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Of Note

IN JULY, THE ASSOCIATION, THE NEW YORK COUNTY LAWYERS’ ASSOCIATION and the New York Law Institute announced an historic agreement that will fundamentally change the way library services are provided to the New York Bar.

The agreement, which takes effect immediately, has two components. It provides that members of NYCLA and ABCNY, for the first time ever, will have free access to the law libraries of both associations. In addition, the participation of all three libraries in an interlibrary loan arrangement will give New York attorneys unprecedented access to the three associations’ 1.1 million volumes.

“This historic agreement marks a fruitful cooperation between the Association of the Bar of the City of New York and the New York County Lawyers’ Association,” said Association President Evan A. Davis. “The members of both associations will benefit by being able to use each other’s library facilities.”

The term of the agreement is one year, to allow each of the organizations to assess its effects and move toward what is hoped will be a more complete integration of library services in the future.

*

IN JUNE, THE ASSOCIATION’S COMMITTEE ON MINORITIES IN THE Courts adopted a resolution which notes that while Hispanic-Latinos comprise fifteen percent of the State’s population and twenty-five percent of New York City’s population, there is no Hispanic-Latino Justice on the Appellate Division. The Committee urged that a qualified Hispanic-Latino be appointed to serve as a justice of the Appellate Division to preserve and promote diversity in the judiciary.

The resolution was sent to Gov. George E. Pataki, who has the authority to appoint Supreme Court Justices to the Appellate Division.

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THREE OUTSTANDING MINORITY STUDENTS AT NEW YORK AREA LAW schools have been awarded Thurgood Marshall Fellowships for the 2001-2002 academic year. These students will have the opportunity to work
with the Association to advance the goals of civil rights and equal justice. Fellowships were awarded to: Bernice Polanco, Fordham University School of Law; S. Omell Richards, Brooklyn Law School; and Subha Dhanaraj, Fordham University School of Law.

Ms. Polanco will assist the Association’s Robert B. McKay Community Outreach Law Program; Ms. Richards will direct her work toward issues facing the Association’s Civil Rights Committee; and Ms. Dhanaraj will work with the Association’s SHIELD Program.

The fellowships are funded by the Orison S. Marden Lecture Fund and are open to second and third year minority law students from New York area law schools. Fellows were nominated by their schools and selected by the Association’s Committee on the Thurgood Marshall Fellowship Program (Daniel C. Richman, Chair).

IN AUGUST, THE ASSOCIATION HOSTED A RECEPTION FOR THE OVER 40 participating students in the 2001 Thurgood Marshall Summer Law Internship Program. Association President Evan A. Davis made welcoming remarks, and Hon. George B. Daniels, U.S District Court Judge, Southern District of New York, addressed the students. The program provides paying summer jobs for New York City high school students—all of whom have shown an interest in the law—in a variety of legal environments such as law firms, corporate law departments and law schools. This year’s activities included the opening and closing receptions, a “Free Night” for socializing, tours of Columbia University Law School and The Legal Aid Society, a movie night, and a college application workshop. The program is sponsored by the Committee on the Thurgood Marshall Summer Law Internship Program (Alfreida B. Kenny, Chair).

IN JULY, THE ASSOCIATION HOSTED A PANEL DISCUSSION, “MULTICULTURAL Women in the Law: Managing Your Career,” an evening event which attracted close to 200 female lawyers from across the city. The event, co-sponsored by the Association’s Committee on the Recruitment and Retention of Lawyers (Mary Jean Potenzione, Chair) and Catalyst and the Association of Black Women Attorneys, focused on several issues, including how to develop mentoring relationships; how to create a balance between work and outside activities; acquiring the best work assignments, skills and opportunities; and how to tell if it is time to move on.
OF NOTE

IN JULY, OVER 250 WOMEN ATTENDED “WHAT IT’S REALLY LIKE TO Practice Law in NYC as a Woman,” held at the Association. The annual program, co-sponsored by the Committee on Women and the Law (Susan Kohlmann, Rosalyn Richter, Co-Chairs) and the Committee on Law Student Perspectives (Jennifer Mone, Chair), and held in conjunction with the New York Women’s Bar Association’s Committee to Advance Women in the Profession, focused on the importance of networking, finding mentors, and developing a career plan. Panel members also spoke about obstacles women lawyers continue to face in the profession such as gender insensitivity and special problems facing single women, minority women and lesbian.

THE ASSOCIATION RECENTLY FILED AN AMICUS BRIEF WITH THE NEW York State Court of Appeals in the matter of Polonetsky v. Better Homes Depot, Inc. written by the Committee on Consumer Affairs (Susan Kassapian, Chair). The case involves an unfair trade practices action brought by the New York City Department of Consumer Affairs against a company that buys and sells one and two family homes in New York City and engages in ancillary services. The brief seeks to reverse a First Department decision that real estate sales are not covered by the plain language of the City’s unfair trade practices law. The Committee argues that the language is not unambiguous, and thus the Consumer Protection Law should be given the broad interpretation that is justified by the legislative history and the agency’s interpretation of its injunction should be upheld.


CORRECTION: Due to a typesetting error the incorrect Chair and Secretary of The Committee on Trademarks and Unfair Competition were listed in the last issue of The Record, Vol. 56, No. 2. Brad I. Parker and Lauren J. Mandell are Chair and Secretary, respectively, of the Committee. We apologize for the error.
Recent Committee Reports

Federal Courts
Letter to US Court of Appeals for the Second Circuit Regarding the Proposed Local Rules of the Second Circuit

Letter to Peter McCabe, Secretary to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Concerning Drafting of Proposed Amendments to the Federal Rules of Civil Procedure

Letter to the Third Circuit Task Force Regarding Auctions and Other Means of Appointing Counsel for Plaintiffs in Class Actions

Foreign & Comparative Law
Comment Paper Regarding the Draft Convention on Assignment of Receivables

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

Government Ethics
Report on Judicial Campaign Finance Reform

Immigration and Nationality Law
Letter to Congress Urging Support of a Permanent Restoration of Section 245(i) of the Immigration and Naturalization Act Which Would Allow Eligible Immigrants to Apply for Their Green Cards Without Leaving the United States

International Environmental Law
Letter to Congress Supporting the Consumer's Right to Know Bill Regarding Genetic Engineering of Foods
International Human Rights
Letter to the President of Zimbabwe Regarding the Recent Deterioration of the Independence of the Judiciary and of the Rule of Law in General
Letter to the President of the Islamic Republic of Iran Requesting that the President Exercise his Power of Clemency to Pardon the Ten Iranian Jews Who Were Convicted on Charges of Espionage

Investment Management Regulation
Letter to the Division of Investment Management of the SEC Commenting on Fair Value Pricing and Related Valuation Issues Under the Investment Company Act of 1940

Council on Judicial Administration
Letter to the State Legislature Supporting the Passage of S.4325/A.7341 Calling for an Increase in Salaries for Housing Court Judges

Labor and Employment Law/Sex and Law
Letter to New York State Assemblywoman Catherine Nolan Supporting the Birth and Adoption Unemployment Compensation Experiment
Letter to Congresswoman Carolyn Maloney Supporting the Breastfeeding Promotion Act

Legal Education and Admission to the Bar
Letter to Chief Judge Judith S. Kaye and the Chair of the New York State Board of Law Examiners Expressing Concern Regarding the Proposal to Increase the Passing Score on the New York State Bar Examination

Legal Issues Pertaining to Animals
Proposed State Legislation to Create a New York State Office of Advocate for Wildlife
Report on S.2576/A.1728 An Act to Amend the Environmental Conservation Law in Relation to the Prohibition on Canned Shoots
Report on A.5482 An Act to Amend the Real Property Law in Relation to Discrimination Against Certain Tenants Who Own or Keep Pets
Report on A.5301 An Act to Amend the Agriculture and Markets Law in Relation to the Adoption of Abandoned Animals by Veterinarians
Recent Committee Reports

Lesbian and Gay Rights/Sex and Law/Civil Rights
Marriage Rights of Same Sex Couples in New York

Lesbian and Gay Rights/Sex and Law
Report on S.720/A.1971 An Act to Amend the Executive Law, the Civil Rights Law and the Education Law in Relation to Prohibiting Discrimination on the Basis of Sexual Orientation

Minorities in the Courts
Resolution Recommending that a Qualified Hispanic-Latino Be Appointed to the Appellate Division

New York City Affairs
Report on A.1775-A An Act to Amend the Municipal Home Rule Law in Relation to any Question or Questions Submitted to Qualified Electors of a City by a Charter Commission or Charter Commissions

Report on Intro. No. 880 In Relation to Repealing Term Limits for Council Members

Letter to Speaker Peter Vallone Regarding Intro. No. 910, Regarding Submissions of Information by the NYC Police Department to the City Council

Non-Profit Organizations
Report on S.5218 An Act to Amend the Not-For-Profit Corporations Law in Relation to Certain Investment Quorum Requirements, Interested Directors and Officers and Dissolution of Not-For-Profit Corporations and to Repeal Certain Provisions of Such Law Relating Thereto

Report on S. 5173 An Act to Amend the Not-For-Profit Corporations Law in Relation to Indemnification of Directors and Officers and to Repeal of Section 721 of Such Law Relating Thereto

Professional and Judicial Ethics
Formal Opinion 2001-3: Limiting the Scope of an Attorney’s Representation to Avoid Client Conflicts

State Courts of Superior Jurisdiction
Report on the Revision of the Rules Governing Affidavits of Actual Engagement
RECENT COMMITTEE REPORTS

Trademarks and Unfair Competition
The Use of UDRP and the ACPA to Combat Cyberpiracy

Trusts, Estates & Surrogate’s Courts
Letter to New York State Senator James Lack Commenting on the New York State Bar Association Proposal to Revise EPTL 2-1.11

Report on S.2938 An Act to Amend the Surrogate’s Court Procedure Act in Relation to Allowing Certain Expenses to Attorneys in Addition to Compensation for Legal Services

Report on A.4440 An Act to Amend the EPTL in Relation to a Waiver of a Right of Election by a Surviving Spouse

Report on S.794 An Act to Amend the EPTL in Relation to the Rule Against Perpetuities

Proposed Draft Legislation—An Act to Amend the Surrogate’s Court Procedure Act in Relation to Statutory Rates for Attorney’s Fees in Estate Administration

Copies of any of the above reports are available to members by calling (212) 382-6624, or by e-mail, at kbopp@abcny.org.
Welfare Reform in New York City: The Measure of Success
The Committee on Social Welfare Law

INTRODUCTION

The most recent version of welfare reform in New York City, dating back to the early days of the administration of Mayor Rudolph Giuliani, has been repeatedly characterized as an unqualified success. During that time, the City’s public assistance rolls have fallen by more than half, from 1.1 million in July 1995 to 497,113 in July 2001, with the decline attributed to economic prosperity and policies enacted by the mayor’s Human Resources Administration that restructured application procedures and created stringent work requirements.

A closer look at conditions affecting the city’s poor puts into question the actual success of these measures. As welfare reform was begun, food stamp participation decreased by twenty-six percent between January 1996 and March 1999. At the same time, requests for emergency food

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1. Throughout this report, the term “welfare reform” is used to denote legislation generated by the federal Personal Responsibility and Work Reconciliation Act and subsequent New York State legislation. The Committee does not believe that true “reform” has taken place under the strict definition of the word: to make better by removing faults and defects (Webster’s New Universal Unabridged Dictionary).

aid increased from January 1998 to January 1999 by thirty-six percent: 73,832 people were turned away from emergency food aid, 43,766 of them children, or an estimated 1,400 children per day.3

At the same time, use of the city’s homeless facilities far exceeded their occupancy, sheltering over 6,000 families with 15,000 children on any given night.4 In addition, litigation against the city by advocates for the poor has exposed important legal deficiencies affecting due process, civil rights, and equal protection.5

This report presents (1) an overview of welfare reform, tracing developments from the federal legislation of 1996 and state legislation adopted the following year, to welfare policies implemented in New York City; (2) a review of data from numerous studies by public and private agencies;6


6. In addition to original research, the Committee used as a resource Downside: The Human Consequences of the Giuliani Administration’s Welfare Caseload Cuts, Timothy Casey, Federation of Protestant Welfare Agencies (November 2000), a discussion of 34 studies conducted in New York City.
and (3) some alternative poverty reform proposals for consideration by future New York City administrations.

I. AN OVERVIEW OF WELFARE REFORM
   A. Federal Welfare Reform

   At the federal level, efforts to revise the public assistance system culminated with the enactment of the Personal Responsibility and Work Opportunity Act (PRA), which was signed into law in August 1996 by then-President Clinton. The PRA abolished Aid to Families with Dependent Children (AFDC), the national program for children and families that had been created by the Social Security Act of 1935, and replaced it with Temporary Assistance to Needy Families (TANF). TANF differs from AFDC in four key ways.

   First, AFDC funding created an entitlement for eligible families to receive welfare payments and reimbursed the state for a certain percentage of the expenditures; TANF has block grant funding, under which a state gets a fixed dollar amount of federal funding. The block grant funding makes benefit increases less likely because the state must pay 100 percent of the cost of any expansions.

   Second, TANF eliminates families’ federal statutory entitlement to receive aid even when they qualify for public assistance under prescribed need standards. States may also deny aid to children as a sanction for parental misconduct, which AFDC had generally forbidden. 7

   Third, TANF is time-limited, restricting a family’s right to receive federal aid to a maximum cumulative total of five years (60 months). The cumulative total includes not only time receiving welfare benefits, but also childcare and other TANF-funded subsidies that are designed to support families who are transitioning from welfare to work. Starting in 2001, hundreds of thousands of needy families throughout the nation will begin exhausting their federally funded TANF benefits and face destitution unless states are willing to aid them with state funds.

   Fourth, TANF work rules tend to discourage education and training and encourage assignment to such activities as job search and workfare. 8

   In addition to repealing AFDC, the PRA discontinued federally funded

7. New York State has not taken this option thus far, although the Giuliani administration and the governor have annually urged the legislature to do so.

8. Workfare is defined as tasks to which welfare recipients are assigned, not for wages, but as a condition of receiving their public assistance grant.
benefits for most legal immigrants making many ineligible unless they become naturalized citizens, a process which usually requires a waiting period of years, among other requirements. These exclusions have had a harsh impact on communities with large immigrant populations, such as New York City where about forty percent of the population is foreign-born.9

Welfare reform is again on the federal agenda because TANF has a sunset provision under which the program will expire in 2002 unless reauthorized by Congress. Given the fact that the transition to work has not been successful for a large group of former recipients, the expiration of TANF presents another critical juncture in the evolution of public assistance policies affecting the poor.10

B. State Welfare Reform

Welfare reform in New York State can be distinguished from reform in many other states because Article XVII of the New York State Constitution requires the state to care for needy New Yorkers. While most other states have no state-funded general assistance programs, New York law mandates continued welfare benefits for all needy families and individuals, including those who have lost their eligibility for federally funded benefits.11

The state responded to the PRA with the Welfare Reform Act of 1997.12 This legislation changed the names of the two components of New York’s welfare system from AFDC and Home Relief to Family Assistance (FA) and Safety Net Assistance (SNA). FA generally covers households with children (the TANF population) and SNA covers households without children. The eligibility criteria and related rules in both programs are similar.

11. Article XVII has been judicially construed to mandate that the state cannot deny aid to needy New Yorkers who comply with the eligibility requirements, but broad discretion is left to the legislature to determine the level of aid. Indeed, the level of the welfare grant has been unchanged since 1990. Thus, the $577-benefit-level for a family of three in New York City is now less than half the federal poverty level.
While recognizing that the state’s constitution prohibits arbitrary time limits on assistance, the governor and the legislature mandated that recipients should move to a more restrictive benefits program. This proposal provided for a transfer from cash aid to “non-cash” aid after a household had received FA for five years or SNA for two years, with benefit redemption for goods and services through an electronic debit card system. The state planned to contract with Citicorp Electronic Financial Services, Inc. to produce the electronic benefits transfer (EBT) debit cards and manage the system. For those receiving “non-cash” aid, welfare would pay rent and utilities directly to the landlord and utility company and issue a small cash allowance.13

Four years later, the non-cash plan (never implemented) was withdrawn by the Pataki administration following concerns by the state comptroller’s office about the failure to secure agreement from sufficient merchants to make it operational. A study by the state attorney general’s office also discovered that, under the current system that uses EBT cards to dispense regular welfare benefits, ninety percent of businesses in the city’s low-income neighborhoods were refusing to accept the card to retrieve cash or were applying a surcharge for every transaction.14 State officials and advocates for the poor were also leery of enlarging on the Citicorp contract, based on its poor performance for the past two years in the regular cash benefits system.15

At present, no revised program for implementing Safety Net Assistance has been announced by the Pataki administration.

The new state work rules essentially track the more restrictive federal pattern. For example, exemptions from the work requirements are primarily limited to people with serious mental or physical disabilities and parents caring for a child less than twelve months old. The new rules also give localities substantial discretion over the types of activities to which work program participants will be assigned.

C. City Welfare Reform

Because the incidence of poverty is much higher in the city than in the rest of the state, the city has about seventy percent of the state’s wel-

13. Exemptions to the two-year limit on cash may be applied for based on a disability finding unless alcohol or substance abuse is indicated.


15. Id.
fare recipients and pays about seventy percent of welfare's total local share, even though the city accounts for only about forty percent of the state's population. In both the city and the state, over half of welfare recipients are children.

New York is one of the minority of states in which welfare is still administered by local government, rather than by state government. New York City and each of the counties outside the city are responsible for administering welfare in the local area and for paying roughly twenty-five percent of the overall cost. As welfare's gatekeepers, local governments have a significant impact upon the size and well being of the local population.

Welfare reform in New York City actually began early in the Giuliani administration, well in advance of the 1996 federal legislation, and intensified with the changes in federal and state law and the arrival of Jason Turner as commissioner of the Human Resources Administration. Their policies, which launched a dramatic reduction in the number of persons receiving assistance, have been characterized by an ever-increasing number of administrative obstacles and an overarching emphasis on workfare as the primary activity.

State welfare policy gives local governments great discretion in assigning welfare recipients to work program activities. Under the Giuliani administration, HRA has placed the highest priority on assigning recipients to the Work Experience Program (WEP) and imposing stringent sanctions on those who fail to comply. WEP requires recipients to “work off” their cash and food stamp benefits at a government or non-profit site, with the hours of work based on the minimum wage rather than the prevailing wage for the activity performed.

While an unprecedented upsurge in the economy reduced the need for assistance, the caseload reduction far exceeded the reduction in poverty. It remains too early to judge the ultimate impact of welfare reform, but life for many poor families, those who continue to receive public assistance and those who have left the rolls, remains a constant struggle, too often with no improvement in their material well being.  

Full utilization of welfare benefits and support programs, in con-

16. Snapshots of America's Families, The Urban Institute (January 1999), based on over 44,000 interviews, found fifty-four percent of low-income children suffering food shortages; young child poverty rates increased by twenty percent since 1979, with a disproportionate share in the three most populous states: California, Texas and New York; forty-two percent of all American children under age six living in poverty, i.e., below the federal poverty line of $12,802 for a family of three.
II. THE REALITY OF NEW YORK CITY'S WELFARE REFORM

Mayor Giuliani has stated repeatedly that his administration’s goal is to eliminate welfare. But a close look at the harsh conditions faced by the poor in New York City belies the administration’s assertion that a reduction in the caseload may be equated with the successful implementation of welfare reform.

Although the city provides little data on what happens to individuals when their public assistance is terminated, numerous independent studies conducted by public and private organizations have concluded that reform has made life for those living at or below the poverty line far worse.

This section summarizes data collected since the implementation of welfare reform, discussing administrative diversion, disinformation and discrimination, the administrative hearing process, the Work Experience Program, and privatization. The studies conclude that hunger and homelessness remain high despite an unprecedented economic boom and the lowest unemployment rate in a generation.

A. Diversion, Misinformation and Discrimination

New York City’s Human Resource Administration (HRA), the agency charged with implementing welfare reform, has adopted aggressive, agency-wide diversion and misinformation policies that both discourage individuals from applying for public assistance and encourage those able to negotiate the process to discontinue that assistance as soon as possible.

1. Diversion. In 1997, Mayor Giuliani brought Jason Turner to New York from Wisconsin, where he had been credited with dramatically re-
ducing the welfare caseload, to become Commissioner of HRA.\textsuperscript{20} One of his first major initiatives was to begin the conversion of the city's "Income Support Centers," which had provided primary access to a variety of welfare-related services, into "Job Centers," designed to emphasize workfare requirements and drastically reduce public assistance rolls.

The Job Center initiative generated widespread controversy, prompted investigations by two federal agencies, and was the target of federal litigation, Reynolds v. Giuliani.\textsuperscript{21} The Reynolds plaintiffs claimed that staff at the Job Centers were preventing people from applying for Medicaid, food stamps, cash assistance, and emergency assistance in violation of federal and state statutory and constitutional law. A District Court judge agreed,\textsuperscript{22}

(a) finding that New York City Job Centers illegally discourage destitute individuals and families from applying for Food Stamps, Medicaid and cash assistance and deny them such assistance;  
(b) enjoining the city from converting any more Income Support Centers to Job Centers; and (c) ordering city officials to develop a corrective action plan, to comply with the law, and to continue an informal process to address individual cases of urgent need.\textsuperscript{23}

The injunction of the conversion of the Income Support Centers to Job Centers was lifted two years later in March 2001, but the remaining provisions of the injunction continue.

Job Centers operate under a policy called "diversion," pursuant to which applicants are dissuaded from filing applications. Those who do apply are required to participate in a full-time schedule of job search and other activities, well before any benefits have been provided. The basis for the diversion policy and for many other features of the Giuliani-Turner governance of HRA\textsuperscript{24} (repeatedly articulated by Commissioner Turner) is an attempt to create a crisis in welfare recipients' lives, precipitating such

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{20} The Human Resources Administration is the local social services agency responsible for administering New York's cash assistance, food stamp, and Medicaid programs.
  \item \textsuperscript{21} Reynolds v. Giuliani, supra.
  \item \textsuperscript{22} Id., Order and Decision (January 25, 1999).
  \item \textsuperscript{24} Hunger Is No Accident: New York and Federal Policies Violate the Human Right to Food, New York City Welfare Reform and Human Rights Documentation Project (July 2000).
\end{itemize}
\end{footnotesize}
dire prospects as hunger and homelessness, so that they will be forced to seek some alternative to public assistance.\textsuperscript{25}

The city diverts individuals in numerous ways. HRA trains workers to discourage potential applicants from pursuing benefits by insisting that they seek assistance from virtually any conceivable alternative, from friends, to family, to churches, to credit cards.\textsuperscript{26} These “up-front” strategies are particularly damaging in that, prior to the filing of a completed application, individuals are unlikely to be aware of their procedural rights. Applicants who are successfully “diverted” do not appear in any statistical compilations and are not provided with notice of their right to challenge agency findings, such as would be received following a formal rejection of an application.

In the event that an individual succeeds in filing an application for public assistance, HRA requires applicants to immediately begin a rigorous regimen that includes daily appointments at the welfare office to comply with various work requirements. Interviews at other locations are also required. The first is Eligibility Verification Review (EVR) in Brooklyn, followed by an EVR home visit during which the city again verifies information the applicant presented in the initial application interview.

Families with children are then sent to the Child Support Enforcement Unit at another location in Brooklyn where they are required to provide information about paternity and child support, irrespective of their domestic situations. Failure to comply results in denial of benefits to the custodial parent, even though the parent’s genuine inability to obtain requested information should not result in this sanction.

Individuals with conditions that might limit their ability to work receive multiple appointments for medical or psychiatric evaluations at Health Services Systems (HSS), a private, for-profit agency under contract with the city.

If applicants miss an appointment or fail to comply with a directive from any of these offices, they are required to begin the entire application process anew.

A foreseeable consequence of this diversion policy is that thousands of eligible individuals are improperly denied assistance. An independent study in July 2000 reported that over forty percent of individuals inter-

\textsuperscript{25} Commissioner Jason Turner, Address at the Nelson A. Rockefeller Institute of Government (November 1998).

\textsuperscript{26} Testimony before the General Welfare Committee, New York City Council (April 30, 2001).
viewed as they were applying for public assistance were re-applicants whose earlier applications had been denied. 27 Fifty-eight percent of those applicants who had applied for public assistance two or more times had never been informed of their right to request an administrative fair hearing. 28 As noted above, the Reynolds lawsuit had exposed the same problem in 1998.

