DEFENDANT

THE DEFENSE ASSOCIATION OF NEW YORK January, 1990

PRESIDENT'S MESSAGE

President Robert E. Quirk

Earlier this year, I accepted the Presidency of the Defense Association of New York with a great deal of pride and the opportunity to represent our organization and direct its activities with other members of the Board of Governors. As I enter the midpoint of my term, I must note with appreciation the contribution made by so many of our members to keep our focus on the defense effort.

Our organization has been a leader in providing quality legal instruction to the defense bar, especially to the younger members of our organization and this year has been no exception. Recently there have been three seminars conducted under the auspices of our seminar chairmen, all of which have received the highest praise for instructional content and presentation. In mid October under the able supervision of John Boeggemann, our Westchester chairman, the direct and cross examination of a medical witness was conducted in the ceremonial courtroom of the Supreme Court, Westchester County in White Plains, New York. It is estimated that between 85-100 lawyers and claims personnel were in attendance. We were most fortunate in having Supreme Court Justice Dennis Donovan preside over the proceedings, which he did in his most judicial manner. Many thanks also to Bill Bave, Jr. and Richard Corde, attorneys for plaintiff and defendant and to Mark Barrett who handled the introductions.

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WORTHY OF NOTE

Compiled by John J. Moore

INSURANCE—Duty to Defend-Sexual Abuse. In **Zurich-American Insurance Companies v. Atlantic Mut. Ins. Companies,** (74 N.Y.2d 621, 541 N.Y.S.2d 970), it was held that an insurer of a church and its employees was obligated to defend individuals in civil actions arising out of alleged sexual abuse occurring at a day-care center operated on church property where it was alleged that the individuals were acting in the church's employ; the individuals' denials that they were agents or employees of the church merely posed factual and legal issues to be resolved in the underlying actions.

JUDGMENT—Comity. The First Department recently submitted that pursuant to the doctrine of comity, full faith and credit will be accorded a judgment of a foreign country unless it is established that the judgment is violative of strong public policy or has been procured by extrinsic fraud. **(Altman v. Altman, ____ A.D.2d ____, 542 N.Y.S.2d 7).**

LIMITATIONS—Revival-Due Process. In **Hymowitz v. Eli Lilly & Co.,** (73 N.Y.2d 487, 541 N.Y.S.2d 941), it was held that the statute reviving for one year actions for injuries caused by diethylstilbestrol (DES) which were previously barred by the statute of limitations did not violate due process as applied to cases in which the plaintiff could have sued originally but did not; under the circumstances, legislature properly determined that it would be more fair for all plaintiffs to uniformly have one year to bring their actions.

THIRD PARTY ACTION—Predicate of Liability. In **Lucci v. Lucci,** (____ A.D.2d ____, 541 N.Y.S.2d 992), the Second Department held that liability to

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ALTERNATIVE THEORIES OF LIABILITY IN PRODUCTS LIABILITY LITIGATION

By: John J. McDonough*

In a prior article (See **Defendant**, April 1989) I discussed how recent court decisions in the products liability field had overturned the dismissal of a case where the plaintiff had destroyed the product that contained the claimed defect (**Otis v. Bausch and Lomb**, 143 AD2d 649, 532 NYS2d 933) and had determined in another (**Landahl v. Chrysler Corp.**, 144 AD2d 245, 534 NYS2d) that the precise nature of the defect did not have to be established in order to make out a prima facie case but that the "existence of a defect may be inferred from the circumstances of the accident."

This article will review New York product liability law when the circumstances are such that while the injury causing product can be identified, the manufacturer of the product cannot be proven so as to establish causation in fact.

The general rule casts the burden of proof upon the plaintiff to identify both the product and the manufacturer thereof in order to state a cause of action. **Morrissey v. Conservative Gas Corp.**, 285 App.Div. 825, 136 NYS2d 844, aff'd 1 NY2d 741, 152 NYS2d 289, 135 NE2d 45. In a products liability case, identification of the exact defendant whose product injured the plaintiff, is of course, generally required. Prosser and Keeton, Torts Section 103, at 713 (5th ed).

The influx of lawsuits into the New York court system stemming from mass produced products, generically produced and supplied drugs, including over 500 diethylstilbestrol (DES) cases alone, has caused a reexamination of the traditional requirement that plaintiff prove causation in fact as part of his prima facie case.

Accepted tort doctrines of alternative liability and concerted action have been available in some personal injury cases to permit recovery where the precise identification of the wrongdoer is impossible. A classic alternative liability case is

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*Mr. McDonough is a member of the Manhattan law firm of Alio and Caiati.

DRI CORNER

By: Ralph V. Alio*

YOU ARE CORDIALLY INVITED TO ATTEND THE 23rd NATIONAL CONFERENCE OF DEFENSE ASSOCIATIONS TO BE HELD MAY 31 THROUGH JUNE 2, 1990 AT SALISHAN LODGE, OREGON. R.S.V.P. - RALPH V. ALIO, (516) 454-4186.

I urge you to consider attending DRI's 23rd National Conference. Your President and President-Elect will attend and it will afford you an excellent opportunity to learn more about D.R.I. as well as meet your counterparts from virtually all 50 states. The National Conference traditionally has been a meeting attendees and their spouses have enjoyed immensely. It affords an opportunity to exchange ideas, learn of problems confronting the defense bar nationwide, as well as solutions arrived at by various groups. In our modern day practice, trends cross state lines with great rapidity mandating a national awareness to keep pace. It also affords the participant a keen insight as to what D.R.I. is all about as well as its willingness to listen and address issues and needs of local defense associations. This year's meeting promises to afford even more opportunity for the exchange of ideas since it will primarily consist of breakout groups where issues can be freely discussed among defense bar leaders and activists. The setting for the meeting promises to be spectacular; Salishan Lodge is a five star resort located on the Oregon coast. I can promise you that if you attend you will find the meeting beneficial and the congeniality of the attendees something you will remember for a long time to come.

D.R.I. is pleased to announce that membership has now reached 17,000. This all time high membership reflects the defense bar's recognition of a need to have a national presence. D.R.I. has filled this need in an admirable fashion. D.R.I. has been extremely effective in educating the public and media of the role and views of the defense lawyer. The media has come to recognize that groups such an ATLA do not speak for the entire Bar. In the last two months alone, D.R.I. has held press briefings with Penton Press, a publisher of industry

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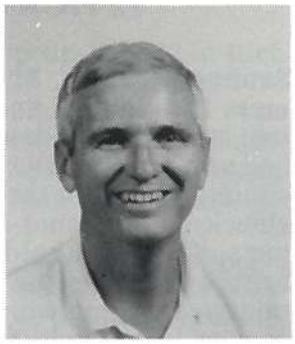
THE IMPOSITION OF SANCTIONS IN STATE AND FEDERAL COURTS



By: Michael J. Holland*

The enactment of CPLR §8303-a and Part 130 of the Uniform Rules of the New York State Trial Courts, 22 N.Y.C.R.R. §130, and the explosion of decisions interpreting Federal Rule of Civil Procedure 11, as amended in 1983, have made the imposition of sanctions on parties and their counsel an area of concern to every practitioner. CPLR §8303-a punishes attorneys and their clients for "frivolous" actions. In federal court, an attorney fails to satisfy Rule 11 and leaves himself subject to unlimited monetary sanctions when the court finds that a pleading has been interposed for any improper purpose or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

A. SANCTIONS UNDER §8303-a AND PART 130 OF THE UNIFORM RULES

The scope of CPLR §8303-a is far more limited than that of its federal counterpart. The statute, enacted in 1985, was originally applicable only to podiatric, dental, and medical malpractice cases. It was amended in 1986 to cover all claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death. The statute provides that if an action or claim is commenced or continued by a plaintiff, or a counterclaim, defense or cross-claim is commenced or continued by a defendant and is found by the court, at any time during the proceedings or upon judgment, to be "frivolous", the court may award to the successful party costs and reasonable attorneys' fees not exceeding $10,000. As under Federal Rule 11, the costs and fees may be assessed against either the party or his attorney, as may be determined by the court, based on the facts and circumstances of the case.

One important distinction between CPLR §8303-a and Federal Rule 11 is that Rule 11 has no

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*Mr. Holland is a partner in the firm of Condon & Forsyth, located in Manhattan.

CARE AND FEEDING OF A DEFENSE EXPERT

By:

Andrew Lavoott Bluestone*

PREPARATION

The last ten years has marked an enormous increase in the use of defense experts. This has been in part because of the increase in more esoteric litigation, in part because of the increased availability, on occasions because of statute, but mostly because of the perceived need for defensive use of experts. There has been a heightened use of experts by plaintiffs, both in areas that classically required them, and in areas that in past days would not have called for an expert. Experts add color, heft, fullness, and other perceived additives to the direct case of parties.

Experts are being used more often by defendant. The expert's testimony will be necessary either as filler, or as an antidote to the testimony of plaintiff's expert, or as a freestanding element of the case for defendant. In any of these events early careful consideration must be made of the testimony of the expert.

CPLR section 3101 mandates that notice of the expert and his proposed testimony be given to the plaintiff. Consideration of the elements of that notice and its timing are outside the scope of this text. However, consideration must be given to the correspondence with the expert and whether or not to request a written report from the expert in advance of the trial.

Correspondence with the expert must be written in such a manner that you would not be concerned if the plaintiff were to obtain a copy of it and read it directly to the jury in summation. It should be dry, matter of fact, direct, non-controversial and businesslike. If all details can be omit-

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*Mr. Bluestone is a single practitioner located in Manhattan.

PRESIDENT'S MESSAGE

In mid-November the Nassau County chairman, our past president, Ben Purvin conducted a seminar at the Nassau County Bar Association in Mineola, New York at which fellow member Tony McNulty lectured on limiting damages in wrongful death cases, resolving conflicts with the insured on covered and uncovered claims and provided us with an update on the serious injury threshold. Afterwards questions from the audience were accepted. Tony, it has been reported, has personally handled over 950 appellate matters during his career. This seminar attracted over 90 eager claim and legal people all of whom gave it high praise for a most professional presentation.

