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THE FOLLOWING CANDIDATES HAVE BEEN ELECTED TO THE VARIOUS

President
Evan A. Davis

Vice Presidents
Lowell D. Johnston
Louise Marie Parent
Kathy Hellenbrand Rocklen

Treasurer
Michael Iovenko

Secretary
James D. Herschlein

Members of the Executive Committee
Class of 2005
Ernest J. Collazo
Eric M. Freedman
Barry M. Kamins
Susan J. Kohlman

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

THE NOMINATING COMMITTEE FOR 2001-2002 CONSISTS OF: ANDREA
J. Berger, Shelia Birnbaum, Micheal A. Cardozo, Fern Fisher-Brandveen,
Helen E. Freedman, Kristin Booth Glen, and Robert D. Joffe. The Execu-
tive Committee has elected Daniel F. Kolb Chair and Mark G. Cunha
Secretary of the Executive Committee for 2001-2002.
ON MAY 16, 2001, THE ASSOCIATION BESTOWED AN HONORARY MEMBERSHIP upon Sir Sydney Kentridge QC, a distinguished member of the South African and English Bars who spent the majority of his legal career fighting against injustice during the era of apartheid. In particular, Sir Sydney was recognized for his willingness to dedicate his skills as an advocate to representing victims of apartheid. Former Association President Michael A. Cooper, who chairs the Association’s Committee on Honors, presented Sir Sydney with the honorary membership. In his remarks, Mr. Cooper recalled the courageous and often perilous way in which Sir Sydney advocated for those unjustly accused of false criminal charges by the South African government, particularly in the case of Stephen Biko.

Biko, the head of South Africa’s Black Consciousness Movement, was imprisoned for violating a banning order. During his incarceration, Biko had been severely beaten and sustained major head injuries. Without medical treatment, Biko was transported to another prison some 750 miles away where he subsequently died. Sir Sydney represented Biko’s widow and family during the inquest, and his presentation constituted a withering indictment of apartheid. In his remarks, Mr. Cooper noted that the South African Court ruled that there was little evidence of criminal wrongdoing on the part of prison officials, but after Sir Sydney’s efforts few in the country believed the government’s verdict and Biko was seen by many to be one of several heroes in the effort to bring about an end to Apartheid.

Sir Sydney is one of four South Africans to receive an honorary membership. In 1996, the Association bestowed an honorary membership upon Richard J. Goldstone, Justice of the Constitutional Court of South Africa, and in 1985, the Association bestowed an honorary membership upon Arthur Chaskalson, S.C., then Director of the Legal Resources Centre and now President of the South African Constitutional Court. In 1930, the honor was bestowed upon Field Marshal the Right Honourable Jan Christian Smuts, P.C., O.M., Former Prime Minister and Minister of External Affairs in South Africa.

THE TWELFTH ANNUAL LEGAL SERVICES AWARDS WERE PRESENTED TO honor attorneys who provide crucial civil legal assistance to New York’s poor. Hon. Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives, presented the awards at a reception on May 7 at the Association.
This year’s recipients are: Peggy Earisman, Managing Attorney, MFY Legal Services; Ken Kimmerling, Supervising Attorney, Asian American Legal Defense and Education Fund; Diane Lutwak, Attorney in Charge, The Legal Aid Society’s Brooklyn Office for the Aging; Foster Maer, Staff Attorney, Puerto Rican Legal Defense and Education Fund; and Rebecca Scharf, Senior Attorney, Welfare Law Center.

This year’s awards included a special achievement award to Dale Johnson, former Executive Director of Legal Services for New York City, for his years of distinguished service.

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

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THE TENTH 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 29 at the Association. Hon. Barbara S. Jones, U.S. District Court for the Southern District of New York, made welcoming remarks. Association President Evan A. Davis presented the awards to: Peter A. Norling, Eastern District/Criminal Division; Michael J. Goldberger, Eastern District/Civil Division; Robert S. Khuzami, Southern District/Criminal Division; and Daniel S. Alter, 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 (Stephen A. Weiner, Chair) and the Committee on Federal Courts (Guy M. Struve, Chair).

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HON. STEPHEN G. CRANE, APPELLATE DIVISION, SECOND DEPARTMENT, presented the Association’s annual Municipal Affairs Awards on June 20. The Awards are given to lawyers from the New York City Law Department who have demonstrated outstanding performance. This year’s recipients are Anthony W. Crowell, Division of Legal Counsel; Karen Leslie Doyle, Environmental Law Division; Jenny A. Montana, Tort Division; Beth Nedow, Family Court Division; and Jorge A. Garcia, Economic Development Division.
The awards are sponsored by the Committee on New York City Affairs (Alan J. Rothstein, Chair).

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THE 2001 BOTEIN AWARDS WERE PRESENTED BY HON. JOSEPH P. SULLIVAN, Presiding Justice of the Supreme Court of the State of New York, Appellate Division, First Department, at the Association on March 26, 2001.

The Awards, dedicated to the memory of Bernard Botein, former President of the Association, 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.

The awards are sponsored by the Special Committee on the Botein Awards, chaired by Justice Sullivan.

This year’s recipients are: Gloria Smyth-Godinger, Clerk-in-Charge of Trial Support Office, Supreme Court, Civil Branch, New York County; Francis J. Byrne, First Deputy Clerk, Supreme Court, Civil Branch, New York County; June Everett, Associate Court Clerk, Criminal Court of the City of New York; Thomas F. Rode, Court Security Specialist, Appellate Division, First Department; and William Donohue, Court Clerk, Specialist Supreme Court, Civil Branch, Bronx County.

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THE FOLLOWING NEW COMMITTEE CHAIRS HAVE RECENTLY BEEN APPOINTED FOR TERMS BEGINNING SEPTEMBER 1, 2001:

Wade S. Hooker, Jr. (Aeronautics); William Hammond (Alcoholism and Substance Abuse); William H. Rooney (Antitrust and Trade Regulation); Ralph E. Lerner (Art Law); Barry Metzger (Asian Affairs); Marianne Engelman-Lado (Civil Rights); Adam Liptak (Communications and Media Law); Isaac Sherman (Condemnation and Tax Certiorari); Jeffrey Greenbaum (Consumer Affairs); Dale J. Degenshein (Cooperative and Condominium Law); Edward J. Davis (Copyright and Literary Property); David S. Hammer (Corrections); Roland G. Riopelle (Criminal Advocacy); Philip R. Edelbaum (Criminal Courts); Loretta Lynch (Criminal Law); Frederick Paul Schaffer (Education and the Law); Barbara A. Sloan (Estate and Gift Taxation); Thomas Moreland (Federal Courts); Joan Salzman (Government Ethics); Richard Singer (Housing and Urban Development); Stephen D. Kahn (Information Technology Law); Jeffrey B. Gracer (Inter-American Affairs); Roger Juan Maldonado (International Legal Services); Jeh
OF NOTE

Johnson (Judiciary); Tamara Stephen (Law Student Perspectives); Matthew Nolfo, Mary Sembrot Croly (co-chairs, Legal Problems of the Aging); Benito Romano (Litigation); Katherine A. Clements (Mental Health Law); Frances Milberg (New York City Affairs); Marie Antoinette Thomas (Non-Profit Organizations); Kelly L. Morron (Patents); Hal Lieberman (Professional Discipline); Russell E. Bleemer (Provision of Legal Services for Persons of Moderate Means); Elizabeth Anne Bousquette (Public Service and Education); Leslie Carol Treff (Science and Law); Donald J. Friedman (Social Welfare Law); Irwin Slomka (State and Local Taxation); Mark R. Hellerer (Henry L. Stimson Award); Leslie D. Kelmachter (Tort Litigation); Deborah M. Buell (Women and the Law); and Christopher J. Garvey (Young Lawyers).
Recent Committee Reports

Alternative Dispute Resolution
Letter to the ABA Section on Dispute Resolution Commenting on its March 12, 2001 Draft Resolution on Mediation and the Unauthorized Practice of Law

Banking Law
Letter to the Federal Reserve Board Recommending the Adoption of a Regulatory Exemption Under the Bank Holding Company Act

Council on Children
Letter to Governor Pataki and Members of the State Legislature Regarding the Crisis Facing Children with Mental Health Disorders in New York State

Election Law
Testimony Before the New York State Task Force on Elections Modernization Regarding Improving New York’s Electoral Process

Election Law/State Legislation
Letter to Governor Pataki Regarding the Proposals Issued by the Attorney General and the State Board of Elections to Reform the State’s Electoral Process

Federal Courts
Letter to the Chair of the Senate Judiciary Committee Regarding the Expedited Appeals Provision of the Pending Bankruptcy Legislation HR 333

Futures Regulation

Health Law
Statement in Support of the Family Health Care Decisions Act (A.5523)

International Human Rights
Letter to the President of the Republic of Tunisia Regarding the Detention
RECEN T COMMITTE E REPORTS

of Tunisian Attorney Mohammed Nejib Hosni Based Upon Charges of the “Illegal” Practice of Law

Legal Issues Pertaining to Animals
Report on S.345/H.R. 1155—A Bill to Amend the Animal Welfare Act to Remove the Limitation that Permits Interstate Movement of Live Birds, for the Purpose of Fighting, to States in Which Animal Fighting is Lawful

New York City Affairs
Letter to Comptroller Hevesi Regarding New York City Water Tunnel No. 3

Securities Regulation

Trusts Estates and Surrogate’s Courts
Report on A.9073—An Act to Amend the Estates, Powers and Trusts Law and the Surrogates’ Court Procedure Act in Relation to Trust Accounting Income

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

Annual Meeting of the Association

Evan A. Davis

This report was delivered at the Annual Meeting of the Association, held on May 15, 2001.

Good evening members of the Association and guests.

We have two special events to celebrate tonight. We will confer honorary membership on Sir Sydney Kentridge and we will unveil the portrait of my immediate predecessor, Michael Cooper. My report will be relatively brief so that we can focus on honoring these outstanding lawyers.

The legal profession in the United States has for some time been working on three areas of concern. The first area relates to the desire to have the legal profession be more inclusive and accessible to African-Americans, Latinos, Asians, women and others who face problems of prejudice and/or historic disadvantage. The second area involves working to make access to justice universal. This area focuses on the encouragement of pro bono work and the securing of adequate funding for criminal and civil legal services for the poor. The third area is how best to maintain high professional standards in an increasingly competitive, multidisciplinary and global practice environment.

The results so far achieved in each of these areas have been mixed. Thirty years ago very few women or lawyers of color attended law school.
Today people of color, who now represent a majority or near majority in most urban areas in the United States, constitute more than 20 percent of law school students, 15 percent of associates at major law firms and three percent of the partners. Women represent almost 50 percent of law students, more that 40 percent of associates and, in New York, 13 percent of the partners.

These statistics show progress but also show that we still have a long way to go. Last month I lent my President’s Page in 44th Street Notes to Joseph McLaughlin who chairs our Committee to Enhance Diversity in the Profession. He compared the task of increasing diversity to running a marathon. This is a good analogy and, pressing it further, maybe we can say that we have run thirteen of the twenty-six miles that will achieve equal status for women and half that, seven or eight miles, for lawyers of color. For both groups equal status in top-level positions remains elusive.

Turning to the second area of concern, access to justice, there too we are only part way toward our goal of minimally sufficient access to justice for all. On the plus side, pro bono work has been institutionalized at most large law firms and several well run organizations provide clearinghouse infrastructure to support pro bono volunteers. New York’s 165,000 lawyers on average do about 12 hours of pro bono work per lawyer per year. Legal services organizations in New York State receive each year about $100 million in funding from all sources, private and governmental. Through private effort this amount has been held constant despite cutbacks in government funding.

These combined private and public efforts, however, meet only a small fraction of the need of the poor, and this fraction has not increased in recent years. To meet the need at a minimally adequate level, pro bono hours would have to increase to a statewide average of about 40 hours per lawyer per year and legal services funding would have to be increased by a factor of four.

In addition, the right to counsel in criminal cases is badly tarnished due to government’s neglect of its constitutional obligation adequately to fund criminal defense services. New York State has been an egregious offender by failing to increase assigned counsel fees from the maximum rate of $40 an hour set in 1986. New York City has also hurt the criminal justice system by excessively cutting the funding of criminal defense services at The Legal Aid Society, which is the backbone of criminal legal defense for the City.

The third area of concern, maintaining the values of the profession in the modern, market-oriented world, creates an especially great chal-
lenge for bar associations. Many law firms in New York have a business plan that calls for the doing of high value added work that supports premium billing. This leads to vigorous competition not only for clients but also for talent. In addition, a marginal increase in the number of hours billed goes directly to the bottom line because there is little marginal cost associated with these hours. For the moment, the confluence of these vectors has been relatively high pay, long hours for both partners and associates and diminished time for pro bono work and bar activities, let alone family and quality of life needs.

At the same time lawyers are increasingly being offered a variety of “platforms” from which to practice law at a high level. The accounting firms offer a multi-step promotional path leading for the most successful to leadership of a major global institution. Consulting firms, which have become leading recruiters at law schools, offer an interdisciplinary approach to addressing a client’s needs.

The Association of the Bar is working on all these problem areas.

We are keeping the issue of diversity high on the agenda by repeatedly making the case that promoting diversity is both the right thing to do and a key part of any plausible strategy for attracting and retaining clients and talented lawyers. Scores of speakers have made these points at over ten different diversity programs this year including two sold out events: the Ruth Bader Ginsburg Lecture and Symposium and this month’s all-day Conference on Diversity in the Legal Workplace.

I, our first wheelchair-using President, serving with an Executive Committee Chair who is gay, am putting our rhetoric on diversity to practice. For example, I have just appointed the first African-American to head our Judiciary Committee. That person, Jeh Johnson, was a Vice Chair of the Committee and has recently returned to New York after serving as General Counsel of the Air Force. I am proud to have appointed him to this key position.

In the coming year we intend to press the diversity agenda. Among other things, we plan to 1) mount an exchange program to help black lawyers in South Africa strengthen their commercial law capabilities, 2) consolidate and strengthen our diversity goals for New York law firms and corporate law departments, 3) publish a directory of resources used in successful diversity programs, 4) publish detailed diversity data collected on a voluntary basis from law firms and legal departments, 5) organize networking events that connect minority lawyers who work in-house with those who work in private practice, and 6) enhance programs that address the needs of minority lawyers in public sector law departments.
The Association is also working hard on access to justice. A focus this year has been on lobbying Albany to increase assigned counsel fees in New York from $40 to $75 an hour. We have built this effort on Chief Judge Judith Kaye's uncompromising leadership on this issue.

Last fall, following a presentation by our Council on Children and the Committees on Domestic Violence and Criminal Advocacy, the Executive Committee made assigned counsel fee increases an Association priority. Shortly thereafter, our Committee on Domestic Violence organized a symposium chaired by the former Presiding Justice of the Appellate Division, First Department, Betty Ellerin. The symposium addressed both substance and strategy.

Following up, I devoted my monthly President's Page to a plea to Governor George Pataki to put money for an assigned counsel fee increase in his budget. In a first for the Association, I also sent e-mails to our members urging them to contact leaders and legislative members in Albany.

The Governor did not put the money in his budget, but he did take the lead in organizing with the Legislature a task force to address the problem. To keep the pressure up, we, with strong support from the State Bar and New York County Lawyers Association, organized a successful rally at the Capitol in Albany. A bus full of New York City lawyers came to Albany to participate. The President of the State Bar and I will return to Albany next week to press our case further.

We need to broaden our general efforts to increase access to legal assistance. I have asked our Committee on Pro Bono and Legal Services to report on the feasibility of increasing the statewide average of pro bono hours to forty hours per lawyer per year over the next ten years. I have also asked them to identify the steps that we should take now to facilitate increased pro bono work and to secure substantially increased legal services funding. This August, we plan to urge the House of Delegates of the American Bar Association to make clear that law firms have an ethical obligation reasonably to support the doing of pro bono work. As an aspirational matter, law firms should actively encourage such work.

The two issues I have just discussed are not easy ones and that is also true of the third area of concern: maintaining the values of the profession in the market-oriented environment of law practice today. For example, we have differed with most other bar associations in how to approach the issue of multidisciplinary practice. We would allow lawyers to be partners with other professionals under rules that would preserve professional values such as confidentiality, the duty of loyalty, independence
of professional judgment and the pro bono obligation. Others have taken the view these values can not be adequately maintained unless we preserve the rule that non-lawyers may not own or control a legal practice.

In New York we are supporting the State Bar’s proposal to allow joint ventures between lawyers and other professions. I think it is fair to say that we view this as a first step while the State Bar views this more as the final destination.

We are also working to make bar work as attractive and user-friendly as possible for busy lawyers. Our membership has increased more this year than at any time in the past 10 years, but we need to do even more to show lawyers how much fun active involvement in the Association can be. We also have a responsibility to help keep the New York bar one of the most exciting in which to practice. To do this we must make the good use of New York’s status as one of the two leading centers of legal practice in the world and be the bar that shows the greatest leadership on matters of professional responsibility including access to justice.

To that end, next fall we, with the co-sponsorship of the City of London Law Society, the Paris Bar and the Tokyo Bar, plan to hold a summit meeting of the leaders of city bar associations from twenty-five key world cities. The conferees will discuss issues of mutual interest including access to justice, the bar’s role in securing a qualified and independent judiciary, the independence of the profession and the building of capacity and structure for international commercial practice.

The Association is active on many matters in addition to these three areas of particular focus. We do our utmost to promote the selection of qualified judges who possess the requisite character, temperament, professional aptitude and experience. We believe that judges must be above ideology and politics. At the direction of the Executive Committee, we have written to President George W. Bush asking him to reconsider his decision to alter the role of the ABA Judiciary Committee in the federal judicial selection process.

We continue to work hard on our opposition to the death penalty, our support for reform of the Rockefeller Drug laws, our support for campaign finance reform at the federal and state level and our call for reform of the so-called three men in a room system in Albany. We were very pleased that the State Bar recently decided to support a moratorium on executions in New York. We are hard at work on merging our library with that of the New York County Lawyers and the New York Law Institute so that improved services can be given to the members of all three institutions while substantial savings accrue to service providers.
Earlier this year I wrote a column on the presidential election that was critical of the work of both the Supreme Court of Florida and the Supreme Court of the United States in connection with litigation over a Florida recount. Subsequently, our Committee of Federal Legislation sponsored a well-attended symposium that focused on the need to improve the legal structure that governs presidential elections. There is a strong argument that the federal government and not the state governments should be the guarantor of the fairness of presidential elections. Our Committee plans to follow up with actual proposals for change.

Next year we will also make an all-out effort to obtain first passage of a constitutional amendment to correct serious flaws in the structure of our Court system. These flaws prevent the efficient use of judicial resources, waste the time and money of litigants and make it harder for courts to address the legal problems of families and children. The obstacles to reform that are thrown up in Albany relate to the interests of political parties and include a desire not to make a significant increase in the number of Supreme Court judges appointed by the Mayor of the City of New York. We may need to show some creativity to solve this political problem.

I want to thank you, the members of the Association, for the opportunity you are giving me to lead this marvelous organization. I also want to thank our outstanding staff. Without our Executive Director Barbara Berger Opotowsky, our General Counsel Alan Rothstein, our Executive Director of the City Bar Fund Maria Imperial, our Director of Administrative Services Robin Gorsline, our Executive Director of the Legal Referral Service Allen Charne, our CLE Director Michelle Schwartz-Clement, our Director of Meeting Services Nicholas Marricco, our Communications Director Andrew Martin, our Treasurer Carol Rosenbaum, our Manager of Membership Services Melissa Halili or the others who manage and implement our programs and activities, we could not be the leading bar association that we are.
Remarks

Portrait Unveiling: Michael A. Cooper

Following the Annual Meeting on May 15, a portrait of former Association President Michael A. Cooper was unveiled. Mr. Cooper, the Association's 60th President, served from 1998-2000.

John Warden

Mike and Nan, Sir Sidney, President Davis, ladies and gentlemen. It is a privilege and pleasure to speak for Mike's partners on this happy occasion.

Mike's service as President of the Association is the capstone of a life at the Bar spanning more than four decades, throughout which Mike has given his all to his clients and then given as much again to his community. The Association's only institutional rival for Mike's affections is the City Ballet, but then it has had the advantage of Suzanne Farrell and Darcy Kistler.

When Mike started practice at Sullivan & Cromwell in 1960, he entered a legal community quite different in many respects from that he led in his two years here. John W. Davis had died only five years before, and Harrison Tweed was still practicing at the firm that bears his name. At our own firm, four giants of the Bar—Arthur Dean, David Peck, Eustace Seligman and Norris Darrell—were active leaders of the practice. About 90 lawyers strong, the Firm was not much larger than our Litigation Group was 20 years later when Mike became its Managing Partner.
The four men I’ve mentioned set an example to young lawyers joining the firm not only in the practice of our profession but in service to it. Dean was—among many other things—a founding co-chairman of the Lawyers Committee for Civil Rights under Law, a position he assumed during Mike’s years as an associate; Judge Peck, in addition to his earlier service on the Bench, served during the same period as president of the State Bar; and Seligman and Darrell served for the remarkable period of fifteen years each as presidents of the Legal Aid Society and the American Law Institute, respectively, again while Mike was a young lawyer.

No one took these examples more to heart than Mike, who has more than lived up to them by following Mr. Dean as a co-chairman of the Lawyers Committee and Mr. Seligman as president of Legal Aid, both before becoming the first of our partners to serve as President of the Association. Mike’s advocacy of justice for all in each of these three positions makes it particularly fitting that it was he who spoke for the Association in honoring Sir Sydney Kentridge this evening.

Mike had the good fortune to work directly with both Mr. Dean and Judge Peck in his earliest years with the firm, assisting Judge Peck with the landmark Hudson Tubes condemnation case and representing Mr. Dean and the other defendant directors in Greenbaum v. American Metal Climax, one of the leading New York cases on corporate governance, which Mike argued and won in the Appellate Division while still an associate.

When I joined the Firm in 1965, Mike was a senior associate, possessed of a gravitas beyond his years. He practically wore out the carpet on our mutual corridor as he paced up and down, apparently in aid of the composition of winning arguments. He has since mellowed—without of course losing his gravitas—a process some might attribute merely to the passage of time, but I suggest is due to his marriage to Nan, who has enriched not only Mike’s life but the lives of his friends and partners.

Mike is a lawyer of true integrity and strong personal values, as well of the highest professional competence. But I would say Mike’s singular quality as a lawyer is soundness of judgment in all matters great and small, a quality respected and relied upon by his colleagues at the Firm, who have for many years looked to him as our “in-house” ethics expert and as coordinator of both our charitable giving and our pro bono activities. We were happy for the Association to have had the benefit of that judgment for Mike’s two years at the helm here.

Indeed, in the 35 years I’ve known Mike, I’ve questioned his judgment only once: Some years ago Mike entertained 30 or 40 mostly younger lawyers and their spouses at his house in Short Hills on a beautiful sum-
mer day. After libations and lunch, for some reason lost in the mists of time, Mike—a la Bobby Riggs—challenged my wife to a foot race through the streets of the neighborhood finishing in front of his house. The company assembled, the race was run—and lo and behold, my wife, running in a skirt and heels and breathing normally, cruised home well ahead of Mike. Unfortunately, I didn’t have a camera to record the finish and Mike’s astonished expression.

Having recounted the exception that proves the rule, I close by saying that Mike’s career epitomizes the Jeffersonian ideal of “the lawyer as public citizen,” for which his partners and his colleagues at the Bar together honor him.
Thank you, John, not just for your overly generous remarks, but also for the support that you and all of my partners gave that permitted me to take what was in substance a two-year sabbatical from the firm to serve as President of this Association.

One of my partners has told me more than once in the past several weeks that he was looking forward to my “hanging.” I must say that I found the eagerness of his anticipation a bit worrisome. If, as Whitney North Seymour dubbed recent Association Presidents, we are “former livings,” then I suppose the portrait of a “former living” is a “pre-posthumous” portrait.

Seeing oneself portrayed in paint on canvas is an odd and in some ways unsettling experience. It makes me think of the belief in some South American cultures that if your photograph is taken, the photographer steals your soul. It is not for me to say whether Daniel Greene, who painted my portrait, found my soul, much less whether he captured it.

It is humbling to have one’s portrait arrayed on walls with such former Presidents as Charles Evans Hughes, John W. Davis, Whitney North Seymour, Harrison Tweed and Bob McKay. Truly, the person who serves as President of this Association stands, in Isaac Newton’s words, “on the shoulders of giants.” Sadly, one of those giants, Jim Oliensis, passed away yesterday. He and his family are in my thoughts and prayers, and I hope will be in yours.
One entirely unexpected happy consequence of having my portrait painted is that Dan Greene, the portraitist I chose, lives less than two miles from our weekend home in North Salem, and he and his wife, Wendy Caporale, also a painter, have become good friends.

This portrait and the annual meeting just ended are vivid reminders of the two most exhilarating years of my professional life. I learned and relearned much during those two years: (i) that the rule of law and the fair administration of justice in accordance with the rule of law form the surest glue that can bind a nation, (ii) that law plays an indispensable role in addressing many—by no means all, but many—of the challenges our nation faces, and (iii) that there is a surprisingly large number of lawyers among the Association's 21,000 members who are willing to make significant commitments of their time and talents to responding to those challenges through Association committee service and otherwise. I also learned that the challenges we face in the United States are quite similar to challenges faced by other societies, in which there are also lawyers like Sydney Kentridge dedicated to securing and maintaining the rule of law.

The richest reward for me of serving as Association President was the privilege of working with Association members and other lawyers, many of whom I had never previously met but now count as not only colleagues but friends as well.

And all of this work was made more satisfying and enjoyable by the remarkably dedicated staff of the Association led by Barbara Opotowsky and Alan Rothstein, by my partners at Sullivan & Cromwell, who never for a moment begrudged the time I devoted to Association activities, and by my always supportive wife, Nan. I am grateful that several of my Sullivan & Cromwell colleagues are here, as are many friends (lawyers and non-lawyers), and Nan and Emily and my sons Jeff and Paul, who traveled here from Indianapolis and Flagstaff, Arizona, respectively. You have all made this an evening I will always treasure in my memory, and for that you have my deepest thanks.

M I C H A E L  A.  C O O P E R
Letter to President Bush
re: Departing from Practice of Advance Review by ABA of Potential Judicial Nominees

The following letter was written at the direction of the Association’s Executive Committee.

Dear President Bush:

I am writing on behalf of the more than 21,000-member Association of the Bar of the City of New York. The Association was formed in the latter part of the 19th century, to address the serious need at the time for independent, nonpartisan review by members of the bar of candidates for election or appointment to judicial office in New York City. That need arose because the nominations and appointments to the judiciary in that era were regularly made by machine politicians based primarily on political considerations and favoritism, not on the legal ability, integrity or temperament of the candidates. We are particularly proud of those distinguished and courageous lawyers who, at a time when political corruption was rampant, formed the Association in order to promote integrity in the selection of judges by performing nonpartisan reviews of judicial candidates.
During the more than one hundred and thirty years since that difficult time, our Association has consistently reviewed candidates for judicial office in New York and reported its conclusions to those responsible for judicial nominations and to the public. The Association’s rating of candidates as qualified or not qualified has, over the years, contributed to greater public confidence that candidates for judicial office are possessed of the requisite qualifications.

Notwithstanding the respect our ratings of candidates consistently receive, those at the Association of the Bar of the City of New York involved in the judicial review process recognize that the decision as to who should take the bench is for elected officials or the public, not our Association. Just as judges must be above politics and ideology, we consider it essential to the integrity of the Association of the Bar’s judicial review process to avoid any political or ideological bias in the review of candidates.

Especially because of our Association’s history of independent review of the qualifications of candidates for the bench in New York, we are concerned by your recent decision to depart from the practice of affording the American Bar Association’s Standing Committee on the Federal Judiciary, the opportunity to conduct a review of potential nominees for the Federal bench in advance of the public announcement of their nominations. Based on our experience in New York, pre-nomination reviews not only tend to promote the selection of candidates who are qualified, but also tend to eliminate the potential for embarrassment that can arise when a candidate’s nomination is announced and only thereafter weaknesses in the candidate’s ability or character are disclosed. Among other things, such disclosure following announcement of a nomination can tend to cast doubt on the judicial selection process and those involved in it. That in turn can erode confidence in the system of justice.

It is also our experience that when we review a candidate before public announcement of the nomination, the quality of the review is enhanced because knowledgeable persons tend to be more candid in their comments as to a candidate. That is especially important when considering candidates for lifetime appointments to the federal bench.

While we are aware that there have been concerns that political or ideological considerations could influence the ABA Committee, we do not know of any valid reason to believe that the Committee’s decisions have been influenced by such considerations. We have examined the Committee’s membership lists and the lists of Chairpersons of the Committee over many years and cannot imagine a group more appropriate to the task of
reviewing judicial candidates impartially, with due focus only on legal ability, integrity and temperament. Certainly, those members of the ABA’s Committee from the Second Circuit have consistently included the most able and honorable of New York’s lawyers.

To provide added assurance that there is no distraction of the Committee members from the Committee’s commitment to nonpartisan review of judicial candidates, it is our understanding that the ABA has organized itself so that the Judiciary Committee peer review process is totally separated from the other activities of the ABA. Even the ABA’s president, for example, has not known the identity of candidates for judicial office while they have been subject to Committee review.

We also understand that, of the twenty-six candidates that the ABA Standing Committee on the Federal Judiciary has found not qualified, only three have been nominated by Republican Presidents. We know too that among the especially prominent candidates the Committee has found to be either qualified or well qualified are candidates with both well known conservative and liberal credentials. That is not a record that suggests to us any bias, except in favor of approval of candidates who have the requisite qualifications for lifetime appointments.

Based on our own long experience with the review of judicial candidates, we would respectfully urge that you reconsider your decision, and allow the ABA relationship to continue. We believe that the ABA’s role, as conceived in the Eisenhower Administration, has contributed to confidence in the system of justice in the United States and should be preserved.

We have no doubt, Mr. President, that your Administration will seek to maintain a federal judiciary of high quality. Our experience of over one hundred and thirty years suggests strongly that your achievement of that goal will be fostered in important ways if you restore the ABA Judiciary Committee’s traditional role.¹

Very truly yours,

Evan A. Davis
President, Association of the Bar of the City of New York

cc: Members of the Senate Committee on the Judiciary

May 2001
LETTER TO PRESIDENT BUSH

The following is the response from the White House:

Dear Mr. Davis:

On behalf of President Bush and Counsel to the President Alberto R. Gonzales. I acknowledge receipt of your recent submission expressing disagreement with the Administration’s decision to alter the role of the American Bar Association in the judicial selection process. We appreciate your taking the time to share your organization’s views.

There is a long tradition by which Members of Congress, interest groups, and individual citizens provide suggestions to the President about potential judges and evaluations to the Senate of those individuals the President nominates. We will continue to welcome such suggestions and evaluations from all sources, including the ABA.

Please accept my thanks on behalf of the President and Counsel to the President for your group’s input.

Sincerely,

Stuart W. Bowen, Jr.
Associate Counsel to the President
Report on Judicial Campaign Finance Reform

The Committee on Government Ethics

It is axiomatic, if regrettable, that the elected legislative and executive officials who create our laws currently raise campaign funds from interested individuals and groups. Thus far, the public has appeared to accept this situation with relatively little protest. However, it expects the judiciary, which must interpret and apply the laws enacted by the other two branches, to be utterly removed from political considerations. The Committee on Government Ethics recognizes that ensuring the integrity of the judicial branch and the legal profession is crucial to maintaining public confidence in the justice system and the rule of law; it also recognizes that reform of New York’s current system of judicial campaign finance is an essential element of any such effort. The following proposal outlines steps the Committee may wish to take to reform the system by which judicial campaigns are financed in New York.¹

BACKGROUND

Repeated studies show that much, if not most, of the public does not even realize that most judges must run for office. Fewer still recognize that requiring judges to run for the bench can carry the same political and financial baggage more commonly associated with the other two

¹. While this report proposes improvements in the process by which judges are elected, the Association of the Bar continues to believe that the best way of choosing judges is through merit selection: appointment of judges from a short list of potential nominees proposed by a broad-based nominating commission. This method is now used very effectively to select judges for New York’s highest court, and should be expanded to all state courts.
branches of government. In New York, the vast majority of trial court judges—those most likely to come into contact with the ordinary citizen—must run for office in partisan elections. Moreover, they are permitted to accept campaign contributions from the very lawyers who will appear before them in court, and to whom they may grant lucrative fiduciary appointments. Such situations carry an inherent conflict of interest, creating the perception that justice is for sale and undermining public confidence in the system’s integrity.

