ENDING DISCRIMINATION IN GIFTED EDUCATION IN THE NEW YORK CITY PUBLIC SCHOOLS
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THE FOLLOWING CANDIDATES HAVE BEEN ELECTED TO THE VARIOUS Association offices and committees for 2003-2004:

President
E. Leo Milonas

Vice Presidents
Laurie Berke-Weiss
Betty Weinberg Ellerin
Robert D. Joffe

Treasurer
Helaine M. Barnett

Secretary
Cyrus D. Mehta

Members of the Executive Committee
Class of 2007
L. Robert Batterman
Fern A. Fisher
Andrew A. Scherer
William J. Snipes

Members of the Committee on Audit
Donald S. Bernstein
Elizabeth D. Moore
Susan Porter

OF NOTE

THE FOURTEENTH ANNUAL LEGAL SERVICES AWARDS WERE PRESENTED to honor attorneys who provide outstanding civil legal assistance to New York’s poor. Hon. Joseph W. Bellacosa, Dean of St. John’s University School of Law and former Judge of the New York Court of Appeals, presented the awards at a reception on May 8 at the Association.

This year’s recipients are: Hillary Exter, Senior Staff Attorney, Brooklyn Legal Services Corporation A; Catherine Ruckelshaus, Litigation Director, National Employment Law Project; Sandy Russo, Coordinating Attorney for Housing Law, Legal Support Unit, Legal Services for New York City; Edward N. Simon, Acting Managing Attorney, Legal Services for New York City-Manhattan; and Kim Sweet, Associate General Counsel, New York Lawyers for the Public Interest.

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

THE 2003 BOTEIN AWARDS, A WELL-MERITED RECOGNITION OF THE personnel attached to the courts of the First Judicial Department, were presented at the Association on March 31, 2003. The Hon. John T. Buckley, Presiding Justice of the Supreme Court of the State of NY, Appellate Division, First Department, presented the awards.

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

This year’s recipients are: Joseph Bleshman, Deputy Clerk, Appellate Division, First Department; Steven B. Clark, Court Clerk Specialist, Bronx Supreme Court, Criminal Division; Jacqueline Dupree, Citywide Manager of Data Entry Operations, Criminal Court of the City of New York; Esther E. Kell, Case Management Coordinator, Supreme Court, Bronx County Civil Branch; Paul Moriarty, Deputy Chief Court Clerk, Bronx County Family Court; and Evelyn C. Spence, Principal Administrative Services Clerk, Supreme Court, Civil Branch.

The awards are made possible by a grant from the Ruth and Seymour Klein Foundation, Inc.
THE TWELFTH ANNUAL PRESENTATION OF THE HENRY L. STIMSON MEDAL to outstanding Assistant United States Attorneys in the Southern District and in the Eastern District of New York, was held on May 27 at the Association. Hon. John M. Walker, Jr., Chief Judge of the U.S. Court of Appeals for the Second Circuit, made welcoming remarks and Association President E. Leo Milonas presented the medals.

This year’s recipients are: Eric Corngold, Assistant U.S. Attorney, Eastern District, Criminal Division; Carolyn Lisa Miller, Assistant U.S. Attorney, Eastern District, Civil Division; Richard Sullivan, Southern District, Criminal Division; and Jeffrey Oestericher, Southern District, Civil Division.

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

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

JUSTICE JOSEPH F. BRUNO OF THE SUPREME COURT, SECOND JUDICIAL District, presented the Association’s annual Municipal Affairs Awards on June 18. The Awards are given to lawyers from the New York City Law Department who have demonstrated outstanding performance. This year’s recipients are: Michael Chadirjian, Tort Division, Manhattan Office; Howard Friedman, Contracts and Real Estate Division; Jennifer Rossan, Special Federal Litigation Division; Rachel Livingston, Tort Division, Brooklyn Office; and Carolyn Wolper, General Litigation.

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

THREE OUTSTANDING MINORITY STUDENTS AT NEW YORK AREA LAW schools have been awarded Thurgood Marshall Fellowships for the 2003-2004 academic year. These students will have the opportunity to work with the Association to advance the goals of civil rights and equal justice. Fellowships were awarded to: Aarthi Belani, New York University School of Law; Kelli Lane, Rutgers University School of Law; and Ami Sanghvi, Fordham University School of Law.
THE FOLLOWING NEW COMMITTEE CHAIRS HAVE BEEN APPOINTED for terms beginning September 1, 2003:

Brad Laurence Berman, (Admiralty); Jonathan Givner (AIDS); Elaine S. Reiss (Administrative Law); Kenneth L. Andrichik (Alternative Dispute Resolution); Robert B. Davidson (Arbitration); Bradley K. Sabel (Banking Law); John E. Linville (Bioethical Issues); Lynette P. Koppel (Career Advancement and Management); Sara S. Portnoy (Citybar Public Service Network); Joel Ditchik (Condemnation and Tax Certiorari); Burton N. Lipshie (Continuing Legal Education (CLE)); Howard Marc Rosen (Construction Law); John H. Doyle III (Criminal Justice); Judith E. White (Criminal Justice Operations and Budget); Philip Weinberg (Task Force on Downtown Redevelopment); Jonathan S. Rosenberg (Education and the Law); Richard S. Green (Energy); Martha Cohen Stine (Entertainment); Rosalind S. Lichter (Entertainment Law); Judith D. Moran (Family Court and Family Law); John S. Siffert (Federal Legislation); Adele Hogan (Financial Reporting); Rita M. Molesworth (Futures Regulation); Leonard B. Sand (Honors); Michelle D. Schreiber (Housing Court Public Service Projects); Claudia Slovinsky (Immigration and Nationality Law); James R. Silkenat (International Affairs); Lawrence Walker Newman (International Commercial Dispute Resolution); Christopher J. McKenzie (International Environmental Law); Martin S. Flaherty (International Human Rights); Stuart Hayden Coleman (Investment Management Regulation); Daniel Silverman (Labor and Employment Law); Jeannette Arlin Koster (Land Use Planning and Zoning); James A. Beha II (Legal Education and Admission to the Bar); Loren M. Gesinsky (Legal Issues Affecting People with Disabilities); Meena Alagappan (Legal Issues Pertaining to Animals); Maureen Frances Grady (Lesbian, Gay, Bisexual and Transgender Rights); Bridget Asaro Lawrence (Medical Malpractice); Michael C. Banks (Minorities in the Profession); Michael A. Cooper (Nominating); Laura B. Hoguet (Orison S. Marden Memorial Lectures); Marco V. Masotti (Private Investment Funds); William T. Russell, Jr. (Pro Bono and Legal Services); Susan Patrice Persichilli (Legal Services for Persons of Moderate Means); Andrew Mandell (Science and Law); Matthew J. Mallow (Securities Regulation); John P. Albert (State Affairs); David Ethan Bronston (Telecommunications Law); Dale M. Cendali (Trademarks and Unfair Competition); Thomas R. Lamia (Transportation); Charles F. Gibbs (Trusts, Estates and Surrogate’s Courts); Sophia R. Vicksman (Uniform State Laws); and Elizabeth F. DeFeis (United Nations).
Recent Committee Reports

African Affairs
Letter to President Bush urging the administration to support the expeditious passage of the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003.

Alternative Dispute Resolution/Legal Issues Affecting People with Disabilities
Letter to Joseph Stulberg, Reporter, Model Standards of Conduct for Mediators, Recommending a revision to the Model Standards of Conduct for Mediators which would reflect the impact of the ADA on a mediation in which one or both parties have a disability.

Art Law
Report supporting Legislation A.5384, an act to amend the tax law and state finance law, in relation to gifts for the support of the New York State Council on the Arts. This bill establishes an arts fund to receive contributions through a voluntary personal income tax return check off.

Children, Council on/Children and the Law/Family Court and Family Law/Juvenile Justice
Letter to City leaders regarding the New York City Administration for Children’s Services Budget urging the restoration of child welfare funding cut from the Executive Budget for FY 2004.

Communications and Media Law
Letter to Mayor Bloomberg urging the City to change its policies concerning political marches to avoid in the future the significant civil rights violations that occurred when protestors were denied the opportunity to march during the anti-war rally on February 15, 2003.

Copyright and Literary Property
Amicus Brief—Liu v. PricewaterhouseCoopers—urges the U.S. Supreme Court to grant certiorari to vacate and remand the decision of the lower court which, the brief argues, unnecessarily upset the balanced policy estab-
lished in the Copyright Act of 1976 that vests copyright ownership initially in the author of a work and requires a signed writing for ownership to be transferred.

**Corporation Law**
Letter to the SEC commenting on the noisy withdrawal requirements of the Sarbanes-Oxley Act (File No. S7-45-02).

**Criminal Justice Operations and Budget**
Letter to Judge Collins, Administrative Judge of the Bronx, requesting that the Criminal Term of Bronx Supreme Court change the policy that permits cases to appear on the Supreme Court arraignment calendar even though no indictment has been filed.

**Education and the Law**
Report on Ending Discrimination in Gifted Education in New York City Public Schools. This report documents the patterns of discrimination and makes recommendations to enable the New York City Department of Education to move toward equitable access to gifted programs for all New York City students.

Amicus Brief—Kruger v. Bloomberg—argues that the implementation of the comprehensive educational reform agenda called “Children First” is well within the authority of the Chancellor and does not violate any provision of the Education Law.

**Election Law**
Report Regarding the Adoption of New Voting Technology by New York State. This report considers what new voting technology should be adopted in New York including the pros and cons of touch screen machines.

**Election Law/State Affairs**
Letter to Governor Pataki expressing concern over New York State’s implementation of the federal Help America Vote Act (HAVA).

**Entertainment Law**
Music Rights Primer. The Primer is designed to highlight issues and provide a basic understanding of music rights. It is intended for law students and non-lawyers who have an interest or involvement in the entertainment industry.
Environmental Law/International Environmental Law
Report on the “Good Wood” bill, New York City Council Intro 108-A. This report recommends the approval of a bill which would amend the Administrative Code of the City of New York to require that wood products and materials used by city contractors originate from a forest that has been certified through an eligible forest program.

Federal Courts
Letter to President Bush and congressional leaders regarding the National Commission on Public Service (the Volcker Commission) expressing support for granting an increase in judicial, executive and legislative salaries.

Letter to the Committee on Rules of Practice and Procedure regarding amendments to the federal rules of civil procedure concerning discovery of electronic evidence. The letter explores several of the principal issues that often arise in the context of electronic discovery and provides recommendations as to each.

Futures Regulation
Letter to the Secretary of the Commodity Futures Trading Commission commenting on performance data and disclosure for commodity trading advisors.

Letter to the Secretary of the Commodity Futures Trading Commission commenting on the proposed rules for CPO and CTA registration and other regulatory relief.

Immigration and Nationality Law
Letter to Attorney General Ashcroft urging him not to reinstate or codify a Board of Immigration Appeals decision inappropriately narrowing the basis for pursuing gender and domestic violence-based asylum claims.

Amicus Brief—Beharry v. Ashcroft—opposes the application of judicial exhaustion rules to bar the court’s consideration of equitable factors in immigration removal proceedings.

Insurance Law
Letter to State Senate Majority Leader Bruno and Assembly Speaker Silver approving A.8536/S.3878A, which would allow New York Insurance Law provision (N.Y. Insurance Law § 1410) authorizing both New York domes-
Recent Committee Reports

tic insurers and New York licensed insurers to enter into derivative and replication transactions to remain on the books.

International Affairs, Council on
Letter to the President of Kyrgyzstan expressing concern over a case being brought against Ms. Galina Kaisarova, a member of the Kyrgyz bar. The letter urges the Kyrgyzstan to reconsider its current criminal liability statute to accord a full privilege to lawyers for statements made in the context of legal proceedings.

International Human Rights
Letter to the Clerk of the Bill Committee of Hong Kong expressing serious concerns regarding the proposed National Security Bill. An extensive legal analysis of the legislative proposal is attached to this letter.

International Law
Letter to President Bush, on the occasion of the swearing-in of the International Criminal Court’s first eighteen judges, urging the United States to reconsider its opposition to the ICC.

Judicial Administration, Council on
Submission to the New York State Commission on Public Access to Court Records sharing the results of the Association’s examination into the present status and future potential of internet access to court records.

Judicial Administration, Council on/Government Ethics
Amicus Brief—Spargo v. Commission on Judicial Conduct—argues that the importance of the state’s interest in regulating the conduct of state judges is unquestioned and that the district court should have abstained and permitted the constitutional issues to be decided in the first instance by the New York State Court of Appeals and addresses First Amendment aspects of the State Judicial Cannons regarding judges’ political activities.

Legal Issues Pertaining to Animals
A.4884/S.2996—An act to amend the Agriculture and Markets Law in relation to unlawful tampering with animal activities. This report disapproves the proposed legislation as it would vastly expand beyond animal research the animal-related activities that are shielded by the law.

Letter to the Commissioner of the New York City Office of Emergency
Management offering to assist that office in developing emergency procedures for the benefit of animals.

Lesbian, Gay, Bisexual and Transgender Rights
Letter to New York State Senator Thomas Duane and Assembly Member Richard Gottfried endorsing the passage of same-sex marriage legislation that has been introduced in New York.

Mergers Acquisitions and Corporate Control Contests/Corporation Law/Securities Regulation
Letter to the SEC commenting on possible changes to the proxy rules (File No. S7-10-03) in particular the issue of shareholder access to the company’s proxy statement and card for the purpose of nominating director candidates.

Military Affairs and Justice

Letter to the Inspector General, Joseph Schmitz expressing concern that the detention of enemy prisoners of war and other detainees at Guantanamo Bay without the benefit of status determinations by competent tribunals when applicable may be a violation of the Geneva Convention.

Non-Profit Organizations
Letter to David Nocenti and William Josephson of Attorney General Elliot Spitzer’s office commenting extensively on proposed legislation AG-2 which concerns enhanced accountability for non-profit corporations operating in New York.

Letter to David Nocenti, Office of the Attorney General, regarding a revised version of AG-2, expressing approval of much of the legislation but concern that the threshold for second-tier certification is too low.

Professional and Judicial Ethics
Formal Opinion 2003-1: Lawyers’ and Law Firms’ Selection and Advertising of Internet Domain Names. A lawyer or law firm may use a domain name that does not include or embody the firm’s name or that of any individual lawyer, under certain conditions: the web site bearing the do-
main name must clearly and conspicuously identify the actual law firm name; the domain name must not be false, deceptive or misleading; the name must not imply any special expertise or competence, or suggest a particular result; and, it must not be used in advertising as a substitute identifier of the firm.

Formal Opinion 2003-2: Undisclosed Taping of Conversations by Lawyers. A lawyer may not, as a matter of routine practice, tape record conversations without disclosing that the conversation is being taped. A lawyer may, however, engage in the undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good. NY City 1980-95 and 1995-10 are modified by this opinion.

**Professional Discipline/Professional and Judicial Ethics/Professional Responsibility**
Letter to the New York State Bar Association expressing support for the report by the Special Committee on Multi-Jurisdictional Practice which calls for the adoption of proposed rules which would create a regulatory scheme governing multi-jurisdictional practice in New York State.

**Project Finance**
Letter to the US Department of State commenting on the draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects.

**Real Property Law**
Letter to FinCEN (Financial Crimes Enforcement Network) urging that lawyers not be deemed “financial institutions” under Section 352 of the USA PATRIOT Act of 2001.

**State Courts of Superior Jurisdiction**
Memo in support of Bill A.3483/S.622 amending Section 4545 of the CPLR to eliminate the exception to the Collateral Source Rule that allows excessive recoveries for plaintiffs who are public employees.

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

Annual Meeting
of the Association

E. Leo Milonas

This report was delivered at the Annual Meeting of the Association, held on May 20, 2003.

I am pleased to report to you on the Association’s activities in my first year as President. You know, if this were the garment business, I would say that this is the height of our season. There is so much going on at the Association at this time of the year. The important committees are issuing reports. We’re selecting committee chairs, filling committee slots, our meeting rooms are filled with important programs. Distinguished speakers have come and addressed the membership. We have over 100 CLE programs this spring alone, and it’s also the time when we have changes in the Executive Committee.

I’d like to thank those who served, for their dedication and their service. Jim Herschlein, who served as Secretary, is a terrific lawyer. I listen to his advice very carefully. Vice Presidents James O’Neal, Dan Kolb and Carmen Ciparick, and Executive Committee members Fern Schair, Bill Dean and Greg Joseph. I’d like to thank them all for their terrific service in this Association.

One lesson I have learned as President of this Association is that world events largely dictate what we do. We see it as our responsibility to respond to the local, national and international events which affect all of us and it is our committees which have the expertise, the reputation and the clout that comes from our 133-year history that make a difference.
Several committees have been addressing the complex issues relating to the “war on terrorism.” The maelstrom of developments over the past few months have left much of the American public and our profession dazed and strangely silent. But the understandable natural reluctance not to undermine our government’s effort should be balanced by a rational concern for fundamental human rights and civil liberties.

We have spoken out to urge our government to follow the rule of law in our international activities, and with regard to military activity in Iraq. Now that the military action is hopefully, for the most part, over, we look to the Administration to restore order and to protect the rights and security of all Iraqis and to establish a framework in which Iraqis can democratically govern themselves. We cannot assume that will be accomplished in a short time, and in proceeding there we must be concerned by how the Administration has handled Afghanistan, where we deposed a government a year and a half ago. Recently, we wrote to President Bush urging him to move quickly to protect the rights of women and girls, whose new-found freedoms in the post-Taliban era are being significantly eroded. If the policy of the United States is to strike to depose a government in order to impose democracy we must have a plan to fulfill our promise. Our committees will be studying the obligations and responsibilities of our government in post military ventures when we succeed in deposing the governments we oppose.

At home, we continue to monitor measures by the Justice and Defense Departments to address security issues. We also continue to call attention to the government’s deprivations of fundamental rights, which it urges is necessary in order to protect national security. For example, the treatment of persons considered by the Administration to be enemy combatants has been cause for concern. We are preparing a brief in the Padilla case, which involves an American citizen taken into custody in Chicago, ostensibly for plotting to use a “dirty bomb” in the US. The Justice Department argues it has the right to declare someone (even an American citizen) an enemy combatant without making any showing to a court, and to detain an enemy combatant indefinitely, without access to a lawyer or his family, and without any formal charges being brought. Many immigrants are also being treated in this manner, and their proceedings are being held in secret. We are working on those cases as well, as they make their way through the courts.

Furthermore, we have reviewed the Defense Department’s rules for implementing military tribunals. Our concern from the beginning has been that these tribunals, as conceived in the Bush order creating them,
will operate without the oversight of the courts and under restrictions imposed by the Defense Department that would provide more limited rights than criminals are entitled to under US law. We do not yet know how or to whom these military tribunals will be applied, and will continue to advocate for a fair process that is open to scrutiny.

Much of the thrust of the Bush Administration’s initiatives in the “war on terrorism” involve the primacy of the executive branch of government, and diminishing the authority of the judicial branch. Thus, the military commissions are designed to function without judicial review. The USA PATRIOT Act, and proposals by the Justice Department to expand that act, gives the Attorney General authority to operate in certain areas without court scrutiny. In its justification for this expansion of power, the Department alleges that going to court uses the time of its lawyers that could be better devoted to other things. So much for the independence and authority of the courts. It is difficult, indeed inappropriate, for the judicial branch to respond publicly to these efforts. It is up to the Bar to speak out, and we shall.

The last few months also have seen unprecedented activity with regard to corporate governance. Several of our committees have filed comments with regard to various proposed rules implementing the Sarbanes-Oxley Act. A primary focus has been on rules that would govern the conduct of lawyers representing companies before the Securities and Exchange Commission. We have submitted two extensive sets of comments with regard to these rules. You may recall that, among other issues, the Act requires a procedure which would require lawyers who believed their clients are materially violating the securities laws or breaching their fiduciary duties to report their concerns “up the ladder” (a position we support). However, the SEC proposed that, if the lawyer’s admonitions go unheeded, the lawyer would have to withdraw from the representation and disclose the withdrawal to the SEC. We have urged that the SEC not adopt this so called “noisy withdrawal” rule in any form, as it would undermine the attorney-client relationship and indeed discourage companies from seeking the advice they sorely need to stay out of trouble. The SEC should promulgate new rules in August.

A third topic that is high on the domestic agenda is the campaign to change tort law, on a state and national level. Currently, the highest profile issues in this area involve medical malpractice. There are efforts to impose a cap on damages for pain and suffering and to make other changes that are designed to reduce the costs of lawsuits for health care providers and insurance companies. I have asked committees with an interest in
this area to evaluate the arguments on both sides and to develop a balanced Association position, and work is proceeding.

Our international activity continues to revolve around our concern for human rights and access to justice. We have had two highly successful missions to Rwanda, led by Robert Van Lierop, chair of our Council on International Affairs. The missions were requested by leaders of the Rwandan legal system and funded by USAID, and sought to help that country structure an ethical code and promote judicial independence in the aftermath of the 1994 genocide. We have been asked to continue our relationship with Rwanda by providing information and training in specific areas of law, ranging from dealing with HIV/AIDS and international commercial transactions. We are seeking funding to continue these efforts.

The Vance Center for International Justice Initiatives held a successful conference in Chile, focused on promoting the pro bono involvement of the Chilean Bar. The Center is embarking on the second year of its program to place South African lawyers of color in New York law firms for a one-year fellowship, so that they can learn how these firms practice commercial law. The fellows can then take those lessons back to their home firms.

Our International Human Rights Committee is currently engaged in a mission, led by former President Barbara Paul Robinson, to Northern Ireland, as part of our ongoing efforts over the past 15 years to monitor the justice system and access to justice in that troubled area. That committee has also been monitoring and commenting on developments in Hong Kong, as that former British colony wrestles with its new status as part of China while trying to maintain its own unique character.

We have presented a number of special events in this room, including speeches by Supreme Court Justice Stephen Breyer on April 14 and Anthony Lewis on May 7. We have also hosted state and local leaders—Attorney General Eliot Spitzer, City Comptroller William Thompson and City Public Advocate Betsy Getbaum and our own Corporation Counsel, Michael Cardozo, all spoke at our Public Affairs luncheon series, presented by the Senior Lawyers Committee. And I am delighted to say that next Wednesday, May 28, at 8:30 a.m., Mayor Michael Bloomberg will speak here. You are all invited.

Closer to home, our City Bar Fund continues to provide free legal services to 1,800 victims and families of victims of the September 11th attacks, as well as to 800 small businesses harmed by the attacks. This assistance includes helping families file claims with the September 11th Victim Compensation Fund. The Special Master of that Fund, Ken Feinberg,
has come to the Association several times to present information and field questions. His most recent visit was just last night.

The City Bar Fund has been expanding its efforts to provide legal assistance, focusing on the City’s substantial immigrant population. One new initiative is in the area of human trafficking, which is fast becoming the largest illegal industry in the world. To stem this tide, Congress enacted legislation to enable prosecution and punishment of traffickers, and to ensure protections for victims through the granting of new visas. We have begun to represent people seeking these new visas, and recently obtained a visa for a woman sent from India by her husband to work as a nanny. She agreed to work for the family for three years, hoping to earn enough money to return home and build a house with her husband. Instead, she suffered years of abuse from her employers, forced to work as many as 130 hours per week and to perform household work in addition to her nanny duties, all for $85 per month. Her employers confiscated her passport, forced her to sleep on the floor and kept her from leaving the house by herself. When she asked for a day off to attend church, she was thrown out. In addition to successfully obtaining her visa, she has sued her former employers and is a new crusader for the rights of trafficking victims.

This is just one of many stories of people helped through the City Bar Fund in the past year. The Fund is now embarking upon a new effort to assist immigrant men from predominantly Muslim and Middle Eastern countries who must comply with a special registration program. There is fear in these communities because large numbers of men who have complied with the program have been detained or placed in deportation proceedings. We recently trained lawyers to provide advice and representation to individuals caught up in this program, and are working with other concerned groups in this City to conduct clinics and provide meaningful assistance in the affected communities. Assistance has already been provided to over 120 people.

We began this month with two Law Day activities that provided a public service. Both of these have become annual events. Our terrific Legal Referral Service, directed by Al Charne, presented a series of free information fairs at central locations around the City. At these fairs, volunteer lawyers and government agencies answered questions from the public—no appointments were necessary. In addition, many brochures were available on legal and consumer issues. That same day, we sent lawyers into public school classrooms to talk about legal topics and law as a career. Many of these children had not met a lawyer before, so the exposure was

P R E S I D E N T ' S A D D R E S S
a valuable experience for both lawyer and students. And you won’t be surprised at the first question that often comes out of their mouths—how much do lawyers make?

Continuing the school theme, last week I was privileged to participate as a judge in the culminating event for our law-related education program, in which lawyers help teach a law-related curriculum to middle school students. This event, which was originated by James O’Neal and the Legal Outreach Program, and Chief Judge Judith Kaye and in which she participates each year, features a competition among classes making presentations on an important public issue; this year’s topic was internet filtering on school computers. These presentations range from commercials to songs to speeches and marches, and sometimes all of the above. It was a thrill to see over a hundred lively, energized middle school students making their presentations in our Meeting Hall.

We are also engaged substantively in issues involving the educational system. Our Education and the Law Committee has completed a report that addresses the complaints of discrimination in the administration of gifted education programs in the City, and makes recommendations for reform.

All of the above activity happened because of you, our members. Our membership continues to grow, despite the uncertain times. Or, perhaps, because of those times, since it is in those moments that the unique character of the Association as a public voice for our profession is most evident. We are continuing to involve our newer lawyers in committees, and in programs targeted to their needs. We are also expanding the number of programs geared to helping lawyers and law students looking for career opportunities.

As you may know, a couple of years ago we held a series of focus groups at which we asked various categories of members about the Association and how we can improve it. We have taken to heart the information learned from these focus groups, and are pursuing a number of the recommendations we heard. For instance, we hope you have noticed our targeted e-mailing of programs of interest, driven by the information our members have given us about their areas of practice and interest. We have increased the number of programs in which we specifically invite members in a particular practice area. Most notably, we have had receptions over the past year to which we invite judges of a particular court and members who practice in that court. That will continue next year.

We are also interviewing architects who will work with us to improve and modernize the Meeting Hall, which many in our focus groups said
could use sprucing up. We will eventually look at other areas of the building where the tone could be improved.

Finally, the recent events in the Brooklyn Supreme Court are shameful. But the public’s alarm and dismay may provide the opportunity for the much needed reforms of the judiciary, which this Association has long-advocated. I shall be appointing a special task force to look at the elective and appointive system for the selection of our judges and at the court structure with an eye to see first, if any immediate improvements can be made either by court rule or legislation. Secondly, we shall revisit the more sweeping system reforms of the judiciary that we have proposed in the past to seek effect paths for their pursuit.

This is a snapshot, not meant to be comprehensive, of what’s going on here at the Association. Of course, with regard to what we can do and what is expected of us, more is better, consistent with the high quality we bring to our efforts. It is not so much that I will be looking for more from our committees and our members. It is that our world will keep generating issues and needs that call for our attention. Fortunately, the caliber and dedication of our membership allow us to rise to these challenges, and I look forward to serving as President of this Association for the next year.

Before I sit I’d like to say a special thank you to Alan Rothstein and Barbara Berger Opotowsky. They really make everything around here work. They’re wonderful to work with. They’re just terrific people.

Now for the big event of the evening. This is Evan Davis’ night when before your very eyes he will be hung in the next room. Evan was a great President and is a wonderful, supportive advisor and friend.

So without further delay, please join us for the portrait unveiling ceremonies, and thanks for coming.
Remarks

Portrait Unveiling:
Evan A. Davis

Following the Annual Meeting on May 20, 2003, a portrait of former Association President Evan A. Davis was unveiled. Mr. Davis, the Association’s 61st President, served from 2000-2002.

Every picture tells a story,” and Ray Kinstler is known as a gifted story-teller. The story in this painting, as I see it, is not just about me in particular. The subject is only the occasion for the idea of the painting.

What is the idea? You might say that is for Ray and not me to say. However, when the painting is unveiled, as has just happened, the artist surrenders the issue of meaning and impact to the audience.

No doubt it is particularly dangerous for the subject to say what he or she thinks the painting conveys. You can end up saying more about your sense of self than about the painting.

In this case, however, there is a piece of factual information that I can offer. I asked Ray if he would use as a background for the portrait the view from Cleary Gottlieb’s offices on Liberty Street, between Church Street and Broadway, that used to look out on the World Trade Center and now overlooks the work of rebuilding. He said he would.

On September 11, I was driving to Cleary when I heard on the car radio about the attack as it was unfolding, so I came here to the Association of the Bar instead.

A few days later I sent an e-mail to all our members. I said how proud I was of the outpouring of offers of assistance from law firms, individual
lawyers, legal institutions and organizations, from opening their law offices to people who needed a place to work to providing free service to people affected by the tragedy.

I also wrote that the goal of the terrorist is to confuse, disorient and weaken and the legal profession must do its best to frustrate that goal. I said that we had a critical role because in our society much of the basic structure is provided by law, lawyers and judges. I said that we must display now our traditional standard of excellence and use that excellence to “deny to evil its hoped for prize.”

With that background, I see in this painting the idea that evil and adversity can be, and in this case have been, frustrated. I also find here, in the context that this portrait will hang with an increasingly diverse group of former Association Presidents who reflect an increasingly diverse bar, the idea of the normalcy and value of difference. Our diversity and readiness to accommodate difference helps New York City be truly the legal capital of the world.

I want to thank Cleary Gottlieb for commissioning this portrait and giving it to the Association. Cleary used the excellence of its people, legal and non-legal staff alike, and the tenacity of our managing partner, Peter Karasz, to frustrate evil and prosper following September 11.

I also want to thank Ray Kinstler for painting such a fine and interesting portrait.

Most important, I want to thank my wife Mary and my daughters Sara, Charlotte and Phoebe. The blue sky and twinkle in the eye that you see in this portrait is very much about them.

So let us begin our reception. Thank you all very much.
Introduction

The Benjamin N. Cardozo Lecture

Judge Judith S. Kaye


For so many things I am grateful to President/Judge/former Chief Administrative Judge Milonas, and to the City Bar Association. But high on my list is the privilege they allow me tonight of introducing Albert M. Rosenblatt as he presents the 55th Cardozo Lecture, entitled “The Law’s Evolution: Long Night’s Journey into Day.”

On any occasion it would be pure pleasure to introduce Judge Rosenblatt, a splendid Court of Appeals colleague and cherished personal friend. But this is a very special occasion, starting with the presence of Julie Rosenblatt, and the Chief Judge of the Second Circuit, John Walker; the entire Court of Appeals of the State of New York (Judges Smith, Ciparick, Wesley, Graffeo and Read); the Presiding Justices of the First and Second Departments, Eugene Nardelli and Gail Prudenti; and the Chief Administrative Judge, Jonathan Lippman. This is surely a first among Cardozo lectures.

Then too, this is a very special occasion for my Court of Appeals colleagues because it is the Cardozo lecture—I am so pleased to see Professor Andrew Kaufman, Cardozo’s pre-eminent biographer, in the audience. All of the Judges of the Court of Appeals—maybe Judge Rosenblatt even a millimeter more—are closely bound to Judge Cardozo, our former Chief. He’s “Bennie” to us. And in the New York Reports we are delighted to link his punctilious prose to ours, as of course by law we are fully entitled to do.
To add even further to the singularity of this occasion, as Judge Rosenblatt’s colleagues well know, he has delighted—no, exulted—in preparing for this evening. Unforgettable forever are those excited calls we all have received from him these past weeks and months—opening with the words “What fun!” When we heard those words we knew exactly what Judge Rosenblatt was working on. And in very short order we also got to know the stage of his journey through history, as he has pursued his treasure hunt from the very beginning of time—from Genesis, past the Greeks and Romans, and into the sunshine of enlightenment.

Judge Rosenblatt’s scholarly credentials, I feel confident, go all the way back to his very beginning. Though I have not myself investigated back beyond his days at the University of Pennsylvania and the Harvard Law School—which is the Rosenblatt family alma mater—all of the evidence points unequivocally in that direction, no doubt starting with the nursery at the Royal Hospital on the Grand Concourse in the Bronx, where Judge Rosenblatt was born. Imagine what would have been possible back then if only he had had access to a computer.

I know no one who more thoroughly than Judge Rosenblatt delights in the pursuit of learning, in turning every stone, in plumbing the depths of his subject, and then in sharing his discoveries in lyrical, well-punctuated prose—sometimes even in lucid, perfectly-metered poetry.

Though Judge Rosenblatt lost precious moments during his down time at the Royal Hospital nursery, he certainly has led a productive life ever since, following up his stimulating summers as a busboy at Grossingers in my home County with distinguished years as Dutchess County District Attorney, then utterly outstanding service as a trial judge, Chief Administrative Judge, Appellate Division Justice, and for the past four years, two months and one day—thankfully and joyously for all of us—as a phenomenal Judge of the Court of Appeals.

Whatever Judge Rosenblatt undertakes he does to the nth degree of pleasure and perfection, whether on our Court or the squash court, on the ski trail or the trail of Sherlock Holmes.

I could go on and on describing, and praising, this genuinely extraordinary, delightfully multi-faceted human being, were it not for the fact that we have an even greater treat in store for us this evening than hearing about him. We can hear from him. It is my honor now to present Judge Albert M. Rosenblatt.
The Benjamin N. Cardozo Lecture

The Law’s Evolution: Long Night’s Journey Into Day

Albert M. Rosenblatt delivered the 55th Benjamin N. Cardozo Lecture, March 6, 2003 at the Association.

Albert M. Rosenblatt*

The links with Judge Benjamin Cardozo are everywhere. They are closest, perhaps, through Judith Kaye, our Chief Judge, who has carried on the Cardozo tradition, enhancing it with her own scholarship, her relentless pursuit—and attainment—of excellence, and her wonderful sense of humor.

I’m deeply pleased to see my six colleagues here from the New York Court of Appeals. I’ve told many of you how much I respect and admire them and how privileged I am to be one of them. They have assured me that when I finish here tonight, none of them will rise and deliver the dissenting Cardozo Lecture of 2003.

