ARE YOUR THOUGHTS YOUR OWN?

“Neuroprivacy” and the Legal Implications of Brain Imaging
OF NOTE 305

ANNUAL MEETING OF THE ASSOCIATION: 321
PRESIDENT'S ADDRESS Bettina B. Plevan

BENJAMIN N. CARDozo LECTURE: ACADEMIC FREEDOM 326
AND THE SCHOLARLY TEMPERAMENT Lee C. Bollinger

"IF IT WALKS, TALKS AND SQUAWKS..." 343
THE FIRST AMENDMENT RIGHT OF ACCESS TO
ADMINISTRATIVE ADJUDICATIONS: A POSITION PAPER
The Committee on Communications & Media Law

OPPOSING THE PROPOSED FEDERAL MEDICAL MALPRACTICE 397
REFORM LEGISLATION
The Committee on Tort Litigation

ARE YOUR THOUGHTS YOUR OWN? "NEUROPRIVACY" AND THE 407
LEGAL IMPLICATIONS OF BRAIN IMAGING
The Committee on Science and Law

Reports by the Committee on Professional and Judicial Ethics 438
FORMAL OPINION 2005-01:
PRO BONO CONSUMER BANKRUPTCY REPRESENTATION

FORMAL OPINION 2005-02:
CONFLICTS ARISING FROM POSSESSION OF CONFIDENTIAL
INFORMATION OF ANOTHER CLIENT

FORMAL OPINION 2005-03: VOLUNTARY ATTORNEY
TESTIMONY CONCERNING FORMER CLIENTS

FORMAL OPINION 2005-04: COMMUNICATIONS WITH
INSURANCE ADJUSTERS IN LITIGATION WHERE
THE INSURANCE COMPANY IS A PARTY

PRELIMINARY CONFERENCE ORDERS IN NEW YORK STATE COURTS 480
The Council on Judicial Administration

THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW
YORK is published four times a year by The Association of the Bar of the City
of New York, 42 West 44th Street, New York, NY 10036-6689. Available by
subscription for $60 per volume. For information call (212) 382-6695. Periodi-
cals postage paid at New York, NY and additional mailing offices. USPS number:
012-432/ISSN: 0004-5837. Postmaster: Send address changes to THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 42 West
44th Street, New York, NY 10036-6689. THE RECORD is printed on paper which
meets the specifications of American National Standard ANSI Z39.49-1984,
Permanence of Paper for Printed Library Materials. Copyright © 2005 The Asso-
ciation of the Bar of the City of New York. All rights reserved.
Of Note

THE FOLLOWING CANDIDATES HAVE BEEN ELECTED TO THE VARIOUS Association offices and committees for 2005-2006:

President
Bettina B. Plevan

Vice Presidents
Barbara S. Jones
Barry M. Kamins
Carlos G. Ortiz

Treasurer
James L. Lipscomb

Secretary
Cyrus D. Mehta

Member of the Executive Committee
Class of 2007
Joseph C. Hill

Members of the Executive Committee
Class of 2009
Cathleen A. Clements
Barbara S. Gillers
Jeh C. Johnson
James A. Yates

Members of the Committee on Audit
Laurie Berke-Weiss
Allan L. Gropper
Marsha E. Simms
THE NOMINATING COMMITTEE FOR 2005-2006 CONSISTS OF: EVAN A. Davis (Chair). Jane E. Booth, Zachary W. Carter, Hector Gonzalez, Bruce A. Green, Joan Guggenheimer, and Barbara Jaffe.

The Executive Committee has elected William F. Kuntz, II Chair and Norman L. Greene Secretary for 2005-2006.

HONORARY MEMBERSHIP IN THE ASSOCIATION WAS BESTOWED ON Sargent Shriver by Bettina B. Plevan, president of the Association, and Judge Leonard B. Sand, chair of the Association’s Committee on Honors, June 10, 2005, at Mr. Shriver’s home in Potomac, Maryland. Mr. Shriver was honored in recognition of his contributions to the law and social justice, most notably for providing the foundation for low-income individuals to participate in the justice system through his creation of the first federal program to provide civil legal services for the poor.

In the history of the Association, Honorary Membership has been bestowed on 58 luminaries in the legal community, including six chief justices of the United States, seven associate justices of that court, two presidents of the United States, numerous chief judges of many of the United States Courts of Appeal, and presiding judges of foreign courts.

Acknowledging the honor, Mr. Shriver said: “I am grateful to Ms. Plevan and Judge Sand and the members of the Association for this high honor. In accepting it, I want to specifically acknowledge the vision of Edgar and the late Jean Camper Cahn, whose article in the Yale Law Journal first brought to my attention the need for a nationwide, government-run legal services program for the poor. I am grateful to the late United States Supreme Court Justice Lewis F. Powell, Jr., who was then president of the American Bar Association, to Clinton Bamberger, the first director of ‘Legal Services for the Poor,’ to Mickey Kantor who would not accept the closing down of ‘Legal Services for the Poor’ and who energized us all to work until Congress created The Legal Services Corporation, and to the thousands upon thousands of Legal Services lawyers, past and present, across our country who work day in and day out to bring equal justice to all Americans. They believe as I do, that, as a lawyer, our government and our profession have a positive, moral and legal duty to make sure that legal services are available to the poor on an accessible, affordable, regular, dignified basis and, if necessary, even free of charge!”
OF NOTE

Mr. Shriver was the first director of the Office of Economic Opportunity (1964–1968). In 1994, Mr. Shriver received his nation’s highest civilian honor, The Presidential Medal of Freedom.

*

THE SIXTEENTH ANNUAL LEGAL SERVICES AWARDS WERE PRESENTED to honor attorneys and nonlawyers who provide outstanding civil legal assistance to New York’s poor. Helaine Barnett, President of the Legal Services Corporation and a former Treasurer of the City Bar Association, presented the awards at a reception on May 23 at the Association.

This year’s recipients are: Michael D. Hampden, Deputy Director, Legal Services for Children, Inc.; Diane Lagamma, Staff Attorney, HIV/AIDS Representation Project, The Legal Aid Society; Ellen Rosenberg, Supervising Attorney, Sanctuary for Families’ Center for Battered Women’s Legal Services; and Jeanette Zelhof, Deputy Director, MFY Legal Services Corporation A, became the first nonlawyer to receive the award.

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

*

THE 2005 BOTEIN AWARDS, A RECOGNITION OF THE PERSONNEL ATTACHED to the courts of the First Judicial Department, were presented at the Association on April 4. The Hon. John T. Buckley, Presiding Justice of the Supreme Court of the State of New York, Appellate Division, First Department, presented the awards.

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

This year’s recipients are: Carmen Sierra, Senior Management Analyst, Appellate Division, First Department; Daniel Alessandrinio, Chief Management Analyst, New York City Criminal Court; Joseph Parisio, Court Clerk Specialist, New York City Criminal Court; Wilson Kenney, Principal Surrogate Court Clerk, New York County; and James McElligott, Chief Matrimonial Clerk, New York County.
OF NOTE

The awards are made possible by a grant from the Ruth and Seymour Klein Foundation, Inc.

*

THE FOURTEENTH ANNUAL PRESENTATION OF THE HENRY L. STIMSON medal to outstanding Assistant United States Attorneys in the Southern District and in the Eastern District of New York, was held on May 31 at the Association. Hon. Reena Raggi, Judge of the U.S. Court of Appeals for the Second Circuit, delivered welcoming remarks, and Association President Betsy Plevan presented the medals.

This year’s recipients are: Greg D. Andres, Eastern District/Criminal Division; Elliot M. Schachner, Eastern District/Civil Division; Robin L. Baker, Southern District/Criminal Division; and David S. Jones, Southern District/Civil Division.

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

The awards are sponsored by the Committee on the Stimson Medal (Mark R. Hellerer, Chair) and the Committee on Federal Courts (Molly S. Boast, Chair).

*

HON. NAOMI REICE BUCHWALD, FEDERAL JUDGE OF THE SOUTHERN District of New York, presented the Association's annual Municipal Affairs Awards on June 27. The Awards are given to lawyers from the New York City Law Department who have demonstrated outstanding performance. This year’s recipients are: Meredith Kopelow, Family Court Division; Gabriela P. Cacuci, Tax and Bankruptcy Litigation Division; Donna Kasbohm, General Litigation Division; and Michelle Goldberg-Cahn, Administrative Law Division.

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

*

TWO OUTSTANDING MINORITY STUDENTS AT NEW YORK AREA LAW schools have been awarded Thurgood Marshall Fellowships for the 2005-
2006 academic year. The program provides two exceptional minority students from New York area law schools the opportunity to work with the Association to advance the goals of civil rights and equal justice. Fellowships have been awarded to Dariely Rodriguez of Hofstra University and Michael S. Oppenheimer of CUNY Law School.

Ms. Rodriguez will assist the City Bar Justice Center and Mr. Oppenheimer will work with the Association’s Civil Rights Committee.

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, chaired by Ira M. Feinberg.

THE FOLLOWING ARE THE NEWLY APPOINTED CHAIRS OF ASSOCIATION Committees FOR the 2005-06 year:

Eruch P. Nowrojee (African Affairs); Victoria F. Neilson (AIDS); Avrom Robin (Alcoholism & Substance Abuse); Laurie Berke-Weiss (Audit); Alan W. Kornberg (Bankruptcy & Corporate Reorganization); April A. Newbauer (Civil Court); David E. McCraw (Communications & Media Law); Arnold Jay Levine (Corporation Law); Amy P. Barasch (Domestic Violence); Philip S. Straniere (Encourage Judicial Service); Francis J. Murphy (Books at the Bar); Stephen R. Greenwald (Capital Punishment); Bonnie E. Rabin (Children and the Law); Susan Lisa Jacobs (Council on Children); Jo-Ann Citterbart (City Bar Chorus); Susan J. Kohlmann (Enhance Diversity in the Profession); Christine A. Fazio (Environmental Law); Robert Eli Michael (Foreign & Comparative Law); Joyce Tichy (Health Law); Kathleen M. Golden (Insurance Law); Peter J.W. Sherwin (Judicial Administration); Meridith F. Sopher (Juvenile Justice); Margaret P. Stix (Land Use Planning & Zoning); Thomas Moreland (Lawyer’s Role in Corporate Governance); Thomas M. Ross (Legal History); Peachetta S. DeFreitas (Legal Problems of the Aging); Sara D. McShea (Legal Referral Service); Allen Drexel (co-chair, Lesbian, Gay, Bisexual & Transgender Rights); Christine Fecko (Legal Services for Persons of Moderate Means); Alton L. Abramowitz (Matrimonial Law); Daniel S. Sternberg (Mergers, Acquisitions & Corporate Control Contests); Michael J. Mernin (Military Affairs & Justice); Debra A. James (Minorities in the Courts); David W. Ichel (Product Liability); Paul Dutka (Professional & Judicial Ethics); David George Kayko (Professional Responsibility); Robert L. Vitale (Project Finance); Nancy Ann Connery (Real Property...
Law); David N. Ellenhorn (Senior Lawyers); Maria Cilenti (Sex & Law); Maia T. Spilman (Small Law Firms); Marc E. Ackerman (Sports Law); Andrea Masley (State Courts of Superior Jurisdiction); Mark Stone (Taxation of Business Entities); Tamara Stephen (Thurgood Marshall Summer Law Internship Program); and David J. McCabe (Trusts, Estates & Surrogates Courts).
Recent Committee Reports

**Bankruptcy & Corporate Reorganization**
Letter to Congress expressing opposition to the Bankruptcy Venue Bill. The legislation would require that all corporate bankruptcy cases be filed in the jurisdiction where a company (or the parent company of a corporate family) is physically headquartered or has its principal assets, requiring courts to ignore more important considerations such as the location of principal operating subsidiaries, the interests of justice or the convenience of the parties who actually need to and will appear during the proceedings to protect their interests, and the state of incorporation. The letter argues that the Venue Bill is misguided and would create material harm and in many cases place substantial expenses on creditors and debtors.

**Capital Punishment**
Letter to NYS Governor and legislative leaders urging that the Capital Defenders Office not be disbanded. The committee said the office has done a superb job in representing capital defendants. Even though the death penalty is not currently in use in New York, it could be re-enacted and, if capital punishment is revived, there is no guarantee that an office of this quality could be reassembled. The Committee recommends that the office be used for other indigent defense work in the coming year.

**Civil Rights/Sex and Law**
Memorandum urging the New York City Council to enact Int. No. 305 which would amend the City’s Human Rights Law to prohibit housing discrimination against actual or perceived victims of domestic violence, sex offenses or stalking. The legislation would also permit these victims to terminate their current leases, allowing them to flee the violence and move to a confidential location.

**Communication & Media Law**
Letter to Senate and House leaders supporting the “Free Flow of Information Act of 2005” (H.R. 581/S. 340). This legislation would establish a federal statutory reporter’s privilege. The legislation would allow testimony
to be compelled from journalists when there is clear and convincing evidence such testimony is essential for certain stated purposes, and the party seeking such information has sought and failed to obtain the information from an alternative source. The committee believes the bill strikes an acceptable balance between the public’s interest in free dissemination of information and the public’s interest in the fair and effective administration of justice.

Copyright & Literary Property
Letter to the U. S. Copyright Office commenting on the Office’s January 21, 2005 Notice of Inquiry regarding the problem of orphan works. The letter notes that orphan works present a genuine problem and that any solution should accomplish several objectives including: substantially lessening the risk for those who seek to make use of orphan works; imposing the least possible burden on both users and copyright owners; complying with the international obligations of the U.S. to avoid imposing formalities as a precondition of copyright protection; requiring the least possible intervention by the courts and the Copyright Office; and avoiding the creation of “traps for the unwary” which could disadvantage individual authors.

Criminal Law
Letter to House Judiciary Committee urging the committee not to include Section Twelve of H.R.1528, the “Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Prevention Act of 2005,” to the full House. Section Twelve, a provision unrelated to the basic purposes of the Act, would impose a mandatory sentencing regime, with factors allowing a judge only to increase the sentence. This would radically change the Sentencing Reform Act, undermining judicial discretion in sentencing and eviscerating the U.S. Sentencing Commission’s power to determine uniform sentences based on the data and analysis it has gathered.

Domestic Violence/Sex & Law
Letter to the New York City Housing Authority (NYCHA) urging the NYCHA to continue and strengthen its efforts to ensure that its policies most effectively help battered women seek and maintain safety. The letter emphasizes three policy recommendations that can substantially advance victims’ safety: recognizing a range of documentation rather than requiring police reports or orders of protection to establish abuse; ensuring that any policy for transfer does not arbitrarily require victims to move or to
Recent Committee Reports

prevent them from moving to areas in which they will likely be safe from their abuser; and ensuring that eviction policies do not discriminate against domestic violence victims because of their victimization.

Estate and Gift Taxation
Memorandum in support of state legislation which would amend EPTL Section 7-3.1(a) to clarify existing law that a trustee’s discretionary authority to pay or reimburse the creator of an express trust for taxes imposed on trust income or principal is not a disposition that causes the trust to be void as against creditors of the trust creator. This clarification is necessary to protect trust assets from being includible in the creator’s gross estate for federal estate tax purposes.

Election Law
Letter to the NYC Election Modernization Task Force containing recommendations and raising issues regarding electronic voting systems; the recruitment, training and use of poll workers; the potential for greater use of the Internet; the need for a management study of the city’s Board of Elections, voter registration and ballot access.

Energy
Letter to Gov. George Pataki and legislative leaders opposing a budget amendment that would jeopardize the state’s Systems Benefit Charges (SBC) and Renewable Portfolio Standard (RPS) programs. The amendment, which would eliminate the secure funding these programs now have and make them subject to the annual budgeting cycle, would make it more difficult for the state to promote energy efficiency and the development of renewable energy programs, which have relied on multi-year funding and long-term contracts for their success.

Energy/Environmental Law
Letter to New York City Council Speaker Gifford Miller expressing support for proposed legislation currently before the City Council concerning energy efficiency and green building design. The letter also makes some recommendations as to how the legislation could be improved.

Estate & Gift Taxation/Personal Income Taxation/Trusts, Estates & Surrogate’s Courts
Report expresses concerns with the U. S. Treasury Department’s proposed Circular 230 Regulations. The report concludes that Circular 230 places unwarranted restrictions on routine written tax advice and that such re-
strictions would likely increase substantially the cost of providing such advice to clients and establish a norm in tax practice where legends are routinely employed to elect out of the covered opinion rules so long as the advice does not pertain to principal purpose transactions or listed transactions.

Follow-up report providing supplemental comments to the U.S. Treasury Department’s final proposed Circular 230 Regulation. Although the report acknowledges the changes made by the Treasury Department in response to practitioner comments it argues that the Circular continues to place unwarranted restriction on routine written tax advice.

**Federal Legislation**
Letter to House Energy and Commerce Committee supporting the Castle-DeGette Stem Cell Research Enhancement Act of 2005. This proposed legislation would extend federal support for stem cell research beyond the current, unduly limited, federal program and would set standards to guard against misuse of human embryonic materials. The bill is necessary to enable researchers to fulfill the enormous potential of stem cell research to find cures for many devastating diseases and to unravel the mysteries of human development.

**Financial Reporting/Securities Regulation**
Letter to the Public Company Accounting Oversight Board (PCAOB) commenting on the PCAOB’s proposed Auditing Standard—Reporting on the Elimination of a Material Weakness. The letter supports in general the PCAOB’s objective of establishing requirements and providing direction that apply when an auditor is engaged to report on the elimination of a material weakness in internal control over financial reporting and suggests certain select revisions for consideration by the PCAOB.

**Futures Regulation**
Letter to the Members of the North American Securities Administrators providing various comments to the proposed revisions to the NASAA Statement of Policy on the Registration of Commodity Pool Programs.

**Immigration and Nationality Law**
Letter to Senators Hillary Rodham Clinton and Charles Schumer urging them to oppose certain provisions of the REAL ID Act in a forthcoming appropriations bill. The REAL ID Act would severely burden noncitizens.
The REAL ID Act would increase the evidentiary burden on asylum seekers and eliminate most federal court review of asylum claims, and would allow bail bondsmen unprecedented authority, without adequate safeguards, to arrest and detain noncitizens in removal proceedings. The Act would also require states to verify the lawful immigration status of all drivers’ license applicants, creating a system that will be nearly impossible to run fairly and without furthering the goal of deterring terrorism.

**International Commercial Disputes**

“Lack of Jurisdiction and *Forum Non Conveniens* as Defenses to the Enforcement of Foreign Arbitral Awards” addresses decisions by U.S. courts that have used lack of jurisdiction and *forum non conveniens* as bases for denying enforcement of foreign arbitral awards though Conventions governing recognition and enforcement of those awards do not provide these grounds as bases for denying enforcement. The Committee believes jurisdiction should be required for enforcement, and that the presence of the debtor’s property in the state, even if not connected with the underlying claim, should be sufficient. However, *forum non conveniens* should not be a ground for dismissing an action to confirm or enforce an award.

**International Human Rights**

Letter to Secretary of State Rice urging that the Department of State recommend that the U.S. representative to the U.N. Security Council vote in favor of referring the situation in Darfur to the International Criminal Court. The committee acknowledged that the U.S. opposes the existence of the Court, but believes the urgency of the situation and the value of the Court as a vehicle in dealing with the internationally-acknowledged perpetrators of violations of law which may be crimes against humanity in Darfur make the Court the most effective and appropriate forum for this situation.

Letter to President Gloria Macapagal Arroyo of the Philippines expressing concern about the attempted assassination of Romeo T. Capulong, a leading Philippine human rights lawyer and ad litem judge of the UN International Criminal Tribunal for the former Yugoslavia. The letter notes that the assassination attempt seems to fit within a larger scheme of intimidation aimed at political activists that includes other assassinations and abductions, and attacks by the Philippine military and paramilitary forces. We urged President Arroyo to denounce and investigate these acts, and to take the necessary steps to ensure the safety of Judge Capulong.
International Law
Letter to the leader of the Senate Judiciary Committee regarding the President’s nomination of William J. Haynes II to a seat on the U.S. Court of Appeals, Fourth Circuit. Although the letter does not take a position with regard to Mr. Haynes’ nomination, it expresses concerns with regard to his actions as General Counsel to the Department of Defense regarding government memoranda purporting to provide a legal basis for the government’s detainee interrogation procedures. The letter urges the Senate Judiciary Committee to take these concerns into account during its review process of Mr. Haynes.

Investment Management Regulation
Letter to the SEC urging the Commission to provide greater written guidance, through the public rulemaking process, on the obligation of investment advisers to retain and produce e-mail. The letter expresses serious concerns about how the Commission and its staff have used the inspection and enforcement process to implement Rule 204-2 under the Investment Advisers Act in relation to e-mail. Rule 204-2 requires advisers to retain certain records and communications and over the last several years the SEC staff has informally interpreted the rule to apply to e-mail and in doing so have created ambiguities regarding an adviser’s obligations to store and produce e-mail.

Judicial Administration, Council on/Election Law/Government Ethics
Testimony before the state Senate Judiciary Committee on judicial elections. The testimony acknowledged the efforts at reform of the judicial election process, but noted that such efforts are fundamentally inadequate because they cannot cure the basic disadvantages of judicial elections. The testimony noted the Association’s continued support for merit appointment of judges and noted that, if there was to be judicial election reform, there would be a need to establish independent screening panels which would recommend only a limited number of candidates per vacancy, from which the political leaders would pledge (or if possible, be compelled) to choose.

Legal Issues Pertaining to Animals
Memorandum supporting S.2517/A.1280, which would amend section 96-b of the State Agriculture and Markets Law to provide for the mandatory revocation of licenses of operators of slaughterhouses upon the failure of three consecutive sanitary inspections. This legislation would reduce ani-
mal cruelty by encouraging compliance with regulations that promote animal health and well-being.

**Lesbian, Gay, Bisexual and Transgender Rights**
Letter to New York City Department of Health urging the adoption of a standard that would allow individuals to change their sex designation on a birth certificate if their medical provider makes the determination that sex-reassignment care has been completed.

Memorandum opposing S. 3330-A/A. 6212-A, which would amend the Agriculture and Markets Law, in relation to making it unlawful to force feed birds under certain circumstances. The bill seeks to end the inhumane practice of force-feeding ducks and geese to enlarge their livers. As the bill explains, force-feeding “is the sole method employed in the production of pate de foie gras.” Though the Committee supports the premise of the bill, they object to the unreasonably long implementation period of 11 years.

**Mergers, Acquisitions & Corporate Control Contests**
Letter to the SEC commenting on the proposed rule: Use of Form S-8 and Form 8-K by Shell Companies. The letter summarized the Committee’s primary areas of concern, and proposed changes in the instructions to Form S-8 that would address those concerns.

**Professional and Judicial Ethics**
Formal Opinion 2005-1. Pro bono representation of debtors in Chapter 7 bankruptcy filings; limiting the scope of the representation; conflicts of interest. The opinion finds that the pro bono representation of an individual in connection with a Chapter 7 bankruptcy filing while simultaneously representing one or more of the individual’s creditors in unrelated matters will not typically create a conflict of interest within the meaning of DR 5-105. As a result, a lawyer participating in a pro bono program will ordinarily be able to satisfy his or her obligations under DR 5-105(E) by determining in an initial interview with the prospective client that no unusual facts sufficiently suggest direct adversity with a particular creditor so as to require a conflict check to determine whether that particular creditor is a client of the firm. If, however, any creditor subsequently objects to the discharge of a debt or takes other action that is directly adverse to the Chapter 7 debtor, the pro bono lawyer may not represent the debtor in connection with that aspect of the Chapter 7 case.
unless a conflict check is undertaken and, if the objecting creditor is revealed to be a client of the lawyer’s firm, both clients consent to the dual representation after full disclosure.

Formal Opinion 2005-2. Conflicts of Interest; Duty of Confidentiality. The fact that a lawyer possesses confidences or secrets that might be relevant to a matter the lawyer is handling for another client but the lawyer cannot use or disclose does not without more create a conflict of interest barring the dual representation. The critical question is whether the representation of either client would be impaired. In particular, the lawyer has a conflict if the lawyer cannot avoid using the embargoed information in the representation of the second client or the possession of the embargoed information might reasonably affect the lawyer’s independent professional judgment in the representation of that client. Whether that is the case depends on the facts and circumstances, including in particular the materiality of the information to the second representation and whether the information can be effectively segregated from the work on the second representation.

Formal Opinion 2005-3. Voluntary Attorney Testimony Concerning Former Clients. The opinion finds there is no per se bar preventing a lawyer from voluntarily testifying about a former client. However, if the testimony would involve a revelation of a “confidence” or “secret,” the lawyer must conform to the limitations of DR 4-101; in particular, the lawyer should attempt to secure the client’s consent before testifying. If in the course of testifying, the lawyer is asked a question for which the client’s consent has not been obtained, the lawyer should assert any applicable objection that would enable the lawyer to avoid answering the question.

Formal Opinion 2005-04. Communications between non-lawyer representatives of an insurer and opposing counsel; scope of “prior consent” requirement. This opinion finds that where an insurance company is a party to litigation, an opposing party’s counsel may not communicate with an insurance adjuster in the absence of prior consent from the insurance company’s lawyer. This prohibition arises from the plain language of DR 7-104(A)(1) and applies notwithstanding that it is the non-lawyer who initiates the communication, notwithstanding the presumed sophistication of the adjuster and notwithstanding that the goal of the communication is to facilitate a quick and efficient settlement. “Prior consent” means actual, formal consent of counsel, whether conveyed orally or in writing; a lawyer risks violating the rule by relying on the adjuster’s word...
that insurance company counsel consents or otherwise inferring consent from the circumstances.

**Real Property Law**
Memorandum opposing S.4744/A.7667, which would protect innocent homeowners from the loss of their homes as a result of certain predatory practices. While the letter supports the intent of the legislation, it raises a number of concerns about the effect the legislation would have on innocent home buyers and urges the Legislature to defer consideration of the legislation until the next legislative session.

**Science and Law**
“Are Your Thoughts Your Own? ‘Neuroprivacy’ and the Legal Implications of Brain Imaging” looks at potential legal questions within the context of existing brain imaging technology, applications and protections. The report summarizes current technologies and the reliability of these technologies. Also addressed are the potential applications of the technology and some of the legal implications as well as the existing protections. The report notes that existing laws provide only a limited framework by which to protect the privacy of persons who are subjected to brain imaging to ascertain the veracity of their testimony or to determine their personal preferences and biases, and that although the use of brain imaging for these purposes is not yet widespread, policy makers and legislators should address these issues prospectively.

**Social Welfare Law**
Memorandum supporting the passage of two bills S.4349/A.7486 and A.7639, intended to extend and expand the New York State Food Assistance Program (FAP), which is set to expire in September 2005. FAP provides food assistance to hungry immigrants who are either elderly or victims of domestic violence and who would otherwise be ineligible for the Federal Food Stamp Program. A.7486/S.4349 would reauthorize FAP, while A.7639 would expand it by removing the 1996 residency requirement for the program. The memorandum argues that the expansion, along with reauthorization of the program, would go a long way toward restoring FAP to its intended purpose of meeting the nutritional needs of immigrants until they become eligible for regular food stamps.

**Tort Litigation**
Memorandum opposing the proposed federal medical malpractice reform legislation H.R.534/S.354. H.R.534/S.354 would impose, among other lim-
its, an artificial cap on non-economic damages recoverable in medical
malpractice actions, thus denying thousands of victims of medical negli-
gence, especially women, children, the elderly and low-income people rea-
sonable and necessary compensation. The legislation would also enact
sweeping preemption of state laws in areas of local responsibility that
have been subject to state autonomy for over two hundred years while
doing nothing to cap insurance premiums or reduce the high incidence
of serious medical errors.

United Nations
Letter to State Senate Majority Leader Joseph Bruno urging that he do
everything within his power to expedite the passage of legislation neces-
sary for the renovation and consolidation of United Nations headquar-
ters in New York City. The letter discusses the proposed project, sponsored
by the United Nations Development Corporation, highlights the need to
improve the deteriorated UN headquarters buildings and the importance
of the UN to the city and the nation, and notes that the proposed UN
project will not require state or city funding.

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

Annual Meeting of the Association

Bettina B. Plevan

The Annual Meeting of the Association was held on May 17, 2005.

I am pleased at this halfway mark in my tenure as president to have the opportunity to report to you this evening on the work of the Association during the past year and some plans for the year to come. It has been a busy and exciting year. Although I will only speak about a few areas in which we have focused our institutional energy, our committees, with their diverse subject areas, have been hard at work throughout the year and have made enormous contributions to law reform and the pursuit of justice both here and around the world through reports, comments on legislation and regulations, and amicus briefs and programs. It is just not possible to mention them all but I thank everyone for their commitment and energy.

DIVERSITY

This year marks the first year of the broad implementation of our diversity initiatives program following the adoption and launching of the diversity principles under the leadership of Don Kempf, Chair of the Committee to Enhance Diversity in the Profession. Our achievements in the past year have been numerous:
We have hired a director of the office of diversity, Meredith Moore, whose efforts, together with the leadership and wise counsel of Barbara Berger Oplotowsky, have already had an enormous impact.

We held our first annual diversity day last May which included panel discussions and networking opportunities.

We have held monthly information sessions in the form of panel discussions led by experts on different aspects of a diversity program including topics such as: how to develop a diversity program; how to utilize consultants; part-time work and parental leave policies; gay and lesbian lawyers in the workplace and several others. These unique programs are providing the tools to our signatory organizations to help them succeed in achieving diversity.

We have secured more than 100 signatories (106 to be exact).

In addition to these formal programs, our office of diversity has assisted many different legal organizations including the U.S. Attorney’s office, the Corporation Counsel’s office and other law firms and legal institutions who need additional advice and counsel on an informal basis.

As an Association we have also tried to focus on diversity issues in many other ways, including becoming more involved with special interest or minority bar associations. We have met with several and discussed collaborations that we hope will generate ongoing dialogue and partnerships in the future. We will be continuing our educational programs and hope to expand our efforts with governmental offices and other bar groups this year.

HUMAN RIGHTS

During this past year we have continued our high level of activity focused on preserving and protecting human and civil rights in the age of terrorism. Some of this work has been behind the scenes, where we assisted members of Congress in the questioning of Alberto Gonzales during his confirmation hearings, and in other activities. We also commented in support of proposed legislation: (1) to create a national commission on detention and interrogation policies; and (2) to end the practice of extraordinary rendition. In these endeavors we could not have accomplished anything without the leadership of Scott Horton, Chair of the Committee on International Law; Martin Flaherty, Chair of the Committee on International Human Rights; Miles Fischer, Chair of the Committee on Military Affairs and Justice and Sidney Rodsteicher, Chair of the Committee on Civil Rights; and our ringmaster, constant cheerleader and editor, Alan Rothstein.
I would be remiss if I didn’t mention as well in the field of international human rights that we have sponsored two missions for this year, one to India and, as we speak, another group is headed for an area called Transdniestria in the former Soviet Union where there are numerous challenges to the rule of law affecting ethnic Romanian minorities and other people in that area. The mission is sponsored by the committee on European Affairs and is led by Mark Meyer, the chair of that committee. We look forward to formal reports from these missions in the near future.

PRO BONO

In my inaugural address, I also mentioned Pro Bono Legal Services as an area of focus, and the desire I had to galvanize some of our members to focus on the role of lawyers in corporate governance. I am pleased to report that during the course of this year we have made progress in both areas.

A major effort this year in the area of pro bono has been to develop a statement of principles that we hope that law firms and law departments will adopt, to establish a regimen, so to speak, that will insure that the pro bono programs of law firms and corporate law departments will be structured and administered in a way that is designed to encourage as many people as possible to help provide legal services to poor persons. I am deeply grateful to the Committee on Pro Bono and Legal Services and particularly Bill Russell, its chair, for guiding the preparation of the Statement of Pro Bono Principles. The Statement of Principles goes far beyond other statements issued by bar groups nationally and in the New York area in that it articulates guidelines in the form of best practices for law firms and law departments to follow in organizing a successful program. We are incorporating these guidelines into a statement that we hope firms will be willing to adopt and implement readily. We have spoken to a number of firms already about these principles and have received very positive feedback. Several firms have already agreed to sign them and we hope many more will in the months to come.

We also plan to schedule quarterly meetings of the partners in charge of pro bono programs to insure that the principles are implemented and to provide a forum for the exchange of ideas and ways to improve pro bono programs.

CORPORATE GOVERNANCE

In March, after several months of what might be best described as think tank or brainstorming meetings, we launched a task force to focus
on the role of lawyers in corporate governance issues. The title does not quite capture the depth or breadth of the work of the task force but serves the interests of brevity. The task force is being led by Tom Moreland, who has so successfully led many other important committees of the Association. We have assembled a diverse group with considerable expertise. I am confident that they will succeed in accomplishing some meaningful work by this time next year.

MISCELLANEOUS

Although it is undoubtedly unfair for me to single out other accomplishments of the committees this year, there are several that are so important in the terms of the significance of the positions that we took and the impact we have had that they should not go unmentioned. First, this year the Association took a position for the first time on the important issue of no-fault divorce by supporting that concept through the work of our Matrimonial Law Committee, chaired by Hal Mayerson. We will continue to work towards the adoption of appropriate legislation to implement these recommendations. Second, our Committee on Capital Punishment, chaired by Jeff Kirchmeier, prepared an extensive report submitted to the State legislative committees investigating death penalty legislation in the wake of a Court of Appeals decision declaring New York's death penalty statute unconstitutional. I had the privilege of testifying before the committees and of expressing the views of the Association, which have long been strongly opposed to the imposition of the death penalty in New York. Through our efforts and those of many other organizations it now appears that no legislation reinstating the death penalty will be forthcoming in New York in the foreseeable future.

In March, through the Vance Center for International Justice Initiatives, we hosted an important conference of leaders in the profession from many countries in Latin America to discuss the role of lawyers in a democratic society, including discussions about codes of professional ethics, pro bono work and the role of bar associations. The conference was well planned and executed by Joan Vermeulen, Executive Director of the Vance Center, and the Vance Center committee chaired by Todd Crider.

Our Bankruptcy and Corporate Reorganization Committee, led by Marc Abrams, generated several important reports this year providing practical guidelines and proposed rules for the sound administration of bankruptcy cases, and commentary in legislation. And tomorrow more than 220 lawyers will attend a training program organized jointly by the committee and the City Bar Fund staff to handle consumer bankruptcy cases.
This year we also issued an extensive report on the federal common law of journalist's privilege prepared by the Committee on Communications and Media Law, chaired by David Schulz.

I could go on and on but I won’t. Instead I urge you to continue reading the 44th Street Notes and The Record and watching our website for important developments and activities. I also urge you to get involved if you are not already on a committee and to encourage particularly the more junior of your organization to do the same.

None of this work would be possible without the steadfast and enthusiastic support I receive every day from Barbara Berger Opotowsky, our energetic and talented Executive Director, and Alan Rothstein, our multi-tasking General Counsel. Other senior members of the staff who have contributed greatly to our success this year who I haven’t already mentioned are Carol Rosenbaum, our Chief Financial Officer, Adele Lemlek, our new Marketing Director who gets involved in almost every activity that we sponsor, Michelle Schwartz-Clement, director of our outstanding CLE program, Maria Imperial, Director of the City Bar Fund, about which Barbara has already spoken, and Al Charne, Director of our Legal Referral Service. Our legislative and communications work has also been aided enormously by Jayne Bigelsen, who heads that department.

With their help and yours I am looking forward to another exciting and I hope productive year.
We gather at a time of enormous stress for colleges and universities across the country. It is a time of contentious debate on campuses—among students, among faculty, and within administrations. Some of these debates concern matters of national or global importance. Many are joined—even incited—by outside forces, from political pressure groups to the mainstream media to increasingly strident voices on the Web.

For those of us who inhabit the academic world, these can be troubling times. It is a time when a notion we all hold very dear—academic freedom—is invoked by people on opposite sides of any given debate, often by people who have very different ideas of what academic freedom means. Some even question the basic premises of academic freedom.

What is called for in times like these is a renewed understanding of what our principles are in theory and what they mean in practice. As always, we must also understand what purposes they serve, so we know what’s ultimately at stake.

Academic Freedom goes to the heart of the university, to the rights
and responsibilities of faculty and students, to the nature of teaching and scholarship. As such, it cannot be reduced to a soundbite or slogan, as some would have it, without jeopardizing our working grasp of the principle itself. In stressful times especially, we must make every effort to hold in our minds the complexity of what we say we believe. That is what I will endeavor to do this evening.

Let me begin, then, by surveying the climate in which our conversation takes place.

There is a deep sense of vulnerability in our universities. It is hard not to believe that the extraordinary action of Harvard’s faculty of Arts and Sciences in taking a vote of no confidence and censuring its President, Larry Summers, will in time come to seem symbolic of larger societal issues, much larger than the immediate questions they well may have thought they were addressing. In the last national presidential election, many of our country’s most distinguished scientists felt the singular need to enter the public arena and criticize the Bush administration for systematically choosing politics over science in various public policy settings where the norm had theretofore been scientific objectivity. Meanwhile, politically powerful conservative figures and groups (e.g., the National Association of Scholars) within the country regularly and publicly castigate our leading colleges and universities as bastions of outdated political liberalism, intolerant of diverse perspectives, committed to political ends under the mask of scholarship, living by a double standard of free speech for us but not for our opponents, and harboring extremists and especially anti-American extremists.

One notable manifestation of these attacks is a national group called Students for Academic Freedom (SAF), founded in 2003, by the conservative activist David Horowitz, with members on about 150 campuses. At the core of SAF’s campaign is a so-called “academic bill of rights,” written by Horowitz and peddled to legislators across the country. Among other things, the bill calls for “fostering a plurality of methodologies and perspectives” in the hiring process; creating “curricula and reading lists in the humanities and social sciences [that] reflect the uncertainty and unsettled character of all human knowledge in these areas by providing students with dissenting sources and viewpoints where appropriate”; and inviting speakers with different points of view to campus. Horowitz’s agenda has gained traction in statehouses across the country: legislation enacting variations of the academic bill of rights is moving ahead in 19 states. A Republican congressman from Georgia introduced Horowitz’s bill as a nonbinding resolution in the U.S. House of Representatives in 2003.
It is by no means a new phenomenon that an individual professor’s public comments provoke a national political firestorm and, then, calls for the professor’s dismissal (as we shall see). This is especially true in periods of perceived national emergency. We have that today, but seemingly augmented by the new forms of media and communications that have emerged in the last decade.

Take, for example, the controversy surrounding Ward Churchill’s invitation to speak at Hamilton College in 2004. None of us could have anticipated the speed with which conservative activists around the country organized to stop him from speaking. What started with an op-ed in the Hamilton student newspaper rapidly snowballed into a national media campaign.

We experienced a version of this at Columbia in 2003, just as the United States was undertaking the invasion of Iraq. An assistant professor speaking at a public forum, called to protest the war, expressed the wish for “a million Mogadishus” in order to stop what he saw as America’s colonializing hubris. This statement was seized by local and then national media, including the commentator Bill O’Reilly. In the week after the protest, I received over 20,000 e-mails and the phone lines in my office became inoperable. Nearly 140 lawmakers from the U.S. House of Representatives and from state legislatures wrote to me demanding that the faculty member be discharged. The professor had to be moved to an undisclosed new apartment because of threats. I and others expressed vehement objection with the professor’s statements. But its rapid transformation into a national scandal is, I think, symptomatic of a kind of persecution that arises during wartime.

At this moment, Columbia is facing another, slightly different—but very difficult—challenge. A number of students, supported by some faculty, have asserted that certain professors in our department of Middle Eastern and Asian Languages and Cultures have taught courses on the Israeli-Palestinian controversy that are biased against Israel, Zionism, and Jews, and have intimidated students who try to express reasonable and alternative viewpoints on the subject. A few professors have also allegedly called Zionism—and the very existence of Israel as an avowedly Jewish state—“racist,” and have urged the rest of the world to treat it as a “pariah state.” Some groups outside the University and segments of the media have condemned the professors and the University for these actions and called for their dismissal. Some have gone so far as to depict Columbia as a “campus of hate,” filled with anti-Semitism.

The University’s policy with respect to two aspects of the controversy
is clear and, I believe, right: We will not tolerate intimidation of students in the classroom for appropriately expressing reasonable and relevant points of view. And we will not punish professors (or students) for the speech or ideas they express as part of public debate about public issues. I can also say with complete confidence that it is simply preposterous to characterize Columbia as anti-Semitic or as having a hostile climate for Jewish students and faculty. Columbia is deservedly proud of the strides it has taken over the years as a leading world center of Jewish studies and a place where everyone of whatever background, race, or religion can flourish.

These controversies raise important questions about the work of the modern university. In particular, what are the rights and responsibilities of professors to set and control the content of the classroom? (I am using “classroom” throughout as shorthand for the educational experience.) Is it within the prerogatives of the professor to teach a single perspective on the subject, perhaps reinforcing this choice with selective readings? Is there a line between academic inquiry and politicization of a course? If so, how is it set and who enforces it? Should we care whether an individual professor uses the classroom as a place of political advocacy, as long as elsewhere in the curriculum there are offerings by advocates for other sides of the same topic?

I do not intend my discussion of these questions, as they relate to academic freedom, to be merely one about “rights.” As with any “right” or freedom, we can only understand what academic freedom means when we also understand what we are striving to accomplish. So, I want to also talk about what we value and aspire to in the university and why that serves society—and justifies academic freedom in the first place. I believe we are neglecting a critically important function of universities—a function that arises out of the particular intellectual character nurtured within the modern university and beneficial to democratic society. It is what I would call the scholarly temperament.