2. Withholding Information. The city also engages in a misinformation campaign that discourages eligible public assistance applicants and recipients from receiving the benefits to which they are entitled, regardless of the circumstances in which they live. 29 The impending five-year time limit on public assistance benefits mandated by TANF legislation will begin to affect recipients in December 2001. This cessation of federal eligibility has allowed the city to implement a damaging misinformation campaign in its effort to reduce the number of persons receiving public assistance: HRA systematically fails to inform and misinforms low-income New Yorkers about their eligibility for the state's Safety Net Assistance-Non-Cash program, which will provide benefits for those who reach the TANF time limit. 30

Misinformation about time limits is conveyed by instructions to welfare caseworkers and reinforced by misleading notices and posters hanging on welfare center walls. 31 Notices are sent to welfare recipients stating that their time limits for Cash Assistance will expire this year and inviting them in to discuss “how you plan to manage your household expenses once your limits for Cash Assistance expire.” The notice simply fails to inform clients that the state will continue to provide benefits for as long as the client is eligible.

Likewise, the city does not provide applicants and recipients with information regarding their right to childcare, a critical component of humane and effective welfare-to-work strategies. 32 In fact, the city has a

27. Hunger Is No Accident, supra.
28. Id.
29. See Testimony, General Welfare Committee, supra. This phenomenon is perhaps most noteworthy with regard to the arrival in December 2001 of the five-year time limit for those recipients who have been receiving Family Assistance since the adoption of the PRA in 1996. Approximately 46,000 New York City families will face federal welfare cutoffs. "As Welfare Deadline Looms, Answers Don't Seem so Easy," New York Times (June 25, 2001); "Lowest Welfare Levels Since 1966," New York Times (July 7, 2001).
30. Id.
31. Id.
32. Nowhere to Turn: New York City’s Failure to Inform Parents on Public Assistance About...
legal obligation to assist parents in finding appropriate, available childcare in order to assign them to WEP programs.\textsuperscript{33}

A study completed in 2000 found that almost half of the parents surveyed had been threatened by their caseworkers with sanctions if they did not get childcare. More than half did not receive the mandatory assistance from their caseworkers in locating such care, leaving most to rely on informal care or risk improper sanctions. And while the law entitles parents to formal childcare in a licensed preschool or childcare program when appropriate, a study of New York City’s welfare childcare policies found ninety-five percent of parents surveyed were not told by their caseworkers that they would be exempted from sanctions if they could not work because they did not have childcare, despite federal, state and city policies that require that this information be given to parents.\textsuperscript{34}

3. Discrimination. Although the city’s diversion policy results in the violation of the rights of the poor in general,\textsuperscript{35} the discrimination is particularly harsh against vulnerable populations, including those (1) with mental disabilities, (2) living with HIV and AIDS, (3) fleeing domestic violence, (4) with substance abuse problems, and (5) with limited literacy and English proficiency.

Persons with Mental Disabilities. Reports on the mental status of welfare recipients indicate that very few individuals make it through the bureaucracy of the application process, which requires verification of housing status, citizenship status, past employment, family composition, and medical history. To obtain an exemption from WEP, applicants must obtain current supporting documents from treating health practitioners for submission to Health Services Systems, an agency under contract with HRA to conduct medical and psychiatric screening of those claiming disability status. Without Medicaid, clients are frequently unable to obtain treatment or reports for extended periods of time and are therefore unable to substantiate their disabilities.

A recent study on depression found that forty-two percent of heads...
of households receiving TANF meet the criteria for clinical depression, more than three times the national average. In surveying the homeless population, researchers for Better Homes Fund found that forty-five percent of women in shelters suffer from major depression and more than one-third have post-traumatic stress disorder. New York City’s public assistance system is not equipped to recognize applicants’ mental disabilities or provide appropriate accommodations for those who suffer from such conditions. Without the support of family, friends, and advocates, persons with such disabilities and their children are likely to continue to be at risk for loss of assistance.

Persons Living with HIV and AIDS. After taking office in 1994, Mayor Giuliani sought to eliminate the city’s Division of AIDS Services and Income Support (DASIS), a unit within HRA that was established to assist those welfare applicants and recipients living with AIDS to access and maintain their public assistance benefits. Public protest and litigation thwarted the mayor, but the struggle continues.

In Hernandez v. Barrios-Paoli, advocates challenged HRA’s imposition of Eligibility Verification Review (EVR) on DASIS clients. Under EVR, clients were required to travel to Brooklyn for a second interview after their initial application and submit to an unscheduled home visit; this required them to remain in their homes for days at a time, conflicting with scheduled medical appointments. Unless and until clients complied, their benefits were interrupted, delayed, or discontinued. In October 1999, the New York Court of Appeals, in a unanimous decision, ordered EVR discontinued for DASIS clients, finding that “investigations for DASIS clients contravene one of the intended purposes of Local Law 49: to ease unnecessary administrative burdens for public assistance applicants suffering from clinical/symptomatic HIV illness or AIDS in New York City.”

In Henrietta D. v. Giuliani, a class of 25,000 DASIS clients alleged that the city and state, through DASIS, systematically failed to accommodate the disabilities of DASIS clients by not providing timely subsistence benefits. After five years of litigation and a bench trial, the Court found that the city and state were “chronically and systematically failing to

39. Id.
provide plaintiffs with meaningful access to critical subsistence benefits and services, with devastating consequences.” 41 The judge ruled that the evidence at trial “and defendants own data painted a picture of an agency that routinely fails to provide access, meaningful or otherwise, to its clients.”42

As set forth in Henrietta D., the city did not meet the legal time frame in providing DASIS clients with benefits in thirty-three percent of the cases, and up to forty-five percent at some centers. “In practical terms,” the judge, “this means that thousands of indigent New Yorkers living with AIDS stand an almost fifty-fifty chance of having their rights violated by this agency, rights to critical subsistence benefits for which they have been determined fully eligible.”43

Similarly in Hanna v. Turner,44 petitioners challenged the city’s violation of Section 21-128(b) of the New York City Administrative Code (upon which DASIS is based), which requires the city to ensure the provision of medically appropriate transitional and permanent housing for eligible persons with clinical/ symptomatic HIV illness or with AIDS. DASIS staff routinely denied immediate housing to recently hospitalized clients, regardless of inclement weather conditions.45 Throughout the litigation, the city asserted that it was permitted twenty-four hours from the time of the request to provide housing for this homeless, medically needy population.

In November 1999, the New York Supreme Court required that the city comply immediately with all terms of the provision. However, as recently as June 2001, the court cited the Giuliani administration for contempt in failing to do so, stating that the city had “repeatedly violated [the] 1999 court order that it provide medically appropriate transitional housing for people with AIDS.”46

Persons with Domestic Violence Issues. The TANF Family Violence Option requires HRA to screen welfare applicants and recipients for domestic abuse issues and provide victims with necessary assistance, including access to services and an exemption from WEP and other requirements. However, a 2000 survey reports that HRA fails to screen clients, inform victims of available services, or refer self-identified clients for services.47

41. Id.
42. Id.
43. Id.
45. Id.
47. Dangerous Indifference: New York City’s Failure to Implement the Family Violence
Commissioner Turner, in an address at the Rockefeller Institute, accused women of pretending to be victims in order to obtain exemptions from obligations, leading advocates to believe the administration encourages caseworkers to ignore the Family Violence Option and leaves families to continue to suffer from domestic abuse. Because a significant percentage of women receiving welfare are victims of domestic violence and ninety-two percent of mothers in homeless shelters have been sexually or violently abused, such an approach constitutes a major impediment to the discharge of legally mandated public assistance.

Persons with Substance Abuse Problems. People with drug and alcohol problems constitute one of the most difficult segments of the welfare population. HRA’s efforts to address substance abuse issues have often disregarded the rights of the recipients and ignored the judgments of treatment providers and professionals. For example, the city’s plan to search Medicaid payment records for evidence that welfare recipients had in the past sought drug or alcohol treatment was attacked by a New York Times editorial, decrying the violation of federal confidentiality laws. Public criticism terminated the initiative, but people with substance abuse problems continue to face numerous obstacles in negotiating the welfare system. Perhaps most disturbing, HRA has adopted its own procedural guidelines to which treatment providers must adhere as a condition of receiving HRA referrals. Such policies as characterizing relapse as non-compliant behavior, mandating treatment for all relapses, using untrained HRA staff to oversee the transfer of treatment clients between different levels of care, and widespread use of urinalysis were challenged by the New York State Association of Alcoholism & Substance Abuse Providers, ultimately resulting in some modification of these punitive actions.
Nevertheless, HRA’s priority of moving recipients into work activities and off the welfare rolls poses a constant challenge and threat for those in need of treatment. Although state law suggests that treatment can be mandated only for those recipients found unemployable by reason of their substance abuse problem, HRA routinely assigns recipients to both treatment and work activities. For some percentage of the affected population, this may be appropriate, but for many others, it ensures that they will be sanctioned for alleged non-cooperation.

Despite the fact that substance abuse forms one of the greatest barriers to employment, HRA has yet to develop practical and humane treatment programs that support full recovery in welfare recipients, preferring to rely on punitive measures that do not move clients to functional independence.

Persons with Literacy and Language Issues. In October 1999, following an investigation in response to advocate complaints, the U.S. Department of Health and Human Services found that New York City welfare offices regularly fail to provide adequate language assistance to public assistance applicants and recipients who have limited English proficiency (LEP), resulting in the improper denial of public assistance.

Those who do not speak either English or Spanish are particularly disadvantaged. Even those who speak Spanish reported significant problems when communicating with HRA workers. Another survey found that less than ten percent of South East Asian adults and their children received translation services when they need them, and forty-eight percent believe that their public assistance grants were improperly reduced solely because of language barriers.

Because the city denies necessary translation services, children of LEP parents are compelled to translate for their parents at welfare centers. Over eighty-six percent of the children interviewed for the same survey

John Coppola, Executive Director, New York State Association of Alcoholism & Substance Abuse Providers (November 19, 1999).

54. Social Services Law §132(4)(c).

55. Decision in Docket Number 02-99-3130, U.S. Department of Health and Human Services, Office of the Secretary, Office for Civil Rights, Region II (October 21, 1999).

56. Id.

57. System Failure: Mayor Giuliani’s Welfare System is Hostile to Poor and Immigrant New Yorkers, Make the Road by Walking (April 1999).


59. Id.
admitted that they had missed school so that they could accompany their parents to the welfare office. As damaging to children as this practice is in general, it creates special problems when the LEP client is asked to divulge sensitive information such as HIV/AIDS or domestic violence particulars as a prerequisite to obtaining benefits.

The failure to accommodate LEP clients extends to the hearing impaired community, as well, when welfare offices rarely provide translators proficient in American Sign Language and do not provide auxiliary aids and services to the hearing-impaired, thus denying disabled clients the opportunity to effectively communicate with HRA workers regarding their subsistence needs.

B. The Administrative Hearing Process

A series of federal lawsuits filed in the late 1960’s and early 1970’s established that any notice of action to change a welfare benefit generates access to the so-called “fair hearing” process. Until welfare reform, New York City appellants’ win rate at these administrative hearings consistently hovered around ninety percent. Due process had real meaning for welfare applicants and recipients, providing an unbiased forum in which to challenge improper actions that denied, reduced or discontinued benefits to which they were entitled under federal and state law.

As new workfare requirements were established, the viability of this process was compromised. Hearings on issues related to non-workfare matters were held as usual at the state’s office building at 80 Centre Street before the same administrative law judges (ALJ), who continued to find in favor of the appellants in ninety percent of the cases.

The setting for work-related hearings was moved to HRA’s Office of Employment Services at 109 East 16th Street, with appellants appearing before a newly hired group of judges. These state hearings, now housed at the city’s site, were attended by new city representatives who had been trained to aggressively defend HRA determinations. The result was fewer settlements and a precipitous decline in the appellant win rate from ninety percent to fifty-five percent.

60. Id.


63. Id.
A major factor contributing to the city's success was the manner in which HRA evaluated recipients' claims that their medical disabilities should exempt them from participation in work program activities. Health Services Systems, the for-profit company under contract with the city to review disability claims, performed perfunctory physical examinations using physicians who could not or did not communicate with the clients and, according to recipients' testimony at administrative hearings, disregarded and sometimes discarded their personal physician recommendations and test results. Clients who challenged the employability determinations were rarely able to overturn the city's claims at these sophisticated hearings because they did not possess sufficient documentation, and, due to funding cutbacks for public interest law offices, were unable to obtain legal representation.

Even more distressing was the perceived bias of the state's administrative law judges (ALJ) in favor of the city, also documented in hearing transcripts. In an effort to level the playing field, legal advocates met with the state's deputy counsel for administrative hearings to address the problem. The result was a directive to ALJs regarding compliance with due process procedures, the importance of conducting unbiased hearings, and the necessity of a full and complete record on the issues.

Although judges generally followed the directive when attorneys were present, ongoing review of unfavorable hearing decisions showed little difference when clients appeared pro se, as confirmed in February 1998 by Lewis v. Barrios-Paoli, which overturned an unfavorable state hearing decision on appeal.

In Lewis, the issue concerned the alleged failure of the appellant to cooperate with workfare requirements. In the decision, the judge described the “fair hearing” as neither “fair” nor a “hearing” in that the appellant

64. Fridman v. The City of New York, HS Systems, Inc., Marva Livingston Hammons and Aurelio Salon, Jr., M.D., 96 Civ. 6099 (S.D.N.Y.) (personal injury lawsuit following heart attack and subsequent lifetime disability for failure to exempt plaintiff from strenuous workfare assignment despite documentation of preexisting cardiac condition).

65. Omnibus Consolidation Rescissions and Appropriations Act (OCRAA) of 1996, Public Law No. 104-134, Sec. 504, reenacted in OCRAA of 1997, Public Law No. 104-298, Sec. 502 (which reduced and restricted funding to the Legal Services Corporation).


was denied the opportunity to present her case, and the decision was not based on the merits of the case, the evidence, or the issue upon which the hearing was requested. The court also noted, referring to the hearing transcript, that the state’s ALJ had elicited no testimony from the city’s representative, clearly conducting the hearing on the city’s behalf while the appellant appeared without counsel.69

At the time, the court reserved judgment as to whether the state and city’s behavior constituted a pattern. Fifteen months later, however, in Martinez v. Turner,70 the same court found a discernable pattern by state and city commissioners who “disregarded their own rules, regulations, consent decrees, and due process essentials in sanctioning” participants in the workfare program.71

The Martinez decision asserts that the state ALJ “obviously failed to understand the applicable law,” violated a number of mandatory procedures at the hearing, and was “arbitrary and capricious and violative of petitioner’s due process rights.”72 The court went further, quoting from an appellate decision:

A welfare agency does not fulfill its legislative mandate by operating under a policy that extends benefits only to those persons who are sufficiently familiar with the law to effectively demand them. Social welfare programs are, by their nature, intended to assist the least sophisticated members of society. The ‘safety net’ provided by the program is ineffectual if the most vulnerable among us are allowed to slip through.73

Despite these strong admonitions, seven months later a different judge overturned a fair hearing decision with equally vociferous language, writing: “There are a number of troubling aspects to the manner in which the agencies carried out their statutory mandates.... [T]he [state] agency is bound by both the [New York City Human Resources Administration—NYCHRA] and its own policy guidelines to implement public assistance in a fundamentally fair manner. In reviewing [appellant’s] fair hearing transcript and decision, the court finds that NYCHRA and the state agency

69. Id.
71. Id.
72. Id.
failed to follow many of the procedural requirements to ensure fundamental fairness.”\textsuperscript{74}

C. The Work Experience Program

One of the fundamental themes underlying welfare reform is the idea that recipients must perform some form of work in exchange for the benefits they receive. Often referred to as “workfare,” the program is formally known in New York State as the Work Experience Program (WEP). WEP generally requires welfare recipients to work for up to thirty-five hours weekly as a condition to receiving their grants and without the benefits that would normally accrue to employees. The cost to the city for an hour of workfare is $1.80, based on the city’s share of the welfare check.\textsuperscript{75}

The WEP Program has transformed New York City’s public sector into a two-tier system of workers: union workers, who are reasonably compensated in wages and benefits, and WEP workers, who perform many of the same tasks for below poverty-level wages under constant threat of sanctions.\textsuperscript{76} The difficulties inherent in navigating the work program bureaucracy are reflected in the sheer volume of public assistance sanctions generated monthly by that program. For example, according to HRA’s records in March 1999, 7,271 Safety Net Assistance recipients were in the sanction process that month, representing twelve percent of the entire nonexempt Safety Net Assistance caseload, approximately one in every eight cases.\textsuperscript{77}

WEP workers are also threatened with sanctions by supervisors who engage in sexual and racial discrimination. For the past five years, the U.S. Equal Employment Opportunity Commission (EEOC) has been investigating such claims by female WEP participants. In a report released in October 1999, which stated that welfare recipients in workfare programs fall under anti-discrimination laws to the same extent as other employees, the Giuliani administration was charged with violating federal law by turning away women who made complaints. The EEOC advised these workers to bring private lawsuits against their harassers and criminal assault charges against male supervisors where appropriate.\textsuperscript{78}

\textsuperscript{74} Matter of Nembhard v. Turner, Index No. 403024/99 (Sup. Ct. N.Y. County).
\textsuperscript{75} The Work Experience Program: New York City’s Public Sector Sweat Shop Economy, Community Voices Heard (2000).
\textsuperscript{76} Id.
\textsuperscript{77} HRA JOBSTAT (March 1999).
\textsuperscript{78} “NYC Nixed Harassment Claims,” “City Must Shield Workfare Force on Harassment: City Is Accused of Ignoring Harassment in Workfare Program,” New York Times (October 1, 1999).
Workers’ attempts to remedy these complaints against the administration were unsuccessful. Nearly two years later, on July 15, 2001, the U.S. attorney in Manhattan announced a federal suit against the Giuliani administration for failing to protect women in workfare jobs and for subjecting four women to a hostile work environment by not responding vigorously after they complained of sexual or racial harassment. A spokesman for Mary Jo White, U.S. Attorney, said the government “brought the lawsuit only after efforts at negotiating a settlement of the harassment claims failed.” Employment law experts note that “it is unusual for the federal government to accuse a city of not doing enough to stop sexual harassment.”

A private attorney for one of the plaintiffs said that “the Giuliani administration had refused to commit to improving conditions” following the EEOC findings in October 1999. The lawsuit was filed with the approval of Attorney General John Ashcroft.

Although the administration suggests that workfare participants develop skills that ensure subsequent employment, WEP does little to lift people out of poverty. As an HRA study indicated, thirty-three percent of those who left welfare had not worked at all since their cases were closed, and forty-two percent were jobless at the time the city interviewed them. In the same study, the city found that forty-eight percent of those who were employed said that their income was equal to or less than their welfare distributions, and only fifty-one percent of those working received health care coverage from their employer or Medicaid, even though all remained eligible for Medicaid by virtue of poverty-level wages. Advocates have long contended that thousands of poor families leaving welfare have had their Medicaid coverage improperly terminated, a problem soon to be rectified as a result of a July 11, 2001 settlement in federal

80. Id.
83. Id. See also Mangracina v. Turner, 96 Civ. 5585 (JFR) (failure to continue Medicaid benefits when closing public assistance cases).
district court in Mangracina v. Turner in which the city agreed to reinstate over 40,000 affected individuals and reimburse them for out-of-pocket medical expenses accrued due to their improper termination from Medicaid.84

Besides WEP’s failure to provide a meaningful transition from welfare to work, failing to provide adequate and appropriate transitional childcare, without which recipients are unable to comply with WEP participation requirements or find and sustain regular employment, may contribute to the city’s overall unemployment rate.

Statistics on this issue are abundant and compelling. A 1999 study found that thirty-six percent of parents were either unable to work or lost their jobs due to lack of quality childcare.85 When the New York City Public Advocate examined HRA’s childcare policies and practices, researchers found that the city’s system was a chaotic and ineffective bureaucracy that failed to ensure “that children are being cared for in safe, appropriate childcare settings, frequently contradict[ing HRA’s] own mandates and undermin[ing] parents’ efforts to become self-sufficient.”86 Given the state legislature’s new budgetary cutbacks in childcare subsidies amounting to $304 million for the coming fiscal year,87 we cannot expect to see the city’s situation remedied anytime soon.

While the city has long stressed that parents who participate in WEP are providing good role models for their children, a Child Trends study by the Manpower Demonstration Research Corporation on the effects of workfare on these parents’ adolescent children uncovered significantly different outcomes.88 Adolescents whose welfare recipient parents are required to engage in workfare activities have lower academic achievement and more behavior problems than children in welfare households where mothers remain in the home.89 In all three target locations (Florida, Minnesota, and Canada), “there were no positive impacts [on adolescents of parents participating in welfare-to-work programs] in any of the studies.”90

86. Welfare and Child Care: What About the Children? Report by the Public Advocate for New York City (June 1997).
89. Id.
90. Id.
Researchers hypothesized that parents have less time and energy to monitor adolescent behavior, that the stress of working might result in harsher parenting styles, or that adolescents are assuming more responsibilities at home, particularly childcare, thus creating too great a burden. Whatever the cause, the study found that these adolescents engaged in increased smoking, drinking, drug use, and delinquent activity, did worse in school on measures such as performing at grade level, and were more likely to act out in school than adolescents whose mothers received welfare but did not participate in work programs.91

The city’s refusal to recognize education and training programs as satisfying WEP work requirements is another major flaw in the program. At every level, from literacy and basic education to two- and four-year college programs, public assistance recipients are routinely denied the right to participate in education and training and are instead assigned to WEP activities that teach few skills and rarely lead to employment. For example, before HRA began to systematically force recipients out of college programs or deny new recipients the opportunity to engage in such activities, approximately 28,000 individuals received welfare and attended a CUNY school. By the year 2000, that number had diminished to fewer than 6,000.92

Although strongly opposed by Mayor Giuliani, the New York State Legislature amended the Social Services Law in January 2001 to permit students to count their hours in work-study programs or internships toward their weekly workfare requirement. Yet in June 2001, six months after the law took effect, few HRA caseworkers were aware of the law. As a result, students are required to challenge workers’ erroneous and improper determinations through the lengthy, costly, and time-consuming administrative hearing process in order to keep their benefits and stay in school.93

Finally, WEP displaces thousands of city workers who should be employed to do the work that WEP workers do at nominal cost to the city. While the majority of WEP workers are performing entry-level jobs, many are placed in more complex jobs with higher degrees of responsibility. HRA may assign a WEP worker to jobs ranging from keeping parks clean and safe, to doing light repair work, to painting, to office duties.

91. Id.
92. Workfare: The Real Deal II, Community Food Resource Center (July 1997).
One study found that by 1999, the Giuliani administration had raised WEP participation from a few thousand to nearly 40,000. At least eighty-six percent of those surveyed reported doing the same work as municipal employees. As the WEP work force was dramatically increasing, New York City’s municipal labor force was reduced by 20,000, with WEP workers now doing the tasks that these workers had previously performed.

D. Privatization

At every level of government, the most recent round of welfare reform has encouraged the contracting out of a wide range of services traditionally provided by the public sector. Many public services have been “privatized” for years, but welfare reform legislation, coupled with the Giuliani administration’s strong support for the concept, have combined to substantially expand the use of private contracts by HRA.

The City Project, an advocacy group that focuses on the New York City budget and the way in which the city allocates its funds, estimates that contracts for human services now represent eleven percent of the city budget. This administration has also made extensive use of “sole-source” contracts, awarded without competitive bidding based on claims of “urgency.”

This report will not review the many arguments for and against privatization but will note some of the concerns raised when government services are extensively contracted out.

In its 2000 report, City Project called the city’s contracting practices “random, decentralized, and unaccountable,” despite 1989 New York City Charter revisions designed to improve accountability. Indeed, HRA’s 1999-2000 plans to award $500 million in contracts for a variety of basic welfare-related functions were deferred by the city comptroller for several months due to a lack of necessary information and apparent irregularities. While

95. Id.
96. Id.
97. Focus on Contracting, City Project Newsletter, Vol. 1, No. 1 (December, 2000). In The City Project’s terminology, human services covers a broad range of activities, e.g., childcare, AIDS services, employment services, and homeless services.
the contracts were eventually approved, the episode served to highlight a number of causes for concern with regard to privatization efforts:

(a) Contracting to for-profit agencies. As huge contracts to companies like Lockheed Martin and Maximus proliferate, a critical question must be raised: To what extent does a corporation’s commitment to a profit lead it to unduly cut costs and services?