Also, I see Andrew Kaufman here. Most of you know that he is not only a renowned professor at Harvard Law School, but is Cardozo’s biographer. After 40 years of research, Professor Kaufman wrote the definitive life of Cardozo. I recently phoned him.

“Andy,” I asked—he insists that I call him Andy—“what did Judge Cardozo usually have for breakfast?”

Without a moment’s hesitation, he said: “You’ll find it at page 138.”

* Judge, New York Court of Appeals. B.A. 1957, University of Pennsylvania; J.D. 1960, Harvard Law School. I extend warm thanks to Erwin Chemerinsky, Inez Tierney, Michael Dimino, Gabriel Torres, Lisa DellAquila, Julia Carlson Rosenblatt, and Betsy Rosenblatt for their very helpful and constructive critiques. I also have special thanks for Librarian Frances Murray for her patience and industry in acquiring books and materials for me from far-flung places.
Just as I had hoped: Oatmeal! I had already been a confirmed oatmeal eater, but I soon began eating oatmeal more frequently, and in larger and larger quantities. I can't say that it has improved my writing style, but if I collect enough oatmeal boxtops over the next ten years, I can win a free trip to Philadelphia.

As for tonight's talk, the evolution of the law struck me—and I hope it does you—as an apt topic, considering that most of our day is spent in microcosm. We might spend hours researching a single point of law, or Shepardizing, or analyzing one paragraph in a lease for an office building in Rochester or on East 53rd Street.

In an Article 78 proceeding against a municipality, we don't dwell on how the petition stacks up with Greek concepts of natural law or whether the basis for the proceeding springs from Magna Carta or the Age of Enlightenment. All we know is that if you don't file within four months, you're out. But once in a while we might want to step back, look at the big picture, and reflect on how well our American legal apparatus is serving us as a society. Our ancestor civilizations have been painting on this canvas for thousands of years. As Americans, have we improved on it? In a word, how are we doing?

I suggest we look at the origins of American and Western law and examine how the law has evolved over a recorded legal history that goes back more than 4,000 years. We'll make a few stops along the way and bring along two yardsticks. First, we'll try to measure whether the law has advanced in comparison to the eras before it, with particular reference to concepts of freedom and the relationship between the individual and the sovereign. Second, every so often we'll compare the advance of the law with progress in other fields.

We have to be fair about how we make these comparisons, and it doesn't seem right to compare the advance of the law with our progress, say, in transportation. A plane that can travel by instrument at 2,000 miles an hour represents an undeniable advance over Ben Hur's chariot or even Wilbur and Orville Wright's 1903 plane. (Of course, that says nothing as to whether the increased speed of the plane, and with it the speed of life, is desirable. One can debate the point.) Scientific progress of this type is often indisputable because improvements may be shown empirically or mathematically.

But law does not build on itself as easily as science does. Why not? If we can cure diseases that were once incurable, and if we can compute in an instant what used to take days, why can't the law make similar leaps? I wish it could. The development of the law involves elements of philoso-
phy, religion, governance, morality, and human emotions to a far greater degree than those involved in building a rocket or a faster, better hyper-threading 3.06 gigahertz computer processor with 1.5 gigabytes of memory.

On a technical level, we’ve made enormous advances in law that are analogous to rocketry. Only recently, when we wanted to find a particular labor law case or statute, it might have taken us a long time to hunt it down, manually. Now, in an instant, it appears on the screen, and we press another button that says “print.” This is a spectacular retrieval process (particularly to those of us over 55), but the principle of law has not necessarily improved, and people still quarrel over labor contracts.

There also is the element of subjectivity in any evaluation. Take, for example, the arts. Some people still prefer Aristophanes to Neil Simon. Travel across town to the MOMA and ask whether Rothko is an improvement over Van Gogh or Constable. And which is better: the madrigals of the 14th century or a tune by Paul McCartney? As we traveled from Orlando de Lassus to Bach to Mozart to Beethoven to Brahms to Mahler to Schoenberg to John Philip Sousa to Ravel to Louie Armstrong and Duke Ellington—have we improved? For me, it’s close between Bach and Louie. But it’s entirely subjective.

There are, of course, subjective judgments to be made in evaluating whether law has progressed, but I would argue that the question of progress in the law is less subjective and more discernable than art or music. I aim tonight to explain why, in my view, the path of the law—in terms of our historical antecedents—has been generally, and almost unfailingly, upward.

I would add at the outset that some of our more recent gains, in the areas of civil rights and freedom, have been hard fought and are in need of constant and vigilant protection. Let me also emphasize that I speak as an American discussing Western culture, in general, and American culture, in particular, in the 21st century and not everyone in the world shares the American vision of freedom and enlightenment. As we have learned, there are those who would destroy it.

I.

We’ve been on this planet for a very long time, but for thousands and thousands of years we went about our daily lives and left no written record of how we passed the time of day, let alone how we governed ourselves. The first transcriptions of any kind—not necessarily legal—are said to be the work of the Sumerians, somewhere around 3200 B.C. 1 Fifty-five hun-

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dred years ago seems like a long time, but recorded history represents only a tiny fraction of what we had been doing for thousands of years before that.

We might call this pre-history—an awkward phrase. There was no moment in time at which we said, “O.K. prehistory is over; when the bell goes off, history begins. Ready, set, go.” But it almost comes to that because of the difference between prehistory and history: There came a time when we started to write things down or at least to leave some good clues as to what we were up to.

Although we cannot state with certainty how rights and responsibilities were maintained in the tens of thousands of years before the first written codes, we can be pretty sure as to how they were not maintained. If there was a dispute over which group or tribe had the right to occupy a particular cave or piece of real estate, we can safely say that there was no such thing as document discovery or the in camera voir dire. Most likely, it was force—pure and simple.

In terms of the internal organization of the tribe or clan, however, we have to think that there was some system of law at work. If that were not so, a small group or tribe could not function. It would have been necessary, we surmise, to create a program by which rights and duties were understood and allocated. We cannot say exactly how this was done, and it undoubtedly differed from location to location.

It was, we suppose, a mixture of habit, arbitrariness, supernaturalism, and force that grew into custom. In this primitive condition, the most authoritative statement of right and wrong was a determination made by the ruler after the fact, and as these determinations were breathed for the first time, a vague body of custom developed, so that the members of the tribe or clan could begin to catch on as to what was acceptable and unacceptable behavior.

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2. The Sumerians "developed what was probably the first high civilization" in history. Samuel Noah Kramer, The Sumerians 1 (1963). In the early dynastic period (2900-2350 B.C.), Sumer, in present day Southern Iraq, was divided among some 30 city-states, each with a patron deity and a ruler. See Chaplin, supra note 1, at 908.


4. Henry Sumner Maine, Ancient Law 6-7 (Dorset Press, 1985) (1861). Critics have challenged Maine’s emphasis on the role of religion in primitive societies, pointing out that the early tracts are free of religious coloring. See A.S. Diamond, Primitive Law 161–69 (1935). Maine, however, cannot be understood to assert that religion was the source of law. Maine did, however, point out the interdependence of law and religion, see Hoebel, supra note 3, at 258, and that primitive criminal law often coincides with certain notions of sin. See id at 259.

In primitive societies, there was no clear distinction between civil and criminal wrongs, and at least one astute commentator has suggested that the introduction of banishment (or outlawry) as a punishment marks a critical stage in what may have been the origin of criminal law. Banishment was among the most severe punishments imaginable. It was not like being expelled from Yonkers to White Plains. Banishment meant isolation, the loss of the protection of the tribe, and in all probability death by starvation or violence.

Cultures have controlled—or sought to control—errant or harmful behavior in a number of ways, including private retaliation, compensation, physical punishment, governmental coercion, demonic exorcism, banishment, guilt, moral suasion, social disapprobation, and by regarding certain behavior as sinful, with the threat of serious afterworld consequences. Today, we're compartmentalized: our shelves might house a red-colored book for the penal law, a blue one for the civil law, and a black one for the Bible, but I would conjecture that at the earliest times they were largely one and the same.

II.

No one knows when the first written legal tract appeared. All we know is what we've found. The Code of Hammurabi, written in about 1750 B.C., is best known among the earliest of ancient law codes, but archaeologists have discovered three earlier codes that predate Hammurabi by several hundred years.


The laws of Eshnunna (ca. 1920 B.C.) are the third oldest. See Robert C. Ellickson & Charles
All of these cuneiform writings\(^8\) come from the same general part of the world, a region that covers ancient Sumeria, Akkadia, Mesopotamia, and Babylonia. This is another way of saying . . . Iraq. It’s not surprising that these codes should have emanated from this region—where civilized development occurred around 7,000 years ago\(^9\)—because there was extensive foreign and domestic trade that prompted Mesopotamians to devise comprehensive contract and business laws.\(^10\)

Looking back on this era, we allow ourselves to be astonished at 4,000-year-old Mesopotamian codes so refined that they dealt with bailment, negligence, fault, punitive damages,\(^11\) agency, restitution,\(^12\) express warranty, consignments, domestic relations, and even eye surgery. (I have read the codes of Hammurabi and its precursors, and so can you. The Code of Hammurabi is at the Louvre.\(^13\) It’s on stone, but it’s also online at hamcode.htm. I’ll give you the full URL, if anyone wants it, after this talk.)

To put things in historical perspective, let’s pick our heads up from out of the Mesopotamian sand and look around to see what was going on when Hammurabi’s laws were written. Stonehenge is the center of worship in England. Moses and the Ten Commandments will not appear for another seven or eight hundred years. Horses are used to draw vehicles. There

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8. The cuneiform script is a system of wedges impressed into damp clay tablets or, in imitation, impressed into wax, incised in stone or metal, or painted on other surfaces. Roth, Law Collections, supra, at 57; Klaas R. Veeren, "In Accordance with the Words of the Stele": Evidence for Old Assyrian Legislation, 70 Chi.-Kent L. Rev. 1717, 1718 (1995); Raymond Westbroek, Slave and Master in Ancient Near Eastern Law, 70 Chi.-Kent L. Rev. 1631, 1632 (1995); Wise, supra, at 477; Reuven Yaron, The Laws of Eshnunna, available at http://www.uni-frankfurt.de/fb01/miller/Eshnunna.html (2d ed.).


are reports of the first trumpet being played in Denmark. Plato will not set up his academy in Athens for another 1500 years.

A. HAMMURABI

We might say that during the Hammurabi era, the stewards of the law were doing creditably well, at least in the Fertile Crescent between the Tigris and Euphrates rivers. In medicine, Sumerians were in some ways advanced but were also taught to believe that disease was caused by demons who enter the body and must be expelled. They regarded the liver as the body's central organ and even prescribed castor oil for ailments, but the youths of Mesopotamia could rest assured that cod liver oil had not yet been discovered for medicinal use. That eventful day came in 1854, in Norway.

The Code of Hammurabi is a fascinating work, but its polytheistic premise strikes us as alien. It is a document wrapped in theology, through which King Hammurabi conveys the law as propounded by divine will, invoking a number of deities in whose control these matters were thought ultimately to lie. Hammurabi must have been a very good guy, and not only because he has his own web-site. He ascribes these laws as emanating from an array of gods and sees himself as their messenger to “abolish the wicked and evil,” to “provide just ways for the wail and the widow,” to “make justice prevail in the land,” to “prevent the strong from oppressing the weak,” to “illuminate the land,” and to ensure domestic tranquility and provide for the common defense. Sounds almost like the U.S. Constitution, and someone has written a book saying so.

Can it get any better than this? After all, here's a ruler who recognizes individual property rights, sees a governmental obligation to the

14. See History of Medicine, 15 Encyclopedia Britannica 197 (1953). But the Sumerians also had what one commentator described as the oldest pharmacopoeia known to man, containing some 15 prescriptions, with no mention of magic or incantations involved. Kramer, supra note 2, at 93.


17. Roth, supra Collections, supra note 7, at 133.

18. Id. at 76-77.

poor that's worthy of Article XVII of the New York State Constitution, and whose description of a bona fide purchaser was surely a prelude to Section 8-302 of the Uniform Commercial Code. But Hammurabi's Code also had provisions that we would find abhorrent. The criminal law was based in part on class status, and a man could sell his wife to discharge a debt. Another major difference between our culture and Hammurabi's is the way in which Hammurabi and his constituents saw themselves in relation to one another, the world around them, and perhaps most importantly, the world above them, so to speak.

The ancients saw the elements as having personalities. Thus, the wind that cooled the house—or destroyed it—was a person, and of course a divine person. The sun that warmed—or scorched—the earth was also a divine person, as was the rain that fed—or flooded—the land, and so forth. As Abba Eban put it, these gods might be benevolent or vengeful, constant or capricious, but one thing was certain: they were always hungry. The ancients' conception of gods as capricious and hungry no doubt led them to fashion their practices and in turn their required observances with an eye toward pleasing a number of deities. Gods were unpredictable and could be assuaged by satisfying their perpetual appetite for roasted birds, bulls, lambs and other forms of sacrifice, perhaps even children.

The pantheon of gods was highly complex, and some gods and goddesses were thought to be at war with others. Actions that pleased one god or goddess might have offended other gods with different taboos, requirements, and agendas.

**B. THE HEBREWS**

The Code of Hammurabi surely had what we would call elements of fairness, but it was not founded upon a single, coherent understanding based on predictability, as between the people on the one hand, and the source of the law, on the other. For that, it took Moses. For the first time in history, the law—as embodied in the Ten Commandments—was cast

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20. See MAINE, supra note 4, at 3; PARKES, supra note 5, at 35.

21. ABBA EBAN, HERITAGE, CIVILIZATION AND THE JEWS 10 (1984); see also Oppenheim, supra note 10, at 183-198.


23. See Eban, supra note 21, at 11-12.
on a fixed moral foundation. It was delivered in the form of a covenant in which the Hebrews, in effect, entered into a bargain with a singular God who would not act capriciously. God would protect the followers as long as the followers held up their end of the bargain, by adhering to a prescribed ethical tract.

For the most part, the methods of earlier religious practices were magical and the motivations largely materialistic.\(^24\) (Keep the rain god happy, and hopefully the crops will be nourished.) With Moses, however, the premise was not magical but contractual. And the motivation was not materialism but rectitude. This was one of the most breathtaking breakthroughs in all of human history—let alone legal history. In this setting, law was not simply imposed by divine fiat. It was the product of a belief in a principled, bilateral contract—even though bargaining power was, perhaps, unequal.

The Sixth through Tenth Commandments deal with affairs among mortals. The Sixth Commandment is still very much with us, now embodied in New York’s Penal Law Article 125, along with felony murder interpolations. The Seventh, adultery, will be found in Penal Law Section 255.17. The Eighth is divided in Article 155 between petit and various degrees of grand larceny, and the Ninth sounds very much like perjury in the first or second degree under Penal Law Article 210. As for the Tenth, there is nothing in the Penal Law about coveting your neighbor’s house, spouse, servant, ox, or donkey—let alone your neighbor’s G4 i-Mac. But we’ve learned what envy can lead to. The message is clear: Don’t even think about owning your neighbor’s Lincoln Town Car.

C. THE EGYPTIANS

But what about Egypt? When the Jews took their exodus, they left one of the most advanced civilizations in the ancient world. The Egyptians were capable of extraordinary engineering and architectural feats, so it’s only right that we ask ourselves why a society so sophisticated administratively and otherwise is not associated with greatness in jurisprudence. We may never know for sure, because when the library in Alexandria burned, the fire consumed a good deal of the accumulated wisdom of the time.\(^26\) But to the best of our knowledge, the Egyptians never develope

\(^{24}\) See Parkes, supra note 5, at 36.

\(^{25}\) See Frazer, supra note 22, at 61.

\(^{26}\) There were several fires. See generally Lionel Casson, Libraries in the Ancient World 31–47 (2001) (Casson states that the library was founded around 300 B.C., and after having been
oped formal codified law. It's arguable, I think, that the Egyptians had little use for law texts because Pharaoh was believed to be God and as such, his judgment came straight from heaven. This is not to say that they had no courts or judges; they did, and indeed had an elaborate legal system, administered by officials who are said to have based their laws on precedent.

Egyptian government included lower and higher judicial offices with a chief judge whose position was second only to the Pharaoh. But he was a very distant second. This was not a system of checks and balances in which the chief judge administered the legal realm and Pharaoh the executive. The Pharaoh was God, and as such he was the state, and everyone served not so much at his pleasure but at his divine will. Indeed, as one historian put it, "[t]he authority of codified law would have competed with the personal authority of the Pharaoh." This may be a scholarly way of saying that if the law is not written down, it's easier to make it up as you go along.

D. THE GREEKS

Conceivably, the lawgivers like Hammurabi and the Egyptians ruminated into the wee hours of the morning, debating the eternal questions. They may well have sat under the proverbial olive tree, exchanging views on the metaphysical aspects of law, or around a fire, roasting the ancient equivalent of marshmallows, discussing epistemology, the theory of knowledge. If they did, they left no written record of what they were thinking.

For a written record, we turn to the Greeks and the Hellenic world...
about 2,500 years ago, long after the great Egyptian dynasties. If we were to chart this out on an imaginary clock and supposed that we arrived on this planet at 12:01 (just after midnight) this morning, it’s fair to say that no one began to record the philosophy of law until quite recently, say, about the time we had dessert earlier this evening. And it was the ancient Greeks who prepared the dessert, and what a scrumptious treat it was.

Pericles was the chef d’cuisine, Plato gave us the recipe, Socrates asked a lot of questions about the ingredients, and Aristotle served it up for the world to enjoy, to follow, to modify, and to add more flavors. If Moses and the Israelites taught that we need not be ruled by theocratic arbitrariness, surely we can credit the Greeks with expanding the philosophical platform on which our law rests. As one writer put it, the Greeks invented the revolutionary idea that human beings are capable of governing themselves through laws of their own making, and seizing control of their destinies.

What distinguished the Greeks from the theocratic monarchies in the West or Near East was the notion that the laws may have been divinely inspired but were not designed primarily to express reverence for the ruler or even for God. The law served as a public vehicle, promulgated under the authority of the polis.

And so the first Greek writers devised the batteries, we might say, for our earliest philosophical searchlights. They began to explore the nature of the universe, and, in turn, the philosophical foundation for rules of behavior and governance. The Athenians made waves, and as one historian said: “[T]hey were born into the world to take no rest themselves and to give none to others.”

By the sixth or fifth century B.C., Greek philosophers saw nature as an orderly universe. It was not governed by freakish or inexplicable disorder. Nature manifested a rational law or design that called for logic and reason. And this is where Socrates comes in. Many know him primarily as a misty figure responsible for a method that law professors seized upon to drive first-year law students to the brink of suicide. But it was Socrates who said that the unexamined life was not worth living, and who equated

34. See Michael Gagarin, Early Greek Law 132-133 (1986).
35. See Francis H. Eterovich, Approaches to Natural Law from Plato to Kant 20-21 (1972).
36. Thucydides (attributing the words to a Corinthian orator); see, http://www.shunya.net/Text/Herodotus/TheGreeks.htm.
rationality, knowledge, and happiness with the virtuous, lawful life.37 His student, Plato, carried those ideas forward by proposing that justice is achieved in an ideal state—the Republic—and that harmony exists when people live together in the polis under precepts of universal and eternal justice.

The Athenians constructed a philosophical cradle for the development of Western thought. They held that because chaos and unreason cannot explain the order of nature,38 rules of conduct must rest on certain universal norms that are fixed and permanent in nature. This is one of the first formulations of natural law. By this conception, “natural law” cannot be undercut by the day-to-day rules established by human institution or statute.39

Aristotle expanded on this theme when he distinguished between laws that may simply have been promulgated by lawmakers (which may be good laws or bad),40 and those that comport with the higher law of nature.41 He was among the earliest thinkers to recognize—or at least to record—that as humans we are endowed with the unique capacity for reason and rationality,42 the Aristotelian requisites for universal concepts of natural law.

What did Aristotle mean by natural law? He himself tells us. Aristotle was not only a great philosopher but obviously a theatergoer, and he used Antigone, a play by Sophocles,43 to illustrate “natural law.” Antigone was the sister of Polyneices. Polyneices, who was on King Creon’s bad list, was killed in battle, and so the king was determined to deny Polyneices a rightful burial and leave him to the buzzards. Antigone assailed the King,

37. ETEROVICH, supra note 35, at 27.
38. Id. at 22. Moreover, in 478 B.C., eight years before Socrates was born, Heraclitus of Ephesus may have paved the way for a theory of natural law, when he wrote that the world order is fixed and eternal and that human laws are nourished by divine universal law. See GEOFFREY S. KIRK & J.E. RAVEN, THE PRESOCRATIC PHILOSOPHERS 214 (1957).
39. See ETEROVICH, supra note 35, at 22 (quoting WILHELM WINDENBURG, A HISTORY OF PHILOSOPHY 27 (1901)).
40. Aristotle, Politics *1294a7 (1831). The star pages refer to Immanuel Bekker’s 1831 Greek edition of Aristotle’s writings. My direct source for Aristotle’s works, which are cited throughout this text, has been from 1 ARISTOTLE, THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1984).
41. See ARISTOTLE, supra note 40, at *1294a7-4.8.6.
42. ARISTOTLE, ETHICA NICOMACHAE, *1098a7-8, *1098b2-4.
defied him, and buried Polyneices, claiming that no King had the right to deny her brother a decent burial. This was long before Article 78 was enacted.

As to this, Aristotle made one of the most far-reaching observations the world has ever known, and I quote:

Particular law is that which each community lays down and applies to its own members: . . . Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice that is binding on all men, even onto those who have no association or covenant with each other.

Aristotle went on to say:

It is this that . . . Antigone clearly means when she says that the burial of Polyneices was a just act in spite of the prohibition: she means that it was just by nature.

Not of to-day or yesterday it is,
But lives eternal: none can date its birth.44

In looking at the Ancient Greeks, I confess having to pause and question my thesis that we've progressed. The Greek culture was so rich in erudition, beauty, and philosophy as to constitute a Golden Age. Does that imply that today, by comparison, we live in an age of jurisprudential brass or tin? Emphatically, no. It's tempting to say that the Athenians had it right, but we must remember that in the Greek way of thinking, a person's identity was defined entirely by membership in the polis,45 and that the fruits of freedom and democracy existed only for citizens. But citizens comprised only a minority of the population. Beneath them were the disenfranchised classes: aliens who could not acquire citizenship, semisubordinated peoples, and a huge population of slaves.46

44. Aristotle, Rhetoric *1373b1-19, *1375a27--*1377b11 (emphasis added); see also Edward S. Corwin, The Higher Law Background, 42 Harv. L. Rev. 149, 153-55 (1928). For an interesting perspective as to the "man-made law" as not encompassing Antigone's concerns as a woman, see Marina Angel, A Classical Greek Influences an American Feminist: Susan Glaspell's Debt to Aristophanes, 52 Syr. L. Rev. 81, 94 (2002).

45. See Wiltshire, supra note 33, at 11; Aristotle, supra note 42, at *1097b11.

Most tellingly, Athenian women had no political rights and were barred from public life. There were no women throwing the discus or the javelin at the Olympics. They were not even allowed to watch.47 Even to Aristotle, slavery and the subordination of women were part of the natural order.48 At about 500 B.C., the height of Ancient Greek culture, as twenty or thirty thousand free men ruled over six times that many who were enslaved or disenfranchised.49 Nor can we forget that of five of the most renowned Greeks (Socrates, Plato, Aristotle, Pete Sampras, and Leo Milonas), Athens indicted two of them—Socrates and Aristotle—for what we today would call First Amendment witch hunts.50

Nonetheless, the Greek contribution is undeniable, and despite these serious shortcomings, it is to them that we as Americans and Western thinkers owe the concept of natural law and a glorious philosophical dimension to legal theory that takes us well beyond theology or the black letter.

E. THE ROMANS

After the Greek Golden Age had come to an end, our legal antecedents were next developed by one of the most powerful civilizations the world has ever known. If we were to see the epoch after Greece as unfolding on a stage, we can say that the authors, producers, directors, actors, and stage managers were Roman.

In an empire as vast as Rome, it was necessary to impose a system of law capable of governing far-flung provinces and peoples of radically dif-

47. One historian has asserted that “[t]he Greek City represents the perfect realization of a political plan to exclude women.” Eva Cantarella, Pandora’s Daughters: The Role and Status of Women in Greek and Roman Antiquity 38-51 (Maureen B. Fant trans., 1987); see also Jan B. Elshtain, Public Man, Private Woman 41-54 (1981).

48. As to slavery, see Aristotle, supra note 40, at *1254a, *1255b. As to women, see id. at *1254b14 (“[T]he male is by nature superior, and the female inferior”); id. at *1255b; see generally H. Blümner, The Home Life of the Ancient Greeks 519-22 (1966).

49. Wormser, supra note 46, at 58.

50. In 399 B.C. Socrates was tried and put to death for not worshiping the gods whom the state worshiped and for corrupting the youth. See A.E. Taylor, Socrates 106-15 (1932). He died refusing to surrender his principles, much as Antigone had refused. See Jones A. Colatacco, Socrates Against Athens 187 (2001). The trial was conducted before a jury of 500, 280 of whom voted to convict. See I.F. Stone, The Trial of Socrates 181 (1988). The trial is described in Plato’s Apology. See The Works of Plato 57-85 (Irwin Edman ed., 1928).

Aristotle, having been charged with sacrilege, left Athens “to save the Athenians from sinning a second time against philosophy.” John Ferguson, Aristotle 22 (1972); see also Felix Gray, Aristotle and his School 44 (1974).

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ferent cultures. If Rome spent her days in war and conquest, she must have spent her evenings making law; today we feel her influence in our own common law.

Initially the Romans recognized two types of law: jus civile (local law) and jus gentium (the law of nations). This is another way of saying Roman law and everyone else’s. But as Rome expanded, jurisconsults like Cicero and Gaius drew on certain aspects of Greek natural law theory and came to recognize that the law of nations—jus gentium—was more than an abstract or foreign doctrine. Roman jurists transformed a natural law abstraction into a cosmopolitan, legal corpus that served as an equitable system of law for all of Western society.

By the third century A.D., Roman law had become highly developed. The Roman judges were secular and not priestly. Law was a profession. Treatises and law schools grew and multiplied. (Incidentally, one of the oldest of Roman law texts to survive was written by Gaius, the jurisconsult, late in the second century. It had been lost for 14 centuries, but it was found and is now safe, standing as a testament to the Roman science of jurisprudence. A bust of Gaius also survives. I’ve seen a picture of it. He looks like a professorial Mel Gibson.)

The Romans gave us an extraordinary gift. In all of the literature of the legal systems before the Romans, there had been no abstract generalizations of the body of positive law—no commentators who treated the rules as a logically connected system. If Hammurabi and Sumerians pro-

51. Wiltshire, supra note 33, at 17 (quoting Joseph Declaireuil, Rome the Lawgiver 3 (1927)).
53. Wigmour, supra note 27, at 420.
54. In 1816, in Italy, historian B.G. Niebuh discovered the complete manuscript of Gaius’s Institutes. It is known as the Gaius palimpsest or the “Verona Gaius.” See Michael H. Hoeflich, Savigny and his Anglo-American Disciples, 37 Am. J. Comp. L. 17, 20-22 (1989).
55. Wigmour, supra note 27, at 438.
mulgated the first written statutes, the Romans produced the first treatises. Gaius and Cicero were the Wigmores and Willistons of their day.

At its height, the Roman Empire ruled over much of the known world. It's a tribute to the Roman sense of pragmatism that they were able, with almost scientific ability, to craft laws of such universality as to seem part of the natural order of things. As a model rule of law for all of Western society, culminating in the Justinian Code of the sixth century, the articulation of law by Rome must be counted as a giant stride in the history of law on this planet. Upward and onward.

And so was it close to perfect? Not nearly, for at least two reasons. While the Greeks also defined themselves in terms of the polis—as opposed to the individual—they seem to have had an occasional soft spot for the individuality of an Antigone, who could elevate the natural law above the king's crown. The Romans made no such accommodation. Their version of natural law was the formulation of brilliant common-denominator precepts that could be applied throughout their vast empire. King Creon killed Antigone for her defiance, but as far as the Greeks were concerned, the King paid a dear price for his hubris: the gods would crush him. But to the Romans, natural law could not be invoked to overrule positive laws. To them, Antigone would have made no sense at all. The notion of natural law as a source of individual liberty would not arise until many centuries later. When the Romans spoke of rights, they meant property ownership. They did not conceive of individual or even collective rights against the sovereign. What we, for example, recognize as First Amendment rights would have been an inconceivable notion to the Romans and even to the Greeks. Second, and most importantly, the Roman law—like the Greek law—contemplated the abject subjugation of women and slaves, which of course meant that most of the inhabitants had no share of the pie.

56. Id. at 373.
57. After Rome split and Byzantium became the Center of the Empire, Roman emperor Justinian in the sixth century compiled what we refer to as the Justinian Code. It was based on an examination of 2,000 books containing three million sentences, which he reduced to about 150,000. The world fame of Justinian rests on this Code. Justinian presided over it but like any good and decent editor, he gave credit to a commission of 17 jurists whom he appointed to do the compilation. All were Byzantine Greeks. Id. at 444.
58. Id. at 25.
When Rome disintegrated, her luminescence was lost, her rule of law collapsed, and all of Europe was darkened. Yet it wasn’t so pitch black that we had unalterably lost our way—a pilot light remained. Over the next several hundred years, the Great River of Roman law was replaced by a variety of legal tributaries that in one degree or another helped make us what we are today. Of course, we’ve drawn from Rome, but also from the legal precepts of the Scandinavians, the Normans, the Anglo-Saxons and other regional systems that filled the vacuum left by the collapse of Rome. From these legal systems, the law of England and, in turn, our law was distilled.

III.

A. THE INFLUENCE OF CHRISTIANITY

After the fall of Rome, the concept of natural law persisted in Europe, but the premise was different from the way the Greeks or Romans saw it. With the introduction of Christianity, natural law took on a theological character, through the teachings of St. Augustine (354-430), and later, St. Thomas Aquinas (1225-1274). St. Augustine equated natural law with the will of God, and held that there is “no law unless it be just” and if a human law is at variance in any particular with the natural law, it is no longer legal, but rather a corruption of law.

In time, the concept of natural law became synonymous with church doctrine and was accepted and imbedded in the teachings of Christian fathers. In the history of law, the fourth century was ecclesiastical. The Bishop of Rome was a legislator, perhaps a more important one than the Emperor. A pagan sacrifice was by the letter of the law a capital crime.

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60. See, e.g., J. E. G. deMotmorency, Danish Influence on English Law and Character 40 Law Q. Rev. 324 (1924); see also id. at 335-343 (discussing Danish concepts of freedom).


63. Eterovics, supra note 35, at 48-49.


65. Id. at 38-39.

66. 1 Pollock & Maitland, supra note 61, at 2.

67. See id. at 3-4.
In England the lines of secular and ecclesiastical jurisdiction were blurry or overlapping. During the Anglo-Saxon period, the Bishop sat in the county court.68

Given the highly theocratic basis of law during the so-called dark ages, we can begin to understand that the process of finding the truth—as in a criminal accusation—was tied to divining the will of God.69 The premise may have been pure, but it took on proportions that we today would find bizarre, as in the trial by ordeal or trial by battle.

By the ninth century, trial by ordeal had entered its heyday and was used commonly to adjudicate charges of religious heresy70 or sexual impurity.71 In trial by ordeal, the accused was made to hold a scalding or burning object and the verdict would depend on the degree of injury—which reflected God’s intervention.72 The judge would wait for three days to see if the hand had healed,73 and, if it did, the accused was cleared. In cases where this 72-hour delay seemed too long for the crowd to wait, the trier of fact would employ trial by water. This carried immediate results. The accused who floated was guilty.74 If the accused sank, it was a sign of innocence (even though it might have had other consequences).

In another form of trial, when witnesses disagreed they were consigned to combat which, presumably, would result in God supporting whichever side was right.75 Moreover, “[h]e, also, who gave the judgment of an inferior court might, on a charge of false judgment, have to defend the award in the king’s court by the duel, either in person or by a champion.”76

68. See id. at 40.
69. 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 310 (3d ed. 1922).
70. See ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL 24 (1986).
71. See id. at 16.
73. See BARTLETT, supra note 70, at 23.
74. See id.
75. See Thayer, supra note 72. In a trial by oath, the oath-takers lined up on behalf of a litigant (not as witnesses, but merely swearing to the truthfulness of another person’s oath). See id. at 58; 1 HOLDSWORTH, supra note 69, at 302-308.
76. Thayer, supra note 72, at 66.
But these Christian influences also had a highly benevolent aspect that formed an essential part of our jurisprudence. The earlier Germanic law, "with its overwhelming biases of sex, class, race, and age, was affected by the Christian doctrine of equality of all persons before God." 77 Reason and conscience were used to overturn ritual and magic 78 and, perhaps most importantly, Christian doctrine altered the notion of endless personal revenge. If someone persisted in a blood feud 79 after a reasonable offer of satisfaction, it was regarded as an offense against God. 80 Indeed, the ninth century laws of England's King Alfred begin with the Ten Commandments and a restatement of the laws of Moses. 81

This Judeo-Christian reliance upon God was a feature of medieval law, and many of these discredited modes of trial were in vogue in 1066, which is, for us, a critical date. At that time, William the Conqueror and the Normans prevailed at the battle of Hastings, and England was to change forever. Our focus is of course on England because we were an English colony, and in New York's first State Constitution (1777), we declared that we were adopting the English Common Law. After 1066, a blend of

78. See id. at 251.
79. For the rules of the blood-feud in Anglo-Saxon custom with reference to Beowulf, see Seebohm, supra note 62, at 56-72; see also Edward Jenks, A Short History of English Law 7-8 (1913); A.K.R. Kiralfy, Potter's Historical Introduction to English Law and its Institutions 348 (4th ed. 1958).
80. See Berman, supra note 77, at 66. The idea that Christianity (the Judeo-Christian heritage) is part of our common law has been advanced by a number of historians. Pollock and Maitland discuss the influence of Christianity on the development of common law felonies. See Pollock & Maitland, supra note 61, at 476-478; see also Jeremy Miller, Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?, 29 Wash. U. L. Rev. 21, 27 (2001). Christianity was recognized as part of the common law by courts in Pennsylvania, Delaware, South Carolina, Arkansas, Tennessee, North Carolina, and Alabama. Stuart Banner, When Christianity Was Part of the Common Law, 16 Law & Hist. Rev. 27, 31 (1998). Indeed, in 1844 the United States Supreme Court affirmed that "the Christian Religion is part of the common law of Pennsylvania." Vidal v Girard's Ex't, 43 U.S. 127, 198 (1844); see also Church of the Holy Trinity v. United States, 143 U.S. 457, 470 (1892).