Across New York, the price of a judgeship has risen steadily in recent years. This heightened need for fundraising is accompanied by other problems. In 1999 in New York City, a long-simmering scandal in Brooklyn exploded into the headlines when two local party officials released a letter complaining that they were denied their rightful share of fiduciary appointments, despite their efforts on behalf of party candidates. As a result, the Chief Judge appointed a Special Inspector General for Fiduciary Appointments to investigate, and established a Commission on Fiduciary Appointments to address long-term concerns. Other recent examples in New York abound:

- 1996: The head of the National Republican Senatorial Committee funneled $137,000 into upstate judicial races to help ensure victories for Republican candidates in state judicial races. In response, the State Democratic Committee spent $40,000 on behalf of the Democratic candidates in the same races.
- 1998: The victorious candidate in a County Court race in Westchester County raised more than $167,000, dwarfing her opponent’s war chest of little more than $41,000.
- 1998: The campaign treasurer for an interim appointee to an upstate Supreme Court judgeship issued a press release trumpeting a fundraising “record” in excess of $103,000 in the first three-month reporting period. The opposing party’s challenger abandoned the race prior to the parties’ judicial nominating conventions, citing an inability to compete at such fundraising levels, and the incumbent sailed, by default, to a fourteen-year term.
- 1999: Newsday reported allegations of impropriety involving receiverships awarded by a Suffolk County judge to a local party leader, whose endorsement had assured the judge’s election.
- 1999: A Westchester County Supreme Court Justice was admonished by the State Commission on Judicial Conduct for
making improper campaign statements in seeking the endorsement of the Right to Life Party.

• 1999: A Broome County Family Court judge was censured for appearing to show favoritism in granting Law Guardian appointments to two lawyers who agreed to secure cross-endorsement deals.

• 2000: A Westchester County Surrogate's Court primary degenerated into mudslinging and formal conduct complaints by both Democratic primary candidates.

• 2000: A candidate for a Yonkers City Court judgeship resigned from the race and stood trial for election fraud allegedly committed during the primary.

• 2000: A candidate for Supreme Court in Westchester County who is currently a village justice has been criticized for naming as chair of a campaign fundraiser a prosecutor who tries cases before him.

• 2000: A Suffolk County Supreme Court justice was formally admonished for making improper campaign statements, distributing misleading literature, and making an improper political contribution to the Suffolk County Right to Life Party.

• 2000: A County Court judge in Oswego County was formally admonished for making improper campaign statements that indicated how he would rule in types of cases that were likely to come before him, and for engaging in inappropriate attacks on his opponent.

• 2000: During a contested primary, a Brooklyn Civil Court judge levied allegations that a party official attempted to “shake her down” for $140,000 to keep her judgeship.

• 2001: A Suffolk County Acting Supreme Court Justice and Judge of the Court of Claims was formally admonished for authorizing the “carry-over” of funds raised for one election campaign to successive campaigns, a practice barred by the Rules of the Chief Administrator of the Courts Governing Judicial Conduct and accompanying Advisory Opinions.

As candidates compete in increasingly high-stakes races, instances of campaign conduct that violates the canons of judicial ethics have esca-
lated, and the need to amass huge campaign war chests deters many qualified candidates from running for office.

DISPROPORTIONATE IMPACT OF CONTRIBUTIONS TO JUDICIAL CAMPAIGNS

The small number of contributors to judicial campaigns increases the potential for undue influence in two ways. First, within existing legal limits, a single contributor or a small number of contributors have a greater opportunity than in other election contests to wield undue influence over a particular candidate. Second, because of the very low voter involvement with judicial elections, a single contributor or a small number of contributors can, through their financing of a judicial campaign, have a disproportionate impact on the outcome of an election.

LACK OF PUBLIC INFORMATION

Repeated studies show that, of all candidates, voters are consistently least informed about those running for judicial office. A variety of factors is involved, including a ban on most substantive campaign speech; judicial candidates’ inability to offer the electorate the kinds of campaign promises commonly advertised and sometimes fulfilled by other elected officials; and longer terms of office, with fewer candidates up for election in any given year.

LIMITS ON CAMPAIGN SPEECH

The Rules of the Chief Administrator of the Courts Governing Judicial Conduct, which also apply to candidates for judicial office who are not currently judges, severely constrain what candidates may say during a campaign. Under Rule § 100.5 (A)(3)(d)(i-ii), judicial candidates shall not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,” nor “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” Candidates are thus forbidden to answer questions regarding how they would rule even in a hypothetical set of circumstances. They are barred from stating political positions (e.g., a stance on abortion) that may indicate a willingness to rule for or against a particular side in certain types of cases, and forbidden to engage in false or misleading attacks on opponents. Consequently, campaign advertising and speech are confined largely to proclamations about levels of experience and party identification.

However, voters are accustomed to the availability of a wide range of
personal information about candidates for elective office, including personal opinions on timely political issues, willingness or lack thereof to engage in personal attacks on opponents, and the sort of personality information that is available to voters from seeing candidates debate substantive issues. Because voters rarely see judicial candidates in any of the usual political contexts, not only do they have none of the usual bases upon which to determine their votes, but frequently do not even know who the candidates are.

IMPACT OF BUCKLEY V. VALEO

Codes of judicial conduct throughout the United States prohibit candidates for judicial office from engaging in political advocacy or committing themselves to political positions. This general rule applies not only to questions that may arise before the candidate in court, but also to issues that are not likely to become the subject of litigation. Similarly, the codes limit judicial candidates’ contributions to political candidates or party organizations to prevent the appearance of candidates purchasing judicial appointments. The codes’ restrictions are upheld, despite the limitations they impose upon political free speech, because they are essential to the integrity, both real and perceived, of the judicial process.

Currently applicable rules and their rationales, and the fact that they consistently withstand constitutional challenge, therefore, render Buckley v. Valeo inapplicable to judicial elections. The codes regulate judicial cam-

2. See, e.g., Rules of the Chief Administrator of the Courts Governing Judicial Conduct, § 100.5; see also ABA Model Code of Judicial Conduct Canon 5; California Code of Judicial Ethics Canon 5; Florida Code of Judicial Conduct Canon 7; Washington Code of Judicial Conduct Canon 7; Alabama Code of Judicial Ethics Canon 7.

3. 424 U.S. 1 (1976) (per curiam). Buckley v. Valeo, in which the Federal Election Campaign Act was challenged, held, inter alia, that a governmental interest in combating corruption could overcome the need to protect First Amendment activities implicated by various kinds of restrictions on campaigns. In the Sixth Circuit, application of the Buckley reasoning to judicial campaigns resulted in the invalidation of spending limits. In Suster v. Marshall, 121 F. Supp. 2d 1141 (N.D. Ohio 2000), judicial candidates challenged the constitutionality of Canons VII (C)(6) and VII (C)(8) of the Ohio Code of Judicial Conduct. Canon VII (C)(6) limited the amount a candidate for judicial office could spend in his or her campaign, and VII (C)(8) prohibited the use of funds raised for a previous non-judicial campaign in a subsequent judicial campaign. See id. at 1143. The court, relying on the Sixth Circuit’s opinion remanding the case to the District Court (Suster v. Marshall, 149 F. 3d 523 (6th Cir. 1998)), rejected defendants’ claim that the unique role of the judiciary rendered Buckley v. Valeo inapplicable to the dispute. See Suster, 121 F. Supp. 2d at 1147-48.

The court further rejected defendants’ argument that Canon VII (C)(6) did not violate the First Amendment because it did not burden political speech, a contention based upon the
campaign activity in general; in this context, imposing reasonable restrictions on judicial campaign spending would simply amount to a “lesser included” restraint. Furthermore, judges, unlike executive and legislative officers, should not be elected based upon campaign pledges or their adherence to a particular position or party; rather, professional experience, legal expertise, and the ability to administer cases according to the rule of law are the necessary qualifications. The unique role of judges eliminates the need to communicate any message to the electorate beyond that of a candidate’s qualifications. The same concern for the integrity of the judicial system underlying the codes’ restriction of a candidate’s campaign activity in general also justifies limiting contributions to judicial campaigns. The need for unbridled political speech that is inherent in executive and legislative races is absent from judicial contests. Reasonable restrictions on judicial fundraising and spending should therefore survive a challenge under Buckley.

NO QUID PRO QUO

Candidates for legislative and executive office can bargain for votes in exchange for promises to enact certain laws, and their role, if elected, is largely to accomplish certain objectives on behalf of their constituencies through a process of compromise. Judicial candidates, however, have no lawmaking authority, do not “represent” a constituency in the way that

distinction between judicial and non-judicial candidates. See id. at 1148. The court determined, again relying on the Sixth Circuit, that spending restrictions are not time, place, or manner limitations, but rather reduce the quantity of expression in which candidates may engage. See id. at 1148-49. The court, applying First Amendment analysis, found that Canon VII (C)(6) was not narrowly tailored to meet a compelling government interest. The court held that defendants had not demonstrated “a correlation between campaign expenditures and any corruption.” Id. at 1150, citing Suster, 149 F. 3d at 532. The court found that Canon VII (C)(8), in contrast, did not burden political speech more than necessary to serve a compelling state interest.

The Committee, notwithstanding the conclusion reached in Susters, believes that protecting the integrity of the judicial process—i.e., assuring fair, unbiased judges who are not pledged or committed to causes or outcomes by prior explicit or implicit promises—justifies appropriate limitations on the “free speech” aspects of unlimited campaign spending.

This view is bolstered by a recent Eighth Circuit decision in Republican Party of Minnesota v. Kelly (2001 U.S. App. LEXIS 8023 (April 30, 2001)), which rejected a challenge to Minnesota court rules barring judicial candidates from, inter alia, attending and speaking at political party gatherings, identifying their political party membership, or authorizing others to engage in this conduct. The Eighth Circuit determined that the constitutionality of the rules must be evaluated under a strict scrutiny standard, but found the First Amendment interests to be outweighed by the state’s interest in preserving both the independence of the judiciary and public confidence in an independent judiciary.
executive and legislative officials do, and are not expected to use the judicial decision-making power as a way of advancing a political agenda. Thus, the tacit quid pro quo for votes cast for candidates for positions in the other two branches does not apply to judges. Indeed, from the voter’s standpoint, voting for a judge is an act quite different from voting for other elected officials, since judges are often required to overturn popular laws or enforce unpopular ones. Because no implicit benefit can or should be offered in the latter voter/candidate relationship, voters may be less inclined to bother either to learn about judicial candidates or to vote at all.

LONGER TERMS OF OFFICE

The potential for corruption and low voter turn-out may have more consequence in judicial races because of the longer terms that judges serve in New York compared with other elected officials. While longer terms serve an important public policy of enhancing judicial independence, they diminish the chances that the ordinary voter will become knowledgeable about particular candidates. Whereas voters are accustomed to reviewing the qualifications of other candidates every two, four, or, at most, six years, more than a decade may pass before they have occasion to revisit the qualifications of their judges. In addition, because of widely variable term lengths among various courts, and because of the procedures for naming interim judges, there are usually a few judicial seats up for election across the state in every year. In any but general-election years, voters may be unaware that candidates are running for judicial office.

SOLUTIONS

Public Financing

Judicial campaigns provide the best possible argument for a system of public financing. Critics of public financing in other types of races often cite First Amendment concerns, which are notably diminished in the context of judicial campaigns, because judicial candidates are so severely limited in taking public positions on issues. These restrictions create an unfortunate cycle: As candidates encounter difficulties in making their candidacies known, there is an increasing need for advertising; advertising requires increased fundraising; and the need to raise ever-larger sums of money leads to the temptation to campaign in ways that contravene the canons on judicial conduct. As noted previously, the rising cost

4. Judges of the Supreme Court, New York’s trial court of general jurisdiction, serve terms of 14 years.
of judicial campaigns in New York also significantly limits the pool of potential judges.

Finally, the need to raise funds to run in partisan judicial campaigns, almost by definition, undermines public trust in the integrity and the objectivity of the judiciary: When judges are permitted (and, indeed, forced by circumstances) to accept campaign funds from the very lawyers (and potentially, from future corporate or action-committee litigants) who will appear before them in court, the public understandably can have little confidence that the judge’s decisions were not swayed by the contributions. Indeed, a survey conducted in 1999 by the National Center for State Courts, in conjunction with the American Bar Association and other groups, found that 79% of respondents believed that “elected judges are influenced by having to raise campaign funds,” and 81% agreed that “judges’ decisions are influenced by political considerations.” Moreover, in jurisdictions like New York, many elected judges are required to appoint lawyers and law firms to lucrative fee-paying positions, such as guardianships and receiverships. An apparent correlation between campaign contributions and fiduciary appointments has been documented in several instances, including a lengthy 1998 study by this Committee of local Surrogates’ campaigns.

A public financing system would remedy many of these problems, and could be mandatory together with expenditure limits on judicial candidates without running afoul of Buckley v. Valeo (see pp. 161-162 above). Even if the public financing system were voluntary, it would likely succeed if modeled, for example, on that used for legislative- and executive-branch races by the New York City Campaign Finance Board, which matches funds in a four-to-one ratio. This would provide a significant incentive even to those judicial candidates who are capable of raising large sums of money: Many feel that it is an inappropriate use of their time, and many are made extremely uncomfortable by the need to raise funds, especially from the very donors who will later appear before them in court. (Indeed,

5. Under 22 N.Y.C.R.R. 100.5 (A) (5), judicial candidates in New York State are not permitted to solicit or accept contributions to their campaigns, but may establish a committee to do this for them. While most judicial candidates undoubtedly abide by this rule, as a practical matter and without violating any strictures, many candidates must know who contributes, and, in any event, public skepticism undermines the value of having such a rule in place. Public financing of judicial campaigns would diminish the need for this rule.

6. This report does not propose a specific system of public financing of judicial campaigns. There may be other public financing models that serve to meet the objectives set forth in this report. The Association of the Bar will be examining alternative judicial campaign financing models in the coming months.
it would seem that partisan political activity is itself inconsistent with the essence of judging—i.e., the unbiased administration of justice based purely on the merits. A strong public financing plan would be of even greater benefit to challengers, who find it particularly difficult to raise funds against an incumbent who has likely served on the bench in a community for many years, and who likely has his or her party’s backing (and perhaps the backing of the opposing party, as well, via a cross-endorsement deal).

**VOTERS’ GUIDES**

A simple and cost-effective way to create a better-informed electorate is by the dissemination, at public expense, of voters’ guides. The New York City Campaign Finance Board already distributes voters’ guides for legislative- and executive-branch candidates and ballot proposals. Several op-

7. In Terence Rattigan’s 1945 play The Winslow Boy, based on an actual court case of a young British naval cadet unjustly accused of stealing a five shilling postal order, the cadet’s able barrister sums up the lofty goals of the judicial system by reference to the English “Petition of Right,” as he sets about proving the boy’s innocence. After a blistering private cross-examination of the boy, the barrister, convinced of the boy’s innocence, accepts the case and becomes unstoppable. An English subject could sue the Crown by a Petition of Right, redress being granted as a matter of grace. In such matters, it was the custom for the Attorney General, on behalf of the King, to endorse the Petition and allow the case to come to court:

“Sir Robert Morton (the barrister for the cadet): it is interesting to note that the exact words he [the Attorney General] uses on such occasions are: Let Right be done.

Arthur (the boy’s father): Let Right be done? I like that phrase, sir.

Sir Robert: It has a certain ring about it; has it not? (Languidly.) Let Right be done.”


Having won the nearly impossible case by taking on the Crown on behalf of the boy, at the cost of an appointment as Lord Chief Justice, which post he turned down simply in order to proceed with the case, Sir Robert openly weeps in the courtroom:

“Sir Robert: . . . I wept today because right had been done.

Catherine (the boy’s sister): Not justice?

Sir Robert: No. Not justice. Right. It is easy to do justice—very hard to do right. Unfortunately, while the appeal of justice is intellectual, the appeal of right appears for some odd reason to induce tears in court. That is my answer and my excuse. . . .”

Ibid., Act Four, pages 94-95.

It would be so much easier for judges to “do right” if they did not have to concern themselves so much with fundraising to win their seats on the bench.
tions exist for production and dissemination of guides: Municipal governments might add judicial races and distribute guides at the local level; guides could be produced and disseminated by the state by an appropriate agency; or bar groups could seek funding to produce independent guides. Several foundations, such as the Joyce Foundation and the Open Society Institute, currently fund projects designed to reform judicial selection and judicial campaigns, and may be willing to underwrite such an endeavor by a bar association.

Regardless of the source of publication, a few factors should remain constant:

- The guides should be nonpartisan. Party affiliation may be identified, where applicable, but the guides themselves should avoid any appearance of partisanship.
- Second, the guides should highlight, at the outset, the speech and conduct standards that apply to judicial candidates. These standards, and the relevant penalties, if any, should be put into clear, non-legalistic language, so that the lay reader will understand both the limits and when a candidate transgresses them.
- Third, incumbency should be identified only in the biographical text, not as a separate indicator (e.g., an “I” underneath the candidate’s photo).
- Fourth, the text should be limited to biographical data, including professional qualifications. If candidates are permitted to include a personal statement, it should comply with the rules of campaign conduct; preferably, the candidates will be limited to text compiled by the guides’ producers that has been culled from questionnaires completed by the candidates themselves.

CONDUCT CODES/PANELS

Judicial candidates are subject to restrictive codes of conduct. However, as in most jurisdictions, New York voters are rarely, if ever, made aware of violations—certainly not in time to provide voters with a basis for making voting decisions. This is due in part to the nature of the formal investigative and disciplinary processes themselves: By the time the Commission on Judicial Conduct receives a complaint, investigates it, and determines what action, if any, to take, the election is likely to be over. From the viewpoint of voters who might have used such informa-
tion in the decision-making calculus—and from the viewpoint of the wronged candidate—the result is moot. The harm has been done, and generally, the public is none the wiser. Moreover, lay voters are unfamiliar with the relevant standards of conduct, but tend to be quite familiar with campaign styles that may be acceptable for non-judicial races. Thus, even if they are exposed to the illegitimate conduct, they are unlikely to see anything wrong with it. Finally, when voters observe illegitimate campaign conduct, they may have little confidence in the source of the criticism (e.g., an opposing candidate).

A solution adopted in several jurisdictions is the use of a campaign conduct oversight committee. Such a committee should comprise members from a variety of backgrounds, including both lawyers and non-lawyers. The committee would promulgate a code of conduct—not for disciplinary purposes, but to set a standard. The committee’s authority would be moral: Its only enforcement capability is the ability to render its own opinion and to disseminate that opinion quickly to the public (although the product of its investigation should be made available to the appropriate formal disciplinary body). In some jurisdictions, judicial conduct committees may be sponsored, e.g., by a state or local bar association; the most effective include a broad membership base, appointed from a variety of sources, including members outside the bar association or sponsoring entity.

CHANGES TO EXISTING LAW

Other obvious solutions include changes to the existing Election Law and to the Rules of the Chief Administrator of the Courts, both of which have been visited by this Committee in the past. Late last year, this Committee forwarded to the Administrative Board of the Courts three new proposed rules that would better prevent the practice known as “pay to play” (i.e., granting or obtaining fiduciary appointments in exchange for campaign contributions, solicitations, or similar assistance). In March, 2000, the Administrative Board released a public statement concluding that “pay to play” was already barred by a combination of the Code of Professional Responsibility, Ethical Considerations, and the Election Law. However, the Board specifically declined to adopt the more stringent disclosure and other requirements urged by this Committee, on grounds that such reforms were a matter for legislative action. This Committee has discussed renewing its recommendation that the Administrative Board pro-

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8. Copies of these rules are available from the Executive Director’s office of the Association.

THE RECORD

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mulgate such rules. In addition, it may be appropriate to consider drafting proposed changes to the Election Law that would close any remaining loopholes, even in the event that the Administrative Board does promulgate new rules.

Finally, an important change that ought to be made through legislation or by the Administrative Board, unless or until public financing program can be established, is the imposition of expenditure limits on judicial races. There is a strong public policy basis for limiting judicial campaign expenditures even without public funding. The constraints properly placed on campaigns by the Rules of the Chief Administrator of the Courts limit the need for extensive efforts to “get out the message.” Furthermore, expensive campaigns would need to be funded, quite likely through contributions from lawyers who expect to appear before the judge. The importance of preserving judicial independence and public confidence in the judiciary fully justify campaign expenditure limitations.

May 2001

9. As noted above at pp. 161-162, the reasoning of Buckley that would require public funding or some other incentive for candidates to accept expenditure limits would not apply in the case of judicial candidates.
The Committee on Government Ethics

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* Member, sub-committee on Judicial Campaign Finance Reform; participated in the discussion but not in the vote on this report.
** Participated in the discussion but not in the vote on this report.
*** Chair, sub-committee on Judicial Campaign Finance Reform, and principal author of this report.
**** Participated in the discussion but not in the vote on this report.
Marriage Rights for Same-Sex Couples in New York

The Committee on Lesbian and Gay Rights, The Committee on Sex and Law, and the Committee on Civil Rights

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Same-Sex Couples Should Not Be Excluded From Exercising the Right to Marry in New York 174

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There is currently a national debate over the right of lesbian and gay couples to enter into state-sanctioned marriage. Much of this debate stems from Vermont's recent legislation permitting same-sex civil unions. Lawsuits in Hawaii and Alaska attacking the constitutionality of prohibitions on same-sex marriage have also fueled the debate. In addition, many states are currently considering and some have adopted legislation attempting to prevent recognition of same-sex marriages performed in sister states. Most notably, in 1996 Congress enacted the Defense of Marriage Act ("DOMA"), which could give states that enact such legislation further ammunition in their efforts to deny recognition to same-sex marriages that may be legally-sanctioned in sister states.

The constitutionality of measures denying recognition of same-sex marriage is in doubt, especially in light of the U.S. Supreme Court's ap-

1. The committees wish to thank Bob Bacigalupi, Michael Davis, Shannon Minter, Tina Matsukka, Damon Suden, Lia Brooks, Ian Chesir-Teran, Anne DeSutter, C. Dino Haloulas, Sarah Martinez, Tom Prol, and Rhonda Weir for their contributions to this Report.
parent shift in its consideration of gay and lesbian rights. Fifteen years ago, the Court found that a state sodomy statute enforced only against homosexuals violated no constitutionally protected rights. In contrast, in 1996 the Court found that a state constitutional amendment that barred anti-discrimination measures that protected lesbians and gay men violated the U.S. Constitution’s Equal Protection Clause by subjecting one group to a disadvantage that no other group had to suffer. In so doing, the Court took the remarkable step of invoking the landmark dissent in Plessy v. Ferguson in the opening paragraph of its decision:

[T]he Constitution “neither knows nor tolerates classes among its citizens.” Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Court made clear that it would not countenance a legal distinction that raised the “inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”

This Report, which is an update of a report issued by the Association in 1997, addresses the issue of whether same-sex couples have the right to marry in New York and obtain the legal rights afforded to opposite-sex couples, as well as the ancillary issue of whether New York should recognize same-sex marriages and legal unions entered into in sister states and abroad. This Report takes the position that same-sex couples currently have the right to marry. It argues in Parts I.A, I.B and I.C that same-sex couples should be permitted to marry in New York because New York’s marriage laws are gender neutral, because same-sex marriage is entirely consistent with New York’s public policy, and because a strong argument can be made that the Equal Protection Clauses of both the federal and New York Constitutions require that the fundamental right of marriage be available to all couples of suitable capacity regardless of their sex.

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4. Id. at 634.
6. This Report acknowledges that there is a diversity of opinion about the institution of marriage. However, this Report focuses solely on the fundamental right of all couples, regardless of their sex, to enter into state sanctioned marriage if they determine that it is appropriate for them, and takes no position on the debate regarding the institution.
Lesbian and Gay Rights, Sex and Law, Civil Rights

Failing a prompt recognition of this right, as for example through an opinion of the Attorney General, or legislative or judicial action, this Report argues in Part I.D that New York should, as an interim measure, enact civil union legislation similar to that recently enacted in Vermont. In Part I.E, this Report also explores the ways in which gender identification issues affect the legal analysis of same-sex marriage. Finally, this Report concludes in Part II that New York should recognize same-sex marriages and civil unions entered into in other states and countries, in accordance with the Full Faith and Credit Clause of the federal Constitution and New York’s conflict-of-laws jurisprudence.

Part I
Same-Sex Couples Should Not Be Excluded From Exercising the Right to Marry in New York

A. New York’s Marriage Statute is Gender Neutral and Therefore Poses No Bar to Same-Sex Marriage

In New York, marriage is governed by the Domestic Relations Law. Nowhere in Article 3, which sets out the requirements and procedure for entering into a marriage, is there any requirement that applicants for a marriage license be of the opposite sex. Nor are same-sex marriages among the categories of marriages that are void or voidable. The gender-neutrality of the New York Domestic Relations Law has never been analyzed by a court; however, the commentary to Article 2 acknowledges the gender-neutrality of New York’s statutory scheme. The commentary notes that although the courts have “rejected the legal viability of same sex marriage . . . the Domestic Relations Law does not directly address the issue. The New York statutes do not explicitly state that marriage is limited to persons of opposite sex.”

Only one lower court in New York has considered directly the issue of same-sex marriage knowingly entered into, and it found that New York

7. N.Y. Dom. Rel. Law § 10 (McKinney 1999). There are sporadic gendered references in articles 9, 10, and 11, which respectively govern actions for annulment, divorce, and separation, and one reference to “groom” and “bride” in Article 3, but, as compared to the pervasive gender neutrality of Article 3, these do not rise to the level of establishing a legislative intent to prohibit same-sex marriage.

8. Article 2 makes only incestuous and bigamous marriages void and provides that marriages are voidable only due to certain defects in contracting capacity, such as being under age, under duress, or subject to mental illness. Id. at §§ 5-7.

does not authorize such marriages.\textsuperscript{10} However, that decision was issued early in the same-sex marriage debate, before the enactment of civil union legislation in Vermont and similar laws abroad, and before the spread of domestic partnership laws and private company benefits in this country, described in more detail below. The law has developed considerably in the intervening years since that decision. The court in that case did not engage in any analysis of the marriage statute, but rather, in a brief opinion, proceeded directly to a cursory constitutional analysis on the apparent assumption that the statute applies only to opposite-sex couples. The gender neutrality of the statute, therefore, has yet to be analyzed.

Additionally, there are two cases from the early 1970's that considered the validity of a same-sex marriage and found the marriage void.\textsuperscript{11} However, both of those decisions were based on the doctrine of mistake, in that the plaintiff in each case entered into what was believed to be an opposite-sex union only to learn the spouse's true sex after the wedding.

In cases arising under the Estates, Powers and Trusts Law ("E.P.T.L"), the First and Second Departments of the Appellate Division have interpreted “spouse” to exclude same-sex partners, but have not addressed the issue of gender neutrality under the language of the Domestic Relations Law.\textsuperscript{12} A policy reason for this interpretation was articulated in In re Petri: the state’s "interest in having its descent and distribution scheme clear, simple, predictable and capable of determining heirs at the moment of..."
death.”13 This policy would not be undermined by a gender-neutral interpretation of the Domestic Relations Law, but rather would be supported: when same-sex couples are able to obtain marriage licenses, their marital status will be “clear, simple [and] predictable” for judges deciding cases under the E.P.T.L.

While rejecting the E.P.T.L. claim, the court in In re Petri acknowledged the gender neutrality of the Domestic Relations Law when it stated:

> [T]he requirement of a solemnized marriage may not be assumed to be based on sexual orientation. Section 3 of the Domestic Relations Law has no requirement that applicants for a marriage license be of different sexes. The only authority in this state for the prohibition of same-sex marriage is contained in two lower court decisions... With no clear precedent, the assumption that same sex marriages are prohibited in New York is premature... It is questionable whether, in this era of domestic partnerships and alternative lifestyle education in grammar schools, it can still be said that marriage has one universal meaning which does not include couples of the same sex.14

At worst, the Domestic Relations Law is ambiguous on the issue of same-sex marriage. This fact invokes two well-established rules of statutory construction to which the decisions discussed above have given no attention. The first such rule is that ambiguity in a statute should be resolved in light of the purpose of the statutory provisions in issue.15 That inquiry involves assessing the purpose of marriage and the purpose of the state in recognizing and enforcing marriage vows.

While marriage can involve an expression of religion faith, and some religious views may oppose same-sex marriages, the state cannot ground its relationship to the support of marriage on the enforcement of reli-

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13. N.Y.L.J., April 4, 1994 at 29 (Sur. Ct. N.Y. Co.) (internal citations omitted) (surviving gay partner could not inherit from deceased partner’s estate when there was neither a will nor a marriage license). Like intestate rights, spousal maintenance is unavailable to unmarried partners who separate. See Robin v. Cook, N.Y.L.J., Oct. 30, 1990, at 22 (Sup. Ct., N.Y. County 1990) (lesbian plaintiff denied support from former partner); see also Vincent C. Green, Same-sex Adoption: An Alternative Approach to Gay Marriage in New York, 62 Brook. L. Rev. 399, 405 (1996).


15. See Commentary to Consolidated Laws of N.Y. § 76 (McKinney 1971) (where a statute is ambiguous it must be construed in light of legislative intent and purpose; and “if a statute viewed from the standpoint of the literal sense of the language works an unjust or unreasonable result, an obscurity of meaning exists which calls for judicial construction”).
gious doctrine. Nor is it tenable to tie state involvement in the creation and protection of a marriage relationship to the encouragement of procreation. Procreation is not the object of a significant number of marriages. Maintenance of a stable family relationship for the rearing of children is arguably a state interest. However, same-sex couples may have and adopt children16 and this interest is therefore furthered by allowing same-sex marriage.

A conception of the purpose of marriage that is not unduly under-inclusive is warranted. That purpose is the creation of a public, durable legal relationship that expresses a commitment to emotional support, financial interdependence and personal dedication to one another.17 The purpose of the state in recognizing marriage is to create the opportunity for such expression and to provide a framework where people can make a durable promise to support and be dedicated to one another.

Viewed in light of these purposes, any resolution of statutory ambiguity against the possibility of same-sex marriage would be irrational. The expressive needs of same-sex couples and the benefits that they can achieve under a legal regime that allows them to make a durable commitment to one another are not different from the needs of and benefits accruing to different-sex couples.

The second rule of statutory construction invoked by statutory ambiguity is the rule that an ambiguous statute should be construed so as to avoid a substantial constitutional issue. In Goodell v. Goodell, the court preserved the constitutionality of New York’s alimony statute, which imposed financial obligations only against the husband, by reading it expansively to apply to all spouses.18 Similarly, in People v. Liberta, the Court of Appeals interpreted New York’s forcible rape and sodomy statutes in a gender-neutral fashion in order to cure the statutes’ liability exemption for women.19 The United States Supreme Court recently employed this rule of statutory construction in United States v. X-Citement Video, Inc. when it applied a federal statute’s scienter provision beyond its grammatical reading in order to avoid finding the statute violative of the First Amendment.20

18. 77 A.D.2d 684, 685 (3d Dep’t).
20. 513 U.S. 64, 78-79 (1994); see also id. at 69 (applying rule “that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions” since “[w]e do not assume that Congress, in passing laws, intended” arguably unconstitutional
B. New York’s Public Policy Supports Permitting Same-Sex Marriages

New York’s public policy supports the gender-neutral application of New York’s marriage statute to reach same-sex couples. New York courts have increasingly recognized that long-standing, committed same-sex relationships deserve the protections that were previously afforded only more traditionally recognized relationships. The hallmark of these decisions is a willingness to evaluate intimate relationships based on how they function, not on the sex of the participants. Several recent cases involving housing, adoption, and funeral arrangements illustrate this trend.

In Braschi v. Stahl Associates, the New York Court of Appeals held that the gay life partner of a tenant in a rent-controlled apartment is to be considered a family member under the rent control statute and entitled to protection from eviction.21 As the term “family” is not defined in the rent control code, the appellate division had found that the non-eviction provision applies only to “family members within traditional, legally recognized familial relationships.”22 The Court of Appeals reversed, holding that, “[i]n the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence,” and finding that to define “family” in this manner fulfilled the legislative intent of extending “protection to those who reside in households having all of the normal familial characteristics.”23

Another recent landmark decision is In re Jacob/In re Dana, the “second parent” adoption case in which same-sex and opposite-sex live-in partners of the children’s biological mothers sought permission to adopt without the termination of the mothers’ parental status required by section 117 of the Domestic Relations Law.24 The Court of Appeals held that second-parent adoptions can be granted because they permit the creation of stable legal ties between one partner and the biological or adopted children of the other partner.25 In reaching its decision, the court stressed

23. 543 N.E.2d at 54.
25. Id. at 399.
the many emotional, social, and financial factors of legal parent-child status that are very similar to those accompanying the status of being married:

[The best interests of the child] would certainly be advanced in situations like those presented here by allowing two adults who actually function as a child’s parents to become the child’s legal parents. The advantages which would result from such an adoption include Social Security and life insurance benefits in the event of a parent’s death and disability, the right to sue for the wrongful death of a parent, the right to inherit under rules of intestacy and eligibility for coverage under both parents’ health insurance policies. In addition, granting a second parent adoption further ensures that two adults are legally entitled to make medical decisions for the child in case of emergency and are under a legal obligation for the child’s economic support. Even more important, however, is the emotional security of knowing that in the event of the biological parent’s death or disability, the other parent will have presumptive custody. . . .

A further example of New York’s supportive public policy is found in Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc. In that case, the plaintiff sought to honor his deceased gay partner’s preference for the treatment of his remains, over the objections of the decedent’s mother and brother. Departing from the general rule that only the surviving spouse or next of kin may determine disposition absent testamentary directives to the contrary, the court looked to the nature of the relationship between the plaintiff and the decedent and granted the surviving partner standing. The court characterized the couple as having had a “close, spousal-like relationship” and found that to deny the partner standing as the surviving spouse would “illustrate a callous disregard of [their] relationship” and would effectively ignore the decedent’s wishes “merely because the Plaintiff does not fit neatly into the legal definition of a spouse or next of kin.”