Let me say, I am deeply, deeply proud of Columbia University, proud to be a member of the faculty, proud of the extraordinary students we have, and proud to serve as the president. I cannot imagine a community more committed to the life of the mind, in the best sense, and I see it in facets of the institution every single day. All that I have to say tonight about academic freedom and the ideals of the university constitute the stuff of daily life in this remarkable place. Thus, I approach the subject with a confidence that, while, at certain moments we do not reach as close to the ideal as we would like, Columbia nevertheless approaches the ideal as much or more so than any institution I know.
I. ACADEMIC FREEDOM

The current American conception of academic freedom can be traced to early 19th-century Germany. The founders of the University of Berlin adopted two basic principles upon its establishment in 1810: Lehrfreiheit (“freedom to teach”) and Lernfreiheit (“freedom to learn”). Professors had the right to research and teach according to their interests, and students had the right, free from administrative coercion, to choose their own course of study. (It is worth highlighting that in these origins the rights of students were encompassed by the idea of academic freedom, something I believe we need to integrate more into our contemporary thinking.)

In the late 19th century, American universities overwhelmingly adopted the German model. They established individual graduate schools, each dedicated to a specific field of knowledge. They also adopted the general principles of the “freedom to teach” and the “freedom to learn”—since, it was believed, in order for graduate students and faculty to break new intellectual ground, they had to possess the freedom of inquiry.

Historians trace the codification of academic freedom, meanwhile, to a series of conflicts in the late 1800s that pitted individual faculty members against university trustees and administrators.

The most famous was a case involving Edward A. Ross, a Stanford economist who made a series of speeches in support of the Democrat William Jennings Bryan in 1896. Jane Lathrop Stanford—widow of Leland Stanford, ardent Republican, and sole trustee of the university—was so outraged by Ross’ activism that she demanded his dismissal. The president of the university eventually acceded to her demands; Ross was forced to resign in 1900.

Ross’ mistreatment at the hands of Stanford administrators became the basis for the charter document of the American Association of University Presidents, entitled the “Report on Academic Freedom and Tenure.” Cowritten in 1915 by Arthur Lovejoy, a Stanford philosopher who resigned over Ross’ firing, and Edwin R.A. Seligman, a Columbia economist, the report sought to remove university trustees as arbiters of research and teaching, and to assert instead the authority of self-governing faculty members. The report stated:

The distinctive and important function [of professors]...is to
deal at first hand, after prolonged and specialized technical training, with the sources of knowledge; and to impart the results of their own and of their fellow-specialists’ investigations and reflection, both to students and the general public, without fear or favor. . . The proper fulfillment of the work of the professoriate requires that our universities shall be so free that no fair-minded person shall find any excuse for even a suspicion that the utterances of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexpert and possibly not wholly disinterested persons outside their ranks.

This notion—that faculty members, not external actors, should determine professional standards for the academy—remains, today, a powerful and widely accepted idea. It is the foundational principle of academic freedom.

It has not, however, gone untested. Indeed, the 20th century presented a flurry of challenges to academic freedom, especially in times of great national stress.

When the United States entered World War I in 1917, the nation’s political leaders sought to enforce public support for the war effort. That year, Congress passed the Espionage Act, which prescribed a $10,000 fine and 20 years’ imprisonment for obstructing the draft or disclosing information about the nation’s defenses. A year later, Congress passed the Sedition Act, which made it a federal offense to use “disloyal, profane, scurrilous, or abusive language” about the Constitution, the government, the flag, or the uniforms of the Army and Navy.

Such legislation, along with a widespread fear that new immigrants still harbored loyalty to their European homelands—particularly to Germany—gave rise to a brand of fanatical American nationalism. Citizens felt great pressure to publicly proclaim their allegiance to the United States. Submitting to loyalty oaths, participating in public rallies for the sale of bonds, and joining nationalistic societies became essential proofs of citizenship. Americans who chose not to flaunt their patriotism sometimes aroused mistrust.

The American university did not escape scrutiny. In fact, professors became particular targets of suspicion, since, as the historian Walter Metzger wrote in 1955, they were “by trade and usually by disposition somewhat more detached from mass obsessions.” Across the country, boards of trustees, community members, even fellow faculty members “harassed those college teachers whose passion for fighting the war was somewhat less flaming than their own.”
Perhaps the best-known invasion of academic freedom during the World War I era occurred at Columbia. In March 1917, the Board of Trustees adopted a resolution that essentially imposed a loyalty oath on the entire university. It read:

Resolved—The unqualified loyalty to the Government of the United States be required of all students, officers of administration and officers of instruction in the University as a condition of retaining their connection with the University, and that the President have authority to exercise the disciplinary powers of the University to carry this resolution into effect.

Many faculty members responded with disgust, calling the resolution “unjust and injurious” in a petition they sent to the trustees. But President Nicholas Murray Butler accepted the authority that the resolution gave him. In his Commencement Day address in 1917, he declared that Columbia would not allow any opposition to the war effort. “What had been tolerated before became intolerable now,” he said. “What has been wrongheadedness was now sedition. What had been folly was now treason.”

A rash of firings followed. Psychologist James McKeen Cattell sent a petition to three U.S. Congressmen in August 1917 urging them not to pass legislation that would send American conscripts to European battlefields. He was dismissed in October. Politics professor Leon Fraser was summoned by the trustees for making critical remarks about a military training camp in Plattsburgh, New York and was fired the next year. One of Columbia’s best-known scholars, the historian Charles Beard, was investigated for condoning a speaker who had allegedly said, “To hell with the flag.” Beard was eventually exonerated—but he resigned his post in 1917, in protest of the dismissal of many of his colleagues. In his resignation letter, he explained his reason for leaving. He wrote: “The university is really under the control of a small and active group of trustees who have no standing in the world of education, who are reactionary and visionless in politics, narrow and medieval in religion.” Beard went on to become one of the founders of the New School for Social Research—and not until 1919 did President Butler put an end to the trustees’ investigations.

The McCarthy era also posed significant challenges to academic freedom, and universities often yielded to the pressures of the day. James B. Conant, president of Harvard, said at one time that Communist Party members were “out of bounds as members of the teaching profession.” Many institutions fired faculty members suspected of Communist ties—
in fact, the purges of the McCarthy era claimed the jobs of over 600 professors and teachers nationwide. It is further estimated that 20 percent of all the witnesses called to testify before congressional and state investigating committees during the 1940s and '50s were college teachers or graduate students.

At this point in history, significantly, the United States Supreme Court, began to recognize academic freedom as part of the rights of free expression under the First Amendment.

Cases from the McCarthy Era, in particular *Sweezy v. New Hampshire* (1957) and *Keyishian v. Board of Regents* (1966), framed the liberty interest as one belonging to individual teachers. These early opinions set the groundwork for later cases in which a broad right to free academic decision-making was granted to the universities themselves. In cases like *Board of Regents v. Southworth* (2000) and the admissions cases—*Regents of the University of California v. Bakke* (1978) and *Grutter v. Bollinger* (2003)—the Court carved out a zone of freedom for universities, giving them wide latitude to determine how best to educate students.

The Court’s first explicit mention of academic freedom was in Justice Black’s dissent in *Adler v. Board of Education* (1952). Adler upheld the constitutionality of New York’s Feinberg Law, which forbade the state from employing in its public schools any member of a group that advocated overthrow of the government. The Court held that dismissal from employment in the school system did not amount to a deprivation of the right to free speech. In his dissent, Justice Black predicted that the threat of investigation and possible termination “is certain to raise havoc with academic freedom” by turning the public school system into a “spying project” and “police state” where “there can be no exercise of the free intellect.”

Five years later, in *Sweezy v. New Hampshire*, a plurality of the Court identified academic freedom as a core constitutional interest. In their concurring opinion Justices Frankfurter and Harlan memorably identified the central role of academic freedom in a free society. Sweezy arose out of an investigation by the Attorney General of New Hampshire into a series of lectures given by Professor Sweezy at the University of New Hampshire. When the professor refused to cooperate with the investigation, the Attorney General sought to compel his testimony. The Court decided the case on due process grounds, holding that the Attorney General had been given “a sweeping and uncertain mandate” such that the inquiry infringed on Professor Sweezy’s constitutional rights. The opinion disapproved strongly of government interference with academic freedom, holding that “there
unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression—areas in which government should be extremely reluctant to tread.” The Court cautioned that “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate.”

The concurring opinion in Sweezy used language that has been quoted, analyzed and relied upon for nearly half a century. Justice Frankfurter warned of the “grave harm resulting from governmental intrusion into the intellectual life of a university.” In its most celebrated portion, the opinion quoted with approval from a statement written on behalf of two “open” universities in South Africa that stated:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

This quick review of the origins, scope, constitutional basis, and vulnerability of the principle of academic freedom provides us with a helpful framework for approaching at least some of our contemporary issues. Given the regrettable violations of academic freedom, especially in times of war and threats to national security, that characterize the recent century, it is certainly understandable how universities now are feeling skittish and vulnerable. And, yet, we have more to resolve in our minds as we confront criticisms that we in universities are not living up to our own standards of intellectual integrity. It may well be that some of those critics have illegitimate and ulterior motives, claiming they only want diversity of voices when, in fact, they want to silence opposing views or to obtain their own platform within the university to propagate their political agenda. And it may well be that, assuming for the moment there is some merit to the criticisms, it is the proper business of the university and the faculty to remedy. In either case, we need to know what it is we are striving towards, our ideals and their social purposes, if we are to chart the right course, to defend meaningfully and persuasively our academic freedom against inappropriate interventions, and to speak authentically and persuasively to the broader society.

Do we believe there is a fundamental difference between what goes
on in a classroom and what goes on in a political convention? What do we strive for in the university that academic freedom is supposed to protect and how does that help improve our society? Are we saying that professors are completely autonomous in determining the content of their courses? Or are there some internal norms the community of scholars try collectively to live by?

I would now like to turn to that discussion.

II. THE IDEALS OF A UNIVERSITY

I think we should pause and take note of a few significant elements in the earlier review of academic freedom. First, note how academic freedom by most accounts, and in its origins, encompasses students’ freedom to learn as well as faculty’s freedom to teach. Academic freedom, in other words, is a freedom we share in the classroom. Second, note how the seminal “Report on Academic Freedom and Tenure” described the professor: namely, as someone steeped in “prolonged and specialized technical training” and about whom “no fair-minded person” would even suspect of speaking other than as “shaped or restricted by the judgment . . . of professional scholars.” The idea of the “profession” of the scholar is, I think, one of the keys to understanding the ideals supported by the principle of academic freedom. What does it mean to be a “professional scholar”?

A. Primary Purpose

When you ask what our primary purpose is within a university, the typical answer would be that of preserving and advancing our understanding of life, the world, and the universe—of discovering truth. That is the typical answer, but some hold a different view. Some will say that a university is a time and place to find your identity, to discover who you are and what you believe. Some (Edward Said suggested this in one of his books on the role of the public intellectual) will say that, since the university is free of the interests of power, or money, or ideological party, interests which skew one’s judgment, the academy is a place that identifies with those out of power, with the oppressed or the victims of injustice, and in that way naturally speaks truth to power. Some will say that the university is nothing more than a haven for the simple and pure pursuit of ideas, where curiosity is the only guide and the spirit of play is the governing motivation. Still, the most common explanation for the university is that it transmits as much of human understanding as it can from one generation to the next and adds as much new knowledge as it
can to the existing store of human knowledge—a function that has, unquestionably, brought enormous benefits, practical and otherwise, to our society and to the world.

I certainly do not want to challenge that primary function of the university, but I do believe it incomplete. There is far more at work within a university than simply the search for truth. A significant additional function is that of nurturing a very distinctive intellectual character. It is often said of the academy that it is a place of deep skepticism, and I think that is true. But the qualities of mind emphasized go well beyond skepticism, and it is critical to understand what they are and how they relate to the broader society, and to the political arena in particular.

I have now spent more than three decades of my professional life in the university, and of all the qualities of mind valued in the academic community I would say the most valued is that of having the imaginative range and the mental courage to take in, to explore, the full complexity of the subject. To set aside one’s pre-existing beliefs, to hold simultaneously in one’s mind multiple angles of seeing things, to actually allow yourself seemingly to believe another view as you consider it—these are the kind of intellectual qualities that characterize the very best faculty and students I have known and that suffuse the academic atmosphere at its best. The stress is on seeing the difficulty of things, of being prepared to live closer than we are emotionally inclined to the harsh reality that we live steeped in ignorance and mystery, of being willing to undermine even our common sense for the possibility of seeing something hidden. To be sure, this kind of extreme openness of intellect is exceedingly difficult to master, and, of course, in a profound sense we never fully do. Because it runs counter to many of our natural impulses, it requires both daily exercise and a community of people dedicated to keeping it alive (which is why, I believe, universities as physical places will continue to thrive in a world of electronic communication). But we all know what I have just described from personal experience: the extraordinary, unique thrill of thinking about a subject one way until you feel there cannot possibly be another valid perspective, and then beginning with another line of thought and feeling the same certainty settle into our minds, all the while watching in amazement as it happens. Sometimes, of course, this yields new “truths,” but that is not the only purpose for developing this mental capacity.

B. The Greatest Challenge: Democracy

Different forms of government require different, and special, mental capacities of citizens. Just as with a market economy or a military, par-
ticular intellectual and emotional attributes are needed to make it a successful democracy. It is not a simple matter to define these capacities, but it is almost certainly harder to build them up in a population. A democracy, in my view, poses the greatest challenge of all. Obedience to authority seems, at least, easier to inculcate and sustain than the intellectual flexibility of the give-and-take of perpetual conflict over multiple desires and beliefs that characterize life in a democratic system of government. When to share and embrace other views, when to insist on your own; when to compromise and when to resist; how to use reason and rhetoric, when even our most cherished and fundamental beliefs cannot be “proven” by logic—these are difficult to sustain in the best of times and, experience sadly shows, nearly impossible in the worst of times. I could go on at some length about this subject, having spent much of my scholarly life trying to understand—through the practiced lens of reflection and experience of the First Amendment and freedom of speech—what batch of social structures and qualities of mind are needed to support a democracy. I would just say this: The most thoughtful observers during the last century about the risks of totalitarianism (I’m thinking of people such as Oliver Wendell Holmes, Jr., Isaiah Berlin, and Hannah Arendt) all identified intellectual intolerance and certitude as the central cause of the failure of democracies and the shift to authoritarianism.

In the nineteenth century, John Stuart Mill argued that democracy is perennially at risk of being transformed into tyranny by the tendency of human nature to assume that our beliefs are true and, accordingly, to coerce opposing “falsehoods” into silence. Holmes offered a similar analysis of the normality of the roots of persecution: “Persecution for the expression of opinions is perfectly logical,” he said. “If you have no doubt about your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition.”

In a volume of essays entitled “The Crooked Timber of Humanity,” Isaiah Berlin speaks of how the twentieth century was frequently devastated by great ideological storms sweeping across the landscape. In his essay “The Pursuit of the Ideal,” Berlin identified two forces above all others that shaped human history in the twentieth century, the first being “the development of the natural sciences and technology” and the second the “great ideological storms that have altered the lives of virtually all mankind.” Berlin senses the dangers of belief. “Happy are those,” he says ironically, “who have, by their own methods, arrived at clear and unshakable convictions about what to do and what to be that brook no
possible doubt." But, though happy, such people are a threat to human decency. "For if one really believes that [a solution to life's problems] is possible, then surely no cost would be too high to obtain it: to make mankind just and happy and creative and harmonious forever—what could be too high a price to pay for that?" Arendt, too, found the sources of totalitarianism in the self-inflating appeal of infallibility and its accompanying belief in one's own omnipotence.

In a speech to the Federal Bar Association, Learned Hand offered a simple parable about the kind of intellectual capacities required in a democracy, and why democracies fail when these capacities are absent. He compared a democracy to a group of children at play, confused about how to organize their games and deferring to an older, more experienced peer for direction. But that solution satisfies no one, as each child is unhappy to be bossed about by another, and eventually confusion reigns again—until, Hand wrote, "in the end slowly and with infinite disappointment they do learn a little; they learn to forbear, to reckon with another, accept a little where they wanted much, to live and let live, to yield when they must yield; perhaps, we may hope, not to take all they can. But the condition is that they shall be willing at least to listen to one another to get the habit of pooling their wishes. Somehow or other they must do this, if the play is to go on . . ."

This is the intellectual capacity we teach ourselves and our students in the academy, a capacity that is useful in the search for truth but has many purposes in life beyond that. It characterizes the "scholarly profession." Perhaps we pursue this capacity to an extreme degree, but we're just one of many social institutions designed to contribute to the whole by nurturing the complex qualities of mind our complex modern societies need. The principle of academic freedom is the guardian of this enterprise, which ironically is to correct against the very intellectual impulses (both internal and external to the academy) that continually threaten to breach academic freedom (as we have seen in the opening discussion).

III. APPLYING THE FRAMEWORK

I now want to close the discussion by returning to the opening questions and offering some answers. I believe that there are four guiding principles that should shape our actions.

First, we need to realize that the health and vigor, which I believe is strong, of universities depends upon the scholarly professionalism I have described. This
involves our commitment to the intellectual disposition of extraordinary openness of intellect and the self-restraints that entails.

Public life poses, as we have seen, constant pressures and temptations for the university. Within the academy, we always face the impulse to jettison the scholarly ethos and adopt a more partisan mentality, which can easily become infectious, especially in times of great controversy. As Raymond Aron observed in his book “The Opium of the Intellectuals” in the 1950s, the intellectual life is continually tempted by the “longing for a purpose, for communion with the people, for something controlled by an idea and a will.”

I must say that every faculty member I have known is aware of this impulse and tries to live by the scholarly temperament, just as we expect judges to maintain a judicial temperament. In the classroom, especially, where we perhaps meet our highest calling, the professor knows the need to resist the allure of certitude, the temptation to use the podium as an ideological platform, to indoctrinate a captive audience, to play favorites with the like-minded and silence the others. To act otherwise is to be intellectually self-indulgent.

This responsibility belongs to every member of every faculty, but it poses special challenges on those of us who teach subjects of great political controversy. Given the deep emotions that people—students and professors both—bring to these highly charged discussions, faculty must show an extraordinary sensitivity to unlocking the fears and the emotional barriers that can cause a discussion to turn needlessly painful and substantively partial.

Some may wonder whether this is too much to ask of a classroom and, therefore, universities should forego these subjects altogether. I think this would be a grave mistake. Not only is this the only way our universities can offer insights into questions of great importance to the society, but, as I have described the broader role of the university in a democratic society, we would lose the ability to serve these societal purposes just when it’s needed most.

Second, given the expectations of a scholarly profession, how should we deal with lapses, for surely we must expect there will be occasional failures? Let me answer by saying what we should not do and what we should do.

We should not elevate our autonomy as individual faculty all other above every other values.

We should not accept the argument that our professional norms cannot be defined and therefore transgressions must be accepted without consequences. We, as faculty, properly have enormous autonomy in the
conduct of our teaching and our scholarship. Yet, it will not do simply to say that the professional standards within which that autonomy exists are too vague for any enforcement at all. Life, after all, is filled with drawing lines about highly elusive and difficult-to-define differences, and yet we do so because to shirk the task is to invite worse consequences.

We should not accept the argument that professors are foreclosed from expressing their opinions on the subject in the classroom, nor that because professors are free to do so in some contexts there are no boundaries involved whenever viewpoints are expressed. The question is not whether a professor advocates a view but whether the overall design of the class, and course, is to explore the full range of the complexity of the subject.

We should not accept the argument that we as teachers can do what we want because students are of sufficient good sense to know bias and indoctrination when they see it. This ignores the enormous differential in power between the professor and the student in a classroom setting.

We should not accept the idea that the remedy for lapses is to add more professors with different political points of view, as some would have us do. The notion of a “balanced curriculum,” in which students can, in effect, select and compensate for bias, sacrifices the essential norm of what we are supposed to be about in a university. It’s like saying of doctors in a hospital that there should be more Republicans, or more Democrats. It also risks polarization of the university, where “liberals” take courses from “liberal” professors and “conservatives” take “courses from “conservative” professors.

We should not say that academic freedom means that there is no review within the university, no accountability, for the “content” of our classes or our scholarship. There is review, it does have consequences, and it does consider content.

And this happens every day, every year, and it is properly lodged in the hands of the faculty of the departments and schools of our intuitions. Every faculty member participates in such a process, as I have myself over many years, and it has, generally speaking, the highest integrity. In appointment, promotion, and tenure discussions, as well as annual reviews, we make professional judgments about the scholarly temperament, the originality of ideas, the development of students’ understanding and capacities, the respect shown for students, the tolerance of mind displayed, the mastery of the subject, and many other qualities of mind.

This is what it means to be part of a scholarly community, as the seminal, founding statement of the AAUP implied. It rests with the fac-
ulty, and the role of the university is to ensure that the system of local self-governance is enabled.

Third, we must respect what I would call the principle of “separation of university and state.”

As I indicated at the outset, universities do not penalize faculty or students for comments they make as citizens in public debate. A corollary is that, while faculty and students are free to take whatever positions they wish on public matters, universities are not. We do not, as institutions, generally speaking, take positions on public issues.

The latter was a much debated topic during the Vietnam War, as many pushed to have universities condemn the war. A well-known commission at the University of Chicago, chaired by the eminent First Amendment scholar Harry Kalven, issued a report saying that universities should not do so. The basic argument of the Kalven report was that to do so would chill debate on the campus. I think that is a problem, but I believe the opposite is also a problem. As I said before, the risk is always present that we will jeopardize the scholarly ethos and join the public sphere. We, therefore, need to maintain the line between the differing roles—the role of the scholar professional and the role of the citizen. The last thing we want to do is to turn the campus into a political convention.

My fourth point, is that all of us, but universities in particular, must stand firm in insisting that, when there are lines to be drawn, we must and will be the ones to do it. Not outside actors. Not politicians, not pressure groups, not the media. Ours is and must remain a system of self-government.

To be sure, as we have witnessed throughout recent history, the outside world will sometimes find the academy so dangerous and threatening that efforts will naturally arise to make decisions for us about whom we engage and what we teach. This must not be allowed to happen. We must understand, just as we have come to with freedom of speech generally, that the qualities of mind we need in a democracy—especially in times of crisis—are precisely what the extraordinary openness of the academy is designed to help achieve—and what will necessarily seem dangerous and threatening when our intellectual instincts press us, to be single minded or, to put it another way, of one mind. In a democracy, that’s what we must be wary of.

CONCLUSION

In closing, I want to note a deep irony of academic freedom, and its parent, freedom of speech. These freedoms, when they are at issue, often
divert our attention from serious engagement on more substantive issues. When controversies erupt over something someone said, we often quickly find ourselves in a debate about whether that speech is protected or not, rather than expending our energy explaining why in our view the ideas are wrong and should be rejected.

With the broad perspective we’ve taken of the intellectual landscape, we can understand why this happens. Engaging with ideas, as it turns out, is actually a very hard thing to do. The demands it places on our powers of reason, of imagination, of tolerance often seem overwhelming. Indeed, as I said earlier, the more that our most fundamental beliefs are at stake the harder it is to defend them. Therefore, it is natural for all of us in a controversy to turn our attention to debating the narrower—and often seemingly safer—question of whether an idea is protected or not.

Yet, robustly engaging with difficult ideas is the basic purpose of academic freedom—a fact that makes this diversion a great pity as well as an irony. I’ve always felt that tolerance carries a responsibility to speak to the ideas tolerated. This is, moreover, a moment in American history, in world history, when difficult, painful, sensitive issues truly need our clear-eyed attention, and could greatly benefit from the academy’s perspectives.

As I said at the outset, this is a time of high vulnerability and anxiety at our universities. Yet I am confident that what I have called the scholarly temperament is alive and well in our universities. I know it is at Columbia University. A handful of instances of inappropriate behavior within our nation’s universities must not be permitted falsely to define the whole and foster a counterproductive climate of distrust. Our basic mission is still strong, our sense of unique purpose is still well placed, and the value that our universities continue to provide our students, our nation, and the world is not exceeded by any other institution.

We do not need a new set of principles, tailored to the times. We need only to reaffirm the principles that have guided us for the past hundred years, that have seen our profession through times of great challenge, and led us toward ever-expanding horizons of human insight and the building of democratic societies.
“If It Walks, Talks and Squawks...”
The First Amendment Right of Access to Administrative Adjudications

The Committee on Communications & Media Law

INTRODUCTION
This paper explores the nature of the public’s constitutional right of access to a class of administrative proceedings where important liberty and property interests are at stake, specifically those executive branch and agency proceedings conducted as adjudicatory hearings before a neutral decision maker. Although these hearings take place outside of the judicial branch, they fall well within the scope of the public’s First amendment right of access recognized by the U.S. Supreme Court more than two decades ago.

This paper grew out of concerns raised by the extreme restrictions on the public’s access rights advanced by the Department of Justice after 9/11. Following the attacks on the World Trade Center and the Pentagon, the Department of Justice rounded up hundreds of Arab and Muslim immigrants with visa violations, and then decided to conduct their deportation hearings completely in secret. The Department asserted the right to act is secret by claiming that the constitutional right to attend govern-
ment proceedings exists only in criminal cases conducted before Article III judges.¹

Because no statute currently mandates public access to immigration proceedings—or to most administrative proceedings—an absence of any constitutional constraint against closed administrative hearings would mean that administrative law judges can conduct proceedings behind closed doors at any time, for any reason, or for no reason, which is just the power the Department of Justice claimed. As this position paper demonstrates, there is no principled basis in law or logic for such a cramped construction of the constitutional right of access.

It is beyond dispute that a broad, albeit qualified, First Amendment right protects the ability of the press and the public to attend certain government proceedings. Building on a tradition of public access to the workings of government that dates back to the founding of this nation, the Supreme Court in Richmond Newspapers, Inc. v. Virginia² identified such an implied right in the First Amendment. Scores of decisions by courts at every level have applied this constitutional right to the full range of criminal and civil proceedings conducted by Article III courts and their state counterparts. Only a few decisions, however, have yet addressed the scope of this First Amendment access right to administrative hearings and other executive branch proceedings.

Properly defining the scope of the public’s right of access to administrative adjudicatory proceedings is particularly important given the vast power exercised by the ever-expanding “administrative state,” where administrative law judges decide more cases each year than the Federal courts.³ This task deserves urgent attention given the current claim of the Executive branch to possess the constitutional right to conduct completely secret deportation hearings—adjudicatory proceedings conducted in many respects just like a criminal trial. In the view of this Committee, the public’s constitutional right of access plainly applies to administrative adjudicatory hearings to the same extent and under the same analysis as it applies to trials in Article III courts. This is the only interpretation that allows the right of access to fulfill its constitutional purpose of informing voters

². 448 U.S. 555 (1980).
about the actions of their government, and this is the only approach consistent with the clear Supreme Court precedent defining the First Amendment access right.  

Section I of this position paper reviews briefly the vast importance of the administrative state, comprising hundreds of administrative agencies that have supplanted courts as the arbiters of many important rights. Executive branch agencies now exercise broad-sweeping powers that “the Framers, who envisioned a limited Federal Government, could not have anticipated.” Federal courts acquiesced in this delegation of responsibilities to administrative agencies, in large part, because they long ago concluded that “due process” and other procedural safeguards imposed upon the judicial system—such as the public right of access—would apply to adjudicatory proceedings conducted by government regulators and administrative agencies.

Section II reviews the series of four decisions in which the Supreme Court articulated the right of public access implicit in the First Amendment, whose logic and holdings make plain that the right applies broadly to all branches of government. Those decisions define the scope of the constitutional right of access to any government proceeding by two interrelated considerations: whether the type of proceeding has traditionally been open to the public, and whether public access enhances the functioning of the proceeding itself. While the First Amendment right of access is a qualified right, not an absolute right, where it exists a government proceeding may be closed only if openness threatens some “transcendent” public value that can not effectively be protected unless the public’s right of access is limited.

Section III demonstrates that the First Amendment right is not limited either to criminal proceedings or to Article III courts as the Department of Justice urged in defending secret deportation hearings. The Department’s argument misconstrues the constitutional source of the right of access, and the constitutional purposes advanced by the right. Lower courts have widely rejected this restricted interpretation of the First Amend-

4. As discussed below in Section II, recognizing a constitutional right of access to deportation proceedings does not mean that such proceedings can never be closed where legitimate security concerns require confidentiality and existing standards would permit closed proceedings. The relation between the public’s right of access and national security concerns is explored more fully in this Committee’s earlier report, “The Press and the Public’s First Amendment Right of Access to Terrorism on Trial: A Position Paper,” 57 The Record of the Association of the Bar of the City of New York 94 (2002).

ment right and have applied the right of access to civil proceedings, and proceedings outside of Article III courts, including bankruptcy proceedings, Executive branch courts martial and other adjudicatory proceedings.

Finally, Section IV demonstrates that a public right of access necessarily applies to those administrative proceedings that are conducted in the form of adjudicatory hearings, where the parties present information to an unbiased fact finder, have the right to counsel and to cross-examine, and can appeal findings that must be based on an evidentiary record. The body of Supreme Court case law applying the Due Process clause to administrative proceedings makes clear that the Due Process clause guarantees a “fair and open” hearing when liberty or property interests are to be decided through an administrative process conducted as an adjudicatory hearing. A public right of access must apply to any administrative proceeding where the Due Process clause independently provides the parties themselves the right to a “fair and open” hearing, just as the public has an independent First Amendment right of access to any criminal proceeding where a defendant has a Sixth Amendment right to a “public trial.” This conclusion is confirmed by applying to administrative adjudicatory hearings the Supreme Court’s standard for defining the scope of the First Amendment right of access.

This paper addresses only the public right of access to adjudicatory administrative proceedings, and leaves for future consideration the scope of access rights to other administrative proceedings, such as individual social security and welfare benefit proceedings that are nonadversarial.6

6. Such “mass justice” cases are beyond the scope of this paper because they typically are non-adversarial proceedings and different constitutional considerations may therefore apply. Nonetheless, there are strong public policy arguments for openness even in such non-adversarial proceedings. Many studies have shown a great concern for bias and discrimination in these proceedings, which would surely be improved if greater access were provided to the press and public. See, e.g., Elaine Golin, Note: Solving the Problem of Gender and Racial Bias in Administrative Adjudication, 95 Colum L. Rev. 1532 (1995); Linda G. Mills, A Calculus for Bias: How Malingering Females and Dependent Housewives Fare in the Social Security Disability System, 16 Harv. Women’s L.J. 211 (1993).

Investigatory proceedings are similarly not addressed by this paper, but have often been opened to the public because of the important role they play in public knowledge of governmental inquiries. The investigation into the Space Shuttle Challenger in 1986, the New York City Mollen Commission in 1994, and many other investigations were conducted openly, resulting in an informed electorate who had had the benefit of scrutinizing for itself what went wrong both in space and on the streets of New York. Indeed, the court in Soc. of Prof. Journalists v. Sec. of Labor, 616 F. Supp. 569 (D. Utah 1985), vacated as moot, 832 F.2d 1180 (10th Cir. 1987), determined that no less than with administrative adjudications, the two-part access test of Richmond Newspapers should logically be applied in the context of investiga-
“IF IT WALKS, TALKS AND SQUAWKS…”

There is no sound basis, however, to treat the public’s right of access to administrative adjudicatory hearings any differently than its right to attend Article III trials where similar procedures are followed. If a “proceeding ‘walks, talks, and squawks very much like a lawsuit’…[i]ts placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication.”

A core objective of the First Amendment is to shed light on the conduct of government, to empower voters, and to enable democracy to function. The First Amendment right of access must extend to hearings conducted by the vast administrative judiciary built over the past century if these objectives are to be fulfilled.

I. BRIEF HISTORY OF THE ADMINISTRATIVE STATE AND GROWTH OF AN ADMINISTRATIVE JUDICIARY

A. The Rise of the Administrative State

As early as 1789, when the first federal agency was created, Congress and Article III courts struggled with the proper role of administrative agencies in our constitutional framework. It was not, however, until the twentieth century that a vast administrative state began to develop in earnest. In a burst of legislation from 1914 to 1934, Congress delegated substantial rule making, rule enforcement, and adjudicative powers to newly created administrative agencies, while state legislatures established new authorities to oversee factory safety, workmen’s compensation, and public utility regulation.

The primary impetus for this wave of legislative del-


8. The Act of July 31, 1789 created the first administrative agency “to estimate the duties payable” on imports and perform other duties. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4. at 8 (4th ed. 2002). At that time, there was quite a lot of distrust of executive power, with the separation of powers doctrine still holding great weight. Thus, the agencies of the eighteenth century were deliberately made rudimentary in order to restrict executive power. Id. § 1.4. at 9.


10. PIERCE, supra note 8, § 1.4. at 9.

11. See STEIN, supra note 9, § 1.01[3] n.72.
egation was the inability of the traditional, compartmentalized tripartite form of government to deal effectively with the complex problems of an industrial economy.\textsuperscript{12} According to Professor Richard Pierce, “[t]he scope and degree of modern government intervention and the complexity of modern society ... combined to make it impossible for legislatures to resolve most policy disputes by statute.”\textsuperscript{13}

The “New Deal” was a watershed event in the history of the administrative state. Many new and powerful agencies were created to ameliorate the problems of the Depression and to carry out the public philosophy of regulating the entire economy.\textsuperscript{14} Among these new agencies were the National Recovery Administration, the Securities and Exchange Commission (SEC), and the National Labor Relations Board (NLRB), all having vast power over their respective arenas.\textsuperscript{15} The National Recovery Administration had broad authority to regulate all economic life.\textsuperscript{16} The SEC introduced new levels of personal liability to those involved in the issuance of securities. The NLRB was a particularly “intrusive” agency from the point of view of employers and seemed invariably to favor employees.\textsuperscript{17}

Those opposed to the major expansion of administrative power by the Roosevelt administration, including significantly the American Bar Association (“ABA”),\textsuperscript{18} invoked the separation of powers, the delegation doctrine and other concerns to condemn as unconstitutional the combination of legislative, executive, and judicial functions in one body.\textsuperscript{19} Opponents initially challenged the constitutionality of the delegation of broad powers by Congress and sought \emph{de novo} judicial review of virtually

\begin{flushleft}
\textsuperscript{12} JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1 (Yale Univ. Press 1966) (Seventh printing of lectures given by Landis in 1938).
\textsuperscript{13} PIERCE, supra note 8, § 1.4 at 10.
\textsuperscript{14} See LANDIS, supra note 12, for a discussion of the legal battles surrounding the rise of the administrative state.
\textsuperscript{15} Id. at 12.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Much of the opposition to the modern administrative process was and continues to be directed at the combination of lawmaking, executive and adjudicative functions into a self-contained bureaucracy, without effective means to insure their operation is in the public interest. See generally ARTHUR SCHLESINGER, The Imperial Presidency (Boston: Houghton Mifflin Co. 1973)); LEON FRIEDMAN ET AL. UNQUESTIONING OBEDIENCE TO THE PRESIDENT: THE ACLU CASE AGAINST THE LEGALITY OF THE WAR IN VIETNAM (W.W. Norton & Co. 1972)).
\end{flushleft}
all administrative actions. In 1933, the ABA formed a Special Committee on Administrative Law that issued a series of annual reports calling for the separation of judicial powers from administrative agencies, the creation of an “administrative court” to cure the “fundamental evils” of the new regulatory system, and other measures to protect the constitutional structure. Criticism of the administrative state came from within the government too. In 1937 the President's Committee on Administrative Management issued a report calling the agencies “a headless ‘fourth branch’ of the government,” and recommending complete separation of adjudicatory function and personnel from investigatory and prosecuting functions and personnel.

Nonetheless, the palpable public benefits that flowed from the new regulatory regime—from protection of investors to increased employee rights—were a particularly effective shield against opponents of the rise of the administrative state. The reality was that, by the beginning of World War II, administrative agencies had become an integral part of the federal government, without which there could be no collection of taxes, dispensing of federal funds, carrying of mail, managing of public lands, or operating of the departments of agriculture, commerce and labor. Justice Stone likened the opposition to administrative agencies to the opposition that arose to the Courts of Equity in the time of Coke and characterized opponents of the agencies as having “nostalgic yearnings for an era that has passed.”

Eventually the participants in the debate over the propriety of the new administrative structure compromised and passed the Administrative Procedure Act of 1946 (the “APA”). Passage of the APA had four major effects: (1) it satisfied a political desire for reform of the operation of administrative agencies, (2) it improved and strengthened the administrative process, (3) it enhanced uniformity within the administrative process, and (4) it preserved judicial review of administrative action.

20. LANDIS, supra note 12 at 11.
22. See Report of President’s Committee on Administrative Management at 39-40 (1937) (quoted in PIERCE, supra note 8, ¶1.4 at 13).
23. PIERCE, supra note 8, ¶1.4 at 13.
25. PIERCE, supra note 8, ¶1.4 at 15.
The delegation of adjudicatory authority to administrative agencies subsequently gained muted approval from the Supreme Court. Its 1982 plurality decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.* resulted in a partial invalidation of adjudicatory powers granted to Article I bankruptcy judges, in a ruling that objected to non-Article III judges exercising jurisdiction over “private rights” (i.e. a breach of contract action at common law) rather than purely governmental rights. However, the plurality opinion was subsequently limited in *Commodities Future Trading Commission v. Schor* and *Thomas v. Union Carbide Agricultural Products Co.*, in which the Court granted wide deference to Congress’ delegation of adjudicatory power to administrative agencies. There is now hardly any function of modern government that does not involve some rights that are subject to review before administrative tribunals in adjudicatory proceedings.

**B. The Administrative Judiciary**

As the administrative state has grown, so too has the administrative judiciary—a “fourth” branch of government with which the public has little familiarity. There are many, many types of administrative decision-makers. Administrative Law Judges (or “ALJs”) are appointed under the APA to preside over formal administrative hearings. ALJs exercise the same responsibility for maintaining the integrity of our federal laws as do traditional Article III judges, but there are many more of them. Approxi-
mately 1400 ALJs exist within 29 administrative agencies; Article III judges total only about 850 nationwide.\textsuperscript{33} Despite their extensive responsibility and significant caseloads, ALJs have been described as the “hidden judiciary” because they are little known beyond the parties directly engaged with a regulatory agency involved in an administrative hearing process.\textsuperscript{34}

The scope of issues subject to adjudication before an ALJ is vast. ALJs preside over cases involving radio and TV broadcasting licenses; gas, electric, oil and nuclear energy allocation and rates; labor-management relations; consumer product safety; corporate mergers; occupational health and workplace safety; securities trading; social security benefit adjustments; international trade; and many other matters.\textsuperscript{35} The types of cases decided by ALJs have been distilled by one commentator into three general categories: “mass justice cases,” “typical regulatory proceedings,” and “esoteric proceedings.”\textsuperscript{36}

Mass justice cases include Social Security disability cases and Department of Labor benefits cases that are decided by the hundreds of thousands every year.\textsuperscript{37} These cases are “nonadversarial, involve relatively simple issues, and typically take no more than an hour or two to hear.”\textsuperscript{38} At the other end of the spectrum, esoteric proceedings, include such matters as Federal Energy Regulatory Commission and Nuclear Regulatory Commission proceedings, far removed from the simplicity and speed of the mass justice cases.

These proceedings may involve numerous parties and issues, extensive discovery, lengthy written expert testimony, multiple prehearing conferences, weeks or months of hearings, post-


\textsuperscript{35} See Wertkin, supra note 32 at 365 (quoting \textit{THE ALJ HANDBOOK: AN INSIDER’S GUIDE TO BECOMING AN ADMINISTRATIVE LAW JUDGE} 3, (Linda P. Sutherland & Richard L. Hermann eds., 3d ed. 1997)).


\textsuperscript{37} \textit{Id.} at 15 (as of 1992, more than 70% of ALJs were assigned to the Social Security Administration and 7% to the black lung and other cases for the Department of Labor).

\textsuperscript{38} \textit{Id.}
hearing briefs, and initial decisions running into the hundreds of pages. 39

Occupying the middle ground between these extremes is the typical regulatory case, such as proceedings before ALJs at the National Labor Relations Board, the Securities and Exchange Commission, the Federal Mine Safety Review Commission, the Department of Housing and Urban Development, the various banking agencies and about twenty other departments and agencies of the federal government. 40 Usually initiated by an individual complaint, these cases are defended by seasoned counsel and often involve complex legal and factual disputes heard over a period of days or weeks. 41 A typical regulatory case can involve the imposition of a variety of sanctions including civil money penalties, cease and desist orders, revocation or suspension of licenses, and debarment from doing business with the government. 42

The “typical regulatory cases” and “esoteric cases” are “in all significant respects, functionally equivalent to federal non-jury trials” and—like Article III judicial proceedings—often result in decisions that have far-reaching effects. 43 Thus, it is not surprising that the Supreme Court has held that a determination of rights by an ALJ is subject to constitutional “due process” requirements, like judicial proceedings. As the Court stated in 1960, “when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.” 44 In decisions stretching back to the creation of the modern administrative state, the Court repeatedly has ruled that the “rudiment of fair play” guaranteed by due process mandate that administrative adjudications—no less than judicial proceedings—be “fair and open.” 45

39. Id.
40. Id. at 16.
41. Id.
42. Id. The similarities between adjudications presided over by ALJs and cases before an Article III court are not mere happenstance, but rather are the intended result of the compromise struck between opponents and proponents of the administrative state during the drafting of the APA. Those opponents, such as the ABA, pushed for an entirely separate administrative judiciary, but finally settled for a cadre of independent judicial officers who remained part of the agencies.
43. Id.
II. THE SUPREME COURT’S ARTICULATION OF THE FIRST AMENDMENT RIGHT OF ACCESS

Between 1980 to 1986, the United States Supreme Court recognized and defined the qualified First Amendment right of public access in four cases dealing with access to various court proceedings. The common thread binding these decisions together is the Court’s unwavering focus on the need for openness to inform the citizenry about the operations of government, and the importance of an informed citizenry to the success of our system of democratic self-rule.