(b) Performance-based standards. Few would oppose the proposition that both government and private agencies should be evaluated on the basis of performance. But reasonable and appropriate criteria for measuring performance must be established. Thus while it may be entirely appropriate to insist that a job placement company demonstrate a significant number of successful job placements, it may be unrealistic to insist on immediate job placements from a provider of basic literacy instruction.

(c) Accountability. The issue of private agency accountability will inevitably be explored by means of litigation because there is no clear present answer to the question of a private agency’s accountability to its clients for the agency’s abuse of discretion or transgression of applicable legal standards. For example, are a private entity’s records, compiled pursuant to a government contract, readily available under Freedom of Information Laws? If hearings are requested and the relevant records are in the control of a private agency, who is responsible to ensure that they are properly preserved and produced at appropriate times? If an actionable wrong is committed, what remedies are available and against whom do they apply?

(d) Faith-based initiatives. With the energetic support of the new Bush administration, it can be anticipated that faith-based groups will receive an increasing share of contract services. In New York City, the Giuliani administration has undertaken one particularly noteworthy initiative, the so-called Faith-Based Demonstration Project. Of particular concern in this instance is the fact that eligibility to perform this public function was

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100. “Rejecting Favoritism Claim, Court Upholds a City Welfare Contract,” New York Times (November 25, 2000). The article noted that although the City was now free to finalize these contracts, criminal investigations of the contract procedures continued. Sanctions were later issued against Commissioner Turner and First Deputy Commissioner Mark Hoover for other conflict-of-interest violations. “Questions Mounting for Turner,” New York Newsday (October 18, 2000); “$8,500 Ethics Fine for HRA’s No. 2,” New York Newsday (October 26, 2000); “City Fines Welfare Aide 8.5G in Ethics Case,” New York Daily News, October 26, 2000).
limited to faith-based organizations, a restriction of dubious legality.

(e) Processing delays. One of the more troubling aspects of privatization in New York City concerns simply the delay involved in processing payments from the city. A City Project study revealed that there is typically a delay of nearly four months from a contract award until the first payment to a community-based organization; in the case of HRA, the wait is generally 4½ months. As a result, private agencies must often take out loans to survive until payments are commenced, or must delay the provision of services.101

E. Hunger and Homelessness

Any society's measure of its success must take into account the humane treatment of its members, including access to food and shelter for all. Yet at a time when the country has experienced its most prolonged prosperity in history, hunger and homelessness in New York City continue to rise.

1. Hunger. In their zeal to eliminate dependency, city officials have routinely obstructed access to adequate food for low-income New Yorkers.102 Studies indicate that this obstruction coincides with a thirty-five percent drop in food stamp cases in New York City between 1996 and 1999, despite persistently high poverty rates of around twenty-four percent.103 Because the Food Stamp Program is the principal safeguard against hunger in this country, declining participation has led to increased demand at already over-burdened food pantries and soup kitchens. Every day, approximately 400,000 New Yorkers suffer from moderate to severe, a figure that includes 118,000 children.104

A number of advocacy groups, as well as one City Council member, have documented increased use of food pantries105 and the increased number

103. Id.
104. Id.
of individuals turned away empty handed. These reports uniformly trace this deterioration in the quality of life to implementation of the city’s welfare reform policies. Notwithstanding a documented increase in demand for food by the needy, New York City regularly fails to make Food Stamp Program applications readily accessible to potentially eligible households and imposes eligibility requirements that exceed the standards set by the Food Stamp Act and regulations.

2. Homelessness. The Giuliani administration did not invent the problem of homelessness; the causes are complex and longstanding, and satisfactory remedies remain elusive. However, the city’s policies have made a bad situation unnecessarily worse.

An August 2001 study reported that the number of homeless persons in New York City shelters is running thirty percent higher than last year, with officials expecting new records to be set in the coming winter. In July, a record 6,252 families with 11,594 children, or 20,655 members of homeless families, were in the shelter system, surpassing the previous high in the late 1980’s and mid-1990’s of 18,700. Advocates report that the Giuliani administration, unlike the Koch and Dinkins administrations before, have abandoned the policy of creating low-cost housing to counter the rise in New York City housing costs. The city’s Department of Housing Preservation and Development, which produced 1,500 apartments each year during the Koch administration’s initiative on homelessness, provided only 117 apartments in a nine-month period last year.

Since the late 1980’s, the largest group of homeless persons is women and children. Officials cite domestic violence, evictions and declines in subsidized housing as likely reasons for the rise in homeless families. Yet in the face of conditions that require greater numbers of families to seek public shelter, Martin Oesterreich, the city’s commissioner of homeless member A. Gifford Miller, (May 1999); Living on the Edge, Hunger Action Network of New York State (November 1998).


109. Id.

services, was quoted as saying, “I can’t screw the front door any tighter,” in reference to the rigorous screening procedures begun by the Giuliani administration in 1996, hurdles that result in more families being turned away.\textsuperscript{111} Despite ongoing litigation on behalf of these families, each night approximately five-hundred eligible children and parents are given beds for one night only, forcing them to return to the screening unit in the South Bronx each morning to reapply.\textsuperscript{112}

The continued disruption in the lives of these children results in long-lasting trauma. In a study released in April 2001, the Institute for Children and Poverty reported that the typical homeless child in New York City is five years old, has suffered an increase in emotional distress since becoming homeless, has had to change schools in the last year, is more than twice as likely to repeat a grade as a non-homeless child, is four times as likely to suffer from asthma, and receives primary medical care only in an emergency room or walk-in clinic.\textsuperscript{113}

The study also documented the correlation between benefit loss and homelessness. Over half of homeless parents reported that their welfare benefits had been reduced or discontinued in the preceding year, forty-two percent reported losing their food stamps, and twenty-seven percent had experienced cuts in Medicaid. One-fifth of parents who had their benefits reduced or cut in the last year reported becoming homeless as a result, while only ten percent reported finding a job as a result. Of those who succeeded in finding a job, less than half were currently working.\textsuperscript{114}

In Callahan v. Giuliani,\textsuperscript{115} the administration’s decision to use the status of an applicant’s welfare case to determine eligibility for emergency shelter was enjoined based on a finding that welfare status was not a reliable indicator of whether the client had, in fact, complied with the requirements of HRA’s programs. The court found that applications are routinely denied and cases improperly discontinued, and that persons with language limitations, disabilities, or social dysfunction are particularly vulnerable to wrongful agency actions.\textsuperscript{116}

\textsuperscript{111} id.
\textsuperscript{112} id.
\textsuperscript{113} Déjà Vu: Family Homelessness in New York City, Institute for Children and Poverty (April 2001).
\textsuperscript{114} id.
\textsuperscript{115} Callahan v. Giuliani, Index No. 41494/82, (Sup. Ct., N.Y. County 2000).
\textsuperscript{116} id.
For fifteen years, the city has been under court order to stop forcing homeless families to sleep on the benches and floors at the Emergency Assistance Unit (EAU), located in the Bronx, where families must apply in order to obtain immediate and long-term emergency housing. Although the EAU has never been a model of efficiency, studies demonstrate that the city regularly denies applications for shelter, depriving families of any semblance of normal family life for weeks and months, and consistently fails to provide legal notification of reasons for denials.

As recently as April 2001, the Giuliani administration presented yet another plan to the court detailing how it will “rapidly add beds at homeless shelters and move hundreds of other families to permanent apartments” in an effort to avoid a contempt order for its mistreatment of homeless families. The chief assistant corporation counsel acknowledged that the city had been unable to live up to all of its pledges to relocate four-hundred-sixty families to subsidized apartments by the end of June; only nine families had been moved by April.

As the accumulation of data in the foregoing discussion makes clear, using caseload reduction to evaluate the success of New York City’s welfare reform programs is a meaningless and cynical exercise. While there has been support for the abstract concept of workfare, its practical application has produced results that are wholly inconsistent with a strategy of moving people towards financial independence or of providing a true safety net for those in need. Nonetheless, the city has both the resources and the expertise to reform the way we address poverty in future administrations with strategies set forth below.

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117. Although previous administrations provided application centers throughout the city, the Giuliani administration requires all applicants to travel to a single center in the South Bronx in order to apply for entry to a homeless shelter.


122. Id.
PART III. ALTERNATIVE PROPOSALS

Perhaps the most important information we have gained about welfare reform in New York City is that this administration's transformation of the system has focused upon caseload reduction, not remedying or alleviating poverty. A substantial number of those who have left welfare have obtained employment and for some, this has meant an improvement in their living standard.

But as the wealth of research described above indicates, even during a period of remarkable economic growth, many of those who have moved off welfare have struggled with low-paying and temporary jobs without employee benefits; many others have left the rolls without employment at all. Many have moved to the streets and soup kitchens; the demand at shelters has never been greater. For those remaining on welfare or in need of welfare, basic survival is an increasingly difficult challenge. A realistic look at life in poverty suggests a number of urgently needed policy modifications.

A. Easing Hardship for Welfare Recipients

The most fundamental change is required to care for those with no choice but to rely on welfare: the grant in New York State, now unchanged in eleven years, must be substantially increased. The real value of the grant has diminished by close to fifty percent since the mid-1970s, such that meeting basic survival needs is virtually impossible in the typical case. Yet the decline in the public assistance caseload combined with continuing state budget surpluses make a reasonable grant increase eminently affordable.

An important component of the reassessment of the welfare grant is the need for an honest, realistic examination of the shelter allowance. The portion of the grant designated for housing bears no meaningful relation to the actual cost of housing in New York City. Any of a range of alternatives would improve housing affordability. These include:

• a general increase in the public assistance grant, as discussed above, from which the recipient could allocate more funds for rent;

• an increase in the housing portion of the grant, although we favor the general increase affording the recipient the ability to make allocation choices; and

• the creation of a housing subsidy program similar to the federal Section 8 program, although we prefer an entitlement over the capped Section 8 benefit.
A separate housing subsidy has the advantage of not counting as income for food stamp budgeting purposes.123

B. Easing Hardship for Those Leaving Welfare

While still campaigning for the presidency, Bill Clinton began to use the language, “making work pay.” The central tenet of this policy is that no person employed full-time should be living in poverty. Putting aside reservations about the welfare reform legislation he later signed, President Clinton’s proposals for making entry-level employment available should be pursued.124 Among key features designed to “make work pay” are:

- a significant increase in the hourly minimum wage;
- an expansion of both the size of the Earned Income Tax Credit and those households eligible to receive it;
- a health care system that covers every employed person and his or her family; and
- more widely available childcare resources.

As Katherine Edin and Laura Lein note in Making Ends Meet,125 many of those who leave welfare for employment suffer a net loss of income, due largely to the increased cost of childcare, health care, travel, and clothing.126 Adoption of the proposals outlined above would make substantial contributions toward alleviating this misfortune.

123. The proposals noted here each seek to enhance the capacity of the household to pay for existing housing. Clearly, a long-term approach to the affordable housing crisis must involve a significant expansion of the city’s housing stock through rehabilitation and new construction.


126. See, e.g., Economic Policy Institute’s study, released July 24, 2001, reporting that 80 million Americans have incomes that will not cover their minimal needs, or nearly 30 percent of the US population. The Washington-based research group found that the minimum budget for a typical family of three could be as much as $46,000 a year, depending on location. See also The Self-Sufficiency Standard for the City of New York, Women’s Center for Education and Career Advancement (September 2000).
Finally, the housing crisis afflicts not only public assistance recipients, but also those households with higher incomes. The New York Times recently reported on the panic of many of the more than two million residents of rent-stabilized apartments who are facing increases by the Rent Guidelines Board. Owners are having a hard time maintaining their buildings without higher rents, but tenants say that rent absorbs nearly their entire income, leaving less and less for food and other necessities. Programs such as housing subsidies and incentives for rehabilitation and new construction, similar to those proposed for the welfare population, are also desperately needed for non-welfare, lower income families.

C. Modifying the Administration of Welfare
1. System Access
Recent HRA practice has focused on diverting people who are seeking assistance, persuading them not to apply, to seek help elsewhere, or to save money by living doubled up with others. People who do manage to apply often see their applications summarily rejected for failure to comply with any one of a multitude of often inappropriate and burdensome procedures, including onerous WEP requirements.

A fundamental change in the culture of the welfare system is urgently needed. HRA, at every level of the hierarchy, must make clear that the system exists to provide assistance to people in need. Only eligible people should receive benefits, but every New York resident is entitled to be informed of and to apply for benefits to which he or she might be entitled. On the same day persons enter an Income Support or Job Center expressing a possible need for assistance, they must be permitted to commence the application process.

In addition, applicants should immediately be given the opportunity to apply for expedited benefits for emergency needs. Preferably, no WEP assignments would be made while an application is pending, as a person applying for welfare is, by definition, experiencing crises often involving hunger and homelessness. At a minimum, no assignment should be made until there has been a thorough evaluation of the individual’s employability.

2. Special Populations
As difficult as it has become for anyone to negotiate the welfare system, it is often simply overwhelming for various subgroups of needy New

Yorkers who are, for one or more reasons, exceptionally vulnerable. Among these are people with disabilities including those with HIV/AIDS, the homeless, people with alcohol and substance abuse problems, people with limited literacy or English proficiency, and victims of domestic violence. When people struggling with these challenges confront a complex, hostile welfare administration, they are likely to abandon the effort to pursue needed benefits, to have their applications rejected, or to have their benefits terminated for failure to comply with some administrative or WEP requirement. The failure to serve these individuals may, in many instances, violate the Americans with Disabilities Act or the Rehabilitation Act of 1972. But whether or not there is a legal violation, a system that effectively denies them assistance is morally unacceptable.

While the problems posed and, therefore, appropriate responses for each of these groups are in significant ways unique, there are common elements of an approach that should be adopted across the board.

First, procedures must be adopted to identify the presence and severity of each individual's disability or limitation. This may sometimes be relatively simple, requiring no more than medical verification or reliable self-reporting. In other instances, there may be complicating issues, such as applicant denial or incapacity or a special need for confidentiality, privacy, and trust. Considerable research exists regarding the enhanced capacity of public agencies to identify and serve clients with one or more of these difficulties. A good-faith review of the research and implementation of any of a number of potential program designs will substantially improve the situation.

Second, once the individual's problem has been identified, appropriate accommodations must be implemented. Such accommodations, designed to ensure that benefits are not improperly denied solely because of administrative obstacles, should be applicable to all who need assistance. But until there is a willingness to engage in such a dramatic, system-wide restructuring, at a minimum, procedures should be implemented to identify and serve these special needs populations.

Some accommodations are relatively easy to identify. For example, requirements that are duplicative or unnecessary should be eliminated; a simple reduction in the number of mandated application activities would correspondingly reduce the risk of non-compliance and consequent sanction.

A valuable addition to welfare administration would be the inclusion of protective measures to guard against inappropriate benefit rejections, terminations, or reductions. For example, there should be in place a triggering mechanism whenever it appears that a special needs person...
has failed to comply with a mandated action. Under usual circumstances, this would generate a notice of denial, termination or reduction of benefits, with prescribed methods for challenging this adverse action. Unfortunately, those with disabilities may be no more capable of utilizing the means to challenge the action than they were able to comply with the initial requirement.

This problem would be significantly mitigated if the initial failure to comply generated not a notice of adverse action, but rather triggered specified outreach efforts, e.g., phone calls, home visits, or contacts to designated relatives, friends, or service providers, to ensure that the failure to comply was not related to the individual’s disability. Once again, a wide range of choices can be explored once the agency recasts its orientation away from caseload reduction and towards assisting the needy.

3. Welfare to Employment

Determining Employability. The first step in the process of assigning public assistance recipients to work activities is the determination of employability. Closely related to the welfare system’s general treatment of people with disabilities, individuals who are unable or are seriously limited in their ability to engage in work activities are often improperly evaluated and determined to be employable. The inevitable result is that recipients either jeopardize their health by trying to comply with inappropriate assignments or face sanctions for non-compliance.

Recipients must be better informed of their rights and obligations in the employability determination process and must be given ample time to secure medical documentation, with mandated agency assistance when needed. HRA and its contract agencies must be directed to give appropriate weight to evidence provided by the individual’s treating health practitioners. Once a valid determination has been made, the agency must use care to ensure that any assignment given is appropriate to the individual’s condition and limitations.

Access to Education and Training. Since early in the Giuliani administration, HRA has actively discouraged recipient participation in education and training in favor of workfare. As a result, few people have gained skills relevant to the labor market and few have obtained jobs as a result of their work activities, while a tremendous number of sanctions have been imposed for alleged non-compliance. As the labor market increasingly demands higher levels of education and skill for living-wage employment, the city should respond by providing access to appropriate training and education for welfare recipients. This should include access
to every level of education, from literacy and English as a Second Language to post-secondary education.

The city may, consistent with state and federal law, permit and even encourage many more recipients to participate in more meaningful activities. Indeed, many other states and even other counties in New York State permit a much wider array of activities to count as a recipient’s work-related involvement than is permitted in New York City. Furthermore, legislation has been proposed in both the New York City Council and the state legislature that would authorize participation in a range of education and training activities to count towards meeting work requirements. The next administration should actively support such legislative initiatives.

In addition, the successful implementation of a workfare program in which recipients are appropriately assigned requires a thorough, up-front assessment of their skills and education, as well as their particular training and service needs. Although assessments are already provided for in the law, work assignments are currently made even before the assessment is conducted. In addition, assessments tend to be perfunctory, and little genuine effort is made to assure that assignments reflect the outcome of the assessment. The city should support legislative initiatives that mandate assessments before assignments can be made, that would guarantee that assessments be conducted by trained personnel, and that require reasonable efforts to conform assignments to the information gained in the assessment.

Reliance on Workfare. New York City assigns a greater percentage of welfare recipients to workfare than any jurisdiction in the country. As noted above, workfare has little or no value in helping people to move from welfare to employment. Therefore, we reiterate our support for a dramatic reorienting of HRA practice, whether by reason of state or local legislation or as the result of a change in city policy, to permit, or better, to encourage recipients to engage in appropriate education and training as work-related activities. To the extent that workfare will still be used as a work activity, HRA should be required to ensure that work assignments reflect the individual’s assessment in terms of skill strengths and deficits, preferences, and employment goals. To the extent feasible in terms of civil service law and collective bargaining agreements, workfare assignments should readily be converted to actual offers of employment, perhaps after a period of successful participation. Above all, all workfare participants should receive a living wage, that is, a wage sufficient to lift them out of poverty.
D. Privatization

There may be settings in which the contracting out of city services is appropriate. But safeguards must be implemented to ensure that the privatization of governmental functions does not lead to a diminution of services or a loss of accountability.

First, the contracting process must be thoroughly transparent, open and fair. Even the appearance of bias undermines the credibility of the process. In addition, measures must be in place to guarantee that privatization does not result in a dilution of public access to information or in a decline in agency responsibility and accountability.

Finally, a thorough public review should be undertaken concerning the issue of “charitable choice,” which involves contracting to faith-based providers. While such providers have long played a critical role in the provision of social services, the perils to both the providers and to government of publicly funded, explicitly faith-oriented services merit considerable caution and debate before moving ahead.

V. CONCLUSION

As the end of the Giuliani era approaches, the next mayoral administration should abandon the policy of equating the success of welfare reform with caseload reduction and instead develop new principles that address the reality of the continuing poverty disclosed by research conducted in New York City over the past five years. The new administration should establish a system designed to (1) address the barriers to financial independence faced by those who remain in need of support; (2) provide access to reasonable financial support for those who are currently unable to provide adequately for themselves; and (3) ensure the timely, respectful, and proper administration of benefit delivery by the Human Resources Administration and by private entities under contract to the agency.

August 2001
The Committee on Social Welfare Law

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Dying Twice: Conditions on New York’s Death Row

The Committee on Corrections and the Committee on Capital Punishment

"[A] man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted upon him, the first being worse than the second."
Albert Camus, Reflections on the Guillotine, Resistance, Rebellion & Death 205 (1966)

Introduction

In 1995, New York State revived the death penalty as a punishment for certain categories of murder, and established a “death row” for condemned men at the Clinton Correctional Facility in Dannemora, New York (variously, “Clinton” or the “Prison”). Four years later, in October 1999, two committees of the Association of the Bar of the City of New York joined together to study the conditions of confinement on this death row—or, as it is officially called, the Unit for Condemned Persons (the “UCP”). These committees—the Committee on Corrections and the Committee on Capital Punishment—formed a joint subcommittee (the “Subcommittee”) to study, assess and report on the conditions under which death row prisoners await their execution. This is the report of that Subcommittee.

The Subcommittee has worked on this project for nearly two years. In the process, we have interviewed a number of lawyers involved in death row litigation, including some with clients in New York’s UCP; we have
visited Clinton and interviewed that Prison’s superintendent about the UCP; we have reviewed the literature on the organization and management of other death rows around the nation, and we have, with some difficulty, obtained a limited amount of information about the operation of the UCP from New York’s Department of Correctional Services (variously, the “Department,” “Corrections” and “DOCS”).

In this last regard—obtaining information from DOCS—our efforts have been largely unsuccessful. Almost immediately after beginning our project, the Association’s then president wrote to the Commissioner of Corrections for New York State, asking him to permit members of our Subcommittee to visit the UCP. This request was refused because of undefined security concerns. The Subcommittee’s inability to visit the UCP, to gain a first hand inspection of its facilities, and to interview the inmate population, seriously restricted the factual record that we were able to compile.

Nevertheless, even our incomplete record reveals this basic point: the UCP has been modeled on the punitive segregation units that normally house inmates who violate important prison rules, that is, inmates who prove themselves to be violent and/or highly disobedient during their incarceration. The body of this report consists of an argument against this punitive segregation model, which punishes condemned inmates whether or not they have violated any prison rules.

We contend that—even for ardent supporters of the death penalty—death should be a sufficient punishment in itself. While they await execution, condemned prisoners who have obeyed prison rules should enjoy the same rights and privileges accorded inmates (including a number of convicted murderers) within Clinton’s general prison population. To the extent the punishments and restrictions imposed at the UCP serve no legitimate purpose, they should be lifted. This seems to us both simple justice and wise policy. Justice because it requires good reasons for the imposition of hardship, even on the condemned. Wise policy because it seeks to preserve the sanity of these men, and, with it, their capacity to function in society should their present sentences of death be reversed or commuted.

We regret that we have been unable to engage DOCS in this argument. Had it been more willing to cooperate with our examination, DOCS might have been able to defend the punitive segregation model, pointing out virtues that, on our own, we have been unable to identify. It is our hope that the circulation of this report will persuade DOCS that a fuller explanation of its policies is in its own interest, and that of the public it endeavors to serve.
I. A DESCRIPTION OF DEATH ROW

Location

The New York State Department of Correctional Services ("DOCS") calls the state's death row the Unit for Condemned Persons or "UCP." As of the date of this report, the UCP holds six condemned men, who are housed at Clinton Correctional Facility (previously identified as "Clinton" and the "Prison") in Dannemora. This location, 15 miles south of the Canadian border in the northeastern corner of the state, is 322 miles from New York City, approximately a six-hour drive.

Background

In 1995, when New York reinstated the death penalty, the Department of Correctional Services appointed a task force to develop rules for governing the state's new death row. Our Subcommittee has secured, through a Freedom of Information Law request, a small portion of the materials generated by that task force, although not its central memoranda and recommendations. The materials produced, when read in light of the rules actually adopted, and supplemented by remarks made to us by several DOCS officials, make clear that DOCS modeled the UCP upon the state's punitive segregation or "Special Housing Units" ("SHU's")—the units employed to deal with the system's most violent and intractable prisoners. The hallmarks of punitive segregation—constant surveillance, nearly complete isolation of inmates from each other and from outsiders, and severe limitations on the privileges normally accorded inmates within the prison system—all are present in the UCP.

Significantly, no law requires DOCS to confine all condemned men to the UCP. To the contrary, Corrections Law § 652(2) provides that a condemned prisoner:

may, in the commissioner's discretion, either be kept isolated from the general prison population in a designated institution or confined as otherwise provided by law. The commissioner, in his discretion, may determine that the safety and security of the facility, or of the inmate population, or of the staff, or of the inmate, would not be jeopardized by the inmate's confinement within the general prison population.

