

# Perspective

A publication of the Young Lawyers Section  
of the New York State Bar Association

## (Trade)Mark My Words . . .

By Odia Kagan



### Introduction

A research survey by the Pew Internet and American Life Project published on January 23, 2005, reported that only 1 in 6

users of Internet search engines differentiate between regular, unbiased search-engine results and paid advertisements. According to the study, only 38 percent of Web searchers even know that a distinction between the two types of results exists, and of them only 47 percent said that they could always identify the ads which were paid.<sup>1</sup>

In several recent cases, companies who operate commercial websites filed suits arguing that advertising policies such as Google's *Adwords* infringe their trademarks and harm their goodwill by permitting their competitors to purchase their trademarks as keywords which trigger the ads appearing in "sponsored links" on the search engine's results page.

The decisions reached by U.S. courts in these matters to date are

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## A Message from the Section Chair

*The Young Lawyers Section serves as a bridge to professional life and the New York State Bar Association. The Section's mission is to effectively meet the unique and changing needs of young lawyers by providing educational, career and leadership development, and networking opportunities; enhancing communication between young lawyers and the New York State Bar Association; and increasing young lawyers' participation in the Section, the Association, the legal profession, and their communities.*

When I began my term as the Chair of the Young Lawyers Section in June of this year, I told you about the many new and exciting activities and initiatives planned for the Section in 2006-2007. I also told you about a number of improvements being made to the ways in which the YLS offers and delivers its benefits and services to the membership.

With a focus on four major areas, including Section reorganization, Section communications, strategic and long-range planning, and Section membership benefits and services, I would like to take this opportunity to tell you about the progress we have made over the last four months and what we hope to accomplish in the next few months.

This summer, six regional meetings of the Executive Committee were held around the State.



YLS Bylaws, Art. I, § 2.

Executive Committee members as well as general members of the Section were invited and encouraged to participate and engage in discussion about the Section's agenda for 2006-2007. The Section's programs,

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# **Save the Dates!!!**

Mark your calendars for the following upcoming YLS events.

**January 24, 2007**  
**YLS Annual Meeting in New York City**

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**January 25-26, 2007**  
**YLS Bridge-the-Gap Program in New York City**

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**June 3-4, 2007**  
**YLS Supreme Court Admissions Program**  
**Spring Meeting in Washington, D.C.**

The 2007 Supreme Court Admissions Program in Washington, D.C. is an exceptional opportunity to be admitted to the Supreme Court and sit in on one of the High Court's sessions.

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**Section Liaison and District/Alternate Representatives**  
**Conference Calls**  
**January 2, 2007**

**2:00 p.m. – 3:00 p.m. Section Liaisons**  
**3:00 p.m. – 4:00 p.m. District/Alternate Representatives**

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**April 3, 2007**  
**2:00 p.m. – 3:00 p.m. Section Liaisons**  
**3:00 p.m. – 4:00 p.m. District/Alternate Representatives**

# From the Editor's Desk...

Welcome to the Fall 2006 issue of *Perspective*. After a two-year hiatus, the Young Lawyers Section's print newsletter is back. First and foremost, I must thank James S. Rizzo, who did an extraordinary job as the previous Editor-in-Chief of *Perspective*. Jim provided Section members with great articles from leading authors in the profession. I also wish to thank Megan O'Toole, Justina Cintrón Perino, and the newsletter department at the New York State Bar Association for their guidance and patience with me during this learning process.

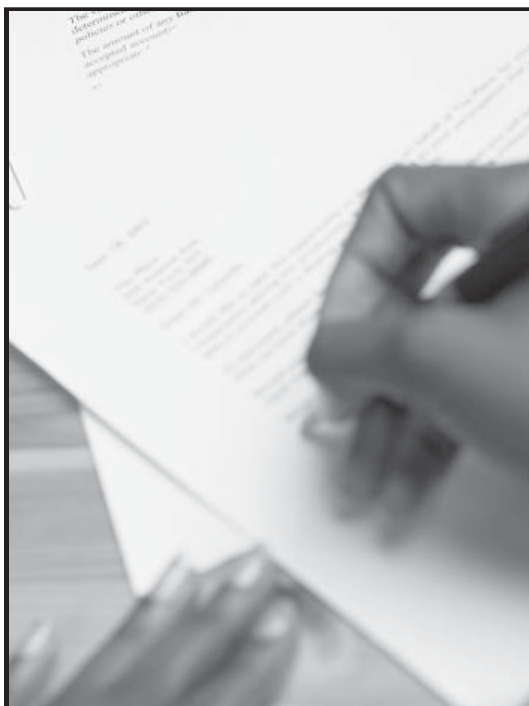
My goal for *Perspective* is to provide the readership with a variety of articles, covering many diverse areas of law. For this issue, I have