Finally in New York on November 14, 21 and 28, a complete personal injury trial arising out of an alleged violation of the New York State Labor Law was presented at the auditorium of the Continental Insurance Company at 180 Maiden Lane. This was conducted under the supervision of Kevin Kelly, our New York chairman, ably assisted by Roger McTiernan and Ed Hayes co-chairman. Additional accolades to Roger not only for his organizational talents but also for his professional competence as plaintiff's attorney. The panel participants also included Tony McNulty, Dennis Carrol, John McDonough, Alan McLaughlin, Mike Caulfield, John Downey, Jean Cygan, Robert Wood, Gene Banta, Mike Blumenfeld, Joe McSpedon, Dr. Ehrenreich and Dr. Swearingen who took on the characters of the presiding judge, the plaintiff's and defendant's attorneys and witnesses. One need only to have tried one case to completion to be aware of the research, writing and preparation needed to present a mock trial commencing with the selection of a jury to the return of its verdict. Kevin Kelly must accept the gratitude of all of us who witnessed these proceedings. It has been estimated that the audience on each of the three nights consisted of 115-130 eager counsel hoping to gain insight into the subtleties of trial tactics. Ralph Alio must also be thanked for his continuing effort in procuring the Continental auditorium for our use on these and other occasions.

After attending these seminars, it is very clear to me that the heart of our organization rests with the efforts of our seminar chairmen and with the legal education their activities impart to our members. DANY is a successful organization because of the efforts of its Board of Governors but mostly because of you, its membership.

Let us continue to strive together to keep DANY in the forefront of the defense bar and reap the rewards that accompany membership in our organization.

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ALTERNATIVE THEORIES OF LIABILITY IN PRODUCTS LIABILITY LITIGATION [Con't.]

Summers v. Tice, 33 Cal2d 80, 199 P2d 1. In **Summers** the plaintiff and two defendants were hunting, and the defendants carried identical shotguns and ammunition. During the hunt, defendants shot simultaneously at the same bird, and plaintiff was struck by bird shot from one of the defendants' guns. The court held that where two defendants breach a duty to the plaintiff, but there is uncertainty regarding which one caused the injury the burden of proof shifts to each defendant to prove he has not caused the harm. Successive tort-feasors may be held jointly and severally liable for an indivisible injury to the plaintiff. Application of the alternative liability doctrine generally requires that the defendants have better access to information than does the plaintiff, and that all possible tort-feasors be before the court.

The concerted action theory of liability is best illustrated in drag racing cases. (See e.g. **DeCarvalho v. Brunner,** 223 NY 284, 119 NE 563). Each defendant/participant can be held jointly and severally liable for the plaintiff's injuries based the understanding, express or tacit, to participate in "a common plan or design to commit a tortious act." Prosser and Keeton, Torts Section 46, at 325 (5th ed.). The use of this doctrine in a DES case

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THE DEFENDANT
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MEMBERSHIP APPLICATIONS for The Defense Association of New York may be obtained from John J. Moore c/o the Defense Association of New York—22 Cortlandt Street, New York, New York 10007. Our members are asked to encourage their colleagues to join our Association. Use form in this issue.

ALTERNATIVE THEORIES OF LIABILITY IN PRODUCTS LIABILITY LITIGATION [Con't.]

first reached the Court of Appeals in 1982 in **Bichler v. Eli Lilly and Co.**, 55 NY2d 571, 450 NYS2d 776. In that case the plaintiffs claimed that the "consciously parallel conduct" of the defendant drug companies in marketing, developing and regulation compliance was sufficient to establish the agreement element noted above. The Court of Appeals refused to set aside a jury verdict against Lilly based on a finding of concerted action because, inexplicably, the issue was not properly preserved for Appellate review. The compliance by the defendants with a 1941 Federal Drug Administration directive that they pool their information formed the basis for the **Bichler** conclusion that the defendants acted jointly to commit a tort. As one later court stated in reviewing the holding of Bichler, "The legal foundation for such a theory is lacking and the proponents are reduced to a Robin Hood logic of targeting the most prominent drug manufacturers to give to the unfortunate." **Enright v. Eli Lilby & Co.**, 141 Misc 2d 194, 533 NYS2d 224.

Two additional theories of liability have evolved over the past several years in response to the sometimes complex or impossible task of identifying the manufacturers of the injury causing product: enterprise liability and market share liability, a sort of synthesis of alternative and enterprise liability. Enterprise liability has its genesis in **Hall v. E.I. DuPont de Nemours & Co.**, 345 F.Supp 353 (E.D.N.Y. 1972). It requires a tightly knit industry which delegates its safety duties to its trade association. Upon such proof the burden of proof on causation is shifted to the defendants. To date no court has adopted this theory of recovery.

Market share liability has its roots in the California Supreme Court case of **Sindell v. Abbott Labs.**, 26 Cal.3d 588, 163 Cal Rptr. 132, 607 P2d 924, cert. den. 449 U.S. 912, 101 S.Ct. 285. **Sindell** held that a DES plaintiff need only join as defendants a sufficient number of DES manufacturers so as to include a "substantial share" of the DES market at the time of exposure. In subsequent cases this rule was further refined so that under this theory a manufacturer's liability is several only. In cases where only some of the manufacturers in the relevant market are not joined, liability will be limited to market share, resulting in a less than 100% recovery for the plaintiff. After attempts at using small geographical units failed, further litigation resulted in the use of national market sales to determine market share.

New York was slow to move to adopt any of the above theories in a products liability setting. This evolution started with **Bichler** and has resulted in the April 1989 Court of Appeals decision in **Hymowitz v. Eli Lilly**, 73 NY2d 487, 541 NYS2d 941. A well reasoned discussion of the Constitutional ramifications of imposing liability without "causation in fact" is set forth in **Tigue v. E.R. Squibb & Sons, Inc.**, 136 Misc2d 467, 518 NYS2d 891.

The "concerted action" theory of **Bichler** was attempted to be used by a defendant/third party plaintiff in **Compagno v. Ipco Corporation**, 138 Misc2d 44, 524 NYS2d 138, against the alleged manufacturer of an eyeglass lens that shattered. It argued that it was unable to precisely identify the manufacturer of the lens which caused plaintiff's injuries because it was an industry practice to produce lenses not traceable to a specific manufacturer. The attempt to premise liability on this theory was rejected by the court as the alleged consciously parallel behavior was found not to be an assertion of an industry wide deficiency in the production of eyeglass lenses. "If all that is asserted on an industry wide basis is an inability to identify the source of what is essentially a fungible good all members of the industry are not liable for the negligence or other wrongdoing of one of their number who is not identified. **Campagno**, supra at NYS2d 140.

A pleading defect was also found fatal in the assertion of a claim of concerted action in **Sosa v. Joyce Beverages, Inc.**, 138 A.D.2d 256, 525 NYS2d 607 by the App. Div. of the First Dept. There the court refused to grant consent to the third-party plaintiff to amend its complaint to include a concerted action theory against the third-party defendants, all manufacturers of glass bottles. Plaintiff was injured when a beverage bottle he was drinking from exploded. The third-party plaintiff could not establish which of the manufacturer supplied the bottle to it for resale to the plaintiff. Although the proposed amendment included an allegation that each third-party defendant "acted in pursuance of a common plan or design to commit a tortious act" the affidavit presented in support of the proposed cause of action (apparently supplied by the attorney for the third-party plaintiff) set forth no facts which established that the third-party defendants had acted in pursuance of a common design in the manufacture of bottles.

After twice expressly refusing to adopt any of the above theories in DES cases (See **Bichler**, supra, and **Kaufman v. Eli Lilly**, 65 NY2d 449, 492 NYS2d 584, the Court recently adopted the market share theory of liability in **Hymowitz**, supra. The ruling, along with the ruling in **Tigue** were just reviewed by the United States Supreme Court, who let stand the decision in each case (**Rexall Drug v.**

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Tigue, 89-168; **Squibb v. Hymowitz**, 89-204). In adopting a market share theory of liability, using a national market, for determining liability and apportioning damages in DES cases in which identification of the manufacturer of the drug that injured plaintiff is impossible the Court went to great lengths to confine the use of this theory to this precise fact pattern:

> We stress, however, that the DES situation is a singular case, with manufacturers acting in a parallel manner to produce an identical, generically marketed product, which causes injury many years later, and which has evoked a legislative response reviving previously barred actions. Given this unusual scenario, it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than by those who were injured by the use, even where the precise manufacturer of the drug cannot be identified in a particular action. **Hymowitz**, supra, NYS2d at 947.

Liability under this theory is essentially based on the marketing of a product. If a defendant can establish its product was not marketed for the use to which plaintiff employed same there should be no liability.

With the ever increasing expansion of liability in products liability cases due to policy decisions it remains to be seen whether application of the market share theory will expand to other subject area.

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CARE AND FEEDING OF A DEFENSE EXPERT [Con't.]

ted, they should be. A sample first letter follows:

Dr. A.B. Expert
123 Anywhere St.
His Town, U.S.A.

Dear Dr. Expert,

> Enclosed please find documents forwarded to us by the attorney for the plaintiff. Kindly review them and call me to discuss this matter.

Very truly yours,

Mr. Defense Attorney

On a separate sheet of paper record those documents sent and include it as a "blind cc" to the expert. You may later be required to prove what document were sent; on the other hand you may not. The separate sheet should simply list the items:

1. Plaintiff's verified bill of particulars
2. Response to demand for documents
3. Response to notice to admit
4. Plaintiff's MV104.