Richmond Newspapers, Inc. v. Virginia, resolved the “narrow question” of whether there is a First Amendment right to attend a criminal trial, but it was a “watershed” decision, declaring for the first time an affirmative, enforceable right to compel access to a government proceeding. In

(1937); Morgan v. United States, 304 U.S. 1, 15 (1938), rev’d on other grounds, 313 U.S. 409 (1941).

46. See Richmond Newspapers, 448 U.S. at 580 (recognizing right to attend criminal trials); Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596 (1982) (striking down state law mandating closed trial proceedings whenever the victim of a sex crime is called to testify); Press-Enter. Co. v. Superior Court, of Cal., 464 U.S. 501 (1984) (“Press-Enterprise I”) (applying the public’s right of access to jury voir dire); Press-Enter. Co. v. Superior Court, of Cal., 478 U.S. 1 (1986) (“Press-Enterprise II”) (applying the public’s right of access to pretrial proceedings which had no equivalent in English or early American history).

47. The public’s right to know about the workings of government—while not explicitly mentioned in the Constitution—has come to be accepted by scholars and courts as a fundamental First Amendment principle rooted in the idea that an informed public is the essence of a democratic society. See e.g., ALEXANDER, MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 26 (1948); L. LEVY, ORIGINS OF THE FIRST AMENDMENT, 101-132 (Yale Univ. Press 2001).

Even before Richmond Newspapers, the Court recognized that one fundamental purpose of the First Amendment is to protect public discussion of government officials and policies. See, e.g., Mills v. Alabama, 384 U.S. 214, 219 (1966) (“the press serves and was designed to serve a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve”); First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 783, (1978) (“First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw”).

48. 448 U.S. at 558, Justice Rehnquist filed the only dissent to this 7-1 decision. Justice Powell did not take part in consideration of the case, but indicated in his earlier concurring opinion in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), that he viewed the First Amendment as conferring right of access to criminal trials. Id. at 397-98.

49. Id. at 582 (Stevens, J., concurring).
his plurality opinion, Chief Justice Burger traced the history of public access to criminal trials from before the Norman Conquest of England up to Colonial America, finding that “throughout its evolution, the trial has been open to all who cared to observe.” 50 Examining the reason behind this record, he concluded that the presumption of openness “is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial.” 51 Foremost among the values of openness, stated the Chief Justice, is its operation as a check on the proper functioning of trials, in that “it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, or decisions based on secret bias or partiality.” 52

Among the reasons the Chief Justice cited as requiring openness include its ability to enhance “the performance of all involved,” 53 protection of judges and prosecutors from “imputations of dishonesty,” 54 “the education of the public,” 55 and the significant therapeutic value of open proceedings, providing an outlet for community concern, hostility and emotion. 56 Not only do open trials enhance the likelihood of justice, they “satisfy the appearance of justice.” 57 And, Justice Burger famously stated, while “[p]eople in an open society do not demand infallibility from their institutions ... it is difficult for them to accept what they are prohibited from observing.” 58 The importance of openness to the democratic process was clearly crucial to the recognition of the access right. The Court thus held “that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and ‘of the press could be eviscerated.’” 59

50. Richmond Newspapers, 448 U.S. at 564; see also id. at 564-69.
51. Id. at 569.
53. Id. at 569 n.7 (citation omitted).
54. Id.
55. Id. at 569 n.7 572.
56. Id. at 570-71. Another “collateral aspect” of open courts is the “possibility that someone in attendance at the trial or who learns of the proceedings through publicity may be able to furnish evidence in chief or contradict ‘falsifiers.’” Id. at 570 n.8 (citing 6 J. WIGMORE, EVIDENCE § 1834).
57. Id. at 571-72 (citation omitted).
58. Id. at 572.
59. Id. at 580 (citation omitted).
In his concurrence, Justice Brennan went beyond the historical record to underscore the “structural role” that the First Amendment “play[s] in securing and fostering our republican system of self-government.” Implicit in this structural role,” wrote Brennan, “is not only ‘the principal that debate on public issues should be uninhibited, robust and wide-open,’ but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.” This, Brennan concluded, is the wellspring of the access right. Recognizing that this wellspring provides a “theoretically endless” justification for access to government proceedings, Justice Brennan cautioned that any assertion of the First Amendment right of access must be assayed by considering the value of access to the operation of the specific procedure. While the right of access “has special force” when it carries the “favorable judgment of experience,” what is “crucial” in deciding where the access right exists, according to Justice Brennan, is “whether access to a particular government process is important in terms of that very process.”

Globe Newspaper Co. v. Superior Court for Norfolk County, decided two years later, tested the Court’s commitment to Richmond Newspaper's holding in a highly sensitive case. In Globe, the trial judge had closed the courtroom during testimony of three minor rape victims, under a statute that required mandatory closing during the testimony of minors in such cases, and closed the balance of the trial as well. Justice Brennan, this time writing for the Court, reiterated the view in his Richmond concurrence that the First Amendment right of access is based on

> [T]he common understanding that a “major purpose of that Amendment was to protect the free discussion of governmental affairs.” . . . By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

The Globe Court reinforced the right by performing an exacting strict scrutiny analysis of the reasons offered for mandatory closure. The Court

60. Id. at 587 (citation omitted).
61. Id. (citation and footnote omitted).
62. See id. at 588 n.4 (“The technique of deriving specific rights from the structure of our constitutional government, or from other explicit rights, is not novel”; citing examples).
63. Id. at 589.
64. Globe Newspaper, 457 U.S. at 604 (citation omitted).
demanded that before “the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” 65

In *Globe*, the closure rule was justified as a means to safeguard the physical and mental well being of minor sexual assault victims, and there was no dispute that the government’s interest was compelling. Nonetheless, the Court held, “as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest.” 66 Instead, “[a] trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.” 67 Buttressing the point, the Court recalled that “the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are always required before the right of access may be denied....” 68

*Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise I*”) in 1984 applied the access right for the first time outside a criminal trial proper, applying the analysis of *Richmond Newspapers* to jury *voir dire*, and holding by a 9-0 majority that the First Amendment right attaches to those proceedings as well. Writing this time for a unanimous Court, Chief Justice Burger analyzed the structural benefits of open *voir dire* proceedings, reinforcing its past findings that public proceedings enhance the basic fairness of the process, as well as the appearance of fairness so essential to public confidence, and have great cathartic value. 69 “Proceedings held in secret,” the Court stated in a single voice, “would deny this outlet and frustrate the broad public interest ....” 70

In language even stronger than *Globe*, the Court held that “[t]he presumption of openness may be overcome only by an overriding interest

65. *Id.* at 606-07 (citations omitted).
66. *Id.* at 607-08 (emphasis in original).
67. *Id.* at 608 (footnote omitted).
68. *Id.* at 608 n.20 (emphasis in original).
69. 464 U.S. 501 at 507-09. Justice Stevens, in a separate concurrence, echoed the broader First Amendment values articulated in *Richmond Newspapers*, specifically the “‘common core purpose of assuring freedom of communication on matters relating to the functioning of government,’” in order to protect “all members of the public ‘from abridgment of their rights of access to information about the operation of government, including the Judicial Branch.’” *Id.* at 517 (quoting *Richmond Newspapers* plurality opinion, Stevens concurrence and Brennan concurrence).
70. *Id.* at 509.
based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”71 These findings must be “specific.”72 Here, the Court found, “not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript.”73

Press-Enterprise Co. v. Superior Court (“Press-Enterprise II”) broke further new ground in 1986, finding a First Amendment right of access to preliminary proceedings that had no precedent in English or Colonial American history. The Court synthesized its prior holdings as basing the First Amendment right of access on two “complementary considerations,”74 the “tradition” of openness and the “structural benefit” of openness. The first considers whether there exists a “tradition” of public access to a type of proceeding that carries “the favorable judgment of experience.”75 The second asks “whether public access plays a significant positive role in the functioning of the particular process in question.”76 While reciting these two factors, the Court in Press-Enterprise II focused on the “structural benefit” prong, emphasizing that “the First Amendment question cannot be resolved solely on the label we give the event, i.e., ‘trial’ or otherwise, particularly where the preliminary hearing functions much like a full-scale trial.”77

This focus on function no doubt derived from the Court’s recognition that there was no historical equivalent to the modern pretrial procedures that were at issue.78 Justice Stevens underscored in dissent the absence of any meaningful historical evidence of open pre-trial proceedings, contending that

a common-law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted, and . . . the Framers and ratifiers of that provision could not have intended such proceedings to remain open.79

71. Id. at 510 (emphasis added).
72. Id.
73. Id. at 513.
75. Id. (citation omitted).
76. Id.
77. Id. at 7 (emphasis added).
78. Id. at 8.
79. Id. at 22.
Nonetheless, citing a string of modern cases from high courts of 28 states, each recognizing a right of access to preliminary proceedings, the Press Enterprise II majority concluded that a “near uniform” practice had developed of conducting open preliminary proceedings.80 This current practice, coupled with the structural benefits of public access—the value of openness to “the very process” of a preliminary hearing—was sufficient to establish a First Amendment right of access.

The majority’s analysis of the structural benefit of access to these proceedings was expansive. The Court found that “California preliminary hearings are sufficiently like a trial to justify the same conclusion” about the right of access that was reached in Richmond Newspapers, Globe and Press-Enterprise I.81 Except for those limited instances that “would be totally frustrated if conducted openly,” the Court broadly asserted, preliminary proceedings “plainly require public access.”82

The Supreme Court in these four cases thus defined the scope of the constitutional right of access. It found the right implicit in the First Amendment, and it defined the right to reach those government proceedings where openness plays a “significant positive role in the functioning of the particular process,” confirmed by the weight of “tradition.”

In each of its access decisions, the Supreme Court made plain that a determination that a proceeding is subject to the First Amendment right of access does not mean that closure is never proper. The First Amendment right of access is a qualified, not an absolute, right. The qualified right to attend a government proceeding may be overcome where there is a showing of a countervailing, transcendent interest requiring closure.83

Whether the qualified right of access may be restricted in a given instance is resolved by a consideration of four specific factors laid down by the Supreme Court in Richmond Newspapers and its progeny:

1. whether an open proceeding is substantially likely to prejudice another transcendent value;84
2. if so, whether any alternative exists to avoid that prejudice without limiting public access;85

80. Id. at 10 (footnote omitted).
81. Id. at 12.
82. Id. at 8-9.
83. E.g., Richmond Newspapers, 448 U.S. at 581; Globe Newspaper, 457 U.S. at 606-07.
3. if not, whether the limitation of access is narrowed (in scope and time) to the minimum necessary;\textsuperscript{86} and,
4. whether the limitation of access effectively avoids the prejudice it is intended to address.\textsuperscript{87}

This four-part test requires a particularized showing to justify any denial of access on a case-by-case basis.\textsuperscript{88}

III. THE FIRST AMENDMENT RIGHT OF ACCESS IS NOT LIMITED TO ARTICLE III CRIMINAL PROCEEDINGS

In its response to the terrorist attacks on September 11, 2001, the Department of Justice curtailed access to a great deal of government information previously available to the public,\textsuperscript{89} including access to deportation hearings of hundreds of individuals rounded up after 9/11. To close the deportation proceedings of “special interest” aliens, the government did not urge merely that national security concerns outweighed the presumptive right of access. Instead, the Department argued that the First Amendment right of access does not apply at all to Executive Branch administrative hearings. It urged that the right extends only to criminal trials before Article III judges, and asserted an Executive Branch prerogative to close any administrative proceeding that Congress had not directed by law must be open.

The Department’s assertion that the constitutional right of access does not exist outside of Article III criminal proceedings is premised on the “yarn”\textsuperscript{90} that the Constitution contains its own “access” provisions in Article I (governing Congress) and Article II (governing the Executive), so that no other, unstated right of access to any proceedings in those branches of government should be inferred to exist.\textsuperscript{91} Specifically, in the Department’s

\textsuperscript{86} Press-Enterprise I, 464 U.S. at 510; United States v. Antar, 38 F.3d 1348, 1362-63 (3d Cir. 1994).

\textsuperscript{87} Globe Newspaper, 457 U.S. at 610; In re Charlotte Observer, 882 F.2d 850, 854-55 (4th Cir. 1989). The “effectiveness” factor flows from the proposition that First Amendment rights will not be abridged for an idle purpose, See Neb. Press Ass’n v. Stuart, 427 U.S. 539 (1976) (rejecting a prior restraint, inter alia, as ineffective in accomplishing its intended goal); Smith v. Daily Mail Publ’g Co., 443 U.S. 97 (1979).

\textsuperscript{88} Globe Newspaper, 457 U.S. at 608.

\textsuperscript{89} See, e.g., David A. Schulz, How the Government’s Response to 9/11 May Close The Doors to Open Government, 20 ABA COMM. L., 3 (Winter 2003).

\textsuperscript{90} Brief Amici Curiae of ABC, Inc. et al. in N. Jersey Media Group at 6.

\textsuperscript{91} Appellant’s Brief in N. Jersey Media Group at 21.
view, Article I contains an “access” right by imposing an obligation on Congress to report annually its receipt and expenditure of taxpayer funds; 92. Article II similarly contains an express “access” right by requiring the President to report on the “state of the union.” 93 Because the Constitution contains these express “access” obligations in Articles I and II, the Department argues that no other constitutional access obligation can be “implied” to exist for Congress or the Executive. 94 As a constitutional matter, the Department asserts, any other access information or proceedings provided to the public by these two branches is purely a matter of executive and legislative “grace.” 95

In contrast, the Department observes that Article III is silent on “access,” imposing no obligations on the Judicial branch, while the Sixth Amendment affirmatively guarantees criminal defendants a “public trial.” 96 Given this, the Department says, it was not unreasonable for the Supreme Court to infer a public right of access to criminal trials in Article III courts, consistent with the Sixth Amendment. 97 The Department thus contends that the First Amendment right of access does not exist anywhere outside of the criminal courts (the only context directly addressed by the Supreme Court), and the Constitution “leaves to the democratic processes the regulation of public access to the political branches.” 98

A. The Constitution Does Not Exempt the Executive Branch From the First Amendment Right of Access

The Department’s claim that “the political branches of Government are completely immune from the First Amendment guarantee of access” 99 makes no sense, and was properly rejected by the Sixth Circuit and the

92. Article I requires Congress to publish a “regular Statement and Account of the Receipts and Expenditures of all public Money” (U.S. CONST. art. I, § 9, cl. 7), and requires each House of Congress to publish a journal of proceedings from which it may withhold “such Parts as . . . may in [its] Judgment require Secrecy.” (U.S. CONST. art. I, § 5, cl. 3).
93. Under Article II, the President must “from time to time give to the Congress Information of the State of the Union.” (U.S. CONST. art. II, § 3).
94. Appellant’s Brief in N. Jersey Media Group at 21.
95. Id. at 22.
96. The Sixth Amendment provides in relevant part that: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . “ (U.S. CONST. amend. VI).
97. Appellant’s Brief in N. Jersey Media Group at 20.
98. Appellant’s Brief in N. Jersey Media Group at 22.
Third Circuit when presented to them in 2002 in two cases challenging the closure of post-9/11 deportation proceedings. Although the two courts reached different conclusions about whether deportation proceedings are presumptively open, they both rejected the Government’s cramped view of the First Amendment right as limited to criminal courts.

The Department’s contrary argument is seriously flawed on several levels. First, the Department misstates the constitutional source of the public’s right of access. This access right does not emanate from the Sixth Amendment’s “public trial” guarantee but, rather, from the core democratic principles protected by the First Amendment, such as ensuring an informed electorate, assuring public confidence in the workings of government and the actions of governmental officials, and the therapeutic value of open proceedings. Indeed, in Gannett Co. v. DePasquale, 443 U.S. 100. Id.; N. Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002). 101. In Detroit Free Press, the Sixth Circuit rejected “the Government’s assertion that a line has been drawn between judicial and administrative proceedings, with the First Amendment guaranteeing access to the former but not the latter.” 303 F.3d at 695. The court noted that “the Government cites no cases explicitly stating such a categorical distinction—that the political branches of government are completely immune from the First Amendment guarantee of access recognized in Richmond Newspapers,” and concluded to the contrary that “there is a limited First Amendment right of access to certain aspects of the executive and legislative branches. . . . While the Government is free to argue that the particular historical and structural features of certain administrative proceedings do not satisfy the Richmond Newspapers two-part test, we find that there is no basis to argue that the [First Amendment] test itself does not apply.” 303 F.3d at 695-96 (emphasis added).

In North Jersey Media Group, the Third Circuit was more tentative in reaching the same conclusion. While opining that “the notion that Richmond Newspapers applies [to executive branch administrative proceedings] is open to debate as a theoretical matter,” the Third Circuit concluded that its own “prior precedent” barred it from adopting the Department’s position that the First Amendment access right exists only in Article III proceedings. N. Jersey Media Group, 308 F.3d at 201. Citing its own decisions in Capital Cities Media, Inc. v. Chester, 797 F.2d 1164 (3d Cir. 1986) (en banc) (applying the Richmond Newspapers analysis to determine whether public has right of access to state environmental agency records), First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467 (3d Cir. 1986) (same for state administrative proceedings imposing judicial discipline), and Whiteland Woods, L.P. v. W. Whiteland, 193 F.3d 177 (3d Cir. 1999) (same for videotaping Township Planning Commission meeting), the Third Circuit ruled that:

These precedents demonstrate that in this Court, Richmond Newspapers is a test broadly applicable to issues of access to government proceedings, including [INS] removal [proceedings]. In this one respect we note our agreement with the Sixth Circuit’s conclusion in their nearly identical case.

N. Jersey Media Group, 308 F.3d at 208-209 (emphasis added).
368 (1979), decided one year before *Richmond Newspapers*, the Supreme Court held that the “public trial” guarantee of the Sixth Amendment is an individual right extended only to criminal defendants and does *not* confer a general right of access on the public or press.\(^\text{102}\) Nor does the constitutional access right derive from the presence (or absence) of any language in Articles I through III themselves.

Instead, as the Supreme Court repeatedly has stated, “the First Amendment, of its own force...securities the public an independent right of access[.]”\(^\text{103}\) While the right of access “is not explicitly mentioned in terms in the First Amendment,” the Supreme Court emphasized in *Globe* that:

> [W]e have long eschewed any “narrow literal conception” of the [First] Amendment’s terms. For the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that while not unambiguously enumerated in terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.\(^\text{104}\)

Recognizing that “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,”\(^\text{105}\) the Supreme Court held that a qualified right of access to information about government functions is “implicit” in the First Amendment, just as the right to travel, the right of privacy and the right to be presumed innocent are implicit in

\(^{102}\). *Richmond Newspapers*, 448 U.S. at 604 (Blackmun, J., concurring) (“with the Sixth Amendment [right of the accused to a public trial] set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some manner of protection for public access to the trial”); *Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring) (“[t]he constitutional protection for the right of access ... is found in the First Amendment rather than the public trial provision of the Sixth”); *Press-Enterprise II*, 478 U.S. at 7 (“[t]here ... the right asserted is not the defendant’s Sixth Amendment right to a public trial since the defendant requested a closed preliminary hearing. Instead, the right asserted is that of the public under the First Amendment”) (emphasis in original).

\(^{103}\). *Richmond Newspapers*, 448 U.S. at 584-85 (Brennan, J., concurring); *id.* at 576 (Burger, C.J., plurality op.) (“the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors”); *id.* at 599 (Stewart, J., concurring) (“the First and Fourteenth Amendments clearly give the press and the public a right of access to trials”).

\(^{104}\). *Globe Newspaper*, 457 U.S. at 604.

\(^{105}\). *Id.* at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).
other provisions of the Bill of Rights. In short, the Supreme Court has lodged the public right of access squarely in the First Amendment.\textsuperscript{106} Unlike the Sixth Amendment (which by its terms applies only to criminal trials), the First Amendment has long been held to impose limits on \textit{all} branches of government, not just the Judicial branch.\textsuperscript{107} First Amend-

\begin{quote}
106. \textit{Richmond Newspapers}, 448 U.S. at 555 (Burger, C.J., plurality op.). The Department’s argument based upon the supposed explicit constitutional “access” provisions governing the Executive and Legislative branches is reminiscent of an argument the Supreme Court expressly rejected in \textit{Richmond Newspapers}. There, the State of Virginia argued that no public right of access to judicial proceedings should be found to exist because the Constitution had an express access right that extended only to criminal defendants (in the Sixth Amendment), and contained no other explicit right for public access to trials. \textit{Id.} at 579. In recognizing nonetheless an “implicit” right of access within the First Amendment, the Court noted that:

The Constitution’s draftsmen . . . were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that because of this danger no Bill of Rights should be adopted. . . . But arguments such as the State makes have not precluded recognition of important rights not enumerated.

\textit{Id.} Indeed, Madison himself worried that “there is great reason to fear” precisely the type of argument the Department is now making—that the “positive declaration” of some rights would be asserted as proof of the nonexistence of other rights not expressly enumerated. 5 \textsc{Writings of James Madison} 271 (G. Hunt ed. 1904). This fear animated passage of the Ninth Amendment, which has been described as a constitutional “savings clause” that “served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.” \textit{Richmond Newspapers}, 448 U.S. at 579 n. 15. See also \textit{id.} at n.15 (the Ninth Amendment “serve[d] to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined”); 2 \textsc{Story, Commentary on the Constitution of the United States}, 651 (5th ed. 1891).

107. While the First Amendment explicitly states that “Congress shall make no laws” abridging freedom of speech or of the press, by settled tradition it “has been read to apply to the entire national government,” including the executive. \textsc{Gerald Gunther, Constitutional Law, Cases and Materials}, 462 (10th ed. 1982). As explained by Justice Brennan:

[\textsc{N}o clear distinction can be drawn in [the First Amendment] context between actions of the Legislative Branch and those of the Executive Branch. To be sure, the First Amendment is phrased as a restriction on Congress’ legislative authority; this is only natural since the Constitution assigns the authority to legislate and appropriate only to Congress. But it is difficult to conceive of an expenditure for which the last Government actor . . . is not an Executive Branch official. The First Amendment binds the Government as a whole, regardless of which branch is at work in a particular instance.]

\textsc{Valley Forge Christian Coll. v. Americans. United for Separation of Church & State, Inc.}, 454 U.S. 464, 511 (1982) (Brennan, J., dissenting on other grounds). See also \textit{Richmond Newspapers}, 448 U.S. at 575 (“[t]he First Amendment . . . prohibits governments from ‘abridging the freedom of speech, or of the press’”), \textit{Smith v. Ca.}, 361 U.S. 147, 157 (1960) (Black, J.,
ment restrictions and obligations are routinely applied to the Executive Branch in a variety of contexts. Indeed, when it serves their purposes, even the current administration has argued that the First Amendment applies to the Executive Branch—as when application of the First Amendment furthers the administration’s interests in secrecy. Thus, for example, they argued that the reporter’s privilege, which derives from the First Amendment, protects the Department of Defense publication, Stars and Stripes, arguing: “although Stars and Stripes is published by the DOD and its audience consists primarily of the ‘armed forces community,’ it is also ‘every bit a newspaper in the traditional sense,’ and as such enjoys ‘the full protection of the First Amendment.’” To argue that the right of access does not apply to the Executive Branch but the reporter’s privilege does is inconsistent and disingenuous, at best.

Nor would a “political branch” exemption to the First Amendment make any sense, as Justice Black explained in the Pentagon Papers case, where the court rejected the Nixon administration’s argument that the President had both the “inherent power” and the express power as Commander-in-Chief during times of war to enjoin publication of a classified study about American involvement in the Vietnam War:

"[T]he Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Con-


stitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. . . . The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly.111

Historical claims about the Founders' expectation of Executive Branch secrecy are misdirected for similar reasons. In urging that the Constitution provides no right of public access beyond Article III courts, the Justice Department has cited comments made by Alexander Hamilton during ratification of the 1787 Constitution describing "'secrecy' as a principal virtue of the unitary executive,"112 and James Madison's observation that "[t]here never was any legislative assembly without a discretionary power of concealing important transactions, the publication of which might be detrimental to the community."113 This selective resort to historical materials perverts history, ignoring that the potential abuse of government secrecy was actually a major concern voiced in several of the state ratifying conventions during the original ratification debates.114

111. Id. at 715-16 (Black, J., concurring)(emphasis added).
112. Appellant's Brief in N. Jersey Media Group at 23-24 (citing THE FEDERALIST No. 70 at 742) (Alexander Hamilton) (J. Cooke ed. 1961)).
113. Id. (quoting The Debates in the Several State Conventions on the Adoption of the Federal Constitution, As Recommended By the General Convention at Philadelphia in 1787, 409 (J. Elliot ed. 1881) ("Elliot's Debates").
114. See Elliot's Debates at 169-70 (Patrick Henry of Virginia) ("[t]he liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed..."
the point, the views lauding government secrecy cited by the Department were expressed during the debates on the original Constitution—they predate the adoption of the First Amendment in 1791, which was created for the very purpose of “prohibit[ing] the widespread practice of governmental suppression of embarrassing information.”

The rationale of the Supreme Court’s access decisions also contradicts the Department’s assertion that the right of access is confined to Article III criminal proceedings. The facts of the four cases decided by the Court, to be sure, involved public access to criminal trials and pre-trial proceedings. Over and over again, however, the members of the Court emphasized that the paramount purpose of the First Amendment is to ensure that citizens effectively observe the functioning of government (not just the judiciary) so that they may intelligently participate in the political process. As the Supreme Court stated in Globe, “underlying the First Amendment right of access” is,

the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of governmental affairs’ . . . . By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to a republican form of self-government.

115. N.Y. Times Co., 403 U.S. at 723-24 (Douglas, J., concurring). See also, id. at 716 (Black, J., concurring) (“the Solicitor General argues . . . that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history”); Capital Cities Media, 797 F.2d at 1185 (Gibbons, J., dissenting) (“I would not suppose . . . that if presented with the question the Supreme Court would defer totally to Congress with respect to the secrecy of legislative proceedings. Rather it would, as it has frequently done, accommodate the competing governmental interest in secrecy and the values of the First Amendment”).


The Court’s approach in right-of-access cases simply reflects the special nature of a claim of First Amendment right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. . . . But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government.
Indeed, in crafting the tradition/structural benefits test in *Richmond Newspapers*, Justice Brennan described the “crucial” inquiry as “whether access to a particular government process is important in terms of that very process.” 117

Pronouncements such as these—broadly linking the public’s right of access “to information about the operation of their government”—abound in the Court’s access opinions. 118 The collective force of these pronouncements makes clear that *Richmond Newspapers* is not only about access to criminal trials, but about access to matters relating to the functioning of government, which, as discussed in the following section, is precisely how lower courts have interpreted the Supreme Court’s rulings.

In sum, the text of the Constitution, the historical record and the Supreme Court’s access decisions, in our view, all undercut the Department’s claim that the “political branches” are exempt from the First Amendment access analysis articulated in *Richmond Newspapers*.

**B. Lower Courts Have Applied the First Amendment Right of Access Beyond Article III Criminal Proceedings**

Lower courts have consistently construed the access principles established in *Richmond Newspapers* to extend beyond Article III criminal proceedings. They have uniformly applied the right to civil proceedings in Article III courts, and have applied the same *Richmond Newspapers* analysis to adjudications and other types of proceedings conducted by the Executive Branch (including hearings on mine safety 119 and presidential press


118. See, e.g., *id* at 584 (Stevens, J., concurring) (“[T]he First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of their government, including the Judicial Branch.”); *id* at 575 (Burger, J., plurality op.) (the guarantees of the First Amendment “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government”); *id* at 586 (Brennan, J., concurring) (“[r]ead with care and in context, our decisions must . . . be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality”); *Press-Enterprise I*, 464 U.S. at 517 (Stevens, J., concurring) (“the First Amendment’s concerns are much broader [than the interest in effective judicial administration]. The ‘common core purpose of assuring freedom of communication on matters relating to the functioning of government’ . . . underlies the decision of cases of this kind”).

119. *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 616 F. Supp. 569, 572, 578 (D. Utah 1985) (even though Articles I and II of “[t]he United States Constitution [do] not expressly require either Congress or the Executive to hold any of their meetings in public,” court applied First Amendment test of Richmond Newspapers to hold that “the press and public have a constitutional right of access” to formal hearings conducted by the Mine Safety and Health Administration into deadly coal mine fire).
conferences\footnote{120}, to legislative hearings\footnote{121} and to certain state administrative proceedings.\footnote{122} Even when courts have held that particular proceedings do not warrant public access rights, they have done so only after applying the First Amendment analysis required under \emph{Richmond Newspapers}.

1. Civil court proceedings

Lower courts have broadly construed \emph{Richmond Newspapers} to apply to civil proceedings.\footnote{124} Most lower courts have not required that the substance of the civil proceeding resemble a criminal trial.\footnote{125} Rather, the same

\begin{footnotesize}

\footnote{121. See, e.g., \textit{WJW-TV, Inc. v. City of Cleveland}, 686 F. Supp. 177, 180 (N.D. Ohio 1988) (finding “the First Amendment mandates that the legislative process be made generally available to the press and the public”), vacated as moot, 878 F.2d 906 (6th Cir. 1989); \textit{League of Women Voters v. Adams}, 13 Media L.Rep. 1433 (Alaska Super. Ct. 1986) (“can it be doubted that access to legislative meetings would even more directly and forcefully serve the goals of ensuring an informed electorate and improving our system of self-government”).}

\footnote{122. See, e.g., \textit{Whiteland Woods L.P.}, 193 F.3d at 180-81 (holding without hesitation that plaintiff “had a constitutional right of access to the [Township] Planning Commission meeting”) (citations omitted).}

\footnote{123. See, e.g., \textit{United States v. Miami Univ.}, 294 F.3d 797 (6th Cir. 2002) (applying First Amendment access test to request for student disciplinary records); \textit{First Amendment Coalition v. Judicial Inquiry & Review Bd.}, 784 F.2d at 472 (applying First Amendment access test to request for records of judicial discipline board); \textit{Capital Cities Media, Inc. v. Chester}, 797 F.2d at 1174-75 (applying First Amendment access test to request for state environmental agency records).}

\footnote{124. See, e.g., \textit{Rushford v. New Yorker Magazine}, 846 F.2d 249, 253 (4th Cir. 1988); \textit{Publicker Indus. Inc. v. Cohen}, 733 F.2d 1059, 1061 (3d Cir. 1984); \textit{Westmoreland v. CBS}, 752 F.2d 16, 23 (2d Cir. 1984); \textit{In re Cont’l Ill. Sec. Litig.}, 732 F.2d 1302, 1308 (7th Cir. 1984); \textit{Newman v. Graddick}, 696 F.2d 796, 801 (11th Cir. 1983); see also \textit{In re Iowa Freedom of Info. Council}, 724 F.2d 658, 661-63 (8th Cir. 1983).}

\footnote{125. Some cases, however, decided shortly after \emph{Richmond Newspapers} applied First Amendment access rights to civil proceedings on the narrow ground that the civil proceedings at issue were akin to, or arose out of, a criminal trial. For example, in \textit{Newman v. Graddick}, 696 F.2d 796 (11th Cir. 1983), the Eleventh Circuit granted access to pretrial and post-trial proceedings in a civil class action challenging prison conditions because it related to “the release or incarceration of prisoners….” \textit{Id.} at 801. Similarly, the Eighth Circuit, acknowledging that a greater interest in access may exist in criminal cases where the “condemnation of the state is involved” than in civil proceedings, justified access to a contempt hearing, which it characterized as a “hybrid containing both civil and criminal characteristics.” \textit{In re Iowa Freedom Council}, 724 F.2d at 661.}
\end{footnotesize}
traditions of openness and favorable impact on the functioning of the system that are cited in the criminal context have independently been invoked to justify access in the civil setting. For example, the Third Circuit in *Publicker Industries, Inc. v. Cohen*, found “that the civil trial, like the criminal trial, ‘plays a particularly significant role in the functioning of the judicial process and the government as a whole’” The court found numerous precedents crediting the benefits of openness generally, including an opinion of Oliver Wendell Holmes in a libel case decided when he served as a justice of the Massachusetts Supreme Court:

> It is desirable that the trial of [civil] causes should take place under the public eye, not because of the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

2. Executive Branch courts martial

As early as 1956, interpreting a defendant’s Sixth Amendment rights, the Court of Military Appeals held that “[i]n military law, unless classified information must be elicited, the right to a public trial includes the right of representatives of the press to be in attendance” at court marshals—which are non-Article III trials conducted by the Executive Branch.

126. See, e.g., *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm’n*, 710 F.2d 1165, 1180-81 (6th Cir. 1983) (litigation involves “the health of citizens” and “[t]he public has an interest in knowing how the government agency” responds to allegations of erroneous testing); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d at 1309 n. 9 (litigation “partakes of the general public interest in adequate and reliable information about securities and the securities markets”); *cf. Gannett*, 443 U.S. at 386 n. 15 (noting that “in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases,” while citing landmark equal rights cases).


129. *United States v. Brown*, 7 C.M.A. 251, 258 (1956), overruled by *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). This case is the first Court of Military Appeals ruling on this issue. It predates, and, therefore, does not rely on the United States Supreme Court’s express recognition of public and press access to criminal proceedings in *Richmond Newspapers*, 448 U.S. 555 (1980). However, because the defendant was permitted to have anyone present that he wished, and only the general public and press were excluded, the case foreshadowed the issues raised in *Richmond Newspapers* and its progeny. “We are met at the outset with an issue of fundamental importance which is properly before us for the first time,”
And, a quarter century before the Supreme Court explicitly recognized a public right of access to criminal proceedings, in an unrelated context, the Court affirmed that, “[t]he constitutional grant of power to Congress to regulate the armed forces ... itself does not empower Congress to deprive people of trials under Bill of Rights safeguards ....”

Shortly after the Supreme Court’s recognition of a separate First Amendment right of access to criminal trials in Article III courts, the Court of Military Appeals followed suit for courts-martial. In United States v. Hershey, a United States Army Staff Sergeant was accused of sexually abusing his thirteen-year-old daughter. Before the daughter was called to the stand, trial counsel requested that the courtroom be closed during her testimony because she would “be somewhat timid or a little bit uncomfortable” when recounting the sexual abuse inflicted upon her by her father. The military judge granted trial counsel’s request and ordered the bailiff to escort the few spectators (who were all court personnel) out of the courtroom. Following the daughter’s testimony, the Staff Sergeant was convicted and sentenced to five years confinement, forfeiture of all pay and allowances, a reduction in rank, and a bad-conduct discharge.

Hershey appealed his case to the Court of Military Appeals. The issue on appeal was whether the defendant had been deprived of his constitutional right to a public trial. The court determined there to be a constitutional right to a public trial, based not only on Sixth Amendment grounds, but also on the First Amendment. Relying expressly on the Supreme Court’s access decisions, the Court of Military Appeals held that the “stringent” test set forth in Press-Enterprise Co. applies equally to courts-martial.

Following Hershey, military courts have recognized both that the First Amendment guarantees a right of access to court-martial proceedings and that the press and public have standing to exercise those rights. In a re-

the military court wrote in Brown. 7 C.M.A. at 254. “[W]e will develop both the civilian and military rule.” Id. at 255. Though ultimately relying on the Sixth Amendment right, the Brown court’s decision rested largely on the same logic and historical experience later cited by the Supreme Court in Richmond Newspapers.

132. Id. at 435 (C.M.A. 1985) (internal quotation marks omitted).
133. Id. at, 434-36.
134. Id. at 436. The C.M.A. upheld Hershey’s conviction despite the constitutional infirmities because “there [wa]s no evidence that members of the public were actually barred entry during the short period when the bailiff was asked to prohibit spectators from entering the courtroom.” Id. at 438.
cent challenge to closure of a preliminary hearing brought by a media coalition, the United States Court of Appeals for the Armed Forces held that the right of access to criminal proceedings articulated by the Supreme Court in *Richmond Newspapers*, *Globe Newspaper Co.*, and *Press-Enterprise Co.* applied with equal force to courts-martial.\(^{135}\) Subsequent cases have similarly recognized this right.\(^{136}\)

Moreover, its existence is reflected in the Manual for Courts-Martial, which provides that “courts-martial shall be open to the public,”\(^{137}\) and adds that “‘public’ includes both members of the military and civilian communities.”\(^{138}\) Opening courts-martial to public scrutiny, the Manual explains, “reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process.”\(^{139}\) And, as the Court of Military Appeals has stated, “public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public.”\(^{140}\)

3. Article I bankruptcy proceedings

In bankruptcy proceedings—another non-Article III proceeding—judges have similarly upheld the public’s presumptive right of access. Pointing to the First Amendment, common law, and legislative enactments as its source, judges have held the presumption applies to proceedings ranging from creditor’s meetings to debtor examinations.\(^{141}\)

As several of these cases note, the presumption of openness is supported by an analysis of the history and function of the bankruptcy laws and by comparison to the public’s right of access to criminal trials. In *Baltimore Sun Co. v. Astri Investment Management & Securities Corp.*,\(^{142}\) for


\(^{136}\) See, e.g., *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (“It is clear that the general public has a qualified constitutional right under the First Amendment to access to criminal trials. . . . This right of public access to criminal trials applies with equal validity to trials by courts-martial”).


\(^{138}\) *Id*.

\(^{139}\) R.C.M. 806(b), Discussion ¶ 8; see also *Scott*, 48 M.J. at 665.


example, the court considered a newspaper reporter’s request to attend a creditors’ meeting involving Astri as the debtor in a bankruptcy proceeding. Despite the bankruptcy court’s Article I status, the court did not even consider the argument that the Constitution confines access rights to only Article III judicial proceedings. Instead, it assumed without question that application of the “experience and logic” test required by Press Enterprise II was appropriate, holding that, “both the history and the function and policy of our bankruptcy laws require the conclusion that a presumptive First Amendment right of access to creditors’ meetings exists ....” 143

The court traced the history of bankruptcy proceedings in Anglo-American jurisprudence, from “the first English bankruptcy statute ... enacted in 1542” to the present. 144 American bankruptcy laws permitted access to creditors’ meetings as early as the Act of 1898, with later amendments actually requiring “public” examination of the bankrupt. 145 The court went on to explain the significant role the creditors’ meeting plays in the functioning of the bankruptcy process—noting that it is the only mandatory hearing in both Chapter 7 and 11 proceedings:

One purpose of the examination of the debtor at a creditors’ meeting has always been to uncover all of the debtor’s assets, by the obtaining of full and truthful information. Truthfulness by the bankrupt is probably enhanced when the bankrupt testifies in public. In addition, openness will seemingly increase the likelihood that all potential creditors are made aware of the bankruptcy proceedings and are afforded the opportunity to present claims. 146

Concluding that the test of “tradition and logic” supported access, and finding no reason to deny such access, the denial of the reporter’s request to attend the creditors’ meeting was vacated. 147

Following the analysis in Astri, the court in In re Symington applied the “experience and logic test” to bankruptcy examinations, ruling that, like creditors’ meetings, bankruptcy examinations are presumptively open to the public. 148 Bankruptcy examinations, which are governed by Bank-

143. Id. at 740.
144. Id. at 737-40.
145. Id. at 740.
146. Id. at 741.
147. Id. at 741-42.
The case law on access to administrative agency hearings, before the two recent decisions on deportation hearings, was sparse and inconsistent. For example, in Society of Professional Journalists v. Secretary of Labor, 155 See e.g., Whiteland Woods L.P. v. Town of West Whiteland, 193 F.3d 177 (3d Cir. 1999) (holding First Amendment applies to access to, but not request to videotape, township planning commission meeting, citing state code and benefits of open proceedings); Cal-Almond, Inc. v. Dept. of Agric., 960 F.2d 105 (9th Cir. 1992) (finding request for access to USDA list of almond growers raised “a serious constitutional question,” citing six state statutes and “significant positive role” access could play in the function of referendum). But see United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002) (holding no First Amendment right of

 bankruptcy Rule 2004, are designed to locate assets of the estate or to assess whether or not grounds exist to bring an action. Bankruptcy Rule 2004 permits the bankruptcy court, on a motion of any party in interest, to order the examination of any entity about the “acts, conduct, or property or ... the liabilities and financial condition of the debtor . . . .” 149 With respect to the “experience” prong of the Press-Enterprise II test, the court explained that Section 21(a) of the Bankruptcy Act of 1898 was a direct antecedent of Rule 2004. 150 Section 21, the court noted, provided that examinations be held “before the court or before the judge of any State court”—language which had been interpreted to require the proceedings to take place at a public hearing. 151 As for the “structural benefits” prong, the court deferred to the analysis of the Astri court, stating that “[b]ecause Rule 2004 examinations have the same raison d’etre as meetings of creditors . . . the same rationale exists for the two proceedings to be open to the public.” 152 Moreover, the court said, as in the context of criminal trials, a public proceeding “aids accurate fact-finding” and helps “assure that witnesses are treated fairly and equitably.” 153 On these grounds, the court ruled that the public’s interest in maintaining confidence in the bankruptcy system trumped any harm that might result from releasing Mrs. Symington’s financial information. 154

4. Administrative agency adjudications

The case law on access to administrative agency hearings, before the two recent decisions on deportation hearings, was sparse and inconsistent. For example, in Society of Professional Journalists v. Secretary of Labor, 149. FED. R. BANKR. P. 2004(B).
150. In re Symington, 209 B.R. at 693.
151. Id. (internal quotation marks omitted), citing In re Winton Shirt Corp. v. Elizabeth Trust Corp., 104 F.2d 777 (3d Cir. 1939) (holding that “the examination of witnesses pursuant to the provisions of section 21(a) of the Bankruptcy Act must take place at a public hearing”).
153. Id. (internal quotation marks omitted), citing Richmond Newspapers, 448 U.S. at 597.
155. See e.g., Whiteland Woods L.P. v. Town of West Whiteland, 193 F.3d 177 (3d Cir. 1999) (holding First Amendment applies to access to, but not request to videotape, township planning commission meeting, citing state code and benefits of open proceedings); Cal-Almond, Inc. v. Dept. of Agric., 960 F.2d 105 (9th Cir. 1992) (finding request for access to USDA list of almond growers raised “a serious constitutional question,” citing six state statutes and “significant positive role” access could play in the function of referendum). But see United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002) (holding no First Amendment right of
a federal trial court in Utah applied the two-part test to a media request for access to a formal fact-finding hearing of the federal Mine Safety and Health Administration examining the cause of a coal mine fire.156 Although the court found “little historical tradition” of access to the exact proceeding at issue, it found that “analogous” civil trials had been traditionally open, looking to the “broad spectrum of administrative hearings, rather than narrow instances, in order to perceive a tradition.”157 The court also found openness “crucially important” to the hearings at issue, creating “an emotional catharsis that soothes the community sorrow” and ensuring that the agency “properly does its job.”158 The court cited numerous exemplary sources on openness, but confined its holding on First Amendment access to “formal administrative fact-finding hearings.”159

The Third Circuit has also applied the “tradition and logic” test to administrative proceedings and records in several cases. In First Amendment Coalition v. Judicial Inquiry and Review Board,160 the court, sitting en banc, reviewed an order granting media access to records of a formal hearing of the Judicial Inquiry and Review Board, which had dismissed charges of misconduct against a judge of the Pennsylvania Supreme Court without recommending discipline. State constitutional and statutory provisions had generally prohibited public access to such proceedings, although on several occasions their substance had later been made public.