been fortunate to obtain substantive and practical legal articles on topics which should be of interest to YLS members. Odia Kagan provides a piece on trademark infringement; Savina Playter outlines the matrimonial part in supreme court; Joseph Hanna authored an article about the NFL's Cleveland Brown's legal rights to the phrase "Dawg Pound"; Elliott Wilcox gives a practical approach to guiding the jury through evidence during a trial; Weston Donehower reviews the book *In the Shadow of the Law*; Richard Weber dissects the perils of CPLR 2104; R. Graham McNamara outlines the key factors involved in making an effective bail application; and finally, Allison Tomlinson provides a primer on the Foreign Corrupt Practices Act's Anti-

Bribery Provisions. I'd like to thank all of the authors for contributing to this issue of *Perspective*.

Finally, *Perspective* is published in both the spring and fall. If you would like to author or have authored an article, report, summary, or update that would be appropriate for inclusion in the newsletter and has not yet been published, please contact me by telephone (518-445-2301) or by email (mcassidy@nysbar.com). The deadline for submissions for the next issue is January 15, 2007. Submissions should be sent in electronic form to my attention at the above email address. I look forward to hearing from you.

**Michael B. Cassidy**  
Editor-in-Chief



## REQUEST FOR ARTICLES

If you have written an article you would like considered for publication, or have an idea for one, please contact *Perspective* Editor:

**Michael B. Cassidy, Esq.**  
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Albany, NY 12208-3494  
(518) 445-2301

*Articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.*

# Navigating the Matrimonial Part in Supreme Court

By Savina Playter

## I. Overview

- A. In a matrimonial action, the parties seek intervention to dissolve their marriage (known as the “*grounds*” stage) and request adjudication on such matters as maintenance, orders of protection, custody, support and equitable distribution (known as the “*ancillary relief*”). Matrimonial actions can be contested or uncontested.
- B. An *uncontested* matter occurs where both parties agree on the issues and/or the defendant defaulted by failing to appear. Attorneys can obtain an uncontested packet at [www.nycourts.gov/litigants/divorce](http://www.nycourts.gov/litigants/divorce) or [www.courthelp.gov](http://www.courthelp.gov) with instructions for submission. In a *contested* matter, one party mounts an opposition.
- C. The party petitioning for the divorce is called the *plaintiff* and the answering party is the *defendant*. In matrimonial cases, it is common in some counties to encounter pro bono representation. Thus, indigent litigants can file a “*poor person application*” and obtain counsel if they meet the financial eligibility guidelines for indigent status. Attorneys may obtain the applicable filing fees waiver, order and affidavit for poor persons at [www.nycourts.gov/litigants/divorce/ud\\_instructions.shtml](http://www.nycourts.gov/litigants/divorce/ud_instructions.shtml).
- D. To practice matrimonial law in Supreme Court, an attorney must be familiar with the Domestic Relations Law (DRL), the Rules of the Chief

Administrator of the Courts (22 N.Y.C.R.R. § 202.16(a)-(k), and the Civil Practice Law and Rules (CPLR).

- E. Distinguishing between Family and Supreme Court is important in matrimonial practice. Supreme Court has *exclusive* jurisdiction over the dissolution of a marriage and the distribution of marital property. The Family Court has *concurrent* jurisdiction over issues such as visitation, child support, orders of protection and custody. Thus, it is common for parties to commence a divorce action in the Supreme Court at the same time that a petition is pending in the Family Court. In some instances, a *Motion to Consolidate* can be brought in Supreme Court depending on the stage of the Family Court action.