All communication should be limited to telephone talk, and nothing controversial reduced to writing. You should work under the assumption that all writing will be disclosed to the plaintiff. Although privileged, and not discoverable, your note should be as cryptic as possible, and care should be taken that any reports to the carrier are safely encoded or otherwise safeguarded. It is not unknown for other attorneys to read your file, or for materials to be inadvertently handed over to the opponent. A misplaced expert report, or a report on the proposed testimony of the expert will cause a sleepless night, at best.

It may be advisable or necessary for you to meet with your expert before deposition. In many cases you will need his knowledge for effective questioning of the plaintiff, or in that rare circumstance, the plaintiff's expert. By the time of deposition you should have formulated your theory of liability, (as enunciated by plaintiff) and a theory or theories of defense. To do so in the light of facts and not in the light of hope, you will have spoken with the expert, reviewed scientific or professional literature and the associated case law. In fact, you should have a summation written in your head well before deposition.

The following areas must be discussed before depositions:

1. Plaintiff's allegations of fact;
2. Plaintiff's allegation of negligence;
3. Defendant's allegations of fact;
4. Defendant's allegations of codefendant's negligence;
5. Areas of comparative negligence;
6. Those facts necessary as a basis for the defendant expert's opinion.

Plaintiff will have painted a broad picture of his theory of liability in the bill of particulars and in conversation with you. By the time of deposition you should have a very clear picture of the event leading to the litigation, through reports, discussions with witnesses, and all the documents obtained. These facts, all of them, even the bad ones, must be discussed with the expert. Let the expert

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CARE AND FEEDING OF A DEFENSE EXPERT [Con't.]

know the worst case analysis so that he can help you to formulate a defense. Painting a rosy picture is not in your best interest.

The expert should also be appraised of the allegations of negligence. While these will be couched in only the most general terms in the Bill of Particulars, you must reduce them to the operative allegations. Again, do not spare him the most powerful allegations. Allow the expert to work for you.

Probe the expert for circumstances which will enable you to lead the jury to the inescapable conclusion that the plaintiff brought this accident upon himself without any help from the defendant whom you represent, or with the help of codefendant. You may not be aware of the most damning occurrence. It is likely that your expert will be.

GENERAL PREPARATION

From the time that you first speak with your expert until the moment that you ask him the first question on the stand keep in constant touch with him. At first this will mean a monthly call to say hello, and to tell him that the case is not yet on the calendar, and later, when it is on the trial calendar, keeping abreast of the expert's availability. It is very embarrassing to tell a judge that you have selected a jury only to find that your expert is out of the country for several weeks. You may be left in a trial without the expert.

Once you have received the oral report of the expert, the case has been placed upon the calendar, all depositions have been completed (even though on the calendar), all third party actions started, and all documents obtained, request the written report of the expert. Specify to the expert, orally, that he should state his ultimate conclusion in the most general terms and give only a sketchy description of the underlying basis for his conclusion. A powerful tactic of undermining the conclusion of the expert is to undermine the basis for the conclusion; it is less possible if the expert is canny about giving the underlying basis for his conclusion. It is most possible when one is able to tie the expert down to a specific set of facts. Room must be left for the expert to mimic the testimony of plaintiff or others in the trial.

At least a month before the trial, obtain the following for the expert:

a. edited transcripts of the depositions of the fact witnesses,
b. a full transcript of the testimony of plaintiff,
c. a transcript of the testimony of the plaintiff expert's testimony, if any,
d. a copy of the curriculum vitae of the plaintiff's expert,
e. a list of the publications of the plaintiff's expert.

Several days before the expert's testimony meet with him to go over the material. Prepare copies of exhibits or important documents and indicate the positive and negative aspects of them. Allow the expert time to review the material for more meaningful conversation. At this time explain the personalities of the parties and the Court, as this might factor in with his study of the materials. Explain your view of the testimony taken, and the depositions, the positive and negative points as you view them.

Go over his testimony. The first thing to go over is the most obvious: qualifying him as an expert. It is universally accepted that the most obvious quality of an expert is the fact that his credentials will dazzle the jury, and will add credibility to your case. It is necessary to make the jury hear and appreciate his qualifications. A thorough review of his education and writings, his projects and academic achievements should be gone through slowly, and spoken of in everyday language to the jury. You must avoid appearing to "speak down" to the jury; a simple straight forward explanation of an academic project is acceptable. You must elicit the educational background, all degrees held and any special courses of study or research projects. Seminars and courses taken, a description of the expert's employment history and a description of the duties that went along with that employment, publications, memberships in professional organization (excluding those which are simply social) and any special experience should also be laid out for the jury. It may be valuable to have the expert describe a typical day. Prepare the expert to state all these necessary items slowly, fully and without seeming to be bored. On the other hand, it should not be unduly drawn out. This is difficult, for the expert has probably done this many times; yet it must be presented afresh to the jury.

At every opportunity use the expert's title. without being obsequious. Early on ask the expert what he expected his task to be when you met and discussed the case. Prepare him to answer that he expected to review the evidence, obtain descriptions from the plaintiff and the defendant as to how the accident occurred, view the premises or machinery or object of the accident (to the extent that it was actually viewed) and render an opinion with a reasonable degree of (scientific, engineering, medical, etc.) certainty as to how the accident oc-

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curred. It must be an evenhanded recitation of his task. He should be prepared to give a long recitation of the facts upon which he based his opinion (in cross-examination) - long enough to avoid giving plaintiff an argument that he overlooked certain important facts.

The expert should be prepared to answer the predicate question with a simple "yes." He will be asked whether he has an opinion concerning the ultimate question. He should be instructed to answer simply "yes" as this will allow him later to go through the predicate for his opinion, and will also serve as the reason for the request to the judge that he be deemed an expert in his field.

Care must also be given to orient the expert to the Courtroom. Eye contact is paramount and he must be instructed to maintain eye contact with the jury, to avoid appearing to speak exclusively to you, and to target those jurors who have not been reacting well to you. Next, you will prepare the expert to go through the facts of your case, and the evidence, and to apply those facts and evidence to the standards upon which he bases his opinion. You should have appropriate photocopies of the statutes, or rules or professional writings or literature available for the expert to refer to, or to have to offer as evidence, and the expert must be drilled to give the rules or standards in an order so that you will be prepared to offer the evidence. He must be given a list to refer to so that no material is left out. You must also prepare him to flesh out his presentation so that he is on the stand on direct for approximately 40 minutes. Consideration must be given to the ability of the jury to concentrate. His opinion must be given, and he must be off the stand before the concentration span of the jury is up. It is clearly better to have your opponent get up to do cross examination of the expert while the jury is in a fog and unable to concentrate on his opening salvos. You must also tailor your presentation to the practices of the Court. Depending on when the Court is disposed to break for lunch, or for the afternoon, you may wish to leave your opponent not enough time to get in his cross before breaking for the day, or breaking for the afternoon. His cross will be best forgotten then.

Preparing your expert for cross means going through all the usual methods of cross examination. There will be obvious detriments to your expert's presentation. They may include:

1. Examining the plaintiff only once or twice;
2. Examining the premises only once or twice,
3. The expert's history of testimony in previous litigation,
4. Being a professional witness,
5. Impeachment by authoritative texts,
6. Impeachment by the testimony of the plaintiff's or other experts.

The expert must be prepared to deal with these possibilities. A problem exists when the expert has not examined the plaintiff's person, or the premises as often as has the plaintiff's expert. A straightforward explanation, disarming in its delivery must be given. The explanation must be that the expert made an examination sufficient to come to an opinion, and while more viewings could have been made, they were not necessary for his opinion, and were merely surplus.

Previous testimony only for defendants is a more difficult problem. If the expert has testified only for defendants he must answer that it was not out of prejudice against plaintiffs, or because his fixed opinions disfavor plaintiffs but rather because he has responded to attorney requests as they came to him. He would gladly investigate any situation within his realm, even for Mr. Plaintiff's attorney.

Being a professional witness is easier. The witness should answer that he is paid for the preparation and discussions and knowledge of professional literature, and standards and his education. He will state that he is paid for his time, as are all professionals. He should not be allowed, and cautioned not to respond to the attorney by asking how much the attorney makes for processing the case.

Impeachment by authoritative texts is very difficult when the expert denies that the text is authoritative. If pressed, there might be a concession that it is a very nice text, and the author a professional, but that on this issue with regard to this case it is not authoritative. It is unlikely that the plaintiff will then call an expert (at a significant cost) to attempt to impeach the defense expert. It may also be collateral, and the plaintiff's reply expert might be prevented from testifying.

The expert should also differ (of course) with the conclusion of the plaintiff's expert, and be ready to give convincing reasons as to their differing conclusions given the "same" observations. He must point out the differences between their observations of the basic facts, and the differing conclusions that flow from the underlying difference. Here the expert will be more helpful in structuring the narrative when you go over all of the facts in earlier preparation.

Forego rebuttal testimony if you can, and if you cannot, try again to avoid it. If you simply must ask rebuttal questions keep them short, and non-argumentative. They generally do not help your case.

In the next article in this series we will go through specific questions and formats for various types of cases.

DRI CORNER [Con't.]

trade magazines as well an having participated in radio interview shows broadcast nationally. D.R.I.'s recent conference on expert witness testimony continued to receive national media attention most recently in U.S. News and World Report. On October 27th and 28th, D.R.I. funded a forum at the University of Chicago on the jury system. The purpose of this program was to promote the jury system to the general public.

D.R.I. continues to have a significant presence and is willing to address on behalf of the defense bar those issues which are of national and local concern. D.R.I. considers as its major obligation, responsiveness to local defense association needs, constantly striving to solicit from local associations the issues most important to them be they legislative, administrative or simply public relations. Once identified, D.R.I. stands ready to utilize its talent and resources to address these issues. It, therefore, should be no surprise that in order to be effective we must hear from you. The 23rd National Conference is one vehicle to express your needs and concerns. Letters to me or to the Defense Association of New York, are other viable alternatives to focus attention on matters of importance.

