Y. 1997) was a criminal contempt case against a bishop and a monk who violated an injunction that they not block access to an abortion clinic. Judge Sprizzo acquitted, in part because he found that the defendants acted out of a sincere religious belief, and therefore could not be guilty of [criminal] willful contempt. 952 F. Supp. at 170. Judge Sprizzo then added, however:

[E]ven assuming arguendo that the Court were satisfied that the Government’s proof established the requisite willfulness, the Court would still find the defendants not guilty. The facts presented here both by sworn testimony and a videotape depicting an elderly bishop and a young monk quietly praying with rosary beads in the clinic’s driveway, clearly call for what Judge Friendly once referred to, in United States v. Barash, 365 F.2d 395, 403 (2d Cir. 1966), as that exercise of the prerogative of leniency which a fact-finder has to refuse to convict a defendant, even if the circumstances would otherwise be sufficient to convict. Id. at 171.
Judge Sprizzo thus explicitly invoked the fact-finder’s historical power to exercise leniency. The government is seeking to appeal Judge Sprizzo’s decision.

THE CHARACTER EVIDENCE ANALOGY

To add to the seeming anomaly of the law of jury nullification, there is an analogous context in which defense lawyers are permitted to argue, and courts to instruct, that juries may acquit notwithstanding the evidence solely on the basis of a defendant’s good character. Under F.R. Evid. 608 (and similar state evidentiary provisions) a defendant in a criminal case may adduce evidence of his or her good character, i.e. the defendant’s reputation in the community for honesty. Once such evidence is adduced, a defendant is entitled to a jury instruction that the jury may find reasonable doubt based solely on the evidence of the defendant’s good character.

On its face this principle seems analogous to an argument for jury nullification. A lawyer’s argument, and a trial court’s instruction, that a jury may acquit based solely on evidence that the defendant enjoys a good reputation in his community for honesty seems tantamount to an instruction that jury may acquit notwithstanding its view of the evidence on the elements of the crime charged. On the other hand, because the law is established that a defendant is entitled to this instruction, it is difficult to argue that advancing this argument is “unwarranted under existing law.” DR 7-102. Yet this distinction too seems tautological; arguing that a jury should acquit regardless of the evidence because of the defendant’s good character does not seem intellectually different from arguing that a jury should acquit because of the defendant’s disadvantaged background.

THE COMMITTEE’S VIEW

This Committee believes that there is no ethical bar for a lawyer to seek nullification, because the jury continues to have the prerogative to nullify. This is so notwithstanding the Court’s obligation not to instruct the jury of its power and the implicit message of Thomas that judges are obliged to take steps to insure that jurors follow the law. The Committee reaches this conclusion for the following reasons:

1. The Committee believes that the law and ethical rules do not clearly prohibit lawyers from arguing for jury nullification and that there is, at a minimum, a tension between lawyers' obligation to represent their clients zealously, and their obligation to refrain from making arguments unsupported by existing law or a good faith argument for an extension of
that law. Given the lack of clarity, the Committee believes it is preferable to leave open the possibility that lawyers may argue for nullification if they deem it necessary and appropriate, and if not barred by the court in the particular case.

In this regard, the Committee is influenced by Ethical Consideration EC 7-3, which provides: “Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or advisor . . . While serving as advocate, a lawyer should resolve in favor of the client doubts as to the bounds of the law.” Applying this standard, the Committee concludes that a lawyer may, consistent with ethical rules, appeal for jury nullification if not prohibited by the Court.

2. A lawyer’s freedom to argue for jury nullification is always subject to a court’s authority to limit argument, and the Committee does not mean to suggest that a lawyer may ignore a court order limiting argument. Indeed, there are a number of cases in which courts have ordered lawyers to stop arguing for nullification. E.g., People v. Weinberg, 83 N.Y.2d 262 (1994), where the New York Court of Appeals held that defense counsel in a failure to file tax case could not present the concept of jury nullification to the jury during summation: “While there is nothing to prevent a petit jury from acquitting although finding that the prosecution has proven its case, this so-called ‘mercy dispensing power’ is not a legally sanctioned function and should not be encouraged by the court.” 83 N.Y.2d at 268, citing People v. Goetz, 73 N.Y.2d 751, 752 (1988). A further example is U.S. v. Renfroe, 634 F.Supp. 1536 (W.D. Pa. 1986), a criminal contempt proceeding against a lawyer for violating a court order, where the trial court had ordered defense counsel not to argue that the jury should return a verdict of not guilty as an expression of its disapproval of the prosecution’s grants of immunity to its witnesses, the court held that “while it did not dispute an attorney’s right and duty to be contentious, fearless, and zealous in representing his client’s interests, ‘a direct order of the trial judge fixes the limits of proper advocacy; the vigor permissible in representing a client’s interests has never included the flouting of a judge’s rulings.’ ” 634 F.Supp. at 1542, quoting Commonwealth of Pennsylvania et al. v. Local Union 542, International Union of Operating Engineers, et al., 552 F.2d 498, 506 (3rd Cir.), cert. denied, 434 U.S. 822 (1977); Andrews v. State, 473 S.E. 2d 247 (Ga. Ct. App. 1996) (trial court, in its discretion, can preclude defense counsel from making a nullification argument to the jury).

1. One member of the Committee believes that a lawyer should have to seek the approval of the trial court in advance before arguing for jury nullification.
The Committee believes the trial judge always has the power to limit argument and, depending on the circumstances of the particular case, may or may not choose to limit this form of argument. The Committee believes the trial court’s power to control argument is an adequate safeguard against arguments which go too far and, in the absence of controlling authority, opposes a rule which would, on ethical grounds, prohibit a lawyer from arguing for jury nullification.

May 1998

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Formal Opinion 1999-01

Lawyer’s Ability to Represent a Trade Association as Well as Clients with Interests Adverse to Individual Members of the Association

Committee on Professional and Judicial Ethics

**TOPIC:** Lawyer’s ability to represent a trade association as well as clients with interests adverse to individual members of the association.

**DIGEST:** There is no per se rule that representation of a trade association creates an attorney-client relationship with each member of the association, but the particular circumstances of the representation may create an attorney-client relationship with one or more of the members.

**CODE:** DRs 5-105(A); 5-105(B); 5-105(C); 5-108; EC 5-18.

**QUESTION**

May a lawyer who represents a trade association also represent interests adverse to the individual members of the trade association?
The Committee concludes that there is no per se rule that would disqualify an attorney in future litigation adverse to a member of a client association. The conflict analysis is largely driven by the individual facts and circumstances and turns on the nature of the attorney’s dealings, if any, with the association member whose interests would be adverse to the attorney’s hypothetical client in the future representation(s).

A. FORMATION OF AN ATTORNEY-CLIENT RELATIONSHIP

The threshold issue is whether, and under what circumstances, an individual member of a trade association becomes an attorney’s client by virtue of that attorney’s representation of the association. EC 5-18 provides guidance here:

A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer’s professional judgment should not be influenced by the personal desires of any person or organization.

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Occasionally a lawyer for an entity is requested to represent a stockholder, director, officer, employee, representative, or other person connected with the entity in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

Thus, there is no per se rule of derivative representation in the case of a corporation or, by analogy, the members of an unincorporated trade association. See also Or. Op. 27 (1991) (an attorney who represents a trade association may represent one member of the association against another member with respect to a matter unrelated to the work performed for the association without disclosure to or consent from the association). Rather, to determine whether and to what extent an attorney has entered into an attorney-client relationship with a member of an association through representation of the association, one must analyze the circumstances of the representation and the relationships among all of the parties.

F.2d 1311, 1317 (7th Cir.), cert. denied, 439 U.S. 955 (1978) (disqualification of law firm in action adverse to association member based on submission of confidential information by members to law firm with reasonable belief it was acting as their attorney); Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 749 (2d Cir. 1981). The following factors are particularly relevant to determine the existence of an attorney-client relationship: the nature of any disclosures that the member made to the attorney; the member's expectations of the attorney; and the reasonableness of the member's expectations. See Westinghouse, 580 F.2d at 1319-1320; Shadow Isle, Inc. v. American Angus Assoc., No. 84-6126-CV-SJ-6, 1987 WL 17337 (W.D. Mo. Sept. 22, 1987).

In its opinion regarding the representation of trade associations, the American Bar Association Committee on Ethics and Professional Responsibility drew upon its previous conflict analysis with respect to the representation of corporations and partnerships.\(^1\) ABA Op. 365 (1992); see also ABA Op. 390 (1995). Specifically, the ABA Committee considered whether the attorney had affirmatively assumed a duty of representation to the member; whether the member had separate representation; whether the attorney represented the member before commencing its representation of the association; and whether the member relied upon the attorney's representation of its individual interests. ABA Op. 365. In addition, the size of the trade association may bear on the reasonableness of any member's expectation of representation; for example, it is more likely to be unreasonable for a member of a large association to expect that the association's attorney represents its individual interests. Id. n.4.

If, under the analysis described above, a lawyer concludes that the individual association member is a current client of the law firm, the lawyer may not, absent valid consent, represent a client with interests adverse to the member. The basic conflict of interest rule is DR 5-105(B), which provides that

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(C).

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\(^1\) The analogy to corporations does not depend on whether the trade association is incorporated. See ABA Op. 365 n.3 (1992).
Canons 4 (duty to maintain confidences) and 9 (appearance of impropriety) may also be implicated. See Westinghouse, 580 F.2d at 1321. Of course, the existence of a conflict does not necessarily require termination of the representation; under certain circumstances a client may consent to the representation, pursuant to DR 5-105(C). If the firm’s representation of the association has concluded when the hypothetical new matter is presented, such that the association is a former client, DR 5-108 would control:

A. Except with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not:
   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 has become generally known.