Despite the courts’ increased willingness to recognize same-sex relationships in case-specific situations and grant certain corresponding rights, it remains enormously important for New York to allow same-sex couples to avail themselves of the presumptions flowing from marital status and

26. Id. at 658-659 (citations omitted).
27. 159 Misc.2d 884 (Sup. Ct. Queens County 1993).
28. Id. at 888.
thereby bring some certainty to their domestic relations. Marriage encourages social stability, permitting partners to rely on each other rather than the government. As M.V. Lee Badgett and Josh A. Goldfoot have observed:

Encouraging economically stable families has obvious social benefits. Children have increased access to parental resources, both economic and social. Adults will likely improve their own standard of living, share in the responsibility of child-rearing, and have built-in financial support during tough times. Evidence further suggests that married adults are healthier and live longer than single ones. As well, business and industry get a more stable customer base and a stronger current and future labor force. Though difficult to quantify, these are just some of the social benefits of marriage.29

Although lesbian and gay couples have always formed committed, loving partnerships, their unions have been deprived of state recognition and the benefits and burdens that accompany such recognition throughout the life cycle. Those benefits and burdens have great emotional, social, and financial importance and cannot be achieved in other ways. For example, under state law, spouses are automatically entitled to act for each other in healthcare decisions, to hold real estate as tenants by the entirety, to file joint tax returns, to apply for joint insurance policies, to inherent with or without a will, to receive pension and annuity payments, to attend to funeral arrangements and estate administration, and to pursue orderly dissolution or divorce proceedings.30 With those rights come burdens, such as liability for a spouse's debts, for child support, and possibly for spousal maintenance.

A poignant example of what can happen in the absence of the presumptions that accompany marriage is the case of Alison D. v. Virginia


In that case, a lesbian couple planned to have a child together, had a son after one of them was donor inseminated, and shared all responsibilities of child rearing for nearly two and a half years until the non-biological mother moved out of the home when the couple separated. The couple worked out a visitation schedule for the child, who continued to call both women “Mommy,” but after several years the couple severed their economic ties and the biological mother first restricted, and then cut off, the child’s contacts with her former partner. The Court of Appeals refused to grant the non-biological parent visitation rights. Finding that the non-biological parent lacked standing, the court reasoned that granting visitation “to a third person” would hinder the biological parent’s right to custody, but Chief Judge (then Judge) Kaye’s compassionate dissent chided the majority for failing to look “to modern-day realities in giving definitions to statutory concepts.”

At least one New York court has interpreted Allison D. narrowly. In the matter of J.C. v. C.T., a Westchester county family court judge considered another parental visitation dispute between same-sex partners who had separated. The court suggested that a non-biological parent might establish standing to seek visitation under an equitable estoppel theory already adopted by the courts of New Jersey and Minnesota. The court explained that

[u]nder this test, if a non-biological or non-adoptive person, who is not otherwise granted statutory standing, seeks visitation with a child or children with whom he or she alleges a parental relationship, they must demonstrate: (1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by [undertaking] sig-

32. Id. at 656; id. at 661 (Kaye, J., dissenting). Allison D. illustrates the importance to same-sex couples of “licensing mechanisms,” such as marriage, that formalize family ties. If the petitioner in Allison D. had adopted the child, as would now be possible, the court would probably have ordered visitation under Domestic Relations Law § 70. The Court of Appeals has held, however, that the adoption process may not be used as an alternative means for two people seeking to obtain legality of a non-marital sexual relationship, whether the relationship is homosexual or heterosexual in nature. Matter of Adoption of Robert Paul P., 63 N.Y.2d 233, 481 N.Y.S.2d 652 (1984).
33. 711 N.Y.S.2d 295 (Family Ct. 2000).
significant responsibility for the child’s care, education and development, including contributions to the child’s support, monetary or otherwise, without the expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship which is parental in nature.  

New York’s executive orders also reveal a willingness to recognize and support same-sex relationships through its benefits policies. In 1983, Governor Cuomo issued an executive order prohibiting discrimination based upon sexual orientation and providing health insurance benefits to same-sex domestic partners of state employees. Governor Pataki continued the policy in 1996 and as of March 3, 2001, health benefits for same-sex partners are available for all state employees. Similarly, in New York City, Mayor Koch issued an executive order banning sexual orientation discrimination, and Mayor Dinkins established a domestic partner registry with the City Clerk. This trend is aligned with a broader national trend recognizing same-sex relationships. Over 2,000 private employers, 32 unions, 76 academic institutions and 66 government agencies offer domestic partner benefits. Forty-eight states and local governments offer domestic partnership registries.

Last year, the New York Legislature explicitly recognized the particular
needs of gays and lesbians, in enacting the Hate Crimes Act of 2000. The Legislature recognized that legislation imposing increased penalties for bias-related crimes should protect persons who are victimized because of their sexual orientation, as well as other classes of persons traditionally protected under human rights laws.

The essence of the marriage relationship is a couple's decision to become an economic and emotional partnership, with the intention to remain so for life. Although that essence is assumed to exist when opposite-sex couples marry, the courts must currently engage in searching enquiries to determine whether it is present in a same-sex relationship. For example, in Braschi, the Court of Appeals stated that

In making this assessment, the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services. These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.

Committed same-sex relationships deserve the same protections and benefits enjoyed by opposite-sex couples without the uncertainty and second-guessing of an extensive, multi-factored analysis.

C. The New York and Federal Equal Protection Clauses Protect the Fundamental Right to Marry for All Citizens

As recently as the 1960's, many Americans considered interracial marriage unnatural and immoral. Courts had declared interracial marriages void because religion had deemed such unions intrinsically unnatural and because society had traditionally viewed marriage as a union between people of the same race. In the seminal case of Loving v. Virginia, however, the U.S. Supreme Court held that marriage is a fundamental right. As a

41. Ch.107, Laws of New York.
42. 74 N.Y.2d at 212-13 (citation omitted).
43. In fact, New York and U.S. law currently offer substantial protections and benefits to married opposite-sex couples even if they are not committed to each other.
result, the choice of whom to marry became, with narrow exceptions not applicable here, beyond the reach of state regulation: “the government [is] prevented from interfering with an individual’s decision about whom to marry.”45 Even deeply-rooted traditions failed to justify a violation of the “central meaning of the Equal Protection Clause” of the U.S. Constitution.46

The parallels between the anti-miscegenation laws of a generation ago and current attempts to prohibit same-sex marriage are striking, and the assumption that only opposite-sex couples are privileged to marry is as constitutionally questionable as the assumption that only white people are privileged to marry other white people.47 A strong argument can be made that any prohibition on the right of same-sex couples to marry would violate the Equal Protection Clauses of both the New York and federal Constitutions.48

1. Same-Sex Marriage as Guaranteed by the Fundamental Right to Marry

Any classification by which one group is denied a fundamental right is discriminatory and subject to strict scrutiny.49 Under this standard, the

45. People v. Shepard, 50 N.Y.2d 640, 644 (1980); see also Doe v. Coughlin, 71 N.Y.2d 48, 52 (1987) (“The right to privacy, in constitutional terms, involves freedom of choice, the broad general right to make decisions concerning oneself and to conduct oneself in accordance with those decisions free of governmental restraint or interference”), reargument denied, 521 N.E.2d 446, cert. denied, 488 U.S. 879 (1988).

46. Loving v. Virginia, 388 U.S. at 12. In addition to offending the Equal Protection Clause, limiting marriage to opposite-sex couples offends Due Process, as it denies a fundamental right to a distinct group. See Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992) (“It is also tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law.” Thus Loving was correct in finding that marriage is “an aspect of liberty protected against state interference by the substantive component of the Due Process Clause.”).


49. See Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (holding that an infringement of a fundamental constitutional right is subject to review under the “strict scrutiny” standard).
state must demonstrate a compelling interest in excluding same-sex couples from the right to marry, and it must show that legislation is narrowly tailored to that interest.

Loving established that marriage is clearly a fundamental right. Is it possible, however, to characterize the refusal to recognize same-sex marriage as the denial of a fundamental right? After all, in Bowers v. Hardwick the Court refused to find a fundamental right to engage in sodomy, since such conduct was not, in its words, “deeply rooted in this Nation’s history and tradition” or implicit in “the concept of ordered liberty.”

There is strong reason to conclude under Loving that the refusal to recognize same-sex marriage is the denial of a fundamental right under the Fourteenth Amendment, notwithstanding Bowers. Unlike the issue of sodomy in Bowers, which concerned the scope of the right to privacy, same-sex marriage concerns the unquestioned fundamental right to marry. Furthermore, the holding in Bowers is inapplicable to the question of same-sex marriage per se, because Bowers held all sodomy, whether heterosexual or homosexual, not to be a fundamental right. Lastly, under Loving it was irrelevant whether a species of marriage (for example, miscegenation) was itself deeply rooted in the Nation’s traditions or central to the concept of ordered liberty—it was implicitly sufficient for marriage as a category to meet these criteria.

As the Superior Court of Alaska explained in Brause v. Bureau of Vital Statistics, “[i]t is self-evident that same-sex marriage is not ‘accepted’ or ‘rooted in the traditions and collective conscience’ of the people..... The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one’s own life partner is so rooted in our traditions.” Recognizing this, the Alaska Superior Court found that one’s choice of life partner

51. See Mark Strasser, Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal right to Privacy Jurisprudence, 14 Notre Dame J.L. Ethics & Pub. Pol’y 753 (2000) (discussing Bowers in the context of same-sex marriage and arguing that Bowers does not preclude the claim that same-sex marriage is a fundamental right.).
52. Brause, No. 3AN-95-6562, 1998 WL 88743, at *4 (Alaska Super. Feb. 27, 1998) (quoting Baehr v. Lewin, 842 P.2d at 57) (While the court in Baehr found that a ban on same-sex marriage warranted strict scrutiny under the Hawaii Constitution, it incorrectly found same-sex marriage not to be a fundamental right, which the Alaska Superior Court disputed. Ultimately, the decisions in both Baehr and Brause were mooted by subsequent amendments to the respective state constitutions.).
is a fundamental right and that any limitations on that right are subject to the strict scrutiny standard.\textsuperscript{53}

The argument that same-sex unions are incompatible with the basic nature of marriage for historical and functional reasons is also doubtful. As \textit{Loving v. Virginia} demonstrated, traditional or religious notions of the institution of marriage (for example, that it is limited to same-race couples) are insufficient bases for prohibiting otherwise qualified couples from marrying.\textsuperscript{54} Likewise, the argument that procreation is the purpose of marriage has no foundation, either legally or empirically. The Supreme Court\textsuperscript{55} has described the fundamental right to marry as an expression of emotional support, public commitment, personal dedication, and religious faith, with no limitation of marriage as solely or primarily an institution for sanctioned procreation.\textsuperscript{56} Indeed, many opposite-sex married couples do not raise children, while many same-sex couples do, and allowing same-sex marriage would serve to support the interest of fostering marriage by making it available to more couples who share the emotional bonds that characterize marriage and by allowing their children to be raised by parents with a state-recognized relationship.\textsuperscript{57}

2. Level of Review of a Prohibition on Same-Sex Marriage Under Ordinary Equal Protection Analysis Standards

Even if same-sex marriage is not analyzed as a fundamental right, the constitutionality of a prohibition on same-sex marriage is questionable under the federal Equal Protection Clause, whether a strict scrutiny, intermediate scrutiny, or rational basis test is applied. Assuming that denial of same-sex marriage is not the denial of a fundamental right, a prohibition

\textsuperscript{53} Brause, 1998 NL 88743, at *6.


\textsuperscript{56} See \textit{Turner} and \textit{Griswold}, supra n. 6.

\textsuperscript{57} See William M. Hohengarten, \textit{Same-Sex Marriage and the Right to Privacy}, 103 Yale L.J. 1495 (1994) (discussing at length and ultimately dismissing the arguments that tradition and the function of procreation limit marriage to opposite-sex couples.) See also \textit{Loving in the New Millenium: On Equal Protection and the Right to Marry}, 7 U. Chi. L. Sch. Roundtable 61. (2000) (discussing \textit{Loving} and arguing that the various "legitimate interest" rationales suggested by commentators to support bans on same-sex marriage have no merit).
on same-sex marriage would represent a classification on the basis of sex, warranting intermediate scrutiny. Three cases in other states followed this logic in recognizing that laws denying same-sex couples the freedom to marry violate state constitutions guaranteeing equal protection rights. Baehr v. Lewin applied a strict scrutiny test in holding that denying same-sex couples the right to marry constitutes sex discrimination under the Hawaii Constitution.\textsuperscript{58} The court ordered the state to demonstrate a compelling reason for limiting marriage to opposite-sex couples, and in December 1996, on remand, the trial court found that the state had failed to meet its burden and ordered the issuance of marriage licenses to same-sex couples.\textsuperscript{59} In Baker v. State,\textsuperscript{60} the Vermont Supreme Court applied an intermediate level of scrutiny in holding that denying same-sex couples the rights and protections that come with civil marriage violates the Vermont Constitution's equality guarantee,\textsuperscript{61} as did the Alaska Superior Court in

\begin{itemize}
  \item 58. 852 P.2d 44 (Haw. 1993). In addition, in Tanner v. Oregon Health Sciences Univ., 971 P.2d 435 (Or. App. 1998), the court held that the privileges and immunities clause of the Oregon Constitution required a university to extend health and life insurance benefits to the unmarried domestic partners of its gay and lesbian employees. Id. at 448. The court explained that defining a suspect class depends not on the immutability of a class-defining characteristic, but on (1) whether the characteristic has historically been regarded as defining a distinct socially-recognized group, and if so (2) whether that group has been the subject of adverse social or political stereotyping. Id. at 446. Applying this test, the court concluded that the plaintiffs, three lesbian couples, were members of a suspect class under the privileges and immunities clause of the Oregon Constitution.

  Moreover, the Appellate Division, First Department, has held that sexual orientation is a suspect classification under the federal and state Equal Protection clauses. See Under 21 v. City of New York, 488 N.Y.S.2d 669 (1st Dep't), rev'd on other grounds, 482 N.E.2d 1 (N.Y. 1985), order aff'd as modified, 482 N.E.2d 1 (N.Y. 1985).

  It is true that a number of federal circuit courts have rejected claims that sexual orientation should be treated as a suspect classification subject to strict scrutiny. See, e.g., Able v. United States, 155 F.3d 626, 632 (2d Cir.1998); Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 296 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998); Thomasson v. Perry, 80 F.3d 915, 927-928 (4th Cir. 1996); Richenberg v. Perry, 97 F.3d 256, 268 n.5 (8th Cir. 1996); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571-72 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Faulah v. Webster, 822 F.2d 97, 103-04 (D.C. Cir. 1987); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd, 470 U.S. 903 (1985). State courts interpreting their state constitutions, of course, are not bound by these interpretations of the federal Equal Protection Clause.


  60. 744 A.2d 864 (Vt. 1999).

  61. The Baker court's state constitutional analysis does not precisely mirror the scrutiny
Brause v. Bureau of Vital Statistics.62

Even if a prohibition on same-sex marriage were to be analyzed under the rational basis standard, the lowest level of constitutional scrutiny, the state would still have to show that the prohibition bears a rational relation to a legitimate state interest.63

The rational basis analysis that the Supreme Court applied in Romer v. Evans is highly relevant to the issue of same-sex marriage. In Romer, the Court struck down a Colorado constitutional amendment banning laws that protected homosexual citizens from discrimination. As the Court held, even a law that seems unwise or incidentally disadvantages a particular group will satisfy the Equal Protection Clause if it rationally advances a legitimate government interest. Nevertheless, the Court struck down the Colorado amendment because its dramatic breadth was not connected to any “legitimate purpose or discrete objective” and because the disadvantages it imposed were likely born of animosity towards gays and lesbians.64

Similarly, it is difficult to understand how prohibiting two people of the same sex from pursuing a loving relationship in a state-sanctioned marriage could serve any legitimate purpose or result from anything other than animosity toward the homosexual community.65

62. 1998 WL 88743. The court in Brause held that, because the right to choose one’s life partner is a fundamental right, the strict scrutiny test applied. It then went on to state that, “[w]here the right to choose one’s life partner not fundamental, . . . the court would find that the specific prohibition of same-sex marriage does implicate the Constitution’s prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny generally applied to such classifications.” Brause, 1998 WL 88743, at *6. Ultimately, as explained above, the Hawaii and Alaska cases were rendered moot by state constitutional amendments.

63. See, e.g., Romer v. Evans, 517 U.S. at 631-32.

64. Id. at 634-35.

65. Cf. Raum, 252 A.D.2d at 374, 675 N.Y.S.2d at 347 (Rosenberger, J., dissenting) (denial
Regardless of the result under the federal Equal Protection Clause, New York courts, like those in Vermont, Hawaii, and Alaska, are free to take a more expansive view of the State Constitution. The New York Constitution’s Equal Protection Clause states broadly that “[n]o person shall be denied the equal protection of the laws of the state . . . .” Indeed, New York’s Equal Protection Clause has been interpreted in some contexts to afford even more protection than its federal counterpart. The New York Court of Appeals has held that a law that treats people differently on the basis of sex “violates equal protection unless the classification is substantially related to the achievement of an important governmental objective.” Particularly in areas of individual liberties and fundamental rights, the New York Court of Appeals has articulated a willingness to expand state constitutional protections. Even where the state
constitutional provision is identical to the federal provision, this expansive view of state constitutional protection applies if the court finds state statutory or common law defining the individual right, a history or tradition in the state of protecting the right, or that the right is of a peculiar state or local concern. Given New York’s public policy expressed in the cases and executive orders discussed above, as well as this state’s history of tolerance, New York courts should interpret New York’s Equal Protection Clause as allowing marriage for same-sex couples even if the federal Equal Protection Clause does not.

As explained above, only one lower New York case has considered directly the issue of same-sex marriage in an equal protection context. However, that case should not be considered controlling precedent. First, the court’s reasoning was based on notions of marriage that pre-dated the enactment of civil union legislation in Vermont and similar laws internationally, and before the spread of domestic partnership laws and private company benefits throughout this country. Both the law and public opinion have changed considerably in the intervening years. Second, the court’s equal protection analysis relied heavily on a case finding that the E.P.T.L. defined spouses as opposite-sex persons, and that this definition had a rational basis under the equal protection clause. As discussed above, the E.P.T.L.’s need for “clear, simple [and] predictable” rules for determining entitlement to estates is distinguishable from the equal protection issue under the Domestic Relations Law, where this interest is not implicated.

In re Petri, N.Y.L.J., April 4, 1994 at 29.
See text above at note 3.
Moreover, the court did not analyze the marriage statute or its plain language. Consequently, the court ignored the marriage statute's gender neutrality and the absence of any statutory basis for imposing an opposite-sex requirement.77

Thus, same-sex marriage has both a statutory and a constitutional basis. Nothing in either state law or the federal and state constitutions bars same-sex marriage; indeed, they provide the foundation for the legal recognition of those marriages.

D. Civil Union Legislation

While this Report argues that same-sex marriage is lawful, the needs of gay and lesbian couples should not await the acceptance of that view by the judiciary. A legislative act that would provide full rights for same-sex marriages is desirable. If that much cannot be achieved promptly, New York at a minimum should, as an interim step, follow the lead set by Vermont, and several foreign countries and provinces, to establish an institution that affords same-sex couples the vast majority of benefits and burdens that accompany opposite-sex marriage—civil union. Indeed, the trend toward judicial and executive recognition of same-sex relationships in New York discussed above, combined with principles of equality, justify an immediate, interim step of recognition of same-sex civil unions through an act of the Legislature. Such an interim legislative solution should, however, be without prejudice to an ultimate judicial holding that same-sex marriage is lawful.

On July 1, 2000, the State of Vermont became the first in the nation to grant same-sex couples virtually all of the state-related rights and responsibilities accorded to opposite-sex married couples through the enactment of same-sex civil unions.78 That law resulted from the Vermont Supreme Court’s December 1999 decision in Baker v. State79 discussed above. The court in Baker ordered the legislature to take steps to end the state’s discriminatory exclusion of same-sex couples from the marriage laws, and in response the Vermont legislature passed “An Act Related to Civil Unions,”80 which accords same-sex couples virtually all of the state-law benefits, protections, and responsibilities of marriage. The Vermont legislature’s find-

77. See point 1.A above.
ings supporting the legal recognition of civil unions cite to the state’s interest in encouraging close and caring families and acknowledge that “despite longstanding social and economic discrimination, many gay[s] and lesbian[s] have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for family members together, just as do couples who are married . . . .”

The Vermont legislature announced that civil unions were intended to give eligible same-sex couples the opportunity to obtain the same benefits, protections and responsibilities afforded to married opposite-sex couples “whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law.” The non-exclusive list of laws and policies that are now applied equally to civilly-united couples includes intestacy and survivorship rights of spouses, adoption law, insurance law, medical care rights, state-granted family leave benefits, state tax laws and spousal privileges in court. Like a marriage, a civil union is initially licensed by a town clerk and certified by a justice of the peace, a judge or a member of the clergy. Similarly, civil union dissolution falls under the jurisdiction of the family court and follows the same procedures established for marital divorces. Civil union is not a perfect solution, however. While marriage is a clearly defined bundle of benefits and responsibilities, civil union is a new concept that is likely to lead to decades of litigation, limiting its value as a planning tool for same-sex couples.

Internationally, there has been an increasing trend in favor of affording legal recognition to same-sex relationships. The Netherlands recently passed a law allowing same-sex couples to marry and adopt children, and Denmark, Norway, Iceland, Greenland, and Sweden all offer significant legal protections to same-sex couples. France has also extended

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83. Id. § 1204(e).
limited marriage rights to same-sex couples, the Canadian province of Quebec has extended the status of “conjoints de fait” to same-sex couples. Australia treats the long-term partners of gay men and lesbians the same as spouses for immigration purposes, and Canada, Israel, Namibia, South Africa, the Czech Republic, Spain, and Hungary all recognize same-sex relationships for a variety of purposes. The Vermont civil union legislation was therefore in line with legal trends abroad.

Adoption of a Vermont-style civil union law is a viable, albeit incremental step for New York on the road to same-sex marriages. Through civil union legislation, Vermont has attempted to remedy the equal protection violation that is inherent in denying same-sex couples access to marriage. It therefore stands as an example for states like New York that wish to begin to live up to their constitution’s promise of equal treatment.

E. Impact of Gender Identity on Same-Sex Marriage

Another emerging area of the law that may have a significant impact on the development of same-sex marriage law is the effect that gender identity has on legal recognition and rights. The Vermont civil union legislation was a step in the right direction, acknowledging the legal status of same-sex couples in a manner similar to marriage.


91. See Barbara J. Cox, But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate but (Oh)Equal, 25 Vt. L. Rev. 113 (2000). Although discrimination on the basis of marital status is illegal in New York, the New York Court of Appeals has interpreted marital status discrimination very narrowly to mean whether an individual is classifiable as single, married, separated, divorced, or widowed. Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 415 N.E.2d 950 (N.Y. 1980). If civil union legislation is adopted, New York should extend that definition to include people in civil unions.
identity may have on the legal status of same-sex marriage. There are at
least two situations in which the issue of gender identification may im-
 pact the very definition of same-sex marriage. The first situation occurs
when two people of different genders enter into a legally recognized mar-
rriage and, later, one of the spouses transitions from one gender to an-
other. Does the fact that the two individuals are now biologically the
same sex have an impact on the legal status of their pre-existing marriage?

Although there are few published decisions on this issue, many “same-
sex married couples” in this situation have not faced legal challenges pri-
marily because there are relatively few situations in which anyone other
than one of the spouses has legal standing to challenge the validity of a
marriage. Legal problems may arise, however, in a number of contexts.
For example, surviving spouses may face a challenge when they attempt
to collect survivorship benefits or claim inheritance or other tax benefits
that are restricted to married couples. Similarly, an employer may chal-
 lenge the validity of such a marriage in the context of trying to exclude
one spouse from an employer-provided health plan.

The second situation occurs when individuals marry after they tran-
sition their gender. Whether such a union is a same-sex union depends
on how a particular state defines gender.92 Of the handful of decisions
addressing the validity of such marriages, all but two have held that such
unions are null and void.93 Very recently, for example, a Texas appellate
court held in Littleton v. Prange94 that a post-operative transsexual woman

92. Julie A. Greenberg, When is a Man a Man and When is a Woman a Woman, 52 Florida L.
Rev. 745 (2000). The issue of gender identification is further complicated by the fact that
many transsexual people do not have genital surgery, either because they are unable to obtain
it for medical or financial reasons or because they do not want it. Because most states require
genital surgery as a prerequisite for changing one’s birth certificate, transsexual people who
fall into this category are frequently in a legal limbo with regard to their “legal” sex. At least
in the context of marriage, allowing same-sex couples to marry will eliminate this dilemma.
11, 2001) (upholding validity of marriage involving a transsexual woman and giving full faith
and credit to birth certificate amendment in Wisconsin); M.T. v. J.T., 355 A.2d 204 (N.J.
Super. Ct. 1976) (upholding validity of a marriage involving a “post-operative” transsexual
woman), cert. denied, 364 A.2d 1076 (N.J. 1976); Anonymous v. Anonymous, 325 N.Y.S. 2d
499 (Sup. Ct., N.Y. County 1971) (nullifying marriage involving a female-to-male transexual
where spouse alleged that he had defrauded her by not informing her of his transsexual status
prior to marriage); In re Ladrach, 513 N.E.2d 828 (Ohio App. 1987) (concluding that “there
is no authority in Ohio for the issuance of a marriage license to consummate a marriage
between a post-operative male to female transsexual person and a male person”).
could not recover damages in a wrongful death action brought on behalf of her spouse. The Littleton court reasoned that because gender is determined, as a matter of Texas law, by the gender designation on an individual’s birth certificate, the plaintiff had actually entered into a void same-sex marriage notwithstanding her biological gender at the time of her marriage.

Many states have passed laws (or adopted administrative policies) allowing a transsexual person to change the gender designation on his or her birth certificate. This is important because, by allowing birth certificate changes, a state is essentially acknowledging that changing one’s gender can be legally recognized as a status—a female person can become male for all legal purposes, presumably including marriage.

Although the law governing marriages involving a transsexual person is far from settled, the existing transgender marriage cases, and those that will surely follow, call into question the very rationality of imposing gender norms on marriage in the first place. Gender-neutral marriage would eliminate these difficult issues.

PART II
NEW YORK SHOULD RECOGNIZE SAME-SEX MARRIAGES AND CIVIL UNIONS ENTERED INTO IN OTHER JURISDICTIONS

Traditional principles of Full Faith and Credit, comity, and choice-of-law support New York’s recognition of same-sex marriages and civil unions performed in foreign states. The Full Faith and Credit Clause of the U.S. Constitution states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”

95. States with statutes allowing a transsexual person who has undergone sex-reassignment surgery to change his or her birth certificate include Arizona, California, Colorado, Georgia, Hawaii, Illinois, Iowa, Louisiana, Massachusetts, Maryland, Michigan, North Carolina, Nebraska, New Jersey, New Mexico, Oregon, Utah, and Wisconsin; a number of others have administrative policies to the same effect.


97. U.S. Const. art. IV, § 1. In addition, 28 U.S.C. § 1738 (2000) states that “Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” See also Robert L. Cordell, Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause, 26 Colum. Hum. Rts. L. Rev. 247, 264-271 (1994).
In addition, with rare exceptions, New York's choice-of-law rules require the enforcement of foreign laws, including and especially laws governing marriages, even where such laws contradict or differ significantly from our own.

As explained above, the courts of several states recently have recognized that laws denying same-sex couples the freedom to marry violate state constitutions guaranteeing equal protection and privacy rights. Those courts broke ground in recognizing the right of same-sex couples to marry and have paved the way for other states and countries to eliminate their prohibitions on same-sex marriage, as Vermont essentially did when it recently gave same-sex couples the right to join in civil unions. Since the Vermont act was passed, many couples have obtained Vermont civil union licenses, and the majority of those couples are not Vermont residents. Some same-sex couples that have legally married or entered into civil unions under the laws of other jurisdictions will eventually move to New York. Legal issues are bound to arise as they separate, die, have or adopt children, become disabled, or attempt to file joint tax returns in other states.

Given New York's continuing role as the "golden door" of immigration, New York courts will likely confront same-sex marriages and legal unions entered into under the laws of other countries. As explained above, numerous countries offer significant legal protections to same-sex couples. As more and more same-sex couples marry or enter into legally-sanctioned unions abroad, they will no doubt demand recognition of their status in New York. The question becomes whether New York will recognize same-sex marriages and legal unions entered into in other jurisdictions.

For over one-hundred years, New York courts have held that out-of-state and foreign marriages must be recognized in New York so long as they are valid where consummated. Thus, for example, while New York

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98. See discussion above in Point 1.C.
99. Shannon P. Duffy, Pushing the States on Gay Unions, Nat'l L.J., Dec. 4, 2000 (Seventy-five percent of the nearly 1000 couples who have obtained Vermont civil union licenses do not live in Vermont).
100. Under Vermont law, a civil union can be terminated in Vermont only if at least one of the parties is a resident of that state for one year. If other states do not provide such couples with access to divorce proceedings, then the only way for a couple to terminate a Vermont civil union will be to move to Vermont and meet the residency requirement.
law does not permit common-law or proxy marriages, New York does recognize proxy and common-law marriages validly entered into in other jurisdictions. In addition, although the age of consent for marriage in New York is eighteen, New York courts have repeatedly recognized out-of-state marriages involving minors. This “lex loci contractus” principle has been enforced even where a New York couple purposefully left the state solely to avoid New York’s marriage law and substitute that of another state.

New York courts also routinely enforce contracts entered into under the laws of other jurisdictions, even where the contractual provisions would not be enforceable under New York law. In deciding whether or not to do so, courts apply the New York rule on choice-of-law, which is that “the law of the jurisdiction having the greatest interest in the litigation will be applied.”

414 N.E.2d 657, 659 (N.Y. 1980) (“The law to be applied in determining the validity of an out-of-[s]tate marriage is the law of the [s]tate in which the marriage occurred.”) (citations omitted); Bronislawa K. v. Tadeusz K., 393 N.Y.S.2d 534, 535 (N.Y. Fam. Ct. 1977) (describing the “unquestioned recognition afforded in this state to the marriage practices” of other countries).


106. E.g., Carr v. Carr, 104 N.Y.S.2d 269, 271 (N.Y. Sup. Ct. 1951) (recognizing Michigan marriage to a minor); Simmons v. Simmons, 203 N.Y. 215 (1st Dep’t 1924) (refusing to annul marriage to a 14-year-old in the British West Indies).

107. For example, in In re May’s Estate, 305 N.Y. 486 (1953), the court recognized an incestuous marriage entered into in Rhode Island even though both participants were New York residents and returned to New York two weeks after the ceremony.

108. See Bell v. Little, 197 N.Y.S. 674, 676 (4th Dep’t 1922) (“It is doubtless the general rule that a contract entered into in another state or country, if valid there, is valid everywhere and this rule is often applied to the marriage contract.”).

In other words, New York courts balance New York’s interest in having New York law apply against a foreign state’s interest in having foreign law apply.\textsuperscript{110} It is such considerations of comity that underlie New York’s recognition of marriages entered into under the laws or practices of foreign jurisdictions.\textsuperscript{111} Implicit in that recognition is a respect for the interest that foreign states have in establishing their own laws governing family relationships,\textsuperscript{112} as well as a strong public policy that favors upholding the validity of marriage wherever possible\textsuperscript{113} and providing freedom of movement to couples and families. Indeed, in a mobile society such as ours, where an intricate web of personal entitlements grows from marital status, the personal hardships and uncertainties associated with marriages that fade in and out of existence as the partners cross state and international boundaries counsel strongly in favor of recognition of locally valid marriages.\textsuperscript{114} Moreover, given New York’s status as one of the world’s leading commercial jurisdictions, generous comity toward actions of other jurisdictions makes it more likely that New York’s own laws and actions will receive comity from them.

With regard to the “civil contract”\textsuperscript{115} of marriage, courts have held that one may overcome comity considerations only in the very narrow set of cases where New York has a strong public policy against the marriage in question.\textsuperscript{116} In fact, New York has consistently invalidated only polyga-

\textsuperscript{110} Rosenthal v. Warren, 475 F.2d at 444.

\textsuperscript{111} See Bowser v. Pinkins, 626 N.Y.S.2d 674, 676 (N.Y. Sup. Ct. 1995) (explaining that it is "logical to afford to the courts of the state where the marriage is contracted the authority to decide if it is valid" because "[t]hat state has the most substantial contacts to the marriage contract itself [and] neither the passage of time nor change of domicile of the parties diminishes that connection.").

\textsuperscript{112} Cunningham v. Cunningham, 99 N.E. 845, 847 (N.Y. 1912) ("The right of a government, as well as that of the several states of the Union, to determine the marital status of its own citizens and prescribe the terms and conditions upon which their relations may be changes is elementary and beyond question.").