I am pleased to report that New York has a new defense association located in Buffalo. Paul Jones of Phillips, Lytle & Hitchcock was elected President of the newly formed Western New York Defense Trial Lawyers Association. This organization was formed with the assistance of D.R.I. D.A.N.Y. rendered an assist by supplying various materials for review including our paper, constitution and information on our educational seminar.

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be imposed upon a third party defendant in a third party action should arise from or be conditioned upon liability asserted against the third party plaintiff in the main or primary action.

DAMAGES—Market Share. A market share theory using a national market was an appropriate method for determining liability and apportioning damages in cases involving injuries from diethylstilbestrol (DES) in which the manufacturer's identification was impossible. The apportionment of liability corresponded to the overall capability for each defendant as measured by the amount of risk of injury each defendant created to the public at large. (**Hymowitz v. Eli Lilly & Co.**, 73 N.Y.2d 487, 541 N.Y.S.2d 941).

VENUE—Convenience of Witnesses-Elements. In **Alexandra v. Pepsi Cola-Bottling Co., Inc.**, (____ A.D.2d ____, 542 N.Y.S.2d 21), the Second Department concluded that the defendant was not entitled to a change of venue on the ground of convenience of witnesses. The defendant failed to satisfy its burden of establishing the identity of the witnesses who allegedly would be inconvenienced, their willingness to testify and the nature of their anticipated testimony.

ARBITRATION—Vacating-Elements-Modification of Award. In **Vilceus v. North River Ins. Co.**, (____ A.D.2d ____, 542 N.Y.S.2d 26), Second Department indicated that an aggrieved party has only 90 days within which to move to vacate or modify an arbitration award. However, the party may elect not to make the motion and, instead, raise the objection once the successful claimant moves to confirm the award.

FORUM NON CONVENIENS—Dismissal-Elements. It was recently held by the Appellate Division, Fourth Department, in the case of **Brown v. Dataw Island Realty Inc.**, (____ A.D.2d ____, 542 N.Y.S.2d 99), that there was no abuse of discretion in dismissing a complaint on the ground of forum non conveniens, where the cause of action arose in South Carolina, the defendant was amenable to suit in that forum, and both the contract and choice of law principles compelled the application of South Carolina law.

ADMINISTRATIVE HEARING—Res Judicata. In **Fraser v. Brunswick Hospital Medical Center, Inc.**, (____ A.D.2d ____, 542 N.Y.S.2d 204), the Second Department ruled that an administrative determination that a medical malpractice plaintiff's decedent's injuries were not the result of a compensable accident was final and conclusive as to the defendant which fully participated in the administrative hearing and never sought appellate review of that determination; thus the defendant was precluded from asserting the affirmative defense of workers' compensation coverage.

TRIAL—Rebuttal Evidence-Discretion of Court. It was recently indicated by the Second Department that the question of whether to permit the introduction of rebuttal evidence within the sound discretion of the trial court and the court's decision in that regard should not be disturbed on appeal absent clear abuse or improvident exercise of discretion. (**Capone v. Gannon, ____ A.D.2d ____, 542 N.Y.S.2d 199).**

AUTOMOBILES—Duty of Truck Owner. In **Jackson v. Northside Fuel Oil Corp.**, (____ A.D.2d ____, 542 N.Y.S.2d 323), the Second Department indicated that an owner of a truck could not be held liable for injuries suffered by an employee of an-

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other company while the employee was assisting the truck which had a flat tire. The extent of the truck owner's involvement was that one of its employees telephoned the injured plaintiff's employer to report a flat tire and request assistance. That the employee might have told the injured plaintiff's employer that he thought the truck had 16-inch tires was insufficient to hold the truck owner liable for the injuries.

WRONGFUL DEATH—Burden. In **Sachs v. Nassau County,** (____ A.D.2d ____, 542 N.Y.S.2d 337), the Second Department that in a wrongful death matter, a plaintiff is not held to as high a degree of proof required as in a case where the injured party may take the stand and give evidence, the plaintiff is entitled to the benefit of every favorable inference which can be reasonably drawn from the evidence in determining whether a prima facie case has been made.

INSURANCE—Exclusion-Burden of Proof. The Second Department recently indicated that an automobile liability insurer had the burden of proving that the vehicle had been furnished for the regular use of the driver who was the wife of the insured within the meaning of the exclusion of the policy. (**Frank v. Statewide Ins. Co., ____ A.D.2d ____, 542 N.Y.S.2d 248).**

DAMAGES—Emotional Distress. In **DiBlasi v. Aetna Life and Cas. Ins. Co.,** (____ A.D.2d ____, 542 N.Y.S.2d 187), the Second Department held that damages for emotional distress could not be recovered in an insured's action against the insurer for a bad-faith refusal to settle within the policy limits.

INSURANCE—Bad-Faith-Punitive Damages. It was recently held by the Appellate Division, Second Department, that a bad-faith case is established where the liability is clear and the potential for recovery far exceeds the insurance coverage. The insurer cannot be held liable if its decision not to settle was the result of an error of judgment on its part or even by a failure to exercise reasonable care. There is a cause of action only if the decision not to settle within the policy limits was made in bad-faith, meaning in gross disregard of its insured's interests. (**DiBlasi v. Aetna Life and Cas. Ins. Co.,** ____ A.D.2d ____, 542 N.Y.S.2d 187). In a bad-faith refusal to settle a matter against the insurer, the plaintiff is not entitled to punitive damages in the absence of malice or intent to harm.

MEDICAL MALPRACTICE—Causation-Prima Facie Case. In **Sachs v. Nassau County,** (____ A.D.2d ____, 542 N.Y.S.2d 337, the Second Department submitted that because causation is always a difficult issue in a medical malpractice matter, the plaintiff need not eliminate entirely all possibility that the defendant's conduct was not a cause in order to establish a prima facie case. It is enough that the plaintiff offer sufficient evidence from which reasonable men might conclude that it was more probable than not that the injury was caused by the defendant.

AUTOMOBILES—Negligence-Parent Entrustment. In **Rosenfeld v. TISI,** (____ A.D.2d ____, 542 N.Y.S.2d 762), the Second Department held that a mother was not liable under the theory of negligent entrustment of a motor vehicle to her daughter where the records of the Department of Motor Vehicles established that the vehicle involved in the accident was registered to the daughter three weeks prior to the accident at a different address than that of the mother, the daughter admitted ownership of the vehicle, and the daughter was an 18-year-old licensed driver with no mental or physical impairments.

DAMAGES—Future Earnings. It was recently held by the First Department in the case of **DiIorio v. Gibbson & Cushman of New York, Inc.,** (____ A.D.2d ____, 542 N.Y.S.2d 625), that damages for future earnings awarded a 21-year-old dredge oiler without any formal education were too speculative to be sustained where they were apparently based upon a claim that, but for this accident, he would have been elevated to a position of chief engineer on a deep sea vessel, earning upwards of $100,000 per year for only six months of work; thus a new trial was ordered unless the oiler consented to the reduction of the award to $750,000.

JURY—Discharge of Juror-Discretion of Court. In **People v. Thompson,** (____ A.D.2d ____, 542 N.Y.S.2d 700), the Second Department indicated that the court's discharge of a juror midway through a trial following the juror's claim that the trial's unexpected length would cause her to forfeit a deposit of approximately $1,000 she had made towards her vacation airfare and hotel reservations was not an abuse of discretion. The decision was made after thorough inquiry and recitation of facts and reasons for invoking the statutory authorization.

NEGLIGENCE—Res Ipsa-Elevator Fall-Expert Testimony. The First Department recently held in the case of **Williams v. Swissotel New York, Inc.,** (____ A.D.2d ____, 542 N.Y.S.2d 651), that an elevator passenger's testimony that he was injured when the elevator fell nine floors then abruptly stopped was sufficient to support the inference of both negligence and causation under the doctrine of res ipsa loquitur in an action against the elevator servicing company, despite the absence of expert testimony.

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DISCLOSURE—Attorney-Client Privilege. In **Rossi v. Blue Cross and Blue Shield of Greater New York,** (73 N.Y.2d 588, 542 N.Y.S.2d 508), it was held that an internal memorandum of a corporate staff attorney to a corporate officer communicating advice regarding a company form that was the subject of imminent defamation action was protected from disclosure in that action by the attorney-client privilege. The privilege applies to communications between corporations and attorneys, whether corporate staff or outside counsel.

TRIAL—Missing Witness Charge-Failure to Give. The First Department recently reversed a matter which consisted of a negligence action brought by a roller rink patron against the rink. The plaintiff was knocked down by rowdy teenagers, the trial court refused to give the missing witness charge and this was deemed reversible error. The patron claimed that the rink's security guard had previously told teenagers "cool it" and the rink did not offer testimony of the security guard at the trial. (**Trainor v. Oasis Roller World, Inc.,** ____ A.D.2d ____, 543 N.Y.S.2d 61).

ARBITRATION—Res Judicata. In **Allcity Ins. Co. v. Vitucci,** (____ A.D.2d ____, 543 N.Y.S.2d 86), the First Department indicated that it is the judgment that is entered on an arbitration award after confirmation, rather than the award itself, that is entitled to the res judicata effect. The award cannot serve as a res judicata barrier to judicially stay a new arbitration proceeding where the one-year period to confirm the award had elapsed, with the result that the award was no longer enforceable.

INDEMNIFICATION—Construction Contract-General Obligation Law. It was recently submitted by the Appellate Division, Third Department, that an indemnification clause in a construction contract was unenforceable insofar as it purported to indemnify the owner for its own negligence.

A construction contract provision calling for the contractor to obtain insurance coverage could not serve as a basis for imposing liability on a contractor for loss caused by the owner's own negligence. (**Patenaude v. General Elec. Co.,** ____ A.D.2d ____, 543 N.Y.S.2d 234).