B. RECOGNITION OF VICARIOUS CLIENTS
   If the relationship between the attorney and the member does not rise to the level of attorney-client, the attorney may nonetheless be disqualified if representation of the new client against the member would be materially limited by the firm’s representation of the association. Glueck, 653 F.2d at 749 (firm representing association disqualified from representing another client in suit against a member of association). The member in this situation has been referred to as a “vicarious” or “derivative” client, although the Committee does not necessarily find such names helpful to the analysis. DR 5-105(A) provides:

   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(C).

In Glueck, the Second Circuit adopted the following substantial relationship test:

   Disqualification will ordinarily be required whenever the sub-
ject matter of a suit is sufficiently related to the scope of the matters on which a firm represents an association as to create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant.

Glueck, 653 F.2d at 750, quoted in ABA Op. 365 (1992). This test involves a careful analysis of the attorney’s relationship and dealings with the member and the member’s relationship and dealings with the association. For example, the member’s disclosure of confidential information relevant to the association’s matter undertaken by the attorney may be a basis for disqualification. Id.; see Ill. Advisory Op. 790 (1983). Further, the significance of the member’s position within the association may be relevant. ABA Op. 365 (1992) (citing North Star Hotels Corp. v. Mid-City Hotel Assoc., 118 F.R.D. 109 (D. Minn. 1987) (disqualifying a firm from representing a hotel manager in a breach of contract suit against the partnership owning the hotel in light of the firm’s representation of a partnership in which the general partner of the partnership hotel had substantial holdings).

CONCLUSION
To summarize, there is no per se rule that the representation of a trade association creates an attorney-client relationship with each member of the association. The particular engagements an attorney accepts on behalf of the association and the circumstances of those representations may, however, create an attorney-client relationship.

February 1999
Formal Opinion 1999-02

Fugitive Client; Illegal Conduct; Client Instructions; Civil Representation

Committee on Professional and Judicial Ethics

**TOPIC:** Fugitive Client; Illegal Conduct; Client Instructions; Civil Representation

**DIGEST:** A lawyer may (i) sell assets of a fugitive client and place the proceeds in escrow, (ii) pay the creditors of the client from the escrowed funds and (iii) forward the balance of the proceeds to the client, provided that the lawyer does not know, or believe (after inquiry, if called for under the circumstances), that the sale or disposition of proceeds is unlawful or will be used to commit an illegal or fraudulent act. A lawyer may continue to represent a fugitive client in civil matters which precipitated the criminal investigation and the fugitive status of the client.

**CODE:** DRs-110(B)(2); 2-110(C); 7-101(B)(2); 7-102(A)(7); 9-102(C)(4); EC 7-5; EC 7-7; EC 7-8; EC 7-17.

**QUESTIONS**

1. May a lawyer who represents a client who is currently a fugitive sought on criminal charges continue to follow the client’s instructions to (i) sell her assets and place the proceeds in escrow, (ii) make payments to her creditors from the escrowed funds and (iii) forward the balance from the escrowed funds to the client?
2. May the lawyer continue to represent the fugitive client in civil matters which precipitated the criminal investigation and the fugitive status of the client?

OPINION

As a preliminary matter, we note that the present inquiry raises questions of law as well as ethical issues under the Lawyer’s Code of Professional Responsibility (the “Code”). While the Committee’s mandate is limited to interpreting the Code, this opinion identifies some of the legal questions raised in order to provide a framework for the ethical analysis.

A. ATTORNEY CONDUCT ON BEHALF OF THE CLIENT

In general, a lawyer has an obligation to follow a client’s instructions regarding the course of representation, provided that the lawyer’s conduct is legal and that the client is using the lawyer’s services in an appropriate manner. See Canon 7 (A Lawyer Should Represent a Client Zealously Within the Bounds of the Law); see also EC 7-17 (a lawyer owes an obligation of loyalty to the client). Although a lawyer should inform the client of relevant legal as well as non-legal considerations, most decisions rest exclusively with the client and not with the lawyer. See EC 7-7 (the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer); EC 7-8 (stating that the ultimate decision whether to forego legally available alternatives because of non-legal factors belongs to the client). Accordingly, the determination of whether a lawyer may ethically engage in conduct requested by a client depends in part on the client’s choices and on whether, as a matter of law, the proposed action is illegal or intended for illegal purposes.

This opinion is limited to a lawyer’s representation of a fugitive client fleeing criminal charges. In that connection, a fugitive is defined as:

[A] person who, having committed a crime, flees from jurisdiction of the court where the crime was committed or departs from his usual place of abode and conceals himself within the district. A person who, having committed or been charged with a crime in one state, has left its jurisdiction and is found within territory of another state when it is sought to subject him to criminal process of former state.

(stating that the term fugitive from justice means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding).

Various ethics committees have differed with respect to whether it is ethical for an attorney to follow a client's instructions when the lawyer knows that the client is a fugitive. See, e.g., Connecticut Inf. 93-2 (1993) (opining that a lawyer may settle a personal injury case for a fugitive client and may not withhold property rightfully belonging to the client simply because of a speculation or suspicion regarding the client's possible use of that property); Michigan RI-160 (1993) (opining that a lawyer may not represent a client in collateral or unrelated civil matters, and may not recover funds which the client would not be able to recover due to his or her underground status, while the lawyer knows that the client remains a fugitive); N.Y. County 70 (1915) (opining that a lawyer may ethically honor a fugitive client's order directing payment of the client's property to one outside of the United States).

A. General Ethical Principles

We begin by setting forth some general principles regarding a lawyer's ethical obligations when representing a client.

1. Conduct the Lawyer Knows to be Illegal or Fraudulent

The Code clearly prohibits a lawyer from actively contributing to the accomplishment of a client's purpose that the lawyer knows is criminal. DR 7-102(A)(7) provides that:

A. In the representation of a client, a lawyer shall not:

7. Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.

DR 7-102(A)(7) (emphasis added).

Accordingly, if a client is prohibited under the law from engaging in certain conduct relating to property because he or she is a fugitive, a lawyer may not counsel or assist the client in such conduct. Similarly, if a fugitive is not prohibited from engaging in such conduct, but the lawyer knows that the client intends to use the lawyer's services to further an

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1. Although we do not make any determinations regarding the legal and/or property rights of a fugitive, we note by way of example that law enforcement authorities potentially could impose a legal restriction on the sale or transfer of assets of a fugitive.
illegal purpose, the lawyer is prohibited from providing such services to assist the client. In short, a lawyer may not assist the client in any way that the lawyer knows will further an illegal or fraudulent purpose.  

2. Conduct the Lawyer Believes to be Illegal or Fraudulent

A related dilemma arises when the client's motives are unclear, or when the requested services do not explicitly constitute illegal conduct. DR 7-101(B)(2) provides that:

B. In the representation of a client, a lawyer may:

2. Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-101(B)(2) (emphasis added). Thus, whereas a lawyer is required to assist in achieving the client's lawful objectives, a lawyer has complete discretion in dealing with conduct that the lawyer reasonably believes—but does not know—may be intended to further an illegal or fraudulent scheme.

It is the opinion of this Committee that where a fugitive client has requested that a lawyer aid the client in otherwise legal conduct under circumstances that give rise to a suspicion that the conduct may be used to further an illegal or fraudulent act, the lawyer must satisfy him or herself that there is some reasonable support for an argument that the purpose of the request is legal before carrying out the request. As stated by the ABA Committee on Ethics and Professional Responsibility:

[A] lawyer should not undertake representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetrating fraud or otherwise committing a crime... Lawyers have an obligation not to shut their eyes to what was plainly to be seen... United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964). A lawyer cannot escape responsibility by avoiding in-

2. A legal determination that is relevant in this regard is whether the law considers the fugitive's hiding from justice to be one completed act, or an ongoing criminal act completed only when the fugitive is recovered. If the law views the fugitive status as an ongoing criminal act, then the services of the lawyer arguably violate DR 7-102(A)(7) by providing a means for the client to stay hidden and avoid prosecution, thereby furthering an ongoing criminal act. Cf. In re Doe, 101 Misc.2d 388, 390, 420 N.Y.S.2d 996, 998 (Sup. Ct. N.Y. Co. 1979). In this connection, the Committee also cautions the lawyer to consider whether the legal services provided by the attorney will result in aiding and abetting the commission of a crime.
quiry. A lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants. Otherwise, the lawyer has a duty of further inquiry.

ABA Inf. Op. 1470 (1981) (opining on a lawyer's obligation to engage in further inquiry where a client requested a lawyer's advice as to lawful means of bringing funds into the United States in a manner that avoided or minimized tax liability, but where the lawyer suspected that the funds represented payments of unlawful bribes or kickbacks); ABA Inf. Op. 1517 (1986) (opining that, where a client has requested that charges for corporate legal work as well as for personal legal services to the sole shareholder of the corporation be billed directly to the corporation without identifying the personal nature of the legal services, and where the lawyer has reason to believe that the shareholder might cause the corporation to deduct the entire fee as a business expense, the lawyer cannot avoid a violation of the rules against assisting a client in conduct the lawyer knows to be illegal or fraudulent by disclaiming knowledge of illegality or fraud when the lawyer has, without inquiry, recklessly and consciously disregarded information that plainly suggests that a crime or fraud is involved. ((citing ABA Formal Op. 346 (Revised) (1982)); see also ABA Formal Op. 346 (1982) (opining that a lawyer violates the Code where, as part of an opinion relating to tax shelter investments, the lawyer accepts as true facts told to her when the lawyer should know that a further inquiry would disclose that these facts are untrue ); ABA Formal Op. 335 (1974) (opining as to the circumstances under which and the extent to which the Code requires that a lawyer make some effort to verify or supplement facts submitted as a basis for an opinion relating to registration of securities).