This paragraph, although oddly worded, provides that when a defendant sentenced to death is remanded to the custody of DOCS, the Commissioner may determine that he can safely be confined within the general prison population. This, in turn, implies that an investigation
should be made into each prisoner's personal characteristics, since those characteristics will determine if confinement within general population is likely to jeopardize "the safety and security of the facility, or of the inmate population, or of the staff, or of the inmate."

This, however, is not the procedure that DOCS has adopted. Department of Correctional Services Directive #0054 states that all death-sentence inmates shall, in the first instance, be assigned to the UCP, but that, following this initial assignment, "at the Commissioner's discretion, the inmate can be released to the general population." The directive thus preserves the possibility that a condemned prisoner may be released into general population, but defers decision on such release until after the prisoner has been remanded to the UCP for an indefinite period. At some point after this remand, however, a rule-abiding, stable prisoner should, under the Department's own directive, be considered eligible for release from the UCP.

In fact, it appears that the Commissioner has simply ignored both section 652(2) of the Corrections Law, and Directive #0054, and adopted a policy of consigning condemned prisoners to the UCP until they are either transferred to another facility for execution, or released by the Governor or the courts from their sentence of death. Thus, we know of no instance in which the Commissioner, or his staff, has ever conducted an investigation into whether a condemned prisoner should be released into general population; certainly, none of the six death sentenced prisoners remanded to the state system since 1995 has ever been so released. To the Subcommittee, the automatic and apparently irreversible assignment of all condemned prisoners to the UCP seems a clear violation of the purposes of the Corrections Law and the Department's own directive.

The UCP within Clinton State Prison

The close connection between the UCP and Clinton's SHU is immediately apparent on a visit to the Prison. The UCP is located within a building in the eastern portion of the Clinton prison ground, that also houses the Prison's SHU. In 1995, when New York reinstated the death penalty, the Clinton SHU had three twelve-cell tiers, for a total of 36 cells. In order to house the new death row inmates, the state took one twelve-cell tier from the SHU, and dedicated it to the UCP.

New York currently has six male prisoners under sentence of death, each of whom has been assigned to a cell within the twelve cell tier that constitutes the UCP. Although the Subcommittee was not allowed to visit the UCP, its layout has been described to us by the Superintendent of
Clinton and several defense lawyers who have visited the UCP. The occupied cells are contiguous, with the primary entrance to each cell located upon a single hallway which spans the length of the UCP. The hallway wall opposite the cell doors contains a series of opaque windows that, when closed, prevent any outside view. The walls between each of the cells are solid and while the inmates can hold conversations among themselves, they are unable to see each other.

UCP cells consist of two compartments, a living area and a visiting/showering area. The primary living area is approximately 78 square feet and contains a toilet, sink, bed, mattress and pillow. The cells are not air conditioned and fans are not allowed in the cells. The visiting/showering area is accessible from the cells through an electronically controlled sliding door which, when activated by a corrections officer, allows the inmate to move to a small cubicle containing both the inmate's visiting and showering area. For visitation purposes, the inmate is always separated from visitors by a plexiglas window. The men of the UCP are allowed three showers per week, in open stainless steel stalls that have no curtains.

Illumination/Surveillance

Lights are kept on at the UCP 24 hours per day. While the Department of Correctional Services states that it has reduced the wattage of the lights in response to inmate complaints, these lights remain sufficiently bright to permit constant surveillance by the staff; several inmates have complained that the lights disturb their sleep.

UCP inmates live under constant, uninterrupted surveillance, including both 24-hour camera surveillance of their cells, and audio monitoring by installed microphones. On the rare occasions when the inmates are permitted to leave their living compartment, they are kept under surveillance wherever they go: the reason curtains were removed from shower stalls was to permit the inmates to be monitored while they bathe.

Visitation

The visitation rights of UCP inmates are limited to: (i) counsel, (ii) immediate family, (iii) media, (iv) those possessing a court order, and (v) spiritual advisors. These restrictions are more severe than those imposed on the general prison population, and more severe than those that New York imposed on the UCP twenty years ago. Thus, the regulations in force in 1983, when the UCP was maintained at Green Haven Correctional Facility, permitted all the visitors authorized by present regulations, as well
as visits by: (i) relatives who acted in the “parental role,” and (ii) aunts, uncles, nieces, nephews and cousins by blood.

**Non-Legal Visits**

Each UCP inmate is permitted one non-legal visit per week. Since UCP inmates, unlike those in the Prison’s general population, are not permitted to receive visits from non-family friends, and since visits from the media and from spiritual advisors are rare, visitors to the UCP essentially consist of the immediate family of the condemned men. For those inmates who are estranged from their immediate families, or whose families live in distant parts of the State, the “immediate-family only” policy effectively means no visitors at all.

All visits to UCP inmates take place in the visiting area adjacent to the inmates’ cells, under both video and audio surveillance by the correctional staff. The plexiglas barrier prevents physical contact between inmate and visitor. The general population, on the other hand, may receive multiple visitors in multiple visitation periods with some direct physical contact. UCP inmates are limited to one ten-minute telephone call per week.

**Legal Visits**

Defense lawyers who have visited the UCP inform us that each cell has its own visiting area, with a plexiglas shield that separates the inmate from the visitor; it is here that attorney visits take place. Although audio surveillance is shut down during attorney visits, the confidentiality of attorney-client communications is highly compromised. A video camera on the visitor side of the plexiglas is trained upon the inmate.

A telephone system recently has been installed to permit inmates to speak, in a normal voice, to visitors sitting on the other side of the plexiglas partition. Defense counsel have informed us, however, that these phones don’t function properly, and that inmates must speak very loudly, or even yell, to be heard through the plexiglas shield. This makes their “privileged” communication clearly audible to any nearby guard or inmate. If several inmates are receiving visitors at the same time, all inmates and visitors, legal and non-legal, can hear each other. The plexiglas also interferes with the transfer or documents, including legal papers, which must be transmitted through a padlocked slot which an officer must unlock.

There is no limit to the number or duration of inmate telephone calls to counsel of record. However, defense counsel inform us that audio monitoring of the cells is not turned off during these telephone conversa-
tions, so that corrections personnel presumably overhear inmates’ remarks to their lawyers. This seems to the Subcommittee an obvious violation of the inmates’ right to confidential communication with their attorneys.

Exercise
During the initial thirty-day adjustment period after arrival on the UCP, each UCP inmate is permitted an hour of outdoor exercise in a single person “cage.” After this adjustment period, UCP prisoners are then allowed to exercise daily for one hour, by themselves, in a rectangular “dog-run” of approximately 2,000 square feet. All exercise is solitary and outdoors: when weather conditions are extreme, UCP inmates are provided with a coat and galoshes, but are never provided with gloves.

Oversight
Prison regulations require twice a week tours by the Superintendent, and once a week tours by both the First Deputy Superintendent and the Deputy Superintendent for Security. DOCS regulations do not, however, provide for oversight of the conditions on the UCP by any entity outside of the Department itself. We have been informed that the American Correction Association reviewed the plans for the UCP but has never visited the site in operation.

In the summer of 2001, DOCS permitted the Correctional Association of New York to make its first visit to the UCP; we have been informed that the visit took place on June 22, 2001. As of the date of this report, the Correctional Association has not published an account of that visit.

Guidelines and Standards of Conduct for UCP
DOCS has promulgated a number of other rules to control the UCP, including:

1. No talking from one section to another.
2. No passing of anything from one cell to another.
3. No talking from the exercise yard into the housing unit (UCP or SHU).
4. When being escorted from the unit, the inmate’s hands will be placed behind the inmate’s back.
5. No talking after the quiet bell rings at 10:30 P.M.

Use of Restraints
All inmates assigned to the UCP are “mechanically restrained” when-
ever they are escorted off the unit (e.g., during their one-hour exercise period). Mechanical restraints include (i) handcuffing—either in front with a waist chain, or in back with or without a waist chain and (ii) leg irons.

**Commissary Privileges**

The commissary rights of UCP inmates are more limited than those of the general inmate population. A general population prisoner can spend $55 on commissary items once a month and may purchase any item available (snacks, personal hygiene items etc.) A UCP inmate also may spend $55 a month, but only $15 of this may be spent on food. This limitation on discretionary food purchases imposes a real hardship on UCP inmates, since their normal meals are all served within a single eight-hour work-shift. Thus 16 hours can pass between an inmate's dinner and his next meal.

**II. INMATE CONCERNS**

The Subcommittee has tried to determine how UCP inmates feel about the conditions of their confinement. Initially, we asked the Department of Correctional Services for permission to visit the UCP and speak to the inmates directly. This was refused. We then asked DOCS for a summary of the grievances filed by the UCP inmates. This was provided, but proved of limited utility: the summaries were so terse that we often found it hard to determine precisely what the complaints were about.

Recently, however, the Subcommittee has received more substantial information about inmate concerns from two new sources. The first is the law firm of Sullivan & Cromwell ("S&C"), which represents four of the six UCP prisoners in connection with potential litigation concerning aspects of their confinement. At our request, the firm asked its clients (the "S&C Clients") to respond to a number of questions about death row, advising them first that their answers might be included in our report. All four of the S&C Clients responded, articulating various concerns about the operation of the UCP which we summarize below.

The second new source of information came in response to the Freedom of Information Law ("FOIL") request. Among other items, DOCS' response to this request contained letters from two UCP inmates, each of whom is represented by Sullivan & Cromwell. The first of these letters was sent by one of the inmates to the Superintendent of Clinton (the "FOIL Letter"), and forwarded by the Superintendent to a Deputy Commissioner of DOCS. The second letter, by a different inmate, was in the form of a petition on behalf of all the UCP inmates and was submitted directly to DOCS (the "FOIL Petition").

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**NEW YORK'S DEATH ROW**
Summary of the S&C and FOIL Material

As indicated, the Subcommittee has had access to the views of four UCP inmates, all of them clients of Sullivan & Cromwell. These inmates, in their comments to Sullivan & Cromwell and in the letters two of them sent to DOCS, have complained that certain conditions of their confinement are unnecessarily—indeed, senselessly—harsh and restrictive. These include: (i) their nearly complete isolation from other prisoners, (ii) restrictions on their exercise rights, (iii) restrictions on their commissary privileges, (iii) the lack of confidentiality in their communications with attorneys, (iv) the 24-hour a day illumination of their cells, (v) the uninterrupted video surveillance of their cells, (vi) limitations on their visiting rights, (vii) deficiencies in their access to medical care, and (viii) deficiencies in current grievance procedures.

1. Lockdown

Many of the inmates complaints concern their lockdown in individual cells for 23 hours a day. This practice isolates them more or less completely from other inmates and confines their movements to the close quarters of their immediate unit. Both aspects of the lockdown—separation and physical confinement—are demoralizing. Thus, while only one of the UCP inmates expressed a desire to be placed in the general population, almost all expressed a need to congregate with others, as well as a simple need for more freedom of movement. One of the S&C Clients complained of “[n]ot being allowed to go to church or see a doctor without first having it cleared by someone in Albany,” while another wrote that “A person needs to be able to walk around . . . . Why can’t we walk in the hallway for one hour every day?”

2. Surveillance

Many of the S&C Clients have complained about the uninterrupted surveillance to which they are subjected and the 24-hour illumination of their cells which makes such surveillance possible. The illumination rule is particularly distressing. Thus, one inmate stated that “the point that the lights in the cells remain on makes no sense. If a person wanted to cause physical harm to himself or others the act would be done regardless. . . Also, it is very, very hard to sleep.” A second wrote: “I’ve not had a decent night’s sleep since the new lights were installed. It’s uncomfortable sleeping with a towel over my head or sleeping with the light shining in my eyes.” A third stated that he tries to sleep by putting his head under his blanket, but noted that the strategy is often ineffective since the officers wake him up and require that he uncover his head.
The UCP inmates thus object to 24-hour surveillance because the lighting it requires interferes with their sleep. However, they also have a more basic objection: the constant surveillance is a deep intrusion into their privacy. As one man wrote in questioning the need for constant surveillance: “For six years the UCP has been open [and] not once has there been a problem of violence or threat to the safety and security of the facility and it has nothing to do with the structure of how UCP is run. The men of UCP are just that, men who want the chance to show that we are not animals.” In the words of another: “Video surveillance denies me privacy when using the toilet, drying off after showers and privacy to pray.” A third wrote: “We have no privacy. It's inhumane.”

3. Commissary Privileges

The UCP inmates attach great importance to the privilege of buying foods and other items at the Prison Commissary—one of the very few activities in which they can exercise even a small degree of discretion. Virtually all expressed unhappiness with the restrictions imposed on their permitted purchases, especially those restrictions that were not imposed on the general inmate population. Thus, the inmates complained that: (i) their food purchases were confined to “junk food”, while inmates in general population were permitted to buy nutritious items such as cold cuts and peanut butter, (ii) their purchases of toiletries, writing supplies, cassette tapes etc. were for some reason restricted, and (iii) their visits to the commissary were limited to one a month. In the words of one of these inmates, “the men on UCP go to commissary once a month, where if we were in general population we would go twice a month or every two weeks. The men on UCP should be allowed to go every two weeks and be allowed to purchase beverages, cereals, peanut butter, jelly, condiments, writing supplies, household items and special buy items like AM/FM cassette. We should have access to “hot pots” for tea and coffee and spending should be $25 and not $15.”

4. Visiting Rights

a. Family Visits

The UCP inmates are very unhappy with the present arrangements for family visits. They are unanimous in asking for a room in which visits can be conducted in private, and with a degree of physical contact—in which the inmates can touch, hold hands, and even hug their loved ones; such contact is now impossible, precluded by the thick sheet of plexiglas that separates inmates from visitors. The inmates note that the rule against
“contact” visits for UCP inmates is not imposed on other inmates in the system, including those serving disciplinary sentences in Clinton’s Special Housing Unit.

The inmates are again unanimous in wanting to expand the list of permitted visitors to include cousins, aunts and uncles, in-laws and close friends. One of the S&C Clients, for example, complained that present policy prevented him from seeing his godmother, who raised him, or his cousin, with whom he grew up; we note that both these excluded visitors would have been permitted under the rules that governed UCP visitation in the early 1980s.

Two of the S&C Clients noted that Clinton’s remote location made it difficult for their family members to visit.

**Telephone Calls To Family**

In addition to restrictions on face-to-face visits, several of the S&C Clients objected to the rule that UCP inmates may place only one 10 minute telephone call per week to family members. The FOIL petitioner, for example, stated that ten minutes “is by no means adequate enough time for a reasonable conversation with loved ones,” and asked that the time limitation either be abolished, or at least raised to 20 minutes. The FOIL letter writer concurred, stating that “[c]onsidering there are typically 3 or more people awaiting our weekly call that 10 minutes becomes little more than a brief hello and goodbye.”

**b. Legal Visits**

Each of the S&C Clients complained about the lack of confidentiality in their meetings with defense counsel, stating that it was easy for them to hear each other’s conversations. Several men also reported that they had overheard guards talking about what other inmates had said to their lawyers, adding that they were reluctant to tell their own lawyers certain things because they knew that their conversations were not private. The S&C Clients also complained that telephone conversations with their attorneys are not confidential. Calls to attorneys must be placed from the inmates’ cells, and the S&C Clients believe that the resulting conversations can be overheard by other inmates as well as by the audio microphones installed in each cell.

**5. Grievance Procedures**

The S&C Clients uniformly view the grievance procedure as ineffective, one stating that the procedure was “no help at all,” another that
“the grievance procedure does not exist in UCP.” They were divided, however, on whether prison staff retaliated against inmates who filed grievances. While one inmate stated that “[t]he only retaliation for grievances are that they are either lost or ignored,” another wrote that “I definitely believe that there is retaliation for putting in a grievance.”

6. Medical Treatment
UCP inmates are divided on whether they receive adequate health care. One states that the care provided for non-emergency problems is “fair,” while another writes that “I have been waiting two months to see a doctor for my lower back problems. I have filed a grievance and was told last month that a doctor will schedule me an appointment that was in January and it is now March and I have seen no one.” A third states that “to see a doctor we have to call our lawyers, otherwise it could take months.”

When the UCP inmates do receive medical care, it is often provided in their cells, rather than at the Prison’s medical facilities. The S&C Clients are thus concerned that their conversations with health care providers are no more private and confidential than their conversations with counsel and family.

7. Other Concerns
The S&C Clients have expressed dissatisfaction with several additional aspects of their conditions of confinement. Many of their complaints seem reasonable, and could be remedied at very little cost. Thus, they ask for: the right to subscribe to newspapers, to use a typewriter, to have a desk or locker within their cells, to hold legal materials for longer than 24 hours, to keep personal underclothing and shower equipment, and to use fans during the summer.

III. ANALYSIS AND RECOMMENDATIONS
The punitive segregation model, upon which New York has organized its death row, is by now very hard to justify. As the Clinton superintendent himself admits, the middle-aged prisoners on death row have turned out to be among the most obedient within the system. In the six years since the UCP has been established, there has not been a single reported incident of violence, nor a single attempted escape or serious security violation. In spite of this, the UCP continues to operate as if its six condemned men are serious threats to Prison security, who can be controlled only by round-the-clock surveillance and the most stringent restraints.
The punitive segregation model may have seemed a plausible way to organize the UCP in 1995, before the state had any actual experience with the type of prisoners its new death row would be receiving; six years later, the harsh restrictions imposed at the UCP appear to be gratuitous, a form of punishment that has not been judicially imposed and is unrelated to any actual misdeeds the inmates may have committed while in prison. This model, in other words, does not fit the reality of today's UCP, which is a housing area populated by obedient, indeed often passive inmates, obsessed with working on their appeals, and posing little threat to prison security.

We therefore urge the Department of Correctional Services to abandon its present policy of holding all UCP inmates in close confinement and complete isolation until immediately before their execution. Instead, we propose that DOCS adopt the same case-by-case analysis that it employs in determining how and where to house all other inmates entering the corrections system. Currently, each inmate entering New York State prison is classified according to “Security Classification Guidelines,” which require an assessment of the security risks the inmate poses. These Guidelines identify two types of security risks: (1) public risk—a combination of the likelihood that an inmate will escape and the likelihood that he would be dangerous to the public were he to escape; and (2) institutional risk—the likelihood that he will be dangerous to staff, other inmates, or himself. Each inmate is evaluated by point scores which take into account such factors as the inmate's criminal history; history of violence; history of escape and abscondance; time to earliest possible release; family, employment, school and military history; and institutional disciplinary history.

Based upon this analysis, inmates are given a security classification and placed in an appropriate facility. We can see no reason why a similar analysis cannot be performed with inmates under sentence of death, and note that a number of other states currently undertake just such an analysis in determining where death sentenced prisoners should be assigned. Thus, Montana, which has approximately the same number of death-sentenced inmates as New York, employs a classification system, under which inmates on death row can earn privileges by engaging in good behavior. California, which has the largest death row in the Western Hemisphere, classifies its death sentenced inmates as “Grade A” or “Grade B,” the former constituting the majority of inmates, the latter a violent or gang-affiliated minority. The two groups enjoy different privileges and are housed in separate areas, with Grade B inmates consigned to a three-story building called the “Adjustment Center.”
We further note that many other states do not operate their death rows on a punitive segregation model, and that one state—Missouri—actually integrates capital prisoners with the general population at a maximum security facility. Another state, Montana, as we already have noted, allows its death-row prisoners to earn important privileges, including the right to congregate with other death-sentenced prisoners in a day room, to obtain more items from the commissary, and to have greater freedom to use the telephone.

In light of these considerations, the Subcommittee urges the Department of Correctional Services to conform its regulatory model to the actual reality of the UCP. Specifically, we make the following recommendations:

1. Protect the privacy of prisoner meetings with counsel, counsel representatives, psychologists and spiritual advisors. At present, inmates cannot meet privately or communicate confidentially with their families, attorneys, health care professionals (including psychologists) or spiritual advisors. The inmates and their visitors are separated by a Plexiglas partition, which forces all parties to shout in order to be heard. The consequence, of course, is that entire conversations are audible throughout the cellblock, where they may be overheard by other inmates and correction officers. In addition, the partition prevents inmates and visitors from simultaneously reviewing documents; indeed, documents cannot even be transferred unless an officer unlocks a padlocked slot.

   The Subcommittee believes that, at a minimum, the Plexiglas partitions should be removed, although a better solution would be to provide a separate room where privileged visits can be conducted “face to face.” California, Florida, Georgia, Illinois, and Missouri allow such “contact visits” for both legal and non-legal visitors.

   The Subcommittee also believes that audio monitoring of the inmates’ cells should be suspended during their telephone conversations with counsel.

2. Allow inmates to control their own lights. The UCP’s practice of illuminating cells 24 hours a day, with lights that are controlled by officers, interferes with the inmates’ sleep and seems to them a form of harassment. Inmates try to block out the light by placing a towel or blanket over their head—anything to keep “the light [from] shining in my eyes”—but the guards for some reason object to their doing so. The result, which one might expect, is that it is “very, very hard to sleep.” The apparent justification for this “24-hour illumination” rule is that the lights permit night-time video surveillance of the cells; such surveillance in turn is justified by the fear of inmate suicide. The irony in this, however, is that the policy is so demoralizing to inmates, who are unable to see its point and

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**NEW YORK’S DEATH ROW**

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complain bitterly that it interferes with their sleep, that it may increase the likelihood of the very act it is designed to prevent.

The UCP is very small and seems likely to remain so for the foreseeable future. Surely the prison can address its legitimate security and inmate safety concerns simply by having its night-time staff make more frequent rounds of the cells.

3. Expand the list of permitted visitors. The severe restrictions that New York imposes on the list of permissible visitors to death row are unique, unnecessary and cruel. Prisoners cannot be visited by a life-partner, if there has been no formal marriage; they cannot be visited by relatives (such as cousins, step-siblings, uncles and aunts) who fall outside the narrow definition of “family” that DOCS employs for visiting purposes; and they cannot be visited by friends, no matter how close or long-established the friendship may be.

These restrictions on the visitation rights of condemned men, who are permitted no other form of society while awaiting execution, are more severe than those imposed on the general prison population, more severe than those imposed on condemned prisoners in other states, and more severe than those previously imposed in the UCP itself. The Subcommittee can see no justification for these unique and unprecedented restrictions, and therefore urges DOCS to immediately grant UCP inmates the same visitation rights afforded the general prison population at Clinton.

4. Give death row inmates the same commissary privileges that the general prison population enjoys. UCP inmates are permitted to spend $55 per month at the prison commissary, $15 of which can be spent on candy and snacks. Inmates in general population are also given $55 per month, which they can spend as they choose on a wide array of food products, toiletries, cards and other sundries. If a general population inmate violates a prison rule and is sentenced to disciplinary confinement, his monthly food purchases are limited to $15—the maximum allowed death row prisoners even when they have not violated any rules.

DOCS should eliminate these severe and inexplicable restraints on the right of UCP inmates to buy food, especially because UCP inmates often wait 16 hours between their final meal of the day and breakfast. A number of states, including Alabama, California, Florida, North Carolina, Ohio, Louisiana, Illinois, and Texas allow death-row inmates the same commissary privileges as those inmates in the general population.

5. Allow inmates to congregate within the UCP, and to engage in recreational activities in small groups in the exercise cages; afford them exercise equipment and gloves. UCP prisoners are not allowed to congregate either
with each other or with the general Prison population. They are, in other words, kept in virtual isolation, alone in their cells for 23 hours a day, and then alone in the exercise yard for the 24th hour. To our knowledge, DOCS has never publicly explained its policy of keeping these men so isolated, but we have assumed that it reflects a general early expectation that condemned men would be violent and intractable—the worst of the worst in terms of prison discipline.

As Clinton’s own superintendent freely admits, this has not proved to be the case. Indeed, he has stated that the six inmates presently on death row are, in fact, older, more passive and more obedient than most of the rest of Clinton’s population. This, moreover, is commonly the case with death row prisoners. Although it is entirely possible that the next inmate assigned to the UCP will vary from the present rule, and prove as dangerous as DOCS originally expected all condemned men to be, this merely illustrates that presumptions about death row prisoners—either favorable or unfavorable—are very dubious, arising from intuitions and a very errant common sense rather than from a broad and consistent experience.