NEGLIGENCE—Proximate Cause-Intervening Act. The Second Department recently held that there will ordinarily be no duty imposed on a defendant to prevent a third party from causing harm to another unless an intervening act which caused plaintiff's injuries was normal or foreseeable consequence of a situation created by the defendant's negligence.

In an action against a restaurant for a wrongful death of a patron killed when a vehicle crashed through a fence around the restaurant's outdoor dining area, which area was near two major thoroughfares and that the fence surrounding the area could not withstand the impact of a runaway automobile, was insufficient to establish the restaurant's liability for an unforeseeable event of the driver losing control of his vehicle.

Proximate cause is uniquely a question of fact for a jury when varying inferences are possible from the evidence and testimony. However, where the evidence as to the cause of accident is undisputed, the question as to whether any act or omission of the defendant was the proximate cause thereof is one for the court and not for the jury. (**Rivera v. Goldstein,** ____A.D.2d ____, 543 N.Y.S.2d 159).

NEGLIGENCE—Duty of Care-Assumption of Risk. Participants in a game of catch had no duty to an experienced baseball player who placed himself in the line of an ongoing game and thereby put himself in danger of being struck by a misthrown ball. (**Sutfin v. Scheuer,** 74 N.Y.2d 697, 543 N.Y.S.2d 379).

NEGLIGENCE—Automobile-Proximate Cause-Inconsistent Position. In **Kutanovski v. DeCicco,** (____ A.D.2d ____, 543 N.Y.S.2d 476), the Second Department held that sufficient evidence supported a finding that the City which owned a truck which collided with a motorist's automobile was not liable for injuries to the motorist. A police officer who responded to the accident call testified that the only damage he observed upon his arrival at the scene was on the left side of the car and the right fender of the truck with no damage to the rear of the car, contradicting the testimony of the motorist and her passenger that the truck struck the car twice in the rear and once on the left side and once in the front.

LIMITATIONS—Malpractice-Fall from Bed. A hospital's alleged negligent supervision of an intoxicated patient who fell from an emergency room bed and injured his head would be characterized as medical malpractice, rather than negligence for limitation purposes. Thusly, the two and one-half years statute of limitations, not the three-year limitations period for negligence claims was applicable hence, the action was untimely. (**Scott v. Uljanov,** 74 N.Y.2d 673, 543 N.Y.S.2d 369).

APPEALS—Limitation of Appellate Division. In **Chimarios v. Duhl,** (____ A.D.2d ____, 543 N.Y.S.2d 681), the First Department held that the Appellate Division reviewing an appeal in a personal injury action, was limited to review of the facts and information contained in the record and that which could be judicially noticed; a party

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would not be allowed to supplement the record with information not available to nisi prius court or to include information in its brief which was similarly outside the record.

LIBEL—Slander-Opinions. The Second Department recently submitted in the case of **Epstein v. Board of Trustees of Dowling,** (____ A.D.2d ____, 543 N.Y.S.2d 691), that expression of "opinion" is not actionable as a libel because of the constitutional protection accorded to free expression of ideas even if false and libelous, no matter how pejorative or pernicious they may be. Letters to the editor in a student newspaper regarding abilities of a college professor were opinions and were not actionable under the libel law.

CIVIL CONTEMPT—Elements. To sustain a finding of civil contempt based on a violation of a court order, it is necessary to establish that a lawful court order clearly expressing in an unequivocal mandate was in effect and the person alleged to have violated that order had actual knowledge of its terms; that is, it must appear with reasonable certainty that the order had been knowingly disobeyed. Actual notice is an essential predicate to the contempt order, although it is not necessary that the order actually had been served upon the party held in contempt, so indicated the Appellate Division, Second Department in **Graham v. Graham,** (____ A.D.2d ____, 543 N.Y.S.2d 735).

TRANSACTION OF BUSINESS—Jurisdiction-Section 302. In **Carte v. Parkoff,** (____ A.D.2d ____, 543 N.Y.S.2d 718), the Second Department held that a dentist did not "transact business" in the state, within the meaning of the New York long-arm statute, merely because he solicited New York customers to visit his office in New Jersey by placing a New York telephone number and address in the New York directory. The dentist could not be sued in New York dental malpractice allegedly committed in New Jersey.

INSURANCE—Notice as Soon as Practicable-Five-Month Delay. The Third Department recently held that even if the insured was under no obligation to contact the prior insurer until the insured was notified by the current insurer of possible non-coverage, the insured's unexplained five-month delay thereafter in notifying the prior insurer of possible coverage liability foreclose, as a matter of law, a finding that the notice was given "as soon as practicable" as required under the prior insurer's policies. (**Young v. New York State Department of Insurance, Liquidation Bureau,** (____ A.D.2d ____, 543 N.Y.S.2d 768).

CONFLICTS OF LAW—Contacts. In **Calla v. Shulsky,** (____ A.D.2d ____, 543 N.Y.S.2d 666), the First Department held that New York law applied to determine the liability for a worker's fall from a ladder while performing work on a store in a New Jersey shopping center. The plaintiffs and all principal defendants were New York residents or incorporated in New York and the contract between the center and the store was made in New York.

DISCLOSURE—Testing Destruction and Restoration. in **Giorgri v. Union Free School District No. 32,** (____ A.D.2d ____, 543 N.Y.S.2d 723), the Second Department held that plaintiffs in a negligent action to recover damages for personal injuries were entitled to have their engineer drill small holes in defendant's premises provided that they assumed the responsibility for restoring the structure. Plaintiffs had made sufficient showing that due to alteration of the premises, their engineer needed to drill a hole in order to take an accurate measurement of the height of the ramp from which the infant plaintiff fell.

AUTOMOBILES—Keys in Ignition. It was recently submitted by the Appellate Division, Fourth Department, in the case of **Howard v. Kiskiel,** (____ A.D.2d ____, 544 N.Y.S.2d 91), that pursuant to the common law an owner of an automobile who left his keys in the vehicle is not liable for the negligence of a thief who steals the vehicle. A passenger in a stolen automobile could however maintain a personal injury action against the owner based upon the owner's violation of a statute prohibiting a person from leaving an automobile with the keys in the ignition.

DISCLOSURE—Expert Reports-Notice to Admit-Scope. In **Rosario v. General Motors Corp.,** (____ A.D.2d ____, 543 N.Y.S.2d 974), the First Department indicated that where material physical evidence is inspected by an expert for one side and lost or destroyed before the other side has had the opportunity to conduct its own expert inspection, special circumstances exist that per se warrants disclosure directly from the expert concerning the facts surrounding his inspection.

An injured automobile passenger was entitled to an order protecting her against a notice requesting her to admit that the only defect she asserted and relied upon was that to "left front wheel assembly" identified in her expert's report and reiterated in her answer to manufacturer's interrogatories. The manufacturer's asserted purpose—to "narrow the issues" by "obtaining confirmation that plaintiff will not allege new claims of defect at trial"—would be served not by a notice to admit, but by a bill of particulars.

INSURANCE—Assigned Risk-Cancellation-Nullity. In **Davis v. Walsh,** (____ A.D.2d ____, 544

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N.Y.S.2d 208), the Second Department concluded that an insurer's purported cancellation of an assigned risk policy was a nullity and the policy was in effect on the date of the accident because the notice of renewal premium was issued less than 40 days before the date when the policy was due to expire.

INSURANCE—Exclusion-Ambiguity-Indemnification. In **North River Insurance Co. v. United Nat. Ins. Co.**, ____ A.D.2d ____, 544 N.Y.S.2d 122), the First Department held that the confusion created by the use of the term "indemnify" in a general liability policy exclusion for any obligation "to indemnify another because of damages arising out of" bodily injury revealed a potential ambiguity which had to be resolved against the insurer. Therefore, the policy covered a third party indemnification claim against the insured for damages for injuries sustained by an insured's employee while dismantling a hoist used in the construction of a building, in the absence of any agreement on the part of the insured to indemnify any party defendant.

JUDGMENT—Summary-Discovery-Mere Hope. It was recently pointed out by the Appellate Division, Second Department that a mere hope by a plaintiff that he might be able to uncover some evidence during the discovery process was not sufficient to deny summary judgment to the defendant in a negligence action to recover damages for personal injuries. (**Jones v. Gameray**, ____ A.D.2d ____, 544 N.Y.S.2d 209).

CARRIERS—Warsaw Convention-Strict Compliance of Statute. The First Department recently submitted in the case of **Arkin v. New York Helicopter Corp.**, (____ A.D.2d ____, 544 N.Y.S.2d 343), that an international airline's failure to record the number and weight of the passenger's checked bags on passenger tickets and baggage checks delivered to the passengers rendered null and void the airline's attempt to limit its liability to the amounts specified under the Warsaw Convention for lost bags.

EVIDENCE—Videotape-Tape Prepared for Trial. The First Department recently submitted that a trial court's decision to permit a jury in a medical malpractice action to view a videotape of a heart surgery performed by the defendant physician on a male patient six years after a fatal heart valve replacement on a female patient and only two to three weeks before the start of trial, was highly improper, inflammatory and prejudicial; preparing the tape exclusively for trial provided the defendant physician with an opportunity to use special care in a filmed operation, medical and physical conditions of the patients were different, the patient on the tape was being operated upon to establish a coronary bypass grafts and not to have valves replaced and the tape was played in conjunction with and enhanced by defendant physician's self-serving commentary. The court further submitted that although the use of instructional film in a medical malpractice action might be justified under certain circumstances, as were expert witness is demonstrating how a particular medical procedure is commonly carried out, such a film is inappropriate as a self-serving device where prepared by the defendant specifically for introduction at trial in order to disprove his negligence regarding a different surgery. (**Glusaskas v. John E. Hutchinson, III**, ____ A.D.2d ____, 544 N.Y.S.2d 323).