Bradley Chilton catalogs a series of such assertions, including those made by Sir Matthew Hale, Sir William Blackstone, Lord Coke, Lord Mansfield, and Joseph Story. See Bradley S. Chilton, Cliobermatics, Christianity, and the Common Law, 63 La. L. Rev. 355 (1991). Indeed, New York's Chancellor Kent proclaimed that the people of New York State "profess the general doctrines of Christianity, as the rule of their faith and practice" in affirming a blasphemy conviction against an accused. People v. Ruggles, 8 Johns. 290, 294 (N.Y. Sup. Ct. 1811).
81. See Berman, supra note 77, at 65.
English and Norman law emerged, setting the legal compass for the next thousand years. This was to be our inheritance.

B. THE NORMAN CONQUEST

In terms of our own legal history, we must mark the Norman conquest as an unequalled, defining chapter. It gave us what would become the common law. Under Henry I and Henry II, a centralized system of law, administered by the Crown, replaced a jumble of competing courts and conflicting jurisdictions that had their roots in a host of sources, including the king, the church, the feudal lords, and tribal practice. From these origins—traced back to 1066—we developed the common law, a vehicle Blackstone described as the “perfection of reason.”

The Norman conquest also marked the beginning of one of the most extraordinary developments in criminal law—offenses were no longer to be private matters. Slowly, criminal acts became offenses against the Crown, to whom the defendant was answerable. Thus, for 150 years after the Norman conquest, English kings, particularly Henry II, refined and unified law that had developed over the previous centuries. That was the state of affairs on the 14th day of June, in the year 1215, a prelude to one of the most important moments in the history of law.

C. MAGNA CARTA

By the early 13th century, our ancestral legal house was made of planks, boards and pillars supplied by the Sumerians, the Hebrews, the Greeks, the Romans, the Anglo-Saxons, and the Normans, all of whom contributed to the sturdiness of the structure. But the living arrangements had a serious shortcoming. The King of England did not live inside the house. He lived outside it and was above it. On the following day, June 15, 1215, this would change forever, when the barons forced King John to issue Magna Carta. It had a great many technical provisions but the language most relevant to us is in Article 39: “[T]hat no free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed . . . except by the lawful judgment of his peers and by the law of the land.” And in the clause that follows: “[T]o no one will [w]e sell . . . deny or delay right of justice.” Article 39 gave us the seeds for what would grow into the American concept of due process of law.

82. See 1 Holdsworth, supra note 69, at 4; Jenks, supra note 79, at 71-82.
83. 1 Blackstone, supra note 52, at *70.
84. 5 Blackstone, supra note 52, at *2; see generally Kiralfy, supra note 79, at 346-371; Robert Chambers, A Course of Lectures on the English Law 314-26 (Thomas M. Curley ed., 1986).
The Great Charter embodied the idea that no government or sovereign may stand above the people and rule with arbitrariness or caprice. Magna Carta has come to represent a turning point in the history of free peoples in their relationship with their governing authority. In that instant, the law which we inherited was transformed from a device for subjugation into a vehicle of empowerment, which could be used by the people against the sovereign, or as protection from it. After thousands of years the law was turned right-side up.

No person—no monarch, no ruler—was to be above the law. It took 1,600 years, but Antigone's voice was finally heard. The king and the population were made to live under one juridical roof, and no one was to be exempt from the Rule of Law.

1215 was a good year in other ways. Alcohol was used for medical purposes, the first glass windows appeared in private houses, and coal was about to be mined for the first time (in Newcastle). Also, right about that time, we saw Europe's very first birthday cakes, buttons, and buttonholes.

For the law, 1215 was a remarkable year not only because of Magna Carta but because by papal decree it marked the end of trial by ordeal. The Pope who condemned it was named . . . Innocent III. He condemned the ordeal on the ground that one should not tempt God by continually seeking divine intervention and “demand[ing] constant miracles” to address the day-to-day problems that mortals should be able to work out by themselves. After trial by ordeal was abolished, a period of disarray set in. How were we to find the truth?

And so trial by jury developed, as we looked less to the inscrutable will of God and more to inscrutable verdicts of juries. The exact origins

85. G run, supra note 43.
87. See id. at 430.
88. See Richard L. Marcus, Completing Equity’s Conquest?, 30 U. P.R.V. L. Rev. 725, 729 (1986); see also John W. Baldwin, The Intellectual Preparation for the Canon of 1215 Against Ordeals, 36 Speculum 613, 628 (1961); FISHER, supra note 72, at 587; BARTLETT, supra note 70, at 53.
90. Years after Innocent III forbade clergymen from participating in trial by ordeal, Henry III issued a writ prohibiting the practice (G. HOLDENWORTH, supra note 68, at 310-312); Theodore F.T. Flookkett, A Conide History of the Common L a w 112-117 (2d ed. 1936); BARTLETT, supra note 70, at 138.
91. Henry II, who ruled from 1154-1189—several years before the abolition of trial by ordeal—is credited with being most instrumental in the development of the jury trial in
of trial by jury are difficult to discern and may well have been influenced by early Scandinavian practices in England. Although the jury system has its flaws and we sometimes joke about it, the joking is good-natured, because the concept of judgment by members of the polis is the epitome of a participatory and democratic rule of law. It stands as one of the most phenomenal advances in jurisprudence, because it interposed a neutral referee on the playing field in the eternal contest between the people and the sovereign.

If there were ever a time when it was necessary—or believed to be necessary—to have an omnipotent monarch at the helm, our forebears have spent centuries fighting the idea. The Greeks gave us some early support, the Romans may have lost it for a while, but in the Western tradition, the people have slowly gained ground against the sovereign. In this country, we have acquired a sense of endowment that would have been unthinkable to our legal ancestors centuries earlier and is unthinkable in certain parts of the world even today.

D. JOHN LOCKE

This evolution in Western legal thought was probably inevitable, and if it wasn’t John Locke who helped pave the way, it would have been someone else. But it was John Locke, who in the 17th century, advanced the idea that government is the result of a free contract among people who live free and equal in a state of nature. Under Locke’s interpretation of natural law, the government is a fiduciary that exists only as long as it enjoys the consent of the governed. Think of the boldness of such an idea! Rulers hold their authority over individuals in trust, and when this trust is violated, a people may rightfully exercise their power to remove the ruler. It may have sounded treasonous, but to us it was a working manual in Thomas Jefferson’s library, if not at his elbow, when he drafted the Declaration of Independence.

England. See Moore, supra note 72, at 35-47; see also William Forsythe, The History of Trial by Jury 122-33 (1852).

92. See Forsythe, supra note 91, at 4, 15-37; Richard S. Arnold, Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials, 22 Hofstra L. Rev. 1 (1993). The jury may have had earlier roots, going back to the sixth century B.C. in Athens. See W Orner, supra note 46, at 52-58; see also Moore, supra note 72, at 1-4; Alan L. Boegehold, And the Verdict Is . . ., Odyssey 6 (May-June 2001). For a catalog of theories and dates in the development of trial by jay, see J. Kendall Fen, American Jury Trial Foundation: In Defense of Trial by Jury 9-36 (1993).

93. Erovics, supra note 35, at 114.


95. Erovics, supra note 35, at 114.
In his Second Treatise on Government, John Locke stated that the chief end of people uniting into commonwealths and putting themselves under government is the preservation of life, liberty, and property.\textsuperscript{96} If these words sound familiar, they should: they form the basis for our political and legal birthright. Our revolt against the crown in 1776 was not a power-grab or a surreptitious criminal act. We looked George III right in the eye and said, here, read this, our honest justification.

Over the centuries there were surely countless revolts before this one, as when some insurgents overthrew a tribal tyrant. They may have been thinking along Lockean lines, but never before had the idea been presented as a political or legal exegesis. In Western thought, it rearranged for all time the political relationship between the government and the people. If Magna Carta was a first step in undoing the divine right of kings, John Locke drove a stake through the heart of the concept.\textsuperscript{97}

But that was not all. At about that time, the law took a second stride of monumental proportions. For centuries monarchs and governments imposed religious dogma on both the willing and the unwilling. Religious persecution and bloodshed were routine, and if any monarch allowed any freedom of conscience it was surely an act of grace, revokable at will.

Once again it was John Locke, who in 1689 wrote his Letter Concerning Toleration, in which he said that church and state must be separated. A devout Christian, Locke gave the world an unforgettable lesson in both Christianity and civics. He said that “[t]he care of [s]ouls cannot belong to the Civil Magistrate,” whose “[p]ower consists only in outward force” as opposed to the “inward pers[u]asion of the [m]ind.”\textsuperscript{98} According to Locke, in matters of conscience and religious choice, intolerance is unchristian and illegitimate.

If we look at what was happening when Locke was alive, we will see why we call it an age of enlightenment. During Locke's lifetime, Descarte and Galileo published their treatises, and John Milton wrote Paradise Lost (1664), as Rembrandt, Brueghel, and Rubens were painting.\textsuperscript{99}
produced his first violin, and Europe was introduced not only to Johann Pachelbel, John Wesley, Thomas Hobbes, Jonathan Swift, Johann Sebastian Bach, and Isaac Newton, but to fountain pens, chrysanthemums, cheddar cheese, and chocolate.\footnote{Pretty good. But I submit that Locke’s ideas have had as great an impact on us as the Brandenburg Concerto, the articulation of the laws of gravity, and even chocolate.} 100

E. THE FRAMERS OF THE CONSTITUTION

The ideas of the Enlightenment were in the air but took root in the soil of the American colonies. One hundred years later, in 1789, these lessons were etched in constitutional stone. The chief sculptor was James Madison, who assembled the teachings of John Locke along with those of Roger Williams, Thomas Jefferson, George Mason, and others like them, and in 1791 enshrined them further in the First Amendment to the U.S. Constitution.\footnote{See generally Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346 (2002); Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. Rev. 455 (1991); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 38 Cornell L. Rev. 747, 757, 821 (1993).}

For centuries law had been bound up with religion. Being on the wrong side of the religious aisle, even in Europe, could cost people their lives—under law. By declaring that our nation shall not have an official religion, the framers ordered a divorce in what had been a marriage between church and state that had existed for at least 4,000 years and undoubtedly a good deal longer. For a majority of Americans, it has been one of the most felicitous separations ever granted by any lawful authority.

Jefferson and Madison may have had slightly different reasons, but they agreed on the result. Jefferson believed that the church should be separate from the state to safeguard secular interests; Madison held that both religious and secular interests would be advanced by decentralizing religious power so as to prevent domination by any single sect.\footnote{Laurence H. Tribe, *American Constitutional Law* 1159 (2d ed. 1988); see also Erwin Chemerinsky, *Constitutional Law* 970 (1997).} In this respect, Madison’s views on the diffusion of religious power parallel those of his beliefs as to the diffusion of political power so as to prevent the tyranny of any majority.\footnote{See The Federalist Nos. 10, 51 (James Madison).}

And so, as Americans, we entered into the 19th century with potent ideas as to how to restrain government. We wanted the law evicted from
our houses of worship, and we wanted religious dogma excised from our law books. We also wanted the government to understand that it serves us, not the other way around. And we were fearful enough of the abuse of governmental power that with the help of Baron de Montesquieu and others, again including John Locke, we sliced the government into three.104

IV.

For the last 225 years, Americans have been operating within that framework, but with every passing year, and with extraordinary acceleration, we've redefined what we expect of the law. We've seen this in three areas, and the changes have in some ways been so significant as to far outdistance what happened over the preceding 10,000 years. Not surprisingly, they all deal with freedom, and indeed in some ways the history of the law may be written in terms of a quest for freedom from one kind of oppression or another.

In New York, we adopted a law in 1817 abolishing slavery in 1827.105 By March 7, 1857, the New York Times stated that the Dred Scott decision, just handed down, would be startling to the opinions of most Americans.106 Eight years later, on December 6, 1865, we finally enacted the Thirteenth Amendment, declaring that “neither slavery nor involuntary servitude . . . shall exist within the United States.”107 With that stroke, this nation advanced beyond the assumptions of Aristotle, Plato, the Romans, and the European thinkers, not to mention those of Thomas Jefferson and even the Bible. Given the length of time the institution endured in Western civilization and in the United States, it’s disappointing to see how long it took. But abolish it we did, even though we were not the first country to do so.

We have negotiated the sometimes bumpy road from the Three-Fifths


105. 1817 N.Y. Laws 197.


107. U.S. Const. amend. XIII.
Compromise\textsuperscript{108} to Dred Scott,\textsuperscript{109} to the Thirteenth Amendment, to Plessy v. Ferguson,\textsuperscript{110} to Brown v. Board of Education,\textsuperscript{111} to the protection of minorities by requiring that any racial classification must meet “strict scrutiny.” That doctrine began humbly enough in the now famous Carolene Products footnote\textsuperscript{112} but is now an established tenet of our jurisprudence.\textsuperscript{113} In short, this land was made for you and me.

Secondly, throughout all of recorded history—and undoubtedly long before that—the legal systems from which we spring did not provide, and made no pretense of providing, for the equality of the sexes.

In one of his lesser known passages Aristotle declared that “the male is by nature superior, and the female inferior; and the one rules, and the other is ruled; this principle, of necessity, extends to all mankind.”\textsuperscript{114} Plato wrote of the “wandering womb” which, if left unfruitful, travels in various directions in the body and closes up passages of the breath and causes a variety of diseases, later known as “hysteria,”\textsuperscript{115} and went on to say that women were the offspring of men who were cowards or led unrighteous lives, and were thus a symbol of the degeneration of the human race. In the Bible, males were valued more highly than women, at a ratio of approximately five to three.\textsuperscript{116}

Under early Roman law, the father was given sole and absolute power over his children, whom he had the right to kill or sell, and there is mention only of the husband’s right to repudiate his wife.\textsuperscript{117} Under English common law, women and men were defined as one person—the male person. Women had no right to property or to the custody of children.\textsuperscript{118}

\begin{thebibliography}{99}
\bibitem{108} U.S. \textsuperscript{const.} art. I, §2.
\bibitem{110} 163 U.S. 537 (1896).
\bibitem{111} 347 U.S. 483 (1954).
\bibitem{112} United States v. Carolene Products Co., 304 U.S. 144, 153, n.4 (1938).
\bibitem{113} Chemerinsky, supra note 102 at 414-417.
\bibitem{114} Aristotle, supra, note 40, at * 1254b13.
\bibitem{116} See Numbers 30:1-16; Leviticus 27:1-7; Genesis 19:1-8; Anderson & Zinsser, supra note 115, at 21; cf. U.S. \textsuperscript{const.} art. I, §2, cl. 3, amended by U.S. \textsuperscript{const.} amend. XIII.
\bibitem{118} Anderson & Zinsser, supra note 115, at 338.
\end{thebibliography}
When Europeans began thinking about the new world, our first colleges were founded to train men for the ministry. No women were allowed entrance. A hundred and fifty years after that, we were forming our American republic, and no women were among the founders or signers. It was not for yet another hundred years that women got the right to vote, and still longer in beginning to approach equal pay for equal work.

In terms of the evolution of the law, we might be tempted to boast of how, in the last 200 years, we have rewritten our notions of gender equality at an accelerated pace. But the wonder of it is, what took so long and how did our progenitors defend these earlier practices? What got into us in the 19th century to explode notions of inequality that had been imbedded in our predecessor cultures for thousands and thousands of years?

Some historians might say that this developed, at least in part, in early or primitive societies that centered on warriorship and hunting. But increasingly, technology has devalued the importance of brute force. We have bulldozers to move large stones and slaughterhouses to bring beef to the table. In the typical American household, brute strength is seen in its most critical form when the woman asks the man to open a particularly stubborn jar top or take out heavy loads of garbage, and even there sheer physicality is bowing to technology. And for those of us who crave it, there is always hockey.

I observe only that the changes are encouraging but incomplete, and I emphasize that these advances are fragile and must be guarded zealously because there are people in the world and even in this country who would cast them out in an instant if they could. Maybe the most encouraging sign for safeguarding these gains is the legal frame of mind of most Americans. We find it hard to believe that the laws in our earlier stages of legal evolution were so different from what we expect today, that we call those earlier practices irrational and barbaric. My guess is that if you were to go to the shopping mall and suggest to teenagers that until relatively recently in history women could not vote or own property, some teenagers would tell you you’re crazy. This may reveal ignorance, but it is in a way gratifying because of what Americans have come to expect of the law.

The third and last area also deals with freedom, but in the individual rather than the collective sense. We have come to recognize liberties undreamed of by earlier cultures and even by our own. All cultures have understood the notion of liberty in the relationship between the citizenry and the sovereign. And so John Locke could say that the people—a collective entity—have a right to expel a tyrant. But, historically speak-
ing, the notion of the individual having enforceable rights against the
government is quite new.

As Americans, we believe that the government has no power to re-
quire certain things of us as individuals even though the mandate may be
the product of laws passed by way of democratic process. How can this be,
considering that laws are passed by majority rule? The answer, of course,
is that our laws must comport with our higher notions of liberty, and
that if a government passes a law that without due process denies any
individual life, liberty, or property, the law cannot stand. So once again,
we’re back to Antigone. If the Mayor of the City of New York decreed that
anyone who opposes a transit fare hike may never receive a proper burial
and must be left to the buzzards, we would call it impermissible, even if
the City Council passed it as a law. We would not call it a violation of
“natural law,” but we would say it is unconstitutional.

It’s the same basic idea, but there’s a critical difference. For all of her
principles, Antigone was killed—just as the Athenians killed Socrates for
instructing the youth. Today, Antigone and Socrates would prevail if tried
in an American court of law. They would win dismissals even if the laws
they were accused of violating had been enacted by majority vote. If a
legislative body in America were to pass a law punishing someone for
speaking disrespectfully of the government or teaching the youth to re-
Flect on and question governmental authority, we would have little diffi-
culty in striking down the law, and the prosecution.

V.

Earlier cultures—even ours—believed that the way to maintain na-
tional strength was by dominating people and suppressing ideas. (After
all, the alien and sedition laws were American.) Now we believe much the
opposite. It has taken us thousands of years to reach this point of juris-
prudential maturity, and we have been getting better at it every day. As
recently as 1920, the United States Supreme Court upheld a punishment
for mildly criticizing the government for entering World War I.119 We no
longer find it necessary to do that because, little by little (and with some
backsliding now and then), we have figured out that the law is an instru-
ment best used to liberate rather than stifle. It has taken us centuries to
evolve to this realization, and the most remarkable thing about it is that
many of our most extraordinary surges have taken place in the last two
centuries. If a 10,000-year span were a single day of history, this has all
happened within the last five or ten minutes.

Before looking at the big picture I questioned whether the law has advanced nearly as well as science and technology. For thousands of years, we used horses and oxen and only recently developed the automobile, put astronauts on the moon, and introduced electricity and vaccines. But in the law column, over the same relatively recent period of time, Americans have maintained a government based on the consent of the governed, abolished slavery, legislated gender equality, and disestablished religion. Until 1868, with the Fourteenth Amendment, the United States Constitution had contained no provision for equal protection, and so it is another of our more recent concepts. But since that time, we have used equal protection to combat centuries of discrimination based not only on gender and race but on national origin, alienage, sexual orientation, age, marital status, and wealth. To this we add voting and apportionment rights, along with rights to privacy, as expressions of liberty. This is our way of saying that while we respect our government, we don’t want it intruding unnecessarily in our houses of worship, our homes, our bedrooms, or our bodies. When looking at the big picture, it’s even more remarkable to realize how many of these changes have occurred within the last 50 years. Not bad. In fact, spectacular. By way of comparison, as science has advanced so as to give us antibiotics and inoculation against disease, due process and equal protection under law have been the antibiotics and inoculations against governmental abuse.

With apologies to Eugene O’Neill, I have entitled this talk “The Law’s Evolution: Long Night’s Journey into Day.” I mean to suggest, of course, that the law has slowly emerged from darkness into light, with some glittering moments along the way. But I cannot assert that we are at high noon. We have a long way to go in our own allocation of rights and responsibilities, not to mention the challenges of international law and those in other realms that we cannot even imagine. Above all, we cannot be complacent in defense of our freedom and equality, because those commodities are too fragile and too newly won to have acquired indelible security. The ideal, of course, is the exquisite balance between individual liberties and the rightful demands of an ordered society. Perhaps that level of perfection is unattainable, but as Americans, we have understood the importance of continually adjusting the balances. This is particularly
true in an era that will undoubtedly bring with it the prospect of keeping ourselves secure under the threat of terrorist attack.

But I am fervently optimistic because we are smart enough—and I think courageous enough—to realize that we are not at high noon, and because we have history behind us, whispering valuable lessons in our ear. We are Americans, and we originate culturally in continents that include Europe, Africa, and Asia, but in a manner of speaking, we are part Sumerian, part Hebrew, part Greek, part Roman, part Christian, part Scandinavian, part Celtic, and part Anglo-Saxon, and we have managed to learn a good deal from our forebears. That is our legacy, and it will guide us well in our future.
Ending Discrimination in Gifted Education in the New York City Public Schools

The Committee on Education and the Law

INTRODUCTION

• Midway through her child’s first year of public school, the mother of a kindergartener is surprised to discover that one of the school’s four kindergarten classes (not her child’s) is designated as a gifted program. When she inquires about the program, she is informed that the deadline for applications for the program is during the year prior to kindergarten, and that the program is currently full.

• Parents of a four-year old visit their neighborhood elementary school to get a sense of the programs and staff. As they tour the predominantly minority school, they are surprised to notice that one of the classrooms is almost entirely white. They are told that this is the gifted class, and that admission to it is based on scoring above the 95th percentile on an IQ test.

• Spanish-speaking parents wish to have their five-year old, whose first language is Spanish, apply for admission to their district’s
gifted program. They are told at the district office that testing for the program is only done in English, and that there is a $50 fee for the testing.

- A four-year-old child labeled as speech impaired scores sufficiently high on an IQ test to qualify for the district’s gifted program. He applies for a gifted kindergarten class in a school that has plenty of openings, but his parents are told that the school lacks the special education staff to provide the support that he needs.

For the past several years, the Office for Civil Rights of the United States Department of Education (“OCR”) and the New York City Department of Education (“the Department”; formerly the Board of Education of the City of New York City) have been engaged in a series of on-again, off-again discussions intended to resolve a pair of civil rights complaints that were filed with OCR in 1997. The complaints allege systemic discrimination in the manner in which gifted education programs are administered in some of the Department’s thirty-two community school districts. In particular, the complaints (which were combined post-filing into a single OCR “compliance review”) allege that minority and limited English proficient (“LEP”) students are denied equal access to gifted programs.¹ These allegations are of great concern because admission to a gifted program is often seen as entrance to a public education experience of higher expectations, greater achievement, and ultimately, access to competitive high schools and colleges.

Despite having the authority to do so, the Department has failed to promulgate and enforce regulations regarding nondiscrimination and use of best practices in gifted programs. And, despite significant evidence of violations of Title VI of the Civil Rights Act of 1964 and its implementing regulations, as well as Section 504 of the Rehabilitation Act of 1973 and its implementing regulations,² OCR has failed to take any kind of enforcement action against the Department, or even to issue any findings regarding its investigation.

The Association of the Bar of the City of New York (“the Association”) urges the Department and OCR, in consultation with relevant stakeholders and experts, to move quickly toward a monitored resolution re-

¹ As will be seen in this report, there are also significant issues regarding access to gifted programs for students with disabilities. Meaningful reform must address these issues as well.

² Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against students with disabilities.
resulting in equitable access to gifted programs. This Report consists of an overview of the legal standards applicable to gifted programs, an analysis of some of the problems with gifted programs in New York City, a description of elements of model programs, and recommendations for resolving the OCR case and remedying discriminatory practices relating to gifted education in the City.

Legal Standards
The determination of whether a student should be placed in a gifted education program is a high stakes educational decision and a form of educational tracking—the systematic practice of sorting students into different levels, classes, or programs, based on their perceived abilities. Ways of measuring student abilities may include, but are not limited to, achievement tests, intelligence tests, grades, and/or teacher or parent recommendations. Students placed in high tracks are often afforded access to enhanced educational opportunities that enable them to succeed in high school and prepare for college, while students in lower tracks may suffer the consequences of low expectations that they will achieve academically. Gifted programs are essentially a form of tracking that provides “students with perceived exceptional abilities” with “differentiated instruction.”

Black and Latino students nationwide are disproportionately placed in lower tracks and under-represented in higher tracks. Similarly, gifted children with disabilities are frequently underserved and understimulated. Federal constitutional, statutory, and regulatory principles form the legal framework applicable to the determination of whether a school district’s process of identifying and placing students in gifted and talented programs is racially discriminatory. The Equal Protection Clause of the 14th Amendment prohibits intentional discrimination based on race, color, or national origin. Title VI of the Civil Rights Act of 1964 also prohibits

4. Id. at 34.
5. Id.
6. Id.
discrimination on the basis of race, color, or national origin by recipients of federal funding. While the text of Title VI itself reaches only instances of intentional discrimination, the statute’s implementing regulations prohibit policies or practices that have a discriminatory disparate impact on students based on their race, color, or national origin. Therefore, Title VI claims may be proven under two primary theories: intentional discrimination or disparate impact.

**Intentional Discrimination**

Courts employ the same legal analysis to claims of intentional discrimination under Title VI and the Equal Protection Clause of the 14th Amendment. Both Title VI and the Equal Protection Clause require educational institutions to apply their policies and practices consistently to similarly situated individuals or groups, regardless of their race or national origin. A plaintiff alleging intentional discrimination must demonstrate that the defendant intentionally discriminated against the plaintiff because of his or her race or national origin. Therefore, educational placement decisions that expressly classify persons on the basis of race are discriminatory on their face.

**Disparate Impact**

While Title VI’s implementing regulations do not specifically address testing and assessment, they prohibit recipients of federal funds from utilizing “criteria or methods of administration which have the effect of subjecting individuals to discrimination.” Therefore, Title VI’s regulations recognize that discrimination may occur when the use of neutral

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10. OCR Resource Guidance at 14 (citing 34 C.F.R. § 100.3(b)(2)).


12. See People Who Care v. Rockford Bd. Of Educ., 851 F. Supp. 905, 958-1001 (N.D. Ill 1994), remedial order rev’d in part, 111 F.3d 528 (7th Cir. 1997) (finding that school district treated students differently on the basis of race because minority students with test scores qualifying them for two or more ability levels were more likely to be assigned to the lower level class than similarly situated white students without explanatory reason; district had to adopt objective, non-racial criteria to assign students to classes, but was not required to abolish tracking system).


15. 34 CFR § 100.3(b)(2).
criteria results in racial disparities and those criteria lack educational justification. Consequently, Title VI may provide the most accessible avenue for challenging the legality of a school system’s policies regarding student placement in gifted and talented programs.

The elements of a disparate impact claim under Title VI’s regulations are substantially similar to those applicable in Title VII employment discrimination claims. The party challenging the educational practice has the burden of establishing disparate impact. However, demonstrating the existence of disparities alone does not establish a Title VI violation. Instead, after the challenging party establishes the existence of disparate impact, the burden shifts to the educational institution, which must show that the challenged practice is educationally justified. If the educational institution establishes sufficient educational justification, the party challenging the test must show that an alternative practice with less disparate impact is equally effective in meeting the institution’s educational goals or that the defendant’s proffered justification is a pretext for discrimination.

A plaintiff generally meets the burden of establishing a prima facie case of disparate impact by identifying the challenged facially neutral educational policy and showing that it is causally related to an adverse impact on his or her race, color or national origin. While no rigid mathematical formula exists for establishing disparate impact through statistical data, the disparities must be substantial enough to raise an inference that the challenged practice caused the disparities. To establish causation, a plaintiff must offer statistical evidence of the kind and degree sufficient to raise the inference of causation.

In cases alleging disparate impact in educational programs, a defendant satisfies the substantial legitimate justification burden by demon-
strating the educational necessity of the challenged practice by showing that it “bears a manifest, demonstrable relationship to classroom education[ ].” 23 An educational necessity is an action that is necessary to meet an important educational goal. 24 Courts usually give deference to educational institutions to define their goals and instead focus their analysis on whether the challenged tests actually support these goals. 25 In making this determination, courts consider the basic requirements of professional testing practices—the “validity, reliability and fairness”—of the test in question “provided by the test developer and test user to determine the acceptability of the test for the purpose used.” 26 Deference is given to testing practices within professionally accepted standards. 27

If the educational institution presents sufficient evidence that the challenged practice is educationally justified, the plaintiff can demonstrate the existence of an equally or comparably effective alternative practice that meets the institution’s goals and that would eliminate or reduce the adverse impact. 28 Factors that the court considers in evaluating the feasibility of the proposed alternative practice include costs and administrative burdens. 29

In December 2000, OCR published “The Use of Tests As Part of High Stakes Decision-Making for Students,” (“OCR Resource Guide”) in order to help educators and policy-makers “frame strategies and programs that promote learning to high standards in ways consistent with nondiscrimination laws.” 30 The OCR Resource Guide offers guidance regarding professional standards for high stakes testing, particularly those set forth in the “Standards for Educational Psychological Testing,” which were developed by a committee of the American Psychological Association, and the National Council on Measurement in Education, and applicable federal laws that apply to high stakes testing practices. 31 The OCR Resource Guide emphasizes that, together, “sound testing practices and federal nondiscrimi-

23. Georgia State Conference, 775 F.2d at 1418.
24. Id.
25. See id; Sharif, 709 F. Supp. at 354-55.
27. Id.
28. Georgia State Conference of Branches of the NAACP, 775 F.2d at 1417.
29. See Sharif, 709 F. Supp. at 363-64.
30. OCR Resource Guide at iii.
31. Id at 2.
nation laws can work to ensure student achievement and that educational policies do not deny students equal educational opportunity on the basis of race, color, national origin, gender, or disability.”

The OCR Resource Guide states that “[w]hen making high stakes decisions that involve the use of tests, it is important for policy-makers and educators to consider the intended and unintended consequences that may result from the use of test scores.” Moreover, the OCR Resource Guide cautions against the use of a single test score to make high stakes decisions about individuals.

Special Issues for Limited English Proficient (LEP) Students

High stakes testing for LEP students raises special issues. In Lau v. Nichols, the United States Supreme Court held that a school district’s policy of teaching national origin minority group children only in English and without any special assistance, deprived them of the opportunity to benefit from the districts educational program, including meeting the English language proficiency standard required for a high school diploma.

Later, in Castaneda v. Pickard, the Fifth Circuit, relying on language of the Equal Educational Opportunities Act (EEOA) set forth the steps that school districts must take to ensure that LEP students overcome language barriers and can meaningfully participate in the district’s educational programs. Under the standards set forth in Castaneda, “school districts have broad discretion in choosing a program of instruction for limited English proficient students. However, the program must be based on sound educational theory, must be adequately supported so that the program has a realistic chance of success, and must be periodically evaluated and revised, if necessary to achieve its goals.”

Title VI’s disparate impact framework may be applied to determine whether high stakes testing practices have a discriminatory effect on students with limited English proficiency. Title VI requires school districts to provide equal educational opportunities to national origin minority students whose inability to speak and understand the English language excludes them from effective participation in the educational program of-

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32. Id. at iv.
33. Id. at 12.
34. Id. at iv.
37. OCR Resource Guide at 58.
fered by the district. Depending upon the purpose of the educational testing and the "characteristics of the population being tested, accommodations or other forms of assessment of the same construct may be necessary." According to the OCR Resource Guide, there are three "particularly important" areas involving high stakes testing for LEP students:

1. tests used to determine a student's proficiency in the area of speaking, listening, reading, or writing English for the purpose of determining whether the student should be provided with a program or services to enable the student to acquire English language skills (and later, for the purpose of determining whether the student is ready to exit the program or services);
2. tests used to determine if the student meets the criteria for specialized programs, such as gifted and talented, or vocational education programs; and
3. system wide tests, including graduation tests, administered to determine if students have met performance standards.

The OCR Resource Guide explicitly states that "tests used by schools to help select students for specialized instructional programs, including programs for gifted and talented students, should not screen out [LEP] students unless the program itself requires proficiency in English for meaningful participation."

Special Issues for Students with Disabilities
Under Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulations, students with disabilities must be provided with equal access to programs and activities run by federally-funded educational institutions. Section 504 prohibits the exclusion of otherwise qualified students from gifted programs on the basis of disability and requires that districts provide reasonable accommodations to ensure that students with disabilities can meaningfully participate in such programs.

38. See Lau v. Nichols 414 U.S. at 566-68.
40. Id.
41. Id. at 59.
43. 34 C.F.R. § 104.4.
Moreover, the Individuals with Disabilities Education Act entitles each child with a disability to a “free appropriate public education.” 44 This entitlement also appears in the implementing regulations for Section 504. 45 A “free appropriate public education” means “educational instruction specially designed to meet the unique needs of the handicapped child.” 46 If a school system can meet the child’s unique needs only in a gifted program, admittance to that gifted program is legally required. 47

The New York City Context

There have been a significant number of articles and studies providing varying levels of detail about New York City’s public school gifted programs. In 1995, the New York Times published an article critiquing the gifted program in Brooklyn’s District 15, 48 one of the then thirty-two community school districts serving elementary and middle school students. 49 The District’s gifted program, which at that time served about 450 students, determined admission solely through an IQ test; students with IQ scores of at least 129 were eligible for admission to the program. 50 Although District 15’s overall student enrollment was only 21.5% white, the enrollment of the gifted program was 79.2% white. 51 In odds ratio terms, this meant that a white student was about fifteen times more likely to be in the program than a minority student. The article raised the spectre of discrimination, but did not indicate whether the problems identified (use of sole criterion for admission decisions, enormous racial disparities) existed in other districts in the City.