Accordingly, assuming that there are no legal prohibitions, a lawyer may engage in conduct on behalf of the fugitive client under circumstances that give rise to a suspicion that the conduct may be used to further an illegal or fraudulent act only after assuring him or herself that there is reasonable support for an argument that the client's intended use of the fruits of the representation will not further a criminal scheme or act. Of course, the lawyer retains the discretion to refuse to engage or participate in such conduct if the lawyer is not satisfied that such action is lawful. We also note that a lawyer may withdraw from the representation if the lawyer reasonably believes that the client is using such services to commit a crime or fraud. See DR 2-110(C)(1)(b) (stating that a lawyer
may withdraw from representing a client if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent).

B. Application of Principles to Facts

Applying these principles to the present inquiry, set forth below is the Committee's opinion regarding proposed actions requested by a fugitive client.

1. Sale of Assets and Forwarding Proceeds to Client

We believe that a lawyer may represent and act on behalf of a fugitive client, notwithstanding his or her status as a fugitive, provided that the lawyer does nothing to aid the client to escape prosecution or to further some other illegal act. Here, the Committee agrees that a lawyer may ethically sell a client's tangible assets and place the proceeds in escrow. However, if the circumstances give rise to a basis for suspicion that the lawyer's conduct may be used to commit an illegal or fraudulent act, we do not believe that the lawyer may transfer the proceeds from the sale to the client without first satisfying him or herself that there is some reasonable support for an argument that the purpose of such transfer and the intent and motive of the client after receiving the funds are legal.

If the lawyer decides that the transfer of proceeds to the fugitive client will violate the law, or if the lawyer knows that the client will use the money to further some illegal or fraudulent act, then the lawyer is prohibited under DR 7-102(A)(7) from transferring the money to the client. If the lawyer believes that the transfer of proceeds is intended for some unlawful purpose, although there is support for an argument that the conduct is legal, the lawyer may in his or her discretion, pursuant to DR 7-101(B)(2), refuse to transfer the proceeds to the client. However, if the law does not prohibit such transfers, and if the lawyer does not believe that the client will use such proceeds to further an illegal act, the lawyer should deliver the proceeds to the client pursuant to her instructions. See DR 9-102(C)(4) (stating that a lawyer shall promptly pay or deliver to the client, as requested by the client, the properties in the lawyer's possession which the client is entitled to receive).

2. Payment to Client's Creditors From Escrow

This Committee is of the opinion that the same analysis outlined above applies with respect to the payment of the client's creditors from the escrowed funds. A lawyer may not pay the creditors of the fugitive
client if the attorney knows that doing so is illegal or that it will further an illegal purpose. A lawyer also retains the discretion to refuse to participate in such action if she believes that the payment is in furtherance of some illegal or fraudulent scheme. Barring these two scenarios, however, we believe that it would be permissible for a lawyer, and that the lawyer would indeed have an obligation, to pay the creditors of the client, pursuant to the client's instructions, from funds in escrow.

3. Forwarding the Balance of Escrowed Funds to Client

In the opinion of the Committee, there is no distinction between forwarding the proceeds from the sale of personal assets to the client, as discussed above, and forwarding the balance of funds from the escrow to the client after paying off creditors. Once again, the Committee cautions the lawyer with respect to the legal question of whether she would be furthering a crime by providing means for the client to remain a fugitive. However, assuming that the lawyer determines that there is no legal prohibition, and assuming that she does not know or believe that such conduct would be used for unlawful or fraudulent purposes, this Committee believes that the lawyer would have a duty to forward to the client property which rightfully belongs to the client.

II. REPRESENTING THE CLIENT IN THE CIVIL MATTER

The next question is whether the Code permits a lawyer to represent a fugitive client in a civil matter, notwithstanding the client's status as a fugitive. DR 2-110 governs mandatory withdrawal and states, among other things, that a lawyer shall withdraw from employment if the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule. DR 2-110(B)(2). EC 7-5 further clarifies the Disciplinary Rule:

The lawyer may continue in the representation of the client even though the client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as the lawyer does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid the client to commit criminal acts or counsel the client on how to violate the law and avoid punishment therefor.

EC 7-5; see also NY State 529 (1981) (opining that the Code does not require a lawyer to withdraw from representation of a fugitive when the fugitive refuses to surrender, and that a lawyer's ethical obligations are
best served when the lawyer continues to give legal advice to his fugitive client).

Although some ethics committees have opined that a lawyer cannot represent a defendant so long as he or she remains a fugitive, see N.Y. County 462 (1958); Michigan RI-160 (1993), we refuse to follow such reasoning. Instead, we believe that, consistent with the rules presented above, the representation of the fugitive client in a civil matter does not require mandatory withdrawal, provided that such continued representation would not result in the violation of a Disciplinary Rule.

We note, however, that a lawyer retains the discretion to withdraw from the representation under any of the circumstances described in the provisions of DR 2-110(C).

CONCLUSION

Subject to the caveats set forth above, we answer the questions presented in the affirmative.

February 1999

Committee on Professional and Judicial Ethics

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

John Q. Barrett  Barbara S. Gillers  James A. Mitchell
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The Proposed Federal Rules of Attorney Conduct: The Wrong Solution for the Wrong Problem

Committees on Federal Courts, Professional Discipline, Professional and Judicial Ethics, and Professional Responsibility

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the “Standing Committee”) is currently considering whether to propose the adoption of a uniform set of rules of ethics that would apply to lawyers when, and only when, they practice in the federal court system.1 Such a set of rules is being considered because of the Standing Committee’s perception that lawyers in

the United States suffer from excessive “balkanization” of standards of attorney conduct. While that problem is largely the inevitable product of our legal system, which permits each state to regulate the attorneys who practice in it, the Standing Committee believes that the fractionalization is compounded by the fact that the several federal district courts have adopted various different approaches to the regulation of the conduct of lawyers who practice before them.²

The Committees on Federal Courts, Professional Discipline, Professional and Judicial Ethics and Professional Responsibility have jointly studied the arguments that have been advanced over the past few years in support of and in opposition to the concept of a separate set of ethics rules for federal practitioners. The four Committees are in agreement that there is no compelling need for a set of federal ethics rules. To the contrary, the committees believe that expanding the existing body of rules to include yet another layer of regulation would unnecessarily complicate matters for lawyers who practice in the federal courts.

THE PERCEIVED PROBLEM

Regulation of the conduct of attorneys has traditionally been the province of the states, which admit attorneys to practice, adopt rules for their conduct, and discipline them for violation of those rules.³ Although the scope of the practice of law has become increasingly nationwide, if not worldwide, with some lawyers routinely handling matters outside of their states of admission,⁴ there has been no substantial movement toward a national system of attorney regulation. Thus, each state and the

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³ See Leis v. Flyrt, 439 U.S. 438, 442 (1979) (“[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States”).

⁴ The parochialism with which some state courts have viewed the interstate practice of law is perhaps best evidenced by the recent decision of the California Supreme Court in Blubrow, Montalbano, Condon & Frank, P.C. v. Superior Court, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998), which held that a New York law firm could not recover fees owed for work performed in California because it was not authorized to practice law in that state. Most of the preparatory work for a contemplated arbitration had been conducted in California, where the client’s offices were located; the matter was settled before hearings commenced. In rejecting the firm’s claim for fees, the court stated: “Although we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse large firms from complying with [California’s unauthorized practice of law statute].” 17 Cal. 4th at 124.
District of Columbia has adopted its own set of rules of attorney conduct. In more than four-fifths of the states, the rules are based on the American Bar Association's Model Rules of Professional Conduct, which were initially promulgated in 1983 and have been amended from time to time over the past 15 years. Most of these states have modified the Model Rules in various respects. A handful of states have continued to base their rules of conduct on the ABA's Model Code of Professional Responsibility, which the ABA approved in 1969. One state, California, has adopted a Code of Professional Conduct that is based on neither the Model Code nor the Model Rules, but is in form sui generis. It is fair to say that despite the American Bar Association's continual efforts at standardization, the various jurisdictions have adopted dozens of different sets of ethics rules.

Notwithstanding the various substantive and textual differences among these sets of rules, the fundamental concepts reflected in them are largely the same. All jurisdictions have rules governing, for example, the attorney's obligations of confidentiality and the exceptions thereto, conflicts of interest, the so-called "lawyer-as-witness" rule, the rule prohibiting attorneys from communicating with represented persons or entities, attorney advertising and solicitation, and the unauthorized practice of law.

It is against this backdrop that the 94 federal districts have acted to regulate the practice of attorneys appearing in their courts. Admission to practice in the courts of a state does not carry with it the automatic right to practice law in any federal court, not even the districts in the state of admission. Separate admission to practice is required, although it is often little more than a formality involving the provision of proof of good standing in the state bar and the payment of a small fee. The federal
district courts not only admit attorneys to practice before them on a permanent basis (subject, of course, to discipline), they permit out-of-district attorneys to appear in cases pro hac vice provided certain criteria are met, ordinarily including an undertaking by the foreign attorney to abide by the local rules of conduct, whatever they may be. Federal district courts generally have their own mechanisms for disciplining attorneys, and while occasionally a federal district court will take the initiative and institute original disciplinary proceedings against lawyers who violate their rules, more often they simply impose discipline reciprocally on lawyers who have first been sanctioned by the courts of their home states.