\textsuperscript{113} E. Scoles & P. Hay, Conflict of Laws § 13.8 (1986).

\textsuperscript{114} See Estin v. Estin, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting) ("If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom").

\textsuperscript{115} In re Valente’s Will, 188 N.Y.S.2d 732, 735 (N.Y. Surr. Ct. 1959).

\textsuperscript{116} See Van Voorhis, 86 N.Y. at 26; Earle v. Earle, 126 N.Y.S. 317, 319-320 (1st Dep’t 1910); see also Restatement (Second) of Conflict of Laws § 283(2) (1971) (noting that a state is not required to recognize a marriage if “it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”).
mous marriages.\textsuperscript{117} Even an incestuous marriage between an uncle and niece, which would be illegal under New York law, was upheld by the New York Court of Appeals, which noted that such relationships were “not universally condemned.”\textsuperscript{118}

For all types of foreign laws, it is firmly established under New York’s choice-of-law principles that courts must enforce a foreign law “unless some sound reason of public policy makes it unwise for [the court] to lend [its] aid.”\textsuperscript{119} A foreign law is not contrary to New York’s public policy merely because it is different or because New York has not legislated on the matter.\textsuperscript{120} As Judge Cardozo stated in his famous opinion in \textit{Loucks v. Standard Oil Co.}, “[t]he courts are not free to refuse to enforce a foreign right at the pleasure of the judges. . . . They do not close their doors, unless [recognition] would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”\textsuperscript{121} More recently, the New York Court of Appeals stated that “foreign-based rights should be enforced unless the judicial enforcement of such a . . . [right] would be the approval of a transaction which is inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense.”\textsuperscript{122} Accordingly, only rarely is the law of one state considered so far outside the social and moral standards of New York that it violates this state’s strong public policy. Certainly, a legal union between two consenting adults of the same sex cannot be considered “inherently vicious, wicked, immoral” or “shocking to the prevailing moral sense” such that it would be contrary to New York’s public policy. Rather, as discussed above, New York has a clear and growing public policy that favors recognizing

\begin{thebibliography}{100}
\bibitem{117} E.g., \textit{People v. Ezeonu}, 588 N.Y.S.2d 116 (N.Y. Sup. Ct. 1992) (rejecting a criminal defendant’s defense that the woman he raped was his “junior” wife under Nigerian law); \textit{In re Sood}, 142 N.Y.S.2d 591 (N.Y. Sup. Ct. 1955) (upholding clerk’s refusal to issue marriage license where man remained legally married to a woman in India).
\bibitem{118} \textit{In re May’s Estate}, 305 N.Y. 486 (1953) (upholding marriage between Jewish uncle and niece entered into in Rhode Island, where Jews were exempt from the incest law); see also \textit{Campione v. Campione}, 201 Misc. 590 (Sup.Ct. Queens County 1951) (recognizing a marriage between a niece and her uncle).
\bibitem{120} \textit{Loucks v. Standard Oil Co.}, 120 N.E. 198, 201 (N.Y. 1918) (“Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right.”).
\bibitem{121} Id. at 202.
\end{thebibliography}
the bonds between same-sex couples, and there is no legitimate state interest that is furthered by prohibiting same-sex marriages.

The Defense of Marriage Act (“DOMA”), which Congress passed hastily in 1996, does not affect this analysis. DOMA purportedly granted states the right to refuse to recognize their domiciliaries’ same-sex marriages even if validly entered into in another state.123 As an initial matter, DOMA is arguably unconstitutional, since it violates and undermines the purposes of the U.S. Constitution’s Full Faith and Credit Clause.124 Regardless, nothing in DOMA changes state law or requires any state to ignore its own rules on comity or choice-of-law.

In short, a new consensus is emerging in which other states and countries are starting to recognize the right of same-sex couples to participate in the benefits and responsibilities that traditionally accompany marriage. Whether from the Netherlands or Vermont, same-sex couples who have been legally united in foreign jurisdictions will undoubtedly arrive in New York expecting their relationships to remain legally valid. As marriage rights are inevitably extended to same-sex couples in more and more jurisdictions, New York will be forced to answer the question of whether it will retreat from over a century of legal precedent and close its borders to same-sex couples or welcome a diversity of families into the state and provide equal recognition to all legally married couples. In accordance with its firmly-established conflict-of-laws jurisprudence, New York should recognize same-sex marriages and civil unions entered into in sister states and abroad.125

123. DOMA states, in relevant part:

No state, territory or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.


124. Mark Strasser, DOMA and the Two Faces of Federalism, 32 Creighton L. Rev. 457, 457-62 (1998). By giving states the right to refuse to recognize same-sex marriages valid in the state of celebration, DOMA also imposes a special disability on lesbians, gays, and bisexuals, similar to the Colorado amendment that the U.S. Supreme Court struck down in Romer v. Evans, 517 U.S. 620, 634 (1996). Colorado’s state constitutional amendment withdrew from “homosexuals, but no others, specific legal protection from the injuries caused by discrimination.” Id at 627. Because DOMA also singles out a disfavored minority for adverse treatment, it appears to suffer from the same Constitutional defect.

125. Of course, civil unions are not identical to marriages; however, as explained in Part I.D

122.
The Record

PART III
CONCLUSION

The institution of marriage confers countless rights and benefits on its participants that same-sex couples in New York are excluded from enjoying. That exclusion is questionable under the Equal Protection Clauses of both the federal and New York Constitutions, as well as New York’s public policy. New York should therefore allow same-sex marriages, and can presently do so without any amendment to the marriage statute. Failing this, New York should adopt a Vermont-style civil union law. Finally, fundamental notions of Full Faith and Credit and choice-of-law require New York to recognize same-sex marriages and civil unions entered into in sister states and internationally.

May 2001

supra, a civil union is akin to a marriage contract. Thus, all of the rights and responsibilities that inure to couples in civil unions should continue to apply in New York.
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The Use of the UDRP and the ACPA to Combat Cyberpiracy

The Committee on Trademarks and Unfair Competition

INTRODUCTION

Prior to the adoption of the Uniform Domain Name Dispute Resolution Policy (“UDRP”) and the enactment of the Anticybersquatting Consumer Protection Act (“ACPA”), trademark owners had few tools to combat cyberpiracy (i.e., registration of a domain name containing a known mark with the intention of selling the domain to the mark owner or other third party, diverting traffic to the registrant’s site or otherwise achieving financial gain). Trademark owners could pursue avenues provided by domain name registrars, but such avenues were available only if the offending domain was identical in every respect to the registered trademark. Trademark owners could also initiate actions in federal court based on trademark infringement and related claims, but such lawsuits produced inconsistent results.

The UDRP and ACPA have produced more consistent results and provides choices for trademark owners. This report will describe the aspects of the UDRP and ACPA that should be considered in deciding which vehicle to use, some common scenarios, the issue of jurisdiction and the results
of some proceedings brought under the UDRP and ACPA. The report will compare the two and comment on the advantages and disadvantages of these two methods for handling domain name and trademark disputes. These mechanisms will become even more critical as the internet community, trademark owners and the public prepare for the imminent roll-out of the .BIZ and .INFO domains.

THE UDRP

The UDRP, as developed by the Internet Corporation for Assigned Names and Numbers ("ICANN"), and administered by several dispute resolution providers, requires a domain registrant accused of cybersquatting to submit to a mandatory arbitration proceeding once initiated by a mark owner. The Complainant in the administrative proceeding bears the burden of proving the following: the domain name is identical to or confusingly similar to trademarks and/or service marks in which the complainant has rights, the domain holder has no rights or legitimate interests in respect of the domain name and the domain name has been registered and is being used in bad faith.

Under the UDRP, the respondent has the opportunity to counter with evidence of good faith and a legitimate interest, such as evidence that the respondent is commonly known by the name, has made prior use of the name in connection with a good faith offer of goods/services or is making a legitimate noncommercial or fair use of the domain name without intent to gain commercially, to misleadingly divert consumers or to tarnish the mark.

The UDRP provides a set of factors to be considered in determining

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1. At publication time, the .BIZ and .INFO generic top-level domains were about to begin accepting applications. While this topic is beyond the scope of this report, it is highly likely that the UDRP and ACPA will be used in some manner to resolve disputes under these domains. Official information about the .BIZ registry can be found at http://www.neulevel.com; more information about .INFO can be found at http://www.afilias.com. Additional commentary can be found at http://www.inta.org.

2. Dispute resolution providers include the World Intellectual Property Organization ("WIPO"), the National Arbitration Forum ("NAF"), eResolution.ca and CPR Institute for Dispute Resolution.

3. Use of the UDRP is optional for mark owners; domain holders, on the other hand, are only permitted to seek judicial relief either before or after arbitration. The UDRP is imposed by contract upon all accredited registrars and, in turn, imposed by them upon domain holders as a condition of the registration agreement. The UDRP is an online arbitration proceeding in which the filing fee is approximately $1,000 (depending on the resolution provider and the number of names at issue). In addition, decisions are usually issued within two months of initiation of the proceedings.
bad faith and legitimate interest, many reflecting typical fair use defenses and attempting to avoid reverse domain hijacking. Since both bad faith and the lack of rights or legitimate interests must be established, if a domain holder is acting in good faith but has no legitimate right to use the name, then the UDRP will be of no avail to the trademark owner. The existence of the following non-exclusive factors constitute evidence of the registration and use of a domain name in bad faith under the UDRP:

(i) circumstances indicating that the registrant has registered or acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of the registrant’s documented out-of-pocket costs directly related to the domain name; or

(ii) the registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the registrant has engaged in a pattern of such conduct; or

(iii) the registrant has registered the domain name primarily for the purpose of disrupting the business of a competitor; or

(iv) by using the domain name, the registrant has intentionally attempted to attract, for commercial gain, Internet users to its web site or other on-line location, by creating a likelihood of confusion with the complainant’s mark as to the source, sponsorship, affiliation, or endorsement of its web site or location or of a product or service on its web site or location.

Remedies under the UDRP are limited to cancellation of the domain registration or its transfer to the complainant, and appeals are restricted to courts in certain jurisdictions. The mandatory arbitration requirements do not prevent either party from submitting the dispute to a court before the mandatory proceeding has begun or after it is concluded. If a dispute resolution panel decides that a domain name registration should be canceled or transferred, the decision will be implemented after ten business days unless the registrar is notified that a lawsuit against the complain-

4. Reverse domain hijacking occurs when the UDRP is used in bad faith to attempt to deprive a registered domain name holder of a domain name.
ant has commenced in a mutual jurisdiction\(^5\) regarding the right to use the domain name.

**THE ACPA**

The ACPA, enacted on November 29, 1999, amends Section 43 of the Lanham Act.\(^6\) The ACPA was enacted to protect “consumers and American businesses, to promote the growth of online commerce, and to provide clarity in the law for trademark owners by prohibiting the bad-faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks.”\(^7\)

Under the ACPA, a domain name owner shall be liable in a civil action by the owner of a mark if, without regard to the goods or services of the parties, that person:

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark; and

(ii) registers, traffics in, or uses a domain name that

(a) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(b) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(c) is a trademark, word, or name protected by reason of section 706 of title 18, United States Code, or section 220506 of title 36, United States Code.\(^8\)

Thus, similar to the UDRP, a complainant must make a showing of bad faith. The ACPA provides a non-exhaustive list of factors that may be considered in assessing bad faith. Such factors include the following: (i) the trademark or other intellectual property rights of the domain name owner; (ii) whether the domain name consists of the legal name of the

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5. Mutual jurisdiction can be either the location of the principal office of the concerned registrar and/or where the Respondent is located.


8. Refers to Olympic and Red Cross marks.
domain name owner or is otherwise commonly used to identify such owner; (iii) the domain name owner's prior use of the domain name in connection with the bona fide offering of goods or services; (iv) the domain name owner's bona fide noncommercial or fair use of the mark in a corresponding Web site; (v) the domain name owner's intent to divert consumers from the mark owner's site; (vi) the domain name owner's offer to sell, assign or otherwise transfer the domain name; (vii) the domain name owner's provision of material and misleading false contact information; (viii) whether the domain name owner has acquired or registered multiple domain names identical or confusingly similar to the marks of others; and (ix) whether the mark is distinctive and/or famous.9

Other than the availability of in rem jurisdiction (i.e., the ability to bring an action against the domain name itself),10 the most significant difference between the UDRP and ACPA is the ability under the ACPA to seek monetary damages and injunctive relief.11 A complainant also has the option of recovering statutory damages of $1,000 to $100,000 per domain name, instead of actual damages and profits.12 In some cases, a decision under the ACPA can also provide for attorney's fees and costs which are not available under the UDRP.

UNENUMERATED FACTORS

While both the UDRP and the ACPA list various factors that may demonstrate the registrant's bad faith or lack of rights or legitimate interests, the factors are not exclusive. Both UDRP panel decisions and United States District and Appeals Courts have found the existence of various factors to be (or, in some cases, not to be) indicative of cyberpiracy. The following is a selection of such unenumerated factors.

PORNOGRAPHIC SITE

UDRP panelists have repeatedly held that the use of a domain name in connection with a pornographic Web site constitutes bad faith.13 Conversely, to date, there have been no cases applying the ACPA where a

11. 15 U.S.C. §§1116(a) and 1117(a).
domain name is used in connection with a pornographic site. However, assuming the mark is distinctive and/or famous, the use of a domain name that is identical or confusingly similar to (or, in the case of a famous mark, dilutive of) a mark in connection with a pornographic site would likely suggest bad faith and thus lead to liability.

FALSE CONTACT INFORMATION

Though not one of the enumerated bad faith factors listed in the UDRP, panels have often held that the respondent’s provision of incomplete or false contact information in its registration of the domain name is clear evidence of bad faith. As this factor is specifically enumerated under the ACPA, courts have affirmed that the use of a false address when registering a domain name, or the intentional failure to maintain accurate contact information, is one of many factors to be considered in assessing a domain name owner’s bad faith intent to profit.

TYPO SQUATTER

The Respondent’s typo-piracy (i.e., registering and using a domain name with a deliberate misspelling of a famous trademark in hopes of luring Internet users away from the trademark owner’s site) often has been considered evidence of bad faith under the UDRP. Under the ACPA, the use of a misspelling of a mark will in most cases satisfy the requirement that the domain name be confusingly similar to the mark, thus resulting in liability if bad faith is shown. Courts have also viewed domain misspellings as evidence of bad faith under the ACPA.

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17. Morrison, 94 F. Supp.2d at 1130.

SELLING PRODUCTS/SERVICES

Under the UDRP, the registrant has been held to have lacked any rights or legitimate interests in a domain name when the domain name was used to establish a Web site deliberately designed to confuse Internet users and consumers regarding the identity of the seller of the goods and services. 19 The same holds true when the registrant has attempted to benefit from the complainant's mark's fame to lure Internet users to its Web site, even when the site is offering goods or services to which the complainant's registrations do not extend, 20 or the registrant is an authorized dealer or licensee of the complainant. 21

Under the ACPA, a domain name owner's use of a domain name to offer goods or services via a site accessible under the domain name is a factor to be considered in assessing bad faith intent to profit. Courts have also considered the domain name owner's demonstrated plans to enter into competition with a mark owner. 22 Where the products or services are offered for sale prior to the mark owner's gaining rights in the mark, 23 or the owner can show a legitimate reason for its adoption of a domain name, 24 bad faith likely will not be found. The use of a domain name in connection with goods or services identical or similar to those offered in connection with a mark will likely lead to a finding of bad faith. 25 However, the use of a domain in connection with different products or services will not preclude such a finding. 26 Moreover, the use of a


22. Sporty's Farm L.L.C. v. Sportsman's Market, Inc., 202 F.3d 489, 499 (2d Cir. 2000). Damages were not awarded under the ACPA in this case, as the domain name was registered and used by its owner prior to the ACPA's passage.

23. Id.


domain as part of an e-mail address prior to the initiation of litigation involving the domain does not preclude a finding of bad faith.\textsuperscript{27} Finally, in accordance with the ACPA’s safe-harbor provision, bad faith intent will not be found “in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.”\textsuperscript{28}

NO SITE

Under the UDRP, the lack of establishment of a Web site to offer goods or services that are somewhat related to the domain name can be used to show the registrant’s lack of rights or legitimate interests in a domain name.\textsuperscript{29} Furthermore, mere speculations on hypothetical and ill-defined marketing schemes for a business application of a domain name do not constitute demonstrable preparations sufficient to satisfy the rights and legitimate interests requirement.\textsuperscript{30}

Under the ACPA, the failure of a domain name owner to maintain a Web site is a factor to be considered in assessing a domain name owner’s bad faith intent to profit. Additionally, such failure may be viewed as an attempt to prevent the mark owner from use of the domain name.\textsuperscript{31} Courts have also found first use of a web site after the commencement of litigation involving the corresponding domain to be evidence of bad faith.\textsuperscript{32}

OFFER TO SELL

While the registrant’s outright offer to sell the domain name to the Complainant is one of the enumerated bad faith factors under the UDRP, indirect offers have been held to be included in this factor. For example, placing a domain name up for bid on an auction site\textsuperscript{33} and stating that

\begin{itemize}
  \item \textsuperscript{27} Northern Light Technology, Inc. v. Northern Lights Club, 236 F.3d 57, 65 (1st Cir. 2001); Virtual Works, Inc. v. Volkswagen of America, Inc., 238 F.3d 264, 269 (4th Cir. 2001).
  \item \textsuperscript{28} 15 U.S.C. §1125(d)(1) (B) (ii).
  \item \textsuperscript{29} Twentieth Century Fox Film Corp. v. Rissaer, NAF Case FA0093761 (Brandt February 15, 2000) \texthtt{http://www.arbforum.com/domains/decisions/93761.html}.
  \item \textsuperscript{31} Sporty’s Farm, 202 F.3d at 499.
  \item \textsuperscript{32} E. & J. Gallo Winery v. Spider Webs Ltd., 2001 WL 92197 (S.D. Tex. 2001); Sporty’s Farm at 499.
  \item \textsuperscript{33} Arthur Guinness Son & Co. (Dublin) Limited v. Kevin Graham / Kevin Paul Wayne, WIPO
the domain name is for sale in the Whois\textsuperscript{34} information\textsuperscript{35} have both been held to constitute prima facie evidence of bad faith.

The domain name owner’s offer to sell the domain name is a significant factor to be considered under the ACPA in assessing such owner’s bad faith intent to profit.\textsuperscript{36} Moreover, the courts have noted that it is not necessary for the offer to sell to be made directly to the mark owner.\textsuperscript{37} One court has also viewed an offer to sell as evidence of bad faith despite the domain owner’s initial resistance to the mark owner’s efforts to purchase the domain.\textsuperscript{38}

**FAN SITES**

While the registrant’s defense of noncommercial or fair use of the domain name is an enumerated factor, “fan” sites are not explicitly mentioned in the UDRP. To date, very few UDRP proceedings have involved fan sites. Of those that have, while the defense may have been raised by the domain name registrant, the panelists have usually declined to conclude that a true fan site was involved.\textsuperscript{39} While any hint of commercial activity seems to rebut the “fan” site defense,\textsuperscript{40} so does the lack of affirmation.

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\textsuperscript{34} Whois is a directory service provided by registrars for looking up domain name registrant information. The Whois database on Network Solutions Inc.’s Web site is located at \url{http://www.networksolutions.com/cgi-bin/whois/whois}.


\textsuperscript{37} Porsche Cars, 5 U.S.P.Q.2d at 1030.

\textsuperscript{38} Northern Light, 236 F.3d at 65.


\textsuperscript{40} Julie Brown v. Julie Brown Club, WIPO Case No. D2000-1628 (Cornish February 13,
tive steps, rather than mere intentions, to use the domain name to host a fan site. 41

To date, there have been no cases applying the ACPA where a domain name is used in connection with a fan site. Similar to the analysis above with respect to pornographic sites, the use of a domain name that is identical or confusingly similar to (or, in the case of a famous mark, dilutive of) a mark in connection with a fan site might suggest bad faith and thus lead to liability. However, it is also possible such use would fall within the ACPA’s safe-harbor provision, assuming the domain name owner believed or had reason to believe his use was fair or otherwise lawful.

CRITICAL COMMENTARY SITES

While the registrant’s defense of noncommercial or fair use of the domain name is an enumerated factor under the UDRP, many decisions have elaborated on what exactly constitutes such permissible use. Though domain name registrants do have rights to freedom of speech and expression, such rights do not require the use of the complainant’s marks in a domain name for that purpose. 42 Indeed, most panels have found domain names that add the suffix “sucks” to a trademark to be confusingly similar to the mark in question. 43 Use of a domain name consisting of the


Complainant’s mark, for a Web site containing criticism of the Complainant, has been held to tarnish the activities associated with such mark.\textsuperscript{44} Additionally, the registrant’s mere intentions to establish a commentary site, without evidence, is not enough.\textsuperscript{45} Conversely, the establishment of a primarily noncommercial site can still be held not to be a legitimate interest of the registrant if some commercial activity exists, such as sale of advertisements.\textsuperscript{46}

Under the ACPA, where a domain name is used in connection with a critical commentary or “sucks” site and the domain name is identical or confusingly similar to (or, in the case of a famous mark, dilutive of) a mark, a bad faith intent to profit will likely be found.\textsuperscript{47} However, courts are careful to note that the use of a domain name that is not confusingly similar to a mark in connection with such site is permitted.\textsuperscript{48}

**PERSONAL NAMES**

The UDRP does not explicitly provide protection for personal names beyond any trademark value that may be associated with that name. Indeed, the UDRP was never intended to encompass personality rights or right of publicity.\textsuperscript{49} A number of UDRP proceedings have involved domain names that wholly incorporated personal names. The decisive issue

\textsuperscript{44} Mission KwaSizabantu v. Benjamin Rost, WIPO Case No. D2000-0279 (Terry June 7, 2000) <http://arbiter.wipo.int/domains/decisions/html/d2000-0279.html> (finding that a domain name that adds the suffix “sucks” to a trademark is not confusingly similar to that trademark because Internet users are not likely to be confused).


\textsuperscript{47} Virtual Works, 106 F. Supp.2d at 847 (“references to Volkswagen as Nazis using slave labor certainly disparages Volkswagen”); People for the Ethical Treatment of Animals, 113 F. Supp.2d at 918 (Domain name owner’s use of site as a “resource for those who enjoy eating meat, wearing fur and leather, hunting, and the fruits of scientific research” was antithetical to mark owner’s purpose); Morrison, 94 F. Supp.2d at 1128 (Domain name owner’s reference to lawyers as “Parasites No Soul…No Conscience…No Spine…No Problem” disparaged law firm).

\textsuperscript{48} People for the Ethical Treatment of Animals, 113 F. Supp.2d at 921 (“PETA does not seek to keep Doughney from criticizing PETA...they ask that Doughney not use their mark”).

\textsuperscript{49} Report of the WIPO Internet Domain Name Process, April 30, 1999 at para. 165-168.
with regard to such domains is whether the complainant has trademark rights, whether registered or via common law, in the personal name.\textsuperscript{50} Most panels have accepted the complainant’s assertion of confusing similarity when they were able to show that the unregistered personal name was distinctive and entitled to common law trademark protection.\textsuperscript{51}

Although there have been no cases applying the ACPA where a domain name consists of or incorporates a personal name, the ACPA clearly provides for such an action.\textsuperscript{52}

\section*{JURISDICTION}

The UDRP is mandatory for all registrants of domain names containing either the .com, .net or .org extensions, as well as some country code top level domains ("ccTLDs").\textsuperscript{53} The basis of the UDRP jurisdiction flows from an agreement between a domain name registrant and its registrar, all of which have adopted the ICANN Policy. Therefore, if a mark owner wishes to file an arbitration proceeding under the UDRP for any such domain names, jurisdiction over the registrant is automatic. For disputes concerning ccTLDs that are not subject to the UDRP, a mark owner may only bring suit under the ACPA if a U.S. court can assert personal jurisdiction over the registrant. Otherwise, a mark owner may bring suit in the registrant’s home country or explore other alternative dispute mechanisms as provided for by the concerned registrar’s dispute policy.

Domain name owners have unsuccessfully challenged the constitutionality of the UDRP’s jurisdiction, including its retroactive application


\textsuperscript{52} 15 U.S.C. §1125(d)(1)(A). In Bihari v. Gross, 2000 WL 1409757 (S.D.N.Y. 2000), the only located case involving a personal name, the name was used in metatags and, thus, the ACPA did not apply.

\textsuperscript{53} The following ccTLDs have adopted the UDRP: .AC (Ascencion Island); .AG (Antigua & Barbuda); .AS (American Samoa); .BS (Bahaamas); .CY (Cyprus); .FJ (Fiji); .GT (Guatemala); .MX (Mexico); .NA (Namibia); .NU (Niue); .PA (Panama); .PH (Philippines); .PN (Pitcairn Island); .RO (Romania); .SH (St. Helena); .TT (Trinidad and Tobago); .TV (Tuvalu); .VE (Venezuela); and .WS (Western Samoa).
to domain names registered before the effective date of the UDRP. Panels have held that any constitutional objections to the application of the UDRP must be brought before a national court.\textsuperscript{54} Indeed, the UDRP makes it clear that mandatory administrative proceedings do not displace the jurisdiction of courts of competent jurisdiction.\textsuperscript{55}

The ACPA significantly differs from the UDRP in that it allows for the filing of an in rem civil action against a domain name.\textsuperscript{56} In rem jurisdiction is available if the mark owner is unable to obtain personal jurisdiction over the domain name owner or, through the exercise of due diligence, is unable to locate the domain name owner by sending notice to the postal and e-mail addresses on file with the registrar or publishing notice of the court action promptly after its filing.\textsuperscript{57} The action must be filed in the judicial district in which the domain name registrar, registry or other domain name authority that registered or assigned the domain name is located.\textsuperscript{58}

Domain name owners have unsuccessfully challenged the constitutionality of the ACPA’s in rem provision.\textsuperscript{59} Mark owners have argued that bad faith intent need not be demonstrated in an in rem action, particularly where the domain name owner cannot be found and, thus, bad faith may be difficult to prove.\textsuperscript{60} In rejecting such argument, the courts have noted that the failure to keep an address current, coupled with the similarity of the offending domain name, may suffice to demonstrate bad faith and result in an in rem judgment.\textsuperscript{61} Furthermore, courts have

\begin{itemize}
\item \textsuperscript{55} UDRP Rule 4(k).
\item \textsuperscript{56} 15 U.S.C. §1125(d)(1)(E)(2)(A). A mark owner may proceed in personam against the domain name owner or in rem against the domain name; it may not proceed against both at the same time. Alitalia-Linee Aeree italiane v. Casinocalitalia.com, 2001 WL 62870 (E.D. Va. 2001).
\item \textsuperscript{59} Caesars World, Inc. v. Caesars-Palace.com, 112 F. Supp.2d 501 (E.D. Va. 2000) (finding that the ACPA’s in rem provisions do not violate due process clause where the property, the domain name, is the entire subject matter of the action.)
\item \textsuperscript{61} Harrods Ltd., 110 F. Supp.2d at 428-7.
\end{itemize}
been reluctant to grant in rem jurisdiction where the mark owner fails to conduct adequate due diligence, as “Congress did not intend to provide an easy way for trademark owners to proceed in rem after jumping through a few pro forma hoops.”

UDRP VERSUS ACPA

Although both the ACPA and the UDRP are effective tools in combating cyberpiracy, each has its attractive features and drawbacks.

Timing

If a trademark owner is looking for higher chances of obtaining a quick decision, the UDRP is almost always the preferable route since it generally results in a decision within two months. While a court may be a better option for preliminary relief within a matter of a few days or a couple of weeks, thus indicating that the ACPA is the mechanism of choice, such actions are still subject to the varied and often unpredictable schedule of a federal district court judge. While some members of the federal judiciary may provide expedited relief, others may not show as strong an interest, and an action under the ACPA could face some delay.

Remedies

If all a trademark owner needs is the transfer or cancellation of a domain name, the UDRP will be able to provide the necessary relief. However, as mentioned above, one drawback of the UDRP is that it does not offer the possibility of damages or attorneys fees. In contrast, the ACPA provides a variety of remedies including the possibility of damages and attorney’s fees. Since most domain cases are brought simply to obtain the name, the UDRP often will provide a sufficient remedy.

Basis of Claim

One important drawback of the ACPA is that it requires the ownership of trademark rights in the United States. The UDRP recognizes trademark rights from any country. In addition, the UDRP is better suited for cases in which the defendant does not have a basis for claiming a legitimate defense or its own trademark rights. On the other hands, judges deciding cases under the ACPA are generally more experienced at handling closer calls. In addition, a complaint in federal court under the

ACPA can also recite other causes of action such as unfair competition or state common law claims. Moreover, the ACPA action can focus not just on the domain name but also the web site content (or use of trademarks in the site) which may also be at issue.

**Costs**

Litigation is expensive. An action under the ACPA will likely involve the time and expense of motions, discovery and the trial proceedings which are not available under the UDRP. In practice, almost any action in federal court will cost more than a UDRP proceeding.

**CONCLUSION**

In most cases of cybersquatting, the UDRP and ACPA essentially apply similar standards to reach similar results. However, there are practical differences between these two sets of procedures, and each has its own drawbacks. The particular facts and circumstances will determine which procedure will be the better option in any given situation, although the high-speed and low-cost approach of the UDRP will generally be preferred if it provides the necessary relief. In cases in which the facts are not explicitly covered by either the policy or the statute, administrative panels and judges, respectively, have created a mostly consistent body of precedent.63 The UDRP has proven to provide a fast, effective and cost-efficient way to resolve cyberpiracy cases. On the other hand, when interim injunctive relief or damages are sought, or more than a domain name is at stake, a mark owner would do best bringing suit under the ACPA.

June 2001

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63. While decisions under the UDRP do not act as binding precedent, most arbitration panels have relied on previous decisions to guide their reasoning and determine outcomes.
The Committee on Trademarks and Unfair Competition

Paul S. Adler, Chair
Elliot R. Basner, Secretary

Andrew P. R. Casino
Stephen Chesnoff
Lisa C. Cohen
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THE RECORD

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Statement in Support of the Family Health Care Decisions Act Currently Before the New York State Assembly

The Committee on Health Law

The act would establish procedures for making medical treatment decisions on behalf of persons who lack the capacity to decide about treatment for themselves.

The Committee on Health Law of the Association of the Bar of the City of New York strongly endorses the Family Health Care Decisions Act and urges swift passage of this urgently needed legislation by the New York State Legislature.

We live in a time when medical technology can extend life in such a way as to give rise to enormous personal burdens and suffering by the very patients the technology was intended to aid. Accordingly, it is critical that we find a way to make end-of-life decisions reflective of the values of the patient. New York law honors the prior expressions of patient wishes through either living wills or health care agents. However, New York is one of only two states that currently have no effective mechanism to follow the wishes of the majority of incapacitated patients who have left no advance directive.

The New York State Task Force on Life and the Law, recognized as a model of sound public policy study of important issues of life and death, has addressed this issue. The Task Force included leaders in the fields of
law, medicine, nursing, philosophy and bioethics, as well as patient advocates and representatives of diverse religious communities. In 1992, the Task Force published When Others Must Choose; Deciding for Patients Without Capacity. This report included a legislative proposal for surrogate decision-making in those cases where the patient has not (or could not) execute a health care proxy.

The Family Health Care Decisions Act provides a decision-making system that achieves an effective balance between legal empowerment of surrogate decision makers and adequate protections for incapacitated patients facing end-of-life decisions. The Act specifically establishes firm and articulate procedures for: (i) honoring patient wishes and values, as best they can be ascertained; (ii) involving the family and loved ones in decision making for incapacitated patients, and (iii) ensuring safeguards to prevent inappropriate decisions particularly in cases where the wishes of the incapacitated patient are unknown and there are no primary advocates involved.

The fundamental right of patients to determine for themselves the best balance between the application of medical interventions and inevitable death is now broadly accepted. This right of individuals to determine the course of their medical treatment is firmly established both in constitutional law and in our common law heritage. Strong case law has clearly established the right of competent, adult patients to make all decisions regarding their medical treatment, even if death will result from the refusal of treatment. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990); Fosmire v. Nicoleau, 75 N.Y.2d 218 (1990); Eichner v. Dillon, 52 N.Y.2d 363 (1981).

Unfortunately, the decision to withhold or withdraw life-sustaining medical treatment often arises when the patient no longer has the capacity to participate directly in the decision making process. Both federal and state law strongly support the use of advance directives, including health care proxies and living wills, to determine patient wishes when they have lost the ability to make medical treatment decisions. The Patient Self-determination Act of 1991, 42 U.S.C. 1395cc(a) et. seq.; In re O’Connor, 72 N.Y. 2d 517, 534 N.Y.S.2d 886 (1988); Eichner v. Dillon 52 N.Y. 2d 363 (1981). New York’s health care proxy statute permits patients to designate a health care agent to make decisions when they can no longer speak for themselves. N.Y. Pub. Health Law §§2980 to 2994.