The majority opinion of Judge Weis found comparisons to the tradition of access to criminal and civil trials “of limited usefulness” and acknowledged that administrative proceedings “do not have a long history of openness.”161 The majority also expressed concern about the “stifling effect” access could have on judicial disciplinary proceedings and added that appeals to the “structural” value of openness without a historical antecedent “would lead to an unjustifiably expansive interpretation.”162

access to university student disciplinary records because no history of same, and benefits to judicial process does not apply to academic institution); El Dia, Inc. v. Colon, 963 F.2d 488, 495 (1st Cir. 1992) (expressing doubt about applicability of “experience and logic” test to executive order barring access to agency documents).

156. 616 F. Supp. 569 (D. Utah 1985), vacated as moot, 832 F.2d 1180 (10th Cir. 1987).
158. Id. at 576.
159. Id. at 577.
160. 784 F.2d 467 (3d Cir. 1986).
161. Id. at 472.
162. Id. at 473.
Thus, while the majority applied the two-part experience and logic test, it concluded that because the test was not met, no First Amendment access rights attached to the disciplinary proceedings at issue.163

In his concurrence, Judge Becker found that the formal hearings at issue could not satisfy the Supreme Court’s “history” prong. He criticized the district court for in effect making “a nullity of the tradition of openness requirement,” noting that the administrative agency at issue decided to disclose the records of its formal inquiries resulting in no disciplinary recommendation in only two out of twelve cases.164 He also questioned the legitimacy of referring to the practices of the judicial review boards of other states to determine Pennsylvania “experience,” noting that “the historical inquiry implies that states have some flexibility in deciding which of their institutions may be open and which closed to the public” and that differences between state practices “are elemental to our system of federalism.”165

A few months later, in Capital Cities Media, Inc. v. Chester,166 the Third Circuit again denied a press request for access to the records of a state environmental agency by using an extremely demanding historical standard. The court asserted that the Executive Branch “from the early days of the Republic” operated in a way that was inconsistent with a constitutionally protected right of access to government and stated that “decisions as to how much governmental information must be disclosed in order to make democracy work historically have been regarded as political decisions to be made by the people and their elected representatives.”167 Although the press had put forth affidavits stating that documents of a similar nature had been disclosed in the past, the court found that “[i]nconsistent government practice does not constitute the kind of historical tradition” referred to in the Supreme Court and its own decisions, which primarily dated back to the time of the Framers.168 Moreover, it found that reference to the practices of merely one state agency that was a party to the litigation was too narrow a view, and that the media had failed to show more broadly that this “particular type of government proceeding had historically been open in our free society.”169

163. Id. at 477.
164. Id. at 480.
165. Id. at 481.
166. 797 F.2d 1164 (3d Cir. 1986).
167. Id. at 1170-71.
168. Id. at 1175 & n. 27.
169. Id. at 1175.
While the various judges in *Society of Professional Journalists, First Amendment Coalition,* and *Capital Cities* came to differing conclusions regarding whether access rights attached to the particular administrative proceedings and documents at issue, they all reached their decisions by applying the First Amendment access test of *Richmond Newspapers.*

5. INS deportation proceedings

Shortly after the September 11 attacks, the INS put into effect a regulation providing that any deportation case it classified as a “special interest” proceeding would be closed to the public and press. Challenges to the blanket closures were brought in both the Third and Sixth Circuits, and each rejected arguments advanced by the Department of Justice that no constitutional right was at stake.

The Sixth Circuit, in *Detroit Free Press v. Ashcroft,* faced an appeal of a preliminary injunction striking down the closure of a “special interest” hearing involving a Muslim man in Detroit who had overstayed his tourist visa. Finding the administrative action to have violated the First Amendment right of access, the opinion offered a ringing endorsement of the importance of openness as a check upon the abuse of governmental power:

> Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks the power to secretly deport a class if it unilaterally calls them “special interest” cases. The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind closed doors. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.

The court then examined both the tradition of openness in deportation proceedings and the structural benefit of open deportation hearings. The court rejected the Government’s insistence that there must be a historical tradition dating back to the time “when our organic laws were adopted” before a First Amendment right could be found. It noted that *Press Enter-

---

170. 303 F.3d 681 (6th Cir. 2002).
171. Id. at 683.
172. Id. at 700 (quoting *Richmond Newspapers,* 448 U.S. at 569).
prise II and several circuit courts had “relied on exclusively post-Bill of Rights history,”\textsuperscript{173} and found that deportation proceedings had for the most part been conducted openly since the enactment of the first immigration statute in 1882.\textsuperscript{174} The court said it “should look to proceedings that are similar in form and substance” and found that deportation hearings ‘“walk, talk and squawk’ very much like a judicial proceeding” and are comparable to a statutory criminal sentencing statute authorizing removal.\textsuperscript{175} Even if the historical practice was not uniform “it makes more sense to look to more recent practice, similar proceedings, and concentrate on the ‘logic’ portion of the test.”\textsuperscript{176}

The court had little difficulty concluding that access would play “a significant positive role” in deportation proceedings, noting that “the press and the public serve as perhaps the only check on abusive government practices.”\textsuperscript{177} The court then discussed some of the benefits of access to such proceedings, including: improved government performance, a “cathartic” effect on the community, the “perception of integrity and fairness,” and a more informed public.\textsuperscript{178} The Government had not identified “one persuasive reason why openness would play a negative role in the process.”\textsuperscript{179} Thus, the governing standard was satisfied, and the Sixth Circuit found the right of access to extend to deportation proceedings.

Taking up the question of whether the qualified access right was overcome on the facts presented by the Government, the court concluded it was not. Although the Government had demonstrated a compelling interest in preventing the disclosure of information that might impede its ongoing anti-terrorism investigation, its blanket ban on access to all “special interest” hearings failed to satisfy two other requirements mandated by the First Amendment: that the closure order be narrowly tailored and that it be based on individualized “specific findings on the record so that a reviewing court can determine whether closure was proper and whether less restrictive alternatives exist.”\textsuperscript{180} The opinion characterized open de-

\begin{footnotes}
\item[173.] Id.
\item[174.] Id. at 701-02.
\item[175.] Id. at 702 (citing 8 U.S.C.A. § 1228(c) (2003)).
\item[176.] Id. at 703 n. 14.
\item[177.] Id. at 704.
\item[178.] Id.
\item[179.] Id. at 705.
\item[180.] Id. at 707.
\end{footnotes}
portation proceedings as a vital demonstration of democratic values “that Americans should not discard in these troubling times.”\textsuperscript{181}

The Third Circuit case, \textit{North Jersey Media Group v. Ashcroft},\textsuperscript{182} decided six weeks later, also rejected the Government’s argument that the First Amendment access test of \textit{Richmond Newspapers} had no application outside of Article III proceedings. However, in applying the two-prong test for determining whether the right of access attached to deportation hearings, Chief Judge Becker took a strict view of the “tradition” requirement. Writing for the majority, he noted that Congress had never explicitly guaranteed public access to deportation hearings and that numerous federal administrative hearings, ranging from those involving Social Security disability to employee ethics, were either mandatorily or presumptively closed.\textsuperscript{183} INS regulations enacted in 1964 confirming a “rebuttable presumption of openness” for most deportation cases were deemed by Judge Becker to be too recent and too qualified to establish the “unbroken, uncontradicted history” of openness present in \textit{Richmond Newspapers}.\textsuperscript{184} Although Judge Becker considered a “1000-year history”\textsuperscript{185} unnecessary, he rejected the press position that the court could rely solely on the “structural benefits” of open deportation hearings, so long as there was no history of closed proceedings—an approach taken in several Third Circuit cases involving modern criminal procedures.\textsuperscript{186} Judge Becker concluded that a strict demonstration of a history of openness was required in order to “preserve administrative flexibility and avoid constitutionalizing ambiguous, and potentially unconsidered, executive decisions.”\textsuperscript{187}

With regard to the structural benefits (or “logic”) prong of the test, the court first noted that it “does not do much work” because no case had yet found an access request that satisfied the “experience” prong, but failed the “logic” prong.\textsuperscript{188} The court then read the \textit{Press Enterprise II} formulation of “whether public access plays a significant positive role in the functioning of the particular process in question”\textsuperscript{189} to require an exami-
nation of the “flip side” of that inquiry: “the extent to which openness impairs the public good.” Judge Becker criticized the lower court for not fully crediting the declaration of the FBI’s Counterterrorism Chief outlining how disclosure of seemingly minor and innocuous information about a deportation proceeding could be valuable to a person within a terrorist network, and could thwart the government’s efforts to investigate and prevent future acts of violence. Although the court characterized these statements as “to some degree speculative,” it relied upon judicial deference to executive expertise, stating that “[t]o the extent that the Attorney General’s national security concerns seem credible, we will not lightly second-guess them.” In a confusing conclusion, however, the court seemed to limit its analysis to “special interest” deportation hearings only. “On balance,” stated Judge Becker, “we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.”

In a vigorous dissent, Judge Sirica found that the two-step analysis for the existence of the First Amendment right was plainly satisfied. He found an adequate historical record of open proceedings, and relied on cases applying the Supreme Court precedents to civil trials as equally applicable given the similar procedures used at deportation hearings.

IV. APPLYING THE “TRADITION” AND “STRUCTURAL BENEFIT” ANALYSIS TO ADMINISTRATIVE ADJUDICATORY PROCEEDINGS

Typical regulatory proceedings and “esoteric” proceedings are conducted largely like Article III trials and should presumptively be open to the same extent as a civil trial.

A. Constitutional “Due Process” Constraints on Administrative Hearings

The Supreme Court sanctioned the vast delegation of powers to ad-

190. Id. Judge Becker recognized that considering evidence of how open deportation hearings could threaten national security as part of the threshold inquiry into the existence of a presumptive access right created an “evidentiary overlap” with the “compelling government interest” analysis that is taken up to decide whether a presumptively open proceeding could be closed, but was not bothered by this inconsistency in the analysis. Id. at 217 n. 13.

191. Id. at 218.

192. Id. at 219.

193. Id. at 220. (emphasis supplied).

194. Id. at 222 (Sirica, J., dissenting).
ministrative agencies only upon its conclusion that proceedings in such agencies would remain subject to due process rights and other constitutional constraints. In its early decisions, the Court construed due process of law, in its “primary” sense, to require “an opportunity to be heard” and “to defend” rights in judicial proceedings. By the 1930s, however, with the dawn of the New Deal, the Court came to apply these “due process” concepts to the new administrative agencies exercising vast powers in new forums, repeatedly emphasizing that the due process requirement that administrative proceedings be open served as an essential safeguard. For example, in its 1938 decision in Morgan v. United States, the Court held that a “fair and open hearing” is an essential element required by due process in any quasi-judicial administrative proceeding involving liberty or property interests:

The vest [sic] expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand “a fair and open hearing,” essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an “inexorable safeguard.”

The Morgan case involved highly controversial authority granted to the Secretary of Agriculture to fix maximum rates for buying and selling livestock under the Packers and Stockyards Act, 1921. That Act granted the Secretary the power to fix “reasonable” maximum rates, but only if, after a “full hearing,” he determined that existing market rates were “unjust, unreasonable or discriminating.” In fifty consolidated lawsuits

195. E.g., Chicago, Milwaukee and St. Paul Ry. Co. v. Polt, 232 U.S. 165, 168 (1914) (the right to a hearing is one of “the rudiments of fair play”); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678 (1930) (due process of law demands an opportunity to be heard and to defend substantive rights).
196. 304 U.S. 1 (1938).
197. Id. at 14-15 (citations omitted).
challenging the rates fixed by the Secretary, the Supreme Court addressed plaintiffs’ contention that the administrative procedures that had been employed did not afford the “full hearing” required by statute and mandated by the constitutional requirement of due process. On its second review of the case after an initial remand, the Supreme Court struck down the Secretary’s determination. It found that his failure to afford plaintiffs an opportunity to review and respond to proposed findings that had been prepared by the Bureau of Animal Industry, before those recommendations were acted upon by the Secretary, had denied the participants the “fair and open” proceeding demanded by due process.

The Court had first articulated the “fair and open hearing” formulation of the due process requirement in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, a 1937 case decided while *Morgan* was on its initial remand. In that case, the Court struck down a regulator’s order requiring a telephone company to pay rebates, because the determination that the rates were excessive had been made on the basis of information reviewed by the Commission that was never made a part of the administrative record nor disclosed to the telephone company. In the words of Justice Cardozo, the informed opinions of administrative agencies are entitled to deference from the courts only when they comply with “constitutional restraints,” including due process:

[M]uch that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the “inexorable safeguard” of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of “the rudiments of fair play” assured to every litigant by the Fourteenth Amendment as a minimal requirement.

Two decades later, in *Hannah v. Larche*, the Court considered the “due process” validity of procedures adopted by the Commission on Civil Rights to conduct an administrative investigation into claims by African-

200. The Court considered the obligations of due process subsumed in the statutory requirement of a “full hearing,” and therefore did not separately address the scope of constitutional due process. *Id.* at 477.

201. 304 U.S. 1 (1938).

202. *Id.* at 18, 19.


204. 301 U.S. at 304-305 (citations omitted; emphasis added).
Americans that their right to vote was being systematically denied. Citizens called to testify before the Commission challenged the Commission’s refusal to disclose the identities of the individuals who had submitted complaints and the denial of their right to cross-examine other witnesses called to testify. Rejecting the due process challenge to these hearings, the Supreme Court stated:

“Due process” is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

In allowing the development of the modern administrative state the Supreme Court has thus embraced two fundamental propositions: (1) constitutional due process requirements constrain the procedures that may be adopted by administrators, and (2) when liberty and property interests are at stake in proceedings that Congress has directed to be conducted as quasijudicial “hearings,” due process demands a “fair and open” hearing. This due process mandate of “fair and open” administrative adjudications has since been widely recognized.

206. 363 U.S. at 423, 424.
207. 363 U.S. at 442 (emphasis added).
208. See, e.g., Petition of New England Tel. and Tel. Co., 136 A.2d 357, 362 (Vt. 1957) (“A fair and open hearing is the absolute demand of all judicial inquiry”); State v. Duluth M. & I. R. Ry. Co, 75 N.W.2d 398, 409 (Minn. 1956) ([administrative proceedings of a quasi-judicial character demand a ‘fair and open hearing’ essential … to the legal validity of the administra-
For example, in *Fitzgerald v. Hampton*, the D.C. Circuit reviewed the due process obligation of openness in a case involving a former government employee, A. Ernest Fitzgerald, who was entitled to a reinstatement hearing as a matter of statutory right, after he was fired from a federal job. On appeal from a decision by the U.S. Civil Service Commission to close Fitzgerald’s hearing to the public, the D.C. Court of Appeals held that due process required the reinstatement hearing to be open if requested by Fitzgerald. In administrative adjudications, the D.C. Circuit concluded, the rule of the “open” forum is paramount, whether by statutory mandate, regulation, or practice.

Other courts have likewise found that due process mandates that administrative adjudications be open. *Adams v. Marshall*, for example, was a mandamus action by a suspended policeman who sought to compel members of the Civil Service Commission to follow certain procedures at a scheduled hearing of his appeal. The Civil Service closed the hearing to the public and the press. Citing *Morgan*, the Kansas Supreme Court held that a closed hearing offended due process and that “proceedings of a judicial nature held behind closed doors and shielded from public scrutiny have long been repugnant to our system of justice.” Noting that this basic principle applies with equal force to administrative agencies, the *Adams* court concluded that “[a] hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial . . . .”

Similarly, in *Pechter v. Lyons*, due process was held to require an open administrative adjudication where a liberty interest was at stake. *Pechter* involved the INS deportation hearing of Boleslavs Maikovskis that was

---

210. Id. at 766.
211. Id. at 764. Citing *Fed. Communications Comm’n v. Schreiber*, 381 U.S. 279 (1965), a case enforcing a procedural rule of the FCC favoring public proceedings, the *Fitzgerald* court noted a general policy which favors open administrative agency proceedings, unless disclosure in some way compromises the public interest, the dispatch of business, or the ends of justice.
213. Id. at 371.
214. Id. at 372 (citation omitted).
closed in the interest of security. Maikovskis was charged with having concealed his Nazi past at the time he entered the United States in the early 1950s. The immigration judge closed the hearings to the public because of the volatile emotions and hostility of the public towards Maikovskis. He banned the press as well for fear of the press reporting the proceedings to the public. Members of the general public challenged the administrative closure under 8 C.F.R. §246.16(a), an INS regulation requiring deportation hearings to be open to the public unless the administrative law judge orders closure to protect witnesses, respondents, or the public interest. The court granted the plaintiffs standing to assert rights under the governing regulation because of the important interests advanced by openness:

This regulation is but one of countless manifestations of a public policy centuries old that judicial proceedings, especially those in which the life or liberty of an individual is at stake, should be subject to public scrutiny, not only for the protection of the individual from unwarranted and arbitrary conviction, but also to protect the public from lax prosecution.

The Supreme Court’s articulation in the 1930s of a constitutional mandate that administrative adjudicatory proceedings be “fair and open,” meant that the obligation for openness was not subject to dispute when Congress adopted the Administrative Procedure Act (“APA”) in 1946. The legislative history of the APA itself contains substantial evidence of a tradition of open administrative adjudications before 1946, and indicates that Congress fully intended this tradition of openness to continue.

The effort to pass the APA spanned more than seven years. The Walter-Logan Bill, introduced in 1939, was the first of a number of measures considered by Congress to standardize agency practices and to provide adequate avenues for review of agency determinations. Responding to concerns that lack of meaningful review of administrative actions had bred bureaucrats who displayed “contemptuous disregard for both Congress and the courts,” the Walter-Logan Bill provided uniform proce-
dures for administrative rule-making and adjudication. The bill stated that agencies could adopt rules “only after publication of notice and public hearings;”221 and it required adjudications before agencies headed by boards or commissions to be “made in all instances . . . after reasonable public notice and a full and fair hearing. . . .”222 At the “full and fair hearing” the public was required to be notified about, a stenographer would be present to record testimony, and all evidence would be entered into a record filed with the agency and provided to the aggrieved party.223

The Walter-Logan Bill passed both houses of Congress, but was vetoed by President Roosevelt in 1940 for reasons unrelated to its public access provisions. Roosevelt had previously asked his Attorney General to appoint a committee to study administrative procedure in the United States and to develop recommendations for reform. In rejecting the bill, Roosevelt stated that he wished to receive that committee’s report before approving any legislation relating to administrative procedure.224

The Attorney General’s Committee produced twenty-seven monographs reporting on the procedures used in numerous different agencies, and issued its final report on administrative procedure in 1941.225 That Report documented that open adjudicatory proceedings were the well-established norm by 1941, and endorsed this norm as an important safeguard against arbitrary government action:

It is obvious, as we have noted, that a litigant coming before an administrative agency should be afforded a proper and fair forum in which he can present his case. . . . Hearings should be, and almost invariably are, public. The few exceptions where hear-

221. H.R. 6324 § 2(a).
222. Id. at § 4(d).
223. Id. at § 4(b).
225. ATTORNEY GENERAL’S COMMITTEE, 77TH CONG., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 8 (1st Sess. 1941). The Final Report of the Attorney General’s Committee included reform recommendations and proposed bills. The Senate held hearings on those bills in 1941. See Hearings Before a Subcommittee on the Judiciary, United States Senate, on S. 674, S. 675, and S. 918, 77th Cong., pp. 1-1616 (1941). However, “[I]n August 1941, the increasingly threatening international situation moved the Senate Judiciary Committee to postpone further consideration of the legislative proposals.” H.R. REP. NO. 1980 (1946) reprinted in 1946 U.S.C.C.A.N. 1195, 1202. In 1944 and 1945, with World War II winding down, several new bills were introduced in Congress, including S. 7, the bill that eventually was enacted into law as the APA. These bills, for the most part, followed the recommendations of the Attorney General’s Committee Report.
Hearings are private are for the benefit of the individual involved. For example, hearings conducted by the Social Security Board are private whenever “intimate matters of scandalous nature are involved.” Veterans’ Administration cases, usually involving medical testimony, are private, unless the veteran waives his right to privacy.

*In all cases except ones such as these, hearings are open to the public.* This is as it should be; the practice is an effective guarantee against arbitrary methods in the conduct of hearings. Star chamber methods cannot thrive where hearings are open to the scrutiny of all.

The lack of an explicit statutory mandate for open hearings in the APA subsequently enacted by Congress reflects the contemporaneous understanding that adjudicatory hearings would in fact be open, as required by due process—an understanding that was consistent with historical practice and the conclusions of the Attorney General’s Committee, and is reflected in various disclosure and other provisions contained in the APA and later bills. As the Senate Judiciary Committee Report accompanying the

---

226. S. DOC. NO. 8 at 68 (emphasis added).

227. Among other publicity provisions, the statute as passed required agency rules and regulations to be published in the Federal Register, Pub. L. No. 79-404 Sec. 3(a), and required that all decisions of adjudicatory proceedings to be made on a record available not just to the parties, but also to any “persons” properly concerned. Pub. L. No. 79-404 Sec. 3(c). The Supreme Court has cited the mandatory availability of the administrative record as evincing Congress’s “general policy favoring disclosure of administrative agency proceedings.” *Fed. Communications Comm’n v. Schreiber*, 381 U.S. 279, 293 (1965) (finding an F.C.C. rule establishing investigative hearings as presumptively open to the public to be authorized by Section 3(c) of the APA).

228. The 1976 Government in the Sunshine Act required all meetings where agency business is conducted to be “open to public observation.” Government in the Sunshine Act, Pub. L. No. 94-409, §3(a), 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b(a)(3)). One exception to this public access requirement is a meeting that specifically concerns the “initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication....” 5 U.S.C. § 552b(c)(10)). The rationale for this exception was that:

it would be inappropriate for several reasons to require agencies to open meetings discussing specific cases of adjudication. Public disclosure of an agency’s legal strategy in a case before the agency or in the courts could make it impossible to litigate successfully the action. . . . Finally, many aspects of the adjudicative process, such as the trial before an administrative law judge or appellate arguments before the commission are generally now open to the public.

APA stated, the various provisions for public disclosure were to be interpreted broadly because “all administrative operations should as a matter of policy be disclosed to the public.”

In keeping with both the letter and the spirit of the law, it is not surprising that administrative agencies routinely mandate open adjudicatory proceedings within their own regulations.

B. Applying the Richmond Newspapers Analysis to Administrative Hearings

The constitutional due process obligations and a history of openness dating from the advent of the administrative state lead to the inexorable conclusion that the First Amendment’s presumptive right of access attaches to administrative adjudicatory proceedings. At a minimum, those proceedings that are required by due process to be “fair and open” must necessarily be subject to the First Amendment right of access under the Richmond Newspapers analysis.

1. The “tradition” of openness

Although administrative adjudications were largely unknown before the last century, the widely-accepted tradition since then is that such adjudications “should be, and almost invariably are, public.” Just as a “near uniform” practice of openness for newly developed pre-trial criminal proceedings was sufficient in Press Enterprise II, the nearly “invariabl[e]” practice of open administrative hearings since the dawn of the administrative state equally provides the “favorable judgment of experience.”


231. S. DOC. NO. 8, supra note 225, at 68.


233. Id. at 8 (quoting Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 605).
As Press Enterprise II establishes, it is not necessary to demonstrate a historical practice pre-dating our country’s founding to find a constitutional right of access to a government proceeding. Indeed, few aspects of modern criminal prosecutions can boast a pedigree of public access dating back to the Founders and beyond to Magna Carta such as the history of criminal trials reviewed by the Supreme Court in Richmond Newspapers.\(^{234}\) Yet, lower courts have widely found a right of access to phases of criminal proceedings that have no historical counterpart—such as plea hearings, pretrial suppression hearings, and motions for judicial disqualification.\(^{235}\) Some courts have cited the consistent modern practice of openness as sufficient under the Press Enterprise II analysis, while others have concluded that the “favorable judgment of history” is not necessary where the structural benefits of openness are irrefutable.\(^{236}\) In Seattle Times Co. v. United States District Court,\(^{237}\) for example, the Ninth Circuit reasoned that new procedures introduced by the Bail Reform Act of 1984 that did not exist at common law, rendered “the historical tradition surrounding bail proceedings … much less significant.”\(^{238}\) As the Fifth

\(^{234}\) See 448 U.S. 555 (1980).\(^{235}\) See, e.g., United States v. Haller, 837 F.2d 84, 86 (2d Cir. 1988) (plea hearings “have typically been open to the public”); Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (“plea agreements have traditionally been open to the public”); In re Providence Journal, 293 F.3d 1, 9 (1st Cir. 2002) (documents submitted in criminal proceedings); Application of NBC v. Presser, 828 F.2d 340, 344 (6th Cir. 1987) (pretrial motion to disqualify judge, citing Sixth Circuit practice from 1924-1984).\(^{236}\) See, e.g., United States v. Cojab, 996 F.2d 1404, 1407 (2d Cir. 1993) (pretrial hearing); United States v. Criden, 675 F.2d 550, 555 (3d Cir. 1982) (“societal interests” rather than historical analysis should determine First Amendment right of access to suppression hearing).\(^{237}\) 845 F.2d 1513, 1516 (9th Cir. 1988).\(^{238}\) See also United States v. Chagra, 701 F.2d 354, 362-64 (5th Cir. 1983) (same; noting increased significance of bail procedures, citing Bail Reform Act of 1966); Criden, 550 F.2d at 555 (“We do not think that historical analysis is relevant to determining whether there is a first amendment right of access to pretrial criminal proceedings”). How the proceeding at issue is defined greatly affects the outcome of the historical analysis, and judges in several cases both in the Supreme Court and lower courts have differed on the proper approach. For example, although Justice Brennan in the majority opinion in Globe Newspapers alluded to the openness of criminal trials generally (457 U.S. at 605), Chief Justice Burger in his dissent found the more relevant comparison in that case to be trials involving sex crimes against a minor, which he asserted were traditionally shielded from view. See Globe Newspaper Co. v. Super. Court for County of Norfolk, 457 U.S. 596, 614 (1982) (Burger, C.J., dissenting). Similarly, there is little uniformity in geographical scope of judicial sources of “experience.” Some courts have looked only at the “experience” of their own jurisdiction. See, e.g., Application of NBC (United States v. Presser), 828 F.2d 340, 345 (6th Cir. 1987). Others courts
Circuit similarly noted, First Amendment access rights “should not be foreclosed because these proceedings lack the history of openness relied on by the Richmond Newspapers Court.”

Only where there is a strong tradition of holding closed proceedings, as with grand jury proceedings and plea negotiations, have courts consistently found the “tradition” factor material to the First Amendment analysis. And the presumption in favor of openness is so strong that, even when a proceeding has historically been closed, courts have applied the Richmond Newspapers test flexibly and found that the structural benefits of public access alone may still tip the balance in favor of the recognition of a presumptive First Amendment right of access. For example, in Herald Company, Inc. v. Board of Parole, the New York Board of Parole defended its policy of conducting closed parole revocation proceedings on the ground that they had historically been closed and were “neither the equivalent of criminal trials nor post trial proceedings as such.” Nonetheless, the court found a presumptive public right of access that could only be overcome on a case-by-case showing:

The public has a legitimate interest in the conduct of parole revocation hearings, since those hearings deal with issues of crime and punishment which touch the lives of all citizens. It is not idle curiosity which leads us to scrutinize the process whereby a parolee who has evinced dangerous propensities while free on parole may be granted the freedom to strike again. Nor is it simply voyeurism which leads us to watch closely the workings of a process which lets criminals free among us in order to reha-


240. See United States v. Smith, 123 F.3d 140, 150 (3d Cir. 1997) (denying access to sentencing hearing due to potential disclosure of grand jury material, citing Fed. R. Crim. Pro. 6(e)); Ex parte Birmingham News Co., 624 So.2d 1117 (Ala. Crim. App. 1993) (pretrial hearing involving grand jury information and plea negotiations); In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559, 1563 (11th Cir. 1989) (documents produced in response to grand jury subpoena); Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64-65 (4th Cir. 1989) (affidavits relating to issuance of search warrants).


242. 499 N.Y.S.2d at 306.
bilitate them and then reincarcerates those who violate the conditions placed upon that freedom.

* * *

Despite the fact that there is no evidence that parole revocation hearings have historically been open to the public and press, access to the parole revocation process is “important in terms of that very process” (Richmond Newspapers, Inc., supra, 448 U.S. at 589, 100 S.Ct. at 2834 [Brennan, J., concurring]). At a time when the merits of the parole process are being hotly debated, the “structural value of public access” (id. at 598, 100 S.Ct. at 2839) can scarcely be doubted. By opening parole revocation hearings to the public and press, the free, open, and informed discussion of the parole process would be furthered. The time has come for parole revocation hearings to be exposed to “the salutary scrutiny of the public and the press” (Press-Enterprise Company, supra, 104 S.Ct. at 830 [Marshall, J., concurring]).

New York’s decision to open juvenile proceedings to public view after a history of secrecy further demonstrates that the absence of a tradition of openness should not be fatal to the constitutional analysis of First Amendment right of access.

243. Id. at 308. In affirming on appeal (as modified), New York’s Appellate Division, Fourth Department specifically avoided reaching the First Amendment access issue, and instead affirmed on the narrower ground that there is “no specific statutory language requiring closure of [parole revocation] hearings.” 510 N.Y.S.2d at 382. In contrast to parole revocation, administrative proceedings relating to parole release generally do not implicate a constitutionally protected liberty interest, at least where the relevant parole statute is framed in discretionary terms and creates no presumption or expectancy of early parole release. See, e.g., Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979); Board of Pardons v. Allen, 482 U.S. 369, 372 (1987). Concomitantly, courts have held that there is no entitlement to a public or open hearing in connection with an application for discretionary parole or commutation of a sentence. See, e.g., Guerrero v. Hudson, 880 F.2d 1321 (Table), 1989 WL 85849 at *1 (6th Cir. Aug. 2, 1989); Geiger v. Pennsylvania Bd. Of Probation and Parole, 655 A.2d 215 (Pa. Commw. Ct. 1995).

244. As the Supreme Court recognized in Smith v. Daily Mail Publ’g Co, “[i]t is a hallmark of our juvenile justice system in the United States that virtually since its inception at the end of the last century its proceedings have been conducted outside of the public’s full gaze and the youths brought before our juvenile courts have been shielded from publicity.” 443 U.S. 97, 107 (1979). Hearings “out of the public gaze” were considered essential “to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.” Application of Gault, 387 U.S. 1, 24 (1967).

245. Despite longstanding rules mandating open proceedings, decisions in three high profile juvenile cases revealed a desire among family court judges for closed proceedings. See In re
Given that most administrative adjudications have invariably been open to the public since the creation of the modern administrative state—both as a matter of due process and legislative policy—the historical record unquestionably evinces a tradition of access under the Richmond Newspapers analysis.

2. The “structural benefits” of openness

Public access to administrative adjudications also satisfies the second prong of Richmond Newspapers. The structural similarities of administrative adjudications to Article III trials are abundant, and confirm that the same benefits of openness exist in the context of an administrative hearing. When a proceeding is conducted like a trial the value of openness to “the very process” itself is the same as in a judicial trial. Participants in administrative adjudicatory hearings are entitled to notice and a fair opportunity to be heard, including the right to know the nature and contents of the evidence adduced in the matter and to submit their own evidence. They are entitled to cross-examine, to legal representation, and to a decision based upon a meaningful consideration of the evidence presented at the hearing. At least in administrative proceedings where

Katherine B., 596 N.Y.S.2d 847 (App. Div. 2nd Dep’t 1993) (attempts to balance the right of access of press and public with the interest in protecting the welfare of the child resulted in the appellate court not recognizing the constitutional and statutory presumption of openness in family court proceedings); In the Matter of Ruben R., 641 N.Y.S.2d 621, 626 (App. Div. 1st Dep’t 1996) (relying on New York’s Family Court Act §1043 allowing the exclusion of the public and finding that “the presence of the press would further . . . dilute the proceeding by influencing the law guardian as to what testimony she is able to present); P.B. v. C.C., 647 N.Y.S.2d 732 (App. Div. 1st Dep’t 1996) (allowing the press to attend the hearings would not serve the best interest of the six children). As a result of such decisions, New York’s Chief Judge Judith S. Kaye announced revisions to §205.4 of the Uniform Rules for the Family Court at 22 NYCRR §205.4. The revised rules explicitly stated that “[t]he Family Court is open to the public” and “[m]embers of the public, including the news media, shall have access to all courtrooms, lobbies, public waiting areas and other common areas of the Family Court. . . .” Furthermore, the new rules permitted closure only on “a case-by-case basis, based upon supporting evidence, considering factors such as privacy and protecting litigants from further harm.” Id.

248. State v. Duluth, 75 N.W.2d 398, 410 (Minn. 1956).
such rights attach, the First Amendment right plainly exists, and such proceedings must presumptively be open. If a "proceeding ‘walks, talks and squawks very much like a lawsuit’…[i]ts placement within the Executive Branch cannot blind us to the fact that the proceeding is truly an adjudication," 1990).

The INS deportation proceedings at the center of the recent court battles typify the type of process often followed in administrative hearings, even though the APA does not apply. Immigration hearings are presided over by hearing officers, who are not ALJs but who are "neutral," and have authority to make binding decisions, subject only to limited review. In fact, for most of the century, the immigration judges were INS employees, but because of their decision making role, that structure was routinely criticized and, in 1983, the arrangement ended.

Second, just like Article III judicial proceedings, immigration removal proceedings are adversarial. Over time, the INS has developed a specialized staff of attorneys who are almost solely responsible for the prosecutorial functions of a removal hearing and these attorneys generally present the case for removal to the judge. An alien has a right to counsel in removal proceeding under the Fifth Amendment’s due process clause. The INS must inform the alien of her right to counsel (if the alien requests one), and that free counsel may be available; the INS must also give the alien a list of attorneys in the area that may work for free. Although the immigration judge may take an active role in questioning a witness—as Federal


253. The Department of Justice has declined the extension of immigration judges to ALJs perhaps because Supreme Court decisions permit it and the Department of Justice can keep its hearing officers in check more than if ALJs heard the cases. See Paul R. Verkuil, Reflections Upon the Federal Administrative Judiciary, 39 U.C.L.A. L. Rev. 1341, 1357 (1992).

254. An alien may file a motion to reopen before the immigration judge or the Board of Immigration Appeals. See 8 C.F.R. § 1003.2(c), 1003.23(b)(3), 103.5(a)(3) (2004). Under the Immigration and Nationality Act, 8 U.S.C.A. §§ 1101-1537 (West 1999 & Supp. 2004) [hereinafter INA], an alien may also appeal a removal order directly to the Court of Appeals, within 30 days of the removal order’s issuance. INA § 242(b)(1) (2004).

255. This practice was upheld in Marcello v. Bonds, 349 U.S. 302 (1955).

Rule of Evidence 614 permits a judge to do during a civil trial—in practice, these judges rarely do so.257 In addition, the procedural nuts and bolts of a removal hearing closely track those of an Article III proceeding. Removal proceedings begin with the service of a “Notice to Appear,” Form I-862, before an immigration judge.258 As a civil or criminal complaint does, the notice lays out elements of the government’s claim against the recipient.259 Similarly, removal proceedings are conducted in two stages: a master calendar hearing and the individual merits hearing.260 The master calendar hearing is analogous to a civil calendar call or a criminal arraignment.261 It is used to determine if an individual merits hearing is required; if there are disputed issues of fact, the immigration judge will set an individual merits hearing for some future date, as an Article III judge will do if a trial is warranted.

Although, as with most administrative proceedings, the formal rules of evidence do not apply in removal hearings, the regulations take care to ensure that only reliable evidence will be considered. Unauthenticated documents, hearsay, and other information that are not inherently trustworthy can be considered only after the immigration judge finds the specific evidence to be probative and reliable.262 The different burdens of proof and levels of proof required within a removal proceeding also track the structure of civil cases in Article III courts.263 A comparison of the regula-

257. See INA § 240(b)(1) (2004); 8 C.F.R. § 1240.2 (2004).
258. INA § 239(a)(1) (2004); 8 C.F.R. § 239.1(a) (2004).
261. See, e.g., Cody v. Mello, 59 F.3d 13, 15 (2d Cir. 1995), citing BLACK’S LAW DICTIONARY 203 (6th ed. 1990), brackets internal. (“A calendar call is ‘[a] court session given to calling the cases awaiting trial to determine the present status of each case and commonly to assign a date for trial.’”)
262. See 8 C.F.R. § 240.7(a); Bustos-Torres v. INS, 898 F.2d 1053, 1055-56 (5th Cir. 1990). But see Cunanan v. INS, 856 F.2d 1373, 1374-75 (9th Cir. 1988) (alien wife’s affidavit excluded where INS had not attempted to produce her as a witness); Iran v. INS, 656 F.2d 469, 472-73 (9th Cir. 1981) (unauthenticated INS form and consulate letter inadmissible).
263. In most civil trials, the burden of proof on most issues is a “preponderance of the evidence.” See, e.g., Concrete Pipe & Products of California, v. Constr. Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993). In some instances, however, the burden of proof is higher. See New York Times v. Sullivan, 376 U.S. 254 (1964) (requiring proof of actual malice by “clear and convincing” evidence). Similarly, in removal proceedings, burdens of proof vary depending on a variety of factors including whether the alien has been admitted into the United States. See INA § 240(c) (2004). The regulations now provide that:

2005 • VOL. 60, NO. 2
tions governing removal proceedings to the federal rules reveals numerous other parallels.

The decisions made in immigration proceedings have a significant impact on the individual subject, often even more of an impact than a civil lawsuit seeking only financial compensation. As a result, to ensure fairness and conformance with constitutional due process requirements, immigration proceedings, although conducted under the auspices of the executive branch’s administrative apparatus, act and look very much like judicial proceedings. 264

For the same reasons there is an independent, First Amendment right of access to proceedings held in Article III courts, the structural benefits of openness to the process itself dictate that same right of access applies in immigration and other administrative adjudications that “walk, talk, and squawk” like those presided over by an Article III judge.

CONCLUSION

The First Amendment test established in Richmond Newspapers for determining whether the presumption of access applies to a particular proceeding broadly governs all branches of Government. The current effort by the Department of Justice to restrict access rights to criminal proceedings in the judicial branch not only perverts history but disregards the fundamental democratic principles assured by this precedent. Thus, it is inconsistent with history, with Supreme Court precedent and, most fundamentally, with the public’s core “rights of access to information about the operation of their government . . . .” 265

[T]he Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

8 C.F.R. § 240.8(c) (2004) (emphasis added). Although not explicit, the statute suggests that the INS must show that the person is an alien by “clear and convincing” evidence. INA § 240(c)(3)(A) (2004). Once the alien establishes admission or entitlement to admission, “the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.” Id.