According to the Standing Committee, “[n]o area of local rulemaking has been more fragmented than local rules governing attorney conduct.” A June 1997 Report to the Committee on Rules of Practice and Procedure, supplementing a June 1995 paper by the Standing Committee Reporter, Professor Daniel R. Coquillette of Boston College Law School, stated that:

(a) 68 districts have local rules that apply the standards of conduct adopted by the courts of the forum state, whether those rules be based on the Model Rules, the Model Code, or the California Rules of Professional Conduct; (b) eight districts have local rules that refer directly to an ABA model (the Code or the Rules); (c) another 12 have rules that refer to both an ABA model and the state standards; (d) one district has adopted a version of the Rules of Professional Conduct that has been changed substantially from the ABA Model as well as from the version in effect in the forum state; and (e) five districts have no local rules governing attorney conduct at all.

12. Working Papers at 337-41. The Local Civil Rules of the Southern and Eastern District of New York were amended as of April 15, 1997 to require attorneys to abide by “the New York State Lawyer’s Code of Professional Responsibility as adopted from time to time by the Appellate Divisions of the State of New York, and as interpreted and applied by the United States Supreme Court, the United States Court of Appeals for the Second Circuit, and this court.” Local Civil Rule 1.5(a)(5). Previously, the districts’ rules referred to the codes of conduct adopted from time to time by the American Bar Association and the New York State Bar Association (former General Rule 4(f)), notwithstanding the fact that those sets of rules
Adding to the confusion have been the efforts of the United States Department of Justice to exempt federal criminal prosecutors from the general rule barring direct or indirect contact with individuals who are involved in investigations and represented by counsel in the matter being investigated.13 First in a 1989 memorandum issued by Attorney General Richard Thornburgh, and later in a rule promulgated in 1994 under the aegis of Attorney General Janet Reno, the Justice Department took the position that federal prosecutors cannot be disciplined for violation of rules proscribing contact with represented persons, on the theory that under the Supremacy Clause states may not regulate the conduct of federal prosecutors.14 It is possible that it was this effort by the Justice Department that first prompted the Standing Committee in 1995 to explore divergences in attorney regulation among federal district courts and to commence consideration of a set of rules of conduct for lawyers in federal matters.15

The most recent chapter in this saga began on October 21, 1998, when Congress passed the 1999 fiscal year budget. That law included the following provision, which is scheduled to become effective on April 18, 1999 (codified at 28 U.S.C. § 530B(a)):

An attorney for the Government shall be subject to State laws

have differed substantially from one another since the ABA adopted the Model Rules of Professional Conduct in 1983, and have differed even from the New York Lawyer’s Code of Professional Responsibility, particularly since a comprehensive set of amendments to the latter Code became effective in 1990.

13. Ordinarily, attorneys may not engage in such communications without the consent of the attorney representing the person to be contacted. Model Code of Professional Responsibility, DR 7-104(A)(1); Model Rules of Professional Conduct, Rule 4.2.


15. The discussion draft currently before the Standing Committee contain, as its Rule 10, an anti-contact provision based on the work of the Conference of Chief Justices (reportedly the outcome of intensive negotiation between the Conference and the Department of Justice), which issued a Tentative Working Draft on July 1, 1997. See Memorandum, dated December 1, 1997, from Daniel R. Coquillette, Reporter, to Standing Committee. This Association recently expressed its opposition to a relaxation of the anti-contact rule for government attorneys in the context of changes to Model Rule 4.2 proposed by the Conference of Chief Judges. See Association of the Bar of the City of New York, Committees on Professional Responsibility and Criminal Advocacy, “Comments on Proposed Changes to ABA Rule 4.2” (May 1998).
and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.

The law will require the Attorney General to “make and amend rules of the Department of Justice to ensure compliance with this section.” 28 U.S.C. § 530B(b). Should section 530B(a) take effect in its present form, the issue of Justice Department attorneys’ compliance with state standards of professional conduct will have been resolved. The Department of Justice, however, has made clear its intention to seek a modification or repeal of this provision, informally known as the “McDade Amendment,” before it becomes effective.

THE STANDING COMMITTEE DISCUSSION DRAFT

The Standing Committee is currently reviewing a draft set of 10 rules that would govern all attorneys in the course of federal litigation. The first of these rules (Rule 1) would provide a general framework and would state that the Federal Rules of Attorney Conduct shall govern where relevant and that otherwise the current standards of the state where the district court is located will apply. The nine substantive rules deal with confidentiality (Rule 2), candor toward a tribunal (Rule 7), truthfulness in statements to others (Rule 9), conflicts of interest (Rules 3-6), lawyer-witness issues (Rule 8) and, not surprisingly, contact with represented persons and entities (Rule 10).

While the Committees generally agree with the proposition that it is undesirable for there to be a substantial divergence of approach among the various federal district courts with respect to the manner in which attorneys are regulated, we disagree with the philosophy that the problem is best cured by adopting yet another set of rules, even a limited one.

16. 28 U.S.C. § 530B(c) defines “attorney for the Government” as including any attorney described in the “Reno Rule” (28 C.F.R. § 77.2(a)).


18. We emphasize that these rules have not been published as “proposed rules” in any formal sense, but have at this point been circulated for discussion purposes only. See Memorandum, dated December 1, 1997, from Daniel R. Coquillette, Reporter, to Standing Committee.

intended to govern federal litigation, with forum state rules to be applied in other circumstances. Instead, we recommend that a rule be adopted that would require the federal district courts to apply the rules of the state in which they sit (sometimes referred to as the “Erie approach”20 or “dynamic conformity”21). This would mean that a lawyer coming into a state to represent a litigant would be required to adhere to one known and identifiable set of rules, regardless of whether the matter is pending in federal or state court.

THE “PROS” AND “CONS”

Proponents of a set of rules of professional conduct chiefly contend that uniformity is needed among the federal district courts, and that the only way to ensure true uniformity is to adopt a uniform set of rules for those courts. They argue that the “Erie approach” to federal rules of ethics would create only an “illusory” appearance of consistency22 because federal courts ordinarily ignore state court interpretations of state ethics rules and impose their own glosses on those rules. This problem, whether perceived or real, is not cured by providing the federal courts with a different set of rules to interpret and apply, but is only exacerbated by adding a set of dozens of different federal interpretations of federal rules to the various federal and state interpretations of individual state rules that already govern attorney conduct.23

A review of the purported “complaints” made by the various federal district courts to the Standing Committee in response to a 1997 survey confirms this conclusion. Some of the complaints arose out of ambiguities in the drafting of the local rule governing attorney conduct, which do not state clearly which standards of conduct are to be applied. For example, some districts complained that while their local rule declared that the Model Rules of Professional Conduct would govern attorneys


23. This problem could be ameliorated, for example, by drafting a rule that requires federal courts to apply the rules of conduct as adopted by the state in which the court sits, and any interpretations of those rules emanating from the highest court of that state.
appearing before the court, the rule did not specify whether that meant the ABA model or the amended version adopted by the state in which the court sits (or whether state amendments post-dating the adoption of the local rule would be incorporated automatically into the federal regulatory scheme), problems that could be cured by a more explicit local rule and not by the accretion of an additional, partial set of federal rules governing attorney conduct.24

Other problems cited by federal district courts included (a) the district court’s practice of relying upon sources of law not apparent from the local rule (e.g., an ABA model) in interpreting the provisions of the code of conduct; (b) due process concerns involving the specific procedures adopted by the district court for attorney discipline; (c) conflicts between the standards adopted by the federal court and those governing attorneys generally in the state in which the court sits; and (d) conflicts created by the Department of Justice’s promulgation of its own rules of professional conduct.25 None of these problems are the product of different federal district courts having different rules; they are chiefly the result of differences between the codes of conduct governing lawyers in state and federal court. Those differences would only be exacerbated by the addition of still more federal rules of attorney conduct.

Similarly, proponents of a federal set of ethics rules argue that “dynamic conformity” is unworkable for the exclusively federal practitioner or the attorney engaged in multi-jurisdictional federal litigation.26 True consistency, they suggest, can only be achieved with a uniformly applicable set of detailed rules that leave less room for interpretation and engender less inconsistent interpretation. No evidence, anecdotal, empirical or otherwise, has ever been proffered to support the proposition that federal practitioners have been disadvantaged by the requirement that they adhere to the standards of the state in which they are practicing at a given moment.27 Additionally, to the extent that the drive toward ex-

24. Working Papers at 347-48. Interestingly, only 13 districts (10% of the districts responding to the survey) indicated that they had any problem at all with ambiguously drafted rules.
25. Working Papers, at 347-49, 379-87. Interestingly, no more than seven districts reported having experienced any of these problems.
26. See id. at 526-27.
27. As noted above, the evidence before the Standing Committee regarding purported “multiforum problems” relates entirely to differences between the ethics provisions in place in the federal court and those otherwise governing attorneys in the state in which the court sits. Working Papers at 385. We note in addition that the recent Congressional enactment subjecting gov-
empting federal prosecutors from compliance with state-promulgated standards of professional conduct provided an impetus for the proposed federal rules of attorney conduct, it may well have been eliminated by the recent Congressional action, discussed above. Indeed, it could be argued that 28 U.S.C. § 530B reflects a legislative judgment that the public is best served—or at least is not disserved—by requiring federal government lawyers to adhere to state standards of professional conduct.

Those who favor adoption of a uniform set of federal rules of attorney conduct, even one containing “only” nine substantive rules, are apparently of the view that the rank and file practitioner will have a better sense of the standards of ethical conduct that are applicable to him or her when representing clients in federal court if the rules of the 94 federal judicial districts are standardized. This is, however, a case of the cure being worse than the disease.