The availability of these options, however, has not significantly changed patient practice. Despite vigorous efforts to educate people regarding the wisdom of executing advance planning mechanisms, only a small pro-
portion of patients have a health care proxy or a living will. A recent study of advance directive literacy among New York seniors found that 82% of the people studied believed life-sustaining treatment should be terminated for a patient with no hope for recovery. However, many were not aware of the need to plan for this in advance and indicated that their family would “know what to do when the time comes.” Results of Literacy Study Reinforce Need for the Family Health Care Decisions Act, Sarah Lawrence College, Health Advocacy Program.

With the exception of cardiopulmonary resuscitation decisions, New York law demands, in the absence of a completed health care proxy, that life-prolonging medical treatment be provided unless the evidence satisfies the “clear and convincing” evidence standard. When the patient’s wishes are simply unknown because unexpressed, or reasonably known but not strictly provable, treatment must continue. Even if the patient’s condition is terminal and hopeless, even if medical interventions are not in the patient’s best interest and increases rather than decreases the patient’s immediate suffering, treatment must be continued regardless of the consequences to the patient.

The majority of courts in other states to decide this issue have found the “clear and convincing” evidence standard to be unworkable and overly burdensome. Furthermore, even New York does not require “clear and convincing” evidence of a patient’s wishes when a decision must be reached regarding cardiopulmonary resuscitation in cases of cardiac or respiratory arrest. There has been no evidence to date that the less burdensome standards for cardiopulmonary resuscitation leaves patients who lack capacity unprotected and vulnerable to decisions that are not in their best interests.

The “clear and convincing” standard reflects neither common understanding of, nor common parlance on, matters involving end-of-life decision-making. For some New Yorkers, cultural prohibitions make it extremely difficult, if not impossible, to even mention death and dying, let alone to articulate “clear and convincing” plans for it.

Inevitably, cases arise when those most intimate with the patient, but who lack the authority to participate on behalf of the patient, must stand by and endure the knowledge that further medical treatment is only prolonging suffering. Furthermore, under existing law, clinicians often feel legally vulnerable if they submit to the family’s compassionate and common sense pleas. Thus, the loving spouse and children of a terminally ill cancer patient may be helpless to prevent the initiation of dialysis, even though they know deep in their hearts that their loved one would never have permitted it.
The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research has strongly held that decision making for patients who lack capacity is best discharged by those who know and care for the patient, rather than health care providers or courts, to whom the patient is a stranger. Deciding to Forego Life-Sustaining Treatment: Ethical, Medical, and Legal Issues in Treatment Decisions (1983).

In the current climate, in the best case scenario, caring and compassionate families and providers strive to do what they believe the patient would have wanted, although they often lack the legal authority to formally acknowledge their search for the necessary evidence of the patient's wishes. This lack of legal authority undermines the efforts of families and providers to address and resolve these truly difficult decisions with integrity and compassion. At their worst, these situations leave truly isolated and vulnerable patients subject to the whim and dictates of insensitive or conflicted providers. Such patients are thus left either to overly aggressive, yet inappropriate care, or under-aggressive care, because there is no legal mechanism in the clinical setting to address these situations and move them to resolution. Without appropriate statutory guidelines, end-of-life treatment decisions are inferior. They lack adequate scrutiny and are unacceptably arbitrary.

The "clear and convincing" evidence standard does not work. Rather than facilitate a health care provider's ability to follow patient choice about treatment, this standard poses a formidable barrier to both families and providers. Years of clinical custom and a growing consensus explicitly reflected in the law of most states suggest that, in such circumstances, those who know and love the patient best should decide for the patient. In most cases, the person with the authority to decide for the patient is the patient's own family or intimate companion.

The Committee on Health Law has studied the bill in detail and strongly endorses the passage of the Family Health Care Decisions Act in full. Any attempt by legislators to adopt only selected portions of the legislation will jeopardize the balance that was achieved between protecting vulnerable patients from those who would not act in their best interests and empowering surrogate decision makers to refuse medical treatments that are inappropriate and overly burdensome.

A number of concerned and respected organizations, representing a broad based constituency, have already come out in favor of this proposed legislation on numerous occasions. There are several groups who have expressed opposition to this legislation in the past. However, their contrary views are not shared by a majority of New Yorkers as reflected in

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numerous public and professional opinion polls, and are inconsistent with firmly established constitutional and common law precedents.

Underlying the objections is the concern that the Act does not sufficiently protect patients against families and health care institutions which may not be willing to act consistently with the patient’s best interests. However, the Family Health Care Decisions Act imposes numerous substantive and procedural safeguards intended to ensure that the rights and interests of vulnerable patients are appropriately considered and weighed in the decision making process. The safeguards afforded by the Act are wide-ranging: they include among others: (1) at least one other health care professional must concur with the attending physician’s determination of incapacity; (2) notwithstanding a determination of incapacity in an adult patient, the patient’s objection to the determination or to a health care decision of a surrogate prevails; (3) specific medical criteria must be met before decisions can be made to withhold or withdraw life sustaining treatment; (4) decisions to withhold or withdraw life-sustaining treatment when the patient is not suffering from a terminal condition or permanent unconsciousness require review and approval by an attending physician and the institution’s bioethics committee; and (5) a system of dispute mediation must be available to any family member who objects to the surrogate’s decision.

Despite these safeguards, there have been those who have recommended involvement of the courts or the development of a state “watchdog” in cases involving end-of-life decisions for patients who have not appointed a health care agent. We note that when New Jersey enacted a similar oversight mechanism, it met with widespread dissatisfaction among caregivers and families in New Jersey. Medical Ethics Advisor 1989: 5:8: 38. Because of such criticism, New Jersey’s oversight mechanism has already been eliminated. Moreover, a clear consensus has evolved in both the legal and medical literature that the courts of law are in most instances inadequate to address fundamental end-of-life decisions, nor are judges particularly desirous of being asked to make such personal decisions for others. Given the highly nuanced, clinically oriented nature of these decisions, judges and courts of law are largely ill equipped to consider such matters competently and compassionately. Furthermore, in many situations, taking end-of-life decisions to court may unduly delay resolution and unnecessarily prolong suffering.

There are those who are concerned that patients without surrogates are extremely vulnerable to decisions denying them access to care. This overlooks the vulnerability of such patients to over treatment: that is treat-
ment which provides neither benefit or palliation and which may even increase suffering, but which is provided out of fear of liability if such interventions are withheld. Health care providers view vulnerability to over treatment as more likely and harmful than vulnerability to under treatment for patients at end-of-life. Solomon, M., et.al., Decisions Near the End of Life: Professional Views on Life Sustaining Treatments, 83(1) Am. J. Pub. Health 14-23 (1993).

Finally, there are a minority who have sought to distinguish between the provision of artificial nutrition and hydration and the provision of other end-of-life, life prolonging medical treatments. While religious or moral beliefs may lead one to hold such a position for oneself or one's loved ones, as a matter of law and medical ethics, artificial feeding is considered medical treatment. Were the Legislature to accept that distinction, and limit surrogate decision-making in this area, such action would stand squarely in contrast to clear legal pronouncements from both the Supreme Court in Cruzan and the New York Court of Appeals in O'Connor which clearly recognize artificial food and hydration as medical treatment.

The need to take up the plight of incapacitated patients for whom health care decisions must be made is genuine and urgent. A system which is sensitive to the clinical reality in which such decisions are made, yet incorporates the legal empowerment and protections which such patients are owed by a caring and compassionate society, is essential at this time. The Family Health Care Decisions Act is a comprehensive and thoughtful approach to the problem. We cannot allow the current chaos surrounding family authority in end-of-life decisions to continue. To do so would be irresponsible.

May 2001
Formal Opinion 2001-02

Conflicts in Corporate and Transactional Matters

The Committee on Professional and Judicial Ethics

**TOPIC:** Conflicts of Interest; Waivers; Imputation of Conflicts

**DIGEST:** A law firm may represent a client whose interests in a corporate transaction are adverse to those of a current client in a separate matter, and may represent multiple clients in a single matter, with disclosure and informed consent, so long as a disinterested lawyer would believe that the law firm can competently represent the interests of each. Satisfaction of the “disinterested lawyer” test in this context will depend on an evaluation of the nature and circumstances of the simultaneous representations, including those enumerated below.

**CODE:** DR 5-105; EC 5-1; EC 5-15; EC 5-16.

**QUESTION:** Under what circumstances, if any, may a law firm in a corporate transaction represent a client adverse to a current client of the law firm in another matter, or represent multiple clients of the firm in a
OPINION

There will be many situations in which a lawyer will be able to provide competent representation to multiple clients in a transactional setting, including in situations where the lawyer represents a client whose interests in a corporate transaction are adverse to those of another current client represented by the lawyer in a separate matter. Indeed, where the lawyer represents one party in a negotiated transaction involving another client the lawyer represents in an unrelated matter, we think that ordinarily a “disinterested lawyer” could reasonably conclude that the lawyer can competently represent the interests of each client. The same conclusion may also hold where the lawyer represents multiple clients with differing interests in the same transaction, depending on an analysis of a number of circumstances described below. In these and similar situations, clients who are fully advised of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could adversely affect their interests have the right to waive the conflict in order to be represented by the lawyer of their choice, as set forth below.

DISCUSSION

Much has been written on conflicts of interest arising from a lawyer’s simultaneous representation of two clients with adverse interests in litigation. Less guidance exists, however, about the ethical issues involved in the simultaneous representation of multiple clients with differing interests in transactional matters. Accordingly, the Committee has been asked to address the circumstances in which it is permissible for a lawyer to represent a client in a corporate transaction whose interests in the matter are adverse to a client that the lawyer or law firm represents in another matter, and the circumstances in which a law firm may represent multiple clients in a single transaction. The Committee has concluded that there are a variety of circumstances in which client consent would permit a lawyer in a transactional matter to represent one client whose interests are adverse to those of another client in the same transaction or an unrelated matter.

While questions concerning the ability of a lawyer to represent one client in a corporate transaction adverse to another client may arise in a variety of contexts, we begin our conflicts analysis in the context of a lawyer who represents a client (“ABC Corp.”) in several products liability
lawsuits, who has been asked by another client to represent it as the lender in a loan proposed to be made to ABC Corp., which will be represented by another law firm in the loan transaction. May the lawyer accept the representation of the lending client assuming that both clients consent? What limitations, if any, would apply to the simultaneous adverse representations?

Our analysis necessarily begins with Disciplinary Rule 5-105 of the New York Code of Professional Responsibility (the “Code”), which was amended effective June 30, 1999. 22 N.Y.C.R.R. § 1200.24.1 Under this rule, a lawyer may not represent a client in a matter that is adverse to the interests of another client, even if the dual representations are wholly unrelated, unless the lawyer has the informed consent of both clients and “a disinterested lawyer would believe that the lawyer can competently represent the interest of each . . . .” DR 5-105(A) and (C); 22 N.Y.C.R.R. § 1200.24.

DR 5-105(A) is designed to protect the duty of loyalty and the duty of confidentiality owed to every client. Wolfram, Modern Legal Ethics, § 7.3.1 (West 1986). The rule is triggered whenever a lawyer simultaneously represents two clients in matters involving “differing interests,” regardless of the context in which those differing interests arise. The Code defines “differing interests” broadly to include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.” Def. 1, 22 N.Y.C.R.R. § 1200.1.

In the question posed, the clients have “differing interests” as well as interests in common. To be sure, ABC Corp. wants to obtain the loan, and the lending client of the lawyer wants to make the loan, but the interests of the borrower and the lender diverge with respect to a host of business and legal issues, including pricing, covenants, defaults, security, 1. DR 5-105 provides in relevant part:

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [22 N.Y.C.R.R. 1200.24] (C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer’s representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [22 N.Y.C.R.R. 1200.24] (C).
remedies, warranties and the like. Whether the interests of the two clients are so sharply divergent that a “disinterested lawyer” would not conclude that the same lawyer or law firm “can competently represent the interest of each” client is a threshold question that must be addressed before client consent can be sought. In this context, conflicts are imputed, so if any lawyer in a firm cannot take on the representation, then no lawyer can. See DR 5-105(D).  

The Committee believes, and other ethics committees have also concluded, that there are many situations in transactional practice involving the simultaneous representation of clients with “differing interests” where the “disinterested lawyer” test of DR 5-105(C) may be satisfied. In many transactional settings, for example, the parties’ interests may be both “differing” within the meaning of the Code and overlapping in the sense that both share the goal of consummating the transaction. The fact that the matter does not involve litigation or another adversary proceeding between the parties makes it less likely that the lawyer’s judgment will be adversely affected. See EC 5-15; N.Y. County 671 (1989) (other factors to be considered include: (i) the extent and nature of the lawyer’s relationship with each client; (ii) the importance of the matter to each client; (iii) the likelihood that the negotiations will be contentious; (iv) the likelihood that the matter will result in litigation). In transactional matters, there will be many situations when a lawyer, with disclosure and consent, may represent one client in a transaction with another client. In litigation, the burden of the lawyer to justify simultaneous adverse representation may be higher than in the corporate context. See Cinema 5, Ltd. v. Cinerama, Inc., 28 F.2d 1384, 1386 (2d Cir. 1976).

There may also exist circumstances where a lawyer is asked to represent multiple clients with differing interests in the same matter, such as representing the borrower and lender simultaneously in a loan transaction. If the subject matters of the two representations are wholly unrelated, a “disinterested lawyer” might, after weighing the relevant factors, believe that the lawyer or law firm can competently represent the interests of each client. Where a lawyer undertakes multiple representations of clients with actual or potentially differing interests in the same matter, the possibility that a disinterested lawyer may not believe that a lawyer or law firm can provide competent representation of both sides is increased.

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2. DR 5-105(D) provides in relevant part: “While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under . . . DR 5-105(A) or (B) . . except as otherwise provided therein.”
In litigation, the answer is clear-cut. As Professor Simon states, “Obviously, a lawyer cannot represent both sides in the same litigation. That is one of the few per se rules in the field of conflicts.” Simon’s New York Code of Prof’l Resp. Ann., DR 5-105, at 337 (West 2000); accord Wolfram, § 3.7.2 (“Almost without exception, a lawyer may not represent adverse parties in the same litigation.”). In contrast, the application of DR 5-105 to the representation of multiple parties is more relaxed in a transactional context. See EC 5-15 (“there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation”); Wolfram, § 7.3.4 (“Courts demonstrate a somewhat more benign attitude as the scene of a conflict of interest moves away from litigation and into contract and other private-ordering transactions.”).

Today, many law firms serve clients who are requesting, indeed, insisting that they simultaneously represent two clients with differing interests in a single negotiated transaction. It is understandable that clients who have developed a longstanding and close relationship with their lawyer or law firm may be far more willing to face other lawyers from that same firm across the bargaining table in a negotiated deal than be forced to retain a different law firm to handle the deal.3 Indeed, if two clients who both regularly use the same law firm wish to utilize the firm in the same transaction but are precluded from doing so, it is likely to result in both clients being denied an extremely important right, which is to select counsel of choice.4 Although the likelihood of a non-consentable conflict arising in such circumstances is greater than where the clients’ interests diverge in distinct matters, there is no per se ban on simultaneous representations of clients with antagonistic interests in a single matter. In fact, ethics committees have recognized various circumstances in which such an arrangement is ethically permissible. E.g., ABA Informal Op. 518 (1962) (concluding that attorney may ethically represent opposing parties in drafting a contract “with consent given by them after full disclosure”); N.Y. State 611 (1990) (concluding that lawyer may represent both seller and lender in real estate transaction in certain limited circumstances and where both parties provide fully informed consent); N.Y. State 162 (1970) (concluding that attorney may represent both buyer and seller in simple real estate

3. Depending on the size of the law firm involved, the client may never even have met, much less worked with, the lawyer who would be representing the other party to the transaction (who may not even be located in the same office as the lawyers with whom the client works).

4. In situations where the law firm cannot represent both clients, it is likely that neither client will be able to use its firm of choice because the other client is unlikely to consent to the exclusive use by the other party.
transaction where all terms have been agreed to and no major points of negotiation remain); N.Y. County 615 (1973) (same).

We must give especially heavy weight to the fundamental right of clients to select counsel of their choice because the New York Court of Appeals has decisively established that the right of multiple parties to utilize a single lawyer in a transaction is virtually absolute, even in an area such as the representation of both spouses in the preparation of a separation agreement, which is fraught with potential adversity and is often extremely contentious where substantive terms need to be negotiated. Levine v. Levine, 56 N.Y.2d 42 (1982) (Jasen, J.). In Levine, one attorney who was related to the husband and had also represented the husband in connection with his business, represented both the husband and wife in the preparation of a separation agreement providing, among other things, for custody of the children and allocation of property. The attorney, who had known both clients for several years, advised the wife that she was free to seek the advice of another attorney. Although the basic terms had been agreed upon at the time of the lawyer's retention, further negotiations ensued before the final agreement was reached, and two amendments were thereafter executed. In an action by the wife to rescind the separation agreement and amendments, the Court of Appeals rejected the wife's argument that "she was not represented by counsel of her own choosing", based on the lawyer's joint representation of the couple. Judge Jasen stated:

[A]s long as the attorney fairly advises the parties of both the salient issues and the consequences of joint representation, and the separation agreement arrived at was fair, rescission will not be granted. . . . While the potential conflict of interests inherent in such joint representation suggests that the husband and wife should retain separate counsel, the parties have an absolute right to be represented by the same attorney provided "there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement."

Id. at 48 (citations omitted; emphasis added). The Court of Appeals reaffirmed this conclusion in Matter of Estate of Cassone, 63 N.Y.2d 756 (1984), in which it rejected a challenge to an arbitration clause based on the fact that the clause had been drafted by an attorney representing all parties to the contract. Id. at 758. Thus, in determining whether "a disinterested lawyer would believe that the lawyer can competently represent the inter-
ests” of two simultaneously represented clients with differing interests under DR 5-105(C), whether in the same or unrelated matters, we must be mindful of the overarching right of clients to be represented by their chosen counsel, even where they choose the same one. Accordingly, we believe the following factors should be considered:

1. The nature of the conflict. In a transaction where common interests predominate over issues in dispute, the possibility of an adverse effect on the exercise of the lawyer’s independent professional judgment is significantly mitigated. In the example of simultaneous representation of one client in litigated matters and the other in an unrelated loan transaction, the interests of the two clients in closing the loan transaction appear to predominate over the areas of conflict, many of which raise business (as opposed to legal) issues. Significantly, the law firm’s representation of ABC Corp. in products liability litigation will not be affected in any way by the representation of the lender client in connection with the loan, which does not provide the law firm any motive or incentive to be less zealous in its representation of ABC Corp. Indeed, the law firm would have no reason to be less vigorous in its representation of ABC Corp. in the products liability litigation merely because it was representing a lender to ABC Corp. because the lender client would not benefit from any such diminished loyalty. Finally, the dynamics of the lender/borrower relationship, at least at the early stages, are very different—indeed, some might say more aligned—than the contentious relationship that typically prevails between plaintiff and defendant.

Similarly, the context of the proposed representation of multiple clients in the same transaction may dictate the outcome of the “disinterested lawyer” test. Where the interests of the parties are inherently antagonistic, such as the interests of the hostile bidder and the target in a corporate takeover, simultaneous representation generally will be ethically impermissible. See Wolfram, § 7.3.4; Simon’s New York Code of Prof’l Resp. Ann. DR 5-105, at 337 (“only rarely may a lawyer ethically represent both sides of the same transaction”). Situations in which a lawyer or members of a single law firm would be required to negotiate directly with herself or each other on behalf of multiple clients in a transaction also will rarely be consentable.

In other contexts, however, the conflict involved may be less direct and contentious and, therefore, more amenable to simultaneous representation with informed client consent. We think it too simplistic merely to inquire whether a lawyer or law firm is on “both sides” of a transaction. The more relevant inquiry is whether the nature of the concurrent
roles that the lawyer is being asked to play precludes consent from being effective. This distinction is illustrated by two corporate clients requesting a single law firm to represent both in the purchase and sale of a subsidiary. If the dual representations require lawyers to directly negotiate the substantive business terms with each other, the direct adversity could preclude such concurrent representation—even with consent. On the other hand, if the engagements were limited, at least on one side, so that head-to-head negotiations between lawyers in the same firm were eliminated, concurrent representation with consent would be allowable. In this vein, where a single firm serves as mergers and acquisitions counsel to one corporation in a friendly merger and as antitrust counsel to the other merging corporation for purposes of securing regulatory approval, we do not think the nature of the conflict forecloses effective consent. Under these circumstances, Mergers and Acquisitions counsel could represent its client without an adverse effect on its professional judgment because counsel’s primary interest is the consummation of the merger on the best terms available; antitrust counsel’s primary work on behalf of the other client will be in furtherance of obtaining necessary regulatory approvals for the transaction to proceed, and not on improving the terms of the deal. Because the antitrust lawyer’s engagement would not be directly opposed to its own firm’s efforts on behalf of the other party, informed consent could be effective.

These illustrations are by no means a comprehensive catalogue of the various means available to ameliorate the direct adversity that might otherwise emanate from multiple representation in a single transaction. Indeed, adverse clients desiring to utilize a single law firm on opposite sides of a transaction could each retain separate counsel to assure adequate representation by the lawyers from the law firm retained to represent each side. In the Committee’s view, this practice would sufficiently ameliorate the nature of the conflicts to allow consent to be adequate. As EC 5-15 recognizes, “If the interests vary only slightly, it is generally likely that the lawyer will not be subject to an adverse influence and that the lawyer can retain his or her independent judgment on behalf of each client . . . .” To be sure, whether the divergence in the positions of the two clients in the transaction is so severe as to render a conflict non-consentable must be evaluated on a case-by-case basis, with the ultimate resolution turning on the nature of the specific engagement undertaken and the other precautions the attorneys employ.

2. The likelihood that client confidences or secrets in one matter will be relevant to the other representation. As noted, one function of the rule against
simultaneous adverse representation is to protect the client’s confidences and secrets. To the extent that neither client’s confidential information could be used to its disadvantage in the conflicting representation or to the advantage of the other client, this concern is not implicated. It is true that the propriety of an adverse concurrent representation in litigated matters is measured not by the similarities in the two matters, but by the duty of loyalty that the attorney owes to each of the clients. See Cinema 5, Ltd. v. Cinerama, Inc., 28 F.2d 1384, 1386 (2d Cir. 1976). Nevertheless, the fact that the concurrent representation in a transactional matter of one client with interests adverse to another client in a different transactional matter does not give rise to the opportunity to compromise confidences or secrets of either client because of the dissimilarities of the two matters is relevant in evaluating the potential impact on the lawyer’s professional judgment in this context. In cases where a lawyer is asked to represent multiple clients in the same transaction, the confidences and secrets of those clients are clearly relevant. Nonetheless, concurrent representation is permissible where appropriate measures may be taken to protect those confidences and both clients knowingly consent.5

3. The ability of the lawyer or law firm to ensure that confidential information of the clients will be preserved. Assuming that confidential information of one client may be relevant to the adverse concurrent representation of the other, what safeguards can the lawyer or law firm offer to ensure the confidential treatment of all such information? “Screening” has not yet attained general recognition in New York as a substitute for client consent or as a conflict avoidance mechanism, except to avoid firm-wide disqualification in the case of the former government lawyer, or in other limited circumstances. See DR 9-101(B); Kassis v. Teacher’s Insurance & Annuity Ass’n, 93 N.Y.2d. 611 (1999); see also, Gillers, Barbara S., “‘Kassis’ Case and its Impact on the Legal Hiring Practices at New York Law Firms,” New York Law Journal, September 21, 1999; but see Cummins v. Cummins, 264 A.D.2d 637 (1st Dep’t 1999). Nevertheless, screening and the establishment of other information control devices may be appropriately offered by the lawyer or demanded by the client as a condition of the client’s consent. The client may agree to information control mechanisms such as “firewalls,” file segregation and separate legal teams to protect the confidentiality of its information.

5. We hasten to add that clients are free to knowingly waive the attorney-client privilege if they do so on a fully-informed basis. A fortiori, then, a client may consent to a conflict although it could compromise confidences.
There is no reasoned basis to believe that screening could not be effective in a situation where a firm simultaneously represents parties with differing interests in the same matter. See Jonathan J. Lerner, “Eliminating the Gamesmanship,” N.Y.L.J., Feb. 7, 1984 (quoting dissent by Judge Newman in Armstrong v. McAlpin, 625 F.2d 433, 453 (2d Cir. 1980) (en banc) (dissent), vacated on other grounds, 449 U.S. 1106 (1981) (“I do not see why a Chinese Wall should be thought more impervious to information that originated from a government investigation than to information learned from a client without adverse interests.”). In fact, the risk of misuse of client confidences and secrets can be reduced further depending on the nature of the dual representation. By minimizing direct adversity of the dual roles played by counsel, the effectiveness of screening is likely to be enhanced. For example, where the firm’s mergers and acquisitions department represents one client and its antitrust or tax department the other client, “the likelihood of contact between a ‘screened’ attorney and one handling an adverse representation is normally reduced when the two groups operate in different departments within the firm.” “Conflicts of Interest in Private Practice,” 94 Harvard L. Rev. 1284, 1367-68 (1981).

4. The ability of the lawyer to explain, and the client’s ability to understand, the reasonably foreseeable risks of the conflict. DR 5-105(C) requires that a lawyer seeking to obtain consent make “full disclosure of the implications of the simultaneous representation and the advantages and risks involved.” In so doing, the lawyer should apprise the client whose consent is sought of the kinds of conflicts that the client would be consenting to waive and the effect of the consent. There may be circumstances where a lawyer’s duty of confidentiality to one client will prevent the lawyer from being able to explain fully to the other client the nature of the conflict and the material and reasonably foreseeable ways that the conflict could adversely affect the client’s interests.

In this connection, the sophistication of the client is a factor that must be considered in determining the effectiveness of client consent to a transactional conflict. See EC 5-16 (“the lawyer should explain fully to each client the implications of the common representation and otherwise provide to each client information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict . . . .”). A client represented by other counsel or in house counsel in connection with the waiver may more readily comprehend the possible effects on loyalty and confidentiality of the simultaneous adverse representation. To be sure, sophisticated corporate and institutional clients can consent to conflicts which might
be non-consentable in cases involving unsophisticated lay clients who are not represented by independent counsel in connection with the consent. For example, in Allegaert v. Perot, 434 F. Supp. 790, 799 (S.D.N.Y.), aff’d, 565 F.2d 246 (2d Cir. 1977), the United States District Court for the Southern District of New York relied on the fact that an attorney’s clients were sophisticated Wall Street brokerage firms in rejecting an allegation that the attorney’s failure to notify these clients of the perils of simultaneous representation violated Canon 5. In this same vein, the United States District Court for the District of Wisconsin found that the independent review and approval of a simultaneous representation by a commercial client’s internal legal department effectively authorized the multiple representation. Int’l Union, United Automobile, Aerospace & Agricultural Implement Workers v. Allis-Chalmers Corp., 447 F. Supp. 766, 771 (E.D. Wis. 1978). In cases where a corporate client itself has an in-house legal department, it is difficult to see why such a client should not be allowed to consent to simultaneous representation by the same law firm of diverging interests in the same matter, especially where that client desires, or is demanding, that the firm do so.

5. The lawyer’s relationship with the clients. The “disinterested lawyer” test requires that the lawyer be able to represent both clients with equal and undiminished vigor. If the lawyer’s relationship with one client (as opposed to the other) is so disproportionate as to create a bias in favor of the more “important” client (because of the length and nature of the relationship, the amount of fees earned or other factors), a “disinterested lawyer” may consider this to be a factor in determining whether the lawyer will be able to represent each client with undivided loyalty. See, Restatement Third, The Law Governing Lawyers, § 121 RN Comment c(iii) (“[r]elevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer’s relationship with the client or clients involved, the function being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise; [t]he question is often one of proximity and degree”). This subject is also one as to which disclosure may be required for consent to be informed.

CONCLUSION

In sum, a lawyer may represent one client in a transaction with a concurrent client in another matter, with disclosure and informed consent, so long as a “disinterested lawyer would believe that the lawyer can competently represent the interests of each.” A lawyer may also represent
multiple parties in a single transaction where the interests of the represented clients are generally aligned or not directly adverse, with disclosure and informed consent, so long as the “disinterested lawyer” test is satisfied. Satisfaction of the “disinterested lawyer” test in a non-litigation context will depend on an evaluation of the circumstances of the simultaneous representations, including those enumerated above.

April 2001

The Committee on Professional and Judicial Ethics

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Secondary and Supervisory Liability Under the Commodity Exchange Act: An Update

The Committee on Futures Regulation

I. INTRODUCTION

In early 1994, the Committee on Futures Regulation (the “Committee”) of the Association of the Bar of the City of New York (the “Association”) published the first comprehensive review and analysis (the “1994 Article”) of the law that had evolved concerning secondary and supervisory liability under the Commodity Exchange Act (the “Act” or “CEA”), the federal regulatory framework governing the nation’s futures markets. That article, published in the Record of the Association,¹ provided an analytical framework for understanding how the law in this area had evolved and how, properly read, the statutory provisions and regulations promulgated by the Commodity Futures Trading Commission (“CFTC” or “Commission”) should be applied in future cases.

In the ensuing years, although there have been many changes in the marketplace and in many other aspects of the regulatory framework, the

principles governing secondary liability, as well as liability for failure to supervise, have remained relatively unchanged. The Committee has undertaken a comprehensive review of all of the cases—judicial and administrative—that have been published since our original article and here presents a concise and descriptive synthesis of the developments in the law in the last seven years. We note at the outset that the highly publicized Commodity Futures Modernization Act ("CFMA"), enacted at the very end of calendar year 2000, which otherwise wrought numerous changes in the markets and how they are regulated, has left the liability regime covered by this article unchanged.

II. PRINCIPAL AGENT LIABILITY UNDER CEA SECTION 2(A)(1)

Section 2(a)(1) of the Act holds employers and principals engaged in commodity futures or commodity option trading strictly liable for the wrongdoing of employees and agents "acting for" them if the agent's actions were within the scope of his agency.

In the 1994 Article the Committee concluded that the CFTC and the courts generally interpreted Section 2(a)(1) as consistent with traditional agency (respondeat superior) principles and imposed strict liability on the principal for all damages and penalties imposed on another where the other party was acting as its agent, provided that the agent's wrongful actions were within the scope of the agency. Furthermore, this vicari-
ous liability was imposed regardless of whether the principal was aware of those wrongful actions or received a benefit from them.

The Committee also concluded that, in applying these respondeat superior principles, the CFTC and the courts did not limit their application to traditional employer-employee relationships, but imposed strict liability on futures commission merchants ("FCMs") for the wrongful actions of their non-employee agents, including introducing brokers ("IBs"), commodity trading advisors ("CTAs"), associated persons ("APs"), and floor brokers ("FBs") selected by the FCM, who were acting within the scope of their agency, regardless of whether they were registered with the CFTC.6

The Committee concluded that, although the intensely factual nature of the principal-agent determination made generalization difficult, on the whole, CFTC decisions and the Futures Trading Practices Act of 1982 ("FTPA") revealed an "enthusiasm" for the application of Section 2(a)(1) to hold FCMs liable for the statutory and regulatory violations of their IBs, CTAs, and other agents and for a "broad and aggressive reading" of that provision.

Caselaw since 1994 confirms the continuing validity of the Committee's conclusions regarding the nature of the inquiry required under Section 2(a)(1). Such caselaw also confirms that, in general, the CFTC and courts have continued to interpret this vicarious liability provision broadly and aggressively. Indeed, in recent years, intentionally or not, the CFTC and the courts appear to have expanded the application of Section 2(a)(1) vicarious liability to futures industry participants who might not be liable under traditional agency principles. They have also, however, attempted to define certain outer limits for the application of Section 2(a)(1) vicarious liability to FCMs.

A. Recent Legal Developments on the Existence of an Agency Relationship

The most important recent case is Guttman v. CFTC, where the Second Circuit appears to expand the circumstances under which a relationship between futures industry participants can give rise to Section 2(a)(1) vicarious liability beyond those of traditional agency theory.7 In this case, the Second Circuit considered whether Zoltan Guttman, a partner who jointly owned several tenant-in-common accounts with Harold Magid under a 50:50 joint ownership arrangement, could be found vicariously liable

6. See Sections 2(a)(1), 4k, and 14(a)(1)(A) of the CEA.
7. 197 F.3d 33 (2d Cir. 1999).
under Section 2(a)(1). Magid had entered into six noncompetitive strangle trades in sugar options that were found to be unlawful “wash” trades in violation of Section 4c(a)(A) and (B) and Commission regulations. In addition to finding Magid liable, the Commission found Guttman vicariously liable under Section 2(a)(1).

On appeal, Guttman claimed that he could not be held vicariously liable because a tenancy-in-common does not create a principal-agent relationship. Although the Second Circuit agreed with this contention, it nonetheless affirmed the Commission’s finding since Guttman’s liability was not based on his status as Magid’s principal with respect to the trading accounts, but on Guttman’s “participation” in Magid’s unlawful trading by agreeing to the strategy, authorizing Magid to act on his behalf in executing the trades, and reminding Magid to deal with certain deficits each month-end. More precisely, the Second Circuit found Guttman vicariously liable because Magid was “acting for” Guttman when he executed the offending trades; thus, Guttman was vicariously liable for Magid’s wrongdoing. This decision, if extended to its logical conclusion, could subject participants in the futures business who do not directly violate the futures laws to Section 2(a)(1) vicarious liability if they have prior knowledge of the wrongdoing, encourage it, and benefit from it. Although the full reach of this decision has not been determined, it has the potential for expanding Section 2(a)(1) liability to co-conspirators, aiders and abettors, and others who might not be subject to liability under traditional agency principles.