265. Richmond Newspapers, 448 U.S. at 584 (Stevens, J., concurring).
Moreover, the purported concerns the Government has raised regarding access to administrative proceedings are already amply addressed in the very requirements of the two-part access test and by the qualified nature of the right. Thus, while the test of *Richmond Newspapers* compels the conclusion that public access rights attach to certain quasi-judicial administrative trials, it is equally clear that no right of public entrée attaches to many other governmental proceedings (Cabinet meetings, FBI interrogations, meetings of the Joint Chiefs of Staff), given their particular historical tradition of being closed and given their structural features. In other words, the *Richmond Newspapers* test already separates out the access wheat from the nonaccess chaff. Moreover, even where the right of public access *does* attach to a particular proceeding, it is of course a qualified right and may be overcome by a specific showing that closure in that specific case is necessary because of national security or other compelling interests. While the Government is free to raise these issues of whether the qualified right attaches to a particular proceeding and, if so, whether it has been overcome, it is not free to assert that all political branch proceedings may be held in secret by fiat without any First Amendment scrutiny.

*June 2004*
The Committee on Communications and Media Law

David A. Schulz,** Chair
Carolyn K. Foley, Secretary

Stephanie Abrutyn**
Robert D Balin**
Sandra Baron**
Katherine M. Bolger
Dianne Brandi
Binta Niambi Brown
Eve Burton
Patricia A Clark
Barbara Cohen
Cheryl L. Davis
R. Townsend Davis**
Jonathan R. Donnellan**
Sherri F. Dratfield
Jeremy Feigelson
Robert A. Feinberg
Bridgette Fitzpatrick**
Stephen Fuzesi
Amy Glickman
Stuart D. Karle
Henry R Kaufman
Edward J. Claris**
Elisa Krall

Daniel M. Kummer**
Joel Kurtzberg
David E. McCraw
Joseph Miller
Amy L. Neuhardt
Lynn Oberlander
Lisa S. Pearson
Wesley R. Powell
Jed S. Rakoff*
Elisa Rivlin
Robert Sack*
Saul B. Shapiro**
Charles R. Sims
David B. Smallman
Anke E. Steinecke
Miriam Stern
Suzanne L. Telsey
David H. Tomlin
Jack M. Weiss
Maura Jeanne Wogan
Ira Wurcel

** Authors of the report. The committee acknowledges the substantial assistance of Nicholas Berg, Kurt Van Derslice and Matthew M. Guiney of Coudert Brothers in preparing this report.
Edward Klaris, Robert Balin and David Schulz served as principal authors and editors of the report.

* Took no part in the preparation or consideration of this report.
Opposing the Proposed Federal Medical Malpractice Reform Legislation

The Committee on Tort Litigation

INTRODUCTION

President Bush has made “tort reform” a top priority of his second term. His Administration has raised the concern that the country is in a healthcare crisis, and that as a result of medical malpractice lawsuits and payouts to victims, doctors’ premiums have skyrocketed, causing doctors to leave the profession and leaving communities and patients underserved.

The proposed solution will impose, among other limits, an artificial cap on non-economic damages recoverable in medical malpractice actions. Because this legislation will deny thousands of victims of medical negligence, especially women, children, the elderly and low-income people reasonable and necessary compensation; and will enact sweeping preemption of state laws in areas of local responsibility that have been subject to state autonomy for over two hundred years while doing nothing to cap insurance premiums or reduce the high incidence of serious medical errors, which is the root problem, we urge Congress not to enact this legislation.

Non-economic damages cap, other provisions deter court access

A factual, dispassionate examination of the provisions of the proposed medical malpractice reform bill demonstrates a decided tilt in favor of defendant doctors and business operators. The centerpiece of the bill is
a compulsory cap on non-economic “pain and suffering” damages in the amount of $250,000 regardless of the seriousness of the injury or the number of parties against whom action is brought. The proposed federal bill adopts the 1975 MICRA cap, unadjusted for inflation. According to the Rand Institute, if California’s cap had been adjusted for inflation, it would have been pegged at $774,000, in 1999.\footnote{Nicholas M. Pace, Daniela Golinelli & Laura Zakaras, Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA, 2004 RAND INST. FOR CIVIL JUSTICE.} Other provisions include:

- statute of limitations reductions, thereby limiting the time injured patients and families have to file claims, and cutting off claims for diseases with long incubation periods, such as HIV;
- preemption of state laws protecting patients and families while allowing states to keep in their laws that benefit doctors, hospitals, nursing homes, HMOs, drug companies and the makers and sellers of medical devices;
- restrictions on bringing product liability actions against manufacturers of drugs and medical products, where their products have been approved by the FDA, as well as against HMOs, even though suits against such corporate entities have not been implicated as causes of the malpractice crisis and defective drugs and medical device, albeit FDA approved, have been shown to cause serious harm and death to patients and consumers;
- elimination of joint and several liability, abandoning the longstanding determination of our civil justice system that as between an injured plaintiff and multiple defendants, it is the injured patient who deserves the greatest measure of protection;
- introduction into evidence at trial of plaintiff’s “collateral source” benefits (e.g., health insurance), while continuing to bar juries from learning of a defendant doctor’s insurance coverage;
- periodic payment of future damages over $50,000 allowing insurers to receive interest benefits on plaintiff’s unpaid jury awards;
- restrictions on contingent fees, giving the court power to restrict plaintiff’s attorney fees regardless of whether recovery is by judgment, settlement or any form of counsel can receive;
- requirement that medical provider and medical products suits
be brought separately, allowing defendants to implicate persons or entities who are not parties to the instant action; and
- heightened pleading standards for punitive damages and limitation on the amount of recoverable punitive damages to $250,000 or twice the amount of economic damages awarded, whichever is greater, making punitive damages virtually unrecoverable.

The compulsory cap on non-economic damages will hurt patients with the most serious injuries, and those with low or no income. Non-economic damages compensate patients for real injuries such as paralysis, loss of a limb, loss of sight, severe brain injury, disfigurement, permanent infertility and excruciating pain. They also compensate for the loss of a child or a spouse. These are injuries which juries are capable of fairly calculating. Caps on damages and limitations on contingency fees will make it difficult for patients other than the more economically privileged to underwrite costly medical malpractice claims. By correlating harm to economic loss, juries and courts will be permitted to grant higher payouts in cases involving wealthy citizens. The effect will be to permit persons with higher economic losses to collect more in damages than persons with lower economic losses, namely lower and minimum wage earners who are disproportionately ethnic minorities and people of color, at home mothers, the young and the retired. Such a limitation on recovery will effectively leave these victims without adequate redress in the Courts for even the most serious injuries and egregious acts of medical malpractice.

Where permanently and catastrophically injured patients are left without compensation to finances the costs associated with their injuries, the government will inevitably be left to pay the bill with taxpayers’ money.

**Legislation aimed at meritorious suits**

Caps on non-economic damages will have little to do with curtailing so called frivolous lawsuits while targeting meritorious actions, which most affect premiums. In New York, as in some other jurisdictions, the laws already provide for penalties for litigants and their lawyers who press plainly baseless claims in court. New York law also requires that before commencing a malpractice action, the attorney certify that she has conferred with a medical specialist who supports the case. Even in the absence of “sanctions,” which in fact are rarely imposed, the price of bringing a meritless action is staggering. Even if by some fluke a baseless suit is settled or prevails, overall the economics of our system strongly militate against the commencement of the “frivolous” actions.
Caps do not lower malpractice premiums

To the extent that malpractice premiums may have risen, there is undoubtedly more than one factor contributing to that trend. The insurance industry points to escalating judgments and settlements as the reason for hikes, but the statistics do not bear out this argument. According to the National Practitioners Data Bank, a government service which tracks medical malpractice claims, settlements and verdicts, the number of claims has been flat since 1996 and the average payout has increased marginally from a median payout for a medical claim rising from $100,000 in 1997 to $135,000 in 2001. In January 2005 President Bush selected Madison and St. Clair counties in Illinois, “judicial hellholes” of skyrocketing premiums, bankrupted hospitals and fleeing specialists leaving the state because of runaway jury awards in frivolous suits, in which to campaign for tort reform. The facts show that of 720 medical malpractice and wrongful death lawsuits filed in Madison and St. Clair counties between 1996 and 2003, only 14 (1.9%) resulted in jury verdicts. Six of the verdicts favored the plaintiffs. Only one lawsuit in Madison County in the last seven years resulted in a verdict that would have qualified for the $250,000 cap on non-economic damages proposed. The total dollar value of insurance payouts declined 20.7% in Madison County between 2002 and 2003. In St. Clair County, for the same period the decline was 26.5%. Nor have hospitals closed their doors or been forced to abandon long-planned upgrading. On the other hand, according to the results of a Harvard study disclosed last month, 50% of all personal bankruptcies in the U.S. are caused by illness and health care bills.

The fact is medical malpractice rates have historically had less to do with payouts to settle malpractice claims and more to do with the insur-

4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. David U. Himmelstein, Elizabeth Warren, Deborah Thorne & Stelfie Woolhandler, MarketWatch: Illness And Injury As Contributors To Bankruptcy, 2005 HARVARD UNIV. LAW SCH. AND HARVARD UNIV. MED. SCH.
ance companies’ indemnity practices, and success or failure in investing idle funds. In spite of a national slow down in the growth of claims, insurers have benefited from increasing medical malpractice premiums. And premiums have not risen more slowly in states that have imposed caps on pain and suffering awards. During the 10 years following the California legislature’s imposition of a $250,000 cap on non-economic damages in 1975, the model for present federal reform legislation, California’s medical liability insurance rate increases were the same as the national average and had increased sharply since the passage of the Medical Injury Compensation Reform Act. It was only after California voters passed Proposition 103 in 1988 that insurance rates in California began to decline compared with other parts of the country. Proposition 103 instituted the insurance reforms that required insurers to open their books and justify rate increases.

As of 2002 the National Association of Insurance Commissioners data show that California insurers have profited greatly from caps on patients’ pain and suffering. Every year since 1989 California malpractice insurers have paid out in claims less than fifty cents of every dollar they have taken in through premiums. By contrast, malpractice insurers nationally have typically paid out in claims more than two-thirds of every premium dollar. California malpractice insurers’ “operating profits” have been higher than the rest of the nation since the restrictions were implemented, even though many insurers claim to be “not for profit.” In 2000, the average premium per doctor in California was only eight percent below the national average and the average malpractice premium in California between 1991 and 2000 actually grew more quickly (3.5%), than it did nationally (1.9%).

In August 2002, Nevada passed caps on damages and within days the

15. Id.
16. Id.
17. Id.
two major insurance companies in that state announced they had no intention of reducing rates. In Mississippi, during the summer of 2002, doctors were told they would face a 45% increase in liability premiums regardless of whether damage restrictions were enacted. Six months after Texas lawmakers passed a $250,000 cap on compensation for non-economic damages, the nation’s largest medical malpractice insurer, GE Medical Protective, attempted to raise premiums 19% claiming that non-economic damage awards are a nominal part of the crisis and would create loss savings of one percent, noting also in its filing to the Texas Department of Insurance that the Texas law provision allowing for period payments of awards would provide a savings of only 1.1%. As further evidence that lawsuit limits such as caps will not result in affordable insurance for doctors, it is worth noting that in 2003 Farmers Insurance Group pulled out of five states, including California, that have had caps and other tort reforms in place for years, even decades.

A 2004 report examining trends in medical malpractice insurance over the past 30 years found that the amount medical malpractice insurers have paid out, including all jury awards and settlements, directly tracks the rate of medical inflation. On the other hand, medical insurance premiums charged by insurance companies have not corresponded to increases or decreases in payouts. Rather, they have risen and fallen in sync with the state of the economy, reflecting gains and losses experienced by the insurance industry’s market investments. The year 2003 saw no explosion in medical malpractice insurer payouts or costs to jus-
tify skyrocketing rate hikes. In fact, rather than exploding, inflation-adjusted payouts per doctor have dropped for the last two years. Further, medical malpractice premiums rose faster in 2003 than was justified by insurance payouts. Several other studies have similarly rejected the notion that enactment of caps on damages will lower insurance rates. A Weiss Ratings study analyzing this issue found that between 1991 and 2002, states with caps on non-economic damage awards saw median doctors’ malpractice insurance premiums rise 48 percent—a greater increase than in states without caps. In states without caps, median premiums increased only 36 percent.

Assuming for the moment that malpractice premiums were reduced and stabilized by legislating artificial limits on non-economic damages, it is unlikely that there would be any impact on healthcare spending. The Congressional Budget Office (CBO) has reported that even large savings in premiums would not lower private or government health care spending because malpractice insurance accounts for less than two percent of overall healthcare spending, and the percentage is falling because insurance rates have been increasing at less than half the rate of increase in health costs. CBO went on to state that limiting medical malpractice liability would “undermine incentives for safety” while making it “harder for some patients with legitimate but difficult claims to find legal representation.”

Presuming that our legislators earnestly desire a reduction in malpractice premiums for the public good, and think caps are the best way to do so, one would expect that bills under consideration would provide for reduction in premiums once the effect of the caps are adequately realized.

25. Id.
26. Id.
27. Id.
29. Id.; see also Katherine Baicker & Amitabh Chandra, National Bureau of Economic Research, The Effect of Malpractice Liability on the Delivery of Health Care 14, 20 (Aug. 2004) (indicating that there seems to be a fairly weak relationship between malpractice payments (for judgments and settlements) and premiums—both overall and by specialty; premium growth may be affected by many factors beyond increases in payments, such as industry competition and the insurance underwriting cycle).
31. Id.
But they do not. On plain reading, the bills do nothing for the public at all. They set arbitrary limits on the amount medical malpractice victims can recover, and make no provision as to what the insurance company must do with the windfall. And as for market forces creating adjustments, studies of past medical malpractice “crises” demonstrated no correlation between “tort reform” and lower insurance rates.

**Real crisis is incidence of medical errors**

Up to 100,000 people die every year from preventable medical errors, making medical malpractice the eighth leading cause of death in the United States.100,000 Americans die every year from infections they received in a hospital.33 Put another way: one in every 200 patients admitted to the hospital dies in the hospital as a result of avoidable medical error or hospital mistake.34 One in three people reports that they or a family member has experienced a medical error, with one in five stating it was “serious.”35 Yet, it is estimated that twelve percent (12%) or less of patients who suffer serious injury or death as a result of medical malpractice ever file a lawsuit.36 Proponents of reform claim that those who don’t sue make that choice because they are not badly hurt, or are not litigious, or fear disrupting ongoing doctor relations.37 Of those who do bring suit, the vast percentage settle out of court, usually with confidentiality requirements.38 Ninety percent of the cases which end up before a judge and jury are for

---


36. Studdert, et. al., supra note 34.


claims of death (33%) and permanent injury (57%).39 Of those, only 27% result in jury verdicts in favor of plaintiffs.40 According to the Congressional Budget Office, lawsuits remain one of the smallest factors driving rising health costs, at less than one percent of total health care spending.41

Monitor, discipline, retrain negligent doctors
Strikingly, only a tiny fraction of doctors account for the majority of malpractice awards. Yet, only one in six doctors who have had five or more malpractice payouts have been disciplined.42 In New York State, seven percent of physicians are responsible for two-thirds of all medical malpractice payouts.43 Nationally, five percent of the doctors in the United States are responsible for a staggering 54% of all malpractice payouts.44 According to Public Citizen, New York could cut malpractice cases by one-third by stopping doctors who make more than three malpractice payments from harming any more patients.45

It is axiomatic that the best way to reduce the direct and indirect costs of medical malpractice is to prevent unnecessary injuries, which has been estimated to cost to the economy $29 billion every year in excess medical expenses and lost productivity.46

CONCLUSION
In the words of Frank Cornelius, a former lobbyist for the insurance industry, self proclaimed “pioneer” in the reform of medical malpractice laws in his state of Indiana, and eventual victim of serious medical malpractice and the caps he helped create:

Doctors and insurers have spent millions propagating the myth that America is awash in unjustified medical malpractice and crazy jury verdicts...the prospect that these [federal tort] reforms

39. Id.
40. Id.
42. See Morris, supra note 30.
44. Id.
46. See Kohn, et.al, supra note 32.
TORT LITIGATION

will be enacted is frightening... they remove the only effective deterrent to negligent medical care[.]

It is the Committee’s opinion that to support H.R.534/S.354 would be to buy in to that myth at the expense of the public interest. Congress should reject this legislation and support initiatives aimed at solving the malpractice problem by actually cutting down on malpractice, identifying harmed patients and providing them prompt and fair compensation.

June 2005

The Committee on Tort Litigation

Jerome I. Katz, Chair
Christopher L. Sallay, Secretary

Lucy Billings
Richard F. Braun
Mark S. Cheffo
Lawrence Epstein
Marcy S. Friedman
Edward H. Gersowitz
Edward S. Goodman
Erin K. Hurley
Milena S. Dakova-Micheva
Michael Lee Katz
Theresa A. Klaum
Leslie Lewis
Stephen R. Markman

Richard D. Meadow
Stuart A. Miller
Joseph A. Montaniie
Kimberly Ann Miller
Lewis Rosenberg
Simcha Schonfeld
Jonathan Silver
Anthony Tagliagambe
Milton A. Tingling
LaWanda J. Williams
Elizabeth M. Young
Jill Zibkow

The Committee thanks Emily Berkman and John Chang, both student members, for their contribution to the report.

Are Your Thoughts Your Own?: 
“Neuroprivacy” and the 
Legal Implications of 
Brain Imaging

The Committee on Science and Law

INTRODUCTION

Scientists believe the ability to scan brain activity has the potential to yield knowledge about the inner workings of an individual’s brain. Some researchers already claim to be able to discover certain unconscious preferences or to detect when someone is lying about being exposed to certain information based upon cerebral activity. Brain research is beginning to raise numerous legal and social policy questions including: What information is going to be discovered? Who will have access to it? How will the information be used? What privacy rights does a person have to his or her thoughts?

The study of the ethical, legal and social implications of neuroscience is being referred to “neuroethics.”¹ Many types of brain research have, or will have, legal implications. However, this article will focus on the privacy concerns with respect to mental and cerebral functioning as delineated through brain imaging and other neurodiagnostic techniques—or what will be referred to here as “neuroprivacy.”

¹. The term was used by the organizers of “Neuroethics: Mapping the Field,” a conference for neuroscientists, bioethicists, doctors of psychiatry and psychology, philosophers, and professors of law and public policy in San Francisco, CA, sponsored by the Dana Foundation on May 13-15, 2002 [hereinafter “Neuroethics”].
Neuroprivacy issues clearly have hit a nerve among journalists and ethicists. William Safire, the columnist and Chairman of the Dana Foundation, has commented,

the specific ethics of brain science hits home as research on no other organ does. It deals with our consciousness—our sense of self—and as such is central to our being. What distinguishes us from each other beyond our looks? The answer: our personalities and behavior. And these are the characteristics that brain science will soon be able to change in significant ways. Let’s face it: one person’s liver is pretty much like another’s. Our brains, by contrast, give us our intelligence, integrity, curiosity, compassion, and—here’s the most mysterious one—conscience. The brain is the organ of individuality.

However, until recently there has been little detailed discussion of the privacy implications of neuroimaging despite the fact that there are major information-gathering initiatives underway. With the development of “brain fingerprinting” and other technologies, privacy concerns about advances in neuroscience are increasing.

The purpose of this report is to view potential legal questions within the context of existing brain imaging technology, applications and protections. The first section summarizes current technologies. The reliability of these technologies will be addressed in the second section. Potential applications of this technology and some of the legal implications will be discussed in the third section. The fourth section will review existing protections. Lastly, issues that have arisen in the area of genetic privacy will be reviewed and compared to similar concerns that might arise with respect to brain privacy concerns.

2. In the Philadelphia Inquirer, John Timpane wrote, “What if a brain-scan screener at the airport goes off, and I’m not allowed on the plane because I might be a troublemaker or a terrorist? ..previously private aspects of my personality have been rendered public. Which leads to a chilling question: What if my thoughts cease to be my property?” John Timpane, Philadelphia Inquirer, January 25, 2004 at. C1; See also Carey Goldberg, Some Fear Loss of Privacy as Science Pries into Brain, BOSTON GLOBE, May 1, 2003, at A1.


As would be expected in a pioneering field, there is little reported case law addressing neuroprivacy. Existing laws provide only a limited framework by which to protect the privacy of persons who are subjected to brain imaging to ascertain the veracity of their testimony or to determine their personal preferences and biases. Although the use of brain imaging for these purposes is not yet widespread, policy makers and legislators should address these issues prospectively.

I. CURRENT TECHNOLOGIES AND DEFINITIONS

“Neuroscience” is the science concerned with the development, structure, function, chemistry, pharmacology and pathology of the human nervous system. It is directed at exploring the architecture and functions of the brain as well as the effects of stimuli on parts of the brain and cerebral performance. Currently, there are three primary areas of research: imaging of the brain and other neurodiagnostic techniques, exertion of influence on the brain, and design and construction of the brain.


6. “Non-invasive exertion of influence on the brain” usually refers to designing and applying drugs that affect brain performance. While the main focus used to be on improving mood, cognition or behavior, it appears to have shifted from the healing of brain disorders or malfunctions toward enhancing normal brain functioning. Enhancement of mood, cognition and vegetative functions is being studied. Pharmacological manipulations can alter cognitive abilities, including attention and memory. Attention, for example, is primarily modulated by dopamine and norepinephrine. Ritalin and Adderol affect both systems. In normal individuals, these drugs induce reliable changes in vigilance, response time and higher cognitive functions. Similarly, impulsive violence has been linked to certain abnormalities in the levels of the neurotransmitter serotonin and Fluoxetine was found to be helpful to reduce aggression in patients with personality disorders. For any person deemed a threat to self or others, including criminal offenders, judges routinely order compliance with medication. Court-ordered therapy is not limited to people who have a medically diagnosed illnesses, so as new drugs are developed, they will likely be prescribed for offenders.

7. The possibility of directly designing and constructing the brain through sophisticated technology is increasing. Although the outsourcing of certain brain functions to big computer networks or the use of the brain to intuitively control machines seems still to be far in the future, advances are already impressive. Researchers in California have presented the idea of building and implementing a brain prosthesis—an artificial hippocampus. Unlike devices such as cochlear implants, which merely stimulate brain activity, a silicon chip implant would perform the same processes as the damaged part of the brain it is replacing. This might be a way to help people who have suffered brain damage due to stroke, epilepsy or Alzheimer’s disease. Here too, the initial focus would probably be on healing brain disorders but might soon expand to computer augmented brain “enhancements.”
though there are legal concerns with the latter two areas, this article will focus on neuroimaging.

With respect to neuroimaging and adjunctive neurodiagnostic modalities, several advanced noninvasive techniques allow detailed monitoring of the brain and enable the scientist to observe cerebral neurochemical changes that occur as the brain processes information or responds to various stimuli. The more basic techniques are discussed below. Very often two or more of them are combined to optimize results:

A. Positron emission tomography (PET): PET measures emissions from radioactively labeled chemicals that have been injected into the bloodstream and uses the data to produce two- or three-dimensional images of the distribution of the chemicals throughout the brain and the body. PET can be used to show blood flow, oxygen and glucose metabolism or drug concentrations within brain tissue. For example, PET scans are used in drug abuse research to identify the brain sites that are affected by drugs and to show how long drugs occupy these specific areas in the brain.

B. Single photon emission computed tomography (SPECT): SPECT also uses radioactive tracers and a scanner to record data that a computer uses to construct two- or three-dimensional images of metabolically active brain regions. SPECT is generally used for the same types of research as PET. While the technique is much less expensive than PET, it provides less detailed images.

C. Magnetic resonance imaging (MRI): MRI uses magnetic fields and radio waves to produce high quality two- or three-dimensional images of brain structures without injecting radioactive tracers. Functional MRI (fMRI) measures brain activity under resting and activated conditions. It can produce images of brain activity as fast as every second and enables scientists to make “movies” of changes in brain activity as patients perform different tasks or are exposed to various stimuli. Both MRI and fMRI are commonly used for identifying, investigating and/or monitoring brain tumors, congenital anatomical abnormalities, trauma or strokes or certain chronic disorders of the nervous system (e.g., multiple sclerosis). Newer MRI technologies, including studies that are dependent upon blood oxygen levels

(BOLD), recent advances in MRI spin techniques and structural MRIs, are primarily investigational in nature and not used commonly outside major academic centers conducting brain research.10

D. Electroencephalography (EEG). EEG is an adjunctive neurodiagnostic modality, rather than a neuroimaging technique, that uses electrodes placed on the scalp to detect and measure patterns of electrical activity emanating from the brain. It is roughly comparable to electrocardiography (EKG), which uses electrodes on the chest to evaluate and monitor heart function. Other sophisticated techniques, such as event-related potentials (ERP) and near infrared spectroscopy (NIRS), are primarily investigational at this time.11

II. RELIABILITY ISSUES

One cannot presume that brain imaging as applied in this context uniformly provides meaningful information. While CT and MRI scanning has been utilized medically for over 20 years, fMRI and other neurodiagnostic techniques are still a subject of much research and some controversy. Possible applications of these newer techniques have been reported to the public through the lay press; however, there are variables that impact on the reliability of the results. Several questions that arise. What impact does the applied technique have on the results? Do the results differ when different MRI modalities are being used? Is the study conducted by a psychiatrist, a neurologist or a radiologist? Who is interpreting the study? How many subjects are enrolled in the studies? What particular machine (manufacturer, strength, construct) is being used? Are there any case controls? What standards are being developed or being used, if any? These are just some of the issues that would need to be resolved before the use of brain imaging is accepted as a way to determine mental functioning and reasoning. Evidently, the legal ramifications of its widespread use are a primary concern.

Questions remain regarding the significance of the scans. Antonio Damasio, MD, the Director of Neurology at the University of Iowa and a noted researcher into the neurobiology of the mind, noted that,

[the issue is what we can expect from functional imaging—

11. Id., p. 36.
namely, from PET or fMRI... For example, no one need have any doubt that we can now identify a lesion caused by a stroke, tumor, surgical incision, or head injury, and that we can localize it and intelligently combine that information with clinical data. This enables us to make very accurate diagnoses and even predictions about how the person is likely to evolve. And I don’t have any problem with that being brought in court.... Most of the imaging issues that people are very worried about have to do with functional imaging in an experimental setting. Here the interpretation is tied to the hypothesis, to the design, and to the theory that are behind a given study and to analyses that vary from laboratory to laboratory. This is the kind of information that we have to be very cautious about and that I would not find appropriate to introduce in court at this point.”

III. USES OF BRAIN IMAGING AND POTENTIAL LEGAL IMPLICATIONS

Initially, brain imaging was used primarily to diagnose brain injuries or brain disorders; however, current projects are directed toward evaluating more complicated brain processes, including those neural pathways that subserve memory, language, emotion and decision-making. Although it is not yet possible for devices to read a person’s mind or bring actual thoughts to a computer screen, a number of studies are focusing on exploring personality, thought processes and mindset by studying and analyzing individual “brain prints.” The findings from these studies may reveal information regarding unconscious biases, and preferences of which the subjects had been unaware.

A. Non-medical Brain Research

Various non-medical research projects highlight the types of information that apparently can be determined. Some scientists maintain, for example, that socially relevant characteristics, such as racial group identity and unconscious racial attitudes, have neural correlates which can be measured. In one small study, four black subjects and four white subjects viewed photographs of black and white faces. The investigators found that there were significant differences in the individual responses to the faces, which were attributable to whether the faces in the photographs

were of the same race as the subject viewing them. Another study of unconscious attitudes found that white subjects had greater activity in the amygdala (the area of the brain associated with the fear response) when viewing pictures of unfamiliar black faces as opposed to white faces. An even more recent study indicates that fMRI may be used to show an individual's ability to deceive intentionally by having the test subject respond truthfully or falsely to a series of yes/no questions regarding autobiographical information.

Other researchers now are now working in “neuromarketing,” performing brain research for corporate clients. Neuroscientists at the Brighthouse Institute for Thought Sciences at Emory University Hospital in Atlanta believe that cerebral MRI scans which show increased activity in the medial prefrontal cortex of the subject’s brain when shown a certain product are indicative of a preference for that product. It is argued that such tests yield evidence of the subject’s unbiased attitude toward an idea or an item, much like the person who claims not to like a product such as a potentially embarrassing pornographic magazine, but who in fact manifests a preference for it.

Other neuroscientists remain skeptical of neuromarketing. They maintain that increased activity in certain parts of the brain remains an enigma. Critics have pointed out that “just because we can see neurons firing doesn’t mean we always know what the mind is doing. For all their admirable successes, neuroscientists do not yet have an agreed-upon map of the brain.”

While some of this research may appear trivial, it would seem to have

17. C. Thompson, “There’s a Sucker Born in Every Medial Prefrontal Cortex”, NY Times, 10/26/03, Sec. 6, Col.1, Magazine Desk, p.54.
18. Id.
19. Id.
20. Id.
21. Id.
larger legal and policy implications than one might imagine at first. At the very least, one major concern or question is what will be done with these research and neuromarketing test results and who will have access to them.

B. “Brain Fingerprinting” and Evidence

“Brain Fingerprinting” technology is worth a close look as it has already been cited in two court cases. Brain Fingerprinting is a technique that purports to determine the truth by detecting information stored in the brain. Using an EEG, it measures brainwave responses to words or pictures presented on a computer screen. A subject who has knowledge of the information being tested reportedly emits a specific, measurable response, a brain wave known as P300/MERMER (Memory and Encoding Related Multifaceted Electroencephalographic Response). A subject who lacks such knowledge would not manifest this response.

Testimony on brain fingerprinting first was introduced into evidence in Iowa in a convicted murderer’s quest to have his conviction overturned and a new trial granted. The trial court considered the admissibility of the test and stated,

The test is based on a “P300 effect”.... The P300 effect has been studied by psycho-physiologists...The P300 effect has been recognized for nearly twenty years. The P300 effect has been subject to testing and peer review in the scientific community. The consensus in the community of psycho-physiologists is that the P300 effect is valid....

However, the trial court did not find the brain fingerprinting evidence persuasive and refused to vacate the conviction and grant a new trial.

The Iowa Supreme Court subsequently reversed the trial court’s decision on other grounds, granting post-conviction relief and a new trial.

---

Although the Iowa Supreme Court only briefly mentioned brain fingerprinting, it noted that the evidence was introduced through the testimony of Dr. Lawrence Farwell, who specializes in cognitive psychophysiology. Dr. Farwell measures certain patterns of brain activity (the P300 wave) to determine whether the person being tested recognizes or does not recognize offered information. This analysis basically ‘provide[s] information about what the person has stored in his brain.’ According to Dr. Farwell, his testing of Harrington established that Harrington’s brain did not contain information about Schweer’s murder. On the other hand, Dr. Farwell testified, testing did confirm that Harrington’s brain contained information consistent with his alibi.27

The case is significant in that brain fingerprinting received the serious consideration by the court. It can be expected that as awareness of this case and the technology grows, it will become a more common topic.

There was also recently an unsuccessful attempt to introduce brain fingerprinting in Slaughter v. State of Oklahoma.28 A convicted double murderer filed a second application for capital post-conviction relief on the ground that brain fingerprinting was “newly discovered scientific evidence,” unavailable at the time of trial. The court was unwayed by the argument, questioning whether the science “would survive a Daubert analysis” and noting that the argument could have been raised much earlier on appeal.29 Significantly, the court critically stated that “beyond Dr. Falwell’s affidavit, we have no real evidence that Brain Fingerprinting has been extensively tested, has been presented and analyzed in numerous peer-review articles in recognized scientific publications, has a very low rate of error, has objective standards to control its operation, and/or is generally accepted within the ‘relevant scientific community.’ The failure to provide such evidence to support the claims raised can lead to no other conclusion, for post-conviction purposes, that such evidence does not exist.”30

It remains to be seen how the courts in New York and other states will

29. 105 P. 3d 836.
30. 105 P. 3d 835.
rule on the admissibility of a brain imaging test. It is possible that the results will be quite divergent. In New York, a Frye hearing—the type of hearing held to determine the admissibility of scientific evidence when a party seeks to submit innovative or “novel” scientific, medical or technical evidence—might be held to determine the admissibility of brain fingerprinting. For a novel scientific technique to be admissible under Frye, the court would need to be satisfied that such technique has gained “general acceptance,” not that it would be unanimously endorsed in the field to which it belongs.

Brain fingerprinting technology has the potential for other applications, including the detection of deception in the context of counter-terrorism. By using brain imaging, Brain Fingerprinting Laboratories claims to be able to answer questions such as “Who has participated in terrorist acts, directly or indirectly?” or “Who is a trained terrorist with the potential to commit future terrorist acts?” If these technologies are perfected, it is possible that such brain scans might be done without the need to ask permission while persons are waiting to enter the country at U.S. Customs.

C. Neuroimaging in the Context of Liberty Interests and Parental Rights

As this discussion suggests, the use of brain imaging test results as evidence in court proceedings has the potential to affect one’s liberty interests. Sexually violent predators, persons civilly committed to psychiatric hospitals for lack of fitness to stand trial or by virtue of being found not guilty by reason of insanity, and those identified in criminal and national security investigations may be subject to continued hospitalization or incarceration if they fail to submit to certain tests or if the results of such tests show them to be a continued threat to society. On the other hand, test results may influence a parent’s ability to retain custody of his or her child. It can be expected that brain fingerprinting and other brain imaging tests, as they become more reliable, could also be used as the basis for making decisions in such cases. These situations will now be considered in more detail.

32. Id.
1. Sexually Violent Predators

The evaluation of sexually violent predators shows the complexity that arises where neuroprivacy issues are involved. While the results of neuroimaging tests may increase the number of people who ultimately are released from confinement, some individuals may fear the tests will result in self-incrimination.

After the tragic murder of seven-year-old Megan Kanka in 1994, 16 states adopted legislation authorizing the involuntary civil commitment of sexually violent predators in a psychiatric hospital after the expiration of their prison terms.\(^35\) Although, New York State has not yet passed such legislation, bills are pending in the state legislature.\(^36\) In addition, a number of states have passed so-called Megan’s Laws requiring the notification of neighbors when a sexually violent predator is released from prison to the community.

Under *Hendricks v Kansas*, in determining whether to commit a sexually violent predator involuntarily or to release a sexually violent predator from involuntary civil commitment, the state considered whether the individual (1) was convicted or charged with a sexually violent offense, (2) was suffering from a mental abnormality or personality disorder, and (3) if so, whether such a disorder made it difficult, if not impossible, for the person to control his/her dangerous behavior.\(^37\) In making its determination, the state considered what thoughts and fantasies such a person was expressing, if the person was being truthful, and whether he or she could, in fact, control his/her behavior.

In practice, it appears that states rarely risk making the wrong decision. Under the New Jersey law permitting the involuntary commitment of sex offenders who were deemed “likely” to be dangerous after the expiration of their criminal sentences, none of the 300 persons committed under the law since 1999 have ever been recommended for release by the state.\(^38\) Similarly, a 2000 draft study on the release of sexual predators upon the completion of their prison terms under Washington State’s law found

---


that they were unlikely to be released.\textsuperscript{39} Of the 121 persons committed
under the law since its enactment ten years before, only five had been
conditionally released.\textsuperscript{40}

There may be many reasons why few of these offenders were released.
One explanation may be that it is considered impossible to determine
people’s thoughts or to predict how they will behave in the future. As the
discussion of fMRI studies and the trends in neuroscience toward predict-
ing behavior indicate, technology may soon help make some of these
types of determinations possible. For example, fMRI studies of people with
mental disorders meeting the criteria for involuntary civil confinement
may eventually be able to provide an image of a “typical” brain affected
by such disorders, a prototype of sorts, and brain fingerprinting may be
able to assist in determining whether such persons are telling the “truth.”
Thus, it is possible that neuroimaging may help protect people’s liberty
interests by permitting more accurate determinations about releasing cer-
tain individuals from involuntary confinement.

However, the possibility of additional tests and the information they
can provide raises problems of its own. For example, convicted sex of-
fenders can be required to complete an “Admission of Responsibility”
form about crimes for which they have been sentenced, a sexual history
form setting forth all prior sexual activities (regardless of whether these
actions constituted a crime), and then to take a polygraph test about
such history. If the inmate refuses to participate, he or she may lose privi-
leges and be transferred to a maximum security prison. In addition, the
information provided by the offender is not privileged and can be used
against him or her in future criminal actions. These requirements have
been upheld by the U.S. Supreme Court in \textit{McKune v Lile}, as part of a
treatment program and were found not to violate one’s right against self-
incrimination.\textsuperscript{41}

As exemplified in \textit{McKune}, convicted sexually violent predators face a
Hobson’s choice of participating in a program where anything they say
about past events may lead to future criminal charges against them, of
being subjected to a polygraph on such statements, or of being punished

\textsuperscript{39} Carey Goldberg, Sex Offenders in Some States Serve More Than Their Time, \textit{N.Y. TIMES},
Apr. 22, 2001, §1, at 1.

\textsuperscript{40} Laura Mansnerus, Sex-Offender Release Policy Faces Change in New Jersey, \textit{N.Y. TIMES},
Jan. 26, 2004, §B, at 5; see also Laura Mansnerus, Unfinished Sentences: Keeping Prisoners
as Patients: Questions Rise Over Imprisoning Sex Offenders Past Their Terms, \textit{N.Y. TIMES},
Nov. 11, 2003, §A, at 1.

\textsuperscript{41} \textit{McKune v Lile}, 536 U.S. 24 (2002).
for failure to do so. In addition, the failure to submit to a polygraph may be viewed by the authorities as a failure to cooperate in treatment, resulting in their unwillingness to recommend discharge from detention. There is no reason to believe that an offender’s unwillingness to agree to a form of brain imaging as may be required by the state would not result in his/her continued civil commitment or imprisonment. In this way, brain imaging presents a threat to personal liberty interests.

2. Discharge of Persons Who are Civilly Committed and Persons Who are Incompetent to Stand Trial or Have Been Found Not Guilty By Reason of Insanity

In New York State, psychiatric patients, both civilly and criminally committed, generally have the right to refuse medical treatment. Nevertheless, as a practical matter, their refusal to undergo brain imaging tests to gauge whether or not they are dangerous might be used against them at a discharge hearing. For example, appellate courts in both civil commitments and commitments arising from not guilty by reason of insanity verdicts have refused to order the discharge of patients who were no longer psychotic while incarcerated or hospitalized, but who failed to comply with treatment upon prior release and therefore experienced deterioration of their mental condition and resumed violent behavior.

Although the results in these cases are based on the patients’ non-compliance with psychotropic medication, which rendered them dangerous, it is arguable that refusing to have brain scans to determine their degree of dangerousness would be seen as posing a threat to self or others or as failing to comply with a treatment program. Thus, the liberty interest considerations would be similar to those raised in the context of sexually violent predators.

42. Rivers v Katz, 67 NY2d 485 (1986); Mtr. of K.L., 2004 NY Lexis 182 (NY Ct. of Appeals, 2/17/04); 14 NYCRR 527.8; 14 NYCRR 541.13.

43. See Mental Hygiene Law Article 9; Criminal Procedure Law Sec. 330. 20; Criminal Procedure Law Article 730.

44. Matter of Francis S., 87 N.Y.2d 554, 556 (NY Ct. of App. 1995); Matter of Seltzer v Hogue, 187 A.D.2d 230, 230 (N.Y. App. Div. 2d Dept 1993); In the Matter of Dwight J, 234 A.D.2d 116, 117 (N.Y. App. Div. 1st Department 1996) (In a civil commitment proceeding, the Appellate Division reversed a lower court’s order directing the release of a psychiatric patient from the hospital because of his non-compliance with medical treatment. The appellate court stated that the “Supreme Court’s finding that petitioner failed to demonstrate that respondent poses a substantial threat is not supported by the record, which reflects that respondent is schizophrenic, receives his medication by injection due to non-compliance, and is unlikely to take his medication after release.”).
3. Child Custody and Child Protective Proceedings

In contested child custody proceedings, it is conceivable that brain imaging of a parent would be sought and ordered by the court in furtherance of the best interests of the child. Allegations arise on such issues as sexual abuse, domestic violence, substance and alcohol abuse and lack of parental interest. Under CPLR 3121, when the mental or physical condition of a party is in controversy, any party may request that the other be examined by a designated physician. The potential use of brain imaging in such a context is readily apparent.

Similarly, it is possible that such tests would be authorized in child protective proceedings (i.e., abuse and neglect) under Article 10 of the Family Court Act. Family Court Act Sec. 251 permits the court to order a psychiatric evaluation to determine if a parent suffers from a mental disorder that would impair one’s parenting ability.45

IV. EXISTING PROTECTIONS

The use and abuse of an individual’s medical information in an age of computerization and managed care has become a subject of increasing concern and regulation. In 1997, testimony to the Senate Committee on Labor and Human Resources, the U.S. Secretary of Health and Human Services testified that close to 75% of citizens surveyed were concerned that computerized records will have a negative effect on their privacy. Despite the enormous ramifications of the potential use of brain scans, however, there has been little in the way of standards set specifically for privacy and confidentiality of neuroscience clinical information.46

This section will consider existing laws and regulations that may be used or interpreted to cover brain images, brain imaging technology and the privacy concerns raised by them. While potential protections are found in the laws regarding the use of lie detectors, medical research and HIPPA, they are piecemeal at best.