Adding another layer of ethics rules will compound confusion, not reduce it. Many lawyers have local practices and never handle matters outside of their home state. In the majority of jurisdictions, which already abide by the concept of “dynamic conformity,” these lawyers should not suffer from confusion regardless of whether they litigate in state or federal court: in either system they must adhere to the state code of conduct, as amended from time to time. Aside from federal prosecutors, who continue to seek partial exemption from state regulation, we are aware of few, if any, instances of lawyers complaining of being whipsawed by the need to comply with divergent ethics rules in federal districts outside their home state; certainly not any more so than for lawyers who litigate pro hac vice in courts of a state in which they are not generally admitted to practice.28

28. Many states have adopted choice of law provisions, patterned on Model Rule 8.5(b), to make clear that lawyers are subject to the rules of their home state in most circumstances, but that they are subject to the rules of the forum state when litigating in a foreign jurisdiction. The proposed amendments to New York’s Code of Professional Responsibility include the substance of Model Rule 8.5(b) in a new DR 1-105(B), which would provide:

In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

1. For conduct in connection with a proceeding in a court before which a lawyer
has been admitted to practice (either generally or for purposes of that proceed-
ing), the rules to be applied shall be the rules of the jurisdiction in which the court
sits, unless the rules of the court provide otherwise; and
2. For any other conduct:
   a. If the lawyer is licensed to practice only in this state, the rules to be
      applied shall be the rules of this state, and
   b. If the lawyer is licensed to practice in this state and another jurisdiction,
      the rules to be applied shall be the rules of the admitting jurisdiction in
      which the lawyer principally practices; provided, however, that if particu-
      lar conduct clearly has its predominant effect in another jurisdiction in
      which the lawyer is licensed to practice, the rules of that jurisdiction shall
      be applied to that conduct.

New York State Bar Association, Proposed Amendments to the New York Lawyers’ Code of

29. See generally Barry Friedman, Federalism’s Future in the Global Village, 47 Vand. L. Rev.
1441 (1994).

The movement towards a set of Federal Rules of Attorney Conduct, then, appears to be directed at mandating uniformity for its own sake. Yet whatever uniformity is achieved in the “black letter” rules will be lost when the 94 federal districts and 13 circuits begin separately interpreting and applying those rules. Experience has shown that even comprehensive and uniform federal statutory schemes are susceptible to interpretive divisions among districts and circuits. Indeed, our society tolerates balkanization in a variety of substantive law areas. State regulation of the insurance industry, for example, has created a need for a practice area populated by insurance lawyers who specialize in knowing and interpreting the regulatory framework of 50 states. State “blue sky” securities laws, state trade regulation statutes and state banking regulations likewise have engendered a coterie of attorneys with expertise in the differences among the various statutory schemes.29 If balkanization, with its attendant complications, is undesirable as a matter of principle, there are many other areas of law and regulation in which the need for standardization and uniformity is far more compelling.

In the case of attorney conduct, moreover, the creation of a set of federal rules would cause new difficulties for lawyers. Clients often come to lawyers with problems, not cases. When undertaking to assist a client with such a problem, there is often no way for the lawyer to know (a) whether the matter will result in litigation, (b) if it does result in litigation, whether the case will be filed in federal or state court, or (c) if the action is brought in state court initially, whether it will be removed (or
thereafter remanded). These uncertainties raise serious questions about the wisdom of having a set of rules for lawyers “in the district courts,” as the proposed amendment to Federal Rule of Civil Procedure 83(c) would state. Specific problems that would be created include the following:

• Can the lawyer accept the representation if it would be permissible to do so under state conflict of interest standards, even though the lawyer would have to decline the representation under the federal ethics rules? If disqualification is going to be determined by reference to the federal rule, must the lawyer decline the matter at the outset if it is at all conceivable that the dispute could end up in federal litigation?

• To what extent may a lawyer communicate with a represented person prior to the institution of what becomes a federal lawsuit? What if the lawyer reasonably believes that the matter will result in federal litigation, and engages in conduct that would be permitted by the federal ethics rule, and only later determines that the action must be commenced in state court where the very same communications are prohibited?

• Can a lawyer disclose confidential information necessary to prevent a client being represented in federal litigation from committing a non-criminal fraudulent act outside the context of that litigation that is likely to result in substantial injury to the financial interests or property of another? The lawyer would be permitted to do so under the draft Federal Rule of Attorney Conduct 2, but prohibited from doing so under New York’s DR 7-102(B)(1), for example.

Such not-so-subtle differences between federal and state rules would create confusion even for lawyers who do not engage in multistate practice, and could affect federal-state forum selection.

30. The Committee on Professional Responsibility of this Association previously recommended that any set of federal rules include an express safe harbor that would dictate that the conduct of a lawyer prior to the initiation of federal litigation is subject to regulation pursuant to the rules in effect in, and as applied in, the state in which the lawyer primarily practices. See Association of the Bar of the City of New York, Committee on Professional Responsibility, “Uniform Ethics Rules in Federal Court: Jurisdictional Issues in Professional Regulation,” 50 The Record 842-43 (1995). If the Standing Committee proposes rules that would regulate matters affecting the acceptance of employment by a lawyer, a decision that may be made long
Lastly, even if uniformity in both rule and application could be achieved without the complications described above, the fact remains that federal district courts generally have only the most minimal disciplinary infrastructures. For the most part, federal courts adjudicate few original disciplinary proceedings, and rely on state disciplinary agencies to police attorney conduct in federal courts. Inadequate consideration has been given to the effect that the adoption of a federal set of ethics rules would have on the needs of federal district courts to maintain disciplinary staffs and conduct disciplinary proceedings on their own, or if they do not, to the willingness and capability of already understaffed, underfunded and overburdened state disciplinary authorities to prosecute lawyers for violations of rules that differ significantly from their own. In the absence of adequate enforcement, a set of purely federal rules of attorney conduct would be largely cosmetic.

CONCLUSIONS

The best solution to the problem perceived by the Standing Committee, in our view, would be to adopt a rule that requires each district court to apply the professional conduct rules of the state in which the district court sits, as amended from time to time. This approach, the so-called “Erie rule” or “dynamic conformity,” creates no more confusion and conflict than is currently present in the attorney regulatory system solely by virtue of the existence of 51 different sets of rules of attorney conduct. It also eliminates the problems caused by individual federal district courts deviating from the rules governing lawyers in the state in which they sit by requiring them to defer to those rules (and perhaps also to interpretations of those rules issued by the highest court of the state) in regulating the conduct of lawyers who appear before them.

before a determination has or could be made as to the forum of potential litigation, such a safe harbor proposal would not go far enough to cure the problem.


32. We are mindful of the fact that federal prosecutors contend that, in view of special circumstances surrounding their practice, they should not be bound by certain of the generally applicable rules of professional conduct. Whether and how to address the concerns of federal prosecutors are matters well beyond the scope of this report. Assuming, however, that a need exists for the adoption of a different set of rules for federal prosecutors, it is our strongly held view that such a goal should not be accomplished by subjecting all lawyers practicing in federal court to an additional set of ethics rules.
The root of the problem the Standing Committee is seeking to solve, however, is not that the district courts have been inconsistent in their approach to the regulation of attorney conduct, but that the entire structure of attorney regulation in the United States is balkanized. True uniformity, if desired, can only be achieved if attorney admission, regulation and discipline are controlled or at least coordinated on a nationwide basis. The proposal to adopt a system of federal ethics rules simply does not address the core problem: while the practice of law is becoming multi-jurisdictional, the regulatory structure for the legal profession is not. Thus, not only is the Standing Committee proposing the wrong solution, it is addressing the wrong problem.

For the foregoing reasons, we urge the Standing Committee to abandon its efforts to impose Federal Rules Governing Attorney Conduct and to recommend adoption of a rule that would require each district court to apply the ethics rules of the state in which it sits.

December 1998

33. Whether the legal profession should be “nationalized” is likewise beyond the scope of this report.

34. This report was drafted by a working group consisting of members of all four subscribing committees and ratified by each committee at one of its regular meetings. The working group consisted of Steven C. Krane (Chair), John Q. Barrett, Catherine M. Foti, Richard W. Mark, Mary C. Mone, Gay T. Petrillo and James P. Rouhandeh.
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A Mandate to Stimulate the Market for Recycled Paper in the Legal Community

Committee on Environmental Law

INTRODUCTION

One of the most persistent and perplexing environmental problems confronting us today is managing the disposal of solid wastes. Recycling offers a simple cost-effective and environmentally sound solution for reducing the largest component of the solid waste stream, paper. Although recycling of paper (and recycling generally) has received widespread public support, its overall success has been limited by one critical factor, the failure of a sustained demand for recycled paper products to materialize. This report presents a unique opportunity for the legal community in the State of New York to play a leading role in stimulating the demand for recycled paper through the implementation of a proposed rule requiring that all court filings be made on paper containing recycled fiber.

The need for a change in our consumption patterns is real and urgent. The negative environmental impact of waste disposal is well chronicled. While most garbage is disposed of in landfills, many landfills have become major sources of contaminated groundwater and have been identified as priority superfund sites. Additionally, the need to find alternatives to land disposal is intensifying. Since 1978, more than 70% of all
Landfills have closed. New York City is due to close its last landfill in the year 2001. Consequently, many communities must now export their garbage. Finally, the costs of waste disposal continue to escalate due to a myriad of regulations, substantial risk of liability, and increasingly costly “tipping fees.” Yet, our creation of garbage continues to soar. Since 1960, it has nearly tripled.

Paradoxically, the problem also contains the solution, because within the burgeoning piles of garbage exists an untapped resource of raw material that is accessible through recycling. The proven benefits of recycling include: substantial conservation of natural resources, reduction in the costs of disposal, and an increase in the use of landfill space. Recycling and the manufacture of recycled products also contribute more jobs and development opportunities to the economy than are supported through landfill operations. Additionally, the generation of recycled products, and in particular recycled paper, consumes far less energy and generates far less pollution than the manufacture of virgin products.