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8. Id. at 35.
9. Strangle trades are option positions in which the holder establishes a long call (option to buy) and short put (option to sell) at different strike prices and later buys back the strangle at slightly higher prices to cover commission costs and, in this case, compensation to the confederate who made the accommodation trades.
10. Id. at 36-37.
11. Id. at 38.
12. Id.
13. Id. at 39-40.
14. Although, under general partnership law principles, a partner may be called upon to pay all partnership obligations, including those that stem from the wrongdoing of another, regardless of whether the partner participated in the wrongdoing, the Commission can only hold an individual personally liable and impose sanctions if the partner himself committed the fraud, was a “controlling person” under Section 13(b) or was a “principal” and therefore vicariously liable under Section 2(a)(1). 7 U.S.C. § 13c(b).
Another issue that the CFTC has addressed is whether an agency relationship that would subject an FCM to Section 2(a)(1) vicarious liability could be created merely because the customer received the FCM account opening documents from a third party for execution. Before 1994, no case had addressed whether Section 2(a)(1) vicarious liability could be imposed on an FCM solely because its account opening documents were presented to the customer by a third party. Although several earlier cases relied on such evidence to find that an agency had been created, in each case there was additional evidence on which the finding of agency was based.

Since 1994, the CFTC has decided three cases that address whether the client's receipt of FCM account opening documents for execution from someone other than the FCM is sufficient in itself to create an agency: Knight v. First Commercial Financial Group, Inc., Palomares v. Bradshaw, and Sommerfeld v. Aiello. The CFTC concluded that only Knight presented evidence sufficient to create an agency. In the two subsequent cases, the CFTC expressly limited the circumstances under which third-party presentation of FCM account opening documents to the customer would give rise to an agency.

15. When a client decides to open a futures trading account, the customer may be referred to an FCM by an IB or a CTA, who, on occasion, may also provide the client with the FCM account opening documents.

16. See generally Reed v. Sage Group, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,943, at 34,3203 (C.F.T.C. Oct. 14, 1987) (finding that an agency had been created where the FCM, in addition to requiring that the IB deliver the FCM account opening documents to the customer for execution, imposed an exclusive dealing arrangement on the IB and required that the IB distribute the FCM's research reports to all customers and comply with all FCM policies and practices).

Although other pre-1994 cases found that an agency had been created based on substantially less evidence of agency than in Reed, none based that finding solely on the presentation of the FCM account opening documents to the customer by someone other than the FCM. See, e.g., Cox v. Eastern Capital Corp., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,756, at 31,153 (C.F.T.C. Oct. 1, 1985) (FCM held vicariously liable where FCM used CTA to distribute, execute and return its customer account documents and also shared commissions with CTA); See also 1994 Article, supra note 1, n.20.


In Knight, the FCM sent its account opening documents to Falk, an unregistered representative who made the customer referral and had no relationship with the FCM except as a futures customer. The CFTC found that, in delivering FCM account opening documents to Falk for execution by the client, the FCM was also relying on Falk to satisfy its Rule 1.55 risk disclosure obligation and that this created a Section 2(a)(1) agency relationship in which Falk was “acting for” the FCM. In making that determination, the CFTC emphasized that an FCM account executive had admitted that, in sending the account opening documents to Falk, the FCM expected Falk to obtain the customer’s signature and “in an indirect way” make the risk disclosure required by Rule 1.55.

Three years later, in Palomares and Sommerfeld, the CFTC reached the opposite conclusion, based on somewhat different facts. In Sommerfeld, complainants, members of an investment club, had received FCM account opening documents from another member who was not a registered CTA. The FCM claimed to be unaware that any club member was maintaining an inventory of its account opening forms, distributing them to others, and answering questions about them. On these facts, the CFTC agreed with the administrative law judge (“ALJ”) that no agency had been created and expressly distinguished the facts from those in Knight, where the FCM admitted that it had expected Falk to satisfy its Rule 1.55 disclosure obligations. The CFTC cited Knight as an illustration of the risks that an FCM takes when it does not meet with the customer and relies on an unregistered representative to present its account opening documents for execution:

22. All citations to rules refer to CFTC Rules found in 17 C.F.R. § 1 et seq. (2000).
23. Knight, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 44,554-55. In Knight the CFTC found that Falk had breached his duty by falsely advising the client that the FCM account opening documents were a “formality” and by rushing the client through them, thereby preventing the client from reading the risk disclosure statement before he executed the acknowledgment. The CFTC found that Falk’s statements to the client minimizing the significance of the FCM account opening documents had vitiated the effectiveness of the risk disclosure acknowledgment that the client had executed. Id. The fact that the client received a copy of the risk disclosure statement to take home but never read it did not alter the CFTC’s decision. Id
24. Id at 44,552, 44,554.
26. In Sommerfeld, the FCM also made a separate presentation to club members disclosing their trading risk and requested advice from the National Futures Association (“NFA”) concerning the club’s registration status. Id. at 50,643, 50,648 n.25.
27. Id at 50,648-49 n.29.
Knight's analysis does illustrate the significant risks that FCMs must accept when they isolate themselves from customers and turn a blind eye to the conduct of unregistered intermediaries. Nothing in Knight, however, indicates either that personal contact is mandatory or that inquiries about a customer's subjective understanding are mandatory under the Act. Indeed, customers who open accounts through a registered CTA often do not have direct contact with the FCM where they maintain their accounts.28

In Palomares, the customer had obtained the FCM account opening documents from a registered CTA. The CFTC, noting that agency is an area in which more clearly defined “bright-line” rules might produce benefits by reducing uncertainty, found that the CTA's delivery of FCM account opening documents to the customer did not create an agency, regardless of how the CTA received the documents29. In its decision, the Commission rejected the notion that a mere “agreement to provide some good or service” could create an agency and held that an agency could only arise where the principal had authorized the agent “to act in a representative capacity [and bind it]” and the agent had “accept[ed] that authority.”30 Recognizing that the customer's receipt of FCM account opening documents from someone other than the FCM could be a factor in determining whether an agency had been created, the CFTC nonetheless concluded that “in and of itself, it is not a large factor” and that the customer's receipt of FCM forms from a CTA, rather than the FCM, even in combination with other factors, would be insufficient “without substantially more” to convert nominally independent entities into representatives of one another and establish an agency relationship.31

The foregoing caselaw supports the conclusion that mere delivery of FCM account opening documents to the customer by a party other than

28. Id. at 50,652 n.42.
30. Id. at 50,633. The CFTC also asserted that an agency finding could not be based on the subjective understanding of the principal and agent, but only on “objective manifestations” of its creation, such as “an express written agreement or course of conduct from which an actual or apparent agency agreement may be inferred.” Id.
31. Id. at 50,634 & n.115, 50,634-35 n.121. In particular the CFTC found that the facts that there was mutual benefit and that the FCM was distributing commission payments to the CTA from the client's account (by client agreement and without commission-sharing) would not provide the additional evidence necessary to create an agency. Id. at 50,635-36.
an FCM will not create an agency. In other recent cases, discussed below, the CFTC confirmed that an FCM that assists an IB's solicitation efforts will create an agency, but that an FCM will not be vicariously liable merely because it accepted stolen funds from a futures customer without knowing that its customer was acting as a third party representative. One case that examined whether an FCM is vicariously liable for AP wrongdoing held that such vicarious liability will apply to an AP only if the agency relationship between the FCM and the AP is affirmatively established. Other cases examined the proof required to find an agency based on express, implied or apparent authority. Still others focused on whether an agency can be created between two IBs or between a parent and subsidiary, finding that such relationships can create an agency relationship that would impose vicarious liability on the principal.

In Buckler v. ING Securities Futures & Options, Inc., the Commission confirmed that an FCM will create an agency relationship if it assists an IB in soliciting customers. In this case, the FCM had actively assisted an IB by reviewing and having ultimate control over the IB's solicitation materials and other materials sent to the complainant, including fraudulent materials, in the hope that the IB's solicitations would result in more business for the FCM.

In Tatum v. Legg Mason Wood Walker, Inc., the Fifth Circuit considered whether an FCM could be held vicariously liable for receiving stolen funds that a customer had deposited with the FCM to satisfy his personal futures trading account losses. The customer had obtained those funds by fraudulently converting securities that belonged to his investment clients. While the investors had viable state law claims for conversion against the securities investment adviser, the Fifth Circuit affirmed the dismissal of their vicarious liability claims against the FCM because the FCM's customer (who was also the complainants' securities adviser) never held him-

32. Section 4k(1) of the CEA defines "associated person" as any person "associated with a futures commission merchant as a partner, officer, or employee, or . . . associated with an introducing broker as a partner, officer, employee or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged" and requires that all APs be registered with the CFTC. 7 U.S.C. § 6k.
34. Id. at 46,729.
35. 83 F.3d 121 (5th Cir. 1996).
self out to the FCM as representing any investors. In depositing the stolen funds, the FCM's customer was found not to be acting within the scope of an FCM agency, and the FCM was therefore not liable for the investors' losses.

In Aspacher v. Kretz, investors who had sustained losses asserted Section 2(a)(1) claims against an FCM, which had cleared fraudulent trades for three commodity pools introduced by its registered AP based on the AP's providing investment advice to the pools and their investors and his soliciting of additional investments for the pools.

Responding to the FCM's summary judgment motion to dismiss the vicarious liability claims, the district court held that, although the title "associated person" created a strong indication of an agency relationship, it did not confer unfettered per se agency status and that to hold an FCM vicariously liable, complainants were required to prove an express, implied or apparent agency.

Based on the facts in that case, the district court dismissed the "express authority" claim because the title "associated person" was insufficient to establish an agency, and there was no evidence of an express agreement authorizing the AP to act on the FCM's behalf in managing the pools or soliciting investors. However, the court refused to dismiss the implied authority claim because it found that the FCM had authorized the AP to wear an FCM badge and/or jacket indicating that he cleared trades through the FCM, gave the AP access to the FCM offices and its Chicago Mercantile Exchange floor facilities, supported the AP's registration, and gave the AP the authority to solicit the trading accounts. Despite these indicators that an agency existed, the court refused to decide the agency issue on summary judgment because it could not determine from the record whether the FCM knew the trading accounts were com-

36. Id. at 123.
37. Id. The Fifth Circuit also dismissed the claims against the firm because they failed to satisfy the "in connection with" requirement of Section 4b(a) of the CEA. Id. at 122-23. The theft did not occur in connection with an order for the sale of a commodity, but rather in connection with the purchases and sales of securities that did not involve commodities or commodity futures. Id.
39. Id. at 45,296.
40. Id. at 45,295.
41. Id. at 45,296.
modity pools using individual investor funds. 42 The court suggested that proof of such FCM knowledge would establish that the AP had impliedly been authorized to communicate directly with investors, solicit their accounts, and encourage them to continue their accounts. 43

Further, despite the absence of any evidence of FCM communications with the investors, the court also refused to dismiss the apparent authority claim because it could not determine from the record whether the investors reasonably construed the facts that the AP wore an FCM badge and/or jacket, had access to the FCM offices and Chicago Mercantile Exchange floor facilities, and distributed FCM brochures to mean that the FCM had authorized the AP to solicit commodity pool accounts and provide investment advice, and whether the investors in fact relied on the AP’s representations in deciding to continue their commodity pool investments. 44

In re Reifler Trading Corp. involved a consent order that settled a CFTC complaint against two IBs: one who solicited futures customers and one who referred successfully solicited customers to the FCM with which it dealt. 45 These IBs had entered into a correspondent agreement that provided for the sharing of commissions on futures trades for customers that one solicited and the other referred to the FCM. 46 The consent order imposed vicarious liability for the soliciting IB’s violations on the IB that referred the customers to the FCM, finding an agency relationship because the soliciting IB held itself out as part of the referring IB, conducted most of its business through the referring IB, distributed the referring IB’s account forms to its customers, and received trading research, pricing and trading information from the referring IB. 47 The CFTC observed that the solicitation of accounts for the benefit of another is an important factor in determining whether an agency relationship exists. 48 There was no attempt to impose vicarious liability on the FCM. 49

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42. Id.
43. Id.
44. Id.
46. Id. at 47,429.
47. Id. at 47,430.
48. Id.
49. Id.
In Prime Technologies, Inc. v. LFG, LLC, an ALJ rejected a claim that an FCM’s customer was the FCM’s agent where the customer, who had discretionary trading authority for complainant’s futures trading account, did not share commissions with or receive other compensation from the FCM or engage in other acts common to agency relationships, such as using common office space or distributing account applications.\(^{50}\)

In Gunderson v. ADM Investor Services, Inc., the Eighth Circuit reversed the Iowa district court and reinstated vicarious liability claims by more than fifty Iowa farmers against an FCM for allegedly fraudulent misrepresentations made during seminars by its IBs concerning “flex” hedge-to-arrive (“HTA”) agreements.\(^{51}\) The Eighth Circuit’s reversal was based on its finding that the agency claims were not based only on the FCM’s status, as the district court had found, but also on allegations that the FCM supervised the content of the IB seminars promoting the HTA agreements to plaintiffs and knew or should have known that the seminars misrepresented the risks involved—allegations that the court found sufficient to satisfy the pleading requirements of Rule 9(b), if applicable. Rejecting the argument that an FCM’s responsibility over its IBs extends only to regulated futures trading, not to HTA agreements, the Eighth Circuit found that there was an issue of fact as to whether the HTA agreements should be treated as regulated futures contracts or unregulated cash forward contracts.\(^{52}\) Even if unregulated, the FCM could still have vicarious liability under fraudulent inducement, breach of fiduciary duty and RICO claims alleged in the complaint.\(^{53}\)

B. Recent Legal Developments on Scope of Agency

Recent cases concerning agency scope addressed whether an FCM would be subject to Section 2(a)(1) vicarious liability for trades or investments


\(^{51}\) 230 F.3d 1363, 2000 WL 1154423 (8th Cir. 2000) (unpublished opinion). In a flex HTA agreement, a grain elevator permits the farmer to postpone, or roll, the delivery date for the grain, which allows the farmer to sell his grain on the cash, or spot, market if the price is higher than the agreed HTA price. See Grain Land Coop v. Kar Kim Farms, Inc., 199 F.3d 983, 987 (8th Cir. 1999) (describing HTA agreements). This dispute arose because throughout 1995 and 1996 corn prices unexpectedly increased, creating a market inversion. Id. See also Charles F. Reid, Note, Risky Business: HTAs, the Cash Forward Exclusion and Top of Iowa Cooperative v. Schewe, 44 Vill. L. Rev. 125, 125 & n.4 (1999).

\(^{52}\) Gunderson, 2000 WL 1154423, **2.

\(^{53}\) Id
not involving the FCM, whether actions not specifically agreed to could be within the scope of the agency, and whether an FCM could be vicariously liable for transactions that were not traded on a contract market. As shown below, these cases held that vicarious liability could not be imposed on an FCM for wrongdoing unrelated to its accounts unless the FCM had knowledge of the wrongdoing or the wrongdoing was carried out by an AP entrusted with broad authority to act for the FCM and handle client funds, and the unauthorized actions were in furtherance of the FCM’s intent. The cases also held that contracts not traded on a contract market could under certain limited circumstances give rise to Section 2(a)(1) vicarious liability.

In Cunningham v. Waters, Tan & Co., the Seventh Circuit considered whether a guaranteed IB’s fraud involving certain commodity pools was within the scope of its IB relationship with its FCM.54 In that case, Dennis Tan was a partner in Waters, Tan & Co., a registered commodity pool operator that had been engaged in the fraudulent operation of commodity pools. The FCM had no involvement with either the commodity pools or Waters, Tan. However, Dennis Tan was an IB guaranteed by the FCM. When defrauded commodity pool investors sued the FCM asserting that the FCM, as Dennis Tan’s guarantor, had Section 2(a)(1) vicarious liability for the commodity pool fraud, the Seventh Circuit affirmed the ALJ’s dismissal of these claims because the fraud involved the Waters, Tan commodity pools, not Dennis Tan’s actions as the FCM’s IB, and the fraud was therefore outside the scope of Dennis Tan’s agency as an IB for the FCM.55

54. 65 F.3d 1351, 1358-59 (7th Cir. 1995).
55. Id. at 1356-59. Applicable regulations limit IBs to soliciting orders and prohibit them from soliciting or handling client funds. The court found it inappropriate to hold an FCM that had guaranteed an IB vicariously liable under Section 2(a)(1) for a fraud involving the handling of client funds when the FCM had been led to understand that the IB could not handle client funds. Id. at 1357-58.

However, the court, citing Rosenthal & Co. v. CFTC, 802 F.2d 963, 969 (7th Cir. 1986), recognized that the result could be different if Dennis Tan had been an AP with authority to solicit investors for commodity pools and to handle customer funds. 63 F.3d at 1357-58. In view of the FCM’s decision not to give Dennis Tan the broad authority of an AP, the court found that the FCM should not bear the increased risk of being vicariously liable for Waters, Tan’s commodity pool fraud, which was outside the scope of the agent’s employment.

The court also rejected the claim that Dennis Tan had merged his IB and commodity pool operations. There was no evidence that Waters, Tan had registered as an IB or that the FCM knew of the commodity pools or Dennis Tan’s involvement in them. On the contrary, there was evidence that the FCM sought to prevent Waters, Tan from falsely promoting itself as the FCM’s IB. Id. at 1359-60.
In In re Glass, the CFTC considered whether a partner who executed unlawful trades was acting within the scope of his employment. The CFTC found that, where the partner had been employed to engage in commodity options trading and the unlawful transactions involved the trading of options in furtherance of the partners’ joint interests, the partner’s unlawful actions were within the scope of the agency.

In Knight, supra, where the CFTC found that the FCM’s reliance on Falk to present FCM account opening documents to the customer created an agency, damages were assessed on the full amount of the investor’s losses, without further discussion. However, if the purpose of the agency were to have the client execute FCM account opening documents and make required risk disclosure, the scope of the agency would arguably not extend to all trades, but only to those that would have been affected by the disclosure failures. Although Commissioner Tull’s dissent argued that Knight had some knowledge of the risk involved and that his damages should be reduced to reflect only the losses that resulted from the failure to make the required risk disclosure, the majority, without discussion, failed to adopt his position.

In Buckler, supra, where the CFTC found that the FCM’s right to review and approve the IB’s client solicitation materials gave rise to an agency, the CFTC considered whether the scope of the agency extended to subsequent IB actions intended to “lull” the customer into ignoring the IB’s misconduct when the FCM had no knowledge of or involvement in the lulling activities. The CFTC found that lulling was within the scope of the agency because it was a continuation of the IB’s efforts to solicit business on behalf of the FCM.

In DuBois v. Alaron Trading Corporation, an FCM was held responsible for a guaranteed IB’s activities even though the transactions involved over-the-counter contracts because the IB’s conduct resulted in an obligation under the CEA, and the guarantee, therefore, covered the transactions.

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58. Id. at 44,556.
59. Id. at 44,556.
61. Id. at 46,728.
In Boston Cattle Group v. ADM Investor Services Inc., a district court judge remanded two arbitration cases to arbitrators for clarification as to whether an IB's liability fell within the scope of an FCM guarantee arrangement.63

C. Other Recent Legal Developments on Section 2(a)(1)

In Kolbeck v. LIT America, Inc., the court examined whether Rule 9(b) pleading requirements apply to Section 2(a)(1) vicarious liability claims for fraud.64 The Southern District of New York held that Rule 9(b) did apply and that plaintiffs must plead with particularity, in addition to facts regarding the fraud, facts regarding the agency relationship between the FCM and AP, including facts regarding what the agency entailed and permitted.65 Because of the investor's failure to plead with particularity facts concerning the agency relationship, the Section 2(a)(1) claims against the FCM were dismissed for failure to satisfy Rule 9(b) pleading requirements.66

In Skipper v. Index Futures Group, Inc, the district court held that an FCM may not rely on an exculpatory clause in a customer agreement to avoid vicarious liability for violations of the CEA by its agent acting within the scope of its employment.67 Since Skipper involved a guaranteed IB's wrongful acts, an exculpatory clause purporting to preclude vicarious liability was found unenforceable.68

In Violette v. First Options of Chicago, Inc., the CFTC stated that it never had held that the status of "guaranteed IB," standing alone, was sufficient to establish agency.69 However, in a later decision, Violette v. First American Discount Corp., the CFTC found that an FCM that guaranteed an IB could not enforce a customer agreement provision waiving the FCM's

64. 923 F. Supp. 557, 567-68 (S.D.N.Y. 1996), a f ' d 152 F.3d 918 (2d Cir. 1998),
65. I d.  at 568.
66. I d at 567-68. The court also expansively interpreted the CEA to permit an investor asserting a private right of action under Section 22 to assert vicarious liability claims under Section 2(a) (1) despite the language in Section 22(a)(2) that Section 22 is the "exclusive remedy under this chapter available to any person who sustains a loss as a result of any alleged violation of this chapter." 7 U.S.C. § 25(a)(2) (1994).

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liability under that guarantee. Noting that CFTC rules made the FCM absolutely liable for a guaranteed IB's misconduct, the CFTC asserted that it would undermine the protections provided by the guarantee agreement and violate public policy for an FCM to be able to avoid this obligation by contract. The CFTC held the FCM liable for the guaranteed IB's unauthorized trades.

Similarly, in Clemons v. McCabe, the CFTC expressed concern that an indemnity requirement in a customer agreement that required the customer to indemnify the FCM against all losses and liability incurred as the result of the IB's action was inconsistent with the FCM's status as a guarantor of an IB.

In Ferruggia v. Shearson Lehman Hutton, Inc., an ALJ, adopting a "liberalized" pleading theory for CFTC reparations claims, imposed Section 2(a)(1) vicarious liability on an FCM defendant even though the claim was not raised in the complaint or at trial. There, employees of the firm who were registered APs had recruited customers by using the services of a CTA who made misleading representations to the customers. Noting that a principal is always liable for the acts of its agents, the ALJ imposed Section 2(a)(1) vicarious liability on the FCM for its employee APs' use of a CTA who made false representations. The CFTC also found that the CTA who made the false representations was the FCM's agent because the FCM and CTA shared commissions.

In Zizzo v. Vision Ltd. Partnership, an ALJ stated that a mere FCM/IB association or an FCM's unintentional aiding of an IB's fraud would not make the FCM vicariously liable for the IB's violation. The ALJ dismissed claims against the FCM because of the complainant's failure to present

71. Id. at 47,571.
72. Id.
75. Id. at 40,127.
76. Id.
77. Id.
any evidence that the IB and FCM were not independent or that the IB was an agent of the FCM, noting that, to establish vicarious liability, a preponderance of the evidence was required to establish the existence of an agency.\textsuperscript{79}

In Pate v. Alaron Trading Corp., an ALJ dismissed an investor’s claim against an FCM clearing broker based on a guarantee agreement.\textsuperscript{80} The guarantee agreement expressly specified that it became effective only when the IB registered with the CFTC.\textsuperscript{81} Because the IB had never registered, the FCM was not held liable for the fraudulent activities of the IB.\textsuperscript{82} Also, there was no evidence that the customer ever had an account at Alaron, the FCM.\textsuperscript{83}

\textbf{III. DUTY TO SUPERVISE UNDER CFTC RULE 166.3}

Rule 166.3, adopted in 1978, requires that “Commission registrant[s]” diligently supervise the handling of customer accounts and other activities relating to the firm’s business:

Each Commission registrant, except an associated person who has no supervisory duties, must diligently supervise the handling by its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) of all commodity interest accounts carried, operated, advised or introduced by the registrant and all other activities of its partners, officers, employees and agents (or persons occupying a similar status or performing a similar function) relating to its business as a Commission registrant.\textsuperscript{84}

This regulation, which was intended to protect futures customers by ensuring that their dealings with the employees of the registered firm will be reviewed by other officials in the firm, subjects the firm and its indi-

\textsuperscript{79} I d.


\textsuperscript{81} I d.

\textsuperscript{82} I d.

\textsuperscript{83} I d.

\textsuperscript{84} 17 C.F.R. § 166.3. The CFTC has broadly defined the term “Commission registrant” to include “any person who is registered or required to be registered with the Commission pursuant to the Act or any rule, regulation or order thereunder.” 17 C.F.R. § 166.1(a).
individual supervisor registrants to liability for their failure diligently to supervise the actions of firm employees and agents.\textsuperscript{85}

In the 1994 Article, the Committee concluded that, in order to satisfy the "diligently supervise" standard of Rule 166.3, registrants must implement an effective program of supervision and compliance designed to prevent and detect violations, take the necessary steps to monitor and ensure that the supervisory compliance program is carried out, and promptly investigate and assess all customer complaints and indications of possible fraud or irregularities disclosed by the supervisory compliance program.

No statutory or regulatory changes have altered this duty to supervise since the Committee published the 1994 Article.\textsuperscript{86} As before, Section 14(a) of the CEA permits parties who sustain damages as a result of CFTC rule violations to institute reparations proceedings before the CFTC.\textsuperscript{87}

Similarly, no major change or development in caselaw has significantly altered the "diligent supervision" standard. As before, to prove a Rule 166.3 violation, a showing must be made that either (1) the supervisory system was inadequate, or (2) a registrant failed to perform its supervisory duties diligently.\textsuperscript{88}

\textsuperscript{85} 43 Fed. Reg. 31,889 (July 24, 1978).
\textsuperscript{86} For example, there is still no private right of action under the CEA for CFTC rule violations and no indication that Congress intends one. Although Congress passed important futures-related legislation, the CFMA, on the final day of the 2000 legislative session implementing a substantially revised regulatory regime and permitting the trading of security futures, it did not include in that bill a provision implementing a private right of action for CFTC rule violations.
\textsuperscript{87} See 7 U.S.C. § 18(a)(1) which states:

Any person complaining of any violation of any provision of this chapter, or any rule, regulation, or order issued pursuant to this chapter, by any person who is registered under this chapter may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding—(A) actual damages proximately caused by such violation (emphasis added).

\textsuperscript{88} See In re Collins, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,194, at 45,736 (C.F.T.C. Dec. 10, 1997); In re Murlas Commodities, Inc., [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,485, at 43,161 (C.F.T.C. Sept. 1, 1995) ("Finally, the record does not support a finding that respondents breached their duties under Commission Rule 166.3. First, there is little evidence about the general adequacy of [the FCM's] supervisory system. Second, the record fails to establish either the specific supervisory role each of the individual respondents undertook or what duties he failed to diligently perform."); In re First National Trading Corp., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,142, at 41,786 (C.F.T.C. July 20, 1994) ("In appropriate circumstances, proof of an independent substantive violation is not a necessary element to establish a breach of the duty imposed by Rule 166.3. A showing that the registrant lacks an adequate supervisory system,
Although no dramatic shift in Rule 166.3 legal requirements has occurred since 1994, a number of “duty to supervise” cases involving unique facts have expanded the variety of circumstances that would impose liability upon an individual or firm registrant for violating Rule 166.3.

A. Recent Cases Concerning the Rule 166.3 “Diligent Supervision” Requirement

In order to encourage CFTC registrants to conduct their business in accordance with all applicable regulatory requirements, Rule 166.3 requires that a registrant’s business that is subject to CFTC regulation be reviewed by personnel with supervisory authority. At the time of the 1994 Article, to determine whether this Rule 166.3 supervisory obligation had been violated, the CFTC would examine whether a supervisory system had been created, whether a review had occurred, and whether that review was sufficiently “diligent” to satisfy the requirements of Rule 166.3. Although the nature of this inquiry has not materially changed since 1994, recent cases have further illustrated the ways in which the requirements will be applied, as shown below.

1. The Szach Case: The Scope of CFTC Jurisdiction over Rule 166.3 Supervisory Liability

An important supervisory liability case is the recent CFTC administrative enforcement action filed January 8, 2001 against Scott N. Szach (“Szach”), chief financial officer of the now defunct Griffin Trading Company (“Griffin”), a Chicago-based FCM. In January 1997 Szach was also standing alone, can be sufficient” (citations omitted)). See also In re Paragon Futures Ass’n, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266, at 38,850 (C.F.T.C. Apr. 1, 1992) (Since “[t]he basic purpose of [Commission Rule 166.3] is to protect customers by ensuring that their dealings with the employees of Commission registrants will be reviewed by other officials in the firm . . . the focus of any proceeding to determine whether Rule 166.3 has been violated will be on whether such review occurred and, if it did, whether it was diligent.”) (internal quotation marks and citation omitted); Bunch v. First Commodity Corp. of Boston, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,352, at 39,168-69 (C.F.T.C. Aug. 5, 1992) (In determining whether a reparations complainant had established that a branch manager violated Rule 166.3, the Commission focused on: “(1) the nature of the [FCM’s] system of supervision, (2) [the branch manager’s] role in that system of supervision, and (3) evidence that [the branch manager] did not perform his assigned role in a diligent manner”).


placed in charge of Griffin's London office and given responsibility for supervising all aspects of that foreign office, including risk management. Spending about 90% to 95% of his time on London office issues, in February 1997, Szach registered with the U.K. regulatory authorities, the Securities and Futures Authority ("SFA"), as the Senior Executive Officer ("SEO") of Griffin's London office, thereby assuming responsibility to the SFA for establishing internal controls and effective risk management in the London office. Szach was never a CFTC registrant.

As stated by the Commission in its consent order, Griffin was subsequently forced into bankruptcy as a result of huge trading losses sustained by a customer of Griffin's London office on December 21 and 22, 1998. Following an investigation, the CFTC asserted that Szach improperly engaged in recordkeeping, reporting and segregation violations in connection with his efforts to cover up his own unauthorized securities trading, willfully sought to conceal his improper unauthorized trading, willfully

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91. Id. at 51,458. All London staff ultimately reported to Szach, who had authority to hire and fire London personnel and responsibility for appraising the performance of high level London personnel.
92. Id
93. Id at 51,456.
94. From August 1997 until the end of December 1998, Szach traded securities in a Griffin proprietary account and improperly used funds from the customer segregated account to cover his trading activities, deliberately concealing this activity from Griffin's owners and directors. The trading resulted in losses of more than $2 million.

The CFTC found that, in an attempt to hide this unauthorized trading, Szach intentionally omitted the trading losses from Griffin's books and records, which resulted in an overstatement of Griffin's assets. On several occasions Szach adjusted the books to reflect the trading losses, but improperly classified them on Griffin's books as current receivables, thereby
fully made false or misleading statements of fact in reports filed with the
CFTC in violation of Section 6(c)\(^95\) and aided and abetted Griffin’s filing
of false Forms 1-FR with the CFTC in violation of Section 13(a).\(^96\) These
claims are unrelated to Szach’s Rule 166.3 duty to supervise and are not
addressed here.

The CFTC also alleged that Griffin failed to supervise diligently the
firm’s assessment of customer shortfalls and that this breach resulted in
customer losses of such magnitude that Griffin was forced to file for bank-
ruptcy.\(^97\) Interestingly, since Rule 166.3, by its terms, only authorizes the
CFTC to impose failure to supervise liability on individuals who are CFTC
registrants or had an obligation to register,\(^98\) and Szach was not a CFTC
registrant, the CFTC could not impose Rule 166.3 supervisory liability on
Szach. However, relying on the “control” Szach exercised over Griffin’s
London operations, the CFTC sought to hold Szach “vicariously” liable
for the firm’s Rule 166.3 violations as a controlling person under Section 13(b).

The facts are as follows. The CFTC claimed, based on factual findings
to which Szach consented for purposes of a settlement, that Szach had

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\(^95\) The Commission, based on the same evidence of willfulness with respect to Griffin’s false
filings, determined that Szach knowingly induced the firm’s recordkeeping, reporting and
segregation violations that flowed from his unauthorized securities trading and his efforts to
conceal it. As a result, Szach was found to have violated Sections 4d(2), 4g(a) and 6(c) of the
Act and Commission Rules 1.10(d), 1.12(h) and 1.20. \(\text{Id. at 51,461-64.}\)

\(^96\) To satisfy the aider and abettor requirement that there be proof that the respondent
intentionally assisted the primary wrongdoer, the CFTC found that Szach “controlled every
step in the process that led to the filing of the false forms . . . and may therefore be deemed
to have aided and abetted [Griffin’s] violations and to have acted willfully for purposes of
Section 6(c) as well.” \(\text{Id. at 51,461.}\)


\(^98\) See note 84, supra (The term “registrant” has been broadly defined by the CFTC to include
“any person who is registered or required to be registered with the CFTC Rule 166.1”).
failed to supervise diligently the firm’s assessment of customer shortfalls for John Ho Park ("Park"), an investor who had opened a Griffin trading account in its London office in March 1998. 99 Initially placing trades only on the LIFFE, in June 1998, Park began trading German Bund futures contracts on Eurex through an executing broker. After Park’s trades were executed, the executing broker would “give them up” to Griffin, which was obligated to accept them.