In early 1997, a complaint was filed with OCR alleging that District 15’s gifted program was administered in a manner that violated Title VI

44. 20 U.S.C. § 1412(a).
45. 34 C.F.R. § 104.33(a).
47. See, e.g., In re Department of Educ. of the City of New York, 28 Individuals with Disabilities Educ. Law Rep. (LRP Publications) 1093 (January 9, 1998) (decision of Impartial Hearing Officer) (finding that student is entitled to remain in gifted program because he “requires” the stimulation it offers).
48. District 15 includes the neighborhoods of Boerum Hill, Carroll Gardens, Cobble Hill, Kensington, Park Slope, Red Hook, Sunset Park, and Windsor Terrace.
50. Id.
51. Id.
of the Civil Rights Act of 1964. Also in 1997, the Puerto Rican Legal Defense and Education Fund ("PRLDEF") filed a similar Title VI complaint with OCR, but on a citywide basis, and particularly focusing on the alleged exclusion of LEP students from gifted programs. Approximately one year later, OCR closed both complaints, stating that it was instead initiating a proactive, citywide compliance review of the issues raised in the complaints. Meanwhile, then-Chancellor Rudolph Crew announced his intention to implement citywide regulations to ensure that gifted programs were administered fairly, but no lasting effort was made during his tenure to impose citywide requirements regarding gifted program administration.

The flurry of attention to gifted education was largely inspired by the New York City chapter of the Association of Community Organizations for Reform Now ("ACORN"), which in 1996 issued the first of its "Secret Apartheid" reports. The 1996 report described visits to New York City public schools by minority and nonminority testers posing as parents of 4-year olds and seeking information about kindergarten and elementary school programs. While the number of visits conducted by the testers was limited (about one hundred visits were conducted), and some of the findings may have lacked statistical significance, the overall picture that emerged was a disturbing one. Black participants were provided with access to the educators half as often as their white counterparts. White participants were given tours of school buildings more than twice as often as Black participants. There were significant differences between the groups when it came to the attitude and behavior of school personnel as well. ACORN concluded that, whether by design or bad management, "racial steering" begins as early as kindergarten. Because gifted programs often commence in kindergarten, differential access to information about these programs based on race raised great concern.

Spurred in large part by the ACORN report, on June 23, 1997, the New York City Council's Committee on Education held an oversight

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53. Id. at 7.
54. Id.
55. Id. at 10.
56. Id. at 11.

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hearing on Department policies regarding elementary school gifted programs. Among the Council’s preliminary findings were:

- Some districts used an IQ test as the sole criterion for admission.
- Grade level of entry varied among districts.
- Some districts required parents to pay for admissions testing.
- Citywide, Latino students were greatly underrepresented in gifted programs; white and Asian students were highly overrepresented.

The Council also noted that then-Chancellor Rudy Crew had “issued a draft memorandum to District Superintendents that outlines new proposed regulations regarding access to gifted programs in the local community school districts.” As noted above, the regulations were neither finalized nor implemented.

In 1998, the third of ACORN’s reports found that a number of New York City gifted programs create segregated pockets of white students within racially diverse general school populations. In fact, ACORN found that

57. The Council noted that about 34,000 of the more than 744,000 elementary and middle school students were enrolled in gifted programs (about 4.6% of the student population), with selection processes and criteria varying greatly among districts, and with some districts not offering gifted programs. New York City Council, Board of Education Policies Regarding Elementary School Gifted Programs 1-2 (1997) (hereinafter “the City Council Report”).

58. While black students were proportionately represented based on citywide numbers, this was largely due to the existence of some sizable gifted programs in one or more districts that were nearly 100% black in their overall enrollment. By contrast, in districts in which whites were represented in greater numbers, black students were greatly underrepresented in the gifted programs. Office of Systemwide Evaluation and Accountability, Division of Assessment and Accountability, New York City Board of Education, Comparison by Community School Districts of Findings Pertaining to Disproportionate Applications and Acceptances to Gifted and Talented Programs in New York City Community School Districts in 1996-1997 and 1997-1998 (February 24, 2000) (hereinafter “the second Department Report”).

59. The City Council Report at 3. Crew’s proposed regulations would have: required the posting of information about district gifted programs in district offices and other locations frequented by parents; required Districts to submit explanations of the admissions tests used to the central Department; prohibited Districts from charging fees for admissions testing; and recommended that Districts refrain from using a single test for determining admission. Id. at 4.

60. The report noted that at PS 105 in District 20 (in Brooklyn), all of the school’s white
in at least 14 of the City’s gifted programs, half or more of the school’s white students were enrolled in its gifted program.61

Over the past six years, the Department has prepared several internal reports (some in response to the OCR compliance review) regarding gifted programs. The first such report analyzed data from the 1995-1996 school year, received by the Department after a request for information was made by the Chancellor’s office.62 Only 24 of the 32 community school districts responded to the request.63 The Department identified numerous gifted programs, varying in size from 28 to over 3,000 students.64 Of the more than seventy programs identified, “some relied exclusively on IQ scores” as a screening device for entry,65 8% of the programs required parents to pay a testing or application fee,66 and there was great variability in notice and dissemination practices.67

The first Department Report concluded that there was “minimal effort on the part of some districts/schools to familiarize parents with the existence of gifted programs and admission requirements,” and criticized the “limited conception of ‘giftedness’ by some who defined it primarily

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61. I d.  at 18.

62. Office of Systemwide Evaluation and Accountability, Division of Assessment and Accountability, New York City Board of Education, Programs Serving Gifted and Talented Students in New York City Public Schools, 1995-1996 (undated report) (herein after “the first Department Report”).

63. I d.  at i. This lack of response from many districts to requests for information that should be publicly available (even when those requests come from the Chancellor’s office) is disturbing and all too common. The AFC Report noted that its authors had contacted all 32 community school district offices for information about their gifted programs. 22 out of the 32 districts either did not return phone calls inquiring about their gifted programs or failed to provide informational materials about the programs after such materials were requested. AFC Report at 63-65.

64. First Department Report at 3.

65. I d.  at 9.

66. I d.  at 12.

67. I d.  at 8-9.
in terms of intellectual ability as demonstrated by test scores." The Report recommended that the Department focus on data collection; issue regulations establishing standards for notice, admission requirements, and application procedures; and ensure selection criteria “that are clearly related to their respective goals and educational objectives.”

The second Department Report was issued in February 2000 in response to OCR’s then two-year-old compliance review. Again, many school districts responded with incomplete data, leading the authors to focus only “on the 12 CSDs [community school districts] for which complete data were available for non-ELL [“ELL” stands for “English language learner,” a term that is synonymous with LEP] students for either 1996-1997 or the 1997-1998 school years.” The study was based on only 9 districts for the 1997-1998 school year, and only twelve for the 1996-1997 school year, out of the thirty-two districts.

Even this limited data response showed many troubling statistics. For example, in District 2 (in Manhattan), whites were 3.6 times more likely to apply for admission to the gifted program than blacks, 4.4 times more likely to apply than Latinos, and 3.9 times more likely to apply than Asians.

In District 15, whites were 9.6 times more likely to apply than blacks, and white applicants were 4.9 times more likely to be admitted than black applicants. This meant that a white student was 47 times more likely to both apply and be admitted to the district’s gifted program than a black student.

Working with the same data, obtained through a request to OCR under the Freedom of Information Act, PRLDEF conducted its own analysis, and made the following observations:

- Two districts stated that they did not have race enrollment

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68. Id. at i.
69. Id. at ii.
70. See Second Department Report.
71. Id. at 2.
72. Id.
73. Id. at 8-10.
74. Id. at 8, 11.
76. Districts 3 (located in Manhattan) and 13 (located in Brooklyn).
figures for their gifted programs; other districts failed to provide the central Department with breakdowns of enrollment data by race or LEP status.

- Sixteen districts, collectively enrolling over 45,000 LEP students, did not admit a single LEP student to their gifted programs.\textsuperscript{77}
- Two districts\textsuperscript{78} admitted to using an IQ test as the sole criterion for admission to their gifted programs; other districts used an IQ test as a screening device.\textsuperscript{80}
- In many districts, white and non-LEP applicants were most likely to apply for the programs; at the same time, many of the same districts had informal or limited outreach efforts to notify parents about their programs.\textsuperscript{81}

The third, most recent Department report collected information regarding 112 gifted programs in 31 community school districts. The report acknowledged that gifted programs “must use multiple measures to determine program eligibility, acceptance, and participation,” that “[n]o single measure may be used as a program gatekeeper,” and that “districts and schools may not establish a minimum IQ score as a sole condition for program eligibility, acceptance, or participation.”\textsuperscript{82} Unlike previous Department reports, the third report did not collect enrollment data regarding the 112 programs; instead, districts were asked a series of survey questions describing the characteristics of their programs. Accordingly, the third report did not address race enrollment issues.

Despite the lack of specific enrollment data, the third report found a “successive decline in the percentage of respondents indicating ELL eligibility, consideration, acceptance and placement,” and concluded that ELL

\textsuperscript{77} Some of these districts primarily advertised their programs through word of mouth; some districts only tested students in English for admission to their programs; some gifted programs were provided only in English.

\textsuperscript{78} Districts 4 (located in Manhattan) and 15 (Brooklyn).


\textsuperscript{80} In other words, these districts used an IQ test as a sole criterion “gatekeeper” to be met before applicants are eligible to be selected based on other criteria.

\textsuperscript{81} PRLDEF Analysis at 2.

\textsuperscript{82} Division of Assessment and Accountability, Office of Systemwide Evaluation and Accountability, New York City Board of Education, Gifted and/or Talented Program Evaluation 2000–2001 (2002) at 1.
students were significantly underrepresented in gifted programs throughout the City. This led the Department to recommend that program personnel consider “when feasible, increasing instrument administrations in languages that are frequently spoken by NYC public school students (e.g., Chinese, Haitian-Creole, Russian).”

The third Department Report also found that special education students are largely excluded from gifted programs. While more than three-quarters of respondent districts stated that special education students were eligible for gifted programs and half indicated that they had been considered for program admission, less than one-third actually accepted special education students in gifted programs during the 2000-2001 school year.

The third Report made clear the continued reliance on IQ tests in determining eligibility for gifted programs. Other standardized tests were also used as sole admission criteria or as gatekeeper criteria.

Finally, the third report demonstrated significant inconsistencies in the ways in which gifted programs were publicized to the families of potential applicants. About three-quarters of respondents to the third Report indicated that gifted programs are advertised in the schools. A much smaller proportion of programs used other means of informing prospective applicants, a particularly disturbing pattern given the frequent use of kindergarten as an entry point for the programs.

83. Id. at 6, 9-11. While more than three-quarters of the community school districts surveyed acknowledged that LEP students were eligible for their gifted programs, only 60% of the 112 programs indicated that LEP students had actually been considered for gifted programs in last application period. Moreover, fewer than half of the districts reported that ELL students had been accepted into gifted programs during the 2000-01 school year, and only 17% of school districts offer eligibility instruments in languages other than English; of those, 80% stated that the non-English eligibility assessments were conducted only in Spanish.
84. Id. at 11.
85. Id.
86. Eight out of 31 respondent school districts (26%) indicated that IQ tests were very important in assessing whether students are eligible for gifted programs. Strangely, the Department declined to identify these eight districts.
87. Eighty-five percent of respondents surveyed indicated that scores on city-wide/state reading tests served as gatekeeper requirements for gifted programs, and nearly 80% reported that these scores determined a student’s eligibility for gifted programs; 10.7% indicated that IQ scores were a gatekeeper requirement.
88. Additionally, 37.5% reported that programs were publicized in district offices. By limiting outreach efforts to posting information at schools and/or school districts, school districts ignore opportunities for parent outreach that might reap greater representation of students of color.
89. Less than ten percent of respondents indicated that they publicized their gifted programs
The third Report concluded with a set of modest recommendations:

providing administrations of eligibility instruments in languages other than English and Spanish, increasing the awareness of program personnel of programs that accept talented special education students, and establishing written guidelines to assist programs in using multiple eligibility measures jointly rather than successively.90

The Report did not suggest that the Department impose centralized requirements regarding the use of nondiscriminatory best practices in dissemination of information about programs, and selection and admission criteria.

Given the evidence—inequitable access to information about New York City gifted programs, use of IQ tests as a sole or a gatekeeper criterion for admission in a number of programs, use of a single standardized test score as a gatekeeper criterion in many programs, underrepresentation of black and Latino students in some programs, and widespread underrepresentation of LEP students and students with disabilities—the need for more stringent Department-imposed requirements and oversight is clear. The evidence strongly suggests violations of Title VI91 and Section 504.

The inequities described above are aggravated by retention practices. Children admitted to gifted programs in kindergarten typically gain a de facto tenure through at least fifth grade. There is no year by year consideration as to whether there are other children who are significantly more qualified for the limited seats in the programs. Consequently, there are few if any openings in the elementary school grades and beyond.

Because of these retention practices, virtually excluded from the programs are: a) gifted children who recently moved into the City or the Community School District; b) gifted students seeking transfers from private and parochial schools; c) gifted children whose parents did not apply for admission for kindergarten placement; and d) gifted children who did not achieve the highest scores on IQ tests when they were four or five years old, but who later demonstrated superior abilities in the classroom and on tests.

90. Id. at Abstract.
91. Particularly under the Title VI regulations’ disparate impact standard.
This problem can be alleviated in several ways. Kindergarten programs can be eliminated, with resources shifted to the higher grades. For example, in the Spring of 1997, Community School Department 26 voted to change the entry level grade from kindergarten to grade one. Under the old system, initial admission to kindergarten was based solely on IQ scores. Under the new system, initial admission to grade one was based on a matrix of IQ scores, standardized academic achievement scores and teacher ratings. Also, the programs could start out smaller for the youngest children, with resources shifted to add seats in later grades. For example, a district might start out with 50 places in first grade and end up with 75 places in fifth grade. Finally, fair and uniform retention policies can be implemented which result in the removal of lower achieving students from gifted programs to open places for students who can make better use of the special services.

BEST PRACTICES
Definitions and Theories of Giftedness

There is no single theory of giftedness. In their 1994 report, "Towards a New Paradigm for Identifying Talent Potential," Mary M. Fraiser and A. Henry Passow stated: “For decades...a narrow definition of giftedness—one limited to intelligence, academic aptitude, and academic achievement—guided identification procedures.” Fraiser and Passow asserted that, while the definition of giftedness had expanded since the 1970s, to take into account such things as creative thinking and leadership ability, a focus on academic aptitude still predominates. The federal No Child Left Behind Act of 2001 defines gifted and talented students as those “who give evidence of high achievement capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields, and who need services or activities not ordinarily provided by the school in order to fully develop those capabilities.” Similarly, regulations enacted under New York's Education Law state that gifted pu-

94. Id. at 9.
95. Id
pils “show evidence of high performance capability and exceptional potential in areas such as general intellectual ability, special academic aptitude and outstanding ability in visual and performing arts.”

Researchers maintain that gifted children generally share certain characteristics including the ability to develop and express original ideas and insights, think logically, and act independently. Gifted students often have very well developed memories and advanced language, reading, comprehension, and leadership skills. Dr. Joseph S. Renzulli, Director of the National Research Center on the Gifted and Talented notes that research in the field has distinguished “schoolhouse giftedness,” which is defined as “test-taking or lesson-learning giftedness,” from “creative-productive giftedness,” which describes “those aspects of human activity and involvement where a premium is placed on the development of original material and products that are purposefully designed to have an impact on one or more target audiences.” Renzulli further distinguishes the concept of “gifted” from that of “potentially gifted.” He states:

The general approach to the study of gifted persons could easily lead the casual reader to believe that giftedness is a condition that is magically bestowed on a person in much the same way that nature endows us with blue eyes, red hair, or a dark complexion. This position is not supported by the research. Rather, what the research clearly and unequivocally tells us is that giftedness can be developed in some people if an appropriate interaction takes place between a person, his or her environment, and a particular area of human endeavor. . . . Implicit in this concept of the potentially gifted, then, is the idea that giftedness emerges or “comes out” at different times and under different circumstances. Without such an approach there would be no hope whatsoever of identifying bright underachievers, students from disadvantaged backgrounds, or any other special population that is not easily identified through traditional testing procedures.

(Emphasis in original).

97. 8 N.Y.C.R.R. § 142.2.
98. Fraiser and Passow, supra note 93 at 47.
99. Id.
101. Id. at 6.
102. Id.
Evolving definitions of giftedness also include multicultural perspectives in an attempt to focus on traits that are valued among different cultural and economic groups. 103 For example, Jaime A. Castellano points out that certain characteristics are common among gifted Hispanic-American children, including the ability to learn English quickly once exposed to the language, leadership ability, intelligent risk-taking behavior, and acceptance of responsibility normally reserved for older children. 104 Moreover, it is quite possible for a student to be both disabled and gifted. 105 Often students' disabilities conceal their giftedness and these students are never recognized for their talents. 106 In fact, gifted children with disabilities are one of the most unrecognized and underserved groups of gifted students in the United States. 107

Dissemination of Information About Gifted Students and Point of Entry

Information about gifted programs should be widely distributed and easily available. For example, parents of children with disabilities should receive information about gifted programs through the Committees on Special Education, which are charged with recommending classroom placement in the special education system. In addition, information about gifted programs should be provided in languages other than English.

By contrast, studies have shown that access to information about gifted programs in New York City remains problematic for minority and non-English speaking families. 108 The ACORN Reports found that the methods of disseminating information about specialized programs and schools failed to reach parents and students of color to the same extent as white parents and students. 109 In addition, problems arise when, as in New York City, some school districts require parents to apply for a position in a

103. Fraiser and Passow, supra note 93 at 11.
106. Id.
107. Id.
gifted program prior to kindergarten. In many cases, this effectively
denies access to gifted programs to children whose parents do not learn
about the programs until after their children have entered school, as well
as those children who thrive after one or more years of development in a
regular education classroom.

Identification of Gifted Students

Sole criterion identification procedures generally use scores on stan-
dardized tests, such as IQ tests, to determine which students qualify for
gifted programs. Renzulli argues that, in light of the recognition of mul-
tiple theories of intelligence and giftedness, the use of single scores alone
will always be a questionable identification method. In addition, critics
argue that these tests are culturally biased.

Multiple criteria procedures often include “culture-free” tests or require
educators to analyze traditional tests for cultural bias. Non-verbal tests may
be administered to reduce bias against Limited English Proficiency (“LEP”)
students and tests may be given in languages other than English. Educa-
tors also review students’ performances in school activities, examine work
samples, and accept input from teachers, students, parents, and community
members. An example of this approach is Renzulli’s Total Talent Portfolio,
which reviews: (1) a student’s abilities as shown through: (a) scores on stan-
dardized and teacher-made tests; (b) evaluations and grades; and (c) levels of
participation and interaction with others; (2) areas of interest; and (3) style
preferences, including a student’s preferred: (a) method of instruction; (b)
learning environment; (c) thinking style; and (d) method of expression.
The Total Talent Portfolio also focuses on how a student reacts to learn-
ing experiences.

Checklists and rating scales have been developed, which focus on the
behaviors of gifted minority students and on LEP students. For example,

110. Renzulli, supra note 100 at 3.
111. Fraiser and Passow, supra note 93 at 13-17.
112. Id at 14.
113. Patrick Alexander and Amy Kleitman, Advocates for Children, Inc., Gifted Education in
New York City at 49 (1998).
Gifts and Talents at 2-5. The National Research Center on the Gifted and Talented, University
115. Id
116. Fraiser and Passow, supra note 93 at 53-55.
Castellano explains that many school districts serving gifted and talented bilingual Hispanic students use, inter alia, the following multiple criteria for screening and identification purposes:

(a) ethnographic assessment procedures (the student is observed in multiple contexts over time), (b) dynamic assessment (the student is given the opportunity to transfer newly acquired skills to novel situations), (c) portfolio assessment, (d) the use of test scores (performance based and/or nonverbal) in the native or English language (depending on the child's level of fluency), (e) teacher observation, (f) behavioral checklists, (g) past school performance, (h) parent interview, (i) writing samples and other samples of creativity and/or achievement, and (j) input from the cultural group with which the student identifies in the local school community.

Another alternative to using standardized tests is assessment in the student's native language.

With respect to students with disabilities, such children should be explicitly included in initial screenings for gifted programs. Since students with disabilities are rarely identified, they are not included in most standardized testing norms, which compounds the problems with traditional gifted assessment procedures. Therefore, evaluators should look beyond numerical test scores to more nontraditional signs of intelligence. Likewise, evaluators need to be aware that disabilities can depress certain scores. Thus, with respect to scoring, separate subtest scores are often better measures of a child's strengths, than a total composite score. It is also suggested that nonverbal intelligence tests and other nonverbal assessment measures help to lessen the unequal treatment of gifted disabled children.

117. Castellano, supra note 104 at 2.
120. Id. at 1.
121. Id. at 4.
122. Id.
123. Id.
124. ERIC Clearinghouse on Disabilities and Gifted Education, GT-Disable FAQ, supra note 92.
Gifted and talented programs do not always involve separating advanced students from other students. Inclusion, a very common model of gifted education, allows gifted students to remain in the general education classroom.

The two most common models of inclusion programs are differentiation and cluster-grouping. In the differentiation model, curriculum goals are developed and students are given an opportunity to demonstrate their proficiency in a particular subject matter. Once students demonstrate proficiency in a subject matter, through some type of assessment such as a pre-test, they can study the material in greater depth than the other students in the classroom.

In the cluster-grouping model, three to five students of a significantly higher level are placed in the same classroom, rather than split between different classrooms of that same grade. Lower-functioning students are split between the remaining classrooms, thereby tightening the range of the classroom in which the cluster-group is placed. The cluster-group then works on assignments appropriate for their advanced level.

Theories of giftedness and methods of gifted instruction can also be used to help every student develop individual talents and achieve his or her maximum potential. In the Schoolwide Enrichment Model ("SEM"), students are provided a broad range of services “from general enrichment for all students, to highly specialized grouping arrangements, advanced courses, supplementary programs in and out of school, and even special schools and summer programs on college campuses.” The SEM does not eliminate the need for special programs for highly gifted students, however.

The process of identifying gifted students using all of the best practices described above can be expensive and burdensome. Consideration

126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
132. See Richards Interview, supra note 125.
should be given to available resources in determining the appropriate mix of practices to ensure nondiscriminatory identification.

Conclusion and Recommendations

It is possible to maintain high standards for gifted programs while also providing greater equity and access to under-represented groups of students. The Department, with input from OCR and relevant stakeholders, should move quickly toward the implementation of Chancellor’s regulations governing the operation of gifted programs. At a minimum, the Chancellor’s regulations should cover the following areas:

• Clear, effective communication to parents, in the parent’s native or primary language (or via an equally effective mode of communication), regarding the range of gifted programs in Department schools, their respective eligibility criteria, areas of focus, and ages of entry.

• Eligibility requirements that consist of multiple, age-appropriate criteria, with the criteria designed to actually measure the potential skills or talents that the program seeks to foster, including, but not limited to areas such as achievement, mental ability, creativity, and motivation.

• A prohibition on the use of a single test as a gatekeeper or sole criterion, and a focus on multiple paths to eligibility.

• Systematic, annual data collection and analysis,\textsuperscript{133} including information for each program regarding applicants, students admitted, matriculants, and persistence/ discontinuance, disaggregated by grade level or age, race/ethnicity, LEP status, disability status, and gender.

• An increased focus on part-time and “push-in” as opposed to self-contained or “pull-out” models, allowing greater opportunities for heterogeneous instruction and the modeling of gifted education best practices (including high student expectations

\textsuperscript{133} The Department’s ability to collect basic data about gifted programs from individual school districts is by no means certain, though its authority to do so is clear. The third Department report implicitly acknowledged this problem when describing the lengths that Department staff had to go to merely to collect survey responses from districts:

One month after the deadline DAA [the Department’s Division of Assessment and Accountability] set for respondents to return the surveys, DAA compiled a list of districts that did not submit surveys and who failed to provide an explanation for not submitting at least one survey. DAA called these districts and reminded them to complete the surveys and, in some instances, DAA faxed additional surveys to dis-
and challenging learning standards) to the entire student population.\textsuperscript{134}

- Mandated non-discriminatory access for LEP and special education students, with the creation of dual language gifted programs (serving both English-speaking and LEP students) and guidelines for the provision of testing and program accommodations for students with disabilities, and for testing in primary or home language for LEP students.

- Training of Committees on Special Education to ensure that gifted programs are considered as placement options for special education students when appropriate.

- Procedures for scrutiny by the Department of programs that show significant disproportion in applicants, admitted students, or enrollees for particular demographic groups, and procedures for effective intervention by the Department in districts and schools that violate the Chancellor’s regulations.

The recently announced changes in governance and structure for the Department, in which the policy-making roles of local school boards is significantly diminished, should better enable the Department to effectively implement these proposals. Enough reports have been issued, and more than enough years have passed, to warrant prompt action by the Department and OCR to ensure that our gifted programs are consistent with the goal of nondiscrimination.

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\textsuperscript{134} This emphasis would also serve to reduce the degree of within-school segregation created by some programs. See infra at 13-14. The third Department report noted that more than three quarters of the City’s public gifted programs are full-day, self-contained programs. Third Department Report at 9.
APPENDIX

Model Gifted Programs

In preparing this Report, the Committee examined efforts in other jurisdictions to improve gifted program oversight. Below, we summarize key features of gifted education reforms implemented in the late 1990s in Georgia and Alabama. With public education systems comparable in size to New York City's, these two states provide good examples of efforts to ensure nondiscrimination in public gifted programs.

Prior to 1997, eligibility for gifted programs throughout Georgia was based solely on standardized test scores, predominantly IQ scores. From kindergarten to second grade, students could qualify for gifted programs only by scoring in the 99th percentile on a standardized test of mental ability. In grades three through twelve, students could qualify only by scoring in the 99th percentile on a standardized test of mental ability or in the 96th percentile on a standardized test of mental ability and the 90th percentile in “Total Reading or Total Math or the 85th [percentile] on the Total Battery of a standardized achievement test.”

Through regulations enacted in 1995 and effective since 1997, Georgia revised its requirements governing gifted programs. Under Georgia's current gifted standards, school districts must notify parents or guardians of, inter alia, “the gifted education program operated by the local school system, referral procedures and eligibility requirements”; “initial consideration of a student for gifted education services; and “the student's eligibility status after an evaluation at which time the parents or guardians shall be afforded an opportunity for a conference to discuss student eligibility criteria and placement.” Students may be referred for consideration in gifted programs “by teachers, counselors, administrators, parents or guardians, peers, self and other individuals with knowledge of the student's abilities.” There is also an automatic referral procedure for students who score at set levels, designated by school districts, on a “norm referenced test.”

135. Email interview with Dr. Sally C. Krisel, Gifted Education Specialist, Georgia Department of Education, May 14, 2002.
136. Id.
137. Id.
138. Id.
139. GA Comp. R. & Regs. § 160-4-2-.38(2)(a).
140. GA Comp. R. & Regs. § 160-4-2-.38(2)(b)(1).
141. GA Comp. R. & Regs. § 160-4-2-.38(2)(b)(2).
Students may qualify for gifted services in two ways. First, a student may qualify on the basis of mental ability and achievement assessment results. A student must achieve a composite mental ability test score in the 99th percentile for students in kindergarten through second grade and in the 96th percentile for students in the third through twelfth grades. They must also score in the 90th percentile on the “total battery, total math or total reading section(s)” of standardized achievement tests, or they must produce a superior product or performance. A student may also qualify for gifted programs by meeting the standards in any three of the following four categories: mental ability, achievement, creativity, and motivation, “at least one of which must be on a nationally-normed standardized test.”

Finally, local Departments of education must “collect and maintain statistical data on the number of students referred for evaluation of eligibility for gifted education services, the number of students determined eligible for services, and the number of students actually served during the school year.” The data must be kept by “grade level, gender, and ethnic group of the students.” The Georgia Department of Education also evaluates the effectiveness of gifted programs every three years.

According to Dr. Sally C. Krisel, Gifted Education Specialist at the Georgia Department of Education, since 1997, the overall gifted population has increased from 4.5% to 6.5% of Georgia’s students in kindergarten through twelfth grades. There has been a 135% increase and a 193% increase in the numbers of African-American students and Hispanic students, respectively. The increase of students with an ESOL designation has also been substantial.
According to Linda Grill, Education Specialist at the Alabama Department of Education, eligibility for gifted programs in Alabama also used to be determined solely by IQ scores.\textsuperscript{153} Through some initial changes made in 1996 and regulations enacted in 1999, the standards governing gifted programs were amended.\textsuperscript{154} In kindergarten through twelfth grade, students may be referred for evaluation “by teachers, counselors, administrators, parents or guardians, peers, self, and other individuals with knowledge of the students abilities.”\textsuperscript{155} However, in second grade, teachers consider all students for eligibility in gifted programs.\textsuperscript{156}

All school districts must establish Gifted Referrals Screening Teams ("GRST"), which “should consist of at least three individuals including someone knowledgeable about the student and someone knowledgeable about gifted education.”\textsuperscript{157} In some school districts the GRST processes referral information, while in others it conducts additional screening.\textsuperscript{158} Students are then considered for gifted programs by Eligibility Determination Teams which “should consist of at least three individuals including someone knowledgeable about the student being assessed, someone knowledgeable about gifted students in general, and someone able to interpret the assessment information gathered.”\textsuperscript{159}

A student may qualify for gifted programs in Alabama in two ways. First, a student is automatically eligible for gifted services if: (1) “[t]he obtained full scale/composite IQ score on an individually administered test of intelligence . . . is two standard deviations above the mean or higher”; or (2) [e]ither the Verbal Average Standard score of Figural Creativity Index of the Torrance Tests of Creative Thinking is at or above the 97\textsuperscript{th} national percentile.”\textsuperscript{160} Students who are not automatically eligible may still qualify for gifted programs based on a “matrix of multiple criteria,” comprised of the following categories: (1) aptitude; (2) performance; and (3) characteristics.\textsuperscript{161} “Aptitude” is based on “an individual or group

\begin{footnotes}
\item[154] Id.; see Ala. Admin. Code r. 290-8-9-.14.
\item[155] See Ala. Admin. Code r. 290-8-9-.14(5)(c).
\item[156] See Ala. Admin. Code r. 290-8-9-.14(2)(a).
\item[157] See Ala. Admin. Code r. 290-8-9-.14(2)(c).
\item[158] See Grill Interview, supra note 153.
\item[159] See Ala. Admin. Code r. 290-8-9-.14(5).
\item[160] See Ala. Admin. Code r. 290-8-9-.14(5)(c).
\item[161] See Ala. Admin. Code r. 290-8-9-.14(5)(d).
\end{footnotes}
test of intelligence or creativity,” while “characteristics” consists of “a behavior rating scale designed to assess gifted behaviors.” 162 With respect to “performance,” school districts consider things such as portfolios, work samples, grades, and leadership and motivation. 163

School districts must gather information “to determine if there are any environmental, cultural, economic, language differences, or a disabling condition that might mask a student’s true abilities,” and districts are directed to select tests and evaluative materials that are “sensitive to cultural, economic, and linguistic differences.” 164 Finally, “[f]or special populations such as the sensory impaired, LEP, or physically impaired, assessments must be appropriate for their special needs.” 165

School districts must submit child count data by race and grade to the Alabama Department of Education each year and the Department of Education compiles data to determine the standards being used for assessment. 166 In 1996, 8.61% of Alabama’s gifted students were African-American and .35% were Hispanic. 167 In 2001, 13.74% of gifted students were African-American and .73% were Hispanic. 168

164. See Ala. Admin. Code r. 290-8-9-.14(4)(a)(5), (b).
165. See Ala. Admin. Code r. 290-8-9-.14(4)(c).
168. Id.
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Formal Opinion 2003-01

Lawyers’ and Law Firms’ Selection and Advertising of Internet Domain Names

The Committee on Professional and Judicial Ethics

**TOPIC:** Lawyers’ and law firms’ selection and advertising of internet domain names.

**DIGEST:** A lawyer or law firm may use a domain name that does not include or embody the firm’s name or that of any individual lawyer, under certain conditions: the website bearing the domain name must clearly and conspicuously identify the actual law firm name; the domain name must not be false, deceptive or misleading; the name must not imply any special expertise or competence, or suggest a particular result; and, it must not be used in advertising as a substitute identifier of the firm.

**CODE:** DR 2-102(B); DR 2-101

**QUESTIONS:** In choosing a domain name, is a lawyer obligated to follow the rules applicable to the selection of law firm names, thus requiring the do-
main name to comprise some variation of the law firm’s name? If a domain name may under certain circumstances not include the law firm name, may the law firm ethically advertise its services by reference to its domain name rather than its firm name?

**OPINION**

The Committee has received an inquiry regarding the selection of Internet domain names for lawyers and law firms, and the corresponding use of such domain names in advertising the services offered by such lawyers and firms. This inquiry raises two questions of general significance to the bar: First, in choosing a domain name, is a lawyer obligated to follow the rules applicable to the selection of law firm names, thus requiring the domain name to comprise some variation of the law firm’s name? Second, if a domain name may under certain circumstances not include the law firm name, may the law firm ethically advertise its services by reference to its domain name rather than its firm name?

The Committee addresses these areas in the following factual context: A law firm primarily engages in the representation of personal injury plaintiffs. The law firm’s name consists of the names of three of its partners and complies with the requirements of DR 2-102(B) relating to law firm names. However, in considering its advertising and marketing activities, the firm believes that it can achieve better results if it is able to establish a web site using as its domain name a generic name or phrase that contains the word “attorney” or “lawyer.” (Examples of such an identifier might include phrases such as “Dial-a-lawyer” or “New York Lawyer”). The firm has, accordingly, set up a web site that does not include its lawyers’ names as part of the domain name, but instead includes the generic name or phrase followed by “.com.” The firm also wishes to advertise on television and radio using the domain name as its primary identifier and to include client testimonials alluding to the domain name rather than the name of the firm or any of its lawyers.