Our concern with the present state of fairly extreme isolation that is imposed on UCP inmates arises, in part, from the extensive body of literature concerning the destructive psychological effects of solitary confinement and the sensory deprivation it usually entails. This literature has become well known in the corrections community, largely through the work of Dr. Stuart Grassian, who has identified what he calls “solitary confinement psychosis.” Grassian, S. & Friedman, N., Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement, International Journal of Law and Psychiatry, 8, 49-65 (1986). Those who suffer from this syndrome, according to Dr. Grassian, display symptoms including “massive” anxiety, perceptual distortions and hallucinations, difficulty with concentration and memory, acute confusion, primitive and aggressive fantasies, persecutory ideation at times reaching the level of delusion, motor excitement often associated with violent, destructive or self-mutilating outbursts, etc. See also, Benjamin and Lux, “Solitary Confinement as Psychological Punishment,” California Western Law Review, 13, 265-296(1977).

These considerations persuade the Subcommittee that death row prisoners should be allowed some congregation rights unless and until their own behavior proves them to require isolation. We do not now specify the precise form these rights should take—whether congregation should be with other UCP inmates alone, or with members of the general population in supervised settings such as prison jobs or educational programs.
We merely contend that DOCS should abandon the present regime of complete and perpetual isolation, sporadically lifted for family, attorney and medical visits.

The Subcommittee also urges DOCS to relax the extreme and strange restrictions it presently imposes on recreational activities. Today, recreation at the UCP means standing alone in an empty outdoor cage, a condition few outside death row would find particularly stimulating. Inmates should be allowed engage in recreational activities in groups and should further receive some type of athletic equipment, such as a basketball, jump rope or weights.

These proposals—to relax the isolation under which death row prisoners are held—are hardly radical. Indeed many other states already allow death row inmates to congregate. Thus:

- North Carolina allows death-sentenced inmates to congregate in a day room from 7:00 a.m. to 11:00 p.m., where there is a television. Death-sentenced prisoners may also participate in weekly religious services and may attend a 90-minute bible study class taught by the prison chaplain. The death-sentenced prisoners eat in dining halls in groups, not alone in cells.
- California, which has the largest death-row population in the country, allows death row inmates to congregate both inside the prison and outside in the prison yard, and to engage in activities such as chess, cards and board games.
- Florida, Ohio, Illinois, Louisiana, and Pennsylvania allow inmates under sentence of death to exercise together during their recreational period.
- Georgia allows condemned inmates to socialize within their cell blocks for several hours each day, during which time they can play cards, chess and checkers. Death row inmates also are allowed, twice weekly, to exercise with each other.

6. Outside Monitor. In addition to these recommendations for changing specific conditions of confinement at the UCP, the Subcommittee strongly recommends that the state create a mechanism for regular outside oversight of conditions on the UCP. The UCP is unique among housing areas in New York prisons since it is the only location that contains prisoners who have been sentenced to death, and it is the only housing area to which professional corrections monitors have not had regular access.

The importance of visits, scheduled and unscheduled, by an outside
monitor seems obvious. In the first instance, of course, the role of a monitor is to conduct inspections to determine if regulations are being followed. This, however, is not the only service a monitor may provide. A monitor also would be a source of unfiltered information about conditions within the UCP, information both about how inmates are treated and how public funds are being spent. Finally, a monitor represents an extra-institutional vehicle for lodging complaints. Today, UCP prisoners primarily present their complaints to the correctional staff with whom they come in contact. This is unfair to the inmates, because the correctional staff is hardly impartial, and because DOCS seems to have adopted a presumption that inmate requests are unreasonable.

This implicit presumption may be seen in the response by DOCS General Counsel to the FOIL Petition, which we attach as an exhibit to this report. The Petitioner submitted several modest requests for changes in the UCP, among which were: (i) an increase in the variety of toiletries that UCP inmates were permitted to purchase at the commissary, (ii) the right to use typewriters, and (iii) a relaxation of the rule that UCP inmates can make only one 10 minute telephone call per week to family members. DOCS rejected each of these proposals in a perfunctory letter that advanced arguments we find difficult to take seriously. Thus, DOCS asserted that (i) “Additional toiletries would present administratively [sic] and security implications”, (ii) “Typewriters present unique security concerns” and “can be used to secrete contraband,” and (iii) since there is only one telephone on the UCP “Increasing the maximum time that inmates may speak on the telephone with family members would necessarily impact the time that inmates have to communicate with their attorneys.”

Latent in DOCS’ response to the Foil Petition is a hostility, or at least an aversion, to inmate complaints. Given this aversion, we believe that some other method must be found to identify problems at the UCP. This is a role that can be filled by an independent, outside monitor.

We do not now suggest the particular form that a monitoring agency should take. What is important is that it be independent of the executive branch, to which DOCS belongs, that it have a professional staff, however small, and that it have clear statutory authority to make unannounced visits to the UCP.

CONCLUSION

It is a terrible thing to be condemned to death, and confined for years in a small cell, with little to do except to prepare for execution. It
seems self-evident that the conditions under which the condemned spend those last years should not involve additional punishment. Yet, at present, the six condemned prisoners on New York's death row endure a host of indignities and restrictions that normally are employed only as punishment for the violation of important prison rules. To impose these conditions on the UCP's inmates as a matter of course, that is, even if they have obeyed every rule that the system enacts, is harshness without purpose, a fair definition of cruelty.

We have argued in this report that no restriction should be imposed on UCP inmates that is not imposed on the general prison population without a specific and persuasive justification for distinguishing between the two groups. It is because we can see no important distinction between convicted murderers who have been sentenced to death, and are therefore lodged in the UCP, and convicted murderers who have been sentenced to terms of life without parole, and are therefore lodged in general population, that we have strongly recommended abandoning the special restrictions imposed on the UCP.

The Subcommittee recognizes that, even if adopted, the changes we propose may not substantially improve the life of the condemned, each of whom will still suffer under the knowledge that he faces execution. Indeed, it has been noted that "we know little about the experience of living with a death sentence." Nevertheless, we believe that it is better to await death in a humane environment than in one that is harsh and restrictive, and it is toward the end of humanizing the UCP that we submit our proposals.

We urge DOCS to consider our arguments seriously and in goodwill, for this is the spirit in which they are advanced. And we ask them to consider a fact of great importance: it is by no means certain that any of the men on death row will be executed. Some may be returned to the general prison population, where they will be expected to function as members of the prison community. Others may even be found innocent of any offense, and released into civil society. In no case is it in society's interest to impose onerous conditions that may lead to the mental or spiritual breakdown of the prisoner and make it impossible for him to become a functioning member of prison or civilian society. In no case is it in our interest to needlessly inflict pain. But needless, purposeless pain is precisely what is being endured at the UCP today.

August 2001
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Jennifer Wynn,* adjunct member of the Committee on Corrections, is also a member of the Subcommittee.
(d) Judgments Deemed to be Based on U.S. Public Law or Having a Criminal or Quasi-Criminal Nature
3. Procedural Defects
   (a) Inadequate Notice
   (b) Lack of Opportunity to Defend
   (c) Lack of “Finality”
4. No Review of the Merits
5. Reciprocity
6. Choice of Law
7. Expiration of Time Limits
8. Conflict with Other Proceedings
9. Proof of Judgment
10. Fraud

C. Summary of Practical Obstacles to the Recognition of USMJs
1. Bias and Corruption in the Recognizing Jurisdiction
2. Lack of Appeal Process
3. Right to Pursue Recognition
4. Export of Proceeds

D. Length of Time and Procedural Complexity for Recognition

IV. Concluding Remarks
I. INTRODUCTION

The Committee on Foreign and Comparative Law of the Association of the Bar of the City of New York has prepared this survey regarding the recognition of United States money judgments (USMJs) abroad. The survey, undertaken in response to a request by the United States Department of State as part of its ongoing negotiations of the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, was for the purpose of determining what practical obstacles exist to obtaining recognition of money judgments obtained in United States courts in the domestic courts of selected trading partners of the United States.

Our approach was to posit a hypothetical situation in which a U.S. judgment creditor obtained a money judgment in a state or federal court of the United States against a judgment debtor who has assets outside the United States, and, having ascertained that there were insufficient assets in the United States to satisfy the judgment, had decided to pursue the matter abroad. To find out how difficult it would be to actually do so, our Committee looked to a group of selected countries, and surveyed

1. To maintain focus, we limited our survey to commercial matters, rather than attempting to address such matters as family law and personal injury cases.
2. The countries surveyed are identified in Part II below.
members of the bar in those countries and with experience seeking to enforce judgments in those countries, seeking to go beyond black letter law to the more informal, even anecdotal, kinds of information not usually found in the published literature. We wanted to know if there were "unwritten" rules or factors which make it difficult for USMJ's to be recognized in other legal systems. We wish to stress that we were not looking for any particular factor or set of factors, especially negative ones such as corruption, but rather wanted to see which issues would prove important. We also wish to point out that our survey is intended to be just that—a survey, and not an analysis of any particular aspects of (or open issues under) the draft Convention.

The results of our survey turned out to be somewhat different from what we expected, but in retrospect perhaps not altogether surprising. We found little in the way of the anecdotal information that we had anticipated obtaining. What we found was that the relevant substantive and procedural laws themselves, or more precisely the variances found in them between the United States and the states surveyed, constitute significant hurdles to efficient recognition. While at first glance many of the differences may appear minimal, in the actual reality of daily practice they constitute significant obstacles to the efficient recognition of foreign judgments. These substantive and procedural differences result both from historical and cultural factors and from conscious domestic policy choices, and while their existence is understandable, their impact on international commercial activity is indisputable.

We gratefully acknowledge the assistance of members of the Committee on Litigation of the Association in the compilation of this survey.

II. NATURE AND SCOPE OF THE SURVEY

The survey is based on background papers prepared with respect to the following states and jurisdictions: Belgium, Canada, People's Republic of China (People's Republic of China), England and Wales, France, Hong Kong Special Administrative Region (Hong Kong), Italy, Japan, Mexico, South Africa, Spain, and Switzerland. Because of practical constraints it was not possible to include all of the United States' important trading partners, but the Committee believes the states and jurisdictions included comprise a reasonable cross-section of such group. The papers were prepared by members of the Committee on Foreign and Comparative Law and by two members of the Association's Committee on Litigation. In many instances, the Committee members prepared the papers after extensive consultation with ju-
rists, practicing attorneys, and other jurisprudential authorities in the surveyed state, or with US-based attorneys with extensive experience in the surveyed state.³

This survey is arranged by topical subject matter rather than on a state-by-state basis. Under each topic we discuss the states where the topic is relevant. We have chosen this method to emphasize the relevant topic, rather than to focus attention on the specific country. We have focused on recognition rather than on enforcement because we believe that recognition raises “threshold” legal, political, and social issues which must be overcome before issues of enforcement can be addressed.⁴ Once a judgment has been recognized, the issues of enforcement that are unique to international proceedings would seem to be reduced, but in any event are beyond the scope of this survey.

III. RECOGNITION OF U.S. MONEY JUDGMENTS (USMJS)

A. Summary of Substantive Approaches to the Recognition of USMJs (Sources of Applicable Law)

1. Statutory

Legislation to recognize foreign money judgments falls into two broad categories. In all the countries surveyed, legislation of general application governs proceedings to recognize a foreign money judgment in the absence of a treaty with a specific country where a foreign judgment may originate, although not all the legislation can be used by a U.S. plaintiff to its benefit. Where a country has ratified a bilateral or multilateral treaty (and implemented it where necessary), that treaty will govern if the foreign judgment came from one of the other states which also has ratified that treaty.

In the case of the United States, with all but one of the surveyed countries there is no treaty governing the recognition of judgments. Indeed, for that matter there is no such treaty with any other country.⁵

3. Some of the contributing Committee members themselves are qualified in the relevant jurisdiction.

4. Recognition is the determination by the recognizing court that a foreign judgment comprises the final and conclusive resolution of the relevant issues between the parties to the proceeding, and is entitled, generally speaking, to the same treatment as a domestic judgment. Enforcement of a (recognized) judgment, by which the judgment creditor “collects” on the judgment, can be had by any of the various procedural devices available for enforcement in the recognizing (enforcing) jurisdiction.

5. Certain Canadian provinces have reciprocal legislation with a limited number of (U.S.) states.
Thus, parties seeking recognition of a USMJ are subject to a patchwork of national laws governing the recognition of judgments. In those countries having a civil law system, such as Italy, Mexico, Spain, France, Japan, China, Belgium, and Switzerland, national statutes form the exclusive basis for gaining recognition of USMJs. While it is not accurate to say the civil law countries have no “jurisprudence,” in the sense that courts there do not pay attention to legal precedent in the sense of stare decisis, prior decisions clearly play a lesser role in determining outcomes of cases. In the four jurisdictions surveyed which use common law forms of action, England, Canada, Hong Kong, and South Africa, U.S. judgment creditors may proceed under a suit at common law to enforce the judgment.

2. Common Law or Jurisprudential

In countries or regions with a common law system, such as England, Canada, Hong Kong, and South Africa, the applicable law for recognition of USMJs can be either statutory or case law, with each country having its particular set of requirements. In England, for example, while foreign judgments may be enforced either at common law or by statute, the relevant statutes are applicable only to judgments from those countries with which there are statutory reciprocal arrangements. These countries are generally those which are parties to certain international treaties to which England is also a party. This statutory régime most definitely excludes the United States. Thus a United States judgment creditor may still gain recognition and enforcement of the judgment, but as English common law treats the debt as a contract containing an implied promise to pay, the US judgment creditor must seek recognition through filing an ordinary lawsuit to enforce the debt between the parties. Or, the judgment creditor may file a suit de novo if a cause of action exists. In general, US judgment creditors experience little apparent difficulty in enforcing judgments in England; a 1983 decision, Israel Discount Bank v. Hadjipateras, allowed the enforcement of a U.S. $10 million judgment.

In Canada, the laws of the provinces and territories, not the federal law, govern the recognition of foreign judgments. Each province and territory, except for Québec, has the common law as its basis of law governing foreign judgments. Certain of these common law provinces and territories (excluding Ontario, which has Canada's largest and most international economy) have enacted statutes specifically addressing the recognition of foreign judgments. These are available to foreign judgments from jurisdictions with which there are statutory reciprocal arrangements, including a number of states of the United States. Reciprocity arrange-
ments are, however, most frequently in place with respect only to certain border states of the United States.

The other way a judgment creditor can seek recognition of a USMJ is by bringing a common law action on the judgment as a debt claim in the Canadian province or territory in which it is to be enforced. In almost all cases, this ends up being a longer procedure than seeking recognition under the reciprocal statutes.

Hong Kong, although formally a part of China since June 30, 1997, retains (under its Basic Law) laws that were previously in force (subject to certain exceptions not relevant here and that do not change the rules for recognition of foreign judgments to be recognized). Under Hong Kong law, foreign judgments may be recognized and enforced by (a) registration (domestication) pursuant to statute; (b) suit at common law; or (c) relitigating the original cause of action. Since the U.S. has no treaty with Hong Kong, it cannot benefit from the statute.

In South Africa, the applicable law for the recognition of USMJs is the South African common law, which is based on the Roman-Dutch legal system. Nonetheless, there is a statutory constraint placed on foreign judgments in that the Protection of Businesses Act (as amended in 1979) requires that the Ministry of Industry, Commerce and Tourism grant permission before recognition will be allowed. This measure is taken so that the Government of South Africa can assert any interest it may have in any proceedings involving South African persons or assets by foreign persons.

B. Summary of Defenses to Recognition of USMJs

1. Lack of Jurisdiction Over the Defendant.

Whether the courts of the originating jurisdiction have jurisdiction over the defendant, as determined by the conflict of laws rules of the recognizing jurisdiction, is an important issue in all the states surveyed. The applicable laws have different tests for jurisdiction, and can in general be divided between states having more restrictive or less restrictive tests. Most of the states surveyed have concepts of jurisdiction which are inconsistent or incompatible with U.S. concepts of long-arm jurisdiction and are not prepared to see such U.S. concepts expanded into their countries. Two of the states surveyed, Japan and China, appear to have no formal criteria, which makes the standards for determining jurisdiction difficult to discern. As both Japan’s and China’s legal systems incorporate more features of civil law systems than of common law systems, however, it is highly unlikely that USMJs based on expansive U.S. long-arm concepts will find a welcoming environment in those two countries.
(a) States Having More Restrictive Tests of Jurisdiction

The states of England and Wales, Switzerland, South Africa, France, Italy, Spain, and Mexico take a narrow view when considering whether a United States court had jurisdiction over a defendant.

For example, jurisdiction in England and Wales must be established according to English rules of conflict of laws; it is not sufficient that the US court asserted jurisdiction based on its own law. Pursuant to English conflict of law rules, jurisdiction shall be established if (a) the defendant was resident or present in the country of the foreign court at the date to the commencement of the proceedings; (b) in the event that the defendant is a corporation, it was to some extent carrying on business in the country of the court, at a definite and reasonably permanent place, at the date of the commencement of the proceedings; or (c) the defendant submitted or agreed to submit to the jurisdiction of the foreign court. The judgment creditor must also provide evidence of service of process, and must show that the judgment is “final and conclusive.”

Under Swiss law, jurisdiction is even more narrowly determined. Under the Swiss Private International Law (SPIL), the law governing the recognition of foreign money judgments in Switzerland, a foreign judicial authority has jurisdiction only (a) if the defendant had its domicile in the country where the decision was rendered, or (b) in disputes involving a financial interest, if the parties agreed on a forum selection clause, or (c) in disputes involving a financial interest, if the defendant unconditionally surrendered itself to the foreign authority’s jurisdiction, or (d) if the defendant brought a counterclaim before that authority. Swiss law generally provides that contractual claims must be brought at the defendant’s place of residence or domicile. Thus, a U.S. judgment against a Swiss resident defendant would not be enforceable in Switzerland unless there was a forum selection clause, an unconditional submission to the foreign jurisdiction in a financial dispute, or a counterclaim by a Swiss defendant in the U.S.

An important issue under Swiss law is whether a defendant has unconditionally submitted to the foreign court’s jurisdiction. According to one (Swiss) District Court, a defendant has unconditionally submitted to

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6. While there are of course differences between a natural person and a corporation, whether jurisdiction would be established would likely turn on questions of fact regardless of the form of the entity. If the individual, agent, or other entity was resident or present and doing business at a definite and reasonably permanent place in the originating jurisdiction on the date of the commencement of the proceedings, then the individual, agent, or other entity would likely fall within the scope of the rule.
a court's jurisdiction if the defendant leaves no doubt that the defendant is doing so. If a defendant objects to the U.S. court's jurisdiction at the outset of the proceedings, then Swiss law will deem the defendant not to have unconditionally submitted to the U.S. court's jurisdiction, even if the defendant did not object again during the proceedings or appeal the decision.

South African courts will not recognize a foreign judgment, including a USMJ, unless the foreign court exercised jurisdiction according to South African rules. This precludes U.S.-style long-arm jurisdiction as an acceptable means to assert jurisdiction. South African courts will recognize the debtor's domicile as valid jurisdictional grounds, provided the defendant had the opportunity to appear and defend. Notice by publication in a local newspaper in the foreign forum has been held to be unacceptable by South African courts if the defendant did not live in the foreign forum. To be enforced in a South African court, the judgment must also be “final.” Finality is considered to attach when the judgment is no longer “rescindable.” Under South African law, the fact that a foreign judgment is on appeal has no effect on the finality of a judgment, although South African courts have the discretion to stay a proceeding pending the outcome of the appeal.

Under French law, the court will examine the jurisdiction of the foreign court to determine whether the litigation has a real connection with the country where the foreign judgment was rendered and to see whether the French court has exclusive jurisdiction or not. Under Article 15 of the French Civil Code, the portion of the Code relating to the recognition of foreign judgments, if the French rules governing conflict of laws do not confer exclusive jurisdiction to French courts, the jurisdiction of the foreign court must be recognized so long as the dispute has a significant connection with the foreign country and the choice of court was not fraudulent.

In practice, Article 15 and the case law interpreting it impose a very effective obstacle to the recognition of USMJs by granting exclusive jurisdiction to the French courts whenever the defendant is a French national (unless the defendant has waived it). Waiver by the French defendant may be express, via a valid choice of law clause in a contract, or implied, via failure to raise as a preliminary issue the lack of jurisdiction of the foreign court. However, failure to appear, failure to appeal, or appearance solely for the purpose of contesting jurisdiction do not constitute waivers of jurisdiction under French law.

Italian law also follows the general tendency of civil law countries
not to recognize and enforce USMJs due to incompatible concepts of what constitutes an appropriate basis to assert jurisdiction. In Italy, the exercise of “exorbitant” jurisdiction by U.S. courts inconsistent with Article 64(a) of Law No. 218 (“Reform of the Italian System of Private International Law,” enacted May 31, 1995) will make USMJs difficult or impossible to enforce. USMJs rendered on the basis of some state long-arm statutes will not be enforced in Italy to the extent that such jurisdictional criteria are unknown in Italian law. In contract matters, for example, Italian courts have jurisdiction only if the defendant is domiciled or resident in Italy, or if the contract was to be performed in Italy. In tort matters, Italian courts have jurisdiction only if the defendant is domiciled or resident in Italy or if the harmful event occurred in Italy. A USMJ will not be enforced if jurisdiction over the defendant was based on the “minimum contacts” basis or another jurisdictional basis not recognized in Italian law.

Spain will recognize a USMJ if the U.S. court applied jurisdictional rules similar to those used by Spain. Spain will not recognize “exorbitant” jurisdiction, i.e., one in which there is no connection between the subject matter of the litigation and the commercial or other activities carried out by the defendant in that jurisdiction. This may preclude recognizing jurisdiction asserted under U.S. long-arm statutes. Spain (like many states) reserves to itself the exclusive right to decide certain matters, such as rights in real property and immovables located in Spain; the incorporation, validity, nullity and dissolution of corporations or any other legal person domiciled in Spain, as well as agreements and decisions of the governing bodies, such as a Board of Directors, of such domestic legal entities; the validity and nullity of the records registered in any Spanish register; and the validity and nullity of patents and any other registered rights or deposited rights when filed in Spanish registers. Therefore, any USMJs arising out of one of these areas will not be recognized or enforced in Spain. USMJs are most likely to be successfully recognized and enforced in matters relating to contracts or damages for breach thereof, including damages for breach of labor contracts.

Mexico will recognize and enforce a USMJ so long as the U.S. court had jurisdiction over the defendant and the USMJ was rendered in accordance with rules of jurisdiction compatible with Mexican law. Under Mexican rules of jurisdiction, mere physical presence in the country is not a sufficient basis to assert jurisdiction. Mexican courts require evidence of some other kind of connection, such as doing business in Mexico or committing a tort in Mexico. A foreign company is “doing business” in Mexico if
it “habitually” carries out “acts of commerce,” or qualifies as a “permanent establishment” under the U.S.-Mexico treaty for the avoidance of double taxation. The subject matter of a suit need not be specifically related to the business of the foreign company in Mexico. A U.S. attorney seeking to enforce a USMJ in Mexico would be well advised to pay careful attention to Mexico’s rules regarding proper notification—personal service is the only acceptable form.

There are certain substantive matters which Mexican law reserves exclusively to Mexico, and therefore Mexican courts will not recognize foreign judgments in those areas. Examples include suits relating to lands and waters located within Mexico’s national territory or marine resources within Mexico’s 200 nautical mile exclusive economic zone, suits relating to acts of the federal or state entities of Mexico, and other cases as provided by Mexican law. Mexican law does not recognize the concept of forum non conveniens.

(b) States Having Less Restrictive Tests of Jurisdiction

In the 1990s, Canadian case law began to take a more expansive approach to jurisdictional matters than it previously had. Prior to 1990, Canada applied a narrow common law test (similar to that in the UK, as discussed above) to determine whether a foreign court had proper jurisdiction over the defendant. After a case decided in 1990, Morguard Invts. v. DeSavoye, the decisional basis became a “real and substantial connection” to the subject matter or to the person against whom the originating court rendered judgment. Among the factors a Canadian court will look at to determine whether the requisite nexus exists are the following: (a) whether the debtor was a resident in the foreign jurisdiction when the cause of action arose (not on the date of the commencement of the recognition proceedings); (b) whether the debtor carried on business in the foreign jurisdiction; (c) whether the debtor was served in the foreign jurisdiction; (d) whether the contract which is the subject matter of the suit was entered into in the jurisdiction; (e) whether the action in the foreign jurisdiction was anticipated to be a remedy likely to be relied on by the judgment creditor; (f) whether any objection to the jurisdiction of the foreign court was made by the debtor; (g) whether any agreement to bar proceedings in the foreign jurisdiction was entered into; (h) whether the loss or damage complained of occurred in the foreign jurisdiction; and (i) whether there was a choice of law clause selecting the foreign jurisdiction. Almost without exception, Canadian courts have held that the emphasis in Morguard on comity, including its international dimensions, supports
the application of its principles to judgments from outside Canada, including the U.S.