A. Lie Detectors/Polygraphs

It appears the use of brain imaging technologies such as Brain Fingerprinting might be governed by the rules relating to lie detectors and polygraphs. Although decisions are in conflict as to the admissibility of polygraph tests in court, the general rule is that they are inadmissible since there is no general scientific recognition that they are effective in

45. See Mtr. of Tyler S., 192 Misc.2d 728, 728 (N.Y. Fam. Ct. 2002).
46. This may have a negative effect on the willingness of potential research subjects as well. Proceedings, Caplan, Neuroethics, p. 122.
determining the truth or that reasonable certainty can follow as a result of the test. It has also been held that “a polygraph examination is essentially communicative, testimonial in nature, and within the guarantees of the Fifth Amendment” (though such guarantees could be waived).

In spite of the conflicting decisions, in one case, a court admitted the test result, reasoning that a defendant cannot be compelled to take the test, but could do so voluntarily, which would constitute a waiver of his constitutional rights under the Fifth Amendment. However, as a general rule, even though the polygraph may be helpful during the course of an investigation, the results of polygraphs continue to be inadmissible as evidence in criminal proceedings in New York.

It is possible that a brain imaging device might fit within the definition of a lie detector under federal law if it is used as a technique to determine veracity. The federal Employee Polygraph Protection Act of 1988 (hereafter “EPPA” or the “Act”), prohibits employers in the private sector from directly or indirectly requiring or suggesting that employees or job applicants take a polygraph or other type of lie detector test. In addition, a private employer cannot use or refer to the results of a lie detector test, nor take any adverse employment action against an employee or job applicant who refuses to take such a test, or on the basis of the results of such a test, except as otherwise provided.

Federal, state and local government employees are excluded from the protection of the Act. Nevertheless, public employees are protected by the Fifth Amendment privilege against self-incrimination where the demand to take a lie detector does not relate narrowly and specifically to their official duties. Moreover, other federal laws such as Title VII, the National Labor Relations Act, and the Railway Labor Act may protect private and public employees from the unfettered use of lie detectors.

47. 58 NY Jur 2d, Evidence & Witnesses § 444. See also People v Shedrick, 104 A.D.2d 263, 275 (4th Dept. 1984).


49. Id.

50. See People v Shedrick, 104 AD2d at 275; 58 NY Jur 2d § § 444, 445.


53. See Lexstat 2-12 Employment Screening Sec. 12.03(2).

54. Id. at Sec. 12.03(3).
The EPPA defines the term “lie detector” to include “a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.”\textsuperscript{55} The definition has already been interpreted to include other types of technology. For example, in \textit{Veazey v Communications & Cable of Chicago, Inc.}, a fired employee contended that his former employer violated the Act when it discharged him because he refused to provide a tape-recorded voice exemplar that his superiors had requested.\textsuperscript{56} The employer made the demand after another employee had received a threatening voice mail message. In finding that a violation of the Act had occurred, the Court of Appeals stated that

\begin{quote}
[w]e are of the opinion that the application of basic logic necessitates that a tape recorder might very well be considered as an adjunct to a ‘lie detector’ determination under the EPPA because the results of a tape recording (a voice exemplar) can be used to render a diagnostic opinion regarding the honesty or dishonesty of an individual when evaluated by a voice stress analyzer or similar device. Accordingly, a tape recorder, when used in conjunction with one of the devices enumerated in the statute or a similar device, may fit within the definition of a ‘lie detector’ under the EPPA.\textsuperscript{57}
\end{quote}

Importantly, the court also stated that “the EPPA’s legislative history indicates that Congress intended the prohibition on the use of lie detectors to be interpreted broadly.”\textsuperscript{58} Thus, it is submitted that under such reasoning, various forms of brain imaging would likely constitute a lie detector as defined under the Act, and that employees in the private sector would be covered by its protections.

If a brain imaging device constituted a lie detector under the Act, the

\textsuperscript{55} 29 U.S.C. 2001(3).
\textsuperscript{56} 194 F.3d 850, 859 (7th Cir. 1999).
\textsuperscript{57} Id. at 859.
\textsuperscript{58} Id. See H.R. Conf. Rep. No. 100-659, at 11 (1988), reprinted in 1988 U.S.C.C.A.N. 749, 750 (“The conferees...intend that the prohibition on a lie detector test be construed broadly to include any use of a lie detector.”
\textsuperscript{59} 29 USCS 2008 (a),(b); see Orr v Bank of America, 285 F.3d 764, 783 (9th Cir. 2002) (discharged employee’s lawsuit under this provision was dismissed on the ground that the evidence submitted constituted inadmissible hearsay and was not authenticated).
examiners also would be subject to limitations on disclosure. The Act expressly restricts limits who—other than the examinee—can disclose information obtained from a lie detector test.\textsuperscript{59} Such information may be disclosed by an examiner only to the examinee or a person designated by him or her; the employer that requested the test; or any court, governmental agency, arbiter or mediator in accordance with a court order requiring the production of such information.\textsuperscript{60} The employer who requested the test may disclose its results only to the employee or to a government agency, but only insofar that the information is an admission of criminal conduct.\textsuperscript{61} Thus, if brain scans were interpreted as coming within the definition of lie detector in the Act, their disclosure would also be regulated.

\textbf{B. Scientific Research}

Given that neuroscience is a rapidly growing field of study and that research is moving toward investigating more complicated cognitive processes, one should consider whether the confidentiality of information obtained in research involving brain imaging needs to be strengthened. The federal regulatory protections afforded human subjects apply to research projects which are conducted by a federal agency, are federally funded, or, if not conducted or funded by the federal government, are subject to regulation by any federal agency.\textsuperscript{62} However, the federal regulations do not include their own confidentiality privilege.\textsuperscript{63}

Rather, confidentiality protection is required indirectly by the regulation of research by individual Institutional Review Boards ("IRBs") and by the informed consent requirements. For "research" (defined broadly under the regulations), a prerequisite to IRB approval is that "when appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data."\textsuperscript{64} Confidentiality protections are one of the basic elements of informed consent under the HHS regulations in that the subjects must be provided with "[a] statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained."\textsuperscript{65}

This is, in fact, the only mention of confidentiality in the HHS regu-
lations and it allows room for the possibility that no protections will be taken to maintain the confidentiality of records. In addition, the privacy protections are only required for IRB approval where “appropriate.” Thus, the protection afforded brain research subjects under federal regulations may prove illusory unless there is a separate, distinct confidentiality or privacy requirement built directly into the regulations.

Similarly, it is unclear to what extent New York state law would protect the privacy and confidentiality of a participant in a brain imaging study as there is also no explicit privacy requirement. For example, New York Public Health Law 244S provides that state law is superseded when research is conducted in compliance with federal rules and regulations, so that federal regulations would apply in New York for federal projects. For non-federal projects, New York Public Health Law provides that “no human research may be performed in this state in the absence of the voluntary informed consent subscribed to in writing by the human subject.” In addition, the IRB is charged with ensuring that the rights and welfare of the subject are adequately protected. Thus, outside of the employment and medical contexts, to the extent that brain scanning is conducted as part of a research project, there appears to be limited guidance for ensuring the protection of such information.

C. Brain Privacy under HIPAA

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), implemented via the Privacy Rule issued by HHS, addresses some medical privacy concerns, but would be inapplicable to brain imaging that is not done by a covered entity in connection with a covered transaction. HIPAA protects all “individually identifiable health information” held or transmitted by a “covered entity” or its “business associ-
“NEUROPRIVACY”

ates” in any form or media whether electronic, paper or oral. Covered entities include health plans, health care clearinghouses, and health care providers that transmit health information in electronic form in connection with certain transactions (e.g., claims, benefit eligibility inquiries, coordination of benefits and referral authorization requests). Such information is called “protected health information” and is defined to include demographic data and information about:

- the individual's past, present or future physical or mental health or condition;
- the provision of health care to the individual;
- the past, present or future payment of health care;
- information that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.

This definition is quite broad and it is likely that brain images, when generated for medical purposes by the appropriate entity, would fit within its scope.

HIPPA regulates disclosure and use of protected health information. A covered entity may not use or disclose protected health information except either (1) as the Privacy Rule permits or requires; or (2) as the individual who is the subject of the information (or the individual’s personal representative) authorizes in writing.

The Privacy Rule permits a covered entity to disclose protected health information for research purposes, without the need for the individual’s authorization for research purposes in certain instances. If brain scanning was considered protected health information, it would benefit from HIPAA's protections against disclosure of such information.

70. 45 C.F.R. § 160.103.
71. 45 C.F.R. §§ 160.102., 160.103.
72. 45 C.F.R. §160.103.
73. 45 C.F.R. §164.502(a).
74. 45 C.F.R. §164.512(i) (Covered entity may release information for research purposes without a release where this has been approved by an Institutional Review Board or privacy board; the researcher represents that s/he needs the information to prepare a research protocol, will not remove it from the facility and that it is necessary for the research; or the researcher represents that the information is solely for research on the health care information of decedents, is necessary for the research and at the request of the covered entity, documentation is provided on the death of the decedents about whom information is sought.).
While the HHS Privacy Rule is extensive in many respects, it is limited by the underlying statutory framework of HIPAA, which covers only three named categories of businesses: providers, payers, and information clearinghouses. However, the concept of a “business associate” of a covered entity within HIPAA permits the categories of regulated entities to be broadened somewhat as such an associated person must enter into a contract with the covered entity, promising that it will respect the privacy of information transmitted from the covered entity to the non-covered entity.\footnote{45 C.F.R §164.504.} Nonetheless, medical information may be widely dispersed beyond these covered entities and the regulations do not directly affect employers or other non-covered entities. Thus, even if brain imaging were interpreted to come within HIPAA’s provisions, its protections would be subject to the same limitations inherent in HIPAA.

At best, HIPAA sets a minimum standard of protection. States, however, may enact their own more stringent requirements. New York, for example, statutorily imposes an obligation on health care providers to keep patient information confidential and to only disclose it in accordance with the statute.\footnote{N.Y. Pub. Health § 18((1)(e).} The restrictions on disclosure apply to a broad range of health care providers.\footnote{N.Y. Pub. Health § 18(1)(b), (c) and (d).} A health care provider may disclose patient information to someone other than the subject of the information pursuant to a patient authorization or when otherwise authorized by law by following the procedures set forth in the statute.\footnote{N.Y. Pub. Health § 18(1)(g), (2)(a), (2)(b), (2)(c) and (2)(d).} The party receiving the information must keep it confidential and is subject to the limitations on disclosure of N.Y. Public Health Law §18. If brain imaging were considered to come within these provisions of New York law, then the information would benefit from the additional protections afforded by such law.

In the justification for a bill\footnote{New York State Assembly A07197.} to establish a common law cause of action for invasion of privacy with regard to medical records in New York, it was noted that while health care practitioners are held to strict confidentiality standards, there is no way to hold others accountable when they improperly obtain or make improper use of medical records. Thus, improperly obtained information about brain scans could be made widely known.

As this brief discussion of legislation covering lie detectors, medical
research and health information shows, it is possible that the privacy of brain images would benefit from some protection if interpreted to come with in the scope of these regulations. However, such coverage would be piecemeal, applying only in certain contexts. If existing legislation were expanded to cover brain images, then some of these concerns could be addressed. Alternatively, brain images and information may merit their own set of regulations to ensure the protection of neuroprivacy in a manner similar to genetic privacy, which will be discussed below.

V. BRAIN PRIVACY AND GENETIC PRIVACY

As the prior discussion indicates, there is little current legislation that appears capable of directly protecting neuroprivacy. There has not been a lot of detailed discussion of the privacy implications of neuroimaging technologies despite the fact that there are major information-gathering initiatives relating to brain data, such as the Human Brain Project (“HBP”) whose purpose is similar to that of the Human Genome Project (“HGP”). In contrast to the HGP, which devotes 3-5% of its budget toward studying the ethical, legal, and social issues (ELSI) of the project, there appears to be little particular focus on, or funding for, the study of the social and ethical implications of gathering such information.

Some individuals are, however, concerned about these issues. Arthur Caplan, the Director of the University of Pennsylvania Center for Ethics and a prominent bioethicist, has written “[i]t is very likely that advances

80. In fact the HBP was announced in 1993 only three years after the Human Genome Project (“HGP”) was well underway in 1990 (though the HGP was officially announced two years earlier in 1988 by the National Research Council). See www.nimh.nih.gov/neuroinformatics/index.cfm. See also Final Report of the OECD Megascience Forum, Working Group on Biological Informatics, January 1999, available at <http://www.oecd.org/dataoecd/24/32/2105199.pdf> for a discussion of neuroinformatics. The HBP, like the HGP, is an international research project. It seeks, in part, to bring together information about the brain in a way that can be used by the research community and is related to the field of “neuroinformatics.” See also W. Sententia, “Brain Fingerprinting: Databodies to Databrains,” The Journal of Cognitive Liberties, vol. 2 issue 3, 31-46, available online at <http://www.cognitiveliberty.org/6jcl/6jCL31.htm.> [hereinafter “Databodies”] for additional discussion of the HBP.

81. Limited work has been done on these issues, and it has been done through private entities. The Dana Foundation and the American Association for the Advancement of Science (AAAS) cosponsored a 2003 conference for neuroscientists and law professionals to discuss emerging issues in neuroscience. The proceedings were recently published by the Dana Foundation in a compilation called Neuroscience and the Law: Brain, Mind, and the Scales of Justice, edited by Brent Garland. The articles do not discuss neuroprivacy at length.
in our ability to ‘read’ the brain will be exploited . . . for such purposes as screening job applicants, diagnosing and treating disease, determining who qualifies for disability benefits. . . .” 82 Others have expressed concern that one’s brain will be used against them. 83 Reference even has been made to a “brainome,” similar to a “genome”: Donald Kennedy, neurobiologist and editor-in-chief of Science, has stated “I already don’t want my employer or my insurance company to know my genome. As to my brainome, I don’t want anyone to know it for any purpose whatsoever. It is . . . my most intimate identity.” 84 With the development of “brain fingerprinting” and other technologies and the progression of research, privacy concerns about neuroscience will only increase. 85

The fears expressed regarding the privacy of brain information echo in many ways the concerns expressed with respect to genetic information. 86 Such fears were not unfounded in the case of genetic information, as the experience with sickle cell anemia 87 and, much more recently, the Burlington Northern Santa Fe Railroad case 88 have demonstrated. There is no reason to believe that brain information could not or would not also

82. As quoted in Stanford, supra note 4.
84. Stanford, supra note 4.
86. Others have already addressed this level of similarity between neuroscience and genetic concerns. See, e.g., Henry Greely, Neuroethics and ELSI: Some Comparisons and Considerations, in Neuroethics, supra note 1, at 84 (listing the concerns arising over genetics and their similarity to neuroscience concerns) [hereinafter “Neuroethics Comparisons”].
87. When tests were developed in the 1970s that allowed for screening of the presence of sickle cell anemia, which tends to affect African-Americans, both employers and certain states required testing for the gene. The fact that the testing was sometimes done without the employee’s knowledge, combined with the lack of adequate measures to ensure privacy of the results, resulted in discrimination against carriers. Eventually the National Sickle Cell Anemia Control Act was passed in 1972.
88. Employees of the Burlington Northern Santa Fe Railroad were tested without their knowledge for the presence of a genetic mutation causing carpal tunnel syndrome and were deprived of health benefits on the basis of such genetic information. Burlington ultimately settled a lawsuit based on the Americans with Disabilities Act with the Equal Employment Opportunity Commission in 2001. For additional discussion of this case and the sickle cell anemia experience, see S. Rep. No. 108-122, at 7 (2003).
be misused in similar ways. Brain information, just as genetic information, is viewed as having the potential to yield great benefits as well as great dangers.\textsuperscript{89}

Given these similarities and the limited legal treatment of the privacy of brain information, it is worth reviewing genetic privacy concerns in more detail. As genetic privacy has received a great deal of attention in articles, books and legislation, it may provide a useful construct for framing neuroprivacy protections. To the extent that privacy concerns raised by information related to brain function (particularly regarding the results of neuroimaging and other neurodiagnostic techniques) are similar to the privacy concerns that arise with respect to genetic information, genetic privacy protections may be good models for developing neuroprivacy protections, as well as valuable sources of information as to what is most effective or ineffective. If the privacy concerns between the two areas are different, then genetic privacy protections may be a less useful source of guidance on developing neuroprivacy protections. This section will examine the parallels and differences between the privacy concerns that arise with respect to genetic and brain information.

A survey of the legal literature and legislation on genetic privacy\textsuperscript{90} shows four main areas of concern: (1) the obtaining and collection of genetic information,\textsuperscript{91} (2) the disclosure of such information,\textsuperscript{92} (3) the use

\textsuperscript{89} See Brain Monitoring, supra note 4.

\textsuperscript{90} It is beyond the scope of this section to discuss the definition of "privacy," which is a complicated area in itself. See Graeme T. Laurie, Genetic Privacy: A Challenge to Medico-Legal Norms (2002) [hereinafter "Genetic Challenge"] and Symposium, The Human Genome Project, DNA Science and the Law: the American Legal System’s Response to Breakthroughs in Genetic Science, 51 Am. U. L. Rev. 451, for a discussion of these definitional issues. In New York, state law prohibits genetic tests on biological samples taken from an individual without that person’s informed consent. N.Y. Civil Rights Law Sec. 79-I. In addition, New York law prohibits an insurance company from requesting or requiring a person seeking insurance to be the subject of a genetic test without that person’s informed consent. Insurance Law Sec. 2612.

\textsuperscript{91} See, for example, section 105(c), “Prohibition on Collection of Genetic Information,” of the proposed Genetic Information Nondiscrimination Act of 2003, which seeks to address this type of privacy concern. S. 1053, 108th Cong. § 105(c) (2003). Collection of genetic information is also protected under Exec. Order No. 13145, 65 C.F.R. § 6877 (2000). See N.Y. Civil Rights Law Sec 79-I, which in general treats genetic tests on biological samples taken from an individual to be confidential, and prohibits their disclosure without the person’s informed consent.

\textsuperscript{92} This concern has been expressed in legislation such as the Health Insurance Portability and Accountability Act, 45 C.F.R. § 164.504(b)(1) (2004), which limits disclosure to employ-
of such information, in particular the discriminatory use by employers and insurers but also by the government; and (4) the right not to know genetic information. The principal concern expressed is that genetic information, as an indicator of what medical conditions people have or may have in the future, will be used to deny employment and thereby restrict access to health care (as employment is the primary source of health care insurance).

There are also privacy issues with respect to genetic information that are not related to the individual’s health. For example, there is some concern about genetic information being used to predict behavior or ability (e.g., that employers will test potential employees to determine who is genetically wired to be diligent or honest or particularly creative). The use of genetic information to identify an individual via DNA testing is also causing concern. The “national” DNA databases that are being created to store the genetic information of criminals as well as national health information also have significant privacy implications.

93. See, for example, Title I and Title II of the proposed Genetic Information Nondiscrimination Act of 2003. S. 1053, 108th Cong. (2003).

94. See discussion in Genetic Challenge, supra note 90, where these concerns are also addressed using the concepts of “spatial” and “informational” privacy and where the right not to know is particularly emphasized.


97. In the United States “the DNA profiles of convicted felons . . . are routinely maintained in
However, most privacy concerns about genetic information appear to be related to accessing health care, not predicting behavior or identity. For example, in evaluating the degree to which genetic privacy is protected by existing legislation, it has been noted that it would be covered by HIPPA’s protection of health information, which applies only in the context of health care insurance. 98 (See discussion supra Section IV.) The main themes in the Senate Report describing the proposed Genetic Information Non-Discrimination Act are genetic disease and ways in which genetic information relates to health care access and medical practice. The Senate Report specifically rejects the idea of creating a different set of privacy rules for genetic information from the rules that apply to health information. 99

Even in the employment context, genetic privacy concerns are significantly related to health care access. The main point is that people with genetic information showing susceptibility to a certain disease might simply not be hired or could be terminated as a way to reduce the employer’s burden of health care costs in the form of employer sponsored insurance and lost work days. 100 The discussion in the Senate Report is representative of this

98. See S. Rep. No. 108-122, at 8 (2003) (stating that HIPAA “affords some protection against discriminatory practices in health insurance based on an individual’s genetic information” and, later, that the medical privacy regulations promulgated under HIPAA “provide extensive regulatory direction on the permitted and impermissible uses of protected health information, including genetic information.”).

99. See S. Rep. No. 108-122, at 16 (2003), under Section 105, Privacy and Confidentiality, referring to testimony by the Assistant Secretary of Planning and Evaluation urging the HELP Committee not to “craft” legislation that creates a “different set” of privacy regulations for genetic information from those that cover health information. The committee stated that it believes that “treating all health information” in a consistent and similar way will encourage insurance coverage of genetic tests and facilitate protection of the use and disclosure of genetic information and that “it is inherently difficult to separate genetic information from other medical information in the delivery of health care and medical research. . . .”

100. See Marisa Anne Pagnattaro, Genetic Discrimination and the Workplace: Employee’s
view. It provides that an example of a prohibited practice under the proposed legislation would be for an “employer to refuse to hire an otherwise healthy applicant because of a fear that he may develop Parkinson’s disease. . . .”

Put more broadly, the privacy concerns raised about genetic information stem from its predictive quality, its uniqueness and stability and the fact that it provides information about more than one individual (i.e., its familial nature). Some of these qualities are shared by the information gleaned from brain images. The main shared characteristic of genetic and brain data is that both types of information hold out the promise of prediction. By analyzing genes and brain scans, it is hoped that propensities for disease and behavior can be established. Just as one of the main outcomes of the HGP is the ability to test for genetic diseases and conditions, so does brain imaging provide a way to see the structure and function of the brain. It is expected that images of blood flow and neural activity can be used to show the future likelihood of developing certain diseases and mental abnormalities. Eventually data from myriads of neuroscientific studies may be integrated in databases, similar to gene and protein sequence databases, to provide, among other things, functional models for how the brain operates—“brain atlases”—that will include a probability distribution for different cerebral characteristics and some indication of “normal” brain activity.

Another shared quality of genetic and brain information is that both


102. See Genetic Challenge , supra note 90, at 104, for a discussion of the qualities of genetic information.

103. Genetic Challenge , supra note 90, at 87, 88.

104. See Barbara Koenig’s presentation in Brain Science and Social Policy in Neuroethics, supra note 1, where she specifically discusses this predictive aspect.

105. For example, it is expected that it will be possible to predict when cognitive decline will begin for certain individuals. Neuroethics, supra note 1, at 61. See also Neuroethics Comparisons, supra note 86, at 84-86 (discussing the predictive aspect of the field of neuroscience); Rusinek H, De Santi S, Frid D, Tsui WH, Tarshish CY, Convit A, de Leon MJ. Regional brain atrophy rate predicts future cognitive decline: 6-year longitudinal MR imaging study of normal aging. Radiology 229(3):691-6 (Dec 2003).

types of information expose unique and personal, and to a large extent, uncontrollable, aspects of a person that previously were unobservable.\textsuperscript{107} Just as every person’s genetic make-up is unique, so is the brain considered an “organ of individuality.”\textsuperscript{108} In both cases, the availability of this type of unique, personalized information is a very recent phenomenon. It is hoped that neuroscience techniques, such as brain scanning, will, in a manner analogous to DNA testing, provide reliable, objective information about an individual person.\textsuperscript{109} Perhaps the pattern of blood flow and image of one’s brain while engaged in a particular task will be as unique an identifier as a fingerprint or genome. The concerns that have been expressed about using genetic information as a means of identification of one individual would apply to brain imaging information as well. Just as a piece of hair can be obtained easily and used to conclusively identify an individual, so could a momentarily scanned brain be used to identify the subject and reveal detailed, personal information about him or her.

This discussion emphasizes the parallel concerns between the privacy of genetic and brain information, in particular, the predictive quality of both types of data.\textsuperscript{110} Given that brain images are expected to be able to predict disease in a manner somewhat similar to genetic information and that there is a similar risk that brain images indicating a propensity for disease do not necessarily mean that the disease is present,\textsuperscript{111} concerns

\textsuperscript{107} However, in the context of brain activity, patterns of activity showing in brain scans could most likely be modified by learning and response to environmental stimuli. For a discussion of the private nature of genetic information see George J. Annas, Privacy and Discrimination in the Age of Genetic Engineering: Genetic Privacy: There Ought to Be a Law, 4 Tex. Rev. L. & Pol. 7 (1999).


\textsuperscript{109} William J. Winslade, Traumatic Brain Injury and Legal Responsibility, in Neuroethics, supra note 1, at 79.

\textsuperscript{110} See Neuroethics Comparisons, supra note 86, at 85, for a discussion of the predictive aspect of the field of neuroscience. “The same problems [as arise from genetic predictions] can arise from predictions obtained in neuroscience.” Id. at 86.

\textsuperscript{111} In the same way that the presence of a certain gene does not necessarily result in the expression of a disorder, a certain pattern in a brain image does not necessarily mean that there is functional problem. For example, PET scans of individuals with Huntington’s disease have been found to be indistinguishable from PET scans of people who were normal but at risk for the disease. See Neuroethics, supra note 1, at 116.
arise about ensuring that such information remains private and is not used as a basis to deny health care or employment. In addition, if brain images could provide a source of an individual’s identity and characteristics with the same ease and objectivity that genetic information does, then all the concerns about these features of genetic information would apply to neuroimaging as well. Given these similarities, legal protections developed to protect genetic privacy would be helpful toward protecting neuroprivacy.

However, there are significant differences in the privacy concerns that arise with respect to brain and genetic information. Although both types of information are predictive in nature, they differ in what they are considered predictive of. Genetic information is largely discussed in the literature as predictive of future disease; brain information is potentially predictive not only of disease but also of behavior. The idea that people's behavior in a range of areas could be predicted has privacy implications that are even greater than those that arise with genetic information.

Another unique aspect of brain imaging is that it may eventually permit seeing what people actually are thinking in real time. As technologies advance, these implications will receive more attention. As genetic privacy protections do not cover such concerns, they would be less useful models for protecting neuroprivacy and other protections will need to be developed.

Another set of concerns arises from the difference in the nature of genetic and brain information. The predictive aspect of brain and genetic information is made more complex by the fact that both genetic and mental processes are “multifactorial,” but mental processes are arguably more so. Just as different genetic and environmental factors may coincide to give rise to the expression of genetic disease for which one has a predisposition, various factors, including learning and other external and internal stimuli, will influence how a brain functions. In addition, the factors present in the participant’s providing information and in the recipient’s interpretation of the information are very different in genetic and brain information: obtaining brain information and images currently requires the individual’s conscious participation during the test, whereas in a ge-

112. Although the search is on for genes predictive of violence, alcoholism, or homosexuality, there is general awareness that many factors intervene between having a gene for a trait and expressing that trait.

113. For example, see the scenario described in Stanford, supra note 4.

114. See Brain Monitoring, supra note 4.
netic test, the subject’s participation is relatively minimal. In terms of interpretation, genetic information—especially with respect to the correlates between genome and disease—is more objective and, in large part, devoid of emotion and subjectivity. A sequence of DNA and amino acids is observed. However, the interpretation of brain images and behaviors is a much more subjective process, leaving more room for interpretation, bias, variation and error, as is discussed earlier. Thus, with brain imaging, the subjective factors are compounded, making interpretation and reliability of the information far more complicated.

Based on the discussion above, it appears that it would be worth considering genetic privacy protections as models for addressing privacy concerns raised by the ability of brain information to predict disease and its ability to identify an individual. However, the usefulness of genetic privacy protections will be limited due to the fact that brain information—with its potential ability to provide meaningful insight into complicated mental process such as predictions of behavior and views of real-time thoughts and mental functioning—raises privacy concerns and interpretive issues not present to the same degree with genetic information.

VI. CONCLUSION

With the potential to use neuroimaging techniques to predict behavior, display conscious or unconscious attitudes, or as a unique identifier or other purposes, there are many legal implications. Legal protection of neuroprivacy will be required as there is little existing law that seems capable of providing such safeguards. Existing law could be expanded to protect neuroprivacy, and genetic privacy legislation may serve as a useful model for shielding against some of the concerns that arise from neuroimaging. However, there are a range of factors that require careful consideration, since results are not yet standardized or uniform.

Moreover, future behavior based on brain function seems less predictable than future disease based on gene function (or even future disease based on brain function). While predicting future behavior is necessary in certain contexts—sexual abuse, parental rights—using it beyond a narrowly defined set of situations seems to cut against the exercise of free will, or even rehabilitation. In those instances where prediction of a person’s future behavior is necessary to protect society from dangerous conduct,
such as in civil and criminal commitment case involving mentally ill persons and sexual predators, and criminal investigations and counter terrorism, the legislature should weigh whether the state’s exercise of its police power outweighs the individual’s privacy interests. New laws may be necessary in these instances in order to protect society and the interests of children, as to the appropriateness of brain imaging in such contexts, the scope of its use, and the confidentiality of such data.

With regard to using brain imaging in the contexts of employment hiring decisions and the issuance of insurance, it is submitted that the individual’s privacy interests outweigh the financial interests of the employer or insurance company. A person in these contexts should not be restricted in employment or in getting insurance on the basis of what he or she may be thinking now or at some future point, but should be given the opportunity to be judged by his or her actions.

Moreover, in the research field, new laws should be passed providing for the confidentiality of individually identifying information when brain imaging is used. While reviewing genetic privacy concerns is instructive and there are many parallels to neuroprivacy concerns, it should be kept in mind that at the moment, genetic privacy concerns rarely involve liberty interests. When thinking about neuroprivacy, one should keep in mind the range of situations where brain scans could be at issue and the pace at which technology and research may advance in this field.

June 2005
The Committee on Science and Law

Andrew Mandell, Chair*
Matthew S. Haiken, Secretary

Christian Bleiweiss***
Eileen Mary Breslin
Marc Bruzdziaik
Peter J. Castellano
Joseph Evall
Arnold D. Fleischer
Adam Prescott Forman
Alexis Gorton
Drexel B. Harris
Howard Kleinhendler
Denice Krez
Stephanie R. Mann*

Ferris Nesheiwat
Joan F. Peters**
Irwin Pronin
Catherine M. Purdon*
Nina Reddy
William J. Rold
Allen I. Rubenstein
Sima Shapiro
Andrew M. St. Laurent
Leslie Carol Treff
Donna Werner

* Member of Subcommittee who drafted or substantially contributed to Report.
** Editor in Chief of Report.
*** Former Member of Subcommittee who drafted or substantially contributed to Report.

The Committee thanks law students Anne Elise Herold Li, Ann Hillam McGraw and Minna Oh who provided invaluable research assistance. In addition, the Committee thanks Drew Harris, Harvey Bluestone and Deola Taofik-Adekanmbi Ali for their participation.
Formal Opinion 2005-01

Pro Bono Consumer
Bankruptcy Representation

The Committee on
Professional and Judicial Ethics

TOPIC: Pro bono representation of debtors in Chapter 7 bankruptcy filings; limiting the scope of the representation; conflicts of interest.

DIGEST: The pro bono representation of an individual in connection with a Chapter 7 bankruptcy filing while simultaneously representing one or more of the individual’s creditors in unrelated matters will not typically create a conflict of interest within the meaning of DR 5-105. As a result, a lawyer participating in a pro bono program will ordinarily be able to satisfy his or her obligations under DR 5-105(E) by determining in an initial interview with the prospective client that no unusual facts sufficiently suggest direct adversity with a particular creditor so as to require a conflict check to determine whether that particular creditor is a client of the firm. If, however, any creditor subsequently objects to the discharge of a debt or takes other action that is directly adverse to
the Chapter 7 debtor, the pro bono lawyer may not represent the debtor in connection with that aspect of the Chapter 7 case unless a conflict check is undertaken and, if the objecting creditor is revealed to be a client of the lawyer’s firm, both clients consent to the dual representation after full disclosure.

**Code:** DR 5-105(A) – (E)

**QUESTIONS**

Two bar associations propose to establish separate programs in which volunteer lawyers drawn from the private bar, including lawyers from large commercial law firms, will represent low-income individuals on a pro bono basis with respect to Chapter 7 bankruptcy filings, which would result in staying certain credit collection, discharging certain consumer debts, and distributing any non-exempt assets among creditors. In one or both programs, experienced bankruptcy lawyers will serve as mentors to volunteer lawyers who are inexperienced.

In the first program, the scope of the representation will be limited by express agreement at the outset. In an initial meeting, the lawyer will assist the client in determining whether he or she is eligible for voluntary bankruptcy under Chapter 7 of Title 11, the United States Bankruptcy Code (the “Bankruptcy Code”), explain the bankruptcy process, counsel the client about possible alternatives (e.g., Chapter 7 filing, credit counseling, other Bankruptcy Code chapters resulting in the discharge of debts, or taking no action), assist the client in deciding whether to pursue a Chapter 7 filing and, if so, explain what information must be assembled to prepare the necessary filing. If the client wishes to file for bankruptcy under Chapter 7, the lawyer will meet with the client thereafter to prepare the necessary documents (which will disclose that they were prepared by a pro bono attorney under the auspices of the volunteer program), advise the client how to file the documents, and advise the client about the first meeting of creditors pursuant to Section 341 of the Bankruptcy Code (the “341 Meeting”) and the questions that may be asked by the United States trustee. The lawyer will also presumably advise the client on claiming exemptions, the requirements for discharge of debts, and the considerations relating to reaffirmations of debt. Thereafter, the client will proceed pro se. The initial agreement with the client will provide that the lawyer will assist only in preparing the documents needed to com-
mence a Chapter 7 case and providing advice prior to the actual commencement of the case.

In the second program, the representation will continue after the Chapter 7 case is commenced. In the rare event that a creditor files an objection to the discharge of a particular debt, the pro bono lawyer will represent the debtor in responding to the objection and in any adversary proceedings that follow unless the lawyer or the lawyer's firm represents the objecting creditor in another matter.

This Opinion addresses questions of professional conduct raised by the proposed pro bono programs.

DISCUSSION

In general, lawyers providing pro bono assistance to potential Chapter 7 debtors under the auspices of the proposed volunteer programs will be undertaking a legal representation subject to the provisions of the Code of Professional Responsibility governing the lawyer-client relationship. The proposed assistance, which will include giving advice about whether the client is eligible to file under Chapter 7 and ought to do so, as well as assistance in preparing the necessary legal documents, necessitates the formation of a lawyer-client relationship. 1

Limiting the Scope of Representation

A threshold question is whether it is ethically permissible, as volunteer lawyers in one program would do, for the lawyer to agree with the client at the outset of the representation that the lawyer will provide advice and drafting assistance prior to a Chapter 7 filing, at which time the representation will end. 2 In general, a lawyer may, with the understand-

---

1. The Code of Professional Responsibility does not include a provision on when a lawyer-client relationship is established. Although the relationship ordinarily comes about by express agreement, it may also be established implicitly. Authorities describe the relevant standard in various ways. For example, Section 14 of the Restatement (third) of the law governing lawyers (1998) provides: “A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and . . . (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services. . . .”

2. In recent years, considerable recognition has been given to the possibility of providing limited representation to individuals who cannot afford an attorney. See, e.g., Mary Helen McNeal, Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance, 67 Fordham L. Rev. 2617 (1999); Mary Helen McNeal, Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients, 32 Wake Law Rev. 1641 (1997).
ing and explicit agreement of the client,\(^3\) limit the scope of the lawyer’s representation, as long as doing so does not entail providing incompetent representation\(^4\) or representation that is so limited in scope that the client is not helped but harmed.\(^5\) For example, a lawyer may represent the client with respect to some but not all discrete stages of a matter.\(^6\) Or a lawyer may assist an individual who is otherwise representing him- or herself by providing legal advice\(^7\) or drafting documents.

Measured against those standards, the pro bono program which proposes to provide representation only through the commencement of a Chapter 7 case is ethically permissible as long as the volunteer lawyer ensures that the client is aware of, and consents to, any risks posed by limiting the scope of the lawyer’s representation. Thus, it is incumbent upon the volunteer lawyer to explain to the client what will or may occur following commencement of the case (e.g., the 341 Meeting, the possibility that objections will be made to exemptions claimed or to the discharge of certain debts, the standards regarding reaffirmation of debts, and the fact that the Trustee has investigatory and avoidance powers under the Bankruptcy Code) so that the client can make an informed decision about whether he or she is comfortable proceeding pro se. We also believe that the volunteer lawyer should independently evaluate whether the com-

\(^3\) Cf. N.Y. City 1987-02 (where lawyer agrees to draft pleadings for pro se party in matrimonial action, lawyer “must use his best efforts to ensure that the client’s decision to proceed in the manner the client suggested is made only after the client has been informed of all the relevant considerations, and after the client has been advised of the advantages and disadvantages of proceeding with, and without, counsel.”) (citations omitted)

\(^4\) Cf. N.Y. City 2001-03 (a lawyer may avoid client conflicts by limiting the scope of a representation); Model Rules of Prof’l Conduct R. 1.2 (2002); Model Rules of Prof’l Conduct R. 1.2, Cmt. 7, 8 (“[A]n agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation... All agreements concerning a lawyer’s representation of a client must accord with the Rules of Professional Conduct and other law.”)

\(^5\) See, e.g., N.Y. State 664 (1994) (holding that a lawyer may offer legal advice through a telephone call-in service if, inter alia, “the scope of representation is sufficient to render practical service to the client... and... the limited representation [does] not materially impair the client’s rights”); N.Y. City, 1987-02 (drafting pleadings for pro se party).

\(^6\) See, e.g., N.Y. State 604 (1989) (permissible to limit criminal representation to grand jury proceedings).

\(^7\) See, e.g., N.Y. City 1987-02 (drafting pleadings for pro se party in matrimonial action).
plexities of the case or the limitations of the client make it unlikely that the client could effectively proceed pro se. In such situations, the volunteer lawyer should consider assisting the client in finding other counsel, for example by referring the client to a pro bono program that provides representation throughout the pendency of a Chapter 7 case.

It will also, of course, be necessary for the volunteer lawyer to ensure that any assistance he or she has provided is appropriately disclosed. Where limited assistance is provided in the context of litigation, this Committee recognized in N.Y. City 1987-02 that to avoid misleading the court or opposing party, lawyers must ensure that the pro se party discloses that he or she received a lawyer’s assistance in drafting pleadings.8

Conflicts of Interest

The second—and considerably more complex—ethical issue implicated by the proposed pro bono programs relates to the potential application of the conflict of interest rule, DR 5-105, which requires lawyers to avoid representing differing interests without client consent (DR 5-105(A), (B) and (C)), imputes conflicts of interest within a law firm (DR 5-105(D)), and requires lawyers to check for conflicts before beginning a new representation (DR 5-105(E)). The complexities arise out of the possibility that one of the client’s creditors may be represented by the lawyer or the lawyer’s firm in an unrelated matter.

We are told that in typical Chapter 7 cases, creditors most frequently will be financial institutions, credit card companies and/or retail institutions of the type commonly represented by the law firms from which many of the volunteer lawyers will be drawn. We are further told that, as a general matter, debts sought to be discharged in a typical Chapter 7 case are relatively small with respect to any given creditor, particularly large institutional creditors; that in the overwhelming majority of these cases there are no significant nonexempt assets; and, that it is extremely rare for an objection to be made to the discharge of debt in Chapter 7 cases. Thus, for example, we are informed that the records for the United States Bankruptcy Court for the Southern District of New York reflect that during the most recent statistical year (July 1, 2003–June 30, 2004) 15,146

8. Drafting documents for pro se parties is also subject to any applicable legal restrictions, including, in litigation, any applicable rules of court. See generally John C. Rothermich, Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access To Civil Justice, 67 Fordham L. Rev. 2687 (1999). We are unaware of any additional legal restrictions applicable to Chapter 7 filings, but that is ultimately a question of law on which this Committee does not opine.
individual Chapter 7 cases were filed. Of these, 14,842 (98%) were deemed “no asset” cases. Only 223 adversary proceedings were filed during the same period involving a request for exceptions to the discharge of a debt under 11 U.S.C. § 523. Letter, Kathleen Farrell-Willoughby, Clerk of the Bankruptcy Court for the Southern District of New York, to Barbara S. Gillers, Chair, Committee on Professional & Judicial Ethics of the Association of the Bar of the City of New York, dated January 14, 2005, on file with the Committee).

The question is whether the representation of a Chapter 7 debtor seeking to discharge debts owed to a creditor gives rise to a conflict of interest when the creditor is represented by the lawyer or the lawyer’s firm in an unrelated matter. If so, before representing a Chapter 7 debtor, the volunteer lawyers would have to undertake conflict checks to identify whether such a conflict exists, and if it does, could not accept the representation without the respective clients’ consent. We are told that particularly for the proposed pro bono program that would be limited to pre-petition representation, it would be impractical to undertake such conflict checks and, where necessary, to seek the consent of the client-creditors, or to seek all the potential client-creditors’ consent in advance.