1. Law Firm or Attorney Domain Names

New York forbids a law firm or legal clinic from practicing under a trade name or other name that does not convey the identity of one or more of the lawyers practicing. DR 2-102(B) states in pertinent part:

A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the law-
yer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm.¹

Similarly, EC 2-11 states that “The name under which a lawyer practices may be a factor in the [lawyer] selection process. The use of a trade name or an assumed name could mislead non-lawyers concerning the identity, responsibility, and status of those practicing thereunder.”

Numerous opinions from New York have prohibited a law firm from identifying itself by a trade name because of the likelihood of confusion as to the identity and composition of the firm. See N.Y. City 95-8 (prohibiting trade name based on firm’s location; “the Code on its face prohibits all forms of trade names, and opinions construing the Code have applied that prohibition to locational trade names as well as other types of trade names.”); N.Y. City 82-44 (improper to engage in a law practice under the name “The 777 Lawyers Group”); N.Y. State Bar Op. 709 (operating proposed law practice under trade name “The Trademark Store” is impermissible); In re Shephard, 459 N.Y.S.2d 632, 633 (3rd Dep’t 1983) (finding “The Peoples Law Firm” was a prohibited trade name); In re Shapiro, 455 N.Y.S. 2d 604, 605 (1st Dep’t 1982) (finding “Peoples Legal Clinic, Inc.” was a prohibited trade name).

The threshold issue presented here is whether a law firm otherwise compliant with the rules of DR 2-102(B) can establish a domain name that does not include the names of one or more lawyers, but instead uses a “trade name” or other terminology. There are no reported New York ethics opinions on this subject.

Two states, Arizona and Ohio, have issued opinions stating that domain names are not subject to the same regulation or scrutiny as a firm name and are permissible unless they are false or misleading. See Ohio 99-4; Arizona 97-04. In the Ohio opinion, the ethics panel concluded that domain names were governed by the general rules for lawyer advertising and, while it was preferable to use the firm name as a domain name, it is “not improper for an attorney to use letters, words or numbers provided that the domain name is not a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement.” Nor can the domain name be permitted to “imply special competence or experience.” The Arizona State Bar

¹ The exceptions include the right of professional corporations and limited liability corporations to designate themselves as such, the right to use or continue the use of the names of deceased or retired partners can be in a continuing line of succession, and the right of a qualified legal assistance organization to describe itself as such (e.g., Legal Aid).
opinion agreed that domain names were subject to the general advertising rules against false or misleading communications, and concluded that:
(1) a law firm's use of “countybar.com” was misleading because it falsely implied an affiliation with the county bar association; and
(2) the designation “arizonalawyer.org” was misleading because the top level domain name “.org” falsely indicated that the firm was a non-profit organization.

The Committee notes that many New York lawyers and law firms have established domain names that closely track the firm name. We also note the risk that permitting domain names that do not include any reference to the name under which the firm practices might in some cases cause some initial confusion among visitors to a web site. However, the Committee believes that the mere designation of a domain name does not mean that the firm or lawyer is “practicing” law under that name; accordingly, DR 2-102(B)'s strictures on law firm names should not apply and, instead, the selection of a domain name is more appropriately governed by the ethical rules and considerations affecting legal advertising and publicity. See DR 2-101. In so concluding, we specifically do not address the First Amendment and other legal issues that may affect attorney advertising, solicitation of business and professional designations because these issues are beyond the scope of this Committee's jurisdiction.

As a matter of legal ethics, we conclude that a lawyer or firm may employ a domain name that does not include the names of lawyers under the following conditions:

(1) The web site clearly and conspicuously includes the actual name of the law firm and the law firm in no way attempts to engage in the practice of law using the domain name. At a minimum, the web site must clearly present information including the law firm’s name, office address and the telephone number of the attorney or law firm (DR 2-101(K));

(2) The domain name complies with DR 2-101(A), which forbids “any public communication or communication to a prospective client containing statements or claims that are false, deceptive or misleading”;

(3) The domain name does not imply any special expertise or competence, or suggest a particular result. In this regard, we note the abundance of existing law firm domain names accessible on the Internet that would appear to violate this requirement, e.g., “bigverdict.com” and “bigjudgment.com.” In addi-
tion, although New York’s Code includes no specific prohibition on puffery or statements that cannot be objectively verified, we believe names that seek to promote the lawyer’s skill or talent may be considered misleading, e.g., “bestlawyer.com,” “greatattorney.com,” and “personalinjuryexpert.com.”

2. Use of Domain Names in Advertising

Having concluded that it is permissible under certain circumstances for a law firm or lawyer to employ a domain name that does not embody the name of the firm or its lawyers, we believe this domain name may be publicized in advertising so long as the domain name is used to identify a web site rather than as a substitute identifier for the firm. Thus, assuming the law firm was authorized to use the “NewYorklawyer.com” domain name, it would be permissible to refer to that domain name for the purpose of directing readers or listeners to the firm’s web site, but it would not be permissible to refer to the services offered by “NewYork lawyer” or otherwise to replace the law firm’s name with its domain name in describing itself, its services or its personnel.

Similarly, a lawyer or law firm may use bonafide, non-misleading client testimonials in advertising provided the clients do not use the domain name as a sobriquet or substitute for the firm’s name. It would presumably be ethical for the client to identify the domain name as a means to learn more about the firm.

CONCLUSION

As set forth above, we conclude that it is ethical under certain circumstances for a lawyer or law firm to employ a domain name that does not include or embody the firm’s name or that of any individual lawyer. However, we caution that domain names may not be used as a substitute identifier for the law firm and must comply with the strictures of DR 2-101 as applied to legal advertisements generally.

May 2003
Formal Opinion 2003-02

Undisclosed Taping of Conversations by Lawyers

The Committee on Professional and Judicial Ethics

TOPIC: Undisclosed taping of conversations by lawyers.

DIGEST: A lawyer may not, as a matter of routine practice, tape record conversations without disclosing that the conversation is being taped. A lawyer may, however, engage in the undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the taping would impair pursuit of a generally accepted societal good. NY City 1980-95 and 1995-10 are modified by this opinion.

CODE: DRs 1-102(a)(4), 7-102(a)(5), 7-102(a)(7), 7-102(a)(8)

QUESTION: May a lawyer tape record a conversation without informing all parties to the conversation that it is being recorded?

OPINION

In June 2001, the American Bar Association (“ABA”) reversed course with respect to whether it is permissible for lawyers to tape a conversation
without disclosing that the conversation was being taped. For more than twenty-five years, it was the position of the ABA that undisclosed taping by any lawyers other than law enforcement officials was unethical. See ABA Formal Op. 337 (1974). In Formal Opinion 01-422, however, the ABA reversed its position, opining that undisclosed taping was not in and of itself unethical unless prohibited by the law of the relevant jurisdictions.

The Professional Responsibility Committee of this Association has recommended to this Committee that we follow the lead of the ABA—at least to the extent of modifying our prior opinions declaring all undisclosed taping by lawyers in civil and commercial contexts to be unethical. We have revisited the issue of undisclosed taping by lawyers and conclude that our prior opinions, like the ABA’s 1974 opinion, swept too broadly. However, we regard the ABA’s new position as an overcorrection.

This Committee remains of the view, first expressed in NY City 1980-95, that undisclosed taping smacks of trickery and is improper as a routine practice. At the same time, however, we recognize that there are circumstances in which undisclosed taping should be permissible on the ground that it advances a generally accepted societal good. We further recognize that it would be difficult, if not impossible, to anticipate and catalog all such circumstances, and that a lawyer should not be subject to professional discipline if he or she has a reasonable basis for believing such circumstances exist. NY City 1980-95 and 1995-10 are modified accordingly.¹

DISCUSSION

ABA Formal Opinion 01-422 offers a variety of reasons for abandoning a general prohibition against undisclosed taping. Some of the reasons offered are more persuasive than others. None, in the view of this Committee, provides persuasive support for the conclusion that undisclosed taping, as a routine practice, should be permissible for attorneys.

The ABA’s Opinion leads with the suggestion that reversal of the prohibition against undisclosed taping is warranted by an intervening change in societal attitudes and practices with respect to undisclosed taping. Thus, according to the ABA:

the belief that nonconsensual taping of conversations is inher-

¹. This opinion assumes that the taping occurs in a jurisdiction where taping without disclosure to all parties is legal and that the attorney has not represented that the conversation is not being recorded. Attorneys may not engage in illegal conduct, see DR 7-102(a)(7), (8), or knowingly make a false statement of fact. See DR 7-102(a)(5).
ently deceitful, embraced by this Committee in 1974, is not universally accepted today. The overwhelming majority of states permit recording by consent of only one party to the conversation. Surreptitious recording of conversations is a widespread practice by law enforcement, private investigators and journalists, and the courts universally accept evidence required by such techniques. Devices for the recording of telephone conversations on one’s own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people “offend a sense of honor and fair play,” it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party, absent a special relationship with or conduct by that party inducing a belief that the conversation will not be recorded.

ABA Formal Opinion 01-422 (footnotes omitted).

We are unpersuaded that there has been any material change in societal attitudes or practices with respect to undisclosed taping since the 1970s. While it is certainly true that many states currently permit the recording of conversations without the consent of all parties and that courts routinely accept evidence acquired by such techniques, the same could have been said at the time the ABA issued its 1974 Opinion. Similarly, we are unaware of any reason to believe that undisclosed taping is significantly more prevalent today as an investigative technique than it was in the 1970s. To the contrary, as at least one court has noted, the ABA’s 1974 opinion expressly cited the prevalence of surreptitious recording as the reason why a formal opinion on the subject was advisable. See Anderson v. Hale, 202 F.R.D. 548, 557 n.5 (N.D. Ill. 2001). 2

This Committee likewise does not share the ABA’s skepticism with respect to whether individuals today can justifiably assume that a conversation is not being recorded—particularly when the conversation is with an attorney. Anyone who has ever had occasion to call customer service for a telephone, bank or charge account—i.e., the overwhelmingly majority of U.S. residents—has repeatedly been greeted with a taped message advising callers that their conversations may be recorded for quality con-

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2. Formal Opinion 337 begins with the following statement:

Recent technical progress in the design and manufacture of sophisticated electronic recording equipment and revelations of the extent to which such equipment has been used in government offices and elsewhere make it desirable to issue a Formal Opinion as to the ethical questions involved.
control or training purposes. Accordingly, we believe it is neither unlikely nor unjustifiable that many individuals assume that a commercial conversation will not be recorded unless they have been given notice of the possibility that it will be. Nor do we think it unjustifiable for individuals to assume—or advisable for the legal profession to discourage individuals from assuming—that the business practices of lawyers are any less courteous and honorable than those of the local bank or telephone company.

In any event, we regard the state of mind of the recording's target to be considerably less relevant than the state of mind of the individual making the decision to engage in undisclosed taping. And however much the expectations of the target may be subject to debate, it cannot seriously be doubted that an individual who engages in undisclosed taping does so in the hope that the target is not expecting to be taped. Indeed, it is difficult to conceive of any other reason for failing to disclose that the conversation is being taped. It was in recognition of that fact that our first opinion on undisclosed taping characterized the practice as "smack[ing] of trickery," NY City 1980-95, and joined ABA Formal Opinion 337 in concluding that undisclosed taping was, as a general matter, violative of DR 1-102(a)(4)'s proscription against engaging in conduct that "involv[ed] dishonesty, deceit, fraud or misrepresentation."3

Undisclosed taping smacks of trickery no less today than it did twenty years ago. In that respect, the passage of time has not altered the analysis. What has, however, emerged over the years is an increasing recognition of the variety of circumstances in which the practice of undisclosed taping can be said to further a generally accepted societal good and thus be regarded as consistent with "the standards of fair play and candor applicable to lawyers." NY City 1980-95.4

We invoked that principle in our 1980 opinion to support an exception to the general rule against undisclosed taping for criminal defense

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3. We reaffirmed our general disapproval of undisclosed taping in Ny City 1995-10, which opined that a lawyer may not tape record a telephone or in-person conversation with an adversary attorney without informing the adversary that the conversation is being taped.

4. As we noted in our 1980 opinion:

Unlike more explicit ethical prohibitions, concepts like candor and fairness take their content from a host of sources—articulated and unarticulated—which presumably reflects a consensus of the bar’s or society’s judgments. Without being unduly relativistic, it is nevertheless possible that conduct which is considered unfair or even deceitful in one context may not be so considered in another. (See, e.g., the ABA’s Proposed Model Rules of Professional Conduct, Rule 4.1, Comment concerning assertions made in settlement negotiations.)
lawyers who may need to secretly record conversations with certain witnesses. Since that time, other bar committees, boards and courts have adopted that exception, recognized a variety of others (such as the investigation of housing discrimination and other actionable business practices and the documentation of threats or other criminal utterances), and/or opined that the permissibility of undisclosed taping should be determined on a case-by-case basis. In addition, some committees have gone so far as to opine that undisclosed taping is not, in and of itself, unethical.

ABA Formal Opinion 01-422 cites the variety of approaches that have been taken as support for its conclusion that it is time simply to declare the general rule to be that undisclosed taping is, in and of itself, not ethically proscribed:

A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline is highly troubling. We think the proper approach to the question of legal but nonconsensual recordings by lawyers is not a general prohibition with certain exceptions, but a prohibition of the


conduct only where it is accompanied by other circumstances that make it unethical.

In fact, however, most of the opinions cited by the ABA are less at odds with one another than reflective of a cautious case-by-case evolution toward the general principle that if undisclosed taping is done under circumstances that can be said to further a generally accepted societal good, it will not be regarded as unethical.

While that principle carries with it, as many ethical rules do, some risk of uncertainty in its application, attorneys can easily minimize that risk by confining the practice of undisclosed taping to circumstances in which the societal justification is compelling. In addition, even if a disciplinary body does not necessarily share an attorney’s assessment of the need for undisclosed taping in a particular set of circumstances, there is little likelihood of, and no need for, the imposition of sanctions as long as the attorney had a reasonable basis for believing that the surrounding circumstances warranted undisclosed taping. We accordingly regard there to be less conflict in the field and less risk to attorneys in the field than is suggested by the ABA’s Opinion.

We also have yet to see any persuasive argument—either in the ABA’s recent opinion or elsewhere—in support of permitting undisclosed taping as a matter of routine practice.

The committees that have opined that undisclosed taping is not in and of itself unethical have tended to stress either that the practice is legal in that jurisdiction,7 that there are unquestionably times when there is a good reason to engage in undisclosed taping,8 and/or that tape recording “is merely a technological convenience, providing a more accurate means of documenting rather than relying on one’s memory, notes, shorthand, transcription, etc. for recall.” Ok. Bar. Assoc. Op. 307 (1994).

If, however, the only reasons for taping are convenience and increased accuracy, there is no reason to refrain from disclosing that the conversation is being taped.9 Nor is it correct that undisclosed taping has no effect

9. In this regard, the Ohio Board of Commissioners on Grievances and Discipline has aptly observed:

Although the accurate recall of information is important to attorneys in providing legal representation, this on its own does not persuade the Board to condone the
other than providing an accurate record of what was said. As attorneys are well aware, individuals tend to choose their words with greater care and precision when a verbatim record is being made and some individuals may not wish to speak at all under such circumstances. Undisclosed taping deprives an individual of the ability to make those choices. Undisclosed taping also confers upon the party making the tape the unfair advantage of being able to use the verbatim record if it helps his cause and to keep it concealed if it does not. In addition, because undisclosed taping has those effects, it therefore also has the potential effect of undermining public confidence in the integrity of the legal profession, which in turn undermines the ability of the legal system to function effectively. See, e.g., Anderson v. Hale, 202 F.R.D. 548, 556 (N.D. Ill. 2001) (noting that open discussion is vital to the advancement of justice and that the public's willingness to speak openly with attorneys is directly affected by public perception of the integrity of attorneys); NY City 80-95 (undisclosed taping has the potential to "undermine those conditions which are essential to a free and open society").

The fact that a practice is legal does not necessarily render it ethical. Moreover, the fact that the practice at issue remains illegal in a significant number of jurisdictions is a powerful indication that the practice is not one in which an attorney should readily engage. Similarly, the fact that there are times when a valid reason exists to engage in undisclosed taping does not mean that it should be permitted when there is no valid reason for it. No societal good is furthered by allowing attorneys to engage in a routine practice of secretly recording their conversations with others, and there is considerable potential for societal harm.

Routine use of surreptitious recordings in the practice of law. For those who wish to use taping as a way of assisting the memory, consent may be obtained. The fact that an attorney wants to hide the recording from the other person suggests a purpose for the recording that is not straightforward. Recordings made with the consent of all parties to the communication are consistent with the ideals of honesty and fair play, whereas recordings made by clandestine or stealthy means suggest otherwise.

Supreme Court of Ohio Board of Commissioners on Grievances and Discipline Op. 97-3 (June 13, 1997).

Accordingly, while this Committee concludes that there are circumstances other than those addressed in our prior opinions in which an attorney may tape a conversation without disclosure to all participants, we adhere to the view that undisclosed taping as a routine practice is ethically impermissible. We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable.

In situations involving the investigation of ongoing criminal conduct or other significant misconduct that question will often be easy to answer in the affirmative. The same is true with respect to individuals who have made threats against the attorney or a client or with respect to witnesses whom the attorney has reason to believe may be willing to commit perjury (in either a civil or a criminal matter).

The answer is likely to be far less clear with respect to witnesses whom the attorney has no reason to believe will engage in wrongdoing, and the prudent attorney will, absent extraordinary circumstances, refrain from engaging in the undisclosed taping of such witnesses. Similarly, while we are not prepared to state that it would never be ethically permissible to engage in the undisclosed taping of a client or a judicial officer, the circumstances in which doing so would be ethically permissible are likely to be few and far between.

Finally, as we have made clear, merely wishing to obtain an accurate record of what was said does not justify undisclosed taping. Nor, at least with respect to individuals who are not potential witnesses, is undisclosed taping justified by a desire to guard against the possibility of a subsequent denial of what was said. Such practices constitute engaging in undisclosed taping as a routine matter and, for the reasons discussed above, are ethically impermissible.

CONCLUSION

NY City 80-95 and 95-10 are modified. A lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice.

June 2003
The Committee on Professional and Judicial Ethics

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Sarbanes Oxley: Adoption of a “Noisy Withdrawal” Proposal is Inappropriate

These comments opposing the draft Noisy Withdrawal regulations circulated by the Securities and Exchange Commission, were filed by the Association of the Bar of the City of New York on April 7, 2003. The comments reflect the work of representatives of five Association committees, all of whom are listed at the end of the report.

I. PRELIMINARY STATEMENT

The Sarbanes-Oxley Act of 2002 (the “Act”) was passed to address the recent wave of corporate misconduct and to restore investor confidence in the regulation of the securities markets. To respond to the public’s expectations and fulfill its obligation under Section 307 of the Act, the Securities and Exchange Commission (“SEC” or the “Commission” or the “Agency”) proposed rules on November 21, 2002. The proposal required an attorney to report evidence of material violations of securities law or breaches of fiduciary duty by the company or its agents to the chief legal counsel or officer (“CLO”) or chief executive officer (“CEO”). These rules provided that if such reports failed to produce an appropriate response,
then the attorney would be required to “go-up-the-ladder” within the company by reporting the problem to the directors. These proposed regulations were supported by the Association of the Bar for the City of New York (“City Bar”) in the December 16, 2002 comments it submitted on the proposed regulations.

The November 21, 2002 draft rules also would have required that an attorney, under certain circumstances, resign from his or her representation of a client, publicly disclose this act, and disavow certain prior SEC client filings, often called a “noisy withdrawal.” The City Bar, in its December 16, 2002 comment letter, opposed the adoption of the noisy withdrawal provisions. In fact, the Commission has acknowledged that “a greater number of commenters opposed the ‘noisy withdrawal’ provisions.”

The chief reasons for these objections were: (i) Section 307 does not require the Commission to mandate noisy withdrawals; (ii) noisy withdrawals would conflict with longstanding requirements under state ethics-setting bodies, and in some cases would force attorneys to violate the laws of their home jurisdiction; and (iii) requiring noisy withdrawal would not further the Commission’s goals, because it would cause clients to exclude attorneys from meetings where sensitive information was exchanged that could lead an attorney to think a material violation had been committed.

On January 23, 2003, the Commission voted to approve the up-the-ladder reporting rules, with some modifications suggested by the City Bar and others, and deferred adoption of the noisy withdrawal provisions. The SEC also offered alternative proposals to the original noisy withdrawal provisions. Additional comments were solicited by the Commission on the original noisy withdrawal provisions and views on the alternative proposal were sought. The City Bar’s view of the original proposal remains unchanged and, unfortunately, the SEC’s new alternative proposed rules do not resolve the concerns that the CityBar and others previously raised about noisy withdrawal.

Despite the SEC’s attempt to mitigate the effect of the withdrawal requirements in the alternative proposal by mandating that issuers, rather than their former attorneys, disclose the attorney withdrawal, the alternate proposal will still result in a chilling of attorneys’ relationships with their clients. Both proposals will turn advocates into potential adversaries of their clients. We also note that the provision allowing issuers not to disclose the withdrawal in certain circumstances will likely not work.

We therefore urge that the Commission give the recently adopted up-the-ladder reporting system a chance to demonstrate its efficacy before
adopting additional regulations governing attorney conduct. Accordingly, we request that the SEC defer action on the new provisions.

We reiterate, but do not repeat, the views expressed in our prior comments with respect to noisy withdrawal, and focus our comments in this letter on the new proposal. Specifically, the City Bar addresses the following topics in this letter:

• The SEC should give “up the ladder” reporting an opportunity to work before any other far-reaching rules are implemented.
• Because the Act does not authorize the adoption of a “noisy withdrawal” rule, the rule is incorrectly premised on the assumption of its supremacy over state regulations.
• The SEC, as a prosecutorial body, should not regulate the attorneys who are defending cases brought by the Commission.
• A new requirement that counsel not assist an issuer in making a misstatement is unnecessary. Moreover, attorney withdrawal is well regulated by the states.
• The attorney-client relationship is different than the auditor-client relationship, calling for different disclosure rules.
• Requiring reporting outside the issuer’s organization creates issues with the attorney-client privilege, whether the report is made by the lawyer or the issuer.
• A Commission decision to adopt a rule requiring issuer disclosure of an attorney resignation will not further its ultimate goal of protecting investors. The possibility that the issuer will have to make such disclosure will have a detrimental impact on the attorney-client relationship, and will offer little benefit to the public because such disclosure is likely to contribute to market volatility.
• The exception to the proposed section 205.3(e) is impracticable because of the extraordinarily short deadline for disclosure of an attorney withdrawal, which limits the time independent counsel would have to perform an investigation into complex issues.

I. GENERAL CONCERNS

A. The Commission should give “up the ladder” reporting an opportunity to work before other, far-reaching changes are implemented. The legislative history of Section 307 indicates that Congress sought to ensure that “attorneys are responsible for fully informing their corporate client of evidence
of material violations of Federal securities laws.”¹ Part 205, as currently adopted, establishes a strict framework pursuant to which attorneys appearing and practicing before the Commission in the representation of an issuer must report “evidence of a material violation” to the CLO or the CEO and CLO and, in the event an “appropriate response” is not forthcoming, to the full board of directors or a one of its committees. This provision—particularly when viewed in light of the enhanced corporate governance requirements established by the Act, as well as those proposed by the major securities exchanges and NASDAQ—achieves the full objectives of Section 307. Indeed, the Commission has recognized that it has already promulgated all the rules that Section 307 requires.² As a result of the adoption of Part 205 and related reforms, responsible decision-makers, both in the executive ranks and at the board level, will be fully informed of potential corporate wrongdoing of which an attorney subject to Part 205 becomes aware. These decision-makers will be in a position where it would be foolhardy, in light of the significant personal and corporate consequences arising from a failure to act, not to address appropriately any evidence of a material violation reported to them.

Even if the Commission has the power to go beyond the Congressional mandate and adopt a reporting out provision—which we think it does not—the Commission should only do so if such a rule would further the ultimate goal of protecting investors. Given the inevitable adverse consequences to the attorney-client relationship resulting from a reporting out provision (as discussed at great length in our December 17, 2002 comment letter and further discussed below), adoption of such a mechanism now is ill-advised. Both forms of the noisy withdrawal proposal would create a situation where a lawyer withdrawal would require a reporting out of this action, either by the lawyer or by the client. This control over the client’s destiny by its counsel will result—based on the client’s recognition of the potential adverse consequences that could result from a withdrawal even if the client believes its position is reasonable—in a fundamental shift in the client’s perception of the attorney. Instead of being viewed as a trusted advisor and confidant, the attorney will be viewed by the client as a potential adversary—one to be given as little information as possible. As clients become less likely to entrust im-

². In the final rule adopted by the Commission on January 23, 2003, the Commission stated that it believed that the “final rule responds fully to the mandate of Section 307...” (Executive Summary). In the alternative proposal the SEC reiterated this, stating that corollary provisions to the up the ladder rules were “not explicitly required by Section 307.” (Background).
important information to their counsel and less likely to seek legal advice for fear their lawyers will raise concerns regarding potential material violations, the ability of attorneys to provide the type of fully-informed guidance issuers need to comply with the law will be undermined.

Accordingly, we urge the Commission to forego adoption of any “reporting out” requirement at this time and to allow compliance mechanisms based upon the existing rules to develop and be tested. The Commission will then be in a position to determine whether the existing rules sufficiently protect investors while avoiding any complex, controversial and damaging transformation of long-held notions of the attorney-client relationship.

B. The legislation does not authorize the rule and it is incorrectly premised on SEC supremacy over state rules. In response to the SEC’s request for comments on proposed Part 205 of the SEC’s Rules of Practice, a number of commenters—including the CityBar—questioned whether the SEC possessed the authority under the Act to promulgate “noisy withdrawal” requirements.3

Despite the indisputable importance of this question, in adopting release 34-47276, the SEC scarcely addresses the question. Indeed, in the 73-page adopting release, the SEC never confronts the question head-on, and instead places almost exclusive reliance on a comment letter (the “Koniak letter”),4 which, according to the SEC, concludes that “duly adopted Commission rules will preempt conflicting state rules.”5 The SEC then simply “reaffirms that its rules shall prevail over any conflicting or inconsistent laws of a state.”6 The analysis in the Koniak letter, however, is not persuasive.

1. Comment Letters Questioning the SEC’s Authority to Promulgate, and the Advisability of Adopting, Noisy Withdrawal Requirements

Several comment letters argued that the SEC lacks authority under Section 307 of Sarbanes-Oxley to promulgate noisy withdrawal requirements.7 One letter termed “serious understatement” the SEC’s concession

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3. See, e.g., Comments of The Association of the Bar of the City of New York, at 28-30; Comments of Eleven Persons or Law Firms, at 2-6; Comments of Skadden, Arps, Slate, Meager & Flom LLP, at 19; Comments of Weil, Gotshal & Manges LLP, at 2.

4. See generally Comments of Susan P. Koniak, et al.


6. Id.

7. See supra note 1.
that its proposed noisy withdrawal requirements “are not explicitly re-
quired by Section 307” and go “beyond what the Act expressly directed
the Commission to do.” This letter observed that, “[t]he reality is that
not a single word in the text of the Sarbanes-Oxley Act or in the relevant
legislative history even hints that Congress contemplated granting to the
Commission authority to impose ‘noisy withdrawal’ requirements.”

Given this reality, this letter pointed out that, in Ernst & Ernst v. Hochfelder,
425 U.S. 185, 214 (1976), the Supreme Court cautioned the SEC that the
“rulemaking power granted to an administrative agency charged with the
administration of a federal statute is not the power to make law,” but is
instead only “the power to adopt regulations to carry into effect the will
of Congress as expressed by the statute” (internal quotations omitted). Fur-
thermore, as this letter also observed, Section 3(a) of the Act does not
provide any jurisdictional predicate for the SEC to promulgate noisy with-
drawal requirements, because Section 3(a) only authorizes adopting rules

Finally, this comment letter noted that federalism concerns—which
the SEC had long subscribed to—cut against the SEC’s proposed noisy
withdrawal requirements.

2. The Analysis in the Koniak Letter Cannot Support the SEC’s Position

In the adopting release, the SEC’s primary response was to point to
the Koniak letter. The Koniak letter, however, is a thin reed that cannot
support the SEC’s proposed noisy withdrawal requirements. The conclu-

8. Comments of Eleven Persons or Law Firms, at 2.

9. Id.

10. Id. at 3.

11. Id. at 4. In March 2002, then SEC General Counsel, David Becker, explained that the SEC
had not promulgated rules of professional responsibility for lawyers for many years, pointing
to the “strong view among the bar that these matters [rules regulating lawyer conduct] are
more appropriately addressed by state bar rules, which historically have been the source of
professional responsibility requirements for lawyers, and have been overseen by state courts.”
Letter from David M. Becker, General Counsel, U.S. Securities and Exchange Commission, to
Professor Richard Painter, et al. (March 28, 2002). Other comment letters similarly ques-
tioned the SEC’s authority to adopt the noisy withdrawal requirements. See, e.g., Comments
of Weil, Gotshal & Manges LLP, at 2 (“Mandating ‘noisy withdrawal’ also raises substantial
issues concerning the scope of the authority granted to the Commission under the Act to
regulate attorney conduct. This is particularly the case given the long-established policy of the
Congress to favor state regulation of professional conduct, and the notable absence from the
Act of any specific provision making an exception to this policy.”).
sion in that letter that the Act gives the SEC authority to promulgate noisy withdrawal requirements and that these requirements preempt state law is not convincing.

The linchpin of the analysis adopted by the Commission is that "[w]hile the bill was in conference, the ABA sent a letter to the conferees arguing, inter alia, that federalism either mandated or counseled the legislators to declare that any Commission rules issued under § 307 would yield to state ethics codes. The conferees rejected the ABA's pleas."13 From this, the conclusion is drawn that the SEC would be abrogating Section 307's mandate if it permitted state codes to govern attorney conduct.14

This argument is contrary to the principles of both preemption and statutory interpretation. It is beyond peradventure that Sarbanes-Oxley is silent on preemption. Silence, however, has never been a recognized indicator of Congressional intent.15 Furthermore, the question is not whether Sarbanes-Oxley is silent on preemption. Rather, the correct question is whether Congress delegated authority to the SEC to preempt state law and to promulgate noisy withdrawal requirements. Absent that Congressional delegation of authority, the SEC lacks the legal basis to do so. In a case squarely on point, the Supreme Court has held:

[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority... First, an agency literally has no power to act, let alone pre-empt... unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.16

14. Id. at 23.
15. See, e.g., United States v. Wells, 519 U.S. 482 (1997) ("We thus have at most legislative silence on the crucial statutory language and we have 'frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law,'") (quoting NLRA v. Plasters', 404 U.S. 116, 129-130 (1971).
Here, there is no evidence that Congress delegated authority to the SEC to promulgate noisy withdrawal requirements, much less have those requirements preempt state law.

The Koniak letter also argues:

As long as the federal government has authority under the Constitution to regulate in a particular area, the Supremacy Clause of the Constitution makes it clear that state law that conflicts or interferes with federal regulation must yield. We have already asserted that the general power of the federal government to regulate securities is indisputable, so the question is whether there is something about lawyer regulation that forces a different conclusion.17

The letter misses the point, because there is no doubt about what Congress can do in theory. Rather, the correct inquiry is whether Congress, in this instance, delegated the necessary authority to the SEC. Congress unquestionably did not.

C. The SEC, as a prosecutorial body, should not be regulating the attorneys who are defending cases brought by the agency. The SEC plainly has the power to regulate the procedures which those attorneys who practice before it must follow. It is not so apparent, however, that the Commission also may, or should, dictate the substance of the relationship that issuers have with their counsel. In fact, the proposed noisy withdrawal and related requirements place the SEC, which is a prosecutorial agency, in the extraordinary and anomalous position of regulating the counsel of its adversaries. As Richard Hall of Cravath, Swaine & Moore has cogently observed:

The SEC is frequently and quite properly the adversary of private citizens. In those circumstances, private citizens turn to lawyers to represent them and advocate their case to the SEC, before the SEC and, if necessary, against the SEC in court proceedings.

Viewed from this perspective, it is quite extraordinary that the SEC should be given the broad power to regulate the conduct of attorneys in matters bearing upon the enforcement of laws against their clients. While it is clearly appropriate for the Com-

mission to regulate the conduct of attorneys in formal proceedings that take place before it or its administrative law judges, Section 307 and the SEC's proposed rules go much further. The SEC's power under Section 307 to regulate attorneys means that it now has the power to regulate and discipline the advocate of its adversary.

*     *     *

As policeman the SEC's ability to regulate the conduct of attorneys is also remarkable. One can quite legitimately ask why it is that a government agency charged with the detection of wrongdoing should seek to discharge that responsibility by forcing the lawyer for the potential wrongdoer to inform on his or her own client. If the issue is the lack of practical enforcement ability on the part of the SEC, it seems disingenuous to remedy that deficiency in the guise of lawyer ethics.18

II. THE MANDATORY WITHDRAWAL REQUIREMENTS ARE NOT APPROPRIATE

While we recognize that the proposed alternative Section 205.3(d)(1) responds to some of the issues raised about the original “noisy withdrawal” provision, it remains a deeply flawed effort to regulate the conduct of attorneys, in particular through mandated withdrawal. The effort is superfluous. State laws not only are the more appropriate regulatory vehicle, but also are more than sufficient to accomplish the Commission's goals in this area. In addition, the Commission already has the ability under Rule 2(e)(1)(ii) of the Commission's Rules of Practice, 17 C.F.R. § 201.102(e)(1), to address the situation where an attorney assists or facilitates the commission of a securities violation. The question of required or permissive withdrawal therefore should be left to state licensure authorities.