(c) States Having No Specific Tests of Jurisdiction.

According to the Japanese Code of Civil Procedure, for a foreign money judgment to be enforceable in Japan, the court of origin must have jurisdiction over the parties and the subject matter of the original action from the point of view of Japanese laws and ordinances, or on a basis of a treaty that is applicable to Japan. Since the U.S. has no treaty with Japan regarding the recognition of judgments, anyone seeking recognition of a USMJ must seek recognition under relevant Japanese law. The Code of Civil Procedure does not provide specific standards for determining whether a Japanese court has such jurisdiction; accordingly, there can arise uncertainty in evaluating whether this requirement has been met.

China has entered into bilateral treaties on judicial assistance in civil and commercial matters with a number of countries; however, the U.S. is not one of them. According to the Chinese Code of Civil Procedure, jurisdiction lies with the Intermediate People's Court in the area where the judgment debtor resides or where the subject property is situated. The principles governing the recognition of judgments under Chinese law assign great importance to reciprocity. Under Chinese law, the foreign judgment must be recognized if the foreign judgment or ruling is not in contradiction with basic Chinese legal principles or the sovereignty, security, or social and public interest of China. Beyond these very general precepts, it is not known how these general principles would play out with specificity in actual practice. The Committee was unable to find any precedent of any U.S. party having attempted to have a USMJ enforced in China.

2. Recognition of Foreign Decision Against Public Policy

If the above discussion of jurisdiction leaves the reader with the sense that widely varied concepts of jurisdiction make the prospect of pursuing a judgment abroad an uncertain proposition, then a review of the public policy bases for refusing recognition of a USMJ will not make the reader rest any easier. Reflecting fundamental political and cultural disharmony with U.S. laws, courts, and procedures, the notion of public policy in all the states surveyed often acts as an effective deterrent to the recognition abroad of USMJs.

The public policy defense may serve as a useful shield to the judgment debtor against the recognition of a USMJ in a number of ways.
Where a USMJ has a punitive (or multiple) component, a feature of U.S. law universally disliked in the states surveyed, denial of recognition may be justified as furthering local concepts of justice by preventing unjust enrichment. In some countries, standards of what constitutes private law itself may differ so sharply from those accepted in the U.S. that a local court may refuse to recognize or enforce certain kinds of judgments. Securities and tax cases in particular fall into this category. Swiss law, for example, probably would not recognize judgments rendered under U.S. federal securities laws ordering the disgorgement of profits on the grounds that such a judgment is public or administrative in nature. Public policy can in some instances be seen as a means of mitigating laws prohibiting the re-examination of the merits of a case.

The various specific grounds for refusing recognition of USMJs on the basis of inconsistency with local public policy vary widely. Speaking broadly, U.S. or other foreign money judgments will not be enforced if to do so would threaten the sovereignty and security interests of the recognizing state, violate constitutional protections or offend the social or public order. For example, in Japan, the Civil Code states that both the content and procedure followed in the court of origin must not be contrary to the “public order or morals” of Japan if the USMJ or other foreign judgment is to be recognized. Public policy is generally thought to mean the basic principles or philosophy of the Japanese legal order in light of the common moral good. In Japan, as elsewhere, defining what constitutes the common moral good is frequently left to the discretion of the presiding judge. The effect is to give the judge wide although not indiscriminate latitude.

In Hong Kong, the main public policy grounds for refusing to enforce a USMJ are restraint of trade and judgments the recognition of which would offend local standards of morality, justice, human liberty, and freedom of action.

Italian law provides that foreign judgments shall not conflict with Italian public policy. Italian case law on the definition and scope of public policy is very limited and has tended not to involve commercial cases. In those cases in which an Italian court has ruled on the issue, the practice has been to adopt a very narrow construction of public policy. It is therefore possible for an Italian judge to order the recognition of a foreign judgment which, had the judgment originated in Italy itself, would not have been issued on the basis that it violated public policy. Since most of the cases in which the issue of public policy has been raised involve the recognition of foreign judgments of divorce, it is not clear how
it would apply to the recognition of a USMJ outside of this context. It has been suggested by some Italian practitioners, however, that in the appropriate situation public policy arguments could successfully be made.

Under Swiss case law, the public policy exception must be narrowly construed, and is applied on a case-by-case basis. The closeness of the connection to Switzerland is an important factor in deciding the standard to be applied. Similarly in Belgium, case law has repeatedly emphasized that refusal to recognize a foreign judgment on public policy grounds must remain the exception.

A detailed discussion of the many public policy grounds that the states surveyed have used for refusing enforcement of a USMJ is beyond the scope of this survey. However, four principal grounds have emerged from the Committee's survey. These are: (a) judgments awarding multiple or punitive damages; (b) judgments deemed to have the effect of unacceptably restraining trade; (c) judgments based on decisions grounded in novel causes of action; and (d) judgments deemed to be based on U.S. public law or having a criminal or quasi-criminal nature. Reluctance or refusal to enforce USMJs based on these grounds may be seen as a reluctance of foreign courts to act as an arm of, or to be perceived to be acting as an arm of, a foreign state in furthering the interests of the citizens of such foreign state. A more detailed discussion of these grounds follows.

(a) Judgments Awarding Multiple or Punitive Damages

Most of the surveyed countries consider the recognition of punitive damages to be contrary to public policy. The general rule is not to enforce that component of a USMJ. The legal basis for this approach is analogous to the general common-law principle of not enforcing so-called “penalty clauses” in contracts which have the effect of rewarding a plaintiff beyond the extent of the actual damages suffered. In the civil law context, the principle is the same: the public policy rationale is to favor compensation over deterrence in civil matters.

The issue of multiple damages in a foreign recognition context is also troubling. In the U.S., double or treble damages most often are awarded pursuant to antitrust, securities, or environmental legislation. The notion of a judgment directed at deterrence and patently out of proportion to the actual pecuniary loss suffered is, like punitive damages, offensive to the public policy of most nations. Of course, the granting of double or treble damages under U.S. statutes itself reflects deliberate policy choices, so perhaps it is not surprising that other states do not feel compelled to blindly accept such choices.
Under Swiss law, for example, an important issue in the recognition arena is whether a judgment awarding multiple or punitive damages is considered a civil judgment, normally recognized under private law, or a criminal law judgment, which would not be recognized. Historically, Swiss courts have not recognized multiple or punitive damage judgments because they were considered penal in nature. Thus a USMJ reflecting multiple or punitive damages normally would not be recognized. However, in 1991 the Court of Appeals of the canton of Basle-Stadt held that a judgment awarding punitive damages may be characterized as a civil matter under the SPIL. The court held that the punitive damage component was not a “criminal law punishment” but a “private law punishment,” and therefore worthy of recognition. The court’s reasoning was that the punitive damages served the purpose of enforcing private law, and accordingly could be recognized. There are other recent cases, all decided on a case-by-case basis, which have recognized punitive judgments under the reasoning that if the purpose of the punitive judgment was predominantly to compensate the plaintiff for actual damages or to deprive a defendant of unjust enrichment, then the damages could be enforced as a civil matter. On the other hand, if the Swiss court determines that the punitive damages are primarily intended to punish the defendant, deter future behavior, or give rise to unjust enrichment, then the judgment probably will be refused recognition on the grounds that it is not a civil matter. As of this date, the Swiss Federal Court, the nation’s highest court, has yet to publish a decision regarding the recognition of punitive damage judgments under the SPIL, although there have been recent indications that punitive damages could be recognized, given the right circumstances.

Another issue with respect to the recognition of USMJ in Switzerland relates to judgments ordering the disgorgement of profits. Under U.S. securities laws, disgorgement of profits is a civil remedy designed to deprive the defendant of illegal profits. Swiss law, however, is more likely to consider disgorgement to be an administrative law remedy because the disgorgement is intended to recover illicit gains and not to determine the obligations between the parties. Additionally, U.S. securities laws are designed to protect the integrity of the U.S. securities markets, and therefore under Swiss law will be characterized as public or administrative, and therefore not given effect.

Under French law, punitive damages do not exist, and as a general principle are against public policy. Under the French Civil Code, judgments for damages are only intended to indemnify the plaintiff for actual losses. Even if the parties agree on a penalty clause, the French court
may, sua sponte, increase or decrease the penalty if it is either excessively high or excessively low. Although there appears to be no case law on this specific subject matter, some French courts reportedly do tend to uphold punitive damage judgments under limited circumstances, although an in-depth discussion of the precise nature of those circumstances requires more information than is presently available to the Committee.

The reasoning behind an apparent willingness to recognize some non-compensatory awards despite the general public policy prohibition lies in the French judiciary's treatment of foreign judgments in general. Since 1964, when an important case establishing the framework for recognizing foreign judgments in France was decided, courts have held that French judges are prohibited from reviewing the substance and merits of a foreign judgment. Thus a judgment may be upheld even if it violates French public policy so long as its overall effects are not contrary to it. Application of French public policy does not strike down the foreign judgment itself, but only the effects it might produce in France. Insofar as the effects are divisible, a French judge may recognize certain of those effects but not others. 7

In England, multiple and punitive damages are considered to be contrary to public policy. Hong Kong also will not enforce multiple or punitive damages on public policy grounds. In Italy, multiple and punitive damages also appear to be against public policy, especially if they are awarded pursuant to a default judgment or if they exceed damages permissible under Italian law. There is, however, no specific case law on this subject.

Finally, South African law prohibits the recognition of multiple or punitive damages.

(b) Judgments Deemed to Have the Effect of Unacceptably Restraining Trade

The notion of promoting, not restraining, trade and commerce is a fundamental tenet of many states. In refusing to recognize a USMJ on the ground that it reflects an unacceptable restraint of trade, a foreign court again is contrasting the laws of the originating jurisdiction with those of its own. For example, the traditional common law test for enforcement of a restrictive covenant such as a non-compete clause (that it

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7. There appear to be only two cases on this point, both in the domestic relations arena. In the first case, financial support in favor of two wives of the same man was awarded even though bigamy violates French law. In the second, a repudiated wife was awarded a financial settlement even though French law does not recognize this manner of divorce. It is uncertain how, if at all, the reasoning in these two cases would apply to a foreign judgment rendered in a corporate matter.
be reasonable as to the scope of activities, geographic coverage, and time period) will be interpreted differently in different common law jurisdictions.

In Hong Kong, restraint of trade constitutes adequate grounds for a refusal to recognize a foreign judgment.

(c) Judgments Based on Decisions Grounded in Novel Causes of Action

Again, the defense to recognition of a USMJ on the ground that it is based on a “novel cause of action” reflects a tendency of recognizing courts to compare United States law to domestic law and to resist adopting the U.S. form when such comparison illustrates substantive differences. In addition, it reflects a wariness of validating a new cause of action which has yet to be tested in the United States over time and through appeal decisions. Also at work is a theme running through each of the two public policy grounds discussed above, namely, that by recognizing a USMJ inconsistent with local law, there is a risk that the decision to recognize will be seen as precedent for (and thereby importing into the local law) the reasoning behind the USMJ. Although many foreign states consider United States decisions to be of precedential value, a proceeding to recognize a foreign judgment is likely to be seen as an inappropriate forum for developing local law. Mexico is a jurisdiction where there has been a historical reluctance to recognize unfamiliar causes of action.

(d) Judgments Deemed to be Based on U.S. Public Law or Having a Criminal or Quasi-Criminal Nature

The preceding discussion makes it apparent that, in sensitive areas of the law, foreign courts view the recognition of foreign judgments as a potential threat to their sovereignty. Recognition of judgments based on prosecutions by foreign states runs especially counter to the natural desire of each state to preserve its borders and to protect its nationals from foreign sanctions. As a matter of national import, there is a judicial bias toward deferring to the domestic government in respect of such matters rather than exercising legislative authority by judicial act based on foreign policy determinations. Examples of this kind of recognition problem can be seen in the general reluctance of foreign courts to recognize USMJs arising from revenue and tax judgments, judgments based on US securities laws, and antitrust cases.

3. Procedural Defects

In each of the states surveyed, certain procedural defects that are proved by a defendant serve as a defense to recognition of a foreign judgment.
The following procedural defects have been identified in all the states surveyed: lack of notice to the defendant; failure to afford the defendant the opportunity to present a proper defense, as in the case of a default judgment; and lack of "finality" of the judgment itself.8

(a) Inadequate Notice

In all of the states surveyed, a USMJ or other foreign judgment will not be recognized if the defendant was not afforded adequate notice. The chief difference among the states surveyed is whether adequate notice must be given in accordance with the laws of the originating jurisdiction or the recognizing one.

In Canada, the courts generally require only that the defendant be given notice in accordance with the rules for service of process in the originating jurisdiction.

Italian law similarly requires that the defendant be afforded notice in accordance with the law of the place where the judgment was granted, and that the defendant's fundamental due process rights are respected.

Japanese law requires that the defendant receive notice by summons or "other necessary orders" other than notice by publication, or that the defendant has appeared and defended despite the absence of service. Japanese law does not require that service be accomplished in accordance with the Japanese Code of Civil Procedure, but only that the defendant be given adequate notice to defend. Service must be accompanied by a translation, regardless of a defendant's foreign language ability. There are no specific court decisions on the adequacy of service by mail.

By contrast, Mexico places great importance on the formalities of proper service, requiring that "personal" service be effectuated. Service by mail is not acceptable as there is no presumption of receipt by mail. Judgment creditors seeking to recognize a foreign judgment in Mexico are well advised to follow Mexican procedural rules to the letter in this particular regard, as lack of proper notice according to Mexican standards is a major obstacle to having a judgment recognized.

China requires that the defendant receive "actual notice" by a method which was "reasonable." South African courts have refused to recognize a judgment claiming notice via publication in the local newspaper of the foreign forum when the defendant did not live there.

8. Most states also will not recognize a foreign judgment if it conflicts with a judgment rendered by the recognizing court, nor will a foreign judgment be recognized if there is a current proceeding or judgment pending on the same issues and between the same parties before the recognizing court. See Part III.B.8 below.
The Spanish Code of Civil Procedure establishes that a foreign money judgment cannot be recognized or enforced if the judgment has been rendered as a default judgment. This has been interpreted by the Spanish Supreme Court to mean not that a defendant must be physically present to defend, but that the defendant must have been duly notified and given enough time to defend. Thus, proper summons or subpoena must have been given.

Under Belgian law there is no specific requirement with regard to notification of the defendant. There is case law, however, upholding the right of the defendant to a proper defense in the foreign proceeding.

(b) Lack of Opportunity to Defend

All of the states surveyed require that the defendant be given an opportunity to present a proper defense in the foreign jurisdiction as a condition to the recognition of a foreign judgment. Failure to permit sufficient time to prepare a proper defense between the time of notice and the time of hearing and failure to permit a full and fair trial on the merits with a full right of the defendant to be heard are grounds for refusal to recognize and enforce a USMJ or other foreign judgment. The determination of what constitutes “sufficient” time and what constitutes a full and fair trial on the substantive and procedural merits obviously varies by state, the latter being well beyond the scope of this survey.

As to default judgments, the general rule in a number of jurisdictions seems to be that foreign default judgments will not be recognized on the grounds that they do not afford a defendant the opportunity to be heard. Mexico is one such jurisdiction and some U.S. practitioners with experience there have indicated that gaining recognition of a USMJ or other foreign judgment rendered by default can be problematic for just that reason.

In Italy, a foreign default judgment will be recognized if it was granted in accordance with the law of the originating court. However, Italian law requires examination of the notice to the defendant in the original action, both to determine whether the originating court followed its own service and notice procedures and whether the service and notice provided satisfies due process rules applicable in Italy. USMJs obtained by default can be challenged as a violation of the right of defense guaranteed under Italian statutory law.

In France, a USMJ or other foreign judgment will not be recognized if the sole basis for the judgment is the default of the defendant. Under English law, a USMJ will not be recognized if the foreign proceedings were
contrary to “natural justice.” Since Belgian law requires that foreign judgments always must be reviewed on the merits before recognition can be granted, presumably USMJ s entered by default would not be recognized. Likewise, an inadequate period of time between the notice and the hearing will constitute grounds to deny recognition of a foreign judgment in Belgium.

The Spanish Supreme Court recognizes three different types of default: default in conviction, default of convenience, and forced default. The first type, default in conviction, is a non-appearance by the defendant before the foreign court because the defendant does not recognize the court as competent. In the second type, default of convenience, the defendant appears but only to contest the jurisdiction of the court. In both these types of defaults, the Spanish Supreme Court will recognize the USMJ. A forced default occurs when the defendant does not appear because the defendant was not properly served or was not served in time to appear. As a corollary to the need for adequate service, a USMJ rendered under these circumstances will not be recognized in Spain.

(c) Lack of “Finality”

All of the states surveyed require that a foreign judgment be “final” (res judicata) as a condition to recognition. “Final” means either that the judgment has become effective and that all avenues of appeal are exhausted, or that the time period for appeal has expired without action by either party. This raises the issue of what “final” really means in the context of the surveyed states’ legal systems. In the US, finality is usually determined by whether the judgment has disposed of all the issues on the merits of the case. Finality thus could arise through a trial judgment. In Mexico, on the other hand, a judge is much less likely to accept a trial court decision as final for the purposes of recognizing a USMJ or other foreign judgment. This would appear to offer an opportunity for a defendant to raise a roadblock to the recognition of a USMJ.

In Spain, recognition of a USMJ will not be granted unless the decision is beyond the possibility of further appeal in the U.S. The Spanish court will refuse to grant recognition due to lack of finality, defined in this manner, despite Spain’s reciprocity rules, discussed below. In other words, even if the country of origin enforces judgments that are not final according to Spanish rules, Spain will not similarly enforce a USMJ or other foreign judgment. Preliminary relief awarded by a U.S. court will also not be enforced by a Spanish court, even though Spanish law recognizes a number of preliminary relief measures in its own law.
The law of Belgium requires that the judgment has become final and non-appealable in the country of origin and that the decision is enforceable in accordance with the law of the originating jurisdiction.

Swiss law requires the plaintiff to prove that the judgment has become final. This may be done by submitting a certificate confirming that a judgment has become final or by proving finality through the content of the court files. Whether an affidavit valid under US law will suffice to prove the finality of a USMJ is an issue which apparently has not yet been reviewed by the Swiss Federal Court.

South African law holds that a decision is final when it is no longer rescindable. Under South African law, even if a foreign judgment is on appeal in the originating jurisdiction, a USMJ or other foreign judgment is considered to be final. However, South African courts have the discretion to stay a recognition proceeding in South Africa pending the outcome of the appeal. In South Africa it is the defendant, not the party seeking recognition, which has the burden of proving that the judgment is on appeal.

In Canada, the USMJ must be final and conclusive, in that any appeal period must have expired without any appeal having been taken.

In England, for a USMJ to be enforced under a summary judgment proceeding (alleging breach of contract), the judgment must be final and for a fixed sum of money. If the USMJ is on appeal before the U.S. courts, the English court may stay the English proceedings.

In Hong Kong, a judgment must be final and conclusive. A judgment will be considered to be final and conclusive even if it is still subject to appeal or there is an actual appeal pending, so long as it is final and unalterable in the court in which it was pronounced.

In Japan, before a judgment can be recognized, it must be final and non-appealable. For a USMJ to be final and non-appealable, it must have been rendered by a court, as opposed to an administrative agency, and it must not be subject to further appeal under the laws of the country in which the judgment was originally issued. In China, a USMJ or other foreign judgment must be final and non-appealable in accordance with the law of the originating jurisdiction.

4. No Review of the Merits

In all the states surveyed except Belgium, the law provides that the recognizing court will not review, or that the recognition proceeding should not be used as an opportunity to re-litigate, the merits of the original case. This is subject to the caveat that where the basis for the judgment

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impinges on the public policy concerns of the recognizing state, these concerns will be considered and may be found to be a valid defense to recognition. In short, the merits of the decision will not be reviewed unless issues of public policy are involved. How large an obstacle the public policy exception will constitute to the recognition of a USMJ will obviously depend on the circumstances of the case, but its potential impact cannot be ignored by a U.S. judgment creditor.

In Japan, for example, the Code of Civil Execution states that there will be no review of the merits of the original judgment and that the scope of review of the Japanese court is restricted to whether or not the foreign court has rendered a valid and final judgment. However, if the Japanese court determines that there is a public policy question at issue, then the Japanese court has the discretion to hear the underlying facts of the case.

A Chinese court will not review the merits of a case unless recognition would be prejudicial to the sovereignty, security, public order, or social and public interest of China. In Hong Kong, on the other hand, the merits will not be reviewed on the grounds that recognition of a USMJ or other foreign judgment cannot be refused due to errors of fact or law.

In Canada, where recognition of a USMJ is sought under reciprocal legislation, the merits of the case will not be reviewed. If the USMJ is sought to be enforced under common law proceedings, the judgment will be deemed to be conclusive as to findings of fact and conclusion of law, so long as the originating court had jurisdiction over the judgment debtor.

In South Africa, issues of fact and law are considered conclusive and not subject to review unless it can be shown that concepts of natural justice were violated.

Under Spanish law, the merits of the case will not be reviewed unless the Spanish court finds that there are issues of public policy or that Spanish constitutional rights and liberties are at stake.

Since the Munzer decision in France, French courts have held that a review of the merits of a foreign judgment shall not be undertaken.

In Belgium, the relevant statute provides that the merits of the case must always be reviewed before recognition may be granted. Such a review involves consideration of whether the foreign (U.S.) judge has carefully examined the facts and correctly applied the law. In exercising a kind of “quality control” over foreign judgments, the review of the merits is extensive and may lead to a totally new trial, but without the possibility of introducing new claims. Although a trial de novo can result in the same favorable (to a U.S. judgment creditor) outcome, the mere prospect
of having to retry a case from the beginning obviously represents a significant obstacle to a U.S. judgment creditor.

5. Reciprocity

Reciprocity is a key issue in many of the states surveyed. Without reciprocity, many of the states will not recognize a USMJ. Since the U.S. has no relevant treaty with any of the states surveyed, reciprocity in the context of the recognition of USMJs is determined either under legislation or by case law.

It must be noted here that the issue of reciprocity sometimes is complicated by the fact that some states, i.e., the U.S., Canada, and Mexico, are federal in their political and legal organization, while the others surveyed are unitary. Recognition in unitary states is governed by laws applicable throughout the state. In the case of states having a federal structure, the situation is more complex as judgments may arise (whether by statute or by jurisprudence) either from the state entity or from the federal entity. This may pose a problem for the recognizing state in deciding which foreign (originating) entity—the state or the federal—is relevant in determining whether the reciprocity requirement is met. That is, does a recognizing state look to U.S. federal law or U.S. state law to determine whether reciprocity exists?

South Africa has no official policy or statute regarding reciprocity and generally will not deny recognition of valid USMJs on reciprocity grounds. One important exception is where the foreign judgment was issued by a state not recognized by South Africa.

In Mexico, reciprocity is not a prerequisite to recognition but a defense to it. Judges have discretion to consider whether the courts of the originating jurisdiction have given Mexican judgments sufficient reciprocity. If the Mexican court finds insufficient reciprocity, the Mexican court can deny recognition of the USMJ or other foreign judgment. In recent years, a concerted effort has been made to strengthen U.S.-Mexican reciprocity.9

English statutes allow recognition of foreign judgments by registration, but only to those countries with which there are statutory reciprocal arrangements. Since the United States is not recognized by statute as a reciprocal jurisdiction, U.S. judgment creditors seeking to have a judgment enforced in England must follow the common law route.

In Canada, only Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Prince Edward island and Yukon Territory (n.b., not

Ontario, Canada's largest and most international economy) have legislation providing for reciprocal recognition of judgments obtained outside Canada, which requires that there be statutorily recognized reciprocal arrangements with the foreign jurisdiction. To gain recognition of a USMJ in Ontario, then, it is necessary for the holder of the USMJ to proceed by a common law action. This is generally a slower and more expensive way of proceeding than through reciprocal legislation. In general, the legislation of the relevant Canadian provinces and territories recognizes reciprocity only with a limited number of border states of the United States.

Hong Kong courts do not require reciprocity with U.S. courts to recognize and enforce a USMJ, so long as the judgment is final and conclusive, and was rendered by a court of competent jurisdiction.