In general, a conflict of interest exists under DR 5-105(A), (B) and (D) when a lawyer represents one client in a matter that is directly adverse to a second client whom the lawyer or the lawyer’s firm represents in another matter, even if the two matters are unrelated. The most typical example is when a lawyer represents a client in litigation against a party whom the lawyer’s firm represents in another matter. See, e.g., Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976). The restriction

9. A recent provision of the ABA Model Rules of Professional Conduct, Rule 6.5, would limit the reach of the conflict rule in cases where a lawyer “provides short-term limited legal service to a client” on a pro bono basis, by providing that the imputed disqualification rule applies only to conflicts that the lawyer knows of and obviating the need to check for conflicts with regard to law firm clients of whom the lawyer is unaware. This model rule was recently endorsed in a report on New York-area lawyers’ pro bono response to the legal needs generated by the September 11, 2001 terrorist attacks. See Public Service in a Time of Crisis: A Report and Retrospective on the Legal Community’s Response to the Events of September 11, 2001 at 59 (2004) (concluding that the experience of lawyers’ response to September 11 “demonstrates the wisdom of Rule 6.5” and that the rule should be adopted “[t]o expand the availability of legal representation to those who cannot afford a lawyer, not only in emergency settings but in general”) available at www.abcny.org/pdf/PSTC1.pdf (last visited January 18, 2005). However, as of yet, the provision has not been adopted in New York.
against undertaking such a representation without the respective clients’ informed consent reflects the concern that, when a law firm’s activities are directly adverse to a current client, the client may reasonably perceive that the law firm is acting disloyally or may be less zealous in pursuing the client’s interests, and the client’s trust and confidence in the firm’s lawyers will be eroded as a result. See generally Charles W. Wolfram, Modern Legal Ethics 350 (1986) (“Even if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client who is sued can obviously claim that the lawyer’s sense of loyalty is askew.”).

A conflict does not necessarily exist, however, if the representation of one client is adverse to the interests of another client but the respective clients are not themselves direct adversaries in litigation or in an equivalent context. See, e.g., N.Y. City 2001-03 (conflict does not necessarily arise where lawyer’s work for a plaintiff in one lawsuit may be used by that plaintiff in another lawsuit against a party whom the lawyer’s firm represents in other matters, where a different law firm represents the plaintiff in proceedings against the other client) (citing Sumitomo Corp. v. J.P. Morgan & Co. 2000 U.S. Dist. LEXIS 1252 (S.D.N.Y. Feb. 7, 2000)); ABA Formal Op. 97-405 (1997) (lawsuit against corporate client’s subsidiary or parent is not necessarily “directly adverse” to corporate client, even though lawsuit may be financially adverse to client). See also Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp. 2d 276, 282, 288-89 (S.D.N.Y. 2001) (representation adverse to a current client in an unrelated matter may be justified on a proper showing).

This Committee’s research has not disclosed any ethics opinion addressing whether representation of an individual in connection with the filing of a Chapter 7 petition should be regarded as a representation that is directly adverse to the individual’s creditors such that the restrictions of DR 5-105 are necessarily triggered. For the reasons set forth below, we conclude that in the typical case a conflict will not be created when a pro bono lawyer represents an individual in connection with the filing of a Chapter 7 petition while simultaneously representing one or more of the individual’s creditors in unrelated matters. If, however, a client creditor subsequently objects to the discharge of a debt or otherwise takes action that is directly adverse to the debtor, the pro bono lawyer will be unable to represent the Chapter 7 debtor in connection with that aspect of the case unless both clients consent to the dual representation after full disclosure. In addition, we note that there may be Chapter 7 cases in which the particular facts are sufficiently suggestive of direct adversity that the
lawyer may be required to undertake a conflict check and obtain consent of all affected clients before undertaking the representation.

Unlike the commencement of litigation—which by definition is brought directly against one or more parties on behalf of another party with an adverse interest—the commencement of a typical Chapter 7 case is an *in rem* proceeding that triggers the automatic operation of a statutory framework for marshaling and distributing assets and discharging debt. Under that statutory framework, to the extent the debtor has non-exempt assets, those assets are distributed among the creditors in accordance with statutorily mandated criteria. To the extent debt is discharged (assuming no objection has been made to its discharge), that action likewise occurs by automatic operation of statute. In addition, to the extent adversary proceedings are brought by the Chapter 7 estate, the decision to do so is made by the court-appointed Chapter 7 trustee, not by the Chapter 7 debtor or his counsel.

The Chapter 7 statutory framework is one specifically intended to strike a fair balance between the rights of debtors and creditors, see, e.g., *In re Welzel*, 275 F.3d 1308, 1318-19 (11th Cir. 2001); *United States v. Spicer*, 57 F.3d 1152, 1156 (D.C. Cir. 1995); *In re Frasier*, 294 B.R. 362, 366 (Bankr. D. Colo. 2003), and, together with other provisions of the Bankruptcy Code, to ensure equality of treatment for creditors holding claims of equal priority. See, e.g., *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991); *In re Roblin Indus., Inc.*, 78 F.3d 30, 40 (2d Cir. 1996); *Advo-System, Inc. v. Maxway Corp.*, 37 F.3d 1044, 1047 (4th Cir. 1994). As a result, both debtors and creditors alike can be said to derive substantial benefit from the availability of Chapter 7 proceedings.

In light of the structure and purpose of the Chapter 7 statutory framework, we think it is reasonable to conclude that in the typical Chapter 7 case, there is no adversity between debtor and creditor sufficient to trigger the restrictions of DR 5-105 unless and until a creditor objects to the discharge of a debt or otherwise takes action that is directly adverse to the debtor.

The analysis would be different, however, if an initial interview of the prospective client revealed that the prospective client was involved in a litigation, dispute or other matter in which the other side was represented by counsel. Depending on the nature of the dispute, such a circumstance might indicate a risk that the lawyer’s firm was representing the opposing party in that dispute. And such risk would require that a conflict check be undertaken since even though the Chapter 7 filing itself is not directly adverse to any creditor, the lawyer might elsewhere be rep-
resenting a party in a matter that is directly adverse to the debtor and could undertake the dual representation, if at all, only with the respective clients’ consent. Similarly, if the lawyer or the lawyer’s firm represents institutional clients in consumer collection actions, we believe there is a sufficiently great risk of potential conflict that a conflict check may be required.

In addition, there may be circumstances specific to the Chapter 7 case that could render the conclusions expressed in this opinion less applicable. If, for example, the debtor had no non-exempt assets and only a single creditor, or if a particular creditor had already commenced or appeared to be (based upon the creditor’s statements to the debtor or actions toward the debtor) on the verge of commencing a collection action, then the filing of a Chapter 7 petition (which results in the automatic stay of litigation) could have at least the appearance of being more directly aimed at that particular creditor. In such a case, we believe that the lawyer may be required to undertake a conflict check and, if the creditor is a client of the lawyer’s firm, to seek consent of both clients before undertaking the representation.

Similarly, if the debtor client had granted new liens (such as a lien to a debt consolidation service) or made nonroutine payments within the past 90 days, then there is a greater likelihood that a particular creditor would be disproportionately affected by the filing of a Chapter 7 petition. There, too, we believe the lawyer may be required to undertake a conflict check and, if necessary, obtain consent of the affected clients before undertaking the representation.

We also note, as a possible source of further guidance, the analysis that has been applied in another area involving adversity of an indirect nature—namely, matters involving the affiliate of a client. In such cases, courts have often looked to the materiality of the indirect adversity to determine whether DR 5-105 is triggered. 10 Applied to the issue at hand, such an analysis would suggest that a conflict check may be required if the debt that would be discharged in the Chapter 7 case might have a material adverse effect on the creditor’s bottom line or if any other fac-

10. See, e.g., Travelers Indem. Co. v. Gerling Global Reinsurance Corp., 2000 WL 1159260, at *5 (S.D.N.Y. Aug. 15, 2000) (stating that if a lawyer is adverse to an affiliate of a corporate client, disqualification is proper only if, among other things, the representation will have a material adverse effect on the client’s “bottom line”); Hartford Accident & Indem. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534, 540 (S.D.N.Y. 1989) (stating that a conflict exists when a parent corporation client attaches “considerable importance” to litigation brought against its subsidiary).
tors existed that would cause the lawyer to conclude that the filing of a Chapter 7 petition might be of particular importance to one or more creditors.

Finally, we note that additional analysis might be necessary or a different conclusion might be reached if the prospective client’s personal circumstances make it advisable for him or her to consider other forms of bankruptcy relief (such as petitions under Chapter 11 or Chapter 13) or alternatives to bankruptcy (such as direct negotiation with creditors). Obviously, the volunteer lawyer could not represent the debtor-client in negotiations with a creditor who is a current client of the lawyer’s firm unless both clients consented to the representation. In addition, to the extent the volunteer lawyer believes that the debtor-client should consider seeking relief under Chapter 11 or Chapter 13 of the Bankruptcy Code, we note that this opinion does not address whether and to what extent the analysis presented here is applicable in other bankruptcy contexts.

The Need for Conflict Checks and/or Disclosure

As noted above, DR 5-105(E) requires lawyers to, among other things, “have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance . . . in complying with” DR 5-105 and certain other Code provisions regarding conflicts of interest.

Based on the foregoing analysis, and assuming that the lawyer’s firm does not represent clients in consumer collection actions, we conclude that a volunteer lawyer or mentor in the proposed pro bono Chapter 7 programs would satisfy his or her obligations under DR 5-105(E) by determining in an initial interview with the prospective client that none of the following factors is present:

- no creditor has commenced a collection action against the client;
- the client is not engaged in any litigation, dispute or other matter in which the other party is represented by counsel;
- the case is not one in which there is only one creditor;
- the client has not granted any new liens or made any nonroutine payments in the past 90 days;
- none of the debts to be discharged in bankruptcy is of a suf-
ficient size that it is likely to have a material impact on the creditor's bottom line;
• there are no other facts suggesting an unusual or disproportionate impact on any particular creditor; and
• there are no facts suggesting that the client should consider other forms of bankruptcy relief or alternatives to bankruptcy.

If, by contrast, one or more of the above factors is present, then we believe that additional analysis is necessary to determine whether the proposed representation would create a sufficient risk of direct adversity such that a conflict check would be required.

In addition, with respect to lawyers undertaking to provide full representation (as opposed to pre-petition representation only), we believe that it would be the better practice to advise the debtor-client at the outset of the representation of the possibility that a conflict might arise that would require the lawyer to withdraw. In fact, such advice might be affirmatively required if in the particular circumstances it appears likely to the lawyer that a direct adversity will arise between the debtor and one or more creditors. And if such an adversity does arise (whether through the filing of an objection to the discharge of debt or otherwise), a conflict check would be required under DR 5-105(E) and DR 5-105(B) (or perhaps DR 5-108) and the pro bono lawyer would be required to end the representation if the objecting creditor is a current client (or, in some circumstances, a former client) of the lawyer or the lawyer's firm and if one or both clients declined to consent to the dual representation after full disclosure in accordance with DR 5-105(C).

CONCLUSION

Given the structure and purpose of the Chapter 7 statutory framework, we believe that it is reasonable to conclude that the mere commencement of a Chapter 7 case will not ordinarily create an adversity between the debtor and his or her creditors that is sufficient to trigger the restrictions of DR 5-105. As a result, lawyers participating in pro bono Chapter 7 programs will (assuming that they or their firms do not represent institutional clients in consumer collection actions) ordinarily be able to satisfy their obligations under DR 5-105(E) by confirming in an initial interview with the prospective client that there are no unusual facts sufficiently suggestive of direct adversity with a particular creditor as to render it necessary or prudent to determine whether that creditor is a
client of the lawyer or the lawyer’s firm. If, however, any creditor subse-
quently objects to the discharge of a debt or otherwise takes action that is
directly adverse to the debtor, the volunteer lawyer cannot represent the
debtor in connection with that aspect of the Chapter 7 case without first
conducting a conflict check and obtaining any necessary consent under
DR 5-105(C).

January 2005
Formal Opinion 2005-02

Conflicts Arising From Possession of Confidential Information of Another Client

The Committee on Professional and Judicial Ethics

**TOPIC:** Conflicts of Interest; Duty of Confidentiality.

**DIGEST:** The fact that a lawyer possesses confidences or secrets that might be relevant to a matter the lawyer is handling for another client but the lawyer cannot use or disclose does not without more create a conflict of interest barring the dual representation. The critical question is whether the representation of either client would be impaired. In particular, the lawyer has a conflict if the lawyer cannot avoid using the embargoed information in the representation of the second client or the possession of the embargoed information might reasonably affect the lawyer’s independent professional judgment in the representation of that client. Whether that is the case depends on the facts and circumstances, including in particular the materiality of the information to the second representation and whether the information can be ef-
effectively segregated from the work on the second representation.

Whether the conflict can be waived depends on whether the lawyer can disclose sufficient information to the affected client to obtain informed consent and whether a disinterested lawyer would believe that the lawyer's professional judgment would not in fact be affected by possession of the information. If the lawyer is required to withdraw from the representation, the lawyer may not reveal the information giving rise to the conflict. Co-client representations present different considerations that are not addressed in this opinion.

CODE: DR 2-110(B)(2), Canon 4, DR 4-101, EC 4-5, DR 5-101, DR 5-105, DR 5-108, EC 5-1, Canon 6, Canon 7, DR 7-101, EC 7-1.

QUESTION
Where a lawyer has confidential information acquired in the course of the representation of one client that would be useful to another client, but their interests are not otherwise in conflict, can the lawyer continue the representation of the second client? If so, may the lawyer use the information in representing the second client? Must the lawyer do so?

DISCUSSION
In the course of representing one client a lawyer may acquire information that would be of use to another current or future client, even when the interests of the two clients are not otherwise in conflict, in situations in which the lawyer is under an obligation not to disclose the information to the second client or use the information for the second client’s benefit. For example:

Scenario 1: A lawyer represents the underwriters in a securities issuance and in the course of due diligence learns confidential information about the issuer. The lawyer owes a duty to the lawyer’s clients, the underwriters, arising out of the underwriters’ duties to the issuer, to keep the information learned about the issuer in due diligence confidential. After the securities issuance is completed, a long-time client requests the lawyer’s
assistance in seeking to acquire or enter into a transaction with the issuer. May the lawyer undertake the representation of the acquirer?

Scenario 2: A law firm represents an insurer in determining whether a claim by Company A for legal fees incurred in connection with an ongoing regulatory investigation is covered by Company A’s “directors and officers” insurance policy. In that connection Company A supplies information about the investigation to the insurer’s law firm under an understanding that the lawyers and the insurer will keep the information confidential. The law firm is then approached by regular Client B for assistance in forming a potential joint venture with Company A to which Company A will contribute the business being investigated by the regulators. May the law firm undertake the representation of Client B?

Scenario 3: A lawyer represents a state transportation agency in connection with planning a new rail line. To avoid land speculation, the agency insists that its deliberations about the route of the rail line be kept confidential. Another client asks the lawyer to assist it in acquiring one of several parcels of land in the general direction of the rail line. May the lawyer undertake the representation of the land purchaser?

**Use or Disclosure of Confidences and Secrets of One Client for the Benefit of Another**

We discuss first the questions of whether the lawyer may, or must, use information from the first representation for the benefit of the client in the second.

A lawyer has a duty to represent a client “zealously within the bounds of the law.” Canon 7. This duty includes the duty to use all available information for the benefit of the client and to disclose to the client information that the lawyer possesses that is relevant to the affairs as to which the lawyer is employed and that might reasonably affect the client’s conduct. N.Y. State 555 (1984); Spector v. Mermelstein, 485 F.2d 474, 479 (2d Cir. 1973); ABA MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1, rule 1.4, rule 1.7 cmt. 31 (2003); RESTATEMENT (SECOND ) OF AGENCY § 381 (1957); Geoffrey C. Hazard, The Would-Be Client II, NAT’L L.J., Jan. 29, 1996, at A19. It is clear, however, that the duty to use available information for the benefit of a client is qualified by duties of confidentiality to others, and in particular to other clients.

DR 7-101(A)(1) requires a lawyer “to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules.” (Emphasis added.) EC 7-1 likewise states, “The duty of a lawyer . . . is to represent the client zealously within the bounds of the
law, which includes Disciplinary Rules and enforceable professional obligations.” (Emphasis added.) Among the enforceable professional obligations set forth in the Disciplinary Rules is the duty not to use a confidence or secret for the advantage of any third person unless the client consents. DR 4-101(B)(3); DR 5-108(A)(2). It is thus clear that a client has no legitimate expectation that a lawyer will use confidential information of another client for the first client’s benefit. See, e.g., RESTATEMENT (THIRD ) OF THE LAW GOVERNING LAWYERS § 20 cmt. d (2000) (hereinafter, “RESTATEMENT”) ("Sometimes a lawyer may have a duty not to disclose information [to a client], for example because it has been obtained in confidence from another client . . . ."); N.Y. City 2001-1 (holding that a lawyer may not use information imparted by a prospective client for the benefit of an existing client, and noting that "there are many circumstances where a lawyer comes into possession of an adverse party's information and cannot use it"); ABA Formal Op. 358 (1990) ("It is not reasonable . . . for an existing client to expect that the lawyer will use, in connection with the representation, information relating to the representation of another client or a would-be client to the disadvantage of the other client."); N.Y. State 555 (1984) ("generally, the lawyer has no duty (and, indeed, no right) to disclose to one client confidential information learned from, or in the course of representing, another client"); N.Y. City 108 (1928-29) (holding that lawyer who had represented a creditor with an uncollected judgment could thereafter represent the debtor against another creditor "if the attorney does not divulge or use the secrets or confidence of his former client").

This conclusion is supported by the rules governing when a client is charged with a lawyer's knowledge. While a client is usually charged with a lawyer's knowledge relating to a representation, “[a] client is not charged with a lawyer’s knowledge concerning a transaction in which the lawyer does not represent the client.” RESTATEMENT § 28 cmt. b. See also RESTATEMENT (SECOND) OF AGENCY § 272 (1958) (providing that liability of a principal is affected by the knowledge of an agent “concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information”).

This does not mean that a lawyer cannot use any information learned in one representation for the benefit of another client. Indeed, what a lawyer learns in a representation necessarily becomes part of the storehouse of knowledge and experience that the lawyer may draw on in the lawyer's career and that is part of the value the lawyer brings to each successive representation. We do not here attempt to define what infor-
information may not be used in a subsequent representation absent consent, beyond noting that, in general, any prohibition on using for one client's benefit information gained in representing another extends only to "confidences" and "secrets." See DR 4-101(B)(3); DR 5-108(A)(2). It is clear that not all information gained in the course of the professional relationship is either a "confidence" or a "secret." A "confidence" is information protected by the attorney-client privilege; a "secret" is information gained in the professional relationship that the client has, explicitly or implicitly, "requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A). See also RESTATEMENT § 60 cmt. j (permissible to use one client's confidential information for the benefit of another client if no "material risk of harm to the original client"); ABA MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 5 (2003) ("The Rule does not prohibit uses that do not disadvantage the client.").

Conflicts Created by Possession of Information from Another Representation

The next question is whether a conflict arises where a lawyer has confidential information of one client that would be of use to, but cannot be disclosed to, or used for the benefit of, another client. We are not considering situations in which the clients' interests are otherwise in conflict with respect to the matter, because then the lawyer would generally not be able to represent the two clients at all. If they are concurrent clients, DR 5-105 bars the lawyer from representing one against the other, absent consent. If the confidential information was acquired in the representation of a former client and would be useful to a current client whose interests are adverse to the former client, the two matters will often be substantially related so as to preclude the current representation (again, absent consent) under DR 5-108(A). See, e.g., N.Y. State 723 (1999) ("The most important factor [in determining whether two matters are substantially related] is whether the . . . lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation.").

1. We are aware of a number of court cases and older New York State ethics opinions that apply a two-part test to determine whether a conflict exists where a lawyer represents clients whose interests are adverse to those of a former client: whether the matters are substantially related and whether the lawyer received information in the prior representation that is substantially related, or of "use," to the present representation. See, e.g., Nomura Sec. Int'l, Inc. v. Hu, 658 N.Y.S.2d 608, 610 (App. Div. 1st Dept. 1997); Bank of Tokyo Trust Co. v. Urban
The scenarios set forth at the outset of this opinion each present this question. In the first, the lawyer represented the underwriters in the first representation and is adverse to the issuer in the second. The lawyer is not adverse to his former clients, because at the time of the second representation, the underwriters (unless they are involved in the second matter as well) are indifferent to whether the acquirer or counterparty succeeds or not. But the lawyer has confidential information about the issuer that may be used against the issuer in representing the acquirer or counterparty. For example, the lawyer may have reviewed and kept copies of projections of financial results that would be useful to an acquirer or counterparty in deciding what price to bid or offer. Or the lawyer may have learned very damaging information—such as the prospect of indictment—that caused the earlier securities issuance not to go forward. While the acquirer or counterparty might eventually learn that information in the course of due diligence in the second transaction, having it earlier in the sales process might be useful. That information cannot, however, be disclosed because of the underwriters' demand (derived from undertakings to the issuer and from the securities laws) that their lawyer not disclose due diligence information not otherwise disclosed in the prospectus.

Similarly in the second scenario, the insurance company may acquire relatively detailed information about the insured that might be useful to the acquirer (e.g., the significance of the investigation, the insurance

Food Malls Ltd., 650 N.Y.S.2d 654, 665 (App. Div. 1st Dept. 1996); N.Y. State 638 (1992); N.Y. State 628 (1991); N.Y. State 605 (1989); see also N.Y. State 492 (1978). As we discuss below, while we question the language and reasoning of one of the New York State ethics opinions, these cases and opinions address situations in which the interests of the lawyer's second client were clearly adverse to the interests of the first. Where that was not the case the court found no conflict. See Nomura Sec., 658 N.Y.S.2d at 609-10 (noting that former client was merely a witness, not a party, and that his interests were in harmony with present client's). These cases and opinions thus do not present the question addressed in this opinion. To the extent they bear on interpretation of the Code, they may be seen as relating to the breadth of the "substantial relationship" test in DR 5-108.

2. See, e.g., Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc., 82 Cal. Rptr. 2d 326, 332 (Ct. App. 1999) (reversing disqualification of underwriter's counsel in later lawsuit between underwriter and issuer because underwriter's counsel never represented issuer). A recent New York case concluded that the lawyer for the underwriter has fiduciary obligations toward the issuer that could result in disqualification from a later suit brought by the law firm against the issuer if the information the law firm obtained in due diligence was substantially related to the issues involved in the litigation. HF Management Services, LLC v. Pistone, Index No. 602832/04 (Sup. Ct. N.Y. Co. Feb. 16, 2005). A lawyer may wish to establish a clear understanding with the issuer that its possession of information of the non-client that is not used in any later representation would not constitute a conflict or lead to disqualification.
Conflicts Created by Possession of Information in Concurrent Representations

The Code expressly addresses whether the simultaneous or successive representations of clients results in a conflict of interest that would bar representation of one or both clients in two provisions: DR 5-105, dealing with conflicts between current clients, and DR 5-108, dealing with conflicts between a current client and a former client. In addition, DR 2-110(B)(2), which requires withdrawing from a representation if “continued employment will result in violation of a Disciplinary Rule,” and DR 5-101, which addresses conflicts of interest arising from personal interests of a lawyer, play a role.

Under DR 5-105, a conflict arises between concurrent clients if the concurrent representation would “involve the lawyer in representing differing interests” or if “the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected.”

The mere fact that the lawyer possesses information from another representation that would be useful to the client is not the representation of “differing interests.” This is because, as set forth above, the second client does not have any legitimate expectation that the lawyer will use confidential information of the first client for the benefit of the second.  

3. The example in the third scenario may not be perfect, because at least in some situations the state’s interests in avoiding speculation and the purchaser’s interest in picking the right parcel might be so directly adverse that they would give rise to a conflict even if the lawyer did not have access to inside information about the routing of the rail line.

4. We do not address in this opinion the situation of jointly represented co-clients, who often do have an expectation that all confidences and secrets relating to the joint representation will be shared. See N.Y. City 1999-7 (noting “the lack of any expectation by joint clients that their confidences concerning the joint representation will remain secret from each other”); N.Y. State 761 (2003) (“In a joint representation all confidences and secrets are deemed to be shared absent agreement of the co-clients to the contrary.”); RESTATEMENT § 60 cmt. l (“Sharing of information among co-clients with respect to the matter involved in the representation is normal and typically expected.”). But see N.Y. City 2004-2, text accompanying n.9 (holding that absent consent, lawyer “may not be able to pass on [to corporate client] the confidences and secrets of [the lawyer’s] employee client”). In such situations, it may be that if one co-client discloses information to the lawyer but demands that the lawyer keep the information from the other co-client, the lawyer will be representing differing interests and...
There are situations, however, where information that the lawyer has in his or her mind from the first representation is so material to the second representation that the lawyer cannot avoid using the information. In that situation, the lawyer can be said to represent “differing interests” in the sense that the representation of one client cannot be accomplished without violating the rights of another. Alternatively the lawyer can be said to be unable to proceed under DR 2-110(B)(2), because continued employment will mean violating a disciplinary rule, namely the requirement of DR 4-101(B)(3) that a lawyer may not use a confidence or secret for the advantage of another client. Regardless of how the conflict is characterized, the lawyer cannot proceed unless one client agrees to permit disclosure and use of the information or, in some circumstances, the other client agrees to limit the scope of the engagement. This last point is discussed further below.

Scenario 3 illustrates this problem. If the lawyer learns the precise routing of the rail route in advance of the public but at a time when it would be useful to the prospective land purchasing client, the lawyer could not pretend not to know that information in advising the client on which parcel to buy.\(^5\)

The second test set forth in DR 5-105 is whether the lawyer’s exercise of independent professional judgment, which must be exercised zealously...
in the interests of the lawyer’s client, will be or is likely to be adversely affected by the lawyer’s possession of the information and the restriction on its disclosure or use. The issue is that a lawyer may steer so far clear of disclosing or using the embargoed information that the lawyer will not pursue other avenues that another lawyer might pursue to obtain the information. The lawyer, for example, may not recommend a course of conduct that he or she otherwise might, or not investigate a situation, for fear that the impetus was tainted by confidential information. The Los Angeles Bar Association explained this concept in responding to an inquiry in which the lawyer knew facts about former Client A’s dishonesty that would be highly material to Client B, who was contemplating entering into a transaction with Client A:

Knowing of A’s dishonesty, Law Firm might be tempted to recommend that B take special precautions to protect itself, but would be forbidden from using A’s confidences to its detriment in this manner. Thus, Law Firm would constantly have to second-guess whether its advice to B was affected by Law Firm’s secret knowledge of A’s dishonesty. As the court stated in Goldstein v. Lees, 46 Cal. App. 3d 614, 620 (1975): “It is difficult to believe that a counsel who scrupulously attempts to avoid the revelation of former client confidences—i.e., who makes every effort to steer clear of the danger zone—can offer the kind of undivided loyalty that a client has every right to expect and that our legal system demands.”

Los Angeles Formal Op. 463 (1990). See also In re Compact Disc Minimum Advertised Price Antitrust Litig., MDL No. 1361, 2001 WL 243494, at *3 (D. Me. Mar. 12, 2001) (holding that law firm in consumer class action against retailers had a conflict where firm had undertaken not to sue or seek discovery from former retailer client, or use information obtained in that representation, because those undertakings “carry the distinct potential of reducing [the law firm’s] effectiveness in representing the putative consumer plaintiff class vigorously”); N.C. Formal Op. 2003-9 (2004) (holding that lawyer had a conflict where lawyer could not use information from prior representation of another plaintiff against the same defendant because

6. In the Los Angeles opinion, the interests of former Client A and current Client B were clearly adverse, so there would likely have been a conflict under New York’s rules regardless of the possession of information, but the discussion of the potential detrimental effect of the possession of information on the representation of Client B applies as well when the interest of the clients are not adverse.
cause the “[a]ttorney’s failure to use Plaintiff’s confidential information would materially limit his representation of the other employees”).

Under either test, whether the possession of the information will create a conflict will depend on the totality of the circumstances. A critical factor is the materiality of the information to the second representation. The more material the information, the more likely that a lawyer cannot avoid using it or, at least, that the lawyer’s professional judgment on behalf of the client may be affected by knowledge of it. One element of materiality is whether the information in question would be uncovered in the ordinary course of the other matter. If so, then the information would be material only if it was important to have the information earlier than it would have been obtained in the ordinary course. In Scenarios 1 and 2, it may be that the information possessed by the lawyer from the prior due diligence and from the insurance company representation would inevitably be sought in conducting due diligence for the first transaction (either because there are standard questions that would uncover the information or because publicly available information about the target would signal the need to make such inquiry). In that case, unless when the information is known is important, the possession of the information would not likely affect the representation. In Scenario 3, however, the value of the information about the rail routing is in its early possession, so the fact that the routing will eventually be public would not mitigate the conflict presented.

A second factor is the ease with which the information can be segregated from the work on the second matter to ensure that the information is not used. Here a significant consideration is the specificity of the information and whether it is of a kind that the lawyer will likely recall. The rail routing in Scenario 3 or the identity of the thief in N.Y. State 525 are examples of information that, once learned, cannot be pushed from the mind. The existence of financial projections in due diligence files that were not focused on in the earlier matter and are not recalled is unlikely to have any effect on the lawyer’s judgment as long as the lawyer does not look at the files and the files are effectively sealed.

Conflicts Created by Possession of Information of a Former Client

The Code’s rule with respect to former clients—the situation presented by Scenario 1—does not include a provision that refers to the effect on

7. In securities issuances, for example, the underwriter will inevitably conduct due diligence. See 15 U.S.C. § 77k(b)(3) (providing the underwriter with a defense to liability for material misstatements in a registration statement if it performs a reasonable investigation to ensure that all necessary disclosures were made).
the independent judgment of the lawyer in representing the current client. DR 5-108 contains two prohibitions: the lawyer may not represent a client “in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client”; and the lawyer may not “[u]se any confidences or secrets of the former client.” In the situations we are considering, there is no conflict because the clients’ interests are aligned or not adverse. While DR 5-108 does not itself contain a provision barring representation where the exercise of professional judgment would be affected because of duties to a former client, we believe that the same test of whether possession of the information might have an effect on the lawyer’s judgment applies by virtue of DR 5-101. That rule bars a lawyer (absent consent) from accepting or continuing employment “if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer’s own financial, business, property, or personal interests.” If the lawyer’s professional judgment on behalf of a client would be affected by knowledge of information from a prior representation that the lawyer cannot use or disclose, that is a “personal interest” under DR 5-101. See N.Y. State 628 (1992) (holding that lawyer has a conflict under DR 5-101 if his professional judgment in behalf of a client would be affected by possession of information arising out of a prior representation). Cf. ABA Formal Op. 358 (holding that where lawyer has information derived from a prospective client, “[t]he principal inquiry . . . is whether, as a result of the lawyer’s duty to protect the information relating to the representation of the would-be client, the lawyer’s representation of the existing client may be materially limited”).

Contrary Reasoning in Ethics Opinions and Court Cases

We are aware that there is language and reasoning in ethics opinions and some court cases that treat the mere possession of information that might be of use to one client, but that is protected as a confidence or secret, as creating a conflict requiring withdrawal. See, e.g., N.Y. State 605

8. Another source of such a test in a former-client situation would be a combination of Canon 6 (requiring a lawyer to represent a client “competently”), Canon 7 (requiring a lawyer to represent a client “zealously within the bounds of the law”) and DR 2-110(B)(2) (requiring a lawyer to withdraw if continued employment would violate a disciplinary rule). Indeed, N.Y. State 628, the opinion referred to above in connection with the discussion of DR 5-101, also suggests elsewhere in the opinion that the source of the test in the case of former clients is Canons 6 and 7: “A lawyer possessing such confidences and secrets of the former client must evaluate whether such possession impairs his or her professional obligation to represent the current client competently and zealously within the meaning of Canon 6 and Canon 7” (also citing EC 5-1).
(1989) ("absent considerations of waiver or client consent, no lawyer may ever undertake to represent an adverse party where information acquired in the course of a prior representation might be used to his former client's detriment") (citation omitted); N.Y. State 492 (1978) (same). See also Bank of Tokyo, 650 N.Y.S.2d at 665 ("Absent a substantial relationship between the two matters, the party seeking disqualification must demonstrate that the attorney received confidential information about the party that is 'substantially related' to the current litigation."). As noted above, many of these authorities address situations in which the interests of the two affected clients are adverse (beyond the interest in having access to the information in question), and thus the results, or tests discussed, can be understood as elaborations of the basic conflicts rules. One of these opinions, however, N.Y. State 638 (1992), explains these results in terms that conflict with our analysis here. In addressing conflicts arising from possession of information derived from a former client, that opinion states:

[I]f Lawyer possesses a confidence and secret within the meaning of DR 4-101(A), which is not otherwise permitted to be disclosed by one of the several preconditions of DR 4-101(C), but which nevertheless must be used under Canon 7 to discharge faithfully and zealously the current proposed representation in a governmental capacity, Lawyer unquestionably cannot represent the government zealously under Canon 7 without violating DR 5-108(A)(2) and DR 4-101(B). . . . Zealous representation by the prosecutor would require disclosure, DR 7-101(A)(1), but DR 5-108(A)(2) and DR 4-101(B) would prohibit disclosure.

We believe this analysis ignores the express qualification of DR 7-101 that limits the obligation of zealous representation by duties contained elsewhere in the disciplinary rules, including the duty of confidentiality under Canon 4. Moreover, the implications of such an analysis are boundless, because the duty to use information for the benefit of a client is very broad. It makes little sense to disqualify a lawyer because he or she has information that might be useful to the second client, regardless of mate-

9. The opinions also cite EC 4-5 (e.g., N.Y. State 605), the last sentence of which states, "Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure." (Emphasis added.) This expansive interpretation of the EC, to mean that employment would "require such disclosure" where the information would be of use to the client, is inconsistent with the language of DR 7-101, which does not require disclosure of another client's confidences and secrets.
riality or significance. A more sensible result, at least where the interests of the clients are not adverse, and one more faithful to the language of the Code, (1) recognizes that lawyers regularly have information that they cannot use for the benefit of a client, and (2) focuses on the effect that possession of the information has on the representations in question.

The United States Court of Appeals for the Second Circuit also suggested an expansive test in Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779 (2d Cir. 1999), and Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120 (2d Cir. 2002), but there were in that case conflicts of interest and other factors that distinguish it from the situations addressed in this opinion. In that case, a bank consortium that included both Bank Brussels Lambert and Chase Manhattan Bank (as agent for the lending group) hired a Puerto Rican law firm to provide an opinion letter with respect to security the banks were obtaining as part of a loan transaction. During the representation, the law firm allegedly learned in the context of an unrelated representation of Chase that the borrower had been manipulating the borrower’s accounting procedures and financial reports. In the context of a ruling on personal jurisdiction over the Puerto Rican law firm, the court affirmed the district court’s holding that, under the Puerto Rico Canons of Professional Ethics, the law firm would have a conflict that required it to withdraw if it learned in the course of one representation information that would be material to another representation that it could not disclose to the second client. 305 F.3d at 125-26. The Second Circuit suggested that the result would be the same under New York law. Id. at 125.

We note that the parties had not argued the law of New York or any jurisdiction other than Puerto Rico. Id. at 125. But in any event, under the allegations recounted in the opinions, the law firm may have had a

10. The Second Circuit said:

As the district court correctly noted, Puerto Rican courts have determined that a conflict may arise where, in the course of successive or simultaneous representations of clients, “the adequate representation of a subsequent or simultaneous client may require disclosure of the other client’s confidences.” [Bank Brussels Lambert v. Fid-dler Gonzalez & Rodriguez, No. 96 Civ. 7233 (LMM), 2001 WL 893362, at *2 (S.D.N.Y. Aug. 8, 2001)] (quoting In re Belen Trujillo, 126 D.P.R. 743, 754 (1990) (English trans.)) Upon discovering such a conflict, the attorney must withdraw from the representation without divulging any confidential communications. Id.

305 F.3d at 125.

11. Indeed, the language from an earlier Puerto Rican Supreme Court decision on which the district court relied, Belen Trujillo, 126 D.P.R. at 754, was dictum.
conflict of interest that would have necessitated withdrawal regardless of possession of information of use to Bank Brussels Lambert, since the plaintiff alleged that the law firm had “helped” Chase prepare documents “in order to sanitize the record of these activities.” 171 F.3d at 783-84. Even without this factor, however, it appears that the information allegedly withheld—that the clients’ borrower was engaged in accounting fraud—may have been so material that the firm could not have continued the representation under the standards applied in this opinion.

Consent to Waive Conflict Created by Possession of Information

If there is a conflict, the question becomes whether the conflict is consentable. This will typically turn on two questions: whether sufficient information can be disclosed to each of the clients to obtain their informed consent; and whether a disinterested lawyer would conclude that the representation of each current client would in fact not be adversely affected by possession of the information. See DR 5-101; DR 5-105(C).

As to the first question, the ability to obtain consent may be hampered by the inability to disclose the information in question. In Scenario 2, for example, if the fact that the joint venture is being considered is itself confidential, the lawyer could not approach the insurance company for permission to use the information derived from the earlier representation.

The second test for consent is different from the second test for whether a conflict exists that is discussed above because the test for whether a conflict exists is whether the lawyer’s professional judgment will be or might be affected, DR 5-101(A) (“will be or reasonably may be”); DR 5-105(A) (“will be or is likely to be”), while the test for whether the conflict is consentable is whether a disinterested lawyer would believe the representation would not in fact be adversely affected, DR 5-101(A) (“a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby”); DR 5-105(C) (“a disinterested lawyer would believe that the lawyer can competently represent the interest of each”).

One other resolution of the conflict would be to limit the scope of the representation of the affected client going forward. This would require the informed consent of the client, to the extent that can be accomplished without disclosure of the protected information. N.Y. City 2001-3

12. In addition, Chase and Bank Brussels Lambert were co-clients of the law firm, and thus may have had a special duty of disclosure to each other, see note 4 supra. Whether such a heightened duty would have extended to information obtained by one of the co-clients in a separate representation is open to question, however, and is a matter we do not address in this opinion.
Duties in Withdrawing from the Representation

If the possession of information that may create a conflict is identified at the outset of the representation, the lawyer must either obtain consent or decline the representation. If the lawyer declines the representation there will be no need to disclose the reason for the conflict. If the lawyer comes into possession of the information during the representation, or if the information becomes material only during the representation, and consent cannot be obtained, the lawyer must withdraw (or, in the case of matters before a tribunal, seek to withdraw) from the affected representation. DR 2-110(B)(2) (requiring withdrawal if “[t]he lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule”).

The question of what the lawyer can or must say to the affected client upon withdrawing has arisen in the context of co-client representations and has split the authorities that have considered it. In N.Y. State 555 (1984), a majority of the New York State Bar Association ethics committee held that where one partner in a joint representation discloses to the lawyer in confidence that he was “actively breaching the partnership agreement,” the lawyer could not disclose the information to the other co-client. A minority dissented, opining that the lawyer has the discretion, if not duty, to disclose the information in the course of withdrawing. The Restatement adopted the position of the New York State Bar minority. The Restatement concludes:

In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy.

RESTATEMENT § 60 cmt. l.
Whatever may be the correct result in the co-client situation, the Code does not contemplate an exception to the duty of confidentiality simply because the information may be highly relevant to another client. Rather, as we have said, the duty to use all available information for the benefit of the client is qualified by obligations of confidentiality to others. We conclude that where a lawyer is forced to withdraw from a representation because the lawyer cannot disclose or use material information of another client’s, the lawyer is not at liberty to disclose the information. The lawyer should simply state that a conflict has arisen that requires withdrawal for professional reasons. As long as doing so does not effectively disclose the information, the lawyer may state that he or she has acquired information that raises a conflict that requires the lawyer to withdraw. Where identifying the client that “created” the conflict is tantamount to disclosing the information, that client may be revealed.

CONCLUSION

In the course of representing clients, lawyers frequently come into possession of information that would be of use to other clients but that they cannot use for the latter clients’ benefit. The possession of that information does not, without more, create a conflict of interest under the Code. The critical question is whether the representation of either client would be impaired. In particular, the lawyer has a conflict if the lawyer cannot avoid using the embargoed information in the representation of the second client or the possession of the embargoed information might reasonably affect the lawyer’s independent professional judgment in the representation of that client. Whether that is the case will often depend on the materiality of the information to the second representation and the extent to which the information can be effectively segregated from the work on the second representation. Even if the lawyer has a conflict, it may be possible in certain circumstances for the clients to waive the conflict without revealing the information in question. If the lawyer must withdraw, the lawyer should not reveal the embargoed information.

March 2005
Formal Opinion 2005-03

Voluntary Attorney Testimony Concerning Former Clients

The Committee on Professional and Judicial Ethics

**TOPIC:** Lawyer as Witness; Duty of Confidentiality.

**DIGEST:** There is no per se bar preventing a lawyer from voluntarily testifying about a former client. However, if the testimony would involve revelation of a “confidence” or “secret”, the attorney must conform to the limitations in DR 4-101. In particular, if the testimony would disclose a confidence or a secret, the lawyer should attempt to secure the former client’s consent before agreeing to testify. If in the course of testifying, the lawyer is asked a question for which the client’s consent has not been obtained, the lawyer should assert any applicable objection, including privilege, where applicable, that would enable the lawyer to avoid answering the question.

**CODE:** DR 4-101; EC 4-6; EC 4-4; DR 5-108

**QUESTION**

When, and under what circumstances, may an attorney volunteer testimony concerning a former client?

---

THE RECORD

466
This Committee has been presented with the question of whether, and under what circumstances, a lawyer may, consistent with the lawyer's obligations under the New York Code of Professional Responsibility (the “Code”), voluntarily provide testimony about a former client. The attorney may be presented with this often difficult question in any number of scenarios—whether asked to appear without compulsion of subpoena or to provide an affidavit for a court filing. A lawyer might be asked for testimony in competency proceedings where the former client’s mental capacity is at issue; matrimonial actions where the lawyer represented one or both of the spouses on unrelated matters; partnership disputes where the lawyer previously represented one or more of the partners; or even contract disputes where the former client’s expressed intentions and state of mind at the time documents were drafted are relevant.