Not surprisingly, recycling has gained widespread public support and increasing amounts of waste are no longer indiscriminately discarded; however, efforts to recycle generally end at the curbside, or the front end of the “loop” where garbage is separated at its source. Currently, the interest in recycling collection programs far exceeds the interest in purchasing products made from recycled material, even though high quality cost competitive recycled paper is widely available. While many recycling programs are mandated and in many cases generate a glut of “raw material,” there is no requirement that the materials collected be utilized again in products. True recycling, though, does not occur until the “loop” is closed, and without markets for recycled products, the “loop” cannot be closed. Therefore, it is essential to develop sustainable markets to justify recycling collection programs, support investment in the recycling industry, stimulate new economic development opportunities, conserve resources and avoid the costs of waste disposal.

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4. Christopher D. Knopf, Closing the Loop: Requiring Double-Sided Copying and Non-Chlorine Bleached Recycled Paper for Federal Court Papers, Misc.L.Rev., Vo. 1995, No. 2, p. 362; See also, BNA, Environment Reporter, vol.29, No. 7, p. 423 (Mandatory recycling programs have been found to be more effective than voluntary programs).
5. See infra, Part 3.A.
In light of the tremendous impact that the legal community has on the consumption of paper, and the general failure of voluntary efforts at stimulating the purchase of recycled paper, the Committee on Environmental Law found it necessary to reexamine its earlier focus on "buy recycled" initiatives and has determined that a court rule mandating the use of recycled paper is the most effective means of advancing sound solid waste management practices in the legal community. Experience dictates that a mandatory rule is necessary to stimulate the market for recycled paper because of a surprising lack of awareness of our waste disposal problem, enduring misperceptions about recycled paper, and institutional and corporate inertia.

Therefore, the Committee proposes that the Office of Court Administration for the courts of New York State adopt a requirement that all filings be made on paper with a minimum content of 30% post-consumer fiber as soon as practicable. The Committee strongly believes that the adoption of this proposal best meets the legal community's obligation to further current public policy goals aimed at developing sustainable markets for recycled paper.

Part 1 of this report presents an overview of the growth of the generation of solid waste and the impact of paper on the waste stream. Part 2 focuses on the impact of lawyers on the generation of paper waste. Part 3 sets forth the case for supporting "buy recycled" initiatives. Part 4 discusses the failure of the demand for recycled paper products to meet the expectations of the recycled paper industry. Part 5 of the report explains the feasibility of complying with the proposal set forth in part 6.

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7. See , Knopf, supra at p. 382 ("Experience demonstrates that a mandatory rule requiring the use of recycled paper is necessary to truly stimulate the widespread use of recycled paper by the legal profession.")

8. Post-consumer is defined by the EPA as "... materials generated by a business or consumer that have served their intended end uses, and have been recovered from or otherwise diverted from the solid waste stream for the purpose of recycling." This distinction is highly significant because "post-consumer" represents a diversion of material from the waste stream as opposed to "pre-consumer" waste which includes scrap generated by paper mills and other businesses which never enters the waste stream and may be simply reused internally.
1. SOLID WASTE TRENDS AND PAPER WASTE
   
   A. Overview of Municipal Solid Waste

   The United States Environmental Protection Agency ("EPA") reports that in 1996, 209.7 million tons of municipal solid waste ("MSW") were generated, triple the amount generated in 1960.\(^9\) The current rate of generation represents a national per capita generation rate of 4.3 pounds of garbage per day, with a discard rate of 3.2 pounds.\(^10\) 55% of all waste generated in 1996 was disposed of in landfills, 17% was combusted in incinerators, and 27% was recycled.\(^11\)

   B. The Impact of Paper on the Waste Stream

   Paper is by far the largest category of MSW, accounting for approximately 40% of all waste generated, rising from 34% in 1960.\(^12\) Because of the ever increasing demand for paper products, the percentage of paper in the waste stream is projected to reach 50% of all waste generated by the year 2010.\(^13\)

   Excluding paper board products, e.g., boxboards and container boards used for corrugated packaging, the total quantity of paper consumed in the United States in 1990 was 50 million tons, including 25 million tons of printing and writing paper, the largest component of paper waste and more than triple the amount of the next closest category, newsprint.\(^14\) Printing and writing paper generally includes papers used for offset printing, office paper, copying paper, stationary, bonds, and envelopes.\(^15\)

   Despite the advent of electronic communications, the consumption of printing and writing paper has more than tripled since 1960.\(^16\) The prediction of a paperless office due to the advance in office technology has proven na"ïve. The advance in office technology has resulted in many

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10. Id. The discard rate refers to waste that is neither recycled nor reused, but thrown away.
11. Id.
12. Thompson, supra at pp. 6-7. By weight, the next closest category is yard wastes, which make up approximately 18% of the waste stream and, by volume, the next closest category is plastics, which make up approximately 17% of the waste stream.
13. Id. at p. 4.
14. Id. at pp. 7-8.
15. Id. at p. 1.
16. Id. at p. 10.
more documents being produced given the ease of use and ready accessibility of word processing and copying machines.

Indeed, from 1960 to 1990, the amount of office paper in the waste stream increased an overwhelming 427%. Office paper is a sub-category of printing & writing paper and is generally defined as every-day white paper used for letterhead, copying paper, and computer paper. It is the type of paper commonly used by lawyers. Office paper accounts for 6.4 million tons, or 3.3% of the MSW stream before recycling and comprises 2.9% of all landfilled MSW by volume. In 1991, 51 pounds of office paper were produced for every American; however, only 26.5% was recycled. Although the amount of office paper recovered has increased, the use of office paper has outpaced its rate of recycling and its proportionate share of discarded waste is growing.

As of 1990, only 28% of waste paper was utilized by the paper industry in the United States. The waste paper utilization rate for printing and writing paper was only 6%. Of that percentage, only a small portion consisted of deinked post-consumer waste supply, the majority consisting of pre-consumer unprinted trimmings and scraps generated in the manufacturing of virgin paper, also known as “mill broke.”

In fact, the most valuable and underutilized supply of waste paper is office waste paper, which can be recovered to make new printing and writing paper or to make a lower grade of paper, such as tissue. A robust market for recycled paper would vastly improve source separation and utilization of high grade office paper. As this “garbage” would become more valuable, office tenants would be induced to segregate office waste paper thereby increasing its rate of recovery.

These statistics demonstrate that while the growth in the use of pa-

19. Id.
20. Id.
22. Thompson, supra at p. 15
23. Id. at p. 16.
25. Id.
per, and in particular printing and writing paper, continues to soar, the utilization rate of wastepaper remains insignificant, regardless of its rate of diversion from the waste stream. The failure of the utilization rate to match the diversion rate, much less the generation rate, is attributable to a lack of demand for recycled paper. Because the waste stream consists predominantly of paper, it is axiomatic that major consumers of paper, such as lawyers, can play a significant role in alleviating problems associated with waste disposal by increasing the utilization rate of paper diverted from the waste stream.

2. IMPACT OF LAWYERS ON THE PAPER INDUSTRY

The impact of lawyers on the generation of paper waste, particularly with respect to printing and writing and office paper, cannot be ignored. In 1994, the American Bar Association estimated that each lawyer uses, on average, 1 ton of paper per year.26 With nearly 800,000 attorneys in the United States, as much as 800,000 tons of paper are used annually by lawyers.27 In the State of New York alone, there are over 109,000 attorneys, 7,000 of whom were newly admitted in 1997.28

The enormous consumption of paper by lawyers is also demonstrated by the number of cases filed in the court system. In 1992, more than 265,000 cases were filed in the federal district courts and nearly 72,000 additional cases were filed in the federal appellate courts.29 In 1991, 94 million additional cases were filed in state trial courts nationwide.30

In the State of New York, there were over 3,350,000 new filings in the trial courts in 1994.31 This number solely represents initial filings and does not include the number of filings after an action has been commenced, e.g. motion practice. An additional 10,788 records were filed on appeal and a total of 249 cases were disposed of in the Court of Appeals.32

If one were to estimate conservatively that each new filing averaged 10 pages in length, new filings alone would account for tens of millions

28. New York State Office Of Court Administration, Division of Attorney Registration.
30. Id.
31. New York State Office of Court Administration.
32. Id.
of sheets of paper a year. Common experience tells us that these filings represent only a very small fraction of the total paper used by lawyers. Each filing is most likely the product of multiple drafts and involves photocopying of files and background documentation, duplication of research results and memoranda, telefaxes and written correspondence. Moreover, trial court figures on new filings fail to account for subsequent filings, motion practice, administrative proceedings and the equally enormous quantities of paper used by non-litigators. Given the mechanics of the modern law office, it is not unreasonable to conclude that, in New York State alone, lawyers use billions of sheets of paper a year.

The fact that lawyers are dependent upon and consume paper the way trucks guzzle gasoline obligates the legal community to examine its consumption and waste management practices with respect to paper. Because the key component missing from the recycling loop is demand for recycled products, establishing a rule requiring all court filings to be made on paper containing recycled fiber would act as a powerful catalyst for the recycled paper market and would foster sound solid waste management practices among commercial users of paper. Also, because the conversion to the use of recycled paper for litigation would likely result in a general conversion to the use of recycled paper by many firms as a matter of convenience, the ultimate impact of adopting the proposed rule would be huge indeed.

3. THE CASE FOR BUYING RECYCLED PAPER

Why purchase recycled paper? Because completing the loop, that is, diverting paper from the waste stream and manufacturing recycled paper products for consumption serves several important goals: reduction of waste and pollution, reduction of risks and costs of disposal, conservation of resources, promotion of sustainable economic development, and the advancement of public policy goals. As discussed in Part 5, infra, recycled paper is also cost and quality competitive and is widely available. Because of the benefits and feasibility of recycling, it is irresponsible to continue to liberally consume and discard virgin paper.