## II. Residency, Jurisdiction and Venue

- A. An action commences in Supreme Court with the filing and purchasing of an index number which appears on all documents in the case. Under DRL § 211, the plaintiff must also file a *Summons with Notice* or a *Summons with Verified Complaint* with the Court Clerk (see sample at [www.nycourts.gov](http://www.nycourts.gov)).
- B. The Supreme Court must have *jurisdiction* over the parties to adjudicate a matrimonial matter. This can be achieved through service of process. The Summons and Complaint must be served *personally* within 120 days of commencing the action. Under CPLR 306, the parties

must furnish the Court with an *Affidavit of Service* at the first appearance as proof of service (see sample at [www.nycourts.gov](http://www.nycourts.gov)).

- i. Personal jurisdiction can also be achieved through *service by publication* (CPLR 316). A mailing must accompany a service by publication in matrimonial proceedings.
  - ii. Attorneys should note that matrimonial actions are unique in that these are the only kinds of civil cases that require permission for substituted service.
- C. Attorneys may file a *Request for Judicial Intervention* (RJI) (see sample at 22 N.Y.C.R.R. § 202.6) in seeking substituted service or immediate relief by way of an Order to Show Cause. The RJI must be filed no later than 45 days from the date of service of the summons. The applicable RJI fees can be obtained by visiting the applicable County Clerk’s office website.<sup>1</sup>
  - D. Parties can obtain a divorce in New York only upon satisfaction of the *residency requirements* outlined in DRL § 230. These requirements link the State of New York to the parties, their marriage and the grounds for divorce.
  - E. *Venue* is usually the county where either one of the parties resides (CPLR 503(a)). Alternatively, an attorney may file the matrimonial action in a county designated by the plaintiff (CPLR 509).

Attorneys should use § 509 with caution as to accessibility of courts, knowledge of court staff and judge's interpretation of the matrimonial laws and rules.

### III. Preliminary Requirements

- A. The Rules require an attorney to execute a *Retainer Agreement* before working with the client. The Agreement must be filed with the Court prior to the initial court appearance and must describe the compensation and nature of services in plain language (see 22 N.Y.C.R.R. § 1400.3 for the minimum 13 specific areas to be addressed in the Agreement).
- B. The Rules also require that the attorney and client sign the "*Statement of Client's Rights and Responsibilities*" at the initial conference and file said Statement with the Court before the initial appearance. The Statement's purpose is to outline the expectations and obligations of both the attorney and client throughout the matrimonial action (see sample at 22 N.Y.C.R.R. § 1400.2).
- C. Prior to the court appearance an attorney should file a *Notice of Appearance* or a *Consent to Change Attorney* (CPLR 321), if applicable, to the Supreme Court, alerting the Court of the representation.
- D. In a matrimonial action, an attorney must sign each "pleading, written motion and other paper" submitted to the Court and *certify* that contents are not frivolous or false (22 N.Y.C.R.R. § 130-1.1-a).
- E. Attorneys are cautioned to avoid inappropriate

ex parte communication with Chambers. This simply means that substantive discussions with the Chamber's staff about a case must occur in the presence of both parties. This is possible through telephone conference with all relevant parties. However, the Court will field inquiries about procedure, on an ex parte basis.

### IV. The Preliminary Conference (PC) Is the Initial Conference That Maps the Path for the Case

- A. Under the Rules, the Court Clerk schedules the PC within 45 days of RJI's receipt (22 N.Y.C.R.R. § 202.16(f)).
- B. DRL, part B(1)(4) requires *compulsory financial disclosure* in that parties must exchange and file with the Court copies of paycheck stubs for current calendar year, income tax returns including IRS tax form 1099 for the previous three years. A "*Statement of Net Worth*," which discloses family data, expenses, gross income, assets, liabilities, assets transferred; and, support counsel fee, accountant and appraisal fee requirements, must also be filed and exchanged 10 days before the PC (22 N.Y.C.R.R. § 202.16(f)).
- C. Interaction with Court Officer and Interpreters
  - i. An attorney should check in with the Court Officer in the Matrimonial Part by completing an *Attorney Sign-in Sheet* available in the courtroom. Informing the Court Officer of the need for an *interpreter* if clients are non-English speak-

ing may avoid unnecessary delays.