INSURANCE—Bad-Faith-Elements. In **Roldan v. Allstate Insurance Co.**, (____ A.D.2d ____, 544 N.Y.S.2d 359), the Second Department concluded that no valid cause of action against an insurer based on allegations of bad-faith refusal to settle exists unless there is an extraordinary showing of disingenuous or dishonest failure to carry out a contract. To succeed on a claim of bad-faith refusal to settle, the plaintiff must show more than mere negligence on the part of the insurer. A bona fide error by the insurer in assessing the exposure of the insured is not sufficient and it is necessary for the plaintiff to prove that the rejection by the insurer of an offer of settlement within its policy limits constituted a deliberate, or at least reckless, decision to disregard the insured's interests.

NEGLIGENCE—Foreseeability-Proximate Cause. The First Department recently indicated that a lack of foreseeability that someone would introduce water into a bottle containing concentrated sulfuric acid was fatal to the apartment complex superintendent's negligence case against the complex's managing agent premised on the agent's refusal to allow the superintendent to clear out the storage room of materials, including a bottle left by a previous superintendent. The effect of the instructions given about the storage room which simply would have kept the superintendent out of what, with benefit of hindsight, was a zone of danger.

The proximate cause of an accident in which the cap "flew off" plastic bottle and the contents "shot out," causing severe burns on the superintendent's face, arms and upper body was not the complex's managing agent's refusal to allow the superintendent to clear out the storage room in which the bottle had been found, but rather, the proximate cause was the action of an unknown trespasser who introduced water into the plastic bottle containing concentrated sulfuric acid. (**Wojcicki v. Elbert Enterprises**, ____ A.D.2d ____, 544 N.Y.S.2d 353).

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JUDGMENT—Attorney Fees-Error of Waiver. In **Larkin v. The Present Co.,** (____ A.D.2d ____, 544 N.Y.S.2d 696), the Fourth Department held that although a judgment for attorney fees did not fully compensate an attorney for his disbursements, the attorney failed to preserve that error for review by objecting to the trial court's instruction, special verdict question, jury finding or judgment.

ARBITRATION—Alternate Dispute Resolution-Elements. In **Thomas Crimmins Contracting Co. Inc. v. The City of New York,** (74 N.Y.2d 166, 544 N.Y.S.2d 580), it was held that an alternate dispute resolution agreement, like an arbitration agreement, must be clear, explicit and unequivocal and must not depend upon implication or subtlety. The parties consenting to the arbitration surrender many of their normal rights under the procedural and substantive law of the state and it would be unfair to infer such a significant waiver on the basis of anything less than a clear intention or intent.

INSURANCE—Prior Disclaimer. In **Moye v. Thomas,** (____ A.D.2d ____, 544 N.Y.S.2d 675), the Second Department submitted that since the insurer previously disclaimed coverage, the insurer was not relieved of its obligation to appear and defend the insured when the insured failed to comply with the policy requirement that she provide the insurer with copies of legal papers relating to the action; under the circumstances the forwarding of the papers would have been useless.

INSURANCE—Exclusion-Burden of Proving. Where the exclusion clause is relied upon to deny coverage, the insurer has the burden of demonstrating that the allegation of the complaint cast that pleading solely and entirely within the policy exclusions, and further, that the allegations in toto are subject to no other interpretation. (**Technician Electronics Corp. v. American Home Assur. Co.,** 74 N.Y.2d 66, 544 N.Y.S.2d 531).

PROCESS—Service of Summons on Wife. The Second Department that the service on a defendant which was effectuated by serving his wife and thereafter mailing a copy of the petition to his residence on the last day upon which the proceeding could be timely brought was proper. (**Davis v. Dutchess County Board of Elections,** ____ A.D.2d ____, 544 N.Y.S.2d 683).

NEGLIGENCE—Athletic Event-Assumption of Risk. In **Rosa v. County of Nassau,** (____ A.D.2d ____, 544 N.Y.S.2d 652), the Second Department indicated that a professional hockey team was not liable, as a matter of law, to a spectator struck in the mouth by a hockey puck during a game. The hockey team did not own, operate or exercise control over the facility and did not have the authority or ability to control the manner in which the facility was operated and maintained.

The owners and operators of the arena met their obligation to protect the spectator, as a matter of law, by erecting a three-foot fence around the surface of the arena topped by a three-foot plexiglass wall.

TRIAL—Evidence-Improper Exclusion of Medical Evidence. In **Levande v. Dines,** (____ A.D.2d ____, 544 N.Y.S.2d 864), the Second Department concluded that the medical malpractice plaintiff's treating physician's testimony in behalf of the defendant was improperly excluded on the ground that the defendant had conducted an unauthorized private interview with the physician during the pretrial discovery phase, in that the evidence supported conclusion that the defendant had first contacted the physician after the note of issue had been filed, when the discovery phase of the action had been clearly completed.

PRIVILEGE—Attorney-Client. In **Hoopes v. Carota,** (74 N.Y.2d 716, 544 N.Y.S.2d 208), the court ruled that questions regarding whether legal advice was obtained and how such advice was paid for was not protected by the attorney-client privilege. The privilege only extends only to confidential communications made to the attorney for the purpose of obtaining legal advice.

NEGLIGENCE—Duty of Owner-Notice. The First Department recently submitted that a building owner was not liable to a porter employed by a third party defendant to perform maintenance services at a building who slipped on a small patch of water or ice and fell down stairs injuring his back, in the absence of evidence as to what created the allegedly wet or icy condition of when or how the water came into the stairway or evidence that the owner had notice of the condition.

A building owner cannot be liable for injuries caused to a person as a result of a defective condition on the premises unless it can be shown that the owner created the condition or that it had actual or constructive notice of the condition for a reasonable period of time, that in the exercise of reasonable care, the owner should have corrected it. (**Trujillo v. Riverbay Corp.,** ____ A.D.2d ____, 545 N.Y.S.2d 2).

EVIDENCE—Parol. In **Namad v. Salomon Inc.,** (74 N.Y.2d 751, 545 N.Y.S.2d 79), the court submitted that parol evidence would be inadmissible if the contract were clear on its face and sufficient alone to divine intent of the parties.

THE IMPOSITION OF SANCTIONS IN STATE AND FEDERAL COURTS [Con't.]

upper limit on the amount of sanctions which may be awarded. Numerous cases in the federal courts have awarded sanctions in excess of $10,000. **See, e.g., Calloway v. Marvel Entertainment Group,** 854 F.2d 1452 (2d Cir. 1988), **cert. granted,** ____ U.S. ____, 109 S.Ct. 1116 (1989). Under §8303-a, costs and fees are awardable in addition to any other judgment awarded to the successful party.

In order to find a claim to be "frivolous" under §8303-a(a), the court must determine that the claim or defense was "commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another", or that the action or defense "was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law." §8303-a(a).

In contrast to Federal Rule of Civil Procedure 11, which requires that the lawyer conduct a reasonable inquiry into the validity of the claim before signing the pleading but does not require that any post signing inquiry be made to determine the continued validity of the claim or defense, see **Calloway v. Marvel Entertainment Group,** 854 F.2d 1452 (2d Cir. 1988), **cert. granted,** ____ U.S. ____, 109 S.Ct. 1116 (1989), §8303-a seems to impose a continuing duty on the part of the attorney to review claims or defenses asserted during the progress of the litigation. Section 8303-a(c)(ii) provides that the court may find that the party or an attorney did not act in bad faith if the claim is promptly discontinued when the party or attorney learned or should have learned that the action or defense lacked such a reasonable basis. §8303-a(c)(ii). The statute leaves open the question of imposition of sanctions if an attorney continues to press a claim or defense after he learns that the claim or defense lacks a reasonable factual basis.

Section 8303(a) applies literally only to "actions", not notions. As most practitioners can readily attest, some of the most frivolous practice occurs with respect to the bringing of and opposition to motions. This problem was addressed by the enactment of Part 130 of the Uniform Rules for New York State Trial Courts, McKinney's 1989 New York Rules of Court §130 (22 N.Y.C.R.R. §130), which provides that the court may award costs and impose financial sanctions for frivolous conduct in civil litigation.

The test for frivolous conduct in Part 130.1 is whether the conduct "is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." 22 N.Y.C.R.R. §130.1. In considering whether the conduct undertaken was frivolous, the court shall consider the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct and whether the conduct continued when its lack of legal or factual basis was apparent or should have become apparent to counsel. Prior to the imposition of costs or sanctions, a reasonable opportunity to be heard shall be afforded to the offending party or attorney. 22 N.Y.C.R.R. §130.1(d).

Part 130 differs from §8303-a in two important respects: first, Part 130 is discretionary, not mandatory, in its application, and conduct can be punished under Part 130 when that conduct is undertaken "primarily" for an illegitimate purpose, 22 N.Y.C.R.R. §130; second, although both §8303-a and Part 130 of the Uniform Rules provide that the total amount of the sanction may not exceed $10,000, the sanction under §8303-a is phrased in terms of an award to the successful party of costs and reasonable attorneys' fees not exceeding $10,000. Under the Uniform Rules, the payment of sanctions by an attorney shall be deposited with the Clients' Security Fund. Payment of sanctions by a party who is not an attorney are to be deposited with the clerk of the court for transmittal to the State Commissioner of Taxation and Finance.

There is a scarcity of reported decisions interpreting §8303(a) and Part 130 of the Uniform Rules, which took effect only on January 1, 1989. Nevertheless, two bills have been introduced in the State Senate and Assembly which would suspend Part 130 of the Uniform Rules, pending a study by a temporary state commission. **See** S. 3887, 212th Sess. (1989); A. 3521, 212th Sess. (1989). Neither bill has been passed as of this date. Suspension of the new rules has been opposed in a report sent by the Commercial and Federal Litigation Section of the New York State Bar Association to the Legislature and Chief Judge Sol Wachtler. However, the New York State Bar Association has recently formed a Committee to review Part 130 and recommend changes. **See** N.Y.L.J. Oct. 12, 1989, p. 1.