The essence of the alternative Section 205.3(d)(1) is that when retained counsel becomes aware of substantial evidence that leads him or her to believe that (a) an issuer-client is engaged in a material violation of the securities laws that is either on-going or is about to occur and (b) that possible violation is likely to cause substantial injury to the investing public or the issuer, the attorney is required to inform the issuer's of his or her concerns in the manner set forth in Section 205.3(b). If retained counsel finds the issuer's response lacking or if there is no response within a reasonable time, then counsel must withdraw from representing the issuer,

18. Richard Hall, Why the SEC is Unfit to Regulate Lawyers, 21 Int'l Fin. L. Rev. 16 (2002).
report the withdrawal to the issuer’s management in writing, and state that the withdrawal is for professional reasons. Retained counsel is not required to withdraw if, after seeking leave to withdraw, he or she is legally barred from doing so. An attorney employed by the issuer is required to cease forthwith participating or assisting in the matter concerning the alleged violation, and is required to make the same internal notification.

The alternative proposed rule raises a number of issues. First, it appears that the rule would require counsel to resign from representing the issuer-client in all matters, and not just those which pertain to the alleged material violation. The effect of retained counsel’s across-the-board resignation may lead to disruption in unrelated matters, with adverse consequences for third parties and the judicial and administrative process. For example, the rule may require retained counsel to withdraw from representing the issuer in a patent case entirely unrelated to any material violation of the securities laws. Counsel’s withdrawal from that case, in the first instance, would be subject to court approval. Withdrawal, if granted, would probably delay the resolution of the case and waste scarce judicial resources. While it may be appropriate for counsel to withdraw from representing the issuer-client in all matters, such a decision should be for client and counsel to make and not the Commission. There simply is no basis for the Commission to attempt to regulate an attorney-client relationship in a patent case that is unrelated to the alleged material violation of the securities law. Clearly, no such authority is conferred upon the Commission by Section 307.

To the extent that the Commission appropriately may regulate counsel’s conduct, any such regulation should be limited to the harm that the Commission seeks to forestall: counsel’s participation in or facilitation of a material violation of the securities laws. To the extent that a practitioner has engaged in alleged professional misconduct in his or practice before the Commission, the Commission has the authority through a Rule 2(e) proceeding to address any established wrongdoing. See also DR 7-102, New York Code of Professional Responsibility. The newly proposed section 205.3(d)(1) is not necessary to prevent such inappropriate behavior by counsel.

Second, a Commission-mandated resignation of representation by retained counsel may give rise to serious ethical issues for counsel under applicable state law rules. In particular, state rules almost universally impose a duty to avoid unnecessary harm or prejudice to the client that may result from withdrawal. See, e.g., DR 2-110(a)(2), New York Code of Professional Responsibility. There is no reason why counsel should be precluded from complying with that mandate.
Third, the Commission has not made the case that state ethics rules, such as DR 2-110, have failed to address when withdrawal should occur. Further, state rules, such as DR 7-102, defining an attorney’s responsibility when he or she has a reasonable belief that the client is engaging in fraudulent conduct, are more than adequate to meet such situations. Because, as mentioned, Commission rules already afford the Commission the power to discipline counsel who knowingly further the commission of a fraud, there is no justification for additional SEC regulation.

Fourth, the proposal creates the very real potential for disputes with the Commission over what constitutes a “reasonable” amount of time for the issuer to respond to counsel’s reporting an alleged on-going or future material violation after which withdrawal is mandated. That issue will very much depend on the facts of each individual case. The judgment, however, is one that could be second-guessed by the Commission, placing counsel in an untenable position. It would therefore be appropriate, were the Commission to adopt regulations on withdrawal, that the Commission create a safe harbor for the attorney and the issuer. An attorney should not be required to withdraw based on timeliness of a response if the issuer has advised that it has engaged counsel to review the report and counsel and the issuer are considering the matter. The attorney, of course, must not have a reason to doubt that this is true. If the lawyer is thereafter advised that the counsel considering the matter has determined that the issuer can assert a defense in good faith, this should eliminate any need to withdraw. Should an attorney nonetheless choose to withdraw under these circumstances, there should be no need to report this fact given the existence of a defense.19

III. REQUIRING THE ISSUER TO GIVE NOTICE DOES NOT SOLVE THE PROBLEMS CREATED BY NOISY WITHDRAWALS

The alternative “noisy withdrawal” proposal, which would create a duty to report for issuers, rather than their (former) attorneys, should not be adopted. The functional difference between the two “noisy withdrawal” proposals is slight. The major distinction between the two pro-

19. We believe that this is a better way to permit an issuer to avoid the need to disclose a resignation—by preventing the resignation—than the exception to disclosure of withdrawal proposed by the Commission. See infra, Part IV.D. The standard, the possibility of the assertion of a defense in good faith, is more workable than the Commission’s proposed standard in the exception, an opinion that the attorney is unreasonable or that the company has implemented an appropriate response.
posals lies in the identity of the reporting party, which is merely formalis-
tic. The imposition of a duty to report upon an issuer, rather than an
attorney, does not address, in any meaningful way, the concerns expressed
in our December 16, 2002 letter about the harmful effects of the imposi-
tion of a “noisy withdrawal” requirement upon the relationship between
the issuer and its lawyers.

The alternative proposal also suggests that the SEC might consider
certain exceptions to the duty to report. Those exceptions, which may
fairly be characterized as procedural protections, do not provide signifi-
cant comfort.

A. The attorney-client relationship is different than the auditor-client rela-
tionship. Some may view the alternative issuer notification proposal as
analogous to the rule requiring an issuer to notify the public of the resig-
nation of its auditor. Such an analogy can not be drawn because the roles
of attorneys and auditors are very different. One important distinction is
that the product of the auditor’s work—the audit report and the audited
financial statements—is intended to be relied upon by public investors.
The resignation of an auditor, therefore, is information that understand-
ably should be communicated to the public because it could affect the
public’s reliance on such work product. On the other hand, a company’s
attorneys, in general, do not provide advice intended for public inves-
tors. The attorneys’ role is to serve as the issuer’s advocate. Since the
public is not relying on a particular attorney’s work product or advice,
there is not the same expectation of, or reason for, public notice of with-
drawal.

A trusting attorney-client relationship is absolutely critical to the pro-
vision of quality legal services to ensure compliance with the law. The
alternative proposal, in essentially the same way as the noisy withdrawal
proposal, would fundamentally alter this relationship. The end result would
be that overall legal compliance would diminish, which will cause inves-
tor confidence in companies and the markets to suffer.

B. Mandatory disclosure of counsel’s withdrawal to the SEC will undermine
the attorney-client privilege. We are convinced that the imposition of any
duty to report the attorney’s withdrawal outside the issuer’s organization,
whether it be to report just the fact of the withdrawal or the withdrawal
and its attendant circumstances, would chill the relationship between
the attorney and the issuer. Our chief concern with both “noisy with-
drawal” proposals is with their effect upon the attorney-client privilege.
As the Supreme Court has observed, “the loss of evidence admittedly
cost the privilege is justified in part by the fact that without the
privilege, the client may not have made the communications in the first place.”

The alternative proposal, which would impose a duty to report the fact of the issuer’s receipt of notice on a publicly available Form 8-K, remains generally inconsistent with the attorney-client privilege. There is no uniform rule of attorney-client privilege which is applicable in all jurisdictions, contexts and proceedings. Thus, the imposition of a duty to report, coupled with the varying approaches to the corporate attorney-client privilege taken by federal courts and the courts of the fifty states, would result in uncertainty in the application of the attorney-client privilege, particularly in determining when, or if, the privilege has been waived. This uncertainty would take many years, the expenditure of significant and scarce judicial resources, as well as enormous expense for issuers and others, to resolve. Even then, given that different jurisdictions might, and likely would, reach different conclusions, it would be difficult for issuers to have confidence that their communications with their attorneys would remain sacrosanct.

We do not know how courts would ultimately resolve the complex thicket of issues raised if this proposal were adopted. We do know, however, that adopting a regulation that adversely affects the attorney-client privilege would harm issuers. Issuers would react to such a regulation by turning to attorneys less often. In other instances, issuers would give attorneys less information upon which to formulate legal advice, with the resulting advice being inevitably less valuable. Receiving less legal advice and advice of diminished value would hurt issuers, the securities markets, and the economy.

The potential impact of noisy withdrawal requirements on internal investigations could be particularly significant. The attorney-client privilege


21. For instance, the federal courts have rejected the “control group” test for determining when conversations between employees of the issuer and the issuer’s lawyer are privileged. Upjohn Co. v. United States, 449 U.S. 383, 393-394 (1981). On the other hand, a number of states continue to apply the “control group” test. See Brian E. Hamilton, Conflict, Disparity, & Indecision: The Unsettled Corporate Attorney-Client Privilege, 1997 Ann. Survey Am. Law. 629, 630 n.8 (citing cases); Stephen E. Saltzburg, Corporate & Related Attorney-Client Privilege Claims: A Suggested Approach, 12 Hofstra L. Rev. 279, 280-281 (1984) (same).

22. “The internal investigation serves a vital purpose for a company faced with allegations or evidence of illegal behavior. The company cannot fully evaluate the scope of employee wrongdoing or its potential liability without undertaking such an investigation. Companies know their own business operations, employees and records far better than the government. They know where to look, what results are anomalous, and which employees can be trusted.”
enables company counsel to conduct a thorough internal investigation of evidence of misconduct. At the outset of an internal investigation, company counsel informs employees and officers that the company, and not the individual, holds the privilege that attaches to interviews conducted in the course of the investigation, and that the company alone may choose to waive this privilege. In most instances, after receiving this information, employees and officers cooperate fully in these interviews, primarily because of the assurance that the corporate attorney-client privilege and work-product protections will prevent disclosure of the information outside of the company. If these employees and officers understand that company counsel conducting the investigation on behalf of the company may be required by the SEC to waive the privilege—and thus, in effect, the lawyers may be forced to be government informants—they would be less willing to speak freely in these interviews. This, in turn, would prevent counsel from discovering past misconduct, taking remedial action, and ensuring that the company takes steps to prevent inappropriate acts from occurring in the future.

For these reasons, requiring notification of the fact of an attorney’s withdrawal would harm the relationship between the attorney and the issuer. To go further, as one iteration of the alternative proposal does, and require that the issuer also report the “circumstances” of an attorney’s withdrawal, would only exacerbate the harmful effects upon the privilege.

C. There will be little benefit to the public from the proposed alternatives. With respect to the benefits of such a rule, it is our view that the imposition of a new duty to report withdrawal would not provide significant additional investor protection and, in fact, could contribute to stock price volatility. Thus, the proposed rule would do little to increase public confidence in the securities markets. There are other actors—chiefly the issuer’s board of directors and its officers—and other tools—regulatory, civil and criminal—that are available to deter and detect significant corporate malfeasance.

Moreover, the interroterm power of the corporate general counsel to compel obedience to law and corporate policy is largely a function of his or her ability to conduct an effective internal investigation of possible violations. Judson W. Starr & Brian L. Flack, “The Government’s Insistence on a Waiver of Privileges,” White Collar Crime 2001, at J-3-J4 (2001).

23. See United States v. Chen, 99 F.3d 1495, 1499 (9th Cir. 1996) (the service of “counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turning into government informants”).
In fact, the legislative and regulatory responses to recent corporate scandals have added new tools designed to improve the detection and increase the deterrence of corporate malfeasance. To this end, the Act itself, and the Commission’s regulations implementing the provisions of the Act that do not relate to lawyer conduct, add significant new protections for investors. These corporate governance and accounting reforms will have a direct and beneficial effect upon the securities markets and upon public confidence in them; the proposed “noisy withdrawal” rule, on the other hand, would do little to protect investors and would do great harm to the attorney-client relationship.

As described above, the original noisy withdrawal and the alternative proposals suffer from the same principal defect—they will have an adverse impact on the attorney-client relationship. The alternative proposal, however, suffers from a further defect—one that also may prove injurious to the investing public. The requirement contained in proposed section 205(e) and the related amendments to Forms 8-K, 20-F and 40-F mandate that the issuer publicly disclose an attorney’s written notice of withdrawal. Public notification of withdrawal would, in virtually all cases, provoke an immediate and potentially unjustified sell-off of the issuer’s stock. The noisy withdrawal proposal, notwithstanding its many infirmities, requires notification only to the Commission. It thus affords an issuer the initial opportunity to make its case to the Commission before any public disclosure, thus potentially avoiding the need for public disclosure and public over reaction.

Application of the attorney conduct rules necessarily will involve a significant number of cases in which issuer and counsel perspectives and judgments on close questions will differ. The requirement of public notice of an attorney’s withdrawal could subject an issuer to substantial damage in its stock price and market reputation simply because the attorney disagrees with the appropriateness of the issuer’s response and withdraws, even in close cases. The short timeframe that a company has between withdrawal and the time it must provide public notice of counsel’s resignation would preclude an issuer from being able to explain the facts and circumstances to the Commission and would likely lead to an immediate market overreaction to the notice by provoking a “sell now, ask questions later” mentality among investors. In this way, the proposed amendments to Forms 8-K, 20-F and 40-F will likely contribute to the volatility of markets as they react to news before it is fully digested and understood. The proposed requirement has the potential to generate market reaction that is not commensurate with the circumstances of withdrawal, particularly
where the withdrawal is over a close question. These consequences would not serve to further the goals of investor protection.

Alternatively, if reporting out becomes relatively common and a number of cases prove to be the result of “mole hills” built into “mountains” by attorneys engaged in defensive thinking due to their fear of being second-guessed by the Commission, investors may actually become immune to an attorney’s notice of withdrawal. This result can be easily avoided by requiring notice to the Commission rather than a public filing of a Form 8-K, 20-F or 40-F. In fact, if numerous public disclosures turn out to be the result of nothing more than over-anxious lawyers allowing their conservatism to result in disagreements with clients resulting in public disclosure, clients as a whole will become more and more leery of working with, or disclosing information to, cautious counsel and the risk of failures to comply with laws will only increase.

We note that another of the recent reforms, the “up the ladder” reporting requirement for attorneys appearing before the Commission, will ensure that attorney conduct and good corporate governance go hand in hand. On the other hand, we believe that to adopt a “noisy withdrawal” requirement has little benefit, but significant cost. Thus, while we supported the “up the ladder” reporting requirement, we oppose the “noisy withdrawal” requirement, in either the original or the alternative version.

D. The exception to disclosure—indirect institutional director review—does not work. Although we support the spirit of the contemplated exception to proposed section 205.3(e), the City Bar believes that this concept is unworkable as a practical matter. The proposal would allow an issuer to refrain from disclosing an attorney’s withdrawal where:

- a committee of independent directors of the issuer’s board determines, based on the advice of counsel that was not involved in the matters underlying the reported material violation (i) that the attorney providing such written notice acted unreasonably in providing such notice, or (ii) that the issuer has, subsequent to such written notice, implemented an appropriate response.

This exception would allow the issuer to seek the objective advice of a lawyer not involved in the alleged underlying material violation before being compelled to disclose an attorney’s withdrawal. However, the extraordinarily short deadline for disclosure of an attorney withdrawal mandated by section 205.3(e)—a mere two days—and the difficult stan-
standard of review by other counsel—unreasonableness—completely nullifies the proposal’s utility.

The issuer’s independent counsel could not perform the requisite investigation in the short time frame afforded. Inquiries into complex commercial transactions, accounting matters and other issues that would underlie an alleged material violation routinely take weeks, or even months, to complete. For an independent lawyer called on to evaluate the transaction to fulfill his or her own duties of due diligence and responsibility to his or her client would typically require the lawyer to examine large volumes of documents and to interview many witnesses. Certain witnesses may not be amenable to a prompt interview, particularly if they are not employees of the issuer, but of the issuer’s accountants, consultants or other professionals.

Indeed, even the Commission’s own investigations routinely take months to complete. Some of the more prominent corporate scandals that prompted the passage of the Act are still under investigation, and even those that have closed involved many lawyer-months of full time dedication. For example:

- The Commission commenced an investigation into alleged wrongdoing at Tyco International in July 2000. National Law Journal, July 8, 2002 at A13. However, Tyco executives were not named by the Commission in a civil fraud complaint until September 2002, more than two years later. See Jeff Smith, Targeting Ill-Gotten Gains; SEC uses New Tool to Get Execs. to Repay Investors, Rocky Mountain News, March 8, 2003, at 4C.
- The Commission launched its investigation of Qwest in March 2002, and did not file its disgorgement action against Qwest executives until approximately one year later. See Business Briefing, The San Diego Union-Tribune Feb. 12, 2003 at C-2; Smith at 4C.

Independent counsel’s investigations, even with the client’s full cooperation (although without the Commission’s subpoena power), simi-
larly take a long time to complete. Thus, section 205.3(e)'s two-day time limit renders this exception a dead letter.

Accordingly, because we do not believe that the proposed exception’s investigation can be conducted within the two-day window provided by section 205.3(e), the City Bar concludes that the proposed exception to issuer reporting of attorney withdrawal under the Act should not be implemented. We also believe that should the Commission seek to regulate withdrawal—which we believe it should not—a viable alternative exists that should permit issuers to avoid the resignation of counsel in most instances (no withdrawal is mandated while the issuer is investigating the report with the assistance of counsel and no resignation is required if that counsel advises that a defense in good faith exists, see Part III, supra).25

* * *

We thank you for the opportunity to comment on these proposed rules. We hope that the Commission will defer adoption of these or any additional rules under Section 307 until after the Commission has had the opportunity to observe and assess the actual impact of the rules it has already adopted. We would be pleased to meet with the Commission or its staff to discuss or amplify the comments in this letter.

25. As set forth in footnote 19, supra, we also do not think that the standard is an appropriate one. It is quite possible that a good faith defense may exist, even though the reviewing attorney may not be willing to opine that the withdrawing attorney’s position is unreasonable. Because the existence of such a defense should obviate any need to disclose a withdrawal, we do not think that one attorney should be called upon to question the reasonableness of a decision to withdraw made by another attorney.
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"NOISY WITHDRAWAL" PROPOSAL IS INAPPROPRIATE
Online Auction Sites and Trademark Infringement Liability

The Committee on Trademarks and Unfair Competition

INTRODUCTION

Is the operator of an online auction site liable for selling counterfeit goods on its system? The law does not provide an easy answer to this issue that has plagued trademark owners since the boom of the Internet as an online marketplace and, on the other hand, as a symbol of a sort of free expression and economic “state of nature.” The courts have grappled with similar issues very few times, and have yet to clearly signal the extent to which an auction site may be held liable for its users’ trademark infringement. Because of the intense interest in the way the law will respond to emerging technology such as online auction sites, and because this new venue so easily facilitates trademark infringement, the issue of online auction site liability fosters much debate and speculation. Existing law offers some guidance, but the courts could end up going any way on the issue as they attempt to balance perhaps the greatest threat to trademark law with a deeply rooted reluctance to hold third parties, in this case website operators, responsible for the bad acts of others.

Part I of this Report discusses the extent of counterfeiting activity on online auction sites, and provides a brief synopsis of such sites and their policies. Part II explains the doctrine of vicarious and contributory
trademark infringement and sets out the relevant federal, state and foreign case law. Part III draws a comparison to secondary liability for copyright infringement with respect to online auction sites, including a brief discussion of statutory safe harbors. Finally, Part IV weighs policy arguments in favor of and against holding online auction sites secondarily liable for trademark infringement occurring on their sites.

I. OVERVIEW OF COUNTERFEITING AND ONLINE AUCTION SITES

A. Extent of counterfeit listings and trademark owners’ monetary losses attributed thereto

Trademark infringement and counterfeiting rob the United States of $200 billion annually and represent a significant loss in tax revenue in countries around the world. Fortune 500 companies reported that they spend an average of $2 to $4 million per year to combat counterfeiting and some reported spending up to $10 million. The sale of counterfeit goods over the Internet amounts to more than $30 billion worldwide and is certain to increase. This accounts for roughly 10 percent of the total counterfeit market, which is estimated to be around 5 to 7 percent of world trade.

In recent years, Internet auctions have become perhaps the hottest...
phenomenon on the Web, facilitating a “virtual flea-market” featuring an endless array of merchandise from around the world. They have also become a new distribution channel for counterfeit goods, and the most popular one at that. Indeed, scams perpetrated on online auctions, a large percentage of which involve counterfeit merchandise, remain the top Internet fraud for 2001 and 2002, consisting of over three-quarters of all Internet-related fraud. Losses to consumers due to such Internet fraud in the year 2001 alone are estimated at $6,152,070.

B. Discussion of the stated policies of auction sites and the extent of control exercised over listings that are posted thereon

Virtually all auction sites prohibit the sale of counterfeit and infringing merchandise in their “Terms & Conditions” or “User Agreement” legal pages. Many will investigate complaints brought by intellectual property owners and may even remove listings and cancel sellers’ accounts. Some also have feedback bulletin boards where buyers can post complaints about purchases. Nevertheless, some of the smaller auction sites often fail to enforce their own terms of use or policies and attempt to shift responsibility for listings solely to the seller. Additionally, auction sites generally do not monitor listings to ensure that counterfeit or infringing merchandise is not being offered for sale on their systems.

eBay Inc. (“eBay”), operator of eBay, the Internet’s largest auction site,

5. The International Chamber of Commerce also warns that modern technologies, “not only make it easier to produce counterfeit goods, but also facilitate mass production and open up potential new distribution channels for pirated products.” ICC, Counterfeiting in the New Millennium (January 2000), posted at <http://www.iccwbo.org/ccs/news_archives/2000/counterfeiting_in_the_new_millennium.asp>.

6. Statement of the International Trademark Association on the Green Paper on Consumer Protection (January 15, 2002) <http://www.inta.org/policy/cmnt_grpaper.shtml>. The most popular way of selling counterfeits over the Web is through auction sites, as millions of consumers flock to them daily hoping to find the best bargain. What makes the Internet such a haven for counterfeit goods and in turn a danger for consumers, is that consumers are deprived of the opportunity to physically examine the merchandise prior to sale. The Internet also provides cyber criminals with a feeling of anonymity that street corner pirating operations cannot provide as well as being a desirable business venture for syndicates of organized crime by promising high profits and very low risks.

7. Statistics are from the National Fraud Information Center, located at <http://www.fraud.org/internet/intstat.htm>.

8. For a comparison of auction site policies, see Appendix A.

9. eBay promotes itself as the world’s largest online marketplace for the sale of goods and services among its registered users. It operates an Internet-based service in which it enables
has a Verified Rights Owner (“VeRO”) program, which is, arguably, the most comprehensive and structured program offered by online auction sites to deal with intellectual property owners’ complaints of infringement. The VeRO program has various features, including dedicated priority email queues for reporting alleged infringing activities and the ability to use a “personal shopper” feature that allows users to conduct automatic searches for potentially infringing items. Additionally, Amazon.com, Inc., operator of Amazon.com Auctions (“Amazon.com Auctions”), has instituted a similar policy of regularly reviewing all auctions that are posted on its system, removing those that appear to be infringing and possibly even canceling the seller’s account. Despite the fact that eBay and Amazon have set up these structured programs to prevent counterfeit and infringing items from being listed, such listings have not stopped nor have they even been considerably reduced.

In an effort to avoid the posting of counterfeit and infringing items on its site, the second largest online auction site, Yahoo! Inc., operator of Yahoo! Auctions (“Yahoo! Auctions”), created its Neighborhood Watch Program, which allows users to “review” and report questionable auctions. Unlike eBay and Amazon Auctions, Yahoo! Auctions apparently relies primarily on direct feedback from users. It has also been reported that Yahoo! Auctions uses “bots” to search its site for infringements and
will cancel any auctions that appear to violate intellectual property rights.15

Despite the current policies adopted by online auction sites and their disparate efforts at policing their systems for infringements, intellectual property owners might argue that more can be done to prevent violations of their rights. Conversely, auction sites might be reluctant to do more, if not from an effort to protect the rights of their users, then possibly because a strictly enforced policy may reduce the level of user activity or impose a financial cost on the operators of the auction sites. Additionally, anticipating the threat of legal action by trademark owners for secondary infringement, virtually all auction sites have crafted their legal terms in efforts to avoid such liability.16 As will be evident from the legal discussion, it also stands to reason that auction site owners are wary of crossing a line they believe they have not yet approached—that of content provider, with the concomitant exposure to all sorts of liability this may imply. It remains to be seen whether such language will be sufficient to insulate auction sites from secondary trademark infringement liability.

II. OVERVIEW OF SECONDARY TRADEMARK INFRINGEMENT LAW

A. Doctrine of contributory trademark infringement set out in Inwood Labs

The Lanham Act contains no explicit language allowing for a cause of action of contributory infringement or vicarious liability.17 In the seminal case of Inwood Labs., Inc. v. Ives Labs., Inc., however, the Supreme Court interpreted that statute to imply such a cause of action and enunciated what remains the standard for contributory trademark infringement.18

15. Nancy L. Hix, Dealing with Closed Auctions, located at <http://www.auctionwatch.com/awdaily/tipsandtactics/wel-closed.html>. See also White Paper from The Software & Information Industry Association entitled "Piracy on Internet Auction Sites: What Consumers Need to Know," posted at <http://www.siia.net/sharedcontent/piracy/news/auction2001.pdf> (stating that Yahoo! Auctions has "launched a new program to help enforce refined policies and identify items that do not comply with Yahoo!’s Terms of Service. The program will incorporate both a new, internally developed technology, as well as trained representatives who will regularly review the auction site").

16. See third column of comparison chart in Appendix A. Arguably, a site’s policy only serves to bind users, i.e., buyers and seller, and may not be an impediment to claims posed by third party trademark owners.


18. 456 U.S. 844, 855 (1982). While Inwood Labs involved a manufacturer that was held secondarily liable for its distributor’s trademark infringement, this agency relationship has

The Court stated that a party which “intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement ... is contributorily responsible for any harm done as a result of the deceit.” Stated differently, the determination of contributory infringement depends upon a defendant’s intent and knowledge of the wrongful activities.

B. Discussion of cases holding brick and mortar flea markets liable for contributory trademark infringement (Hard Rock Cafe, Fonovisa and Polo Ralph Lauren)

The concept of “knowledge” of infringement, however, was soon expanded, in a critical series of cases. In Hard Rock Cafe Licensing Corp. v. Concession Svcs., Inc.,21 the Seventh Circuit extended the Inwood test for contributory trademark liability to the operator of a flea market. The court stated that a flea market owner and operator can be held contributorily liable for sales of counterfeit products by a market vendor if the owner knew, had reason to know or was “willfully blind” to the infringing sales.22 While the court found it to be axiomatic that a company “is responsible for the torts of those it permits on its premises knowing or having reason to know that the other is acting or will act tortiously,”23 it also stated that there is no affirmative duty to take precautions against the sale of counterfeits. The court refused to hold the flea market vicariously liable for the infringement because, in that case, the defendant and the infringer had no apparent or actual partnership, had no authority to bind one another in transactions with third parties and did not exercise joint

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20. David Berg & Co. v. Gatto Int’l Trading Co., 884 F.2d 306, 311 (7th Cir. 1989). See also Restatement (Third) of Unfair Competition § 26 (1985) (imposing liability when the actor intentionally induces a third person to engage in the infringing conduct, or the actor fails to take reasonable precautions against the occurrence of a third person’s infringing conduct in circumstances in which the infringing conduct can be reasonably anticipated).
21. 955 F.2d 1143 (7th Cir. 1992). In this case, the owner of trademarks for HARD ROCK CAFÉ on apparel brought suit against a vendor at an Illinois flea market for selling counterfeit goods, as well as the flea market owner for its vendor’s infringement.
22. Id. at 1149.
23. Id. quoting Restatement (Second) of Torts § 877(c) & cmt.d (1979).
ownership or control over the infringing product. Nevertheless, the implication in this case was that, had some or perhaps all of these factors been present, Hard Rock Cafe's broader vicarious liability argument may have been successful. While demonstrating the presence of these factors to prove vicarious infringement may be a difficult burden for trademark holders to meet under the circumstances surrounding online auction sites, the likelihood of successfully proving contributory infringement is far greater.

The next significant decision in this area was Fonovisa, Inc. v. Cherry Auction, Inc., in which a record company brought suit for trademark infringement against the operators of a swap meet at which vendors sold counterfeit music cassettes. The Ninth Circuit, citing the decision in Hard Rock Cafe, held that the swap meet could be held liable for contributory trademark infringement. The court, reaffirming the notion that “willful blindness” satisfies the knowledge prong of the contributory infringement test, stated that a swap meet that is supplying the necessary marketplace cannot disregard its vendors' blatant trademark infringements with impunity. By analogy to Fonovisa, it would appear that trademark holders could attempt to meet the willful blindness test and build a case for proving “willful blindness” by routinely providing notice letters to online auction sites informing them of counterfeit merchandise being auctioned on their sites. Thus, contributory trademark infringement could at least theoretically be established if sufficiently specific notices are ignored and an online auction site continues to allow its site to be used to conduct known infringing activities.

In Polo Ralph Lauren Corp. v. Chinatown Gift Shop, Polo Ralph Lauren

24. 76 F.3d 259 (9th Cir. 1996).

25. The bulk of the Fonovisa decision discussed secondary copyright liability. This analysis has been significantly affected by the enactment of the DMCA (see infra). For a detailed discussion of how Fonovisa would have affected ISPs had the DMCA not been enacted, see Kenneth A. Walton, Is A Website Like A Flea Market Stall? How Fonovisa v. Cherry Auction Increases The Risk Of Third-Party Copyright Infringement Liability For Online Service Providers, 19 Hastings Comm. & Ent. L.J. 921 (Summer 1997). Also, for an in-depth analysis of Fonovisa with respect to anti-counterfeiting efforts in general, see Barbara Kolsun and Jonathan Bayer, Indirect Infringement And Counterfeiting: Remedies Available Against Those Who Knowingly Rent To Counterfeiters, 16 Cardozo Arts & Ent. L.J. 383 (1998).

26. As explained in Hard Rock Cafe, in order to constitute willful blindness, a person must “suspect wrongdoing and deliberately fail to investigate.” Hard Rock Cafe, 955 F.2d at 1149 (citing Louis Vuitton S.A. v. Lee, 875 F.2d 584, 590 (7th Cir. 1989)). Additionally, such willful blindness constitutes knowledge under the Trademark Counterfeiting Act of 1984. H.R. Rep. No. 98-997, at 10.

Corp., Rolex Watch U.S.A., Inc., and Louis Vuitton brought suit against three retailers and their landlords for the sale of counterfeit goods bearing the three companies' trademarks. To support their claim of contributory trademark infringement against the landlords, the plaintiffs contended that the landlords were providing their tenants with a safe haven and marketplace to engage in the sale of counterfeit goods; that the tenants had been openly selling the counterfeit goods with impunity; and that the landlords had knowledge of their tenants' illegal acts and that their premises were being used for such unlawful trade. The court denied a motion to dismiss brought by one of the defendants, holding that under Inwood and Hard Rock Cafe, the plaintiffs stated a cause of action for contributory trademark infringement against the landlord. In addressing liability under the Lanham Act, the Polo Ralph Lauren court observed that "a landlord is neither automatically liable for the counterfeiting of a tenant, nor is the landlord automatically shielded from liability. The question of liability depends on the circumstances." The court held that the landlord had a responsibility under both federal and state law, commencing at the time it received notice from the plaintiffs regarding the counterfeiting, to take "reasonable steps to rid the premises of the illegal activity." Thus, this decision seems to indicate that a court may require that a trademark holder prove that the landlord's failure to act is the proximate cause of the trademark holder's damages.

C. Discussion of cases finding contributory trademark infringement resulting from online activity (Lockheed, Gucci, Great Domains)

Various trademark plaintiffs have asked the courts to apply these principles to the Internet, with varying degrees of success. To date, there have been no decisions that have addressed, head-on, the application of secondary trademark liability to online auction sites. Nevertheless, the fol-

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28. The plaintiffs based their case upon several civil seizures of counterfeit goods at each of the retail locations, followed by notice letters to the landlords regarding the tenants' illegal sale of counterfeit goods. After receiving no response from the landlords to these letters, the plaintiffs commenced litigation. The retailer defendants defaulted and the plaintiffs secured a substantial default judgment against them. Id. at 650.

29. Id. at 648.

30. Id.

31. Id.

32. A lawsuit seeking contributory copyright and trademark liability was brought in March 2000 by Sega of America, Inc., Electronic Arts Inc., and Nintendo of America, Inc. in the US District Court for the Northern District of California against Yahoo!, alleging that Yahoo!
lowing cases will likely serve as precedent for such a determination, were the issue to come before a court.

In Lockheed Martin Corp. v. Network Solutions, Inc., the court rejected the plaintiff’s contributory trademark infringement claim against the defendant, the domain name registrar with which the infringing domain name was registered. The court explained that the defendant’s role was limited to registering a domain name and connecting it with an IP address, not its use in commerce and, therefore, its conduct was too far removed from the actual infringing conduct. Lockheed, of course, was not an action brought against a website owner or operator. In Gucci America, Inc. v. Mindspring Enters., Inc. et al., the owner of the GUCCI trademark sued the owner of a website that sold counterfeit Gucci products on the site, as well as the site’s Internet Service Provider (“ISP”). Mindspring brought a motion to dismiss based on the Lockheed court’s refusal to extend secondary liability for domain name squatting to the name registrar. The Court denied the motion, reasoning that a domain name registrar’s “role in the Internet is distinguishable from that of a Internet service provider whose computer provides the actual storage and communications for infringing material, and who therefore might be more accurately compared to the flea market vendors in Fonovisa and Hard Rock.”

Thus, under the rule enunciated in Gucci, the key factor for determining whether a party will be held secondarily liable as a contributing infringer is the degree to which it can control and monitor the activities of the infringing party. In Gucci, the court found that Mindspring, an ISP, was (unlike a domain name registrar) akin to a flea market operator because it provided, “the actual storage and communications for infringing material,” just as the flea market operator provides the physical location and the selling environment to the vendor trading in counterfeit goods. A flea market operator can prevent the sale of counterfeits by prohibiting them from being sold at its site or denying access to a vendor altogether. So too, ruled the Gucci court, can the ISP prevent the infringing conduct by monitoring sites using its services or terminating service to wrongful parties accused of selling counterfeits.

knowingly aided the sale of counterfeit video games on its website. No decision has issued. See Kevin Murphy, Yahoo Sued for Millions Over Pirated Games, CyberCover News (March 30, 2000) posted at <http://www.shockmag.com/pages/computergram_mar_30.htm>.