### D. Interaction with Court Reporters (CR)

- i. Court Reporters record the proceedings in Supreme Court and furnish *transcripts* of the recorded matter at a specified per-page cost to attorneys. As a practice tip, attorneys should obtain the CR's business card for later communication and/or purchase. If the attorney forgets the CR's name, the Court Clerk can provide such information by researching the *Minute Book* or its equivalent.

### E. Default Appearances

- i. Attorneys and parties are required to appear at each conference (22 N.Y.C.R.R. § 130-2.1). Thus, the Court may impose sanctions and award attorney fees for failure to appear. Attorneys should determine what the Court considers a "*default time*" for appearances and call the Court Clerk to request an accommodation if the attorney will be in Court after the default time. When a party fails to appear, the judge will issue a *Default Order* along with an adjourned date and instruct service of the Order on the party who failed to appear. On the 2nd failed appearance, the attorney should request that the default be placed on the record so as to facilitate moving for substantive relief.



## F. Discovery

- i. During the PC, attorneys will conference with the Court Attorney and set a schedule for the completion of discovery. A *Discovery and Inspection* timeline is set pursuant CPLR 3120; the service and reply time to *Interrogatories* are set pursuant to CPLR 3130–3133; and, the taking of *Depositions* is set pursuant to CPLR 3108. Attorneys are required to make a good faith attempt to resolve discovery disputes. To avoid unnecessary delays, a particular judge may prefer that attorneys contact Chambers via a conference call to resolve discovery disputes before the next scheduled appearance.

## G. Fault

- i. During the PC, the parties must inform the Court as to the intended “ground” for seeking a divorce. Currently one of the following “grounds” must still be proven under DRL § 170 to obtain a divorce: adultery; abandonment; constructive abandonment; cruel and inhuman treatment; incarceration over three consecutive years; living separate and apart pursuant to a separation decree; or, living separate and apart pursuant to an agreement.
- ii. In February 2006, the Matrimonial Commission recommended to Chief Judge Kaye that a *no-fault divorce approach* be adopted by the legislature

to reduce acrimony and delays in the divorce process.

- H. The Court will also insist on knowing which of the following *ancillary issues* are not applicable, resolved or outstanding
- i. *Equitable distribution* seeks to divide up marital assets (DRL § 236(B))
  - ii. *Spousal maintenance* seeks to provide financial support to one of the parties (DRL § 236, Part B (6))
  - iii. *Temporary orders of protection* seek to protect parties in instances of abuse and threats of future violence (DRL § 252)
  - iv. *Exclusive occupancy* seeks to exclude one spouse from the marital residence (DRL § 234)
  - v. *Injunctive relief* enjoins parties from disposing of marital assets (CPLR 6313)
  - vi. *Counsel fees* enables the movant to afford the continued cost of litigation (DRL § 237(a))
  - vii. *Real estate appraisals* place a value on the marital home(s) thereby assisting in the distribution of assets (DRL § 237(f))
  - viii. *Forensic services* are assistive in obtaining a value on businesses, licenses and education degrees (DRL § 237(f))
  - ix. *Add-ons* are reasonable expenses related to the child such as private school tuition, summer camp, after school programs, extracurricular activities and child care.

- x. *Visitation and custody* relate to the parents’ current actions toward the child(ren)

1. During the PC, the Court may appoint a *Law Guardian* (LG) who assists the Court in meeting the “best interest of the child” standard under DRL § 70(a).
2. The Court may also recommend that the parties attend mediation<sup>2</sup> or ask that the parties work with a *case analyst*<sup>3</sup> in resolving issues of custody and visitation.
3. *Child support* is determined for children under age 21 who are not emancipated under the Child Support Standards Act (DRL § 240[1-b][c]).

