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A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

To the members of the Corporate Counsel Section:

It is my pleasure to serve you as Chair of the Corporate Counsel Section for calendar year 2002, and to thank your prior Chair, Gary Roth, for a job very well done in 2001. There are several topics on which I wish to report to you.

Annual Meeting in January. The Corporate Counsel Section's half-day annual meeting program on January 23, 2002, held as part of the New York State Bar Association's Annual Meeting at the Marriott Marquis in New York City, was extremely well received and well attended. Section Vice-Chair Mitch Borger chaired this program, which included a one-hour MCLE panel on legal issues in the entrance and exiting of attorneys in corporate law departments and private firms, and a discussion of career counseling, outplacement, recruiters and compensation.

Upstate Ethics Program in June. Building on our highly successful *Ethics for Corporate Counsel* programs that we have held each of the last two falls in New York City (and plan to repeat again this coming fall), the Section sponsored a similar program for upstate in-house counsel on June 10, 2002. This was our first scheduled program for an upstate audience in many years and, we hope, the harbinger of more to come. Chaired by Section Chair-Elect Jay Monitz, the program was hosted by Eastman Kodak Company at its headquarters facility in Rochester. The panelists were Gary P. Graafeiland, Esq., Kodak's General Counsel and Senior Vice President; Gerard M. Larusso, Esq., Chief Counsel, Fourth Department Committee on Professional Standards; Professor Steven Wechsler of Syracuse University College of Law; and Daniel W. Sklar, Esq., of Nixon Peabody LLP in Manchester, New Hampshire. In addition to in-house counsel from Kodak, the audience included attorneys from a number of other companies in the upstate area.

New NYSBA and Section Web site. As I hope most of you will by now be aware, as of May 1, 2002, the New York State Bar Association has completely revamped its Web site at http:www.nysba.org to include many more resources and a far greater range of functions than before. One valuable aspect of the new Web site is the ability for each NYSBA member to personalize the content that he or she sees and uses when logged on to the site. We trust that you will include the Corporate Counsel Section's Web page on the site as one of your areas of interest. In return, we will do our best to make the content and links on that page reflect your needs and desires. At our Executive Committee Meeting in May we met with Barbara Beauchamp, NYSBA's Web site Content Editor, in order to gain understanding of some of the new site's features and functionalities. Executive Committee member Janice Handler is our Section's Web site coordinator and will be working with fellow member Steve Mosenson to compile comments and further develop our Section's pages on the site. We encourage you to e-mail one of us your views and feedback on this topic after you have checked out our new pages.

Inside

Member Survey. This brings me to our previously announced but deferred project of again canvassing our members, as we have done only a couple of times previously since our founding in 1981, for your feedback and suggestions on various aspects of the Section's activities. Originally planned for January, the survey was deferred in part to allow inclusion of questions relating to NYSBA's new Web site mentioned above. It may be that you will have already seen the survey by the time you read this, but if not, it will be appearing in your inbox very shortly, for we are doing it exclusively online. This both conserves our resources by saving the Section considerable mailing expense and greatly facilitates analysis of your responses, since most of the answers will be amenable to automated compilation without the need for human intervention. The information solicited is extremely important and will be given close attention by the entire Executive Committee in shaping the Section's agenda of activities for the future, so we all very much hope that you will take the few minutes needed to provide this information and feedback to us. Your time will be rewarded by our efforts to shape the Section's activities to meet your expressed wishes.

Section Leaders Conference. I am very pleased to have been able to attend the two-day Section Leaders Conference hosted by NYSBA at the Bar Center in Albany on May 14–15, 2002. Comprised of a series of panel presentations by NYSBA officers and members of the staff, as well as fellow Section leaders from many of NYSBA's other Sections, the conference produced a plethora of valuable pointers and suggestions that we will all take back to our respective Sections, as well as opportunities for networking with the various presenters and other Section leaders. Partly as a result of contacts made at this meeting, I expect to be able to report in future Messages on some interesting new initiatives and program plans.