While there is no per se bar preventing a lawyer from testifying about a former client, the lawyer generally cannot voluntarily testify about the former client, subject to certain limited exceptions. As set forth below, the extent to which a lawyer may voluntarily testify will be determined by the nature of the testimony sought and the context in which it is to be provided.

None of the rules in Canon 5 governing conflicts between lawyers and clients create an absolute bar to voluntary testimony. Specifically, DR 5-105 and DR 5-108(a)(1) prohibit a lawyer from representing, or being employed by, a person where the representation is likely to be affected by a conflict of interest between that person and the lawyer’s current or former clients. But it is clear that providing testimony for a person—including a former client—in a proceeding in which the lawyer is not serving as counsel, falls well outside the meaning of “representation” or “employment.” Restatement (Third) Of The Law Governing Lawyers § 14 (2000) (hereafter, “Restatement”) (“A relationship of client and lawyer arises when: a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person”) (emphasis added). For similar reasons, DR 5-102 (the “lawyer-witness rule”) does not, per se, bar a lawyer from testifying about a former client. That rule, too, analyzes the problem in terms of current or prospective employment or representation, not past employment or representation.

Other provisions of the Code speak to this issue, however. DR 5-108(A)(2), which itself incorporates provisions of DR 4-101, expressly prohibits a lawyer from using any confidences or secrets of a former client, unless, as described in greater detail below, the confidence or secret has become generally known, or if permitted by the exceptions delineated in DR 4-101(C).
These rules prevent attorneys from revealing the confidences or secrets of any former clients by way of an affidavit, trial testimony, or otherwise. Accord EC 4-6 (the obligation to protect the confidences and secrets of a client continues after the termination of employment); Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998) (holding that the attorney-client privilege survives the death of the client, since posthumous application of the privilege encourages full and frank communication with counsel); Jamaica Pub. Serv. Co. v. AIU Ins. Co., 684 N.Y.S.2d 459, 462 (N.Y. 1998) (an attorney owes a “continuing duty” to a former client not to reveal confidences learned in the course of a professional relationship).

Although in a slightly different context, the Committee has previously underscored the importance of protecting a client’s confidences and secrets following the termination of the attorney-client relationship. In our opinion 1999-7, the Committee addressed the question of whether an attorney who had jointly represented a married couple in matters relating to the wife’s immigration status could subsequently provide files relating to that representation to her husband after litigation erupted between the spouses. Recognizing that, as an evidentiary matter, no attorney-client privilege could exist between these former clients, we nonetheless rejected the contention that this allowed the lawyer to “choose sides” by sharing confidences and secrets of one joint client with the other in a dispute between them without consent. Concluding that the attorney could not share documents with the husband relating to the wife’s confidences and secrets without her consent, we noted:

As an ethical matter, if the Husband were able to compel the lawyer to provide him on request with personal information about the former co-client Wife under circumstances where it would be used against the Wife simply because the information was no longer subject to the attorney-client privilege, it would enable one co-client to utilize the lawyer as a weapon against the other former co-client. In the Committee’s opinion, this would violate not only the lawyer’s duties to protect and preserve “secrets” of the client but would also involve the lawyer in violating the duty to remain loyal to the client in the matter for which he was retained.


These precedents make clear that the relevant question for an attorney voluntarily testifying about a former client is whether the attorney’s testimony implicates confidences and/or secrets of the former client, and,
if so, whether any of the exceptions recognized in the Code are applicable. As a first step, it is instructive to focus on the definitions of “confidences” and “secrets.”

DR 4-101(A) defines a confidence as “information protected by the attorney-client privilege under applicable law.” Secret is defined far more broadly, as any “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” See, ABCNY Formal Opinion 2005-02, Conflicts Arising Solely From Possession of Confidential Information of Another Client, at 3-4.

Secrets differ from attorney-client privileged information in at least three significant ways.

First, unlike the evidentiary privilege, which generally requires a communication between the attorney and the client, the duty to safeguard secrets exists without regard to the source of the information—the attorney need not have learned of the information from the client. N.Y.C. Bar Op. 1999-7 (discussing “the lawyer’s obligation to protect the client’s secrets without regard to the nature or source of the information. . . .”), quoting EC 4-4; Wise v. Consolidated Edison Co. of N.Y., Inc., 723 N.Y.S.2d 462, 463 (1st Dep’t 2001); see also In re Goebel, 703 N.E.2d 1045, 1047 (Ind. 1998); Model Rules of Prof’l Conduct R. 1.6 cmt. 3 (2004) (duty to protect client information covers “all information relating to the representation, whatever its source”) (emphasis added).

Second, although the evidentiary privilege addresses the compelled disclosure of client information during judicial proceedings, the protections afforded to secrets under DR 4-101 relate to the attorney’s general duty to maintain the confidentiality of all aspects of the client’s representation. Put differently, DR 4-101 prohibits the disclosure of any information pertaining to the representation of the client, but does not act as a shield against disclosure of information in a judicial proceeding. N.Y. City Bar Op. 1999-7 (“[i]t does not follow, however, that because a claim of privilege would not be sustained, and the lawyer therefore would be required to testify to the confidences . . . the attorney also would be obligated to disclose ‘secrets’ of the [client] outside the litigation context”); N.Y. State 555 (1984); Newman v. Maryland, 2004 WL 2846242, at *9 (Md. Dec. 13, 2004); X Corp. v. Doe, 805 F. Supp. 1298, 1309 (E.D. Va. 1992).1

1. We do not mean to suggest that there are no valid objections that can be raised to testifying about a client’s secrets in a litigation setting. In appropriate cases, for example, a testifying lawyer, or separate counsel for the former client, might be able to assert that the probative value of such testimony is outweighed by its prejudice to the former client. In other settings,
Finally, unlike the evidentiary privilege which can be waived or destroyed when third parties come to learn of the otherwise confidential communication, the attorney’s duty to protect secrets is not vitiated because others come to learn that information. N.Y.C. Bar. Op. 1999-7 (quoting EC 4-4); In re Holley, 729 N.Y.S.2d 128, 131 (1st Dep’t 2001); Wise, 723 N.Y.S.2d at 463. Indeed, as DR 5-108(A)(2) makes clear, it is only when a secret has become “generally known” that the lawyer is relieved from the duty not to use it. Cf. Jamaica Pub. Serv. Co., 684 N.Y.S.2d at 462 (reversing disqualification order and holding that lawyer’s disclosure of generally known, but harmful, information about a client fell within exception contained in DR 5-108(A)(2)).

Accordingly, the duty to protect secrets could encompass anything from a client’s age to a client’s alcoholism, depending on the circumstances. Roy Simon, Simon’s New York Code Of Professional Responsibility Annotated 442 (Thomson West 2004); see also N.Y.C. Bar Op. 2002-1 (potential client’s disclosure to an attorney of the location of a car he allegedly stole constituted both a confidence and a secret). Not everything that an attorney knows or learns about a client is necessarily an ethically inappropriate subject for testimony, however. For instance, in N.Y.C. Bar Op. 1997-2, the Committee noted that a lawyer would not ordinarily be forbidden from disclosing his or her observations of a client’s physical condition, assuming such condition was generally exposed to the public.

Moreover, DR 4-101(C) permits attorneys to divulge client confidences and secrets under the following circumstances:

A lawyer may reveal (1) confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them, (2) confidences or secrets when permitted under Disciplinary Rules or required by law or court order, (3) the intention of a client to commit a crime and the information necessary to prevent the crime, (4) confidences or secrets necessary to establish or collect the lawyer’s fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct, or (5) confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discov-
2. We do not address whether that same attorney could, within the bounds of the Code, risk a contempt citation and refuse to comply with a Court order overruling a privilege objection so as to facilitate the client’s ability to obtain appellate review. The views of certain commentators and courts suggest that an attorney could do so without running afoul of DR 7-106(A), which requires an attorney not to “disregard” the “ruling of a tribunal” other than to take.
lawyer does not have consent to disclose it, the lawyer should likewise assert any applicable non-frivolous objection, to the extent possible and practicable, if under the applicable rules the lawyer may refuse to answer the question until the objection is resolved.

CONCLUSION

In conclusion, there is no per se bar against a lawyer voluntarily testifying about a former client. The lawyer should not, however, reveal any information that would constitute a “confidence” or “secret” unless one or more of the exceptions set forth in DR 4-101(C) apply, or when the “confidence” or “secret” has become “generally known,” within the meaning of DR 5-108(a)(2). Of course, whether specific information constitutes a “confidence” or “secret” will depend on the circumstances of the case.

The following guidelines address the most common situations:

1. If the information sought is neither a confidence nor a secret, the lawyer may voluntarily testify regarding his representation of a former client.

2. If the information sought is a confidence or secret, and the lawyer is willing to testify voluntarily, the lawyer should generally seek to obtain the former client’s informed consent before testifying (unless another exception to the duty of confidentiality is applicable, see DR 4-101(C)). If consent is not obtained, and no other exception is applicable, the lawyer should not voluntarily testify.

3. If, while voluntarily testifying, the lawyer is asked a question calling for disclosure of a confidence and consent has not been obtained to waive the privilege, and no other exception to the privilege is applicable, the lawyer should assert the privilege and other applicable, non-frivolous objections. If the claim of privilege and objections are overruled, the lawyer may answer the question.

“good faith” steps to test the validity of the ruling. See D.C. Bar Op. 288 (concluding, in context of Congressional subpoena for documents, that although a lawyer may ethically comply with an adverse privilege ruling, “the lawyer retains the discretion to risk being held in contempt and litigate the issue in the courts, based on the totality of the circumstances.”); Briggs v. Salcines, 392 So.2d 263, 266 (Fla. Dist. Ct. App. 1980) (rejecting possibility that lawyer should have to risk contempt to appeal adverse privilege ruling and holding “[w]e think that this is too great a price for him to have to pay in order to protect his client’s interests”); Roy Simon, Can You Appeal Adverse Privilege Rulings in Discovery?, The New York Professional Responsibility Report, Dec. 2004, at 4-5.
FORMAL OPINION 2005-03

4. If, while testifying, the lawyer is asked a question calling for disclosure of a secret and consent has not been obtained to disclose the secret, and no other exception to the duty of confidentiality is applicable, the lawyer should assert any other applicable, non-frivolous objection that would enable the lawyer to avoid disclosing the secret. If none is available, the lawyer may answer the question. If any objection is overruled, the lawyer may answer the question.

March 2005
Formal Opinion 2005-04

Communications With Insurance Adjusters In Litigation Where the Insurance Company is a Party

The Committee on Professional and Judicial Ethics

**Topic:** Communications between non-lawyer representatives of an insurer and opposing counsel; scope of “prior consent” requirement.

**Digest:** Where an insurance company is a party to litigation, an opposing party’s counsel may not communicate with an insurance adjuster in the absence of prior consent from the insurance company’s lawyer. This prohibition arises from the plain language of DR 7-104(A)(1) and applies notwithstanding that it is the non-lawyer who initiates the communication, notwithstanding the presumed sophistication of the adjuster and notwithstanding that the goal of the communication is to facilitate a quick and efficient settlement. “Prior consent” means actual, formal consent of counsel, whether conveyed orally or in writing; a lawyer risks violating the rule by relying on the adjuster’s word that insur-
QUESTION

Where a sophisticated non-lawyer insurance adjuster, who is employed by a party to a lawsuit, initiates contact with counsel for the adverse party in the lawsuit for the purpose of effectuating a fast and efficient resolution of the claim, does DR 7-104 apply? If so, must the lawyer obtain the actual consent of opposing counsel for the insurance company, or may the lawyer rely on the non-lawyer's assurances or circumstantial evidence of consent?

DISCUSSION

This opinion considers the ethical propriety of a law firm's direct communications with non-lawyer claims adjustors employed by the insurance company with which the firm's client is in litigation. Such communications raise questions concerning the scope and application of DR 7-104(A)(1), the so-called “anti-contact” disciplinary rule permitting direct communications with a represented party only with the consent of opposing counsel. These questions include: (1) Does DR 7-104 apply even in situations where the non-lawyer is sophisticated, the communications are initiated by the non-lawyer and the purpose of the communications is to achieve a fast and efficient resolution of the claim?; and (2) Does a lawyer need to obtain the actual consent of opposing counsel, or may the lawyer rely on the non-lawyer's assurances or circumstantial evidence of consent?

The Committee addresses these issues in the following factual context: A law firm represents providers of medical services in litigation or arbitration with insurance companies over unpaid medical bills. Although the insurance company appears in these cases through a lawyer, it is frequently a non-lawyer claims adjustor who calls plaintiff's counsel to discuss settlement. These communications occur without the express consent of the lawyer representing the insurance company. We further assume: (1) direct communications between lawyers and insurance adjusters are commonplace in this area of practice; (2) the adjusters are sophisticated businesspersons employed by sophisticated insurance companies; (3) the direct approach from the adjuster is intended to facilitate settlement.
at low cost; and (4) if asked, the adjuster would advise that the insurance company's counsel is aware of, and consents to, the communication.

We conclude that, while these factors suggest that the consent of opposing counsel should be readily obtainable in most cases, the plain language of DR 7-104(A)(1) requires that opposing counsel receive notice and provide actual consent before an attorney may participate in such communications with a non-lawyer representative. We further conclude that the opposing counsel's consent cannot be inferred from circumstances, and that the consent must be conveyed in some form by opposing counsel to the attorney.

DR 7-104(A) provides, in pertinent part, that during the course of the representation of a client, a lawyer shall not: "(1) communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party ..." The anti-contact rules "provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests." ABA Formal Op. 95-396, 558 N.E.2d 1030, 1033; see also ABCNY Formal Op. 2002-1; Niesig v. Team I, 76 N.Y.2d 363, 370, 559 N.Y.S.2d 493, 496 (1990) ("By preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions.") (citation omitted).

Under the facts presented by this inquiry, there is no question that the discussions with the adjuster take place during the course of representation of a client regarding the subject of the representation. Nor is there any question that the adjuster is the representative of a party that has retained counsel in that matter.1 It is also clear that the discussions between the firm and the non-lawyer adjuster constitute a communication

---

1. In so stating, we do not address the application of DR 7-104 to communications with an adjuster when the insurance company is not itself a party. See NYSBA Op. 785 (2005) (because adjuster is not represented by counsel employed to represent defendant insured, direct communications between and adjuster and plaintiff's counsel are permissible without consent of insured's counsel); but see, e.g., In re Ieluzzi, 616 A.2d 233, 236 (Vt. Sup. Ct. (though not named in the suit, insurer was arrayed on the opposite side of the case and would be considered an adverse party for purposes of the no-contact rule); Utah State Bar Op. 00-05 (direct contact with insurance adjuster would be improper unless plaintiff's counsel has affirmatively determined that the insurer does not consider itself represented by counsel in the matter); Colorado Bar Op. 73 (1986); Virginia Ethics Op. 550 (1983); New Mexico Bar Advisory Op. 1988-2 (1988).
within the meaning of DR 7-104(A) regardless of who initiates it. See Roy Simon, *Simon's New York Code of Professional Responsibility Annotated*, p. 976 (2005 ed.) (“Even if the represented party initiates the conversation or agrees to the communication, DR 7-104(A)(1) prohibits a lawyer from engaging in any discussion with the represented party without first obtaining a lawyer’s consent.”). Finally, the existence of an industry practice making commonplace such communications with adjusters does not excuse a New York lawyer from compliance with Disciplinary Rules or deprive the insurance company counsel of the right to expect such compliance. See *In re. Illuzzi*, 616 A.2d 233, 236 (Vt. Supreme Ct.) (“Given the absence of ambiguity in [DR 7-104], we find irrelevant respondent’s contention that it is the common and accepted practice for Vermont attorneys to have direct contact with insurance companies whose defense counsel have not consented to such contact.”)

**CONCLUSION**

Accordingly, we conclude that “prior consent” of adversary counsel is necessary before communications with an adjuster for the defendant-insurer can occur. Although it may well be reasonable to assume that consent will be readily forthcoming because opposing counsel is already aware of the adjuster’s actions, such consent should not be implied. Indeed, we believe that the additional effort needed to obtain the prior consent of opposing counsel should not unduly interfere with the expeditious settlement of matters. Because the rule requires the consent of opposing counsel, the safest course is to obtain that consent orally or in writing from counsel. A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client’s assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent.

Although we conclude that a lawyer runs the risk of violating DR 7-104(A)(1) by relying on the non-lawyer adjuster’s word that counsel’s consent has been obtained, an insurance company that wishes to facilitate direct contact with an adjuster may instruct its counsel to provide the adjuster with a letter granting consent to such contact. “The nonclient’s lawyer has a duty to the client to consent when doing so would be in the interest of the client or when the client so instructs the lawyer.” Restatement (Third) Of The Law Governing Lawyers § 99, Comment j (2000) (hereinafter, “Restatement”). Obviously, even when the opposing counsel has consented to direct communication with an adjuster, a lawyer communicating with the adjuster may not engage in dishonesty or in other improper conduct
such as seeking information the adjuster is obliged to keep confidential. DR 1-102 (4); Niesig v. Team I, 76 N.Y.2d 363, 370, 559 N.Y.S.2d 493, 496 (1990); Restatement § 102.

For these reasons, we conclude that DR 7-104(A)(1) applies to direct communications between a plaintiff’s attorney and an adjuster representing a defendant insurance company. An attorney who proceeds without prior consent received from opposing counsel (orally or in writing) therefore risks running afoul of the rule.

April 2005
The Committee on Professional and Judicial Ethics

Barbara S. Gillers, Chair
Heather Gordon, Secretary

Robert Anello
Harold Baer
Stuart Bernstein*
Alvin Bragg
David Brodsky
Pamela Rogers Chepiga
Anne DeSimone
Jeremy Feinberg
Robert Goldbaum
Helen Gredd
Bruce Green
David Greenwald
Luisa Hagemeier
John Harris
Katherine Johnson
Barbara Krasa Kelly
John Kirby
John Larkin

John Leubsdorf
Mara Leventhal
Robert Levy
Robert LoBue
John Mastando, III
John McEnany
Denis McInerney
Joseph Neuhaus
Steven Ostner
Michael Patrick
Elliot Sagor
Roy Simon
Kent Stauffer
Laura Sulem
William Sushon
James Walker
James Yates

*Participated in the discussion of Formal Opinion 2005-01, but takes no position on the opinion as finally issued.
Preliminary Conference Orders in New York State Courts

The Council on Judicial Administration

GENERAL BACKGROUND

Based upon input from the bench and bar, the Council on Judicial Administration decided, more than a year ago, to explore why compliance with Preliminary Conference Orders ("PC Orders") in New York State Courts is lax, and to suggest possible remedies. In that regard, it appears to be universally acknowledged by the bench and bar that PC Orders are too often honored more in the breach than in the observance. This Report sets forth the result of our labors.

The Council drew on the experiences of its membership of attorneys and judges, which spans a broad variety of matters and practice areas, but also the input of Judges Anne Pfau (First Deputy Chief Administrative Judge for Management), John Buckley (Presiding Justice of the Appellate Division, First Department), A. Gail Prudenti (Presiding Justice of the Appellate Division, Second Department), Jacqueline Silbermann (Administrative Judge, Supreme Court, New York County, Civil Division) and Harold Baer (United States District Judge, Southern District of New York, and a former justice of the New York State Supreme Court).¹ The Council is grateful to all of these busy jurists for their time, hospitality, and insightful comments.

¹. As a former Supreme Court Justice, Judge Baer was able to contrast practice in the State and Federal Courts. Some of his thoughts can be found in an article written by him and published in the New York Law Journal on July 20, 2004.
The Preliminary Conference

At some point during its pendency, almost every action filed in state court becomes the subject of a preliminary conference. In accordance with Rule 202.12 of the Uniform Rules for the New York State Trial Courts, the matters to be considered at the preliminary conference include: a) where appropriate, simplification and limitation of factual and legal issues; b) establishment of a timetable for completion of disclosure consistent with the requirements of Differentiated Case Management (unless otherwise shortened or lengthened by the court); c) addition of other necessary parties; d) removal to a lower court where appropriate and e) other matters that the court may deem relevant such as a date for filing a note of issue, and a closure date for dispositive motions. Finally, a compliance conference will be scheduled.

A PC Order, reflecting the stipulations of counsel and any directions given by the court is prepared and executed by counsel (often on forms specifically provided for that purpose), “so ordered” by the court and duly entered. As an Order of the court, it is entitled to all of the weight and dignity of any other Order. In practice, it seems, it is just a piece of paper. Its time limits often are ignored, repeated Preliminary Conferences are held, new PC Orders are entered, and deadlines are reset and then extended. Not only does this waste the time of counsel and squander judicial resources, it undermines the integrity of the judicial system. See Kihl v. Pfeffer, 94 N.Y. 2d118,123 (1999) (“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.”).

The Office of Court Administration has established case management goals designed to reduce the amount of time that a case remains in the system until it is resolved. Ideally, efforts to achieve these goals should result in fewer, but more meaningful, court appearances. However, when PC Orders are as often as not disregarded, the amount of time that litigation remains in the system until resolution is extended, repeated appearances by counsel are required, and many of the appearances are not meaningful. Parties who are zealous in complying with PC Orders often are frustrated by the foot-dragging of adversaries, and the culture of laxity that tolerates it.

This is not to say that the problem of noncompliance is universal. It appears to be less a problem in federal courts and the commercial parts of the State Supreme Court, and more acute in those parts where the civil calendar predominately consists of personal injury actions. Lawyers and judges agree that this dichotomy is undesirable. All cases, and not just commercial cases, should move smoothly through the system, with dead-
lines honored, and the necessity for constant judicial intervention in discovery and calendar issues substantially reduced.

A number of factors contribute to the problem. There is a greater volume of cases pending in noncommercial parts of the Supreme Court, than before either federal judges or in state court commercial parts. Budgetary constraints exist in the Supreme Court that do not exist in the federal courts. Late afternoon conferencing is not an option because the Court must close at 5 P.M. as overtime cannot be paid to non-judicial personnel. The economics of personal injury practice on both the plaintiffs’ and the defendants’ side tend to encourage certain counterproductive case management practices, including, but not limited to, the widespread use of per diem counsel, who often are unfamiliar with the cases and unable to make binding commitments concerning discovery or settlement, which result in delays and inefficiencies at conferences. The problem can be addressed in part by some changes in the rules. Nevertheless, the root cause of the problem is a courthouse culture that tolerates attorneys who are either unaware of, or insensitive to, the offense they give when they ignore the provisions of a court order.

We believe that the problem can best be addressed by a concerted effort by the bench and bar to change that culture. Offending lawyers must be educated to understand that their failure to treat PC Orders as orders of the court offends the judicial process. Also, the judiciary must not be so tolerant or understanding. Long before the need to consider the imposition of penalties or sanctions arises, judges must communicate that their PC Orders are to be taken seriously, and make clear their personal and institutional displeasure when parties ignore the provisions of a PC Order. Penalties or sanctions ought to be imposed on those attorneys who disrespect PC Orders and Preliminary Conference rules and thereby disrupt the process. Obviously, not all lawyers are culprits, and many make a concerted effort to comply. But, even one laggard can materially delay the litigation and unnecessarily tax judicial resources. We recognize that the styles of judges vary, and we have the greatest respect for the jurists in New York City who labor under a heavy case load with scarce resources. But we do believe that more zealous enforcement of the rules by the judiciary is needed.

RULES AND STATUTORY PROVISIONS

Uniform Rule 202.12 (22 NYCRR 202.12)

This Rule calls for the conduct of a Preliminary Conference, but only on request of a party. Local Rules, discussed below, alter this practice. The
Rule expressly requires that an attorney “thoroughly familiar” with the case and “authorized to act,” appear at the conference. The same requirement is echoed in the General and Commercial Rules of New York County. Under subdivision (f) of Rule 202.12, failure to comply with a PC Order, in the discretion of the court, “shall result in the imposition...of the costs or such other sanctions as are authorized by law.”

**Uniform Rule 202.19 (22 NYCRR 202.19)**

Uniform Rule 202.19 is the differentiated case management rule which sets forth the time frames within which disclosure must be completed, tied to the filing of a Request for Judicial Intervention (“RJI”). Subdivision (b) (3) mandates a compliance conference no later than 60 days before the scheduled discovery completion date.

**Uniform Rule 202.21 (22 NYCRR 202.21)**

This is the rule which requires a Statement of Readiness at the time of filing of a Note of Issue. CPLR 3402 requires a Note of Issue to place a case on the trial calendar.

**Uniform Rule 202.27 (22 NYCRR 202.27)**

This Rule sets forth what happens if a party does not appear or proceed at a calendar call or conference, and provides for defaults, inquests, and dismissal.

**Standards and Administrative Policies,**

**Subpart 130-2.1 (22 NYCRR 130-2.1)**

This provision is entitled “Imposition of Financial Sanctions or Costs For Unjustified Failure To Attend A Scheduled Court Appearance.” This rule provides for reimbursement of expenses incurred and attorney’s fees if counsel, without good cause, does not appear at a conference. It is limited to situations in which an attorney actually fails to attend.

**New York County Commercial Rules**

*Rule 1.* Requires appearance by counsel with knowledge of the case and authority to enter into substantive and procedural agreements.

*Rule 7.* Requires that conferences be held within 45 days of assignment of the case to a justice of the Commercial Division. In New York County, commercial cases are assigned to a justice when the RJI is filed.

---

2. We selected Rules of this Court as they are the ones most familiar to us.
Rule 11. Mandates that the Rule 7 Conference will result in a disclosure schedule.

Rule 12. Modifies the “no disclosure” default provision of CPLR 3214(b) so that the making of a CPLR 3211 or 3212 motion does not automatically stay all discovery. Such stays are left to the discretion of the court.

Rule 13. Provides penalties for failure to appear at a conference which are substantially the same as Uniform Rule 202.27.

Rule 14. Requires strict compliance with disclosure schedules and specifies penalties.

New York County General Rules

Rule 1. Requires counsel attending conferences to be familiar with the case and have authority to act.

Rule 7. Calls for a Preliminary Conference or case scheduling order within 45 days of assignment to a Justice. In New York County, assignment of a case covered by the General Rules occurs when the RJI is filed. The Court can order compliance conferences. The Rule also incorporates Uniform Rule 202.27 as to sanctions for failure to appear.

Rule 10. Contains provisions as to disclosure schedules and calls for strict compliance.

CPLR PROVISIONS

CPLR 3126

The statute provides that if a party “refuses to obey an order for disclosure or willfully fails to disclose information which the Court finds ought to have been disclosed pursuant to...article [31], the court may make such orders with regard to the failure or refusal as are just. ” The Court has a broad variety of options to remedy the violation, including: resolving orders, preclusion orders; orders striking pleadings or claims; conditional orders; or orders imposing monetary sanctions. See 6 Weinstein, Korn & Miller, New York Civ. Prac. ¶3126.14. It is clear that PC Orders may form the basis for relief under CPLR 3126. John R. Souto Co., Inc. v. Coratolo, 293 A.D.2d 288, 739 N.Y.S.2d 708 (1st Dep’t 2002).

CPLR 3214 (b)

This statute, with one exception, provides for an automatic stay of disclosure when a motion is made pursuant to CPLR 3211 or 3212 unless the Court orders otherwise.

CPLR 3216

CPLR 3216 provides a cumbersome and largely ineffective procedure
for dismissal for want of prosecution. Efforts to “liberalize” the process have been uniformly unsuccessful.

THE SUBCOMMITTEE’S PROPOSAL

A. Attorneys Must Be Familiar With Their Cases
And Have the Ability To Bind Their Clients

The preliminary conference is designed to be a significant event in the life of an action. At the conference, the action should be discussed in detail. If possible, issues should be narrowed; the necessity and time of impleading or otherwise adding parties and making dispositive motions discussed; and a discovery schedule fixed. In summary, a custom-made time line with performance bench marks for the completion of pretrial proceedings should be developed. Settlement discussions may also be held in conjunction with, or in addition to, the development of the time line.

An attorney who is prepared, and has the authority to legally bind the client and implement the PC Order is essential to the process. An attorney who is unprepared and not authorized to bind the client will neither be able to discuss intelligently the simplification or limitation of issues, the need or timing of third party practice and dispositive motions, nor meaningfully participate in the development of a case management plan tailored to the litigation at issue. The result is a “one size fits all” PC Order that may not relate to the realities of the case and be incapable of compliance.

An attorney who can neither legally bind the client, nor factually bind the firm which the attorney is representing, can only report the contents of a PC Order, but can take no steps to either implement it or see that it is implemented. If the PC Order is not implemented, no one is held accountable. Fed. R. Civ. P.16 requires that an attorney who is familiar with the facts and is authorized to make binding concessions on behalf of the client attend scheduling conferences.3 Uniform Rule 202.12 and various local rules also require that an attorney thoroughly familiar with the case and authorized to act appear at the Preliminary Conference. However, unlike Fed. R. Civ. P. 16, none of the applicable Rules (130-2.1, 202.12, and 202.27) provides any penalty or sanction when an attorney who is unfamiliar with the facts or (even if familiar) is not authorized to act on behalf of the client attends the conference.4 We recommend that

3. Rule 16(c) provides, in part: “At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulation and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.”

4. Rule 16(f) provides: “Sanctions. If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial
these Rules be amended to include a provision that absent good cause shown, the appearance at a preliminary conference of a lawyer who is not familiar with the facts and authorized to bind the client will be the equivalent of a failure to appear. This would create an important case management tool obligating counsel to prepare for the conference, follow up and assure either that there is compliance with the PC Order or if good cause exists, that a timely application to amend is made.

Finally, the Court should ascertain the reason for noncompliance. Penalties or sanctions against counsel, the client or both should be imposed in appropriate cases. The Rules contain no provision for increasing the penalties imposed for repeat offenses. We recommend that the Rules be amended to set forth that repeated noncompliance with PC Orders in a case will justify increasing the amount of monetary sanctions against the non-complying lawyer(s), clients or both.

**B. Judges Must Enforce Their Orders**

Judges should exercise more control over the process early in the conference, or if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith, the judge, upon motion or the judge’s own initiative, may make such orders with regard thereto as are just, and among others any of the order provided in Rule 37 (b) (B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney’s fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.”

The above-referenced subsections of Rule 37(b) provide that the federal court in which an action is pending may impose the following sanctions (among others) for failure to comply with a court order.

“(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination, . . . “].

5. An analogy may be drawn to the situation where a prior history of disciplinary violations may justify increasing the discipline imposed when there is another instance of such misconduct.
tion, and need to take firmer action to enforce PC Orders and disclosure schedules. In New York County, all discovery issues come before the IAS Part judge to whom the case is assigned. In other counties, there are Compliance Parts, where discovery disputes in all cases are handled by a single judge. We did not review this difference in detail, but it seems to us that having each judge handle his or her own cases is preferable. It allows the judge to become familiar with the case and identify problems at an earlier stage. When counsel know that they will always have to answer to the same judge, there are fewer attempts to play the system.

Case management and accountability are the keys. Active case management is labor intensive. It is a difficult task when a judge carries a large inventory of active cases. The problem is exacerbated by the deplorable lack of funds and resources for court personnel to help. But, we also note that some judges evince a “what can you do approach” and are willing to grant counsel far too much leeway. Our perception is that, at present, the major penalty imposed on counsel when a PC Order is disobeyed is that counsel have to appear in court and sign a new PC Order. That wastes the time of the court and makes every attorney on the case—and not just those attorneys who have failed to comply—return for a conference because one party has not complied. More importantly, it undermines respect for the judiciary and the attempt by OCA to use case management goals to support the integrity of, and provide an effective model for managing the pre-trial judicial process.

C. A Time Limit On Third Party Practice Should Be Established

One oft-cited reason for delays was the need, in negligence cases, to identify third and fourth party defendants. We were told that sometimes it is not until well into the discovery process that the existence or identity of such defendants is discovered, and that even then, the impleading party often does not move expeditiously to impale the new party. In our view, it takes a long time to identify and impale third and fourth party defendants in most cases because counsel are allowed that time.

While PC Orders generally include deadlines for impaling other defendants, the dates may or may not be realistic or meaningful. If firmer

6. According to some of the judges we spoke to, case inventories can exceed 500.

7. Some judges believe that by repeatedly conferencing cases, they obtain more opportunities to bring about settlements. We agree, but also firmly believe that judges should not have to use noncompliance with PC Orders as an excuse to conduct status conferences. Indeed a tight, binding discovery schedule, with a trial date not far behind, is extremely effective in focusing counsel’s mind and enhancing a court’s ability to settle proceedings.
deadlines were established at the PC Conference and all counsel knew that they would be strictly enforced via CPLR §1010, the problem would be eliminated. Discovery would proceed in accordance with the timeline established in the PC Order. The proposed impleader-defendant would be identified and impleader would occur prior to the last date established for that purpose in the PC Order. If the adversary delayed discovery of the proposed impleader-defendant’s identity or there was other good cause, the proposed impleader-plaintiff could timely ask the Court to set a new last date to implead.

D. Notes of Issue; Standards and Goals

Under present rules, a Note of Issue is to be filed when disclosure is complete. The Note of Issue must be accompanied by a Statement of Readiness which so certifies. Technically, if a motion to vacate is not made within 20 days, no further discovery may be had, unless permitted by the court for good cause. In reality, this discovery closure rule is frequently ignored. Cases are placed on the calendar while routine discovery proceeds. This practice breeds disrespect for the system and should be eliminated.

Part of the problem results from the requirement that a Note of Issue be filed in a standard case within 12 months after the purchase of an RJI (22 NYCRR 202.19). Litigants, under pressure to comply, will file a Note of Issue and Statement of Readiness when a case is far from ready for trial. And some judges, it seems, simply act as if the discovery completion requirement did not exist.

Further, the one-year pretrial discovery deadline in a “standard” case is impracticable. For example, if a pre-answer motion to dismiss is filed, an RJI must be purchased. Under present practice, the motion stays discovery. But even if it did not, in the absence of an answer, the issues cannot be framed and comprehensive disclosure cannot even begin. It may take 60 days (or more) until the motion is briefed, moves from the Central Motion Part to the IAS Part and is heard by the court. Given the heavy workload placed on the justices, it is sometimes unrealistic to expect a decision within the 60 days, CPLR 2219(a) notwithstanding. Consequently, it may be as much as 9 months after an RJI is filed that issue is joined and disclosure can commence. The remaining time for discovery is therefore too short. Similarly, in negligence cases there may be delays in identifying and bringing in additional defendants. And, there are other good reasons why delays occur.

8. In New York County, an affidavit is required which attaches all PC Orders and attests to full compliance.
In New York County, judges generally do not permit cases to be placed on the calendar until disclosure has been completed. As a result, many judges carry an inventory of out-of-compliance pretrial matters. However, once cases are placed on the calendar, they are rapidly reached for trial. In contrast, in Queens County, where pretrial standards and goals are strictly enforced, cases are placed on the calendar even if discovery has not been completed. The judges carry almost no out-of-compliance pretrial inventory, but it can take several years before post-note-of-issue discovery is completed and the matters are reached for trial.

We recommend that the Statement of Readiness Rule be abolished. Rather, the Court should certify when a case is ready for trial, at which time a Note of Issue can be filed. This would be revenue neutral as the same fee would be required.

E. The Automatic Stay

When either a party or an impleaded party moves to dismiss or for summary judgment, it may take months for the motion to be fully briefed and submitted. Until the motion actually gets to the part, the judge is unaware that the automatic stay has wreaked havoc with the discovery schedule it has previously approved. By requiring an application to stay disclosure, the Court rather than the moving party would decide whether, and to what extent discovery would be stayed while the motion is pending, thus enhancing the Court’s ability to manage the case. This is the practice in the federal courts and to some extent, in the commercial parts in New York. Expansion to include all types of cases would result in cases moving more rapidly.

F. Sua Sponte Use of CPLR 3126 to Order Compliance

As noted above, CPLR 3126 is the statutory provision which enumerates the penalties that may be imposed for failure to comply with the disclosure obligations of the parties. In most cases, the statute is invoked when an aggrieved party files a motion. Conditional orders are not an uncommon result of such motions. Pursuant to such order, a discovery sanction is imposed if the offending party does not cure its default within a specified period of time. The judges we spoke to, however, generally prefer to resolve discovery disputes by conference. Indeed, in New York County both the General Rules (Rule 11) and the Commercial Rules (Rule 15) call for a conference. Frequently, letters are submitted.

Judges pointed out that motions seeking to resolve discovery disputes often do not even come to their attention for several weeks or months.
because they have to be fully submitted at the Motion Support Part before being placed on the judge's calendar. This, they said, delays the process. The conference mechanism usually brings the matter on more rapidly. In the event of noncompliance, sanctions may be in order, but the Court must choose the appropriate sanction.

Absent willful, contumacious, or bad faith conduct, courts are reluctant to impose a sanction that will affect the merits, such as dismissal of a claim or defense, preclusion of evidence or the drawing of an adverse inference. Likewise, imposition of a sanction requiring the sanctioned party to pay the aggrieved party's counsel fees can be a double-edged sword. It often invites additional litigation over the size of the fee. However, imposition of a monetary fine will generally not be disturbed.9

It is our view that the use of CPLR 3126 should be expanded. Although nothing in the wording of CPLR 3126 requires that an Order made pursuant to that section be triggered by a formal motion we recommend that CPLR 3126 be amended to expressly provide judges with the power to enter such orders sua sponte. (An aggrieved party can create a record for appellate purposes by moving to vacate.) Many such orders will be of a conditional nature as described above, but use of this mechanism will shorten the motion process and indicate to counsel that there will be further adverse consequences for noncompliance.

Judges possess broad powers to issue a variety of orders to correct discovery abuse. We have no way of knowing in how many instances a motion made pursuant to CPLR 3126 also requests sanctions, or how many of those requests are granted. Our experiences indicate that sanctions are not imposed. Regrettably, we find it appropriate to suggest that the judges should exercise their powers to sanction counsel more frequently in order to emphasize that the courts are serious about the sanctity of P.C. Orders.

**G. Expanded Use of CPLR 3216**

Some judges noted that the court, sua sponte, may send out a failure to prosecute notice under the statute. The process is cumbersome, as it requires a “written demand” served by registered or certified mail. Further, after a demand has been served, the statute cannot be further invoked if the case is placed on the calendar. If the case is not placed on the calendar, the court may enter further appropriate Orders, but a second motion is required. We believe that the use of CPLR 3126 as outlined above would be a far more viable and flexible device.

---

9. This generally is the case if the noncompliance was not outside the control of the attorney or the attorney’s client.
H. Timing of Conference

We believe that the requirement for holding a Preliminary Conference should continue to be triggered by filing an RJII, rather than by filing the summons. A significant number of judicial proceedings are filed that are subsequently resolved without intervention by the court. There is no need to import these actions and proceedings into an already overburdened pre trial case management system. However, these judicial proceedings should not be permitted to remain pending indefinitely, often to the prejudice of the parties. We therefore suggest that in the absence of a filed RJII, on the first anniversary of the filing of the summons, the court should generate a notice to plaintiff’s counsel advising that absent proof that the judicial proceeding has either been settled or otherwise discontinued, or the filing of an RJII, the proceeding will be dismissed without prejudice by the Clerk of the Court.

I. Increase in the Amount of Monetary Sanctions

Under Rule 202.12(f), the court has discretion to impose costs or other sanctions allowed by law for a party’s failure to comply with a PC Order or the making of an unnecessary or frivolous motion. Under CPLR 8201, pre-note of issue costs are set at $200; and motion costs may not exceed $100. By meaningfully increasing the amount of costs that could be imposed under Rule 202.12(f), and particularly, the costs to be imposed on repeat offenders, judges could deter noncompliance with PC Orders without the need to first determine the amount of an attorney’s fee to be awarded to the adversary.

CONCLUSION

We believe that these suggestions can be implemented and, if adopted, will help alleviate the problem.

A concerted effort by bench and bar is the sine qua non for any true reform.

June 2005
The Council on Judicial Administration

Daniel R. Murdock, Chair
Marissa L. Antoinette, Secretary

Patience E. Atkin
Lucy Billings
Molly S. Boast
Toby M.J. Butterfield
Joseph E. Capella
Michael.Q. Carey
Carrie H. Cohen
Mark Stewart Cohen
James Edward D'Auguste
Elizabeth Donoghue
Joseph H. Einstein*
Charles F. Gibbs
Richard Godosky
Bryanne A. Hamill
Paul Matthew Hellegers
Vilia B. Hayes
Barbara R. Kapnick*
Beth L. Kaufman
Lydia C. Lai
Susan R. Larabee
Leslie G. Leach
Frank Maas*

Lawrence A. Mandelker*
Thomas McGanney
Thomas G. Merrill*
Karen Greve Milton
Louis L. Nock
Maria Park
John L. Pollok
Richard Lee Price
Rosalyn Heather Richter
Scott A. Rosenberg
Jay G. Safer
Jonathan Steven Sanoff
Richard J.J. Scarola
Elizabeth D. Schreo
Steven B. Shapiro
Marian E. Silber*
Jacqueline W. Silbermann
Philip S. Straniere
Wendy R. Weiser
Frank H. Wohl
Richard M. Zuckerman

* Members of the Subcommittee, chaired by Mr. Mandelker, which drafted the report.