## V. Motion Practice

- A. Motions are generally reviewed by the Orders Department in the Supreme Court and then delivered to the matrimonial judge for review. Attorneys can request “oral argument” or that the motion be “submitted” for decision. Submitted motions do not require an appearance. Sometimes it can take 45 days or more for a judge to render a decision; thus, oral arguments may be a more expedient means of obtaining relief.
- B. *Pendente lite motions* are used when seeking interim relief in a matrimonial action in Supreme Court. In such a motion, parties can ask for temporary maintenance, child support, orders of protection, custody, exclusive

use and occupancy of the marital residence, injunctive relief, counsel fees, and accountant's and appraisals fees. (Sample *pendente lite* motion available at [ny-courts.gov/ip/matrimonial-matters/forms.shtml](http://ny-courts.gov/ip/matrimonial-matters/forms.shtml)).

**VI. Compliance Conference (CC)—This Conference Determines If Discovery Is Outstanding and Enables the Parties to Pursue Additional Settlement Discussions**

- A. During the CC, parties may agree on some issues. *Stipulations* are forms provided in the Matrimonial Part for parties to record settlement and promises of future actions. At the completion of the CC, the judge signs the Stipulation thereby converting its contents into an Order. Thus, future noncompliance to the Stipulation can make parties vulnerable to sanctions by the Court.
- B. Also, during a court conference a party may alert the other side of the need for a Subpoena. Attorneys may sign *Subpoenas* pursuant to CPLR 2302. However, Subpoenas are signed by the Court when required by particular institutions.
- C. Attorneys may sometimes find the need to adjourn an appearance because discovery is incomplete and information is required for settlement. *Adjournments* can be done by consent of both parties with written notification given to the Court prior to the scheduled appearance. Where there is no consent, all parties to the action, including the law guardian, can seek adjournment through a conference call with the judge's chambers. The Court Attorney

may request that parties send a letter of confirmation with the adjourned date. Be cautioned that a judge may not adjourn a case more than three times and may seek "good cause" for each adjournment. If the adjournment is due to a priority appearance in another court, a *letter of engagement* should accompany the adjournment request (22 N.Y.C.R.R., Part 125).

- D. At any time throughout the matrimonial proceedings, the Court may make a written Decision and/or Order, which is filed with the County Clerk and made available to parties. Attorneys can request that transcripts of oral *Decision/Orders*, made from the bench, be signed by the Court.

**VII. Pre-Trial Conference/Inquest**

- A. The Court may require that attorneys attending a pre-trial conference be authorized to make settlement decisions and be knowledgeable about all trial issues.
- B. In an inquest the Court places the parties' agreement on the record. Since a settlement can be reached throughout the matrimonial proceeding, an inquest can occur at any time. The Court may provide an inquest outline for attorneys, which includes a series of questions on jurisdiction, type of marriage ceremony, children of the marriage, grounds for the divorce. The judge may then allocute the parties through questions to determine if parties understand the agreement, have adequate representation and are not impaired.
- C. It is important that attorneys make an oral motion

to have the Stipulation of Settlement "survive and not merge with the Judgment of Divorce." Additionally, if the "grounds" portion is met through a counterclaim, the plaintiff attorney must motion to withdraw "grounds" in the Verified Complaint.

- D. Attorneys may also request that the wife in the proceeding resume her maiden name. Be sure to spell correctly the premarriage surname on the record to avoid future corrections.

**VIII. Trial Preparation Procedure**

- A. Attorneys may find that the "grounds" portion of the trial is done by a matrimonial judge and the ancillary issues are then referred out to a "Referee." Referees are Court Attorneys who function in a quasi-judicial manner and the parties must consent to have the Referee hear the case. Judges may vary on what is required leading up to a trial. Courts will not adjourn a trial absent compelling reasons. The *New York Law Journal* website<sup>4</sup> provides a list of Part Rules and attorneys are encouraged to communicate with the Court Attorney for exact procedural guidance. However, the following is usually required:
  - i. The *Statement of Proposed Disposition* (SPD) must be submitted to the Court 10 days before the trial by plaintiff and defendant and certified by counsel. This document should list separate and marital assets claimed and the parties' debts and liabilities. It proposes a resolution for ancillary issues while discussing

the statutory factors forming a basis for the proposal.

- ii. The *Updated Statement of Net Worth* and the *Witness List* are also to be filed with the Court 10 days before the trial. These documents inform the Court of changes in the parties' financial circumstances since the PC and detail the persons each side intends to elicit testimony from during the trial.