I wish you all a pleasant and productive summer. Meanwhile, if you have any suggestions, comments, etc., please feel free to e-mail me at tom.reed@btna.com.

Thomas A. Reed

Enron Collapse Puts Focus on Document Retention Obligations

By Christopher Wolf and Jessica Freiheit

Companies Must Be Alert to Legal Restrictions on Document Destruction

The collapse of the Enron Corporation produced the largest bankruptcy in U.S. history. Shareholders, regulators and Congress are attempting to get to the bottom of the scandal. And the admitted destruction of thousands of documents and electronic files is adding to the uproar. It also has put a new focus on the law of spoliation: the destruction of evidence. There are lessons to be learned from the Enron case about the preservation of documents and files that might be needed as evidence in a legal proceeding.

The auditor for the Enron Corporation, Arthur Andersen, has admitted to the destruction of a significant number of Enron-related documents. If it turns out that such destruction amounts to *spoliation*, there may be civil and criminal charges, severe monetary sanctions, adverse inferences taken from the *absence* of evidence and even default judgments.[1]

Document Destruction, by Itself, Is not Suspect

Systematic destruction of documents and files, by itself, is not suspect. Companies today are awash in paper and electronic files. Good management practice dictates that files be purged on a scheduled and regular basis. The costs of storage are too great to save everything. And old documents can create unanticipated liability issues years after they were created, when they cannot be put in context or explained. Still, document destruction cannot be undertaken without consideration of the law. There are numerous record-keeping requirements imposed by law that exist irrespective of the risk of a particular legal proceeding—tax record retention requirements for example. A systematic document-destruction policy must take into account such record-keeping rules.

And then there is the issue of spoliation: When does the destruction of files create a risk *even if* it is done in record-keeping requirements?

What Is Spoliation?

Under the law of spoliation, a party is under the duty to preserve evidence that it knows, or reasonably *should* know, is relevant to litigation that is pending or reasonably foreseeable. The determination of when litigation is reasonably foreseeable is fact-specific. The test turns on whether a party is reasonably on notice that litigation is likely to be commenced. In some cases, investigations and pre-complaint communications are sufficient to put a party on notice that litigation is imminent.

In a famous definition of obscenity, Justice Potter Stewart declared: "I know it when I see it," adding, "I shall not attempt to define further the kinds of material I understand to be embraced."[2] The fact-specific nature of determining whether legal proceedings are likely and what materials may be relevant may require a similarly subjective test for spoliation. Still, there are some guidelines that have emerged over the years from litigated cases.

Communications About Legal Issues May Constitute Sufficient Notice that Files Should Be Retained

A communication from an outsider raising a legal issue about corporate conduct may be enough to put a party on notice that files should be preserved. For example, in *Computer Associates International v. American Fundware*,[3] a federal district court found that pre-litigation communications between the parties were enough to put a document destroyer on notice that litigation was foreseeable and that the central issue in any eventual action would relate to the documents destroyed. In that case, the plaintiff was a copyright holder of a computer program. It accused the distributor of its program of breaching the contract and of copying the program's software. Under the defendant's business procedures, only the most recent version of the software code was preserved and all earlier versions were destroyed. Two months before filing a complaint, the plaintiff communicated its concerns to the defendant and the parties engaged in settlement talks. During that time, the defendant continued its practice of destroying versions of the software at issue in these talks. The court held that it was inconceivable that the defendant did not realize from these pre-litigation communications that the software in is possession would be sought through discovery.

Past Litigation Experience and Internal Investigations May Be Enough to Require Document Retention

Litigation has also been found foreseeable when the party has been faced with similar lawsuits in the past, or when it has dispatched its own investigators to gather information on an accident or event. In *Capitol Chevrolet*

v. Smedly,[4] it was held to be reasonably foreseeable that the insurance company might sue after it had sent its own expert to inspect and photograph the scene of the accident.