33. 985 F. Supp. 949 (C.D. Cal. 1997), aff’d, 194 F.3d 980 (9th Cir. 1999).

In Ford Motor Co. v. Greatdomains.Com, Inc., the plaintiff, owner of various marks such as FORD, brought an action under the Anticybersquatting Consumer Protection Act (“ACPA”), against registrants of domain names incorporating its trademarks, as well as against the defendant, an online auctioneer of domain names, for contributory trademark infringement. In the first sentence of this opinion, the Court analogized the defendant to eBay and stated that the defendant, “[r]ather than offering a forum for whatever objects cyber-merchants might wish to sell … [it] specializes in auctioning Internet domain names … [by] providing a marketplace for buyers and sellers of domain names…[for which it] receives a fixed percentage of the price of any domains sold over its Website.” In support of its contributory trademark infringement claim against the defendant, the plaintiff argued that the “flea market” analysis used in Fonovisa and Hard Rock Cafe should also apply in this case because the defendant provided “the necessary marketplace” for the alleged cybersquatting. Nevertheless, the Eastern District of Michigan declined to extend this “flea market” analysis to cybersquatting cases because of the heightened standard of “bad faith intent” required by the ACPA. The Court explained that “[b]ecause an entity such as Great Domains generally could not be expected to ascertain the good or bad faith intent of its vendors, contributory liability would apply, if at all, in only exceptional circumstances.” Nevertheless, Great Domains may be used to support the argument that in a “regular,” non-ACPA, contributory trademark infringement action, awareness by the operator of a website that infringing materials are being sold or auctioned thereon would be sufficient for a finding of contributory infringement.

A review of Internet-related case law dealing with contributory trademark liability suggests that an online auction site may be more comparable to the ISP in the Gucci case than to the domain name registrar in Lockheed. In fact, if the Lockheed and Gucci cases are viewed as points along a continuum, with domain name registration services (no contributory liability) on one extreme and ISP services (conditional contributory liability) on the other, online auction sites likely fall somewhere near or possibly further to the right of even the ISP depending on the specific

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37. 177 F.Supp.2d at 639-40.
38. Id. at 646.
39. Id. at 647.
facts of in a given case. And, arguably, online auction sites are more like flea market operators than the defendants in Fonovisa and Hard Rock Cafe.

D. Unfair competition and similar trademark infringement-like liability under state statutes (Gentry v. eBay, Stoner v. eBay, NY statute and Dayana)

A number of other approaches to auction site liability have been attempted, without great success. In Gentry v. eBay, a class of eBay users who purchased allegedly forged autographed sports memorabilia on eBay brought suit in Superior Court in San Diego, California. The plaintiffs claimed that eBay violated California unfair competition law; was negligent in permitting the sale of allegedly forged sports memorabilia by misrepresenting the safety of purchasing such items; and that eBay knew or should have known the individual defendants were conducting unlawful practices but failed to ensure that they complied with the law. The court, whose decision was upheld on appeal, concluded that none of these allegations placed eBay outside the immunity for service providers established by the safe harbor provisions of the Communications Decency Act (“CDA”), reasoning that, otherwise, eBay would be liable for simply failing to stop the individual defendants’ illegal acts of compiling false or misleading content merely if eBay knew or should have known of the fraudulent conduct of these third parties. As no secondary trademark infringement claim was made by the plaintiffs, and, thus, the court made no mention of liability in such a circumstance, the court’s decision presumably would not affect a claim of secondary trademark infringement. Additionally, the CDA is unlikely to be used as a defense to contributory trademark infringement because of the limitation set forth in § 230(e)(2), that “[n]othing

40. 99 Cal.App.4th 816, 121 Cal.Rptr.2d 703 (June 26, 2002).
41. The plaintiffs also claimed that eBay violated a section of the California Civil Code which prohibits “dealers” from selling sports memorabilia without a “Certificate of Authenticity.” The court noted that eBay was not a “dealer” under California law and thus not required to provide certificates of authenticity with autographs sold over its site by third parties.
42. 47 U.S.C. § 230. The CDA immunizes interactive computer service providers from liability for posting harmful information provided by another information content provider. The Gentry court felt that imposing liability on eBay by holding eBay responsible for content originating from other parties, it would be treating it as the publisher (i.e., the original communicator), contrary to Congress’s expressed intent under section 230(c)(1) and (e)(3).
43. Though an unfair competition claim is similar to a trademark infringement claim, the Gentry court’s basis for dismissing this state cause of action was based on its preemption by the federal CDA, a reasoning that is inapplicable to a federal trademark infringement or counterfeiting claim.
in this section shall be construed to limit or expand any law pertaining to intellectual property.”

The unreported decision of Stoner v. eBay, Inc. was cited in fn. 13 of the Gucci v. Hall Assoc. case, as follows:

By letter dated Nov. 16, 2000, Mindspring cites Stoner v. eBay Inc., No. 305666, 2000 WL 1705637 (Cal.Super.Ct. Nov. 1, 2000), in which, the California Superior Court held that eBay was immune (under Section 230) from liability pursuant to Cal.Bus. & Prof.Code § 17200. Plaintiff responds that Stoner “has no relevance to this case” because, “[a]lthough the plaintiff there apparently complained about sales of ‘bootleg sound recordings ... [he did not] bring typical intellectual property causes of actions, such as claims for copyright, trademark or patent infringement,’ but rather sued under Cal.Bus. & Prof.Code § 17200 whose ‘sweeping language’ has been construed to reach ‘anything which can properly be called a business practice and that at the same time is forbidden by law.’” (Pl.’s Letter dated Nov. 21, 2000 (quoting Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553, 71 Cal.Rptr.2d 731, 950 P.2d 1086, 1090 (1998)).)

Indeed, in Stoner, a California State Superior Court decision, the Court stated that, “[i]n order for liability to arise [under this state cause of action] and the immunity to be lost, it would be necessary to show actual, rather than constructive, knowledge of illegal sales, and some affirmative action by the computer service, beyond making its facilities available in the normal manner, designed to accomplish the illegal sales.” While the language appears to be quite broad, the Gucci decision suggests that Stoner should not be applied in federal trademark or copyright cases.

Most states have enacted anti-counterfeiting statutes as well. In New

44. Indeed, the Gucci court rejected the ISP’s argument that the absence of any decisional law prior to passage of the CDA acknowledging ISP liability for contributory trademark infringement meant any such finding of contributory liability after enactment of the CDA would be an impermissible expansion of intellectual property law. Gucci, 135 F. Supp.2d at 412.


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York, trademark holders facing a landlord who knowingly permits the counterfeiting activities of his tenant have a weapon at their disposal that is unavailable in any other state. Pursuant to N.Y. Real Property Law § 231, a landlord may be held liable as a contributory infringer for tenants’ illegal conduct and is jointly and severally liable with the tenant for any resulting damage. 47

Under New York law, trademark plaintiffs have an additional arrow in their quiver that has not yet been tested in the online auction context. In 1165 Broadway Corp. v. Dayana of N.Y. Sportswear, Inc., 48 the Civil Court of the State of New York addressed the issue of whether the holding and selling of counterfeit goods constitute an illegal use under RPL § 231, and in turn, whether landlords can be secondarily liable thereunder. Though RPL § 231 had not previously served as the basis of evictions for counterfeiting activity, 49 the court held that RPL § 231 “certainly includes any

§ 231. Lease, when void; liability of landlord where premises are occupied for unlawful purpose

1. Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises, or any part thereof shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied.

2. The owner of real property, knowingly leasing or giving possession of the same to be used or occupied, wholly or partly, for any unlawful trade, manufacture or business, or knowingly permitting the same to be so used, is liable severally, and also jointly with one or more of the tenants or occupants thereof, for any damage resulting from such unlawful use, occupancy, trade, manufacture or business.


49. This penal law had been habitually used by landlords to evict tenants for illegal uses of premises that negatively affected the health, morals, welfare, or safety of the public, such as where the premises in question were used: (1) for the storage and distribution of drugs, illegal fireworks, and obscene materials; (2) for illegal operation of a rooming house; (3) for the operation of a house of prostitution; (4) as a gambling hall; and (5) for the illegal sale of liquor during prohibition.
enterprise operated in violation of the Penal Law,” including use of “com-
mercial premises in violation of Penal Law 165.72, known as trademark
counterfeiting in the second degree, a class E felony.” Thus, under RPL §
231(2), if the landlord has knowledge that his premises are used for illegal
trade, business or manufacture, i.e., counterfeiting activity, the landlord
is jointly and severally liable with the tenant for damages resulting from
the infringement.

Thus, trademark owners may have an additional claim against online
auction sites under New York law and may only need to overcome the
more stringent standards of a claim of secondary trademark infringement
when they cannot prove counterfeiting. Nevertheless, to date, there have
been no cases applying RPL § 231 to online activity and it remains to be
seen whether auction sites will be considered “landlords” under RPL §
231(2).

E. Analogous foreign cases (Rolex v. eBay and Ricardo in Germany)

Montres Rolex, S.A. (“Rolex”), the owner of the luxury brand ROLEX
for watches, has been especially diligent in its efforts to protect its mark
from counterfeiting activity online. Indeed, it has brought lawsuits in
German courts against online auction sites for contributory trademark
infringement. One such suit is currently pending against eBay’s European
subsidiary. Rolex alleged that eBay infringed Rolex’s trademarks and un-
fairly competed with Rolex as result of users’ selling counterfeit watches
through eBay’s German website. Rolex is seeking an order forbidding the
sale of Rolex watches on the website as well as damages. 51

50. 633 N.Y.S.2d at 726. Section 165.72 provides:

A person is guilty of trademark counterfeiting in the second degree

when, with the

intent to deceive or defraud some other person or with the intent to evade a lawful
restriction on the sale, resale, offering for sale, or distribution of goods, he or she
manufactures, distributes, sells, or offers for sale goods which bear a counterfeit
trademark, or possesses a trademark knowing it to be counterfeit for the purpose of
affixing it to any goods, and the retail value of all such goods bearing counterfeit
trademarks exceeds one thousand dollars.

N.Y. Penal Law § 165.72 (McKinney 1997).

51. In its most recent Quarterly Report filed with the Securities & Exchange Commission, eBay
claimed that it had meritorious defenses and intended to appeal if it does not prevail at the
trial court. This QR can be accessed at <http://edgar.sec.gov/Archives/edgar/data/1065088/
000089161802005206/f85887e10vq.htm>.
Another such lawsuit was brought by Rolex against Ricardo.de, a popular German auction site. The trial court (Cologne Regional Court), held in favor of Rolex and prohibited Ricardo.de from either selling or allowing replica Rolex watches to appear on its website. On appeal, the Regional High Court of Cologne dismissed Rolex’s claim and held that providers of online auction platforms cannot be held liable for trademark infringement caused by an auctioneer’s offer. The court reasoned that the defendant did not willfully participate in the infringement of rights caused by an offer because the automated registration process used for auctioneers and their offers did not allow the defendant to review an offer’s contents. This case, decided under legal doctrines not entirely analogous to the Lanham Act, can also arguably be distinguished from most other auction sites, such as eBay, that do some degree of monitoring of the contents of listings placed on their sites.

III. COMPARISON WITH SECONDARY COPYRIGHT INFRINGEMENT LAW

A. Overview of DMCA safe harbor provisions for ISPs

Section 512 of the Digital Millennium Copyright Act (“DMCA”), in an effort to protect Internet Service Providers (“ISPs”) from liability for the copyright-infringing activities of its users, requires that proper notice be given to an ISP before it has a duty to act. In other words, the DMCA exempts ISPs that meet the criteria set forth in its safe harbor provisions from claims of copyright infringement made against them that result from the conduct of their customers. The DMCA defines an ISP as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received” or “a provider of online services or

52. Rolex is currently appealing this decision to the German Federal Civil Court in Karlsruhe.
network access, or the operator of facilities therefor.” 55 This broad definition has been held to include auction sites, thus apparently insulating them from secondary liability for copyright infringement. 56

B. Discussion of cases involving contributory copyright infringement claims related to online activity (Napster, Remarq and Ellison)

In A&M Records, Inc. v. Napster Inc., 57 the Ninth Circuit found that Napster 58 could be held liable for contributory copyright infringement if it had (1) actual knowledge of specific infringing works available using its system, (2) encouraged and assisted its third-party users to engage in copyright infringement, and (3) materially contributed to such infringing activity. The court held that Napster could also be held liable for vicarious copyright infringement if it (1) had a direct financial interest in its users’ infringing activity, and (2) retained the ability to police its system for infringing activity, to block access to knowing infringers and to remove the infringing material from its system. The court would not, however, find Napster responsible for preventing infringing material from being posted in the first place. While recognizing that Napster may obtain shelter thereunder, the court declined to apply the safe harbor provisions of the DMCA before full resolution at trial, due to factual issues with respect to the parties’ compliance with specific procedures outlined in § 512. 59

In a recent case involving news groups, ALS Scan, Inc. v. Remarq Communications, Inc., 60 it was held that DMCA protection of an innocent ISP

56. See infra.
57. 239 F.3d 1004 (9th Cir. 2001).
58. Napster designed and operated a system that permitted PC users to transmit and retain copyrighted sound recordings employing digital technology. Through a process known as “peer-to-peer” file sharing, Napster allowed its users to make music files stored on individual computer hard drives available for copying by other Napster users, to search for music files stored on other users’ computers, and to transfer exact copies of other users’ music files from one computer to another via the Internet.
59. Napster, 239 F.3d at 1025. This issue was not resolved due to Napster’s bankruptcy filing.
60. 239 F.3d 619 (4th Cir. 2001). In this case, the plaintiff, owner of copyrights in photographs, brought suit against an online news group service that, as a result of its failure to monitor or censor the articles posted on its site by third parties, featured hundreds of infringing postings. The plaintiff sent notice specifying two news groups, which were allegedly created for the sole purpose of violating its copyrights, and demanded that the defendant remove these groups from its site. The defendant refused, advising the plaintiff that it would
disappears at the moment it is informed that a third party is using its system to infringe. The court also held that copyright holders need only comply substantially with the notice requirements set forth in § 512 of the DMCA and that only a representative list of infringements must be provided so as to reasonably identify where the infringements may be found on the provider’s system. This decision would appear to strengthen the hand of the owners of copyrighted properties.

Similarly, in a recent decision involving usenets, Ellison v. Robertson, it was held that the provision of a service that allows for the automatic distribution of usenet postings can constitute a material contribution when the ISP knows or should know of infringing activity on its system and yet continues to aid in the distribution of the infringing material. The court declined to apply the DMCA’s safe harbor provisions to immunize AOL from contributory copyright liability, reasoning that an ISP must first satisfy the DMCA’s requirement to have adopted and reasonably implemented, and informed its subscribers, of a policy for the termination in appropriate circumstances of subscribers who are repeat infringers. Finally, the court rejected the ISP’s argument that the mere provision of usenet access was too attenuated from the infringing activity to constitute a material contribution sufficient to sustain a holding of contributory infringement.

Thus, the DMCA does not provide ISPs with absolute immunity from secondary copyright infringement claims. While the case law in this area considers the extent and sophistication of an ISP’s ability to police its site as evidence that it can and should do all that it can to prevent infringement on its site, courts will also focus on the specific safe harbor factors in determining whether to impose secondary liability.

eliminate individual infringing items if they were identified with sufficient specificity. Since there were over 10,000 copyrighted images that appeared in the news groups over a period of several months, the plaintiff found it more expeditious to bring suit.

61. A “usenet” is a worldwide bulletin board system accessible through the Internet and ISPs, which contains over 14,000 newsgroups. NetLingo Dictionary of Internet Words, available at <http://www.netlingo.com/right.cfm?term=Usenet>.

62. 189 F. Supp. 2d 1051 (C.D. Cal. 2002). In this case, the plaintiff, owner of copyrights in various fictional works, brought suit against both the individual who posted several of these works onto a usenet group that was used primarily to exchange pirated and unauthorized digital copies of text material, as well as America Online (“AOL”), which acted as a usenet peer and hosted the infringing materials on its server.

63. Conversely, the court did grant AOL’s motion for summary judgment on plaintiff’s vicarious copyright liability claim, which was found to be barred by § 512.
C. Discussion of case involving copyright liability of auction sites (Hendrickson)

Recently, in Hendrickson v. eBay, the plaintiff sued eBay for copyright infringement, claiming that pirated copies of his documentary film “Manson” were being auctioned on eBay's site. Specifically, in late 2000, Hendrickson sent a cease and desist letter to eBay, claiming that his company owned the copyright to the “Manson” documentary. Significantly, Hendrickson did not make his copyright interest clear and he failed to specify which copies of the documentary were infringing. eBay sent Hendrickson several email messages requesting that Hendrickson submit eBay's Notice of Infringement form and asking him to join eBay's VeRO program. Hendrickson refused eBay's request to join the VeRO program and never provided eBay with specific item numbers that eBay sought with respect to the alleged infringing copies of his documentary. Instead, Hendrickson filed suit.

The court held that the “safe harbor” provisions in § 512(c) of the DMCA protected eBay from secondary liability for copyright infringement by its sellers. The court did not address eBay's claim to protection under § 512(d). According to the court, eBay did not have a duty to act upon receipt of insufficient notice of alleged infringement, which was deemed inadequate because the plaintiff did not state that he was authorized to act on behalf of the owner of the copyright at issue, did not assert that the use of the copyrighted work was unauthorized, did not provide sufficient information identifying the alleged pirated copies, and did not state under oath in his communications that the information he submitted was accurate. In fact, the judge surmised that eBay should not be “penalized” for engaging in voluntary efforts to “combat piracy over the Internet” and found that the infringing activities were the sale and distribution of pirated copies of “Manson” by eBay's sellers offline, something over which eBay had no control. According to the court, the reference to the offline sale of infringing materials on eBay's website did not constitute infringing activity.

Clearly, the facts of Hendrickson were extremely favorable to eBay and are also easily distinguishable from many trademark owners' prospective cases against online auction sites. Nevertheless, if a court were to follow Hendrickson in a trademark case, online auction sites may prevail. This is likely to be the case due to the court's determination that eBay's limited voluntary monitoring of its site for infringement under the VeRO pro-

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64. 165 F. Supp. 2d 1082 (C.D. Cal. 2001).
gram did not constitute a right and ability to control the infringing activities under the DMCA. It remains to be seen whether a court will apply this analysis in a trademark infringement case where DMCA protections, and the First Amendment considerations that gave rise to them, are not applicable.

D. Similarities/differences between secondary trademark and copyright infringement

From the analysis above, it is clear that there are different standards for imposition of liability for trademark, as opposed to copyright, infringement. Indeed, in Hard Rock Cafe, the Seventh Circuit essentially dismissed the argument that a flea market operator can be vicariously liable for copyright infringement. The court, citing a footnote in Sony Corp. of America v. Universal City Studios, Inc., (the famous Betamax case), stated that “the Supreme Court tells us that secondary liability for trademark infringement should, in any event, be more narrowly drawn than secondary liability for copyright infringement.” The court noted “CSI neither hired Parvez [the vendor] to entertain its customers, nor did it take a percentage of his sales. Further, CSI exercises no more control over its tenants than any landlord concerned with the safety and convenience of visitors and of its tenants as a group.” While this is still an open question, this case suggests that there may be some parallels to be drawn between Hard Rock Cafe and the online auction site context.

IV. PROS AND CONS OF HOLDING ONLINE AUCTION SITES SECONDARILY LIABLE FOR TRADEMARK INFRINGEMENT

There are a number of factors that tend to work in auction sites’
favor. The strongest points in favor of not holding an auction site secondarily liable for the trademark infringing activities of its users are that: (1) if auction sites immediately remove any challenged material, they may be in a stronger position to argue that any claim for potential contributory liability should be dismissed under the *de minimis* doctrine; (2) there are difficulties associated with evaluating competing ownership claims in the short time period within which to determine whether to remove material posted online, and thus the protection of online auction sites’ users may prompt auction sites to demand proof of a registered trademark before action is taken; (3) special training may be required to identify counterfeit from authentic products, and thus, the trademark owners themselves are in the best position to determine if a given listing infringes their rights; (4) because it is quite time-consuming, expensive and impractical for an online auction site to monitor every single listing for possible infringing content, the operators of the online auction sites may not have actual knowledge, or the courts may not impose constructive knowledge, of such infringing content; (5) holding online auction sites liable for user infringement will raise the cost of using such sites, as the cost will have to be spread among all users, and smaller online auction sites, unable to afford the risks of infringement liability, may be forced out of business; and (6) strict standards of liability may limit the benefits of new information technology—the convenience and ease of the online marketplace. 69

On the other hand, a number of factors support the position that auction sites ought to bear some degree of secondary liability for their vendors’ conduct. The strongest points in favor of holding an auction site secondarily liable for the trademark infringing activities of its users are that: (1) auction sites derive direct financial gain from the sale of infringing goods through the charging of a listing fee (which means it profits even from the mere offer to sell) as well as, in some cases, a percentage of the final sale price; (2) some auction sites, notably eBay through its VeRO program, have demonstrated some ability to control their sites; (3) while auction sites, except in the most extreme circumstances, are not likely to be held liable for secondary copyright infringement, recent case law has found ISPs liable for contributory trademark infringement, which may be used as precedent for similar action with respect to online auction

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69. Nevertheless, one commentator notes that “perceptions of the Internet as a frontier society without rules and without legal responsibilities [are already outdated]. If not already closed, the frontier is surely closing fast.” Jonathan E. Moskin, Navigating Choppy Waters in Safe Harbors: Contributory Liability of Internet Service Providers (July 2001), posted at <http://www.pennie.com/news.html?newsType=4&itemID=40&ID=33&content=articleDetail>.
sites; (4) the imposition of secondary liability may act as a deterrent for future infringing activities by transforming online auction sites into trademark owners’ policing partners; and (5) trademark owners are clearly damaged by counterfeits offered through auction sites because not only do they divert sales, cause confusion and frustrate consumers, but they also fail to meet the quality standards of the genuine articles and are not covered by the warranties offered by the manufacturer.

CONCLUSION

Depending on the specific facts, the law of trademarks may impose liability on operators of online auction sites who knowingly contribute to the sale of goods bearing counterfeit marks. The law may impute “knowledge” of infringement to an online auction site operator in various circumstances. The imposition of secondary trademark infringement liability on online auction sites would certainly be a welcome and powerful tool in the eyes of intellectual property owners seeking to enforce their rights. Indeed, combating the sale of counterfeits on auction sites has become a top priority for intellectual property owners and federal and state law enforcement officials, many of whom have grown impatient by the perceived lax attitude of some auction site owners.

On the other hand, the courts do seem sensitive to the practical consideration that such liability may impose too great of a duty for these sites to meaningfully and profitably operate. It is an open question whether they can be persuaded by the traditional rejoinder of trademark holders—that auction sites, which profit (in some cases phenomenally) from their operations, are as a matter of fairness the most obvious party to bear the costs of controlling the “monster” they have created. Also, most trademark owners agree that expensive and risky court action is not the ideal way to shape policy, and that, overall, most auction sites have been receptive to concerns of infringement by developing reporting procedures and terminating auctions found to contain infringing material. While it is unlikely that the sale of counterfeit goods will be stopped entirely, with the courts and the online auction sites protecting trademark owners, online sales of infringing goods can, to some extent, be managed.

As a practical matter, counsel representing a victim of large-scale counterfeiting can take several steps to be ready to pursue an online auction site, if necessary, in addition to the usual good prelitigation hygiene for Internet-related actions (e.g., meticulous recordkeeping, including hard and soft downloads of offending URL’s, etc.). Such steps include the following:
ONLINE AUCTION SITES

1. Being prepared swiftly to meet all the standards of the DMCA for overcoming the safe harbor of notice-and-takedown. Though the argument that the DMCA applies straightforwardly to trademark is a weak one, even the most sympathetic courts are likely to look to the DMCA as a standard of good practice for intellectual property enforcement;

2. Tracking websites' compliance with requests to remove infringing items, as well as with their own internal standards for dealing with infringement, both of the client's marks and those of others;

3. Tracking auctions sites' stated policies on policing (e.g., editing and deleting) their website content;

4. Tracking auction sites' actual practices regarding its policies;

5. Demonstrating how the operator of the specific auction site at issue obtains direct financial benefit from sales of counterfeit items infringing their clients' marks, in order to stress the similarity to flea markets and the contrast with "utilities" or common carriers;

6. Understanding, and preparing for argument beyond the bounds set forth in this brief treatment, the fundamental difference between copyright and trademark and how the courts and the Congress have been especially jealous of restrictions of free speech that may affect the former—and never affect counterfeiting; and, finally,

7. Once all this is done and a powerful litigation armory prepared, establishing sincere lines of communication with mainstream auction site owners who—at the end of the day—well understand both the legal and the commercial issues involved, and will more than likely seek to work with trademark enforcement counsel to an extent that is likely to make the up side of litigation little more than incremental, when weighed with the unknown course of this area of law.

Similarly, counsel representing an auction site operator may want his or her client to take certain steps to support its defense against an action for infringement:

1. Complying with its own stated standards on how it will handle infringements, even if more than required by law, in order to avoid a court's finding that the website did not meet its own policies;
TRADEMARKS AND UNFAIR COMPETITION

2. Following up on specific complaints of alleged infringement and implementing a policy similar to eBay’s VeRO program;
3. Providing courts with information to help them determine that the large percentage of sales on the website are non-infringing, as well as information on the high cost and effort that would be required to find every infringing sale on the website.
4. Revising user terms and policies to maximize the operator’s ability to rely on users’ duties to comply with applicable laws; and
5. Establishing clear means by which potential claimants can, and cannot, identify and substantiate claims of trademark infringement.

If there are solid grounds on which to base auction site liability for counterfeit sales, such potential liability could have a practical effect. If a consensus were to emerge in support of such a view, the result would be the placement of negotiation and litigation leverage in the hands of trademark owners, many of whom feel that the burden of a burgeoning infringement problem has shifted unfairly onto their shoulders while the only ones profiting are counterfeiters and the auction sites themselves.

March 2003
ONLINE AUCTION SITES

The Committee on Trademarks and Unfair Competition

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### APPENDIX A

# AUCTION SITES’ POLICIES RE COUNTERFEITS—COMPARISON CHART

<table>
<thead>
<tr>
<th>AUCTION SITE</th>
<th>ACTIONS EXPRESSLY PROHIBITED</th>
<th>ACTIONS TAKEN UPON NOTIFICATION</th>
<th>EFFORT TO AVOID LIABILITY</th>
</tr>
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<tbody>
<tr>
<td>eBay</td>
<td>Its Replica and Counterfeit Items Policy states “[d]o not list counterfeits, unauthorized replicas, or otherwise unauthorized items (such as counterfeit watches, handbags, or other accessories) on eBay.” Its Authenticity Disclaimer policy states “[g]ellers may not disclaim knowledge of, or responsibility for, the authenticity or legality of the items offered in their listings.” Its Brand Name Misuse Policy states “[d]o not include any brand names or company logos in your listings other than the specific brand name used by the company that manufactured or produced the item you are listing.” The User Agreement states that “[y]our Information (or any items listed) and your activities on the site shall not: (a) be false, inaccurate or misleading; (b) be fraudulent or involve the sale of counterfeit or stolen items; (c) infringe any third party’s copyright, patent, trademark, trade secret or</td>
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<tr>
<td></td>
<td>In the Seller Guide’s Listing Policies, eBay states that “[i]listings violating eBay’s policies may result in disciplinary action. This action may include a formal warning, the ending of all violating listings, or even temporary or indefinite suspension of a user’s account.” The Replica and Counterfeit Items Policy states that “[i]listings offering replica, counterfeit, or otherwise unauthorized items may be ended early by eBay. Multiple violations of eBay’s Replica and Counterfeit Item policy could result in the suspension of your account.” Users as well as Verified intellectual property Rights Owners (through eBay’s VeRO program) can report violations to eBay and eBay is “committed to removing infringing or unlicensed items once an authorized representative of the rights owner properly reports them to eBay.” The email address for notices of infringement is <a href="mailto:infringement@ebay.com">infringement@ebay.com</a>.</td>
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<td></td>
<td>Its User Agreement states that “We are not involved in the actual transaction between buyers and sellers. As a result, we have no control over the quality, safety or legality of the items advertised, the truth or accuracy of the listings, the ability of sellers to sell items or the ability of buyers to buy items... Because we are a venue, in the event that you have a dispute with one or more users, you release eBay (and our officers, directors, agents, subsidiaries, joint ventures and employees) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such disputes.” The User Agreement disclaims any warranties of non-infringement and states that “in no event shall we, our subsidiaries, employees or our suppliers</td>
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70. uBid.com, affiliated with MSN and Excite, is not included in this list of auction sites because it only offers goods the company has bought and approved, and has recently discontinued its “Consumer Exchange” program that allowed third party sellers to use uBid’s services. DealSpin, a hybrid auction/lottery service, is likewise not included in this list for the same reason.

71. eBay is the industry leader with more than 4 million listings. Yahoo Auctions and Amazon.com Auctions rank second and third (approximately 2 million listings and 400,000 listings, respectively). See <http://www.auctionwatch.com/awdaily/features/holiday/2.html>. The auction sites included in this chart (listed alphabetically after the top three) were listed by numerous online sources as the most popular. See, e.g., <http://auctions.nettop20.com>; <http://www.ranks.com/home/shop/top_auction_sites>; <http://onlineshopping.about.com/cs/generalauctions>; <http://freeemailtousa.com/greatauctions>; <http://onlineauctionbiz.com/auction_sites.htm>; <http://weblinks.searchwho.com/search/greatwebsites/gwscat4.html>; <http://www.marketplacesnapshot.com/snapshotapril.html>.
ONLINE AUCTION SITES

<table>
<thead>
<tr>
<th>Online Auction Site</th>
<th>Prohibition Details</th>
<th>Additional Terms Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yahoo! Auctions</td>
<td>In its Auction Guidelines, Yahoo! includes in its Prohibited Items “[a]ny item that infringes the rights of a third party, including items that violate copyrights, trademarks, or privacy rights of third parties... [and] any item that is counterfeit or stolen.” In its Terms of Service, Yahoo! requires users to agree not to “upload, post, email, transmit or otherwise make available any Content that infringes any patent, trademark, trade secret, copyright or other proprietary rights (“Rights”) of any party.”</td>
<td>Its Additional Terms state that “Yahoo does not screen or control users who may sell or bid on auction items, nor does Yahoo review or authenticate all auction listings or items offered for sale. Because Yahoo is not involved in the actual transaction between buyers and sellers, in the event that you have a dispute with one or more users, you release Yahoo and its affiliates (and their respective officers, directors, agents and employees) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with such disputes.”</td>
</tr>
<tr>
<td>Amazon Auctions</td>
<td>In the Help section for Sellers, Amazon states that “[p]articipants are expected to conduct proper research to ensure that the items posted to our Auctions/zShops sites are in compliance with all local, state, national, and international laws.” In the list of Prohibited Content is included “the sale of unauthorized replicas, or pirated, counterfeit, and knockoff merchandise.” In the Sellers’ Participation Agreement, it states that “you may not list any item or link or post any related material that (a) infringes any third-party intellectual property rights (including copyright, trademark, patent, and trade secrets) or other proprietary rights (including rights of publicity or other proprietary rights or rights of publicity or privacy; (d) violate any law, statute, ordinance or regulation (including... unfair competition... or false advertising)...”</td>
<td>In the Sellers’ Participation Agreement, it states that “Amazon.com provides a venue for third-party sellers (“Sellers”) and buyers (“Buyers”) to negotiate and complete transactions. Amazon.com is not involved in the actual transaction between Sellers and Buyers and is not the agent of and has no authority for either for any purpose.” In this Participation Agreement, it also states that “Amazon.com is not the agent, fiduciary, trustee, or other representative of you [the seller]. Nothing expressed or mentioned in or implied from this Participation Agreement is intended or shall be construed to give to any person other than the parties hereto any legal or</td>
</tr>
</tbody>
</table>
wise prohibited by the procedures and guidelines contained in the Help section... 
[and that] Amazon.com has the right, but not the obligation, to monitor any activity and content associated with this Site. Amazon.com may investigate any reported violation of its policies or complaints and take any action that it deems appropriate. Such action may include, but is not limited to, issuing warnings, suspension or termination of service, denying access, and/or removal of any materials on the Site, including listings and bids. Amazon.com reserves the right and has absolute discretion to remove, screen, or edit any content that violates these provisions or is otherwise objectionable."

Amazon also disclaims any warranties of non-infringement and "any obligation, liability, right, claim, or remedy in tort, whether or not arising from the negligence of Amazon.com." Amazon.com also states in its Terms that it "will not be liable for any damages of any kind, including without limitation direct, indirect, incidental, punitive, and consequential damages, arising out of or in connection with the participation agreement, the Site, the services, the inability to use the services, or those resulting from any goods or services purchased or obtained or messages received or transactions entered into through the services."

In its Terms & Conditions, AuctionAddict.com states that it "will not remove or edit listings once they are entered into the service, except to comply or to end auctions with other terms in this agreement." While AuctionAddict.com states in its Terms that they "cannot guarantee that we will notice or prevent any inappropriate use of the system," they also claim that they "will terminate the auction of any [illegal or counterfeit] items upon notification by the legitimate trademark or copyright holder, and the Seller of such items may be subject to suspension." Its Terms state that "AuctionAddict.com serves solely as the listing agent and is not involved in the actual transaction of goods between buyers and sellers. We would like to remind you that AuctionAddict.com is merely a venue for online person-to-person auctions and classified advertisements and does not act as a guarantor regarding the price or completion of such transactions on its site. The transaction of goods is the sole responsibility of the individual buyers and sellers."