- B. The *Note of Issue* must be filed 30 days before trial, notifying the Court that discovery is complete and the parties are ready for trial.

#### IX. Post-Trial

- A. At the completion of the trial, the Court may ask the attorneys to submit a "*Post Trial Summation*" which includes a table of contents, procedural history, issues, lay and expert witness testimony summary, a summary of exhibits, and, the parties' contentions as to all testimony and exhibits using the maintenance and equitable distribution factors, if applicable, with accompanying case law.
- B. Also, at the completion of the case, the Referee's Report must be confirmed or rejected.
- C. Judges may vary in the time taken to render a decision. However, once rendered,

the case is not completed until the *Judgment of Divorce* and accompanying *Findings of Fact and Conclusions of Law* are signed by the judge.

#### X. Post-Judgment Relief

- A. With the applicable legal standards met, motions may be filed for a settlement agreement violation, to set aside an agreement, to change custody/visitation, or to modify awards for maintenance and/or child support.
- B. A plenary action may be needed, in cases where a Stipulation of Settlement has survived and not merged into the final judgment of divorce.

#### XI. Ethics and Professionalism

- A. The judge's chambers and courtroom staff can be an excellent source of information and should be treated with respect despite unfavorable court rulings and personality clashes.
- B. Similarly, colleagues can be assistive to attorneys new to the matrimonial practice, in resolving stumbling blocks. Thus, being civil, cordial and cooperative can prove helpful when in need of a courtesy. As such, attorneys should be cautious of taking on the emotional and combative persona of their clients.
- C. The New York Disciplinary Rules set several restrictions in the area of domestic rela-

tions. First, *contingent fee arrangements* are not permitted in domestic relation matters (1200.11-c). Second, attorneys are prohibited from *engaging in sexual relations* with clients during representation in a domestic relations matter (1200.29-a). Third, attorneys can be disqualified from representation where there is a *conflict of interest* (1200.27-a).

#### XII. Resources

- A. Substantive matrimonial issues discussions and matrimonial forms are available through the Family Law Section of the New York State Bar Association at [www.nysba.org](http://www.nysba.org).

#### Endnotes

1. For example, in Bronx County, a RJI costs \$95 and an index number costs \$210.
2. The New York Unified Court System Office of Alternative Dispute Resolution Program provides divorce mediation at 53 centers located in a variety of counties. (See, [www.nycourts.gov/ip/adr](http://www.nycourts.gov/ip/adr).)
3. Case Analysts are employed by the Court and thus, their services are offered to the parties free of charge.
4. [www.law.com/jsp/nylj/index.jsp](http://www.law.com/jsp/nylj/index.jsp).

**Savina P. Playter is Of Counsel to the Law Firm of Rodriguez & Fuentes. She was formerly an attorney to the Honorable La Tia W. Martin in the Bronx Supreme Court, Matrimonial Part. Ms. Playter co-presented several CLEs on Matrimonial Law to the CUNY School of Law CLRN Family Law group and is an Adjunct Professor at Marymount College teaching Domestic Relations Law.**

**Catch Us on the Web at  
[WWW.NYSBA.ORG/YOUNG](http://WWW.NYSBA.ORG/YOUNG)**





# The NFL and the Fans of the Cleveland Browns Have Earned Rights to the Phrase “Dawg Pound”

By Joseph Hanna

Victims of misery—from the last-second heroics of John Elway and the Denver Broncos in “The Drive” to their franchise bolt-



ing east to Baltimore in 1995—the Cleveland Browns’ faithful have reason to cheer again after a recent ruling rendered by the United States District Court for the Southern District of New York, which granted the National Football League Properties, Inc. (“NFLP”) and the Browns the rights to the phrase “Dawg Pound.”

In the early 1980s, Cleveland’s three-time Pro Bowl defensive back Hanford Dixon would bark like a dog to pump up his defensive teammates. The fans in Cleveland Municipal Stadium’s bleacher section joined Dixon and, before too long, the 10,000-seat bleacher section became known as the “Dawg Pound.” The die-hard Browns fans that made up the “Dawg Pound” began wearing dog noses, dog masks, and bone-shaped hats. The Dawg Pound quickly developed a reputation around the league for their antics, including throwing dog bones and barking at the opposing team throughout the game.