In product liability cases, the plaintiff may be sanctioned for destroying evidence crucial to the defendant's formulation of a defense. In *Lee v. Boyle-Midway Household Prods.*,[5] the court granted summary judgment to the defendant who was unable to formulate a defense to a product liability claim due to the plaintiff's spoliation of evidence prior to filing its complaint. The manufacturer of a drain cleaner was sued for injuries caused when the cleaner allegedly erupted during use at the kitchen sink. But the plaintiff had disposed of the can of cleaner before the manufacturer could examine it. Summary judgment was warranted because the destruction of evidence deprived the defense of the most direct means to counter the allegations.

"The most severe sanction is entry of a default judgment against the spoliator."

Once a non-litigation legal proceeding has begun, such as an administrative agency hearing, litigation may be found to be reasonably foreseeable. In *McGuire v. Acufex Microsurgical Inc.*,[6] the destruction of evidence occurred prior to litigation but during proceedings before an administrative agency, the Massachusetts Commission Against Discrimination (MCAD). The obligation to preserve documents relevant to potential litigation arose during the agency proceeding.

State and Federal Civil and Criminal Law May Cover Spoliation

In 10 states (Alabama, Alaska, California, Florida, Illinois, Indiana, Montana, New Jersey, New Mexico and Ohio) and the District of Columbia spoliation gives rise to an independent cause of action in tort. There are also federal and state criminal statutes that cover the destruction of documents. For example, 18 U.S.C. § 1503 provides that "whoever . . . obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice" shall be subject to fines and/or imprisonment. Destruction of documents falls squarely within that prohibition.

In the "post-Enron era," it is fair to predict that the standard for knowing when legal proceedings are likely, and when to keep documents, will be fairly low, and that the destruction of documents will be viewed with a great deal of skepticism if the documents relate to a legal proceeding.

Sanctions for Spoliation

In a civil proceeding, a court is empowered to direct sanctions against a party under Rule 37 of the Federal Rules of Civil Procedure and its state counterparts, as well as under its inherent power to regulate litigation and preserve the integrity of proceedings. It is this latter power that permits courts to sanction conduct that takes place *prior to* the issuance of court orders and activation of disclosure requirements. Whether to sanction is within the discretion of the court, and relevant considerations will be the nature of the harm to the injured party, the nature of the interests promoted by the spoliator's actions, the means used by the spoliator and the spoliator's motives.

The most severe sanction is entry of a default judgment against the spoliator. For such a remedy, a court must generally find bad-faith destruction, prejudice to the aggrieved party and the inadequacy of alternate sanctions. In assessing the proper penalty, the court must consider whether the penalty will be sufficient to deter recurrence of the spoliation and whether there has been a pattern of spoliation in the past.

The nature of the evidence destruction in *Computer Associates, supra*, was enough for the court to award this severe sanction. The court held that even if maintaining a single updated version of a source code was in most circumstances a *bona fide* business practice, it could not go unpunished when the destruction took place after litigation was foreseeable with knowledge of the relevance of the earlier software versions.

More commonly, a court will permit the fact-finder to draw adverse inferences to the document-destroying party or will adjust the level of proof required for the aggrieved party.

Monetary sanctions are also frequently awarded and this may include compensation for attorney's fees and costs for investigation and research that were incurred to make the motion for sanction. A court may impose sanctions for the consumption of time and resources of the aggrieved party and any expenditures that otherwise result from the spoliation.

In some cases, the monetary sanctions can prove to be severe. In *In re Prudential Insurance Co. of America Sales Practices Litigation*,[7] the court imposed a $1 million fine, representing the unnecessary consumption of the court's time and resources in the spoliation issue.