Park’s use of this executing broker compromised Griffin’s ability to assess the value of Park’s account and the amount of any shortfall. This was because, on Eurex, there is no fixed time limit within which an executing broker must “give-up” trades to the clearing broker. As a result, when the Eurex system shut down at 6:30 p.m. GMT each day, “an unlimited number of trades could remain on the system overnight, creating a risk to the clearing firm that would not become apparent until the next day.”100 The CFTC found that, between October and December 1998, many of Park’s trades remained in the executing broker’s system overnight and did not reach Griffin as clearing broker until the next day.

These overnight trades served to mask the extent of Park’s exposure. By the time the exposure was revealed, Park’s losses were so great that Griffin was forced into bankruptcy. The CFTC concluded that diligent supervision would have revealed Park’s exposure at an earlier time when a prohibition on further trading may have preserved Griffin’s solvency.101

The CFTC’s finding that the supervisory system in Griffin’s London office was inadequate and that its compliance efforts did not satisfy a “diligent supervision” standard appears well founded. A number of supervisory failures collectively resulted in the Griffin failure, including:

(a) No Supervisory System

No supervisory system had been designed and implemented for the London office. Although efforts were made from time to time to monitor aspects of the business there, those efforts were often ad hoc or piecemeal, and were not undertaken pursuant to a carefully designed system for monitoring dealings between customers and firm officials intended to prevent fraud, irregularities, and unsound business practices. For example, although the Eurex exchange on which Park’s German Bund futures con-

99. The supervisory diligence issue appears to be unrelated to Szach’s unauthorized trading and reporting violations.
101. Id at 51,459.
tracts were traded closed each day at 6:30 p.m. GMT, resulting in an unknown but potentially significant exposure over a period greater than twelve hours each day. Griffin’s supervisory compliance efforts were limited to questioning Park about his position. Such a limited inquiry is generally inadequate, but fell particularly short here because Park’s order tickets often did not correspond with the executing broker’s tickets.\textsuperscript{102}

(b) Failure to Implement the Chicago Office Risk Management Policies

Although the Griffin Chicago office had promulgated risk management policies and procedures, and Szach was aware of those policies and procedures, they were never implemented in the London office. Of particular relevance, Szach was aware that Griffin’s Chicago office risk management policy required that traders obtain give-up agreements. Notwithstanding the Chicago policy, the London office had no written policies or procedures relating to give-up agreements—a failure all the more egregious because Szach was aware that Park was using an executing broker with whom Griffin had no give-up agreement. As a result, Park’s executing broker had no obligation to enforce Griffin’s trading limit for Park or inform Griffin about Park’s overnight trades.\textsuperscript{103}

(c) Failure to Take Steps to Remove Threat from Overnight Exposure

Szach was aware that Park’s trades were being left on the system overnight during the period October through December 1998, but took no steps to determine the cause of those delays or their impact, if any, on Griffin or its ability to monitor customer trading. Szach even failed to take the simple, self-evident step of informing the executing broker of Park’s trading limit. As a result, without Griffin’s knowledge or consent, Park exceeded his intra-day trading limits on at least five days prior to December 21, 1998, by amounts ranging from 888 to 5,235 contracts.\textsuperscript{104}

(d) Failure to Implement Trading Limits

Szach failed to implement Griffin’s intra-day and overnight position

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\textsuperscript{102} Id. at 51,459-60.

\textsuperscript{103} Id. at 51,460. The CFTC also failed to find written policies or procedures in the London office for many other supervisory or risk management matters such as policies requiring the documentation of customer limits, the confirmation and monitoring of positions, or the creation of emergency procedures for mitigating large open positions. The CFTC also found that Szach knew little about what risk management procedures were in place for the London office.

\textsuperscript{104} Id.
limits. In fact, Szach did not even know the London office trading limits, including Park's.\footnote{105}

\textbf{(e) Failure to Supervise the Managing Director}

Szach also failed to adequately supervise the Managing Director of the London office, with whom he worked closely. Although Szach believed that the Managing Director was inexperienced in monitoring risk, Szach relied exclusively on the Managing Director to notify him of risk-related problems and took no independent steps to ensure the accuracy of the Managing Director's risk assessment.\footnote{106}

In view of these facts, the CFTC asserted that Griffin's supervision of Park's trading—and particularly of the Park trades executed through Eurex and not disclosed until the next day—did not satisfy the "diligent supervision" standard of Rule 166.3.

Since, as noted above, Rule 166.3 only authorizes the CFTC to impose failure to supervise liability on individuals who are registrants or had an obligation to register, and Szach was a non-registrant, who had no obligation to register, the CFTC could not impose Rule 166.3 supervisory liability directly on Szach.\footnote{107} Instead, relying on the "control" Szach purportedly exercised over Griffin's London operations, the CFTC claimed that Szach was "vicariously" liable for the firm's Rule 166.3 violations as a controlling person under Section 13(b). Through a consent order, the CFTC held Szach indirectly liable for supervisory failures for which he could not be held directly liable under Rule 166.3.\footnote{108}

This case could have far-reaching consequences for multi-national companies that may believe, based on the language of Rule 166.3, that their high level executives who are not CFTC registrants cannot be held liable for supervisory failures over operations of foreign branch offices. If the CFTC is correct, it can impose liability for supervisory violations on non-registrants who control operations outside the U.S.

Finally, it is important to recognize that Szach appears to bear significant responsibility for placing himself in a position where two regulators in different jurisdictions could hold him liable for the same viola-
tion. For, in addition to the CFTC, the SFA was also able to exercise juris-
diction over Szach and impose sanctions on him, because he voluntarily
registered with the agency as Griffin’s SEO.109 In the future, others in his
position might think twice before voluntarily registering with a foreign
financial regulatory agency.

2. Recent Cases Concerning Rule 166.3 Liability for
Failure to Establish an Appropriate Supervisory System

Although Rule 166.3 speaks only of a “diligent supervision” require-
ment, and does not expressly require the creation of a supervisory “sys-
tem,” the CFTC continues to adhere to its 1993 position that, to ensure
the probity of firm dealings with customers and satisfy Rule 166.3, regis-
trants must design and implement an effective supervisory and compli-
cance “system” that is intended to detect past and present fraud and other
irregularities committed by firm employees and agents.110

109. Since another person in the London office was Managing Director for that office, it is
unclear that Szach had any obligation to register with the SFA. Griffin presumably could have
required the London managing director to register instead. Because of his voluntary registra-
tion, Szach could not claim the SFA lacked authority to sanction him for supervisory violations
in the London office. So, in addition to his liability before the CFTC, Szach was sanctioned by
the SFA for the same violation. As CEO, he was found to be in breach of SFA Principle 9, which
requires a firm to organize and control its internal affairs in a responsible manner. Sec. &
Futures Authority Board Notice No. 574, 3 (Feb. 19, 2001). He was also found to be in
breach of SFA Principle 1 (high standards of integrity and fair dealing) for his unauthorized
trading and his deliberate efforts to conceal it. Id. In addition, he was found to be no longer
“fit and proper” and was expelled from the Register of Senior Executive Officers and the
Register of Finance Officers, and ordered to pay a contribution of £4,000 towards the SFA’s
costs. Id.

(CCH) ¶ 25,360, at 39,219 (C.F.T.C. Aug. 11, 1992), aff’d sub nom. Monieson v. CFTC, 996
F.2d 852 (7th Cir. 1993). While requiring the creation of a supervisory “system,” the CFTC
has never promulgated a checklist to guide registrant efforts to establish a compliance system
because it contends that particular facts and circumstances, not general guidelines, must
influence the design and execution of any such supervisory system.

However, certain sources of information noted in the 1994 Article may continue to be used
to guide the development of a supervisory system. For example, the CFTC’s 1977 proposed
guidelines, which were never adopted (see Proposed Standards of Conduct for Commodity
Trading Professionals for the Protection of Customers, 42 Fed. Reg. 44,742, reprinted in
Adoption of Customer Protection Rules, 43 Fed. Reg. 31,886, reprinted in [1977-1980 Trans-
SEC’s experience in applying Section 15(b)(4)(E) of the Securities and Exchange Act of 1934
may provide “some guidance” as to the supervisory standards the CFTC will apply. See In re
Furthermore, the CFTC continues to assert, as before, that it can subject a CFTC-registered entity to Rule 166.3 liability for its failure to create an appropriate supervisory system, without regard to whether there was an underlying violation of the Act or CFTC rules and regulations.\footnote{111} In In re Collins,\footnote{112} for example, an ALJ dismissed the claim that a registrant had engaged in fictitious, off-market transactions that violated Section 4c(a)(A) and CFTC Rule 1.38\footnote{113} and, because of this dismissal, also dismissed a failure to supervise claim. The CFTC reversed both ALJ dismissals. In justifying its reinstatement of the supervisory liability claims, the CFTC observed that, even if the underlying claim had been properly dismissed, dismissal of the diligent supervision claim was inappropriate because a Rule 166.3 violation is “an independent and primary violation for which no underlying violation is necessary.”\footnote{114} The CFTC noted that,}

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\emph{Furthermore, rules of self-regulatory organizations which reflect the industry’s view, although lacking official standing, provide an additional source of information relevant to the design and implementation of a supervisory system that may afford sufficient customer protection to satisfy any supervisory system requirement read into Rule 166.3. See, e.g., Compliance Rule 2-9: Supervision of Telemarketing Activity. Interpretive Notice, Nat’l Futures Ass’n, 7 National Futures Association Manual ¶ 9021 (Jan. 1, 2003).}
in appropriate circumstances, a showing that the registrant lacks an ade-
quate supervisory system can itself be sufficient to establish a breach of
duty under Rule 166.3, but did not discuss the circumstances in which it
would be sufficient to establish a breach and when it would not.\textsuperscript{115} We
are, however, unaware of any case in which supervisory liability was im-
posed without an underlying violation.

In In re Dunhill Financial Group, Inc., an FCM was held liable for its
failure to supervise telephone sales solicitations diligently.\textsuperscript{116} The ALJ, noting
that “Dunhill never had a meaningful system of supervision, either as to
its advertising or the telephone sales solicitations of its APs,” imposed
liability on the corporation and its principal for violating Rule 166.3.\textsuperscript{117}
The ALJ also found that the failure to remove misleading information
from the Company’s website, despite an NFA directive to do so, was evi-
dence of a failure to diligently supervise subordinates.\textsuperscript{118}

In In re Wolcott & Lincoln Futures, L.L.C., the CFTC asserted supervi-
sory liability claims against an FCM and its manager, who was a regis-
tered floor broker who acted as chief executive officer and was “the top
link in the supervisory chain.”\textsuperscript{119} The CFTC alleged that the FCM and its
manager breached the firm’s recordkeeping obligations, willfully filed false
reports, and failed to diligently supervise the firm’s back office functions.
The facts are as follows.

The firm had permitted a customer, who was the general partner in a
limited partnership with a firm trading account, to make numerous transfers
from that partnership account to his and his son’s personal accounts,

44,751 n.125. According to the ALJ, only in Paragon Futures Ass’n, [1990-1992 Transfer
Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266, did the CFTC consider Rule 166.3 liability in the
absence of an underlying violation. In that case, the CFTC declined to impose it.\textsuperscript{Id}

¶ 26,921, at 44,469 (C.F.T.C. Dec. 10, 1996)).

¶ 26,921, at 44,469 (C.F.T.C. Dec. 10, 1996)).

Feb. 4, 2000).

1999).
without verifying the customer’s authority to dispense those partnership funds. In particular, the firm failed to review the customer’s limited partnership agreement (which expressly prohibited such transfers) or obtain written authorization for the transfers. In addition, contrary to firm procedures, the FCM failed to record at least two of those transfers in account statements for the limited partnership account and failed to segregate customer funds as required. 120

In its Rule 166.3 supervisory violation claim, the CFTC, noting that registrants must have an adequate supervisory system, found that the FCM and its registered FB/manager breached their duty to develop procedures for the detection and deterrence of possible wrongdoing by FCM agents. By failing to establish office procedures for handling and transferring customer funds, an adequate supervisory system for handling customer money, clear supervisory relationships, and safeguards that ensure the preparation and maintenance of proper records, the registrant had deprived its staff of coherent guidelines to assess the propriety of the treatment of the customer’s funds and channels to communicate concerns about this treatment. 121

In view of this failure to implement an adequate supervisory system and the manager’s failure to investigate the general partner’s movement of partnership funds, the CFTC concluded that the account was inadequately supervised, and that the FCM and the FB/manager registrant had both violated Rule 166.3. 122

120. Id. at 48,422-23.
121. Id. at 48,424.
122. Id. at 48,425. The CFTC also found that, after the individual registrant was designated as manager for a new branch in the successor entity, he continued to breach his supervisory duties by failing to administer and enforce applicable written policies and procedures diligently, allowing branch personnel to knowingly circumvent such policies and procedures despite his knowledge of certain irregularities in the handling of customer funds. In view of the branch manager’s failure to determine the frequency or quantity of the irregularities in the handling of funds for the limited partnership’s account, the manner in which the branch staff was handling the funds, or whether the branch was complying with questionable transfer instructions from the general partner, the CFTC found the branch manager in violation of Rule 166.3. Id.

See also First Nat’l Trading Corp., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 41,786 (individual registrant who admitted responsibility for the “general design of an effective compliance system” was found to have breached his Rule 166.3 duties by designing a system that was flawed because it “contained a major disincentive to compliance by entrusting compliance enforcement to branch managers whose compensation was tied to sales.”); In re International Futures Corp., [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,993

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3. Recent Cases Concerning Rule 166.3 Liability for Failure to Implement and Maintain an Appropriate Supervisory System

Rule 166.3 requires that, in addition to establishing a supervisory compliance system, including policies and practices governing firm supervisors and employees in their compliance efforts, registrants must implement those systems, practices and procedures to monitor business conduct and to detect and respond to violations. The 1994 Article described several practices and procedures as appropriate to monitor and ensure compliance with applicable legal requirements.

Recent cases confirm that supervisory practices in which individual registrants engage continue to be important in evaluating whether they have satisfied the Rule 166.3 diligent supervision requirement. In First National Trading Corp., the CFTC rejected the claim by the president, chief executive officer and 30% shareholder of the company that, as manager of the “big picture,” he was only responsible for the “general design of an effective compliance system and the supervision of [the chief compliance officer in charge of day-to-day compliance], and that he satisfied that obligation.” The CFTC found that the respondent, who was also a registered AP, had Rule 166.3 supervisory responsibility for the actions of the firm’s sales operations and was therefore liable under Rule 166.3 for misrepresentations to investors by the firm’s APs.

In particular, the CFTC found that enforcement of the supervisory system was inadequate because APs could, and often did, override internal guidelines intended to prevent abuse of customer accounts, and that the president himself undermined compliance efforts by personally ask-
ing the chief compliance officer to relax those efforts. The CFTC also found that the president failed to supervise the chief compliance officer diligently in that he did not require periodic, standardized reports, and despite frequent discussions of customer complaints with the compliance officer, he did not know whether the compliance officer had undertaken steps to control unauthorized trades and enforce compliance. In view of the evidence that the president neither knew nor cared about the methods that the compliance officer used to perform his duties, the CFTC affirmed the ALJ’s findings that the president violated Rule 166.3 supervisory requirements.

Similarly, in Interstate Securities Corp., a vice president in charge of an FCM’s government bond sales department with supervisory responsibility for verifying that FCM customers executed appropriate account opening documentation was found to have violated Rule 166.3 because he inexplicably “ignored established internal control policies” and allowed an account containing substantial funds to be opened without the documents necessary to identify the customer’s trading objectives and to authorize the FCM to act as the customer’s agent.

Noting that not every failure to observe an established supervisory policy was sufficient to establish a Rule 166.3 violation, the CFTC held that, in this case, the FCM and two registered APs were liable for violating Rule 166.3 because the size of the account and the restrictions on trading placed Interstate “on notice of the importance of requiring strict compliance with the FCM’s normal internal control policies.”

In International Futures Corp., an FCM was charged with failing to adequately supervise the promotional activities of a guaranteed IB. The FCM had provided the IB with a compliance manual requiring that pre-recorded radio advertisements or written promotional material be submitted to the FCM in advance for review and approval and prohibiting the IB from using advertisements or promotional material that were likely to deceive the public, from predicting hypothetical performance without the cautionary statement required by Rule 4.41(b), and from including statis-

125. Id. at 47,786.
126. Id. at 41,787.
127. Id.
129. Id.
tical information on past performance in promotional materials without being able to demonstrate that actual performance for the same period was being presented.\footnote{131} Despite this, the FCM approved the IB’s pre-recorded radio advertisements and a promotional document even though the advertisements reported high rates of return without identifying whether the performance reflected actual or hypothetical results and without including the cautionary statement required for hypothetical results, in violation of the FCM’s compliance manual.\footnote{132} Furthermore, although one radio advertisement referred to live radio broadcasts, the FCM did not seek scripts for, or recordings of, the live programs.\footnote{133} In view of the FCM’s failure to comply with its own internal control policies, the CFTC found that the FCM had violated Rule 166.3.\footnote{134}

In In re Lexus Financial Group, Inc., an IB firm that had never implemented a supervisory compliance system systematically solicited unsophisticated customers to purchase options on futures contracts based on false and misleading representations concerning their profitability, minimal risk of loss, and Lexus’s inflated performance record—misrepresentations that were made in the course of more than fifty thirty-minute radio “infomercial” broadcasts over a four-year period and in numerous telephone calls with actual or potential firm customers.\footnote{135}

In a complaint against the firm and two APs alleging fraud and other

\footnote{131} Id. at 49,200-01.\footnote{132} Id. at 49,201.\footnote{133} Id.\footnote{134} Id. at 49,202-03.\footnote{135} In re Lexus Fin. Group, Inc., [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,594, at 47,815 (C.F.T.C. Apr. 9, 1999). During these “infomercials,” listeners were advised that seasonal or other supply and demand forces that cause certain commodity prices, such as unleaded gasoline, heating oil, soybeans, etc., to go up and down predictably can be used to achieve large profits through the purchase of recommended options on futures contracts. The CFTC claimed that these representations were false and misleading because the futures price of any commodity (which is the market’s best estimate of the future cash price of that commodity) already reflects the “predicted” price change. Accordingly, for a call option to be profitable, the futures price must increase by more than the market expected—an event that only happens when unexpected events occur.

In addition, Lexus APs, including the individual respondents, had numerous telephone calls with actual or potential customers that echoed the infomercials, stressed the urgency to invest, exaggerated the likelihood of profit, minimized the risk of loss, and overstated Lexus’ performance record.
claims, the CFTC claimed that the firm and both APs violated Rule 166.3 by their failure to diligently supervise the infomercials and the telephone solicitations, with supervision limited to a single, one-time review conducted by an AP whose July 15, 1995 report concluded that several infomercial ads contained “pie-in-the-sky predictions regarding the soybean market”—an isolated and cursory review that was never followed up.

The CFTC found that the registrants took no corrective action following that adverse report, broadcasting at least six additional infomercials after its release that showed no improvement in content or other alterations suggestive of supervision:

Respondents cannot document any reprimand, disciplinary action, or criticism of any Lexus AP. Nor can they document any corrective action taken, or any internal controls implemented, as a result of any customer complaint or reparations action against Lexus or any of its APs.

In view of this evidence that notice of a violation was never addressed, the CFTC concluded that the firm’s Rule 166.3 duty to supervise had not been satisfied and held both APs as well as the firm liable for the failure—one AP because he knew of, aided, abetted and encouraged the violations; the other AP because he virtually ignored his supervisory responsibilities; and the firm because it failed to diligently supervise the two APs.

In Griffiths v. The Dreyfuss Group, Ltd., a reparations case was brought

136. The CFTC asserted fraud and aiding and abetting claims against the firm and one AP actively involved in the infomercial broadcasts and controlling person liability claims against both APs who, collectively, owned 91% of the firm’s stock. Id. at 47,790-01.

137. Id. at 47,797, 47,815-16. A subsequent NFA Board of Directors Interpretive Notice identified several defects in a Lexus orange juice infomercial that had aired on several radio stations. NFA Compliance Rule 2-29: Deceptive Advertising. Interpretive Notice, Nat’l Futures Ass’n, 7 National Futures Association Manual ¶ 9033 (June 4, 1998). According to that NFA Notice, the historical data on trades showing dramatic profits year in and year out invariably involved different products, different timeframes, or different fee structures, and firm customers never experienced the profits that were touted.


139. Id. at 47,816. See also Paragon, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 38, 850 (“[E]vidence of the occurrence of violations . . . is probative of a firm’s failure to supervise, if the violations which occurred are of a type which should be detected by a diligent system of supervision, either because of the nature of the violations or because the violations have occurred repeatedly.”); In re Refco, Inc. [1998-99 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 27,650, at 48,099 (C.F.T.C. May 24, 1999).
against an FCM and an AP registrant ("Perry") of the FCM for violating their supervisory responsibilities and against another firm's AP (formerly an AP of the FCM) ("Tedesco") for making material misrepresentations that fraudulently induced an investor to open a trading account. The ALJ found Perry liable for failing to supervise because he knew that Tedesco had previously made false statements to customers during his tenure as an agent of the FCM but, other than warning Tedesco, Perry took no steps to monitor Tedesco's subsequent actions or ameliorate the effects of Tedesco's fraud. Perry's review of Tedesco's telephone contact sheets and daily trading runs was found insufficient since Tedesco was not likely to note on these materials what he advised customers to induce them to open their accounts.

In In re Techno Trading, Inc., which was settled before trial, the CFTC asserted Rule 166.3 claims against a registered FCM and a registered AP of the FCM with respect to two separate frauds involving two different IBs who had used the FCM to accomplish their frauds (although the FCM was not alleged to be a participant in either fraud). In the first fraud, a separate, foreign FCM, aided by an accomplice IB, was fraudulently trading customer accounts for its own benefit through a scheme involving matched buy and sell orders that were executed by the registered FCM, which was not a participant in the fraud. In particular, the foreign FCM had three matched pairs of trades entered through six separate accounts, thereby obtaining six separate account statements for these matched trades, with the buy and sell legs of the matched trades entered in separate accounts. By allocating these trades among its customers, the foreign FCM was able to report losses of about $10 million to its customers when actual losses from the matched trades were about $1.5 million, allowing the foreign FCM to pocket the $9 million differential.

In addition to finding that the IB aided and abetted the foreign FCM's fraud, the CFTC found the registered FCM and its AP liable for Rule 166.3 supervisory failures (even though the IB sought to deceive the individual AP by falsely advising that the accounts were proprietary, rather than third-party customer accounts) because of the numerous irregularities in the accounts that the AP had ignored. For example, the trades were reported to the firm as "open" when they had been closed out at the exchange, and the AP knew that the IB was wiring funds to the foreign

FCM’s account from Germany, but wiring funds from those accounts back to Switzerland, not Germany. In addition, in recognition of the balanced trading that was occurring, the registered FCM did not require the posting of overnight margin. The CFTC therefore took the position that, despite the IB’s deceit, the registered FCM had sufficient information that the accounts were not proprietary that its continued willingness to handle the accounts under these circumstances constituted a serious Rule 166.3 supervisory violation.\[142\]

The second fraud, devised by a different IB, was executed through the use of so-called “butterfly spreads,” whereby the IB, which held discretionary trading authority, caused customers to buy two options and sell two options in the same commodity but in different months, creating four commission charges for each spread position established. This scheme resulted in substantial commission payments to the IB and substantial customer losses. The CFTC asserted that, although the FCM did not participate in the fraud, it was liable for Rule 166.3 supervisory violations because it allowed the spread trades to be cleared despite knowing that the discretionary accounts belonged to individual customers, that the butterfly spread trades had high commission rates, and that the pricing and commission structure had a consistently negative effect on the ability of the customers to make money on the trades over the long term. The CFTC found its position reinforced by the fact that the FCM was instructed to pay commissions totaling some $3.7 million to the IB by delivering cash to special couriers sent from Germany, rather than through the customary practice of making payment through discretionary wire transfers, without making any inquiry into the suspicious circumstances of these payments.\[143\]

B. The Supervisory Chain of Command

To create an adequate supervisory system that enables a firm to expose fraudulent branch office activities, an FCM must establish clear, specific lines of supervisory responsibility, within the central office and each branch office, over all employees and agents, including supervisory responsibility over all supervisory AP registrants in each central and branch office.

The CFTC’s “chain-of-command” standard, which was adopted in 1980, is not rigidly tied to a formal organizational chart, but requires a

\[142\] Id. at *1-5.

\[143\] Id. at *1-4, *6-7. The FCM and the individual registrant agreed to settle both claims.
case-by-case functional analysis of actual reporting relationships and the exercise of authority within the firm.\textsuperscript{144}

In Monieson v. CFTC, the FCM's chairman attempted to avoid Rule 166.3 liability by claiming that, as chairman of the board, he could not supervise the activities of the president and executive vice-president.\textsuperscript{145} The Seventh Circuit rejected this claim, noting that, ultimately, it is not the supervisor's title but his duties and responsibilities that determine Rule 166.3 liability:

\begin{quote}
[T]he actions of an individual are more important than his title. In this case Monieson supervised [the FCM's president and executive vice president], who reported directly to him. He also settled commission disputes and reviewed the internal investigation. . . . He was the top link in the supervisory chain, not a disconnected director.\textsuperscript{146}
\end{quote}

\textbf{C. Supervisor/Senior Management Liability}

All persons registered with the CFTC as APs, other than those without supervisory duties, can be held liable for a Rule 166.3 failure to supervise. All senior APs with management responsibilities are therefore responsible for the creation and maintenance of a supervisory and compliance system and may be liable under Rule 166.3 for any failure in that system, including any failure to diligently supervise other high ranking APs.

Rule 166.3 does not impose strict liability on supervisors who fail to detect or prevent misconduct without the additional showing of bad faith.\textsuperscript{147} However, an employee's wrongful act is "often a strong indication of a lack of proper supervision."\textsuperscript{148}

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\begin{flushright}
\textsuperscript{145} 996 F.2d at 862.
\textsuperscript{146} Id.
\end{flushright}
In First National Trading Corp., the CFTC imposed Rule 166.3 liability on an FCM president and CEO for not requiring the compliance director to provide compliance reports, noting that a supervisor must obtain a subordinate’s assurances about performance and that failure to require operational assessments and evaluations is an unacceptable defect in a supervisory system.149

Failure to follow internal control procedures can subject lower level supervisors to Rule 166.3 liability. In Crothers v. CFTC, the Fourth Circuit affirmed the CFTC’s finding of failure to supervise based on a supervisor’s decision to ignore internal control procedures.150 In that case, a Savings and Loan treasurer and controller was allowed to open and trade a futures account without completing new account documents and to engage in unauthorized futures trading.151 When a subsequent fall in interest rates led to approximately $2,000,000 in losses, the employee was allowed to transfer funds between accounts to offset the losses without a confirmation that he had authority to transfer the funds.152 These violations of internal control procedures by a supervising AP, which enabled a high ranking officer to commit fraud, gave rise to a Rule 166.3 violation even though the supervisor neither knew of, nor participated in, the fraud.

D. Liability for Failure to Supervise Agents and Guaranteed IBs

In addition to requiring the supervision of employees, Rule 166.3 requires that FCMs supervise non-employee agents. This has been construed to include IBs guaranteed by an FCM.153

In Violette v. First American Discount Corp., for example, a guaranteed IB introduced Gregory Violette to First American Discount Corporation (“First American”), its guarantor FCM, so that Violette could open a futures trading account there.154 In 1996 Violette filed a complaint against the IB, its principal (Scott Allen Wolf), and First American, claiming that

150. 33 F.3d 405, 411 (4th Cir. 1994).
151. Id. at 407, 411.
152. Id. at 408.
153. 17 C.F.R. § 1.3 (nn). Introducing brokers are permitted to substitute a guarantee agreement with an FCM with whom they have an exclusive relationship for compliance with net capital requirements otherwise applicable to IBs. The guarantee agreement, as prescribed in part B of the Form 1-FN-IB provides that the FCM guarantees all obligations of the IB.
the IB and its principal had engaged in unauthorized trading in violation of CFTC Rule 166.2. The ALJ found for Violette and awarded damages against all respondents, including the FCM, in a decision affirmed by the CFTC. The ALJ held First American jointly and severally liable for the acts of its IB by virtue of its status as guarantor.

In International Futures Corp., the CFTC alleged that the LIT Division of First Options of Chicago, Inc. (“First Options”), a registered FCM, failed to diligently supervise International Futures Corp. (“IFC”), its guaranteed IB. Between March and July of 1996, IFC solicited clients through radio advertisements, written promotional material, and oral representations, reporting hypothetical performance results as actual performance results.

Although First Options provided IFC with a compliance manual that delineated what IFC’s advertising and promotional materials could and could not say, it also approved radio advertisements and promotional documents containing hypothetical results unaccompanied by the required

155. Rule 166.2 states:

No futures commission merchant, introducing broker or any of their associated persons may directly or indirectly effect a transaction in a commodity interest for the account of any customer unless before the transaction the customer, or person designated by the customer to control the account:

(a) Specifically authorized the futures commission merchant, introducing broker or any of their associated persons to effect the transaction (a transaction is “specifically authorized” if the customer or person designated by the customer to control the account specifies (1) the precise commodity interest to be purchased or sold and (2) the exact amount of the commodity interest to be purchased or sold); or

(b) Authorized in writing the futures commission merchant, introducing broker or any of their associated persons to effect transactions in commodity interests for the account without the customer’s specific authorization; Provided, however, That if such futures commission merchant, introducing broker or any of their associated persons is also authorized to effect transactions in foreign futures or foreign options without the customer’s specific authorization, such authorization must be expressly documented. 17 C.F.R. § 166.2.


158. id
cautionary statement explaining their inherent limitations.\textsuperscript{159} The CFTC found First Options's supervisory review of the IFC materials was not sufficiently diligent and was therefore in violation of Rule 166.3.\textsuperscript{160}

NFA Compliance Rule 2-23 provides that an FCM “shall be jointly and severally subject to discipline under NFA Compliance Rules” for a guaranteed IB’s violations of CFTC and NFA requirements.\textsuperscript{161} Despite the language of Rule 2-23, the NFA has never held an FCM strictly liable for its IB’s violations, but rather “NFA’s Business Conduct Committee has charged FCMs under Rule 2-23 only where it appears that the [FCM] failed to diligently supervise its guaranteed IBs.”\textsuperscript{162} NFA has promulgated supervisory guidelines for guarantors to follow to limit the likelihood that they will be held to be vicariously liable for an IB’s violation:

\begin{quote}
[A]ny adequate program for supervision must include procedures for performing day-to-day monitoring and surveillance activities, conducting on-site visits of remote locations and conducting ongoing training for firm personnel. The firm’s policies and
\end{quote}

\textsuperscript{159.} Id. at 49,200. This was a violation of Rule 4.41(b), which states:

(1) No person may present the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a commodity pool operator, commodity trading advisor, or any principal thereof, unless such performance is accompanied by one of the following:

(i) The following statement: “Hypothetical or simulated performance results have certain inherent limitations. Unlike an actual performance record, simulated results do not represent actual trading. Also, since the trades have not actually been executed, the results may have under- or over- compensated for the impact, if any, of certain market factors, such as lack of liquidity. Simulated trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to those shown” or

(ii) A statement prescribed pursuant to rules promulgated by a registered futures association pursuant to Section 17(j) of the Act.

(2) If the presentation of such simulated or hypothetical performance is other than oral, the prescribed statement must be prominently disclosed. 17 C.F.R. § 4.41(b).

\textsuperscript{160.} Id. at 49,202.

\textsuperscript{161.} Rule 2-23: FCM Responsibility for Guaranteed Member IBs. Nat’l Futures Ass’n, 7 National Futures Association Manual ¶ 5145 (Feb. 27, 1984). Rule 2-23 stems from Rule 2-9: Supervision. Id ¶ 5065 (Mar. 15, 1994). (Rule 2-9 applies not only to the supervision of branch office operations, but also imposes a direct duty on guarantor FCMs to supervise the activities of their guaranteed IBs).