Reciprocity has long been considered by the Chinese government to be a matter of national sovereignty. The principle of reciprocity is written into almost every Chinese law and regulation dealing with foreigners. To obtain recognition of a foreign judgment in China, either the requesting party may apply directly to the Intermediate People's Court with jurisdiction over the matter, or the originating court may, according to the principles of reciprocity, request that the Chinese court recognize and enforce the judgment or ruling. These are the procedures that those seeking recognition of a USMJ must use because there is no treaty between China and the U.S. on this matter (and therefore the Chinese Civil Procedure Code governs). After a request to recognize a USMJ is made, the Chinese court will first enter its own judgment based on the principle of reciprocity. If there is no reciprocity, the Chinese court can refuse to recognize the USMJ. There appears to be no written definition of what reciprocity means in actual practice, however, or how a Chinese court would treat a USMJ from one of the fifty United States as opposed to a USMJ from a US federal court.

Under the Japanese Code of Civil Procedure, reciprocity must exist between Japan and the country where the foreign judgment was entered if the judgment is to be recognized in Japan. According to the Japanese Supreme Court, reciprocity is considered to exist if, in the originating court, the same kind of judgment handed down in a Japanese court would be recognized in the foreign court under conditions not materially different from those set forth in the Japanese Civil Procedure Code. Japanese courts have not provided further guidelines to assist in determining whether reciprocity exists between two countries. Thus, there currently exists uncertainty as to whether a party seeking to enforce a USMJ has met this requirement.

In Spain, reciprocity applies where there is no convention or treaty
between Spain and the state from which the judgment to be enforced originates. The U.S. falls into this category. Under this regime, Spain will recognize and enforce a USMJ if the jurisdiction where the judgment is rendered also recognizes judgments from Spain.

Spain will look to the law of the originating jurisdiction to determine the requirements and conditions that must be met for recognition to be granted. In the case of a USMJ or other foreign judgment, those conditions include adequate service of process and various formalities of the judgment. In other words, for a Spanish court to grant recognition of a USMJ or other foreign judgment, it will insist that the same conditions for recognition be met by the court of the originating jurisdiction. It is not enough that the courts of the foreign jurisdiction recognize foreign judgments in general; they must recognize Spanish judgments in particular (bilateral reciprocity). If the U.S. courts recognize certain Spanish judgments, but examine the merits of a case, a Spanish court will similarly examine the merits of a case in making a determination whether to grant recognition. Under the regime of reciprocity, before deciding whether or not to recognize a foreign judgment Spanish courts will consider (a) whether a foreign judgment is res judicata (the USMJ must be absolutely final), (b) whether the originating court recognizes the same subject matter of the decision brought before it (Spain) in the recognition proceedings, (c) whether bilateral reciprocity exists, and (d) whether reciprocity is actually, currently and consistently practiced in the originating state.

This elaborate regime appears to be quite cumbersome and complex. Rather than increasing the likelihood that judgments will be recognized, this regime has resulted in uncertainty and unpredictability.

Under Belgian law, reciprocity is not a requirement for the recognition of a USMJ or other foreign judgment. As noted above, Belgian law requires a review of the merits underlying the judgment.

The lack of reciprocal legislation between the US and the states surveyed (other than Canada to a limited extent) puts a party seeking to enforce a USMJ at a distinct disadvantage to parties that have access to the more expedited procedures provided for in legislation, forcing such a party instead to rely on more expensive, procedurally complex, and lengthy proceedings, with far less certainty that a judgment will be recognized.

6. Choice of Law

In some of the states surveyed, the courts will review the choice of law analysis of the originating jurisdiction and will, if not satisfied, refuse to recognize the foreign judgment.
In France, the application of the proper law according to French conflict of laws rules is one of the main requirements which must be met so that a foreign judgment may be recognized in France. Therefore it follows that the French court will examine the foreign court’s choice of law analysis.

In Belgium, as part of its review of the merits of the matter before it, the court will examine whether the correct choice of law analysis was made by the originating court.

Under Spanish law, the Spanish Supreme Court could refuse to recognize and enforce a USMJ or other foreign judgment if in its judgment the U.S. or other originating court applied choice of law principles that contravene Spanish public policy; i.e., that violate fundamental rights and liberties guaranteed in the Spanish Constitution.

The choice of law analysis by the originating court will not be reviewed by courts in Canada, China, Hong Kong, and South Africa.

7. Expiration of Time Limits (Statutes of Limitations)

Among the states surveyed there are differing approaches to the application of limitation periods to the recognition of USMJs.

In England, recognition proceedings must be initiated within the British limitation period, which is six years, or the time period for enforcement prescribed by U.S. law, whichever is shorter. Exceptions exist on public policy or undue hardship grounds.

In Hong Kong, a USMJ will still be recognized even if, at the time the recognition proceeding is commenced, the underlying cause of action would be barred as having exceeded the U.S. limitation period. In China, the statute of limitations to recognize a USMJ or other foreign judgment is one year for individuals, and six months for corporations and other legal entities.

In Canada, the limitation period for enforcing a USMJ at common law is determined in accordance with the enforcing jurisdiction’s statute of limitations, which usually begins to run from the date the USMJ was rendered. South African courts will not review whether the statute of limitations on the underlying cause of action has expired. Under Belgian law, a review of the merits also includes inquiry into the application of the appropriate statute of limitation of the originating jurisdiction.

In Japan, recognition of a USMJ or other foreign judgment will not be denied even when the underlying cause of action would have been barred under Japan’s statute of limitations. This is because in Japan a statute of limitations is considered to be only a “system of convenience,”
and thus execution of a USMJ on a cause of action that would have been barred under Japan's statute of limitations does not violate public policy.

Under Spanish law, there is no statute of limitations on the recognition of USMJs or other foreign judgments. Under Spanish concepts of reciprocity, however, if the law of the originating state (in the U.S., the relevant state or federal statute) would render the judgment unenforceable due to expiration of the applicable limitation period, then Spain will not enforce the foreign judgment.

8. Conflict with Other Proceedings

Many of the states surveyed will refuse to recognize and enforce a USMJ or other foreign judgment if there is a parallel proceeding before their own courts. This refusal is grounded in sovereignty concerns. For example, in France, recognition of a USMJ or other foreign judgment will be denied if (a) there is a prior French decision on the same matter involving the same parties or (b) there was a proceeding begun in the French courts while another proceeding on the same matter between the same parties was in progress in the foreign court (unless the plaintiff in the foreign proceeding raises lis pendens as a defense to the French proceeding). If recognition proceedings on the foreign judgment are begun in France before a proceeding on the merits is begun in France, the recognition proceeding will be heard first and, if granted, will cause the second action to be terminated.

In Spain, recognition will be denied to a USMJ if a final judgment on a matter has already been rendered in Spain. Further, if proceedings on the merits are begun in Spain before proceedings on the merits in the foreign jurisdiction are begun, the defendant in a recognition proceeding begun in Spain can oppose recognition on the grounds of lis pendens. The policy of Spain is that proceedings begun abroad will not be permitted to limit the authority of the Spanish courts to hear a case.

Hong Kong public policy precludes a foreign judgment from being recognized if a prior judgment has been entered in Hong Kong on the same matter and between the same parties.

A foreign judgment will not be recognized in Italy if it conflicts with any other final judgment rendered by an Italian court.

Japanese courts will refuse to recognize, as a matter of public policy, a judgment rendered by a foreign court that is inconsistent with a judgment rendered by its own courts on the same matter and between the same parties, regardless of the order in which the actions were filed, the judgments were rendered, or the judgments became final.
9. Proof of Judgment

The surveyed states have differing approaches to proving the existence and validity of USMJ's in the context of recognition proceedings. In practice these only amount to procedural and not substantive obstacles to recognition.

In most of the non-English-speaking states the subject judgment must be proved by way of legalization and translation into an official language of the recognizing jurisdiction. Not surprisingly, the surveyed states have differing procedures to accomplish this. In Mexico, for example, the judgment must be translated, but need not be authenticated if it is submitted to the court through consular or diplomatic channels.

In Spain, the foreign judgment must be translated, and an apostille submitted. The apostille is a standard form of certification prescribed by the Hague Convention of 5 October 1961 (Abolishing the Requirement of Legalisation for Foreign Public Documents) which is attached to the judgment by the competent authority in the originating jurisdiction. Since the United States is a party to that Convention, USMJ's are required to have an apostille.

Swiss law provides that the enforcing party may prove that a foreign judgment is final by submitting a certificate issued by the originating court confirming that the judgment has become final, or by proving the content of the court files. The originating court may be the appellate court or, if any applicable period for appeal has expired, the trial court. As noted before, it is not certain whether an affidavit valid under American law will suffice to prove finality.

An exception to the need for translation is Belgium. There, the law only requires authentication but not translation into either of the country's two official languages.

In English-speaking states, only authentication is required when submitting a USMJ, for obvious reasons. In Canada, proof of judgment may be made by tendering a certified copy of the USMJ impressed with the seal of the court that ordered it. Proving authenticity of the seal is not required.

In China, a judgment creditor must submit a written application containing the decision of the foreign court, certain other information, plus a certified translation into Chinese. If the foreign court is making the request, only the relevant text of the decision and a translation thereof into Chinese must be submitted.

In Japan, any document, including documents proving the originating court's decision, must be translated into Japanese before being sub-
mitted. Authentication of the documents evidencing the original judgment is not required.

10. Fraud
It perhaps goes without saying that none of the states surveyed will recognize or enforce a USMJ or other foreign judgment if it was obtained by a fraud on the originating court. Not surprisingly, courts in at least one state feel free to examine this issue de novo if they think the situation warrants it. In the case of Jet Holdings v. Patel,¹⁰ the English Court of Appeal ruled that a foreign judgment will not be enforced at common law if it has been obtained by fraud even when the alleged fraud has been investigated and rejected by the originating court (in this case, the Superior Court of California).

C. Summary of Practical Obstacles to Recognition of USMJs
In addition to the legal obstacles to the recognition of USMJs discussed in Section B above, the Committee's survey elicited a number of more practical and often systemic obstacles to recognition. These hidden obstacles may hinder recognition of USMJs quite apart from any substantive or procedural difficulties arising under applicable law.

1. Bias and Corruption in the Recognizing Jurisdiction
The possible existence of corruption and bias in the legal systems of foreign states is an important consideration for the U.S. judgment creditor seeking to enforce abroad. In those jurisdictions where there are realistic concerns that a judge may be motivated by corrupt practices, i.e., where money and influence may affect the outcome of cases, the root cause is usually an ill-paid, less well qualified judiciary not politically independent from the executive authority. The Committee wishes to stress that corruption was identified as a potential problem in only one of the states surveyed. It may be that the limited extent of this problem resulted from the fact that the states selected to be surveyed were those perceived by the Committee as being important trading partners of the United States. On the presumption that states with more reliable and predictable legal regimes are more likely to achieve this status, it is perhaps not surprising that states where the concern over significant corruption is valid generally were not among the states surveyed.

The “good news” in the foregoing discussion is that, as those states

which do have corruption problems seek to improve their international status and increase foreign trade, the need to heed the rule of law generally and the correlative need for a better trained and more independent judiciary will likely become clearer. At present, however, the inherently vague nature of certain tests for recognition, such as jurisdiction over the defendant and conformance with public policy, potentially provide wide and defensible tools for the pursuit of objectives outside the law. In short, the flexible laws relevant in foreign recognition proceedings potentially afford wide latitude for mischief.

The issue of bias is, like corruption, a many-headed creature, sometimes obvious in its manifestation, sometimes subtle to the point of near-undetectability. Perhaps especially in states having historical, cultural, political, and economic attributes significantly dissimilar from those of the U.S., judges in the recognizing jurisdiction may have a conscious or subconscious bias against the United States and its citizens, and therefore against recognizing USMJ's. They may reflect a larger culture which generally dislikes the United States and its nationals, and which fears being force-fed U.S. law, policy, and culture. On the other hand, a defendant on "home turf" may naturally have certain advantages independent of any such bias.

A less troubling form of bias may arise from a concern over "importing" into their own domestic legal systems certain aspects of U.S. law which are materially inconsistent with local law and which might give rise to novel causes of action in the recognizing jurisdiction. The Committee has noted the reluctance of many jurisdictions to enforce those judgments which are categorized as administrative or quasi-criminal in nature and therefore which are considered to impinge on areas reserved for the sovereign authority.

2. Lack of Appeal Process

The availability of an appeal process is an important check on the integrity of judicial decisions. The majority of the states surveyed permit at least a limited right of appeal in the case of judgments involving the recognition of USMJ's. In such cases the judgment is treated procedurally like any other judgment in the recognizing jurisdiction and is therefore subject to appeal in accordance with the laws of the recognizing jurisdiction.

In Mexico, appeal is by way of a proceeding known as the amparo. This is apparently a time-tested way for a losing party to avoid paying a judgment for years, and to take the opportunity, if it has not already done so, to remove or otherwise shelter assets. Thus, in Mexico, the ap-
peal process is often a significant practical obstacle to the recognition of a USMJ.

In Belgium, denial of recognition of a foreign judgment may be appealed as if it was an ordinary national judgment. In Italy, a denial by the Court of Appeal of the recognition of a foreign judgment may be appealed to the Supreme Court, but such a review is limited to questions of law.

In Spain, requests for recognition of a USMJ are made to the Supreme Court in Madrid. If recognition is denied, there is no appeal. Therefore, once recognition is granted, it is truly a final Spanish judgment.

In Canada, decisions in respect of the recognition of USMJs may be appealed, but only in certain circumstances to its highest court with leave.

3. Right to Pursue Recognition

Not all of the states surveyed automatically permit foreigners seeking recognition to file suit before their courts. Some require that a governmental authority either grant permission or at least be informed that a suit is being filed. The principle underlying such rules is to insure that the recognizing state's sovereign interests are protected. South Africa, for example, requires the permission of the Ministry of Industry Commerce and Tourism before suit may be filed. Mexico requires that the district attorney be informed so that the state can preserve its interest.

In China, an application for recognition of a foreign judgment will not be heard unless the local court first decides that it will hear the case. In other words, a separate proceeding appears to be required before the recognition proceeding can be instituted. The court is required by law to make the preliminary determination of whether or not to accept the case within seven days after the application is made.

There is no apparent requirement in the other jurisdictions surveyed that a governmental authority other than the recognizing court itself must either first grant permission for, or be formally informed of, a recognition proceeding about to be instituted in the local courts.

4. Export of Proceeds

While a discussion of the procedural details of enforcing and executing upon a recognized judgment in the states surveyed is beyond the scope of this survey, the Committee is prompted to make reference to the existence of exchange controls in one of the jurisdictions surveyed, namely, South Africa. The existence of a regime of currency controls, intended to prevent the flight of capital, may restrict or limit the holder of a recog-
nized USMJ from transferring the proceeds out of the jurisdiction after the judgment is satisfied. This represents an obvious practical obstacle which must be taken into consideration when contemplating pursuing a USMJ abroad in jurisdictions that have such restrictions.

D. Length of Time and Procedural Complexity for Recognition

A holder of a USMJ considering whether to pursue a judgment debtor abroad must carefully consider the length of time it will take and the procedural complexity of doing so. In most of the states surveyed, this is by way either of trial or of summary proceedings.

Proceeding by way of trial is the usual course in virtually all of the states surveyed. The trial route in every state surveyed involves the normal procedural elements such as discovery, written submissions, submission of briefs, oral evidence, and so forth. What each of these elements entails may vary greatly from one jurisdiction to the next. In Mexico, for example, the use of discovery is far more limited than in the U.S.; aggressive tactics such as are employed in the US are not allowed, and a judge would not permit the deposition of a government official, nor would the judge normally require the production of documents not already open to the public.

Pursuing a trial to its conclusion is often complex, costly, and complicated, and the difficulties of doing so can be even more pronounced in a foreign jurisdiction. The daunting prospect of engaging in foreign litigation may be somewhat mitigated by the fact that a proceeding to request recognition is directed only to a judgment already litigated to a conclusion, after the issues of liability and damages have been resolved. Such mitigation would be lacking in Belgium, where de novo review of the foreign judgment is required.

The Committee has been made aware of the following estimates as to the length of time to obtain recognition of a USMJ via trial proceedings: Canada, one to two years to obtain a trial date, with the trial to follow thereafter, length of time for trial depending on the nature of the case; China, six month initial limit, subject to a six-month extension in special circumstances, with further extensions requiring the approval of a higher court; South Africa, one to two years depending on the nature of the case; Spain, one to two years depending on the nature of the case; Japan, two to nine years to obtain recognition of a USMJ; in Belgium the period may be lengthy due to the fact that the Belgian court is required to examine the merits; in South Africa, opposed filings may take a year or more; in Italy, the average time to obtain recognition of a USMJ may be between two and four years.
In Mexico, it was reported that the time period to obtain a trial is long due to backlogged court dockets. This was attributed to an increase in the state's international trade, and thus to an increase in its international disputes.

In England, Hong Kong, and Canada, summary proceedings could shorten the time period to a matter of months or even weeks. In the case of Canada, summary proceedings are available both in the case of recognition pursuant to reciprocity arrangements and in certain circumstances in the case of recognition pursuant to common law proceedings (see Part III. A.2 above).

In South Africa, provisional sentence filings, presumably available to US judgment creditors, could take one or two months if unopposed; three to four if opposed. The presumption of availability is based on the fact that neither the applicable South African treaties nor the relevant domestic laws differentiate among foreign judgments based on their state of origin with respect to this issue. The exception of course is those states which South Africa does not recognize at all.

IV. CONCLUDING REMARKS

As the foregoing survey suggests, the recognition of USMJ's abroad is subject to inconsistent legal regimes and a myriad of substantive, procedural, and practical hurdles. No doubt similar hurdles face judgment creditors in most (if not all) other states. The Committee believes that a convention could create a framework for eliminating many of these hurdles. While complete uniformity regarding the recognition of foreign judgments in all jurisdictions is likely never to occur (and is not even a goal of the proposed Hague Convention), the Committee believes that a multinational instrument harmonizing the recognition of foreign judgments would mitigate many obstacles to international trade and thus promote its development.

August 2001
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Limiting the Scope of an Attorney's Representation to Avoid Client Conflicts

Committee on Professional and Judicial Ethics

**TOPIC:** Limiting the scope of an attorney's representation to avoid client conflicts.

**DIGEST:** The scope of a lawyer's representation of a client may be limited in order to avoid a conflict that might otherwise result with a present or former client of the lawyer. The lawyer must remain cognizant, however, of her duty of undivided loyalty to both clients and her duty to maintain the confidences and secrets of both clients.

**CODE PROVISIONS:** DR 5-105.

**QUESTION:** May a conflict of interest be avoided by limiting the scope of a lawyer's representation of a client?

**OPINION**

Over the last two decades, the client rosters of many law firms have grown dramatically, spurred on by a burgeoning demand for legal ser-
services, a market shift where clients that once turned to a single law firm for all their legal needs now routinely retain several law firms, and an increase in law firm size, resulting both from mergers and internally generated expansion. Although this growth may be a bellwether of the economic health of the legal profession, it also heralds the likelihood that law firms will increasingly encounter situations where one client will be adverse to another client of the firm. Given the broad reach in New York of the duty of loyalty imposed by Canon 5, this can, and often does, result in clients being deprived of one of the most important rights accorded by our judicial system—the right to select the attorney of their choice. See, e.g., Richardson-Merrel, Inc. v. Koller, 472 U.S. 424, 441 (1985) (Brennan, j., concurring) ("A fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings.").

In New York and almost all jurisdictions except Texas, a lawyer is precluded, at least prima facie, from representing one client in a matter directly adverse to another current client, even though the representation of the other client is in an entirely unrelated matter. As a result of the strict application of this rule, a client may confront many situations where a lawyer, who does not have a conflict at the inception of an engagement, subsequently develops a conflict with another client. Situations where this can occur abound, in both litigation and transactional contexts.

In one common litigation situation, a law firm may agree to defend a corporate client in a lawsuit which does not appear to pose a conflict with any other client of the law firm. As fact development proceeds, an amendment to the complaint is filed adding as a defendant an additional party, such as the company's accounting firm, which is also a client of the attorney's firm in unrelated matters. At this juncture, an actual conflict still may not exist if the positions of the client company and its accounting firm appear to be united in interest or are not directly adverse. But if facts develop that suggest the client company may possess a cross-claim against the accounting firm, or vice versa, a conflict may emerge that could impact the lawyer's ability ethically to continue its representation of the corporate client. In this context, the question arises whether the law firm can ethically avoid the conflict by limiting the scope of the

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1. By Disciplinary Rule of Professional Conduct 1.06 (1999), Texas abandoned the widely followed decision of the Court of Appeals for the Second Circuit in Cinema 5, Ltd. v. Cinerama, 528 F.2d 1384 (2d Cir. 1976), which held that concurrent representations need not be "substantially related" for Canon 5 to apply.
engagement for the corporate client to exclude any involvement in the aspect of the matter that is adverse to the accounting firm. Absent the ability of the lawyer to limit the engagement, the Code requires the attorney to withdraw from her representation of the corporate defendant. See DR 5-105(B) [22 N.Y.C.R.R. § 1200.24].

Of course, conflicts are by no means limited to the litigation realm. “Adversity of position in litigation is not a necessary precondition for the existence of a direct conflict. If, for example, two businesses were competing for the same Government contract, and each engaged the same lawyer to prepare bids, Rule 1.7(a) would surely be applicable.” In this same vein, an attorney representing a client in mergers and acquisitions practice also may face conflicts that are not foreseen—or even foreseeable—at the time the engagement commences. Such an attorney may be representing a company in an auction in which the company itself or one of its subsidiaries is to be sold. Only after the auction is commenced does another client of the attorney (or her firm) emerge as a potential buyer of the auctioned company. Continuing to represent the auctioned company could place the attorney in a position of direct adversity to the interests of the newly emerged bidder if the attorney were required to negotiate with her own client. Absent consent or the ability to unilaterally limit the scope of the attorney’s representation of the target, the attorney could be required to withdraw from her representation of the target. See DR 5-105(B) [22 N.Y.C.R.R. § 1200.24].

We conclude that a representation may be limited to eliminate adversity and avoid a conflict of interest, as long as the lawyer’s continuing representation of the client is not so restricted that it renders her counsel inadequate and the client for whom the lawyer will provide the limited representation consents to the limitation. In obtaining consent from the

2. Similar situations may arise where a lawyer discovers in an unrelated matter one of the lawyer’s other clients must be subpoenaed to testify.

3. DR 5-105(B) [22 N.Y.C.R.R. § 1200.24] provides: “A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer’s representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24] (C).”

4. Geoffrey C. Hazard Jr. & William Hodes, The Law of Lawyering, § 1.7:203 at 234 (2d ed. 1993), discussing Rule 1.7(a) of the Model Rules of Professional Conduct, which provides: “A lawyer should not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.”
client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that separate counsel may need to be retained, which could result in additional expense, and delay or complicate the rendition of legal services.

DISCUSSION

A Lawyer May Limit the Scope of the Engagement to Eliminate a Conflict with Another Client

Under the Code, a lawyer shall neither undertake nor continue the concurrent representation of several clients if doing so would likely involve the lawyer in representing differing interests.\footnote{The Code defines differing interests 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." 22 N.Y.C.R.R. § 1200.1.} DR 5-105(A),(B) [22 N.Y.C.R.R. § 1200.24]. Absent informed consent, the Code also prohibits a lawyer from representing a person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of a former client. DR 5-108(A) [22 N.Y.C.R.R. § 1200.27]. The sine qua non, then, for the triggering of these proscriptions is the adverse nature of the lawyer’s engagement, and where there is no adversity to a present or former client, these proscriptions do not apply. At bottom, the attorney-client relationship is consensual. Accordingly, we see no reason why the client cannot limit the scope of the lawyer’s representation to eliminate an adversity between another client and the lawyer, and thereby avoid any conflict.

Our conclusion is fortified by the Restatement of the Law Governing Lawyers, which specifically approves limiting the scope of a lawyer’s representation to avoid conflicts:

Some conflicts can be eliminated by an agreement limiting the scope of the lawyer’s representation if the limitation can be given effect without rendering the remaining representation objectively inadequate.

Restatement of the Law Governing Lawyers § 121, cmt. c(iii) (2000) ("Restatement").\footnote{As to agreements limiting the scope of a lawyer’s duty to her client, the Restatement generally provides that such agreements may be valid if: (a) the client is adequately informed} The Restatement offers the following illustration:

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5. The Code defines differing interests 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." 22 N.Y.C.R.R. § 1200.1.