In that same case, the court went even further to require the spoliating party to produce to the court a document-preservation policy that would establish clear guidelines for document retention and destruction in the future. The defendant life insurance company had been charged with deceptive sales practices. One year

earlier, in response to a regulatory directive that was issued, it had begun a process of destroying all unauthorized sales materials. It continued to destroy these documents long after commencement of litigation, with senior management failing to issue any firm-wide memorandum alerting employees to the court order or to the ramifications of violating it.

The court held that it was the obligation of senior management to be sure to preserve discoverable evidence and to make affirmative efforts to guarantee the compliance of all employees. Since the company had failed to properly manage document retention, the court entered an order requiring the creation of a document-retention program.

It is important to note that when spoliation is a concern, there are cases where a party anticipating litigation can obtain judicial relief in advance of litigation to preserve evidence that may be subject to easy destruction. For example, in *Quotron v. Automatic Data Processing Inc.*,[8] a federal judge granted an *ex parte* order allowing executives from the plaintiff company to join U.S. marshals in raiding the defendant company, to prevent it from destroying software before normal discovery could take place.

Document-Retention Policies

Since reasonableness plays a role in a spoliation matter, the existence (or not) of a document retention/destruction policy and the adherence (or not) to that policy will be relevant considerations. Courts are less likely to find the element of bad faith in the destruction of documents when the company disposes of the documents in adherence to a formal policy in the ordinary course of business, in the absence of other facts signaling the need to preserve evidence.

There is considerable variation in state law as to whether spoliation must be intentional to be sanctionable. If the purpose of punishing spoliators is to deter attempts to alter the outcome of a trial through the destruction of evidence, then only intentional acts should be punished. But if the purpose of punishing spoliation is to compensate the aggrieved party for its loss, then it may well make sense to impose liability on negligent spoliators as well. Some states have adopted the former rationale, some the latter.

In Ohio, for example, a finding of spoliation will occur only when the destruction of evidence was intentional, that is, destroyed for the purpose of rendering it useless to the opposing party in preparing their case. In a Sixth Circuit case applying Ohio law, *Nationwide Mutual Fire Insurance v. Ford Motor Co.*,[9] the court held that the insurer's expert's disposal of the electrical wire harness in the car that was set on fire, before the defendant manufacturer could inspect it, was not done with the intention of willfully rendering evidence inaccessible, and was therefore not spoliation.

In other states, however, even negligent destruction of evidence is sanctionable. In *Kelley v. United Airlines, Inc.*,[10] the First Circuit upheld an adverse inference against the defendant based on its careless destruction of documents crucial to the plaintiff's case.

"There is considerable variation in state law as to whether spoliation must be intentional to be sanctionable."

In an era when most business is interstate and predicting which state law will apply (and which court will hear a dispute) is problematic, the best practice is to have a document-retention policy, but not to assume that the policy by itself will avoid spoliation liability.

Not just any retention policy will do. Courts look askance at companies that attempt to hide behind document-retention policies that appear to have been intentionally crafted to permit the destruction of unfavorable records. They will also sanction companies that blindly adhere to a document-retention program that is reasonable on its face but that, under the circumstances, should have been overridden.

In a recent case, *Stevenson v. Union Pacific Railroad Company*,[11] the court penalized a party for destruction that took place pursuant to a document-retention policy. A motorist and the estate of his deceased wife brought an action against the railroad company after a fatal collision occurred at a crossing. Tape recordings that included communications between the train crew and dispatchers just before the collision and track inspection records made in the month of the accident had been destroyed by the railroad company pursuant to its document-retention policy. Under that policy, tapes were destroyed after 90 days and written records after one year. The court considered several factors in finding grounds to sanction the railroad company:

(1) whether the document-retention policy was reasonable;

(2) whether the policy was instituted or continued in bad faith;

(3) whether the spoliator knew or should have known the evidence would become material and should have been preserved despite the policy.

The court found that while the policy was reasonable with regard to the destruction of tapes, the railroad

company had to have known that personal injury or death claims would be made pursuant to the accident. Since the company had been regularly involved in similar litigation in the past, it was reasonable to anticipate that the same might happen here, and that the tape-recorded statements by eyewitnesses would be relevant.