An example of the application of §8303-a to the ordinary negligence lawsuit is **England v. Gradowitz Brothers Realty Corp.,** 137 Misc. 2d 21, 519 N.Y.S.2d 784 (Sup. Ct. Bronx County 1987). In **England,** which Judge Tompkins described as a typical negligence slip and fall case, plaintiff sued after taking a fall in defendant's driveway. No discovery had been conducted in the case. There had been no

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depositions or notices to admit so as to establish any of the underlying facts necessary to prove a **prima facie** negligence case. No photographs or other proof of the driveway's condition had been annexed to the moving papers. No proof was adduced as to the period of time for which the driveway had allegedly existed in a poor condition.

Finding that the plaintiff had failed to make even a minimal showing of entitlement to judgment as a matter of law, the court found that the motion was "frivolous, unnecessary and wholly without merit". **England**, 137 Misc. 2d at 22, 519 N.Y.S.2d at 785. The court based its authority to impose sanctions both on CPLR 8303-a (which apparently does not even apply to this case since the conduct involved was only a motion, not a frivolous claim or defense) as well as the Uniform Rules.

One case applying §8303-a more strictly is **Banat v. Passalaqua**, 142 A.D.2d 706, 531 N.Y.S.2d 106 (2d Dep't 1988), where the court denied a motion which sought $10,000 for costs and attorneys fees in an action based on damages for alleged fraud and perjury in a prior civil proceeding. The court reasoned that §8303-a was enacted and amended solely for the purposes of dealing with the escalating costs of premiums for medical, dental, podiatric and liability insurance. The statutory scheme would not be enhanced by permitting a recovery of costs and reasonable attorneys' fees predicated upon the plaintiff's commencement of a frivolous action to recover damages for alleged fraud and perjury in a prior civil proceeding. **Id.** at 707, 531 N.Y.S.2d at 106.

One case interpreting the statutory language of 8303-a in a straightforward way is **Mitchell v. Herald Co.**, 137 A.D.2d 213, 529 N.Y.S.2d 602 (4th Dep't), **appeal dismissed**, 72 N.Y.2d 952, 533 N.Y.S.2d 59 (1988). In **Mitchell**, plaintiff brought a libel action against the publisher of the Syracuse Herald Journal, alleging injury to his reputation as the result of a newspaper article reporting on a fight between Mitchell and several police officers. Mitchell was convicted of second degree assault, resisting arrest and disorderly conduct. Nevertheless, two weeks after his conviction, he brought an action for libel, alleging that the story was false and that the Syracuse Herald Journal had been grossly irresponsible in reporting the incident. Mitchell attempted to avoid the troublesome defense of truth by claiming that he was innocent of the charges and that the newspaper reporter was at fault in relying solely on the reports of police officers who were involved in the incident. Mitchell claimed that had the reporter interviewed eyewitnesses to the incident, they would have supported his version of the story.

Defendant moved for summary judgment and for sanctions against plaintiff and his attorney for prosecuting a frivolous action. The newspaper contended that the plaintiff and his attorney should have known that the libel claim was meritless in view of the dispositive effect of the criminal conviction on the issue of truth and plaintiff's inability to demonstrate that the reporter was grossly irresponsible in relying on the sworn police reports. The Supreme Court of Onondaga County granted summary judgment to the defendant, a decision upheld by the Fourth Department on appeal. **Mitchell v. Herald Co.**, 137 A.D.2d 213, 529 N.Y.S.2d 602 (4th Dep't), **appeal dismissed**, 72 N.Y.2d 952, 533 N.Y.S.2d 59 (1988). The court held that it was beyond dispute that the police reports were accurate in view of the plaintiff's conviction on charges arising from the incident and that the reporter was not under any obligation to conduct an independent investigation to the incident and to interview witnesses who allegedly would have given a favorable version to plaintiff. **Id.** at 217, 529 N.Y.S.2d at 605.

The court held that because the plaintiff and his attorney knew or should have known that the libel claim lacked merit, the defendant was entitled to sanctions. The court found that the case met the statutory definition of frivolousness and that the language of the statute mandated an award of sanctions upon a finding of frivolousness. **Id.** at 219, 529 N.Y.S.2d at 607. The matter was remitted to the trial court to determine the amount of costs which were properly recoverable and the amount of reasonable attorneys' fees, as well as a determination as to whether the sanctions should be imposed upon the plaintiff, his attorney, or both. **Id.** at 220, 529 N.Y.S.2d at 607.

Section 8303-a has also been applied in a special proceeding under CPLR Article 75 to stay arbitration. In **Eagle Insurance Company v. Ruiz**, 141 Misc. 2d 815, 535 N.Y.S.2d 294 (Sup. Ct. Nassau County 1988), the Eagle Insurance Company moved to stay arbitration of the respondent's claim for uninsured motorist benefits on the ground that the petitioner's insured, Mrs. Ruiz, had failed to report the accident in which she was allegedly involved to the police department. Her failure to do so, maintained the company, was a "fatal bar to arbitration". Upon review of the authorities, the court found that such an assertion by the insurer could not be advanced in good faith and was untenable. **Id.** at 816, 535 N.Y.S.2d at 295. There simply was no authority, either statutory or contractual, to support the company's position that an insured must, as a condition precedent to the arbitration of an uninsured motorist claim, report an accident involving an unidentified uninsured motorist to the local authorities. **Id.**, 535 N.Y.S.2d at 295.

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The court found that §8303-a, despite its reference to an "action", was not to be construed so narrowly so as to bar application of the statute to a special proceeding. The **Ruiz** court directed respondent to file a notice of issue, following which a hearing would be held to quantify the monetary sanction under CPLR §8303-a and to determine whether the sanction would be applied against the insurer or its counsel, or both. **Id.** at 822, 535 N.Y.S.2d at 299.

B. SANCTIONS UNDER FEDERAL RULE 11

Federal Rule 11 has been the subject of a virtual explosion in motion litigation in the Southern District of New York. At last count, there were some 294 cases in the Southern District interpreting Federal Rule 11. The vast majority of these cases having been decided since the Second Circuit's opinion in **Eastway Construction Corp. v. City of New York,** 762 F.2d 243 (2d Cir. 1985), **cert. denied,** 484 U.S. 918 (1987) **(Eastway I). Eastway I** was the opening shot in the sanctions battle. The ground work for this battle was an amendment to Federal Rule of Civil Procedure 11 in 1983. Prior to the 1983 amendment, the rule spoke of an attorney's duties in signing a paper in subjective terms. An attorney's certificate of a pleading was an assertion that, to the best of his knowledge, information and belief, there was good ground to support it. Therefore, sanctions had been imposed upon an attorney who had signed a pleading only where there was showing of bad faith, **Nemeroff v. Abelson,** 620 F.2d 339, 348 (2d Cir. 1980), and the only proper inquiry was the subjective belief of the attorney at the time the pleading was signed.

In 1983, Rule 11 was amended to assist the courts in deterring discovery abuses. As amended, Rule 11 provides in pertinent part that the signature of an attorney or a party constitutes a certificate by him that

> he has read the pleading, motion or other paper, that to the best of [his] knowledge, information, **and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,** and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed. R. Civ. P. 11. (emphasis added).

Following the amendment to Rule 11, subjective good faith on the part of the attorney signing the pleading no longer provided the "safe harbor" it once did. **Eastway Construction Corp. v. City of New York,** 762 F.2d 243, 253 (2d Cir. 1985), **cert. denied,** 484 U.S. 918 (1987). Citing Rule 11's mandatory language that the court "shall impose" upon the party who signed it a sanction for violation of the rule, the Second Circuit ruled, in a clear warning to all counsel, that sanctions would be imposed against the attorney and/or the client where it appears that a pleading has been interposed for any improper purposes or where after reasonable inquiry a competent attorney could not form a reasonable belief that the pleading was well-grounded in fact and was warranted by existing law or a good faith argument for the extension or modification of existing law. **Id.** at 254.

The Second Circuit emphasized that they did not intend to "stifle the enthusiasm or chill the creativity that is the very lifeblood of the law". **Id.** However, where it was "patently clear" that a claim had absolutely no chance of success under the existing precedents and where no reasonable argument could be advanced to extend, modify or reverse the law, Rule 11 has been violated. The court ruled that such a construction would serve to punish only those who would manipulate the Federal Court system for ends inimicable to those for which it was created. **Id.**

A plethora of decisions in the Second Circuit and the Southern District have attempted to interpret **Eastway I.** Any detailed analysis of the many opinions which have cited this rule would be beyond the scope of this paper. However, it is important for the civil practitioner to be aware of certain key legal principles which have been consistently adhered to by the courts in interpreting Rule 11.

1. THE ASSESSMENT OF SANCTIONS—AGAINST THE SIGNING ATTORNEY, HIS FIRM, OR HIS CLIENT?

Rule 11 provides that the court shall impose on the party who signed the pleading, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, including reasonable attorneys' fees.

It is clear from the language of Rule 11 that attorneys' fees may be imposed on the party himself, or the attorney representing him, or both. **See Oliveri v. Thompson,** 803 F.2d 1265, 1274 (2d Cir. 1986), **cert. denied,** 480 U.S. 918 (1987). What is unclear, and what will be decided by the United States Supreme Court this term is whether a sanction against an attorney who signs a pleading violative of Rule 11 is awardable only against the at-

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torney who signs the pleading or against the attorney's law firm as well. **Calloway v. Marvel Entertainment Group**, 854 F.2d 1452 (2d Cir. 1988), **cert. granted**, ____ U.S. ____ 109 S.Ct. 1116 (1989).[1] In **Calloway**, the court found that sanctions could be awarded against the firm of attorneys whose name appeared on the pleadings, as well as the individual attorney who signed the pleadings. Although the Second Circuit agreed that the text of Rule 11 was silent on whether Rule 11 sanctions may be imposed only on the offending attorney or his firm, the court, disagreeing with a Fifth Circuit decision finding only that the signer of the pleading could be sanctioned, **Robinson v. National Cash Register Co.**, 808 F.2d 1119 (5th Cir. 1987), held that Rule 11 sanctions should generally be imposed on a signer's law firm as well as on the individual signing an offending paper, although the district court may in its discretion limit the sanctions to the individual signer where exceptional circumstances exist. **Calloway v. Marvel Entertainment Group**, 854 F.2d 1452 (2d Cir. 1988), **cert. granted**, ____ U.S. ____, 109 S.Ct. 1116 (1989).