6. As to agreements limiting the scope of a lawyer’s duty to her client, the Restatement generally provides that such agreements may be valid if: (a) the client is adequately informed.
Lawyer has been retained by Client to represent Client in general business matters. Client has a distribution contract with manufacturer, and there is a chance that disputes could arise under the contract. Lawyer represents Manufacturer in local real estate matters completely unrelated to Client's business. An agreement between Lawyer and Client that the scope of Lawyer's representation of Client will not extend to dealing with disputes with Manufacturer would eliminate the conflict posed by the chance otherwise of representing Client in matters adverse to Manufacturer. Such an agreement would not require the consent of Manufacturer.

Id. Illustration 4.

In this same vein, Rule 1.2(c) of the Model Rules of Professional Conduct also supports such a limitation on representation. Model Rule 1.2(c) provides: “A lawyer may limit the objectives of the representation.” Several ethics opinions interpreting this provision have found that a lawyer may limit the scope of representation to avoid a conflict.7 Notably, the American Bar Association’s Ethics 2000—Commission on the Evaluation of the Rules of Professional Conduct has proposed clarifying the section by changing the word “objectives” in Model Rule 1.2(c) to “scope.”

The case law also supports the conclusion that certain potential conflicts may be avoided by limiting the scope of representation. In Interstate Properties v. Pyramid Co. of Utica, 547 F. Supp. 178, 181 (S.D.N.Y. 1982), the court did not find any conflict where a law firm “circumscribed its relationship with [client A] to remove the possibility of conflict by first acting only as special environmental counsel to [client A] and then, as it

and consents; and (b) the terms of the limitation are reasonable in the circumstances. See Restatement § 19(1) (“Agreements Limiting Client or Lawyer Duties”).

7. See Pa. Informal Op. 92-99 (July 1993) (noting that Rule 1.2(c) allows a lawyer to limit the objectives of a representation if the client consents after full disclosure, and suggesting that it would be “imprudent to accept the proposed engagement [for a debtor of a bank] in the absence of such a limitation on the scope of the first representation [as outside general counsel to the bank]);” Pa. Informal Op. 93-198 (December 1993) (lawyer seeking to represent debtor in connection with restructuring of a mortgage loan, where ten years earlier lawyer served as counsel to the savings and loan in connection with real estate loans (including documenting the loan at issue) had secured debtor’s agreement that he would not be able to challenge the validity or enforceability of the original loan documents; the committee noted that the lawyer must comply with Rule 1.2(c) by explaining the limitation on objectives of the representation, particularly the lawyer’s inability to challenge the enforceability of the initial loan documents, and that such limitation “cannot be so narrow as to effectively render the representation inadequate or violative of . . . competent representation”).
became involved in more general commercial affairs of [client A], by limiting its involvement to developments in which [client B] had no potential or actual interest as competitor or partner.” Several bankruptcy courts have reached similar conclusions. See In re Fondiller, 15 B.R. 890, 892 (B.A.P. 9th Cir. 1981) (“An attorney representing the trustee as general counsel would be required to give legal advice and to proceed with appropriate litigation in connection with these matters. Any number of possible conflicts can be envisioned. The foregoing reasoning, however, does not apply to those situations in which an attorney’s services are limited to a narrow field for a specific purpose”); In re H & S Transp. Co., 53 B.R. 128, 132 (M.D. Tenn. 1985) (law firm appointed by trustee to represent jointly administered estates of four corporate debtors was entitled to reasonable compensation, where firm represented the trustee only to the extent that the interests of each estate were parallel; citing Fondiller with approval for the proposition that “a law firm may limit its representation so as to avoid conflicts of interest”).

The Limitation Must Be Adequate to Eliminate the Adversity

Our conclusion that it is permissible to limit the scope of a lawyer’s representation of a client to avoid conflicts with other current or former clients depends on the nature and adequacy of such a limitation. Although the nature and adequacy of the limitation necessarily will depend on the specific engagement creating the potential adversity, the limitation should be sufficient to eliminate the “differing interests” that would otherwise exist. And it bears emphasis that both the lawyer and client must adhere scrupulously to the limitation. Indeed, it goes without saying that a lawyer may not circumvent the limitation by acting adversely “behind the scenes.” See Funds of Funds Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 234 (2d Cir. 1977).

In the context of litigation, a lawyer defending a client in an action who determines that there are potential cross-claims between the lawyer’s client and another party also represented by the same law firm in an unrelated matter may, with the informed consent of the client whose engagement is being limited, limit her engagement to the defense of the case, and exclude representation of the client against the other client. Although the lawyer’s two clients would continue to be directly adverse to each other, the limitation would eliminate the lawyer’s differing interests and preclude any conflict. In this context, however, it is important that the lawyer refrain from actions that would effectively undermine the limitation by placing the lawyer in a position adverse to the other client. Although there is no prohibition against the lawyer’s recommending or otherwise assisting her client in retaining other counsel for purposes of
litigating the cross-claims, there are constraints on the lawyer’s interaction with the new counsel. The lawyer may not assist, or otherwise participate with, new counsel in litigating against her own client. This means that the lawyer may not instruct the other lawyer or strategize on the best way to proceed or indicate which evidence already developed pertains to the case against the other client.

**Steps to Limit an Engagement Effectively—**

**Written Terms of the Limited Engagement**

In our view, there are several steps a lawyer should take both to effectively limit representation and avoid the ethical pitfalls highlighted in Fund of Funds Ltd., 567 F.2d at 234. As a threshold matter, the “terms of the limited engagement” should be memorialized in writing as soon as possible, and in detail. These rules should be communicated both to separate counsel (if any) and to the client to ensure they both fully understand the limitations on the scope of the original firm’s representation.

In this connection, it is critical that the client whose engagement is being limited fully understands the implications of the limitation, including any restriction on communication with any separate counsel and the impact, if any, on the cost of handling the matter. A limited engagement should not be proposed if a client could not reasonably conclude that the proposed arrangement serves its interests. In some circumstances, such as where the client is a large corporation already represented by inside or outside counsel, or a sophisticated individual, the client would, after disclosure, be able to provide meaningful consent. In other circumstances, however, such as the representation of unsophisticated individuals, the client, unaided, may not be able to provide informed consent. See N.Y. City 2001-2 (concluding that “sophisticated corporate and institutional clients can consent to conflicts which might be non-consentable in cases involving lay clients”). In the latter situation, the attorney should advise the client that she may retain independent counsel to evaluate the limited engagement. Cf. DR5-104(A)(2) [22 N.Y.C.R.R. § 1200.23] (requiring an attorney entering into a business transaction with a client to advise the client that she may retain independent counsel to evaluate the proposed business venture).

**Communications with Separate Counsel Must Be Regulated**

When it comes to communications with separate counsel, the overarching and guiding principle should be neutrality toward the law firm’s other client. Accordingly, the original law firm should avoid any action or com-
munication with separate counsel where the purpose is to create a detri-
ment to the law firm's other client. The original law firm may engage in
routine efforts to coordinate with separate counsel, and may provide cop-
ies of generally relevant information developed in the case, such as records
of related court proceedings or regulatory investigations, so long as they
are not segregated or otherwise targeted at the other client. The original
law firm may also provide in bulk any documents it has discovered that
are connected to the case. But the original firm may not in any way "se-
lectively" disclose or segregate for review or otherwise identify documents
that would be "particularly relevant" to claims against the other client.
Work product, such as interview memoranda relevant to the case, may be
shared, but the original law firm may not share documents concerning
the legal strategy for the case that might be applicable to issues or claims
involving the other client.8

In Representing Its Client in the Limited Representation the Law
Firm May Take No Action for the Purpose of Injuring Its Other Client

In its limited representation, the law firm also may fully adduce evi-
dence that assists its original client against its adversary. Conversely, the
law firm may not adduce evidence or seek discovery in order to adversely
impact its other client. As long as the evidence is adduced for the sole
purpose of assisting its client, the possibility that the same facts adduced
may be exploited by another lawyer against the other client does not
preclude the law firm from doing so. See Sumitomo Corp. v. J. P. Morgan &
Feb. 8, 2000). After all, "facts" are inherently neutral. There is no "plaintiff's
evidence" or "defendant's facts." To be sure, the same facts or evidence
can be argued by one side or the other to support a position adverse to
the interests of the other party. But the underlying facts or evidence are
themselves unaligned. For this reason, a lawyer is precluded from attempting
to blockade a witness from an adversary by limiting access to the witness.
As Professor Wolfram states: "Witnesses do not ‘belong’ to either party
and generally should be as available for interviews to one side as to the
other." See Wolfram, Modern Legal Ethics § 12.4.2 at 647. Accordingly, the
lawyer is free to elicit facts or evidence even though another lawyer may
exploit it to the detriment of another client. Of course, it goes without

8. For instance, the original law firm should not share with separate counsel draft memo-
randa, or legal research generally evaluating potential claims against an unknown universe of
defendants, which might include B (or other clients of the original law firm).
saying that the lawyer may not elicit these facts for the purpose of adversely affecting his other client and may not assert that these facts are adverse to the other client.9

Our conclusion is supported by the recent decision in Sumitomo, which held that counsel had successfully limited the scope of representation to avoid conflicts. In Sumitomo, when it became apparent to a law firm that investigating potential claims on behalf of client A might involve the assertion of claims against several entities, including client B (a client on unrelated matters), the law firm provided A with a list of potential separate counsel, and contacted counsel on behalf of A. The original law firm then proceeded to represent A against the non-clients, while in a second litigation separate counsel, chosen from the list supplied by the original law firm, prosecuted A’s claims against B. B then moved both to consolidate the case against B with the other cases and to disqualify the original law firm under DR 5-105, arguing that the litigations were so similar that the original law firm’s success in the litigation against non-clients would adversely affect B.

The Sumitomo court granted B’s motion to consolidate the separate litigations for pretrial purposes. Nevertheless, the Court refused to disqualify the law firm. The Sumitomo court held: “No decision, however, has found that the Code’s prohibition against simultaneous representation extends to the situation before the Court. Here [the original law firm] is not representing [A] against [B] in this litigation in violation of DR 5-105. Instead, [the original law firm] is representing [A] against . . . a non-client, while [the separate law firm] is representing [A against B, the original law firm’s] current client in an unrelated matter. Thus, the per se rule against simultaneous representation articulated in Cinema 5 and other decisions does not require the Court to disqualify [the original law firm].” Id. at *4. The court further explained: “While one can understand that [B’s] in-house counsel might be unhappy that a law firm which represents it in some matters was taking a position in litigation involving another client that, if adopted, would prejudice an argument that [B] was advancing in a separate case, that does not mean that the law firm is violating a confidence of its client or engaging in unethical conduct.” Id. at *4. In addition, the court noted that the original law firm was “not involved in

9. In addition, although the Committee concludes that it is not required, in certain circumstances it may be prudent to implement and document an ethical screen to ensure the lawyers who have worked or who are working for the other client and those lawyers involved in the limited representation will be separate and that there will be no communication between the lawyers on each team about the respective matters and the documents will be segregated.
attempting to establish wrongdoing by [B] or seeking a judgment that will directly impact [B].” Id.

Where the adversity is less direct, an attorney may correspondingly have more latitude, for example, in a situation where her client must subpoena another of her clients as a non-party witness.10 To be sure, “it will . . . frequently be the case that a lawyer’s taking discovery, whether testimonial or documentary, on behalf of one client, of a third party who is also a client, will present such direct adverseness, so as to be disqualifying under Rule 1.7(a)” ABA 92-367 (October 16, 1992) at 2-3. In circumstances such as these, separate counsel may be brought in for the purposes of issuing the subpoena and taking discovery from the non-party client.

Similar issues concerning the nature and adequacy of the limitation on representation arise in the corporate context. Where a lawyer represents a company in an auction to sell the company or a part of it, and another client emerges as a potential buyer, absent consent the lawyer cannot negotiate with the second client. But the lawyer may limit the representation to exclude from the scope of representation any aspect adverse to the lawyer’s other client and continue to advise the company in all the other aspects of the auction on matters that are not adverse to the second client.

Finally, although judging the efficacy of a particular limitation on an engagement is necessarily fact specific, there predictably are circumstances where a lawyer’s attempt to limit the scope of her engagement will be doomed. For example, the limitation may be inadequate to protect the client, or once limited so as to address the conflict, the lawyer’s engagement may no longer provide meaningful value to the client whose engagement is limited, or in order to advance one client’s interests, the lawyer must harm the interests of the other client.

CONCLUSION

The Committee concludes that the scope of a lawyer’s representation of a client may be limited in order to avoid a conflict that might otherwise result with a present or former client, provided that the client whose engagement is limited consents to the limitation after full disclosure and the limitation on the representation does not render the lawyer’s counsel

10. Indeed, by precluding representation directly adverse to another client, Model Rule 1.7(a) implicitly recognizes that mere indirect adversity may not be disabling.
inadequate or diminish the zeal of the representation. An attorney whose representation has been limited, however, must be mindful of her duty of loyalty to both clients. Where the portion of the engagement to be carved out is discrete and limited in scope, such a limitation may well resolve the conflict presented.

July 2001

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<td>Anne Lavin</td>
<td>295 Madison Ave</td>
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<td>Rachel Levy</td>
<td>The Association of the Bar</td>
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<td>Leslie L. Lewis</td>
<td>162 West 21st St.</td>
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<td>Wiggins &amp; Dana LLP</td>
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<td>02/92</td>
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<tr>
<td>James S. Hazard</td>
<td>JSH Services Inc.</td>
<td>Middletown, NJ</td>
<td>06/76</td>
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<tr>
<td>Stephen H. Knee</td>
<td>Saiber Schlesinger Satz &amp; Goldstein LLC</td>
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<tr>
<td>Ellen R. Kulka</td>
<td>Kraemer Burns Mytelka Lovell Kulka PA</td>
<td>Springfield, NJ</td>
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<tr>
<td>Kalman G. Magyar</td>
<td>Bressler Amery &amp; Ross</td>
<td>Morristown, NJ</td>
<td>12/98</td>
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### New Members

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<tr>
<th>Name</th>
<th>Firm/Company</th>
<th>City</th>
<th>Date</th>
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<tbody>
<tr>
<td>Lynn Neils</td>
<td>U.S. Attorney’s Office (SDNJ)</td>
<td>Newark</td>
<td>06/90</td>
</tr>
<tr>
<td>Patricia G. O’Byrne</td>
<td>Johnson &amp; Johnson</td>
<td>New Brunswick</td>
<td>06/96</td>
</tr>
<tr>
<td>Tom Petersen</td>
<td>Amerisham Pharmacia Biotech</td>
<td>Piscataway</td>
<td>09/87</td>
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<tr>
<td>C. Raymond Radigan</td>
<td>Ruskin Moscou Evans &amp; Faltishek PC</td>
<td>Mineola</td>
<td>06/62</td>
</tr>
<tr>
<td>Elaine Schroeder</td>
<td>169 Brite Avenue</td>
<td>Scarsdale</td>
<td>12/55</td>
</tr>
<tr>
<td>Dean David N. Yellen</td>
<td>Hofstra University—School of Law</td>
<td>Hempstead</td>
<td>06/85</td>
</tr>
<tr>
<td>Caroline S. Yoon</td>
<td>27 Kirby Lane North</td>
<td>Rye</td>
<td>05/98</td>
</tr>
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</table>

### Recent Law Graduate

<table>
<thead>
<tr>
<th>Name</th>
<th>Firm/Company</th>
<th>City</th>
</tr>
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<tbody>
<tr>
<td>Joshua Sanders Amsel</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
</tr>
<tr>
<td>Michael A. Aristizabal</td>
<td>61 West 62nd St.</td>
<td>New York</td>
</tr>
<tr>
<td>Lindsay A. Baker</td>
<td>201 E 69th Street</td>
<td>New York</td>
</tr>
<tr>
<td>Sarah Diane Bookbinder</td>
<td>Arent Fox Kintner Plotkin &amp; Kahn PLLC</td>
<td>New York</td>
</tr>
<tr>
<td>Jason R. Boyarski</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
</tr>
<tr>
<td>Craig J. Brill</td>
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</tr>
<tr>
<td>Jill F. Burmester</td>
<td>280 Madison Ave.</td>
<td>Port Chester</td>
</tr>
<tr>
<td>M. Callaghan</td>
<td>100 Ardem St.</td>
<td>New York</td>
</tr>
<tr>
<td>Peter J. Calleo</td>
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<td>New York</td>
</tr>
<tr>
<td>Jennifer B. Cannata</td>
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</tr>
<tr>
<td>Thomas Cettra</td>
<td>280 Madison Ave.</td>
<td>Port Chester</td>
</tr>
<tr>
<td>Catherine R. Cirletta</td>
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<td>New York</td>
</tr>
<tr>
<td>Scott E. Cohen</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
</tr>
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<td>Stephen J. Dallas</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
</tr>
<tr>
<td>Pierre M. Davis</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
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<tr>
<td>Andrew M. Eliot</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
</tr>
<tr>
<td>Keith J. Emmer</td>
<td>99 John St.</td>
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</tr>
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<td>Jennifer Feldsher</td>
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<td>New York</td>
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<tr>
<td>Renee M. Fishman</td>
<td>Weil Gotshal &amp; Manges LLP</td>
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<tr>
<td>Jason R. Goldy</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
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<tr>
<td>Rachel N. Greenberger</td>
<td>Hoffheimer Gartlir &amp; Gross LLP</td>
<td>New York</td>
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<tr>
<td>Arlene Arin Hahn</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
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<tr>
<td>Yehuda Y. Halpert</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
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<td>David Herman</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
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<tr>
<td>Idina M. Holmes</td>
<td>Meyer Suozzi English &amp; Klein PC</td>
<td>New York</td>
</tr>
<tr>
<td>Wendy M. Kamerman</td>
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<td>New York</td>
</tr>
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<td>Michael A. Kaufman</td>
<td>200 East 33rd St.</td>
<td>New York</td>
</tr>
<tr>
<td>Daniel Suro Kim</td>
<td>Oak Hill Capital Management Inc.</td>
<td>New York</td>
</tr>
<tr>
<td>Carol Lynn Kline</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
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<tr>
<td>Melissa J. Krakowski</td>
<td>Weil Gotshal &amp; Manges LLP</td>
<td>New York</td>
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<tr>
<td>Sandor Krauss</td>
<td>Fasuzo Shalley &amp; Dimaggio LLP</td>
<td>New York</td>
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<tr>
<td>Rachel H. Lasky</td>
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<tr>
<td>Katarina Lawergren</td>
<td>404 West 116th St.</td>
<td>New York</td>
</tr>
</tbody>
</table>
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Allison R. Liff  Weil Gotshal & Manges LLP  New York NY
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Jason E. Ambers  New York University School of Law
Andrew M. Amerson  Columbia University School of Law
Matthew J. Atlas  University of Virginia School of Law
Ajay Ayyappan  Fordham University School of Law
Richard W. Baker  University of California, Los Angeles
Theresa J. Barbee  New York Law School
Carrie A. Bassel  Benjamin N. Cardozo School of Law
Evan A. Belosa  Harvard University Law School
Rachel Bendit  Benjamin N. Cardozo School of Law
David Benhaim  Benjamin N. Cardozo School of Law

THE RECORD 434
<table>
<thead>
<tr>
<th>Name</th>
<th>School</th>
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<tbody>
<tr>
<td>James Bentley</td>
<td>Brooklyn Law School</td>
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<tr>
<td>Marina Benzaquen</td>
<td>New York University School of Law</td>
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<tr>
<td>Janeen F. Berkowitz</td>
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<td>Billy Betts</td>
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<td>Samuel Louis Blatnick</td>
<td>University of Chicago School of Law</td>
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<td>Christopher B. Britton</td>
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<td>Mark A. Burstein</td>
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<td>Carissa Ann Byrne</td>
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<td>Shana Cappell</td>
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<td>Anthony J. Casey</td>
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<td>Gus Cheliotis</td>
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<td>Sandra A. Chiocchi</td>
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<td>Alexandraj. Dostal</td>
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<td>Vincent R. Fitzpatrick III</td>
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<tr>
<td>Dirk A. Flemming</td>
<td>University at Buffalo, State University</td>
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<tr>
<td>Alexandra Flynn</td>
<td>York University, Osgoode Hall Law School</td>
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Michael Louis Fox, Columbia University School of Law
Gregg M. Freedman, George Washington University Law
Huanyong Gao, Columbia University School of Law
James D. Gatta, Fordham University School of Law
Melissa Pitt Gelbert, Fordham University School of Law
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Eric Lasry  McGill University, Faculty of Law
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Kelly N. Lee  University of South Carolina School of Law
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Peter Levinson  Stanford University Law School
Robert Lewin  George Washington University Law
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Marcus Eli Loglisoi  University of Pennsylvania Law
Stuart Aron Lopoten  Emory University School of Law
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Kerry D. McIlroy  George Washington University Law School
Elisabeth M. McOmber  Brooklyn Law School
Stacey A. Mesler  New York Law School
Frantz Metellus  Rutgers University School of Law
Stephen Meyer  Brooklyn Law School
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Julia Miller  University of Michigan Law School
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Stephanie J. Weissglas Dalhousie Law School
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Colleen Winchester Georgetown University Law Center
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Michael Lloyd Yaeger  Yale Law School
Lei Yu  Columbia University School of Law
Jacob R. Zissu  Catholic University, Columbus School of Law

GRADUATING LAW STUDENT MEMBERS
CONVERTING TO RECENT GRADUATE MEMBERSHIPS

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>City, State</th>
</tr>
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<tbody>
<tr>
<td>Ariel Aminov</td>
<td>Prado &amp; Tuy</td>
<td>New York, NY</td>
</tr>
<tr>
<td>Gilda Austrie</td>
<td>33-14 109 St.</td>
<td>Corona, NY</td>
</tr>
<tr>
<td>Libby Babu</td>
<td>377 Rector Place</td>
<td>New York, NY</td>
</tr>
<tr>
<td>Blair Burroughs</td>
<td>140-17 84 Drive</td>
<td>Jamaica, NY</td>
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<td>Hanz Chiappetta</td>
<td>11 Lake St.</td>
<td>White Plains, NY</td>
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<tr>
<td>Lucia Chiocchio</td>
<td>130 Grand Boulevard</td>
<td>Scarsdale, NY</td>
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<tr>
<td>William M. Cooney</td>
<td>19 Cliff Rd.</td>
<td>North Merrick, NY</td>
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<td>Robert E. Craig</td>
<td>AXA Advisors LLC</td>
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<td>Christopher S. Guardino</td>
<td>561 Hanover Ave.</td>
<td>Staten Island, NY</td>
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<td>Nina D. Harris</td>
<td>Piper Marbury Rudnick &amp; Wolfe</td>
<td>New York, NY</td>
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<td>Steven J. Katz</td>
<td>Rosenman &amp; Collins</td>
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<td>Jordan Katzenberg</td>
<td>Cadwalader Wickersham &amp; Taft</td>
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<td>Jill R. Lebowohl</td>
<td>Patterson Belknap Webb &amp; Tyler</td>
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<td>Stephanie P. Listokin</td>
<td>1 West Dr.</td>
<td>Princeton, NJ</td>
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<td>Susan B. Master</td>
<td>Fitzpatrick Cella Harper &amp; Scinto</td>
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<td>Juliana M. Mirabilio</td>
<td>US Court of Appeals, 3rd Cir.</td>
<td>Newark, NJ</td>
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<td>Mara Moldwin</td>
<td>Coudert Brothers</td>
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<td>Michele R. Olsen</td>
<td>3177 Wynsum Ave.</td>
<td>Merrick, NY</td>
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<td>Anwar Ouazzani-Chahdi</td>
<td>191-13 Auburndale</td>
<td>Flushing, NY</td>
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<td>Louis Perlman</td>
<td>Lazam Properties</td>
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<td>Kent Rackett</td>
<td>101 W 75 St.</td>
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<td>P. Morgan Ricks</td>
<td>Wachtel Lipton Rosen &amp; Katz</td>
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<tr>
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<td>Joseph T. Tillman</td>
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<td>Natalie Toussaint</td>
<td>131-26 221 St.</td>
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<td>Eleanor Vale</td>
<td>1010 Fifth Avenue</td>
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<td>Anne M. Zaneski</td>
<td>9 Montague Terrace</td>
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<td>Cindy Zee</td>
<td>Piper Marbury Rudnick &amp; Wolfe</td>
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