Poor management is yet another way that a company will find itself facing sanctions despite its reasonable efforts to create a sound document-retention policy. In *In re Prudential, supra*, while the insurance company recognized its obligation to preserve evidence in the face of ongoing litigation, it failed to communicate this to its personnel responsible for document retention. As a result, documents continued to be destroyed by uninformed employees in company branches despite court orders to the contrary. The company was subject to severe monetary sanctions, even though the spoliation was clearly inadvertent.

Conclusion

Courts increasingly are penalizing parties that destroy discoverable evidence prior to the commencement of litigation, where litigation is reasonably foreseeable. Sanctions can be financially severe and a company may suffer serious non-financial losses to its reputation through the exposure that comes with a spoliation charge. Document-retention policies can go a long way to protecting against spoliation and its sanctions, so long as the policy is carefully crafted and properly administered, and so long as current disputes or potential disputes are considered before the shredding starts.

Endnotes

1. *See Ohio v. Arthur Andersen*, 570 F.2d 1370, 1374 (10th Cir. 1978) (monetary sanction imposed on auditor even though most spoliated working papers eventually were produced); *Hazen v. Anchorage*, 718 P.2d 456 (Alaska 1986) (spoliation liability extended to a defendant's attorney who knew or should have known of the destruction).
2. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).
3. 133 F.R.D. 166 (D. Colo. 1990).
4. 614 So. 2d 439 (Ala. 1993).
5. 792 F. Supp. 1001 (W.D. Pa. 1992).
6. 175 F.R.D. 149 (D. Mass. 1997).
7. 169 F.R.D. 598 (D.N.J. 1997).
8. 141 F.R.D. 37 (S.D.N.Y. 1992).
9. 174 F. 3d 801 (6th Cir. 1998).
10. 176 F.R.D. 422 (D. Mass. 1997).
11. 204 F.R.D. 425 (E.D. Alaska 2001).

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Book Review—
Commercial Litigation in New York State Courts: A Comprehensive Guide for Corporate Counsel

Reviewed by Lawrence D. Chesler

Commercial Litigation in New York State Courts is a 3-volume, strategy-oriented publication covering both the procedure and substance of commercial litigation. The set provides valuable assistance to inside counsel for working with outside counsel and for advising internal business clients on a variety of business subjects. The distinguished author team is comprised of 63 noted judges from the New York State Court of Appeals, Appellate Division and the Supreme Court and top litigators from the finest firms in New York, under the direction of Editor-in-Chief Robert L. Haig, a partner in Kelley Drye & Warren LLP.

The authors have recently updated their chapters to reflect the multi-faceted activity that has taken place in this area of practice during the year since the 2000 Pocket Parts were published. They painstakingly culled, from the thousands of cases reported and statutory activity, the significant developments regarding all aspects of civil procedure and commercial law. The addition in the 2001 Pocket Parts of analysis of hundreds of new cases and legislative changes to the thousands of cases cited and discussed in the bound volumes keep this unique set current in every respect.

Commercial Litigation in New York State Courts can assist corporate counsel in fulfilling all of their principal roles. To assist in working with outside counsel after a lawsuit has been commenced, this set contains detailed analysis of practical and strategic considerations affecting each phase of the litigation. The nine trial chapters combine to form a detailed and thoughtful analysis of commercial trial advocacy.

Its title notwithstanding, this set is of significant value to corporate counsel beyond merely the litigation context. There are many chapters that corporate counsel, in the role of pre-litigation advisor, should consult to ensure that all relevant issues and options are fully explored. Corporate counsel called upon to advise internal business clients regarding transactions, compliance and setting corporate policy will readily find substantive information and answers throughout this collection. For example, even before a contract suit arises, counsel can put their corporation in an advantageous position by consulting the relevant chapters and structuring their transactions to include favorable choice of law, choice of forum and arbitration clauses. If a competitor uses improper means to solicit the company's customers, in-house counsel can determine their client's rights and remedies by consulting the chapter on *Theft or Loss of Business Opportunities*.