A. Environmental Benefits of Recycling

Environmentally, landfills are a nightmare. Nearly 90% of all landfills have groundwater contamination and more than 44% have surface water contamination.33 Because of the toxic levels of leachate emanating

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33. Knopf, supra at p. 367.
from many landfills, 290 landfills have been listed on the Superfund National Priority List ("SNPL"), comprising 23% of all SNPL locations. The contaminating leachate stems from the fact that waste in landfills does not typically biodegrade.

Additionally, landfills emit tons of methane gas into the atmosphere, require extensive monitoring even after closure, emit noxious odors, are generally unpopular and can depress the value of other property in the area.

These environmental problems, coupled with the facts that more than 70% of all landfills have closed since 1978 and that landfills continue to close at a rate of approximately 8% a year, make paramount the goal of reducing our reliance on landfills and finding alternatives to waste disposal.

Because paper waste comprises the largest segment of the MSW stream and is the largest component of waste disposed of in landfills, developing sustainable markets for recycled paper is critical to reducing our reliance on landfills.

Furthermore, the use of recycled paper in making "new" paper consumes far less energy and generates a great deal less pollution than does the manufacture of paper from virgin fiber. For example, the production of one ton of virgin pulp requires 60% more energy than the production of one ton of pulp from recovered paper. The energy savings from the production of one ton of pulp from recovered paper is the equivalent of 4100 kilowatt hours of electricity, or approximately 75% of the amount of electricity consumed by the average residential household during one year for lighting and appliances, excluding heating and cooling systems.

The production of paper from virgin timber also consumes vast quantities of natural resources. 27% of the domestic timber harvest, which is heavily subsidized by the federal government at a cost of $250 million per year to taxpayers, is used for producing paper pulp. Timber harvesting

34. Thompson, supra at pp. 4-5.
37. Thompson, supra at p. 5.
39. Knopf, supra at p. 370. This energy savings is also the equivalent of saving 9 barrels (380 gallons) of oil, 54 million btus of energy, 3.3 cubic yards of landfill space, 60 pounds of air pollutants from being released, 7,000 gallons of water or 17 trees.
40. Id.

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has also proven to be very damaging to the environment, causing major ecosystem disruptions and soil erosion.\(^41\) "Indeed, the timber industry has in all likelihood wiped out more habitat and more species per unit of production than has any other industry."\(^42\) Moreover, the virgin pulp and paper industry is the largest industrial process water user in the United States, and is one of the world's largest generators of toxic air pollutants, surface water pollution, sludge and solid wastes.\(^43\) Most virgin pulp and paper is made using literally hundreds of highly corrosive and hazardous chemicals.\(^44\)

In contrast, the production of recycled paper uses fewer than a dozen nonhazardous chemicals and bleaching solutions that contain, for example, 99.5 percent water and 0.5 percent hydrogen peroxide (a concentration more diluted than the peroxide in your medicine cabinet).\(^45\) In fact, modern paper recycling mills produce virtually no hazardous air or water pollution or hazardous wastes and, overall, produce far less waste than virgin mills.\(^46\) While product yield per harvested tree used by virgin mills is only about 25 percent—75 percent of the tree is waste—the product yield per ton of recovered paper used by recycled mills is 80 to 85 percent—15 to 20 percent ends up as waste, none of which is toxic. Modern mills also use and discharge approximately half as much water as older virgin mills and some are even designed to use recovered and cleaned effluent from sewage treatment plants.\(^47\)

**B. Avoiding Costs of Waste Disposal**

Disposal of solid waste has becoming increasingly costly. Tipping fees—the cost per ton for waste haulers to unload their cargo at landfills or transfer stations—have risen dramatically, in some cases from $25-30 per ton to over $130 per ton in the Northeast as of 1992.\(^48\) Additionally, truck loads of garbage currently rumble along streets and highways transport-

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41. Id.

42. Allen Hershkowitz, Ph.D., "Too Good To Throw Away: Recycling's Proven Record," Natural Resources Defense Council, Inc. (February 1997).

43. Id.

44. Id. Processing rigid stands of timber into flexible, printable, smooth, glossy (or absorbent) paper requires an intensive chemical and mechanical effort after a tree is harvested.

45. Id.

46. Id.

47. Id.

48. Thompson, supra at p. 4.
ing garbage from one community to another and often across state lines. For example, New York City currently exports by private carters as much as 8,000 tons per day of commercial waste to landfills in neighboring states. 49 With the imminent closure of the Fresh Kills Landfill, all residential and commercial garbage generated in New York City—45,000 tons per day 50—will be taken to waste transfer stations and loaded onto enormous trailers for overland transport. There are already over 100 transfer stations located throughout New York City, and they are highly unpopular because of their odor and trucking activity. 51

Because of the expense of exporting trash, which also runs the risk of a “NIMBY” 52 backlash from communities in which transfer stations are sited, through which trash is hauled and in which landfills are sited, and because of the increasing costs of “tipping” waste cargo, the diversion of paper from the waste stream makes dollars and sense.

C. Economic Benefits of Recycling

Recycling contributes significantly more jobs than those supported by landfill operations. They include jobs in collection, transportation, processing and remanufacturing. 53 Buying recycled paper further supports the economic development opportunities in the recycling industry and justifies the industry’s huge investment in technology and equipment upgrades. Finally, buying recycled paper will increase the value and reduce the cost of recycling programs.

D. Advancing Public Policy Initiatives in Support of Recycling

i. Federal Public Policy

In passing the Resource Conservation and Recovery Act (“RCRA”) in 1976, Congress found, among other things, that:

- although land is too valuable a national resource to be need-

52. NIMBY stands for “Not In My Back Yard.”
lessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

• inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

• alternatives to existing methods of land disposal must be developed since many cities in the United States will be running out of suitable solid waste disposal sites . . . ;

• millions of tons of recoverable material which could be used are needlessly buried each year.54

To help solve these problems, RCRA requires that each federal procuring agency “shall develop an affirmative procurement program which will assure that items composed of recovered materials will be purchased to the maximum extent practicable.”55

To advance the aims of RCRA, President Clinton issued Executive Order #12873 requiring that all printing and writing paper purchased by federal agencies contain a minimum content of 20% post-consumer recycled fiber as of December 31, 1994, increasing to 30% post-consumer recycled fiber as of December 31, 1998. A principal purpose of this Executive Order is to spur recycling markets through government procurement.56

In compliance with President Clinton’s Executive Order, the U.S. General Services Administration (GSA) recently committed to convert all federal paper purchasing to recycled content. This commitment includes all paper consumed by the Department of Defense, the largest consumer of paper of all federal agencies, and has resulted in compliance projections of 90% for all federal agencies for 1998.

ii. New York State Policy

Like the federal government, the State of New York declared a policy of encouraging the use of recycled materials in order to save energy, conserve precious resources and reduce the quantity of solid waste sent to

55. 42 U.S.C.A. § 6962(l).
56. In reiterating his Administration’s commitment to the guidelines set forth in Executive Order #12873, President Clinton recently issued a new Executive Order dated September 14, 1998, requiring all federal agencies to purchase printing and writing paper containing a minimum content of 30% post-consumer material.
landfills. In furtherance of this policy, the “state government must make an essential contribution to the development and implementation of environmentally, economically and technically viable solid waste management programs through fulfilling its responsibilities to provide programs which promote waste reduction and the expansion of markets for recovered materials.”

State Finance Law § 165(3)(a) adopts the procurement guidelines set forth in RCRA. In accordance with these guidelines, Governor Pataki issued Executive Order #142 to maximize the procurement of recycled products by State agencies. As respects paper, Governor Pataki’s executive order, like President Clinton’s, requires all state agencies to purchase printing and writing paper containing a minimum content of 20% post-consumer fiber, increasing to 30% in 1999. Because of the State’s commitment to purchase recycled paper, the New York State Office of General Services recently announced that 96% of the paper bought by State agencies last year contained recycled content.

iii. New York City Policy

In 1989, the New York City Council adopted Local Law 19 to “promote and increase the demand for recycled goods by all consumers including the city and its contractors.” Mirroring the efforts of the Federal and State governments, Mayor Giuliani issued Directive 93-2, which sets forth guidelines for City agencies to purchase recycled paper made with a minimum percentage of post-consumer fiber.

Additionally, generators of private carter-collected waste (commercial generators) are required either to source separate or to arrange for the separation and recycling of their waste, including paper waste. Underlying the importance of “closing the loop” to bring value to efforts at recycling, however, the economic feasibility of these regulations is premised upon a determination by the Commission of the New York City Department of Sanitation that “economic markets exist” for recycled goods.

58. ECL § 27-0106(2).
59. This local law was given momentum by the Court’s ruling in NRDC v. New York City Dept. of Sanitation requiring strict compliance with the recycling mandates set forth in Local Law 19. 188 A.D.2d 415 (1st Dept. 1992), aff’d, 83 N.Y.2d 215 (1994).
60. N.Y.C. Admin. Code § 16-306; 16 RCNY §1-10.
61. 16 RCNY § 1-10(b).
iv. Court Regulations

In New York, the First Department of the Appellate Division has adopted and successfully implemented a rule requiring the use of recycled paper. That rule, adopted in 1993, requires “every brief and every appendix [to] be printed or reproduced on recycled paper,” defined as paper containing 50% “waste paper,” as opposed to “post-consumer” paper. This distinction is important because “waste paper” may include “pre-consumer” waste, e.g., industrial by-products in the papermaking process, such as “mill broke” or scraps, which are reused internally and do not represent a diversion of material from the waste stream.