The rationale for the Second Circuit's decision in **Calloway** was that law firms hold themselves out to clients, to courts and to other counsel as more than mere aggregations of individual practitioners sharing office space and a telephone listing. The law firm creates good will through the use of a firm name and this good will is used to attract clients, to achieve credibility with judges, and to ease relationships with other counsel. Especially where the offending paper may be the joint work of background preparation and drafting by several attorneys, including junior attorneys who prepare the paper at the direction of a more senior attorney, elementary principles of partnership law require that the firm be responsible for any pleading which is found to violate Rule 11. **Id.** at 1480.

The question of whether the sanction should be imposed on the attorney or the party, or both, also raises an ethical problem for the attorney. In **Calloway**, Rule 11 sanctions in the amount of $200,000 were imposed on the attorneys and a party. The court found that once the action was brought against both the client and the attorneys for sanctions as the result of a frivolous amended complaint alleging that a signature on a document was forged, attorneys representing the party should have realized the conflict, and withdrawn from all further representation of the client in the Rule 11 proceedings. **Id.** at 1474.

[1]The **Marvel Entertainment Group** case was argued to the United States Supreme Court on October 2, 1989. On December 5, 1989, the Court reversed the Second Circuit, holding that Rule 11 was clear in referring explicitly to the individual lawyer's responsibility in signing the pleading.

2. THE AMOUNT OF THE SANCTION

Although the courts have indicated a willingness to award substantial sanctions, the exact amount of monetary sanctions lies well within the district court's discretion and the amount of sanctions awarded against an offending party or his counsel is balanced by a consideration of his ability to pay. **Oliveri v. Thompson**, 803 F.2d 1265, 1281 (2d Cir. 1986), **cert. denied**, 480 U.S. 918 (1987). In **Eastway Construction Corp. v. City of New York**, 821 F.2d 121 (2d Cir.), **cert. denied**, 484 U.S. 918 (1987) (**Eastway II**), following remand by the Second Circuit in **Eastway I**, Judge Weinstein awarded the City of New York $1,000 in attorneys fees as the result of a frivolous civil rights and antitrust claim brought against the City of New York by a disgruntled contractor. Although the court recognized in **Eastway I** that the district courts retain broad discretion in fashioning sanctions and apportioning fees, the $1,000 sanction was below the lowest point of permissible discretion. **Eastway**, 821 F.2d at 123. The Second Circuit emphasized that the case law under Rule 11 reflects the exercise of discretion to award only that portion of the defendant's attorneys fees thought reasonable to serve the sanctioning purposes of the rule. The Second Circuit, therefore, on its own initiative, increased the sanction to $10,000. **Eastway**, 821 F.2d at 123.

Taking their cue from the Second Circuit, district court cases and later Second Circuit cases have imposed substantial monetary sanctions.

3. THE ATTORNEY'S OBLIGATION BY SIGNATURE OF A PLEADING

It is well settled in the Second Circuit that an attorney's obligation under Rule 11 is to be judged as of the time the offending paper is signed and that all doubts are to be resolved in favor of the signer. **Oliveri v. Thompson**, 803 F.2d 1265, 1274 (2d Cir. 1986), **cert. denied**, 480 U.S. 918 (1987); **Official Publications, Inc. v. Fredericks**, 884 F.2d 664 (2d Cir. 1989). As the Second Circuit has noted, limiting the application of Rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule. **Oliveri**, 803 F.2d at 1274. Rule 11 imposes no continuing duty to correct an earlier paper which the attorney later finds out to have been inaccurate. While failure to correct an improper pleading may result in the imposition of sanctions under a separate branch of the court's authority to sanction, such conduct does not require the imposition of Rule 11 sanctions. **Motown Productions, Inc. v. Cacomm, Inc.**, 849 F.2d 781, 784-85 (2d Cir. 1988).

An attorney cannot be sanctioned for failing to

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withdraw a claim that later proves to be groundless provided that the attorney took the following steps:

> 1. [He] conducted a reasonable pre-filing inquiry demonstrating a reasonable basis for the claim at the time it was made;
>
> 2. [He] did not subsequently restate the claim after learning it was groundless; or
>
> 3. [He] did not decline to withdraw it upon an expressed request by his adversary after learning it was groundless. However, an attorney who does not undertake such an inquiry cannot avoid Rule 11 sanctions by later withdrawing a groundless claim. By that time, the damage has been done.

Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1472, **cert. granted,** ____ U.S. ____, 109 S.Ct. 1116, (1989) (citing **Oliveri v. Thompson,** 803 F.2d 1264, 1274 (2d Cir.), **cert. denied,** 480 U.S. 918 (1987)).

Although sanctions may not be awarded under Rule 11 where counsel fails to withdraw a claim that he later finds to be unfounded, the court does retain the power under 28 U.S.C.A. §1927 (West Supp. 1989) to impose costs on counsel for misconduct on the part of any attorney or other person admitted to conduct cases in any court which causes another party to multiply the proceedings unreasonably or vexatiously. Section 1927 provides that any party who does so may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct. **Apex Oil Co. v. Belcher Co. of New York, Inc.,** 855 F.2d 1009 (2d Cir. 1988); **Oliveri v. Thompson,** 803 F.2d 1265, 1273 (2d Cir. 1986), **cert. denied,** 480 U.S. 918 (1987).

4. THE REMOVED CASE

Federal Rule 11 does not apply to a pleading signed in state court where the case was thereafter removed to federal court. **Stiefvater Real Estate, Inc. v. Hinsdale,** 812 F.2d 805 (2d Cir. 1987). However, Rule 11 would apply to any pleadings, including the removal petition, filed in Federal District Court. **State of Connecticut v. Insurance Co. of America,** 121 F.R.D. 159 (D. Ct. 1988).

5. THE MANDATORY IMPOSITION OF SANCTIONS

Rule 11 mandates sanctions where it is clear that:

(1) A reasonable inquiry into the basis for the pleading has not been made;

(2) Under existing precedents, there is no chance of success; and

(3) No reasonable argument has been advanced to extend, modify or reverse the law as it now stands. **International Shipping Co. v. Hydra Offshore, Inc.,** 875 F.2d 388, 390 (2d Cir. 1989). **See also Bleckner v. General Accident Insurance Co.,** No. 86 Civ. 9881 (S.D.N.Y. June 9, 1989) (WESTLAW, Allfeds library).

No evidentiary hearing is required before the imposition of sanctions. **Oliveri v. Thompson,** 803 F.2d 1265, 1280 (2d Cir. 1986), **cert. denied,** 480 U.S. 918 (1987); **International Shipping Co. v. Hydra Offshore, Inc.,** 875 F.2d 388, 392 (2d Cir. 1989); **see also Fed. R. Civ. P.** 11, Advisory Committee Note ("[T]he Court must to the extent possible limit the scope of sanction proceedings to the record").

The rationale for imposing sanctions under Rule 11 is demonstrated by the Second Circuit's language in **International Shipping Co. v. Hydra Offshore, Inc.,** 875 F.2d 388, 393 (2d Cir. 1989):

> The quality of Justice depends upon our ability to control the flood of litigation. Rule 11 requires that members of the bar avoid haphazard, superficial research. That requirement places the responsibility for properly invoking the power of the court on counsel as officers of the court.

In addition to monetary sanctions, some judges have imposed non-monetary sanctions on counsel for violations of Rule 11. For example, in **Bleckner v. General Accident Insurance Co. of America,** No. 86 Civ. 9881 (S.D.N.Y. June 9, 1989) (WESTLAW, Allfeds library), Judge Patterson, finding that Rule 11 violations occurred "less from bad faith than carefree lawyering" utilized the sanction of requiring the attorney whose conduct violated Rule 11 to undertake the representation of a **pro se** plaintiff by choosing one case from among those listed in the pamphlet circulated to the **pro bono** Panel of the United States District Court for the Southern District of New York. Given the propensities of **pro se** plaintiffs, this sanction for violation of Rule 11 may well be more chilling than a financial sanction imposed against the offending attorney.

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CONCLUSION

Rule 11 is not intended to "cast a pall on attorney originality and creativity". **Stern v. Leucadia National Corp.**, 844 F.2d 997, 1005 (2d Cir. 1988). Rather, the Rule 11 standard is targeted at situations where it is patently clear that a claim has absolutely no chance of success under the existing precedents and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands. **Id.** The safeguard to the attorney is that all doubts must be resolved in favor of the pleader. **Id.** at 1005, 1006 (citing **Eastway Construction Corp. v. City of New York,** 762 F.2d 243, 254 (2d Cir. 1985), **cert. denied,** 484 U.S. 918 (1987)).

The lesson to be learned from the sanction cases being decided in our state and federal courts is that more attention to factual detail and legal research is required prior to filing of litigation in order to avoid the imposition of sanctions on an attorney, his firm, and his client. Rule 11 and §8303-a provide a potent arrow in the judicial quiver in the deterrence of frivolous claims. •

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I hereby wish to enroll as a member of DANY. I enclose my check/draft $_____ Rates are $50.00 for individuals admitted to practice less than five years; $100.00 for individuals admitted to practice more than five years and $200.00 for firm, professional corporation or Company.

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I represent that I am engaged in handling claims or defense of legal actions or that a substantial amount of my practice or business activity involves handling of claims or defense of legal actions. (* ALL APPLICATIONS MUST BE APPROVED BY THE BOARD OF GOVERNORS).