"Its title notwithstanding, this set is of significant value to corporate counsel beyond merely the litigation context."

The 16 commercial law chapters contain a wealth of legal authority on all significant issues with insightful advice on strategic ramifications. Major areas of commercial law covered include contracts, sale of goods, warranties, agency, letters of credit, insurance, banking litigation, collections, contracts for services, bills and notes, antitrust litigation, torts of competition, right-of-publicity claims, construction litigation, and environmental litigation. These chapters can help corporate counsel evaluate cases for negotiation and settlement, assist in negotiating and memorializing transactions and in determining and enunciating corporate positions and policies.

Numerous attorney and judicial reviewers have praised the utility of the set. Reviews in *Corporate Legal Times, U.S. Business Litigation* and *The Metropolitan Corporate Counsel* were unanimous in their acclaim. They noted that the set is particularly useful for corporate counsel who are accustomed to the very different rules and practices of the federal courts. *Commercial Litigation in New York State Courts* and its 2001 Pocket Parts are an excellent means to become informed about the practice of commercial law and litigation in New York State courts.

The sixth anniversary of the publication of this work coincided with the sixth anniversary of the creation of the Commercial Division of the Supreme Court of the State of New York. That division, originally established in 1995 in New York County and Monroe County (the metropolitan Rochester area), has now been expanded to the Counties of Nassau, Westchester and Erie (where Buffalo is located). In addition, in her 2002 State of the Judiciary address, Chief Judge of the State of New York Judith S. Kaye announced that "the Commercial Division will be expanded to Albany County."

The Commercial Division has attracted an increasing stream of litigators and their clients. The Commercial Division has done so as a result of its proactive case management by judges and court personnel who specialize in commercial matters, its use of alternative dispute resolution (ADR) wherever it can be meaningfully employed, and its utilization of technology to promote efficiency.

The Commercial Division has achieved dramatic improvements in all aspects of commercial case litigation. For example, in 1992 the average contract case in New York County took 648 days from the date of filing to disposition. Similar cases in the Commercial Division have more recently reached disposition within an average of 412 days, an improvement of 36%. In addition, more than 58% of the cases referred to the Commercial Division's ADR program have been successfully settled.

According to the Foreword to the 2001 Pocket Parts, the more than 30,000 new cases filed in the Commercial Division since its inception have prompted the inclusion in the Pocket Part to volume 4 of (1) the current Operating Statement, Guidelines for Assignment of Cases, Rules of the Justices, and Alternative Dispute Resolution Rules of the Commercial Division in New York County; (2) the Guidelines for the Assignment of Cases and Rules of the Commercial Division in Monroe County; and (3) the Guidelines for Cases Assigned to the Commercial Division in Nassau and Westchester Counties and the Rules of the Alternative Dispute Resolution Program of the Commercial Division, Westchester County, and (4) the Rules and Practices of the Commercial Division in Erie County.

This excellent treatise is universally recognized as the definitive work concerning commercial litigation in New York State courts. It will be a valued addition to your legal library.

The set costs $295 (including a WordPerfect disk of more than 500 pages of forms and jury charges).

Lawrence D. Chesler is Senior Vice President and Corporate Secretary of Navigation Technologies Corporation, Past Chair and a current member of the Executive Committee of the Corporate Counsel Section of the New York State Bar Association, Vice-Chair of Committee R (High Technology Section) of the International Bar Association, a Director of the Computer Law Association and a Fellow of the New York Bar Foundation.