Courts in Colorado, California, Florida, Montana, and Tennessee have also adopted regulations requiring the use of recycled paper. Significantly, none of these courts reports any problems with compliance or the administration of their respective requirements concerning the use of recycled paper. In fact, various court administrators reported seamless transitions to the use of recycled paper and some even reported that the recycled paper was a higher quality product than virgin paper and worked better in their photocopiers. Moreover, the Florida Supreme Court found recycled paper to be comparable in price to virgin paper.

4. FAILED EXPECTATIONS IN THE RECYCLED PAPER INDUSTRY

As a result of the various government procurement initiatives to stimulate

62. 22 NYCRR Part 600.10(e).
63. See supra, note 8.
64. Cal.R.Ct. 40, 44 (The California rules apply solely to the appellate courts and to the Supreme Court and, as of December 31, 1998, will require all papers filed with the court or served on parties to be produced with a minimum content of 30% post-consumer fiber); Colo. Rev. Stat. § 13-1-133 (1993) (The Colorado rule applies to all state courts and requires that all documents must be submitted on recycled paper defined as paper consisting of a minimum of 50% secondary and postconsumer waste and consisting of a minimum of 10% postconsumer waste. This rule was specifically enacted in response to the need to “foster the effective and efficient management of solid waste . . .”); Fla. R. Jud. Admin. 2.055(a) (The Florida rule applies to all state courts and requires recycled paper to contain a minimum of 50% “waste paper.”); Mont. Unif. Dist. Ct. R. 1(b)(5); Mont. R. App. P. 27(a) (The Montana rules cover all state courts and require all filings to be made on recycled paper containing a minimum of “50% recycled content, of which 10% shall be post-consumer waste.”); Tenn. Code Ann. § 20-6-103 (1994) (The Tennessee rule is patterned directly on the Colorado statute and applies to all state courts.).
65. These reports were made orally during the course of various telephone conversations in September 1998.
66. Knopf, supra at p. 381.
the market for recycled paper, huge investments were made to convert mills and build de-inking facilities. However, in spite of the strong case favoring recycling and wide public support, the market for recycled paper has stagnated and demand has fallen far short of the paper industries’ expectations.

As recently noted: “[w]hile papermakers continue to trumpet their ‘environmentally friendly’ recycled products, demand for recycled-content printing and writing (P&W) papers in the U.S. has not increased much in the last two years. Great strides have been made in the technology for producing fine papers from deinked pulp, but the market for the products remains weak. This lack of demand has driven mills to produce less recycled-content product and has caused a glut in recovered fiber supplies.” 67

In the early 1990’s, industry analysts projected that the demand for recycled paper would grow substantially. These projections were largely based on the increased interest in recycling programs and the government guidelines requiring the purchase of recycled paper. Moreover, President Clinton’s executive order requiring all Federal agencies to buy recycled content paper was accompanied by a provision that provided financing for the construction of recycled paper mills with tax-exempt bonds.

Backed by these projections, purchasing guidelines and financial incentives, significant investments were made in the development of new deinking systems designed to make high quality recycled printing and writing paper. In 1994 and 1995 alone, a billion dollars worth of tax-exempt bonds were issued to build mills to turn out deinked, recycled pulp. 68

Since then, however, many of these mills have shut down, are operating at a fraction of capacity, or are under reorganization, and some bonds have been in default. 69 One Oregon mill reports that it closed specifically because it was unable to create a sufficient demand for its product in the big markets of New York and California. 70

The poor performance of the market for recycled paper is particularly remarkable in light of the overall boom in demand for paper products. A strong increase in the demand for paper products was expected in 1998 as

70. Jensen, supra.
a result of the growth in consumer spending and industrial output. Paper production pushed to records of 94.5 million tons in 1997, with an expected 2% increase in 1998 to 96.2 million tons. The demand for office paper also continues to increase.

This experience highlights the point that a sustainable demand for recycled paper must be created for the recycled paper industry to succeed. The market cannot rely on government procurement alone. The governmental mandates to procure recycled content paper must be duplicated in the broader private sector market, and there is no better place to start than with lawyers, huge consumers of paper, with a professional obligation to advance public interest goals.

5. FEASIBILITY OF COMPLYING WITH PROPOSED MANDATORY RULE: AVAILABILITY, COST AND QUALITY

A. Availability

The paper industry’s capacity to deink recovered paper, a predicate to its ability to produce recycled paper, far exceeds the anticipated surge of demand for recycled paper should this proposal be adopted. Indeed, the EPA found that 30% post-consumer recycled content is widely available in paper products and printing and writing papers, including copier paper, bond paper, forms and envelopes. The OGS and the National Recycling Coalition also confirm the availability of adequate supplies of high-quality, cost-competitive 30% post-consumer recycled paper.

B. Cost

Major legal printers in New York City having to comply with the First Department’s rule requiring filings to be made on recycled paper found that they were able to provide recycled paper at no extra cost to lawyers and none of the printers reported complaints from consumers arising from the use of recycled paper. New manufacturing technologies and market

72. Id.
73. See, "Recycling Not Mainstream Yet", Environmental News Service, September 17, 1998 (Based on current research, “the government cannot buy enough to force the mainstream issue. There is no incentive to experiment with new recycled products for mainstream corporate America . . .”).
74. Knopf, supra at pp. 402-403.
forces are combining to mitigate any price and quality challenges facing paper with recycled content. Companies have made great strides in refining the waste paper that goes into recycled content and have upgraded deinking facilities allowing for incorporation of lower grades of wastepaper such as curb-side newsprint for manufacturing bond, off-set and copy paper. Use of lower grade waste paper should decrease the cost of the product.

Moreover, government procurement agencies report that recycled paper can be purchased at competitive prices. The United States Government Printing Office ("GPO") reported that as of April 1997 it was able to meet the Justice Department's request that it substitute 20% post-consumer recycled copier paper for virgin paper whenever the virgin paper was no more than 5% less expensive. The GPO competitively bids for its paper requirements every three months to guarantee that its prices reflect current market prices. It found that 20% recycled content copier paper was offered at excellent values and well within the 5% range.

Similarly, a review of New York State Office of General Services' contracts for the purchase of recycled offset and copy paper shows prices to be within 5% of virgin paper prices. This 5% range has been confirmed in conversations with manufacturers and suppliers and has been adopted by all government agencies as their price preference standard for the procurement of recycled paper.

C. Quality

Repeated tests of recycled paper in copiers and printers have proven its satisfactory performance. A study recently sponsored by the Boston Bar Association confirms that recycled paper performed as well as its virgin counterparts and that the perception problem was just that.

Indeed, the last major obstacle for commercial paper recyclers to produce clean product has been overcome. Removal of "stickies" had been a problem which resulted in the production of a lower grade product because the glue residue would appear as specks. This problem, however, was

75. Finchem, supra at p. 66.
76. Id.
77. GPO Remarks of John Chapman, 2nd Copier Paper Summit. Figures are not as widely available for recycled paper containing a minimum content of 30% post-consumer fiber because 20% post-consumer content remains the standard until the end of 1998; however, because the standard is changing to 30% in 1999, prices are expected to remain competitive.
78. Knopf, supra at 404.
significant only in the production of bright white 100% recycled paper and did not arise in the manufacture of 20 to 30% recycled paper. In any event, a simple process was recently patented that allows for easy removal of the “stickies.”

6. THE PROPOSED MANDATORY RULE

The Committee proposes the following rule:

Recycled Paper.
(a) Every pleading, written motion and other paper filed or submitted to the courts of the State of New York, shall be printed or reproduced on recycled paper. For the purposes of this rule, recycled paper is paper that contains a minimum content of 30 percent post-consumer fiber defined as fiber material generated by a business or a consumer that has served its intended end use as a consumer item and has been converted or otherwise diverted from the waste stream for the purpose of recycling.

(b) The following statement shall appear on the signature page of every pleading, written motion, and other paper filed or submitted to the court to certify compliance with this Rule:

“This document is printed on recycled paper.”

(c) The failure to file or submit a document to the court in conformance with this rule shall not constitute a default; however, the court shall require that the party filing or submitting a nonconforming document resubmit the document in conformance with these requirements within ten (10) days from the date of its rejection for nonconformance. Absent good cause shown, failure to timely resubmit the document in conformance with this rule shall constitute a default.

(d) This rule shall not apply to:
   i. Covers, oversized exhibits and dividers;
   ii. Photographs;
   iii. Original documents that were not prepared or created by,

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at the direction, or under the control of the submitting attorney.

The use of recycled paper for these documents, however, is still encouraged.

(e) This rule shall not apply to parties appearing in forma pauperis or pro se.

To effect statewide application of this rule, the Committee further proposes that the rule be added to either the Rules of the Chief Judge or the Rules of the Chief Administrator.

CONCLUSION

Because this proposal adopts a recycled content standard that is uniform with the federal, state and local government procurement guidelines for recycled paper and is modeled after established court rules that have proven to be practicable and effective, and because recycled paper is without doubt quality and cost competitive, its success in New York is assured. Furthermore, because of the significant impact that lawyers have on the generation of paper waste, the largest component of the waste stream, the pressing need to find alternatives to land disposal, and the failure of voluntary and government efforts alone to stimulate sustainable markets for recycled paper, the legal community must not pass on this opportunity to take charge of its obligation to advance current public policy goals aimed at developing markets for recycled paper.

October 1998
Committee on Environmental Law

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Deborah J. Verdile, Secretary

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Jonathan Lang             Michael Theodorou

* Members of the Recycling Subcommittee, which prepared the Report.

This Report was prepared by Gary L. Franklin with the assistance of Jennifer Thelen. Gary L. Franklin was the Chair of the Recycling Subcommittee until his term on the Committee ended in September, 1998.
New Members
As of March 1999

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