\textsuperscript{162.} Compliance Rule 2-9: Supervision of Branch Offices and Guaranteed IBs. Interpretive Notice, Id ¶ 9019 (July 24, 2000), at 9046.
procedures, including those for the supervision of branch offices and guaranteed IBs, should be in written form. Firm personnel and guaranteed IB personnel should be provided a copy of the appropriate policies and procedures relating to their duties, and be aware of the firm’s requirements. A copy of all policies and procedures should be on file with the branch office or guaranteed IB. All supervisory personnel should be knowledgeable of the firm’s requirements for supervision.163

Due to the diversity in size and complexity of NFA members, the NFA has recognized the need for each company to tailor its supervisory procedures to its situation.164

E. Preventive Measures

The CFTC has suggested that FCMs and other CFTC registrants may minimize their exposure to Rule 166.3 liability by: (1) maintaining close scrutiny of account openings and discretionary authority acceptances,165 (2) frequently examining customer trading,166 and (3) reviewing all correspondence.167 The CFTC also recommends that FCMs distribute and explain compliance documents and related manuals to all affected personnel, monitor enforcement of compliance measures, impose sanctions on employees that fail to satisfy their supervisory or compliance obligations,168 take prompt and effective action to investigate and remedy customer complaints,169 and be diligent in their investigation.170

163. Id.
164. Id.
166. Id.
168. Cf. U.S. Sentencing Guidelines, Section B1.2, Ch. 3(k) (4), (5) & (6) (1994) (An “effective program to prevent and detect violations of law” includes procedures calculated to communicate the established standards and procedures to all personnel, “reasonable steps to achieve compliance with . . . [the] standards, e.g., by utilizing monitoring and auditing systems . . . ,” and consistent enforcement “through appropriate disciplinary mechanisms”).
169. Under the 1977 Release, an FCM’s written procedures were to have provided for “[t]he prompt review of all customer complaints, whether written or oral, concerning the handling of commodity accounts.” Supra, note 165.
F. Conclusion

As shown above, Rule 166.3 supervisory requirements have not materially changed since early 1994. Every CFTC registrant continues to risk Rule 166.3 liability if an appropriate system for supervising employees and agents is not created, maintained and implemented. Moreover, the recent Szach cases suggest that the CFTC may also seek to impose liability on some non-registrants by holding them vicariously liable as, e.g., controlling persons and that there may be liability in multiple jurisdictions for the same supervisory violation.

IV. CONTROLLING PERSON LIABILITY UNDER SECTION 13(B) OF THE CEA

A. Introduction

Section 13(b) of the CEA exposes “controlling persons” to secondary liability in actions brought by the CFTC for certain acts of “controlled persons.”171 In the 1994 Article, the Committee noted that almost all of the Section 13(b) cases decided to that date involved egregious facts where violations of the statute were pervasive and the respondent’s control virtually absolute. The cases decided in the intervening years reflect no significant effort to expand the Section’s reach, and we have seen nothing to alter our earlier observation. The Committee noted in 1994 that the precise reach of Section 13(b) was difficult to discern because the cases decided involved such clear control by respondents. But the fact that this trend has continued allows one to conclude more confidently that the CFTC intends to apply Section 13(b) conservatively.

Both the courts and the CFTC have noted that a “fundamental purpose of Section 13(b) is to allow the Commission to reach behind the corporate entity to the controlling individuals of the corporation and to impose liability for violations of the Act directly on such individuals.”172

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171. 7 U.S.C. § 13c(b). Section 13(b) was added by amendment effective January 11, 1983. 7 U.S.C. § 13c(b) provides: “Any person who, directly or indirectly, controls any person who has violated any provision of this chapter or any of the rules, regulations, or orders issued pursuant to this chapter may be held liable for such violation in any action brought by the Commission to the same extent as such controlled person. In such action, the Commission has the burden of proving that the controlling person did not act in good faith or knowingly induced, directly or indirectly, the act or acts constituting the violation.”

172. JCC, Inc. v. CFTC, 63 F.3d 1557, 1567 (11th Cir. 1995) (quoting In re Apache Trading
This statement is consistent with the way in which Section 13(b) has been applied in recent years. Section 13(b) has been employed primarily as a means of ensuring that individuals do not escape personal liability for wrongdoing that happens under their watch; it has not been employed to cast a wide net encompassing individuals with relatively remote connections to wrongful behavior.

Again, in virtually all of the cases decided by the CFTC and reviewed by the courts, individuals found liable under Section 13(b) have had objectively significant involvement in and control over the acts found to be in violation of the CEA.173 There have been, as a result, relatively few “surprises” with regard to the degree of involvement in and control over wrongful actions that will be found sufficient to establish individual liability under Section 13(b).

Moreover, while the CFTC has stated that Section 13(b) was intended to apply, inter alia, to the “chairman of the board of a large conglomerate,”174 and while the language of Section 13(b) is certainly broad enough to cover any conceivable corporate structure, in reality Section 13(b) has been applied almost exclusively against modest-sized institutions managed by at most a handful of individuals. The typical “controlling person” remains an individual who dominates a small corporate entity in which he has a predominant or exclusive ownership interest.175 Thus far, heads of

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173. Perhaps the CFTC has never been reversed by a court reviewing a determination of Section 13(b) liability for this reason. However, the case against respondent Zoltan Gutman was on the outer edges of the degree of control necessary for Section 13(b) liability to attach. The ALJ did not find controlling person liability against Gutman, but the CFTC reversed and imposed such liability. Id. at 46,561-6. The Second Circuit declined to rule on the issue, as it had already upheld the CFTC with regard to an independent ground for assessing vicarious liability. Gutman v. CFTC, 197 F.3d 33, 40 (2d Cir. 1999).


large corporate structures have escaped liability under Section 13(b), perhaps because large institutions tend to have multiple, autonomous levels of supervision that decentralize control from the hands of one person.

B. Elements of Controlling Person Liability

1. The Violation

Section 13(b) liability cannot attach unless there is an underlying violation: the controlled person must have violated a provision of the CEA or of the rules, regulations or orders promulgated thereunder. 176

2. Control

In a CFTC enforcement proceeding, once a violation has been proved, the Division of Enforcement must then establish that the respondent “controls” the person who committed the violation. The standard for “control” is well established and has not changed, even in nuance, over the years: requisite control exists if a person has “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.”177 The determinative question under this standard is whether a respondent possessed power or authority, not whether she actually exercised it: “Failure to exercise such authority, or acquiescence in the usurpation of such authority by another, does not negate a case of control.”178 Factors derived from the recent cases that will govern a determination of whether an individual possesses control include an individual’s ability to control day-to-day operations,179 train new employees,180 have access to and control over corporate bank accounts and expenditures,181


handle customer funds, and hire and fire personnel. The “textbook controlling person,” as designated by the CFTC, is a respondent who, inter alia, was sole owner, treasurer and chairman of the board of the firm; had the ultimate “say-so” in the running of the firm; negotiated and entered into contracts on behalf of the firm; personally signed the contracts; and held signatory authority on most of the bank trading accounts of the firm.

3. Proof of Failure to Act in Good Faith or Knowing Inducement

In addition to proving control, the Division of Enforcement bears the burden under Section 13(b) of proving that the controlling person either “did not act in good faith or knowingly induced, directly or indirectly,” the violative act. “Knowing inducement” (particularly “constructive knowing inducement”) is often difficult to distinguish from lack of “good faith,” and the CFTC has not delineated the difference with any precision. As a general matter, however, it appears that the “knowing inducement” standard will apply when the control person’s involvement is more active, while the “lack of good faith” standard will apply when a control person consciously avoids knowledge and involvement altogether.

184. In re Slusser, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶27,701, at 48,316-17 (C.F.T.C. July 19, 1999); see also In re Rubel, 1998 WL 472334, at *8 (C.F.T.C. Aug. 13, 1998) (control established where respondent was president and CEO of the firm; exercised day-to-day authority over its operations; made all hiring and firing decisions; supervised set commission rates; and had co-signature writing authority).
185. 7 U.S.C. §13c(b). Section 13(b) is phrased here in the alternative, and the Division need only prove knowing inducement or lack of good faith, not both. See CFTC v. Midland Rare Coin Exchange, 71 F. Supp. 2d 1257, 1265 (S.D. Fla. 1999).
186. Indeed, sometimes courts do not even bother to indicate whether they are affirming a finding of Section 13(b) liability on knowing inducement or lack of good faith grounds. See CFTC v. Sidoti, 173 F.3d 1132, 1136 (11th Cir. 1999).
187. For example, in Noble Wealth Date Info. Services, 90 F. Supp. 2d at 692, the court found knowing (constructive) inducement where the respondent provided training to traders, distributed fraudulent solicitation materials, encouraged traders to invest money, and made claims regarding the profitability of the firm while knowing that customers were losing money. See also In re Arnold, 2000 WL 1146365, at *7 (C.F.T.C. Aug. 14, 2000) (knowing inducement shown where respondent prepared and/or reviewed the firm’s promotions, knowing that various representations were false).
188. For example, in Lexus Fin. Group, Inc., the CFTC found lack of good faith where the
(a) Knowing Inducement

Knowing inducement is shown by demonstrating that “the controlling person had actual or constructive knowledge of the core activities that constitute the violation at issue and allowed them to continue.” 189 Actual knowledge is shown, for example, where a respondent solicited investors on behalf of the firm; made misrepresentations about the trading program and the guarantee against losses; prepared and disseminated materials containing misrepresentations about the program; and prepared and filed the firm’s account opening documents. 190 Constructive knowledge is demonstrated by showing that where a controlling person lacked knowledge, he did so solely because he consciously avoided it, “such as when the evidence supports the inference that he has deduced the truth and is simply trying to give the appearance of, and avoid incurring the consequences of, such knowledge.” 191 If knowing inducement is shown, a respondent will not escape liability by demonstrating that he acted in good faith. In other words, ignorance of the law is no excuse under Section 13(b). 192

(b) Failure to Act in Good Faith

A finding of a lack of good faith usually involves the failure of the respondent to “maintain a reasonably adequate system of internal supervision and control . . . or to enforce such a system.” 193 Thus, where a respondent did not have a “meaningful system of controls” with respect to advertising and “failed to implement a procedure to supervise” the advertising, the respondent failed to act in good faith. 194 Additionally, a

respondent lacks good faith where he does not demonstrate diligence in fulfilling his supervisory responsibilities, where he, for example, did not know, or try to learn, certain important aspects of his business, and where he relied heavily on a managing director who he knew was overburdened and lacked relevant training and experience.\(^\text{195}\)

C. Remedies

The remedies issued for violations of Section 13(b) include cease and desist orders, registration revocations, trading prohibitions and civil monetary penalties.\(^\text{196}\) The CFTC has noted that cease and desist orders are appropriate when there is a reasonable likelihood that the violative conduct will occur again in the future.\(^\text{197}\) Registration revocation is appropriate where the respondent has demonstrated a pattern of deceptive trading practices evidencing a strong likelihood that the wrongdoing will be repeated.\(^\text{198}\) In this regard, the CFTC will look to the past behavior of a respondent, noting, for example, where a respondent has already been given a second chance:

Even though we would have been able to refuse to register [the respondent for an earlier violation], we nonetheless gave [the respondent] a second chance and allowed him to the register in 1986. [Respondent] has breached the trust which we placed in him. [Respondent] has committed further violations... which seriously damage the integrity of the futures markets. [Respondent’s] breach of this trust and his failure to abide by the rules and live up to the second chance given to him make it appropriate that his registration be revoked.\(^\text{199}\)

The determination of whether a trading prohibition is appropriate turns on the existence of a “nexus between the violation and the integrity of the futures market and, if such a nexus is found, a correlation between the gravity of the offense, the length of the ban, and the impact the ban will have on the respondent.”\(^\text{200}\) Finally, civil monetary penalties

\(^{195}\) Szach, 2 Comm. Fut. L. Rep. (CCH) at 51,458-60.

\(^{196}\) Glass, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 46,561 (7-9). In several of the cases cited in this section, the respondents settled with the CFTC and received significantly reduced penalties.

\(^{197}\) Id at 46,561-8.

\(^{198}\) Id

\(^{199}\) Id

are ordered commensurate with the gravity of the violation: “Serious violations warrant the imposition of substantial civil monetary penalties.” 201

Civil monetary penalties are also tied to the harm to the consumer and to the financial benefit to the respondent received as a result of her wrongdoing: civil monetary penalties are designed in part to deprive a respondent of her ill-gotten gains. 202

With respect to all of the foregoing, the CFTC has a great deal of flexibility to determine the appropriate level of sanction. The CFTC determines the appropriate sanction “in light of the facts and circumstances” of the case, considering “the relationship of the violation to the regulatory purposes of the act; the respondent’s state of mind; the consequences flowing from the violative conduct; and the respondent’s post-violation conduct.” 203

Until 1996, the CFTC had a practice of reviewing an ALJ’s determination of the appropriate level of sanctions against a respondent under an abuse of discretion standard: “[T]he assessment of sanctions is entrusted to the discretion of the ALJ, and we will not substitute our judgment in the absence of an abuse of discretion.” 204 However, in In re Grossfeld, the CFTC announced its new policy of exercising independent de novo review: “In light of the increasingly important role that sanctions play in deterring wrongful conduct and maintaining market integrity, we have concluded that the Commission should reinstitute the policy of exercising its own independent judgment in assessing sanctions and that our determination should not be limited by the choices made in the initial [ALJ] decision.” 205 Courts continue to review the CFTC’s determination of sanctions under an abuse of discretion standard. 206

D. Conclusion

In 1994, the Committee, noting the sweeping language of Section 13(b), raised the danger that Section 13(b) might be applied in an unduly broad fashion. The cases decided in the intervening years indicate that the CFTC

201. Id
203. Id
206. Guttman v. CFTC, 197 F.3d at 41.
intends to apply the section cautiously and only to the individuals who clearly control or have the ability to control the activity in question.

V. AIDING AND ABETTING LIABILITY UNDER SECTION 13(A) OF THE CEA

A. Introduction

The most notable development in the area of aiding and abetting liability under the CEA is the 1998 Seventh Circuit decision in Damato v. Hermanson, which specifically recognized a private litigant’s right to pursue aiding and abetting claims under Section 22(a)(1). While implied private rights of action under the CEA had been recognized since Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, and the CEA had been amended

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207. 153 F.3d 464 (7th Cir. 1998).
208. 7 U.S.C. § 25 (A) (1), which provides:

Private rights of action

(a) Actual damages; actionable transactions; exclusive remedy

(1) Any person (other than a contract market, clearing organization of a contract market, licensed board of trade, or registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person—

(A) who received trading advice from such person for a fee;

(B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity); or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract;

(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—

(i) an option subject to section 6c of this title (other than an option purchased or sold on a contract market or other board of trade);

(ii) a contract subject to section 23 of this title; or

(iii) an interest or participation in a commodity pool; or

(D) who purchased or sold a contract referred to in subparagraph (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.

in 1983 to expressly permit private rights of action, the courts were in conflict over whether an aider and abettor could be sued under Section 22(a)(1). Specifically, the issue presented in Damato was whether a plaintiff may bring an aiding and abetting claim under Section 22(a)(1) against a defendant who does not independently satisfy the requirements of subsections (A) through (D) of the section by participating in one of its enumerated transactions. As discussed infra, the Seventh Circuit reversed the district court, holding that an aider and abettor may be liable under Section 22(a)(1) so long as the primary violator independently satisfies one of the predicates referred to in subsections (A) through (D).

B. Nature of the Prohibited Conduct
Several district courts held that in order for a private litigant to sue for aiding and abetting liability under the statute, the alleged aider and abettor must have participated in one of the enumerated transactions in subsections (A) through (D) of Section 22(a)(1).

For example, in In re Lake States Commodities, Inc., the Northern District of Illinois held that investors in a Ponzi-scheme commodity pool operated by an individual and his corporation could not maintain an aiding and abetting claim against the FCM where certain accounts were maintained by the individual wrongdoer, because the FCM had not sold interests in the pool nor had it accepted orders for purchases in the pool.
Subsequently, the Seventh Circuit in Damato rejected this approach, holding that Section 22(a)(1) does not require an aider and abettor to independently satisfy subsections (A) through (D), but rather creates, on its own, a private cause of action against an aider and abettor who aids and abets a principal in undertaking one of the specifically enumerated transactions in subsections (A) through (D). This was the position advocated by the CFTC as amici curiae in Damato, and one which the court observed gave meaning to every word and every phrase of Section 22.

The Seventh Circuit agreed with the CFTC that “an aider and abettor may be held liable under that section so long as the primary violator participates in one of the transactions listed in subsections (A) through (D).” Moreover, the aider and abettor need not cause plaintiff’s damages. Rather, the aider and abettor can be held liable for the damages caused by the “violation” perpetrated by the primary violator.

The Damato court also confirmed that the standards for aiding and abetting liability identified in the Committee’s 1994 article remain the same. The aider and abettor must (1) know of the principal’s intent to

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214. Id. at 472
215. Id. at 470. Damato presented the Seventh Circuit with a classic Ponzi scheme in which a CPO enticed new customers to purchase limited partnership interests in a pool under the impression that the CPO would use the money to trade in the commodities market. Id. at 466. The plaintiffs alleged that the FCM aided and abetted the CPO’s fraudulent scheme by permitting the CPO to operate the pool through the CPO’s trading account with the FCM, despite the fact that the CPO was not properly registered with the CFTC. Id. at 467. Analyzing the language of Section 22(a)(1), the district court concluded that in order to sue an alleged aider and abettor under that section, the plaintiff must provide evidence against the aider and abettor that independently satisfies the requirements of subsections (A) through (D) of that provision. The district court concluded that “in a commodity pool case, the only persons subject to a private right of action under the CEA are those who sold or took orders for interests in the commodity pool.” Id. at 467-68 (citing Damato v. Merrill Lynch, 878 F. Supp. 1156, 1160-61 (N.D. Ill. 1995)). The Seventh Circuit reversed, holding that such a reading would render the aiding and abetting language meaningless and contravene congressional intent. If the aider and abettor could only be liable if it actually performed one of the actions listed in subsections (A) through (D), then the aider and abettor would be indistinguishable from a principal violator. Id. at 470-71.

216. Id. at 470, 472.

217. Id. at 471. See also Nicholas v. Saul Stone & Co., 224 F.3d 179, 188 (3d Cir. 2000), cert. denied, 121 S.Ct. 773 (2001) (interpreting the Seventh Circuit’s holding in Damato to imply that the damages to the plaintiff do not have to have been caused by the acts of the aider and abettor herself, but only by the transaction between the plaintiff and the primary violator).
violate the CEA, (2) intend to further that violation, and (3) commit some act in furtherance of the primary violator’s objective.\textsuperscript{218} This is true regardless of whether the action is maintained under Section 13 or 22.\textsuperscript{219} Thus, the Third Circuit in \textit{Nicholas} while endorsing the reasoning of the Damato court concerning the reach of aiding and abetting liability under Section 22, did not need to decide the issue because it found that the plaintiffs had failed to allege the requisite knowledge and guilty intent required for aiding and abetting liability.\textsuperscript{220}

\section*{C. The Intent Requirement}

The cases show that the scienter aspect of aiding and abetting liability under the CEA is by far the most difficult element of the cause of action to establish.\textsuperscript{221} In \textit{Damato}, for instance, the president of a subsidiary of the FCM, having received a loan from the CPO out of monies the plaintiffs intended to be invested in the pool, prepared a false confirmation statement reflecting inflated balances in the pool, which was sent

\begin{footnotesize}
218. 153 F.3d at 473 (citing United States v. Petty, 132 F.3d 373, 377 (7th Cir. 1997)).
219. Id. at 472. The Damato court further explained that “the language employed in Sections 13(a) and 22(a)(1) of the CEA is virtually identical to that employed in the federal aiding and abetting statute, 18 U.S.C. § 2,” and that the elements for an aiding and abetting claim under Section 22 of the CEA are the same as those required to prove a violation of 18 U.S.C. § 2. Id. at 473; see also Weber v. E.D.&F. Man Int’l., [1999-2000 Transfer Binder] Comm. Fut. L. Rep. ¶ 27,628 (N.D. Ill. Apr. 9, 1999) (quoting the Damato standard for aiding and abetting liability under the CEA and dismissing the complaint on the basis that “allegations that imply only negligence will not sustain an aiding and abetting claim”); Hesse v. Halpert, No. 97C4176, 1998 WL 111678 (N.D. Ill. Mar. 12, 1998) (applying criminal standard of aiding and abetting liability).
220. 224 F.3d at 188, 189.
221. For examples of courts’ exacting scienter requirements, see \textit{Nicholas}, 224 F.3 at 190 (concluding that even if the FCMs knew or should have known of the violations, they lacked the “intent to further” those violations); Tatum v. Smith, 887 F. Supp. 918, 920-21 (N.D. Miss. 1995), aff’d 83 F.3d 121 (5th Cir. 1996) (concluding that two FCMs had not aided and abetted their AP and IB even though the brokerage firms had provided the IB with forms, brochures, manuals, computer links, phone lines, and had allowed him to place orders with a clearing broker, because there was no evidence that they knew the IB was embezzling his client’s money); CFTC v. Commonwealth Fin. Group, Inc., 874 F. Supp. 1345, 1356-57 (S.D. Fla. 1994) (concluding that the president and sole shareholder of an FCM was liable as a controlling person under Section 13(b), but not under Section 13(a), because the CFTC had “failed to show” that the president had “knowingly associated himself with or participated in an unlawful venture”). See also Eastern Trading Co. v. Refco, Inc., 229 F.3d 617, 624 (7th Cir. 2000) (pointing out that there is no separate tort of aiding and abetting and that there is no general duty in tort law to report someone else’s fraud to the victim).
\end{footnotesize}
out on the FCM’s letterhead to current and prospective investors.\textsuperscript{222} The plaintiffs nevertheless failed to prove that the FCM knew of the scheme to defraud investors. Although the FCM was probably negligent, plaintiffs still had to prove the FCM’s guilty intent. Similarly, in Hesse v. Halpert & Co., the district court found that, while the FCM and AP were reckless in giving authority to an unlicensed CTA, the record suggested that the defendants had acted “purely to gain the benefits of business.”\textsuperscript{223} This pecuniary motive did not rise to the level of an intent to defraud. Similarly, in In re FSI Futures Inc., the CFTC stated:

\begin{quote}
The element of “knowing participation” in the primary wrongdoing, generally is the “critical focus” in the examination of an alleged aiding and abetting violation. Its requirements are quite specific and demanding. Negligent or reckless conduct \textit{is} insufficient to satisfy the knowing participation requirement.\textsuperscript{224}
\end{quote}

The CFTC appears to have had more success than have private litigants in establishing the scienter required for aiding and abetting liability in enforcement actions.\textsuperscript{225} For example, in In re Dunhill Financial Group,
In an order on settlement, a principal of a registered IB was found liable under Section 13(a) and (b) as an aider and abettor and a controlling person for violations under Section 4c(b) of the Act. The principal knowingly made misrepresentations to customers and “affirmatively concealed” the total amount of commissions charged for options trading as well as the impact the amount of commissions would have on the customers’ ability to generate profits from options trading. Despite the knowledge of his clients’ “dismal trading results,” the principal continued to approve and develop radio and internet advertisements in addition to “Special Reports” that misrepresented the likelihood of making profits by trading options on commodity futures.

In In re Commodities International Corporation, a principal of an advertising company that designed and executed marketing campaigns which identified potential clients for a registered CPO and CTA was not only found to have been an undisclosed principal but also to have aided and abetted the CPO in deceiving its customers. The CPO’s “formula for success” included charging annual, up-front management fees (between 37% and 40%) in addition to having a ratio of initial margin to net asset value of only 13.2% during the period studied. Consequently, customers would need to earn annual profits of nearly 70% in order to recoup the management fees charged. However, the record indicated that the scheme included misrepresenting the amount of pool assets that were actually placed at risk, failing to inform existing and prospective customers regarding the small percentage of pool assets that was actually placed at risk, and encouraging customers to purchase multiple units in order to generate higher management fees. Not only did the record reflect that the
principal did his “utmost” to make the CPO a successful enterprise, “he must have been aware that its formula for success was predicated on defrauding its customers.”

However, private litigants in some reparations cases have prevailed on their aiding and abetting claims. In Gemeinder v. Gartman, an account executive (“AE”) was found liable in a reparations proceeding for aiding and abetting an IB’s fraudulent solicitation because the AE intentionally misled customers into investing with the IB, thus attempting to earn additional commissions for himself. 228 Similarly in Ricci v. Commonwealth Financial Group, Inc., the reparations proceeding found that the two APs “worked closely together, knew of each other's wrongdoing, and intentionally assisted each other during the fraudulent account solicitation.” 229 Therefore, they aided and abetted each other's wrongdoing.

D. Substantial Assistance

While the substantial assistance prong of the aiding and abetting standard is typically easier to establish than intent, a recent district court case, Weber v. E.D.&F. Man International, Inc., held that a complainant must prove affirmative conduct in furtherance of the fraud for aiding and abetting liability to attach. 230 The court refused to find the FCM liable for the fraud committed by its customer despite evidence that the FCM (1) failed to investigate background information before permitting the account to be opened; (2) permitted the customer to act as a trading advisor; (3) supplied customer with new account forms; (4) neglected to inspect the customer's operations; (5) failed to disclose facts pertaining to the customer's previous sanctions and (6) refused to accept a wire transfer from a potential new customer, sending it instead to the fraudulent trading advisor without questioning why a potential new customer would wire money without first establishing an account. The court held that all of this conduct did not amount to affirmative action in furtherance of the customer's fraud. Thus, where a defendant is faced with allegations concerning its failure to act, it should find some comfort that aiding and abetting liability under those circumstances may be very difficult to prove.


E. Remedies

Civil litigants suing under Section 22 of the CEA or in a reparations proceeding under Section 14 may recover actual damages proximately caused as well as, where appropriate, punitive or exemplary damages in an amount up to two times the amount of actual damages.231 The CFTC may pursue broad sanctions232 for liability under Section 13(a) that may include permanent injunctions, cease and desist orders, suspension of registration, as well as civil fines and damages.233 The amount of the monetary penalty awarded is to be determined by the Commission, balancing the gravity of the violation with the appropriateness of the penalty.234

For example, in Global Minerals & Metals Corp., pursuant to an offer of settlement, Merrill Lynch was ordered (1) to cease and desist from violating and aiding and abetting violations of Sections 6(c), 6(d), and 9(a)(2) of the CEA; (2) fined a total amount of $15 million; and, (3) ordered to cooperate with the Commission in any investigation, civil litigation, or administrative matter related to the subject of the proceeding.235 Similarly in CFTC v. Avco Financial Corp., the CFTC sought a permanent injunction in addition to disgorgement, restitution, rescission and civil monetary penalties.236 While the court concluded that a permanent injunction was warranted, it declined to order restitution in addition to disgorgement and civil monetary penalties because the record was incomplete as to the total amount of trading losses suffered. Rather, the court stated that it declined to “arbitrarily choose” a restitution amount based solely on examples of trading losses.237 In another example of an offer of settlement, a floor broker in Constantine Mitsopoulos was (1) ordered to cease and desist from violating Section 4g of the Act and Rules 1.35(a-1) and 1.35(a-1)(2); (2) fined a civil monetary penalty in the amount of $20,000; and, (3) made subject to several conditions to her registration with the Commission for a period of four years.238

Because of the particularly egregious behavior noted in Dunhill Finan-

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231. 7 U.S.C. §§ 18(a), 25(a).
232. Aiding and abetting may also be punishable as a felony. 7 U.S.C. § 13(a)(5).
233. 7 U.S.C. §§ 9, 13c.
236. 28 F. Supp. 2d at 119.
237. Id. at 120.
cial Group, Inc., the Commission not only ordered the principal of the IB, found liable for his own fraud and for aiding and abetting the IB’s fraud, to pay restitution in the amount of up to $200,000, plus pre-judgment interest to the customers of the IB, it also ordered all contract markets to withdraw the principal’s trading privileges. The Commission noted that while an order of a civil monetary penalty and immediate payment of restitution would be appropriate, it did not impose such a remedy based on the financial condition of the principal.\textsuperscript{239} However, in Commodities International Corporation, the Commission revoked the CPO’s registration because its principal was subject to statutory disqualification for other unrelated violations. Furthermore, the Commission noted that the gravity of the violations involved necessitated substantial penalties. Thus, it imposed a civil penalty in the amount of $212,000 in addition to a cease and desist order and a twelve-month trading ban against the aider and abettor.\textsuperscript{240}

With respect to private litigants in reparations cases such as Gemeinder v. Gartmann, it was determined that the private litigant was entitled to recover the amount of loss that was “proximately caused” by the defendants’ violations. Because the defendants (account executives of the IB) were found to have aided and abetted the IB’s fraudulent solicitation, they were ordered to pay $48,390.12 in damages (the plaintiff’s losses in his first year of trading with the defendants amounted to $47,520.85) plus accrued interest and the $250 filing fee.\textsuperscript{241} Similarly, in Ricci v. Commonwealth Financial Group, the defendants were found to have aided and abetted each other’s wrongdoing in violation of Section 13(a) and thus were jointly and severally liable for fraudulent solicitation and having placed the private litigant’s funds at high risk.\textsuperscript{242} The defendants were ordered to pay reparations in the amount of $10,806 (actual, aggregate net losses on option purchases) plus interest.\textsuperscript{243}

VI. CONCLUSION

As shown above, there have been no major changes or developments

\textsuperscript{243} Id. at 43,441.
SECONDARY AND SUPERVISORY LIABILITY

in the caselaw since the Committee published the 1994 Article. The CFTC and the courts continue to interpret principal-agent liability under Section 2(a)(1) in a manner consistent with traditional agency principles—broadly and aggressively. No statutory or regulatory changes have altered the duty to supervise under Rule 166.3, although the nature of the inquiry has modestly expanded and may have implications for multi-national companies and their high-level executives with respect to operations failures in foreign branch offices. The trend of conservative application of Section 13(b) controlling person liability continues. The most notable development is the Seventh Circuit’s recognition of a private litigant’s right to pursue aiding and abetting claims under Section 22(a)(1). The applicable standard identified in the 1994 Article remains the same.

June 2001
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## NEW MEMBERS

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Lenora Boney Cleary Gottlieb Steen & Hamilton New York NY

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<td>Cleary Gottlieb Steen &amp; Hamilton</td>
<td>New York</td>
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## NEW MEMBERS

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<tr>
<th>Name</th>
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<th>Location</th>
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<tr>
<td>Changjian Shao</td>
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<tr>
<td>Jim Sheil</td>
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<td>Morgan Sheinberg</td>
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<tr>
<td>Ivan Smallwood</td>
<td>Sullivan &amp; Cromwell</td>
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</tr>
<tr>
<td>Melissa Solomon</td>
<td>444 E 52nd St.</td>
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<tr>
<td>Elene Spanokos</td>
<td>Skadden Arps Slate Meagher &amp; Flom</td>
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<td>Jill R. Sperber</td>
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<td>Carl Sussman</td>
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<td>Kristen Thompson</td>
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<tr>
<td>Kimberly C. Turina</td>
<td>One River Place</td>
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<td>Niko Velleux</td>
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<td>Scott Weiser</td>
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<td>Deborah S. Whang</td>
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<td>Odette J. Wilkens</td>
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<tr>
<td>Jessica Lynn Zellner</td>
<td>Kaye Scholer LLP</td>
<td>New York</td>
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## LAW SCHOOL STUDENT

<table>
<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Richard H. Agins</td>
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<tr>
<td>Aviges Armans</td>
<td>Paris XI, Sceaux</td>
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<tr>
<td>Andrew L. Baffi</td>
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<tr>
<td>Bradley R. Bailyn</td>
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<td>Lisa S. Ballard</td>
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<tr>
<td>Andrew S. Baron</td>
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<td>Christopher A. Blackman</td>
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<td>Veronica Eswift</td>
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<td>Dianna C. Galustian</td>
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<tr>
<td>Junko Ishibashi</td>
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### NEW MEMBERS

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<tr>
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<tr>
<td>Kristina Keleher</td>
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<td>Yu-Xi Liu</td>
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<td>Desiree A. Lovell</td>
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<td>Yoko Yamamoto</td>
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<td>Anne M. Zaneski</td>
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### GRADUATING LAW STUDENT MEMBERS CONVERTING TO RECENT GRADUATE MEMBERSHIPS

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<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Jim Andes</td>
<td>Cross River</td>
<td>NY</td>
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<td>D. Michael Anglin</td>
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<tr>
<td>Nilgun Arici</td>
<td>Huntington</td>
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<tr>
<td>Angel M. Aton</td>
<td>East Meadow</td>
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<tr>
<td>Jessica Bagner</td>
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<tr>
<td>Erena Baybik</td>
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<td>David Case</td>
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<tr>
<td>Angela DeCespedes</td>
<td>Boston</td>
<td>MA</td>
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<tr>
<td>Olivier De Cource</td>
<td>New York</td>
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THE RECORD

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NEW MEMBERS

Henry C. Dieudonne, Jr. New York NY
Gloria Dunn New York NY
Joan Erskine Brooklyn NY
Joy Fallek Brooklyn NY
Brian Fortunato New York NY
Juan C. Gonzalez Great Neck NY
Scott Goodman Albany NY
Molly Graver Flushing NY
Liz Grisales Woodhaven NY
Vivek Gupta New York NY
Michael Hart Brooklyn NY
Brian Levine New York NY
Alexander Lumelsky New York NY
Patricia Minoux New York NY
Mary F. Mooney New York NY
Mary Jane O’Connell New York NY
Diane Robertson Brooklyn NY
Richard Rodriguez Jamaica Estates NY
Adam J. Rosen Brooklyn NY
Paulino Salzar New York NY
Simon B. Sanchez Brooklyn NY
Charles Sant’Elia Mamaroneck NY
Cheryl Santucci New York NY
Edward Sapone New York NY
Jennifer Sator Newark NY
Danielle I. Schaefer New York NY
Simone L. Sterling St. Albans NY
Robert Stinson Brooklyn NY
Roy L. Sturgeon Valparasio IN
Leonard Townsend New York NY
Jennifer Werdell New York NY
Johanna S. Zapp New York NY