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Legal Experience

Michael is Senior Vice President and General Counsel of Elektra Entertainment Group. He started his legal career in 1967 at Harvard Medical School as counsel. He joined United Artists as counsel in 1968, became Associate General Counsel of Avco Embassy Pictures in 1970, Associate General Attorney of CBS Records in 1974, Vice President and General Counsel of Arista Records in 1979 and Vice President and Senior Counsel of Sony Music before joining Elektra in 1995.

In addition to being on the Executive Committee of the Corporate Counsel Section, Michael is on the Board of Directors of the T.J. Martell Foundation, the Board of Overseers of the Vanderbilt-Ingram Cancer Center, the Advisory Board of the *Entertainment Law Journal*, the Board of Editors of the *Journal of Internet Law* and a Record Board Member of the Alliance of Artists and Record Companies. Michael is also Past President of the Copyright Society of the U.S.A. and a member of the Legal Committee of the Recording Industry Association of America.

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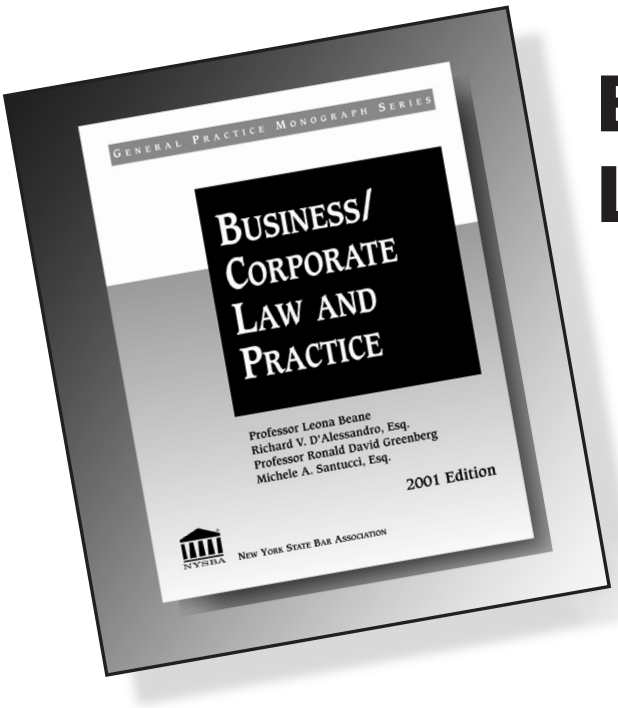

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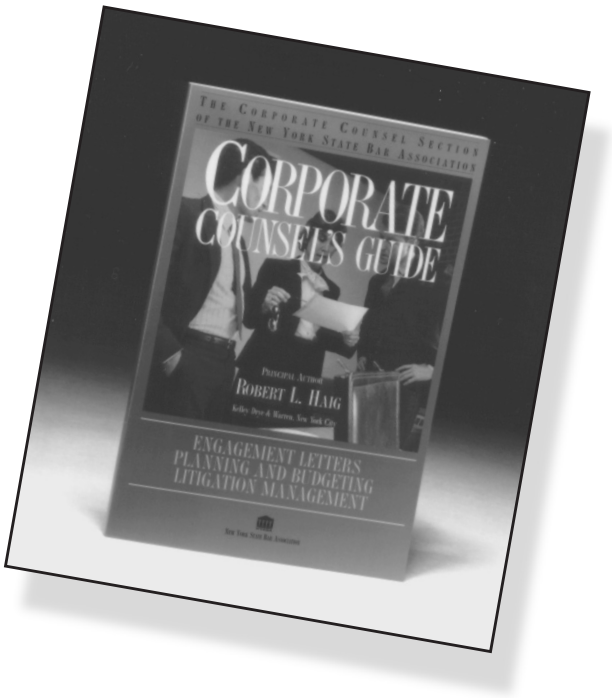

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Inside welcomes the submission of articles of timely interest to members of the Section. Articles should be sumitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information. Please submit articles to Peter A. Irwin, Con Edison Co. of NY, Inc., 4 Irving Place, New York, NY 10003.

Inside

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