The Terms also state that "AuctionAddict.com is run as a service for the internet community and cannot take responsibility for the condition or quality of the items presented within its pages." The Terms state that "under no circumstances, including, but not limited to negligence, shall AuctionAddict.com be liable for any special or consequential dam-

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**TRADEMARKS AND UNFAIR COMPETITION**

Auction Addict

The Terms & Conditions state that "[t]he auction of illegal items, including all counterfeit goods, are expressly prohibited."
<table>
<thead>
<tr>
<th><strong>ONLINE AUCTION SITES</strong></th>
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<tbody>
<tr>
<td><strong>Auction-Weiser/InterShop Zone</strong></td>
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<tr>
<td><strong>BidVille</strong></td>
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to provide our services to you: (a) if you breach this Agreement or the documents it incorporates by reference; (b) if we are unable to verify or authenticate any information you provide to us; or (c) if we believe that your actions may cause legal liability for you, our users or us.

Any concerns regarding infringement should be sent to service@bidville.com.

In its User Agreement, BidVille also disclaims any implied warranties of non-infringement and states that "in no event shall we or our suppliers be liable for lost profits or any special, incidental or consequential damages arising out of or in connection with our site, our services or this agreement (however arising, including negligence)."

Bidz Terms & Conditions state that "[a]ll registered Bidz.com members shall comply with all applicable laws, statutes, ordinances and regulations regarding their use of our service while listing items for sale, selling items, placing bids, purchasing items and leaving feedback or using any public forum contained on this site." "Selling Violations" include the listing of illegal items for sale and the misrepresentation of items for sale. Its Terms require that users agree not to use the site for illegal purposes.

In its Terms, Bidz "reserves the right to issue warnings, temporary or indefinite suspensions, or terminations of Bidz.com membership to any user who violates any of the provisions set forth in the rules, guidelines, terms and conditions as listed, or for any other reason at our sole discretion." Bidz also Bidz.com "reserves the right to terminate, without notice, auctions that … display evidence of fraudulent listing information or bidding activity or violate any of the rules, guidelines, Terms and Conditions of this service."

Bidz.com membership to any user who violates any of the provisions set forth in the rules, guidelines, terms and conditions as listed, or for any other reason at our sole discretion."

In its Terms, Bidz require that a user (member) "agrees that Member shall not join Bidz.com in any auction [sic] of any nature or kind to assert any claim relating to or arising out of a purchase of any product or service from these, or any other, sellers on this site." In its Terms & Conditions, Bidz disclaims any implied warranties of non-infringement. Its Terms further sets forth that Bidz "shall not in any way be liable for any direct, indirect, incidental, special or consequential damages, resulting from the use or the inability to use the service ... even if Bidz.com ... has been advised of the possibility of such damages."

In its Terms and Conditions ePier reserves the right to cancel any ePier Account at any time in ePier’s sole discretion, for any reason or no reason." Its Terms also provide that "ePier may immediately issue a warning, temporarily suspend, indefinitely suspend, or terminate Your ePier Account and refuse to provide the ePier Services to You: (i) if You breach this Agreement or the Additional Terms and Conditions of this service."

ePier’s User Agreement states that “[y]ou acknowledge and agree that ePier is neither involved in nor a party to any actual transaction between or among ePier users, and therefore you hereby waive and release the owners of this site from all claims arising out of or in any way related to your transactions or attempts to enter into transactions with other ePier users.” ePier’s Terms & Conditions.
In its **Terms & Conditions**, Xuppa states that “[y]ou shall not violate or infringe on any third party’s copyright, patent, trademark, trade secret, or other proprietary rights.” In its Help pages, Xuppa states that a seller cannot sell “[a]ny item that infringes or violates anyone’s rights.”

In its **Terms & Conditions**, Xuppa reserves the rights to terminate any auction at any time, currently in progress or not, to remove or reject any listings, and to terminate or suspend any users membership, at its sole discretion. Its “Buyer Safety Tips” state that “Xuppa does not mediate between transacting parties in disputes regarding potential incidents of fraud of any type. Buyers and sellers are responsible for all aspects of the transactions in which they participate. However, concerned buyers are encouraged to report any questionable seller activity directly to Xuppa. In order to do so, send an email to auctions@xuppa.com. In this email, please provide a detailed description of the incident, the seller’s username, and the auction number of the item. Xuppa will review the seller’s activity in our auction community and may decide to suspend the seller.”

In its **Terms & Conditions**, Xuppa disclaims any implied warranties of non-infringement.

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72. Xuppa was formerly named Bay9.
New Voting Technology

The Committee on Election Law

New York has debated whether to replace its mechanical lever voting machines for many years. Supporters of change have argued that these machines are obsolete and prone to frequent breakdowns. Opponents of change have cited the high cost of conversion and the fact that in recent elections increased attention to maintenance and machine preparation has improved reliability. Congressional reaction to the problems encountered in Florida in the 2000 Presidential Election, as embodied in the Help America Vote Act (HAVA), has accelerated the impetus for change by providing both a federal mandate and a fund which would offset, at least in part, the cost of conversion.

The Committee was charged with the task of considering what new voting technology, if any, New York should adopt. Implicit in its recommendations is the belief that the time for change is now both because of the Congressional mandate and the positive benefits in terms of accessibility and flexibility offered by the new technology. An overriding issue in the deliberation was concern for the security of the voting process. Candidates and voters have a right to be able to verify with their own
eyes that votes have been properly cast, recorded and tabulated. The Com-
mittee firmly believes that public confidence in elections will not endure
if the final arbiters of fairness are technicians reviewing computer code.
The Committee is also of the opinion that the conduct of elections should
remain a public function subject to the intense scrutiny engendered by par-
tisan elections. This too will help ensure continuing fairness.

Four voting systems are now in use in the United States. Mechanical
Lever machines are no longer manufactured and are the technology New
York will be replacing. Punch Card Systems were discredited by the much
publicized problems in Florida in year 2000. Optically Scanned Paper Bal-
lots may be viable in some jurisdictions but the Committee was concerned
that the sheer size and complexity of New York elections made this alter-
native impractical in this State. This focused our deliberations on Elec-
tronic Voting Systems generally and the ATM type touch screen machines
specifically. This technology, although offering many benefits, is not a
panacea. It has limitations, which the Committee has attempted to ad-
dress in its recommendations.

I. RECOMMENDATIONS

1. Touch Screen/ATM Type Machines:
The Committee recommends that New York State purchase Touch Screen/
ATM type technology for its next generation of voting machines pro-
vided any such device shall contain the following features:

A) A Voter verified paper trail for each vote cast
B) Full handicapped accessibility
C) Capacity for multiple languages
D) Prevents over voting
E) Actively warns against under voting
F) Allows alternative election formats (e.g., IRV, cumulative voting
   and proportional representation)
G) Meets durability/reliability standards to be developed

A) Voter Verified Paper Trail. Although technologically attractive, ATM
type touch screen voting machines, as currently designed, have received
significant criticism because of their alleged vulnerability to undetectable
software tampering. In recent weeks a growing consensus has been de-
veloping, to which the Committee adds its voice, that this problem can and
should be addressed by adding to such voting machines an integral con-
temporarily voter verified paper ballot, which would be the official ballot. As envisioned the paper ballot would be viewed by the voter through a window thus permitting the voter to verify that the machine has accurately recorded his/her choices. The ballot would not be cast until such verification was confirmed. The voter would never come into physical possession of the paper ballot. A system like this was recently used in the Brazilian national elections. Such a system substantially answers the principal security concern of opponents of such technology which is that the computer and any internal audit features which rely on the programming of the computer may be manipulated to alter the results. It also will help insure voter and candidate confidence in the new technology by providing a physically verifiable proof of the computer’s accuracy. Confidence in the system will be further enhanced by mandating that in each election in a defined small percentage of randomly selected ED’s (i.e., not more than 5%) the paper ballots should be manually (not optically scanned) counted to verify the accuracy of the computer tabulations. Such manual tabulations should be completed and the results made public within the time periods allowed by statute to contest the results or request a court supervised recount. Of course a candidate may, in an appropriate case, petition the Court for a manual tabulation of all the ballots if he can demonstrate a reasonable basis for such a count. The recommended technology is more expensive than other possible systems such as optical scanners whether polling place or central facility based. The Committee nonetheless recommends it because (i) with the addition of the contemporaneously voter verified paper ballot the principal security issue is addressed, (ii) optically scanning the millions of ballots generated in a New York election would be burdensome and significantly delay the posting of even unofficial results\(^1\) (iii) the ATM type touch screen system is a flexible platform which can be enhanced and modified as improvements are developed and (iv) the ATM type touch screen system will provide faster and more accurate election night returns.\(^2\) The Committee is aware that its recommendation that the ATM type machine be purchased only if it contains a contemporaneously voter verified paper ballot will create a logis-

1. The Committee is also concerned about the reliability of optical scanners especially as they have been used in New York City. Based upon concededly anecdotal reports this technology may be more sensitive to error then the literature on the subject suggests.

2. Election night returns should be accumulated in a manner which absolutely assures that the voting data contained in the machine is not corrupted. The voting machines themselves should not be networked and any election night communication of results from remote polling sites to the Board of Elections should be by a one way delivery of data.
tics challenge relating to the care and storage of these ballots. It also will introduce into the technology a mechanical feature which may decrease the reliability of the machines. The Committee believes however that this is a price which must be paid to preserve the confidence of voters and candidates.

B) Handicapped Accessibility. Advocates for the disabled stress the importance of voting systems which permit the handicapped to participate in the communal act of voting at the polls on Election Day. HAVA (as well as the ADA) also requires that any new voting technology allow this. Proper polling site selection and sensitively designed voting machines address many of these concerns but the difficulty in providing a secret ballot for the visually impaired remains significant. ATM type touch screen voting systems permit the visually impaired to vote without assistance at the polls on Election Day through an audio interface. Competing technologies (e.g., optical scan, punch card, mechanical lever) do not. Any new voting technology for New York must permit full handicapped accessibility.

C) Multiple Languages. Ballots in the three voting rights counties of New York City are available in four languages: English, Spanish, Chinese and Korean. There is some thought that a fifth language, Russian, may soon be mandated. ATM type touch screen technology will permit greater language accessibility, even allowing for inclusion of languages beyond what the Voting Rights Act requires. Language accessibility is also mandated by HAVA.

D) Prevent Over Voting. Over voting—mistakenly voting for more than one candidate—was a major problem in Florida during the 2000 Presidential election and is a major flaw with traditional paper ballots, punch cards and optical scan ballots. ATM type touch screen computer voting technology prevents over voting.

E) Under Vote Warning. Under votes—where the voters does not cast a vote—may be the result of error or a conscious decision by a voter not to express a preference. The touch screen system can and should be programmed to warn the voter of his/her failure to express a preference for a specific office, and give him or her the opportunity to correct the vote.

F) Allows Alternative Election Formats. Any new voting system should be flexible enough to permit formats other than winner take all elections including IRV (instant runoff voting), cumulative voting and proportional representation. ATM type touch screen voting systems can be programmed to allow this.

G) Durability/Reliability. Although the mechanical lever machines in New York have reached the end of their useful life and may have to be
retired to comply with HAVA, on the whole they have been highly reliable and durable. Any new technology, including the ATM type touch screen voting system preferred by the Committee, should be designed to withstand the difficult use, transportation and storage conditions which such equipment will experience in New York City and some upstate and suburban jurisdictions.

2. Full Face Ballot
New York requires that all candidates for each office and all propositions appear on the face of a single ballot. This requirement is incompatible with the current ATM type touch screen voting systems which instead provide a separate computer screen for each office or proposition. The Committee recommends that the legislature repeal the full face ballot requirement. Only two electronic systems incorporate a full face ballot. These systems are roughly 60% more expensive than the recommended technology and have been criticized by disability advocates for presenting difficulties for voters with cognitive disabilities. Yet unless the full face ballot requirement is eliminated New York's choice will be limited to one of these systems. Those who fear that elimination of the full face ballot may decrease voter participation in contests for lesser offices may be assuaged by the requirement that any new technology include an under vote warning. Further the legislature may consider more innovative solutions to such a problem such as changing ballot order (e.g., moving Assembly, State Senate and other lesser offices to the “top” of the ballot).

II. RESERVATIONS
1. Precipitous Action
The Help America Vote Act (HAVA) mandates replacement of New York's existing mechanical lever voting machines. It also will provide federal financial assistance (up to 4K per machine) if Congress fully funds the program. This mandate dovetails with a growing consensus in New

3. The electronic systems incorporating the full face ballot will cost approximately 8K per unit substantially more than the anticipated 5K per unit cost for ATM type touch screen machines.

4. Some argue that New York may comply with HAVA and retain its the mechanical lever machines by providing at each polling place at least one fully handicapped accessible machine in addition to the existing machines. The weight of opinion is to the contrary. It is however beyond dispute that if New York does not act now to replace its existing voting machines it risks losing its share of the $350M appropriated by Congress for this purpose.

5. Congress has allocated only $350M to replace all mechanical lever and punch card systems.
York that it is time to replace the existing mechanical lever voting machines. Such sentiment appears to be driven by (i) the age of the machines (40 plus years), (ii) the unavailability of spare parts, (iii) fear that New York may experience a debacle comparable to that seen in Florida in the 2000 General Election and (iv) concern regarding the over count in the 2001 Democratic Mayoral Primary Runoff. Notwithstanding HAVA’s mandate and the independent sentiment for change, some argue that change now may be precipitous. Despite reservations among academics and election professionals over the security of computerized voting, until quite recently these concerns were ignored by government procurement officials. Even Santa Clara County, California, where debate has been most intense, recently placed an order for touch screen machines which do not include a voter verified paper ballot, albeit with a reservation that if such a security device is ultimately mandated by the State of California the vendor will be required to provide it at no additional cost. California has also recently formed a state commission to study the desirability of requiring touch screen machines to incorporate such a feature. Given the size of New York’s potential order (more than 6,000 machines will be needed in New York City alone) and lingering questions regarding security and durability/reliability a case can be made for slowing the procurement process until other jurisdictions which have already purchased touch screen machines are able to provide a solid base of data on their reliability and until integral voter verified paper ballots are effectively incorporated into the design. Arguing against any delay is the HAVA mandate (and possible federal action to compel compliance) and the possibility of loosing federal funds for any conversion not completed by 2006.

2. Testing

New York should conduct its own wide scale testing of any new voting system especially under the rigorous conditions prevailing at many voting sites in New York City. A pilot project to be launched as soon as possible, therefore, should be considered. This need is underscored by the fact that no extensive testing or use of systems containing an integral voter verified paper ballot has been done in the US.

3. Training/Voter Education

Conversion to any new voting system may generate confusion and
long lines at the polls. This problem may be exacerbated by a lack of familiarity with computer technology among some voters and poll workers. An essential part of any conversion plan will be the need to develop and adequately fund an extensive voter education program and comprehensive training of poll workers. Absent such training and education any conversion may lead to disaster on Election Day. This was the experience in some Florida jurisdictions during the first election following their abandoning punch card ballots in favor of a computerized system.

III. CONCLUSION

The Committee recommends that New York State repeal the requirement of a full face ballot and that it purchase ATM type touch screen voting machines containing the features delineated above.

May 2003
The Committee on Election Law

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Norman C. Ryp
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Gregory Charles Soumas
Jordan E. Stern
Darian B. Taylor
Nina Taylor
Andrew Tulloch
Frederic M. Umane
Tova A. Wang
Richard M. Weinberg
Paul Windels

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Alternate Methods of Public Works Procurement

The Committee on Construction Law

I. INTRODUCTION

By mandating the traditional design-bid-build ("DBB") approach to procuring public works, with only limited exceptions, New York law places major public works projects outside of the mainstream of current construction practice and unnecessarily prolongs the time needed to deliver such projects. At a time when frustrations with public works contracting are leading to calls for privatization of such contracting, it is time to lift the constraints on public works and bring this portion of the industry into the 21st Century.

Under DBB, a public agency identifies a public works need, engages a designer to prepare a complete design for the work, awards a contract to construct the work to the lowest responsible bidder after competitive bidding based on the completed design documents, finances the work with public funds and thereafter operates the completed project with public employees. Not only is this DBB model, which contemplates a fully completed design prior to the award of a construction contract, rarely used for major private procurements but there is increasing use of alternate methods of public procurement by governments outside New York and, in limited circumstances, within New York. Such alternate methods of pro-
The alternate methods of procurement include design-build ("DB"), turnkey, design-build-operate ("DBO") and design-build-finance-operate ("DBFO"). The finance and operate elements sometimes include ownership of a completed facility for a period of time, after which ownership is transferred to the public agency, and this approach is sometimes called build-own-transfer ("BOT"). All of these alternate methods combine design and construction, with operation and/or financing sometimes added.

The Federal Government and many states have enacted new laws permitting greater use of such alternate procurement methods. A bill allowing combination of design and construction on certain New York State Department of Transportation and Thruway Authority projects was submitted to last year’s session of the New York State Legislature but failed to pass. It should be adopted. However, this bill is too limited in scope. Legislation permitting other State agencies and local governments to use, on a regular basis, alternate procurement methods that are both routinely used in the private sector and also utilized by governments outside New York should be enacted. The anticipated result will be greater efficiency in public works procurement and construction throughout the State.

II. USE OF ALTERNATE PROCUREMENT METHODS

There is a growing national, and international, trend toward use of alternate methods of procuring construction of public works. A 1997 study identified 356 privatized infrastructure projects worth $146 billion in forty-two countries during the preceding decade.¹

News articles report frequent use of alternate methods. Following are examples of such reports:

- The new light rail line in the City of Minneapolis is to be designed and built under a single contract. 1/7/01 Star Tribune at 1B.
- The Franklin, Ohio, City Council has authorized a contract to design, build and finance a new library and other facilities. 11/23/00 Dayton Daily News at 1.
- The contract for the Jackson Street Garage in downtown Phoenix has been awarded to a design/build team based on a substantive list of fourteen major evaluation criteria. 62 Southwest Contractor 11 at 27 (11/00).
- Since 1990, twenty-three states and the District of Columbia

have started or approved design-build transportation projects. 56 Intermountain Contractor 12 at 33 (10/00).

- The State of Oklahoma is using design-build for a new dome atop the State Capitol. 8/19/00 Saturday Oklahoman.

- The City of Deltona, Florida, is contracting on a design-build basis for a new fleet-maintenance facility. 8/17/00 Orlando Sentinel at D8.

- San Francisco’s Bay Area Rapid Transit District (BART) has undertaken a $1.5 billion subway extension on a design-build basis. 2/00 Design-Build at 15.

- The Bexar Metropolitan Water District in Texas has created a nonprofit corporation for purposes of contracting on a design-build-operate basis for a new water intake, pumping, transmission and filtration project. 1/00 Governing Magazine at 56.

- The City of New York has awarded an emergency design-build deck replacement contract for the Brooklyn Bridge. 5 City Law 101 (9-10/99).

- The City of Seattle has contracted on a design-build-operate basis for procurement of a new 120-million-gallons-per-day water filtration plant. 6/15/98 Engineering News Record at 50.

- The Utah Department of Transportation has contracted on a design-build basis for the $1.5 billion reconstruction of Interstate 15 in Salt Lake City. 1/98 Design-Build at 33.

- The Port Authority of New York and New Jersey has contracted for private development of the new International Arrivals Terminal at JFK Airport. 11/17/97 Engineering News Record at 36.

- The Massachusetts Port Authority has opted for private development and operation of a new terminal at Logan Airport. 6/23/97 Engineering News Record at 14.

- The State of Georgia has awarded a contract to build and run a new prison in Charlton County. 6/3/97 Florida Times-Union at B-1.

Commenting on the widespread use of alternate methods of construction procurement in general, one industry representative recently stated that “[t]he word ‘alternate’ doesn’t seem appropriate anymore.”

In public works, particularly, alternate procurement methods offer the possibility of significant reduction in the total time necessary to progress a project from conception to completion, providing the strongest rationale for
using such methods. Time savings can be achieved in two ways: (a) reduction in procurement time; and (b) reduction in design and construction time.

Due to elaborate procurement requirements (which can include extensive advertising of contracts, long time periods for pre-bid investigation and questions and post-bid responsiveness and responsibility evaluation), it is not uncommon for public agencies to require many months to progress a contract to the award stage. When design and construction contracts are pursued separately, one following the other, the procurement process can be greatly extended. Because alternate procurement methods involve a combination of design and construction, such methods almost always provide a substantial savings in time.

Furthermore, the traditional approach requires preparation of a complete design before any construction begins. Where design and construction are combined, a “fast track” method of construction may be used. For example, construction of building foundations may begin before the building itself is fully designed.

A second rationale for using alternate methods of procuring construction is the potential for improving the quality of design and reducing disputes by allowing for extensive construction-based input during design. With the traditional approach, the designer prepares and completes the design without input from the constructor, who then prepares a price based on reading the designer’s drawings and specifications. Almost inevitably, this process yields at least some instances of inadequate communication of the designer’s intent, because of incomplete or ambiguous designs or contractor misreading of the design documents. It also minimizes the opportunity for contractor input on material specifications and design details, which can be handled only to a limited extent during bidding. Combining design and construction provides for a constant interaction of design and construction expertise during design, potentially improving the design quality and minimizing disputes.

In addition to the advantages of combining design and construction, alternate methods can alleviate burdens on public resources by providing for financing and operation of facilities, which is another reason for the trend toward use of such methods. “The shortage of public funds and the desperate need for new or rehabilitated infrastructure have created an increased reliance on the private sector to finance, operate, manage, and even own facilities and services traditionally supplied by government.”

Combining design and construction with operation also can allow the public owner to benefit more fully from the expertise of specialized companies. For example, a company with special expertise in transit vehicles might be hired to build and equip a new transit line, including vehicles, and then to operate and maintain those vehicles over a period of years. The company's expertise as manufacturer of the vehicles would aid not only in design and construction of the line but also in maintenance and reliability after the line begins operation. A complex wastewater treatment plant or recycling plant also might benefit significantly from combining design and construction with operation, especially if state-of-the-art electronic systems are a critical element of the project.

None of this means that alternate means of procurement are in the process of replacing the traditional design-bid-build approach, or that they should do so. Not every public owner that has tried an alternate approach has been satisfied with the results. Also, there are policy reasons behind the traditional approach (such as making public works opportunities available to many potential bidders, both large and small, and protecting against favoritism) that should not be ignored. However, it does suggest that alternate methods should be available to public owners, for use when appropriate and with procedures aimed at assuring competition and impartiality in the contract awards.

This is the very conclusion reached in a recent paper titled “The End of Privatization and the Rediscovery of Competitive Procurement Mechanisms.” The author, an expert in infrastructure development strategy, concluded as follows:

A public/private infrastructure strategy is emerging in the United States. This strategy will be led by technological contributions from the private sector (originating across the globe), and implemented through intense private sector competition to meet the public's need for services. The emerging strategy will not rely on a single project delivery method as the exclusive means for providing infrastructure facilities or services. Instead, a risk mixture of DBB, DB, DBO, BOT, and Pure O&M [operation and maintenance] will increasingly be used by private firms and by governments to meet the public's evolving need for infrastructure services. This will be accomplished by matching technologies,

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4. See William G. Krizan, "Big Tests Ahead for Design-Build," 6/15/98 Engineering News Record at 47, 50 ("A design-build experiment in Loudon County, Va., may have spelled the end for that method of project delivery in the [local] school construction program").
capital sources, and engineering expertise to particular projects and delivery methods.\(^5\)

The point is that no single approach to public works projects should be viewed as correct. Each public works need should be analyzed separately, and a sound determination made as to the best “delivery system” to meet that need. Such analysis and determination can only be accomplished if a full array of procurement methods are available for use by public agencies.

### III. LEGAL RESTRICTIONS ON THE USE OF ALTERNATE PROCUREMENT METHODS

Various New York statutes require as a general rule that contracts by State agencies for construction work be awarded to the lowest responsible bidder based on open competitive bidding.\(^6\) Section 103 of the General Municipal Law contains a similar requirement applicable to all municipal corporations and other political subdivisions. These requirements essentially mandate the traditional design-bid-build approach to public works procurement, since competitive bidding requires a completed design, meaning that design services must be procured separately and before construction work is procured, and that the selection process cannot be based on comparative evaluation of proposals. Alternate methods of procurement are prohibited, unless an exception to the general requirements applies. See Long Meadow Associates v. City of Glen Cove, 171 A.D.2d 731, 567 N.Y.S.2d 287 (2d Dep’t 1991) (agreement by which developer would construct sewage pumping facility and city would pay cost of construction less developer’s agreed share was awarded in violation of GML § 103); Attorney General Informal Opinion No. 82-54 (1982) (village may not enter into lease-purchase agreement under “turnkey” concept for construction of a fire hall on village property).

GML § 103 contains an exception applicable where “otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three....” As a result of this exception, municipalities and other political subdivisions with pre-existing laws permitting construction procurement without competitive

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bidding may be permitted to combine design and construction and use alternate procurement methods. For example, the City of New Rochelle's pre-existing City Charter permits waiver of competitive bids by the City Council when “in the judgment of the city manager the subject matter of a proposed contract is such that completion is impossible or impracticable” by means of the competitive bidding process. As a result, the City's award of a negotiated turnkey contract for a new court and police facility was upheld, based on the City Manager's determination, adopted by the City Council, that timely completion and a cost effective fixed price were needed. Imburgia v. City of New Rochelle, 223 A.D.2d 44, 645 N.Y.S.2d 111 (3d Dep't 1996).

Section 312b.1 of the New York City Charter also permits procurement without competitive bidding “except that, in a special case as defined in subdivision b of this section, the head of an agency proposing to award such contract may order otherwise in accordance with policies and procedures established by the procurement policy board.” Section 312c.1 of the Charter sets forth the parameters of this “special case” exception:

For the purposes of this chapter, the term “special case” shall be defined as a situation in which it is either not practicable or not advantageous to the city to use competitive sealed bidding for one of the following reasons:

i. specifications cannot be made sufficiently definite and certain to permit selection based on price alone;

ii. judgment is required in evaluating competing proposals, and it is in the best interest of the city to require a balancing of price, quality, and other factors;

iii. the good, service or construction to be procured is available only from a single source;

iv. testing or experimentation is required with a product or technology, or a new source for a product or technology, or to evaluate the service or reliability of such product or technology; or

v. such other reasons as defined by rule of the procurement policy board.

Under Section 312b.2, the agency head’s determination must be in writing, stating the reasons why competitive bidding is not practicable or

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7. New Rochelle City Charter, Art. XIII, § 143[A](6).
advantageous and why the selected alternative procurement procedure is the most competitive alternative under the circumstances. Sections 317-21 of the Charter spell out permissible alternative procedures (competitive sealed bids from prequalified vendors, competitive sealed proposals, competitive sealed proposals from prequalified vendors and sole source). Section 322 of the Charter permits use of other procedures as determined by the City’s procurement policy board. The board has adopted regulations further detailing the appropriate circumstances and alternative procedures for “special case” procurement.8

The City has relied on this “special case” exception to use alternative procurement methods such as design-build. Informal discussion with City officials indicates nearly all “special case” determinations for construction projects over the last several years, have been based on a need to complete construction within a particularly short period of time because of health or safety concerns or legal mandates. Recent “special case” projects by the City include renovation of severely deteriorated firehouses, remediation of several petroleum-contaminated sites, a schools rehabilitation program and construction of new jail cells on Rikers Island.

Although the City Charter’s “special case” exception provides a basis for departure from the traditional design-bid-build procurement method on a case-by-case basis, the recent Court of Appeals decision in Diamond Asphalt Corp. v. Sanders 9 raises a serious question as to the permissibility of using this exception. That case involved the mayor’s authority under City Charter § 313b.2 to bypass the results of competitive bidding and “in the best interests of the city” accept a bid from someone other than the lowest responsible bidder. The Court rejected the City’s argument that the transfer of that pre-1953 by-pass authority to the Mayor in the Charter adopted in 1989 was merely a “revision, simplification, consolidation, codification or restatement” of the former City Charter.

Instead, the Court of Appeals invalidated the City’s award because the former City Charter lodged the “bypass” authority with the Board of Estimate, which was abolished by the new Charter, rather than with the Mayor. In rejecting the City’s position, the Court explained:

The transfer of bypass authority from the Board of Estimate to the Mayor would represent a major shift in the balance of authority originally provided for under the defunct Charter. Therefore, we hold the view that to override the plain language of

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8. 3 NYCRR Rules Chapter 3.
the General Municipal Law, an express or definitive declaration would be required to establish that the Legislature intended to continue and transfer bypass authority of such sweeping proportions and nature, as is presented in this case, solely to the chief municipal executive or designee.10

Thus, the Court concluded that the bypass authority found in Section 313 (b) of the new City Charter was not a mere “restatement” or “codification” of the bypass authority in the former City Charter and accordingly that it postdates and therefore does not override Section 103 of the General Municipal Law.

The former City Charter required a two-thirds vote of the Board of Estimate to approve a “special case” exception to competitive bidding.11 As with the “bypass” authority, the new Charter transferred the authority to approve a “special case” exception away from the Board of Estimate, giving it instead to the agency heads. While Diamond Asphalt deals solely with the “bypass” authority, the decision may well also mean that the City lacks authority today to depart from the traditional design-bid-build procurement method in a “special case.”

The preference for competitive bidding of construction work, and hence for the design-bid-build method of procurement, exists not just in New York but also has existed in the procurement laws of the Federal Government and most other states. However, this preference has not always existed. As one commentator has written:

The practice of employing one contractor to design and build a facility existed as early as 1800 B.C. when kings and emperors commissioned “master builders” to design and build works within their kingdoms and empires. This precursor to modern day “design-build” was the traditional method of construction contracting. It became “nontraditional,” however, when the economic concepts of maximizing competition and obtaining reasonable prices in government procurement were introduced by the Continental Congress’s establishment of the first Commissary General in 1775.12

10. 92 N.Y.2d at 266, 678 N.Y.S.2d at 579.
11. Former City Charter § 343(a).
In recent years, the Federal Government has recognized that sole reliance on the traditional procurement method is undesirable. The Competition in Contracting Act of 1984 eliminated sealed bidding as the exclusive method for obtaining competitive prices in Federal procurement.

The Clinger-Cohen Act of 1996 enacted two-phase design-build selection procedures under which Federal agencies may select a single contractor to design and construct public buildings. In addition, the Federal Government has begun to support use of non-traditional procurement methods at the state and local levels. For example, the Intermodal Surface Transportation Efficiency Act of 1991 permits Federally-funded bridge, road and tunnel projects to be privately owned.

Similarly, at least sixteen states have enacted laws over the past ten years expressly authorizing the use of alternate methods of procuring public works construction. When adopting a new law in 1998 to allow design-build construction of state facilities, the California Legislature declared:

The design-build process can improve the project delivery process by accelerating delivery schedules and saving costs by promoting improved coordination between contractor and architect, shifting management risk from the state to the design-build team and minimizing change orders through early collaboration between design and construction disciplines.

According to a recent article, twenty-three states permit government agencies to use design-build either generally or in certain circumstances.\textsuperscript{18}

To a large extent the trend toward increased use of alternate procurement methods and statutory changes permitting such use derives from a recognition that acceptable levels of competition can be obtained, and protection against favoritism assured, without sealed competitive bidding based on completed design. Many government agencies now have substantial experience with procedures, such as the two-step competitive sealed proposal process, that allow for a substantial degree of open participation in the procurement as well as objective evaluation. The concept of “efficient competition,” set forth in the Clinger-Cohen Act, reflects widespread recognition that maximizing competition, through the traditional method of procurement, is not always the most efficient means of procurement.

New York law, especially when viewed in light of the potential impact of the Diamond Asphalt decision on New York City procurement, is in the rear-guard of the law in this area. In 1999 the State Legislature took a small step in the direction of alternative procurement methods by authorizing the State University Construction Fund (until 2003) to “solicit proposals and award contracts for design/build projects to an entity or combination of entities for approved university related economic development facilities.”\textsuperscript{19} However, this is as far as New York has gone to date.

A Governor’s Program Bill\textsuperscript{20} was introduced in the New York State Legislature in 1999 that would have allowed the State Department of Transportation and the Thruway Authority to award design-build contracts under a five-year pilot program. The number of design-build contracts of certain amounts would have been limited to twenty-five by the Department of Transportation and ten by the Thruway Authority. It also would have restricted the combined dollar value of such contracts from exceeding three percent of the Department of Transportation’s capital construction budget and five percent of the Thruway Authority’s capital construction budget. Contracts above $50 million (for the Department of Transportation) and $40 million (for the Thruway Authority) would have been permitted without limitation. Contract awards would have been based on a two-step competitive proposal basis.

This bill died in committee but should have been adopted. Further-

\textsuperscript{18} 11/20/00 Engineering News Record at 43.
\textsuperscript{19} N.Y. Education Law § 376-11, added by Laws 1999, ch. 624.
\textsuperscript{20} Governor’s Program Bill #66 (1999); (A. 8745/S. 5996).
more, it does not go far enough. As discussed below, broader legislation should be enacted permitting all State and municipal agencies to use alternative procurement methods at least on a “special case” basis.

IV. RECOMMENDATION

Section 103 of the General Municipal Law, and the State’s other statutes requiring competitive bidding for public works construction, should be amended specifically to permit all government agencies to make a “special case” determination to use alternate procurement methods. This “special case” exception should be modeled after Section 312b of the New York City Charter. Any agency using this “special case” exception to the general requirement of competitive bidding should be required to issue a public report every five years detailing the projects for which the exception was applied, the procurement method that was used and the project results in terms of duration and cost.

Such amendments would preserve the traditional method of procurement as the general rule, but permit agencies to try other methods where they determine other methods to be appropriate based on stated criteria and with safeguards to ensure competition and prevent favoritism. The reporting requirement would allow the Legislature, the Governor and others to evaluate the experience of agencies with the use of alternate procurement methods to determine if further statutory action is desirable in the future. New York would be joining the Federal Government and most other states in recognizing that design-bid-build is not the only acceptable method of procuring public works construction and does not provide the most efficient results in all circumstances.

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The Committee on Construction Law

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