The NFLP soon took notice of the vastly increased sale of the Browns’ merchandise and considered Cleveland to be a “hot market.” In 1985, in order to capitalize on the popularity of the team, the NFLP asked the Browns to register the marks “Cleveland Browns Dogs” and “Cleveland Browns Dawgs” with the State of Ohio Trademark Office. The “Cleveland Browns Dawgs” was officially registered with the state of

Ohio in 1988. The logo contained the phrase “Cleveland Browns Dawgs” and consisted of three dogs in football uniforms (a similar design was also used for the Cleveland Browns Dogs as well). The trademark registrations were set to expire 10 years from their date of issuance.

The NFLP was established to protect the integrity of the NFL and its teams’ trademarks in dealings with third parties via licensing agreements. The NFLP referred to these marks as “NFL Marks,” and broke them down into five categories:

- “League Marks,” which included marks such as “National Football League,” “NFL,” “Super Bowl,” “Pro Bowl,” and the like;
- “Club Marks,” which included the names, symbols, designs, and colors of the various NFL teams;
- “Huddles,” which included copyrighted team mascots, helmet designs, and other indicia of the teams;
- “Superstars,” which included special designs including Club Marks and the personal likenesses of one or more NFL players; and,
- “Game Day,” which were special design treatments of the Club Marks marketed in connection with the term “Game Day” and/or the League Marks.

The NFLP listed “Dawg Pound” under the Club Mark category, licensing the use of the logo to various third parties. The NFLP accepted licensing fees for T-shirts, Christmas cards, posters, logos, and other sports apparel that used the phrase “Dawg Pound” in some form. In the mid-1990s, Hawaii-Pacific Apparel

Group (“HP”) began to design, manufacture and market a line of non-football-related apparel bearing phrases such as “Dawg Pound,” “Lil Dawg Pound,” and “Top Dawg.” Donald Shepard, HP’s president and sole shareholder, created this line of clothing after his teenage son was given the nickname “Top Dawg” by members of his baseball team. In March of 1994, HP attempted to register the “Dawg Pound” mark with the United States Patent and Trademark Office (“USPTO”) (alleging a date of first use in commerce of March 1994); however, the NFLP opposed the registration, and the mark was never registered.

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*“The NFLP was established to protect the integrity of the NFL and its teams’ trademarks in dealings with third parties via licensing agreements.”*

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In 1995, the unthinkable happened to Browns fans and the city of Cleveland, as owner Art Modell announced that he was moving the franchise to Baltimore. In one fell swoop the team that defined the true blue-collar atmosphere of Cleveland and the raucous crowd at the Browns’ games no longer existed. In February of 1996, however, the NFL announced that Cleveland would again be granted an NFL franchise and the rights to the Browns’ name, colors and memorabilia. In 1999, Cleveland welcomed back its beloved Browns, and the “Dawg Pound,” with open paws.

In March of 1999, prior to the start of the 1999-2000 NFL season, the Browns and the NFLP (which prior to this time had never registered or attempted to register the “Dawg

Pound” mark with the USPTO), filed an intent-to-use application with the USPTO for the “Dawg Pound” mark. The USPTO rejected the NFLP’s application in August of 1999 due to its similarity to, and likelihood of confusion with, HP’s “Lil Dawg Pound” mark (which HP registered with the USPTO in 1996). In March of 2000 HP’s attorneys sent a letter to the NFLP and the Cleveland Browns organization, demanding that they immediately cease and desist using the Dawg Pound mark. In August of 2000 the NFLP commenced a lawsuit against HP in Ohio district court, seeking a declaration of non-infringement. The United States District Court for the Northern District of Ohio dismissed the case for lack of personal jurisdiction over HP, and the Sixth Circuit affirmed.<sup>1</sup>

Thereafter, HP commenced an action against the NFLP and the Browns in the Southern District of New York.<sup>2</sup> The complaint contained four counts: trademark infringement under the Lanham Act, unfair competition under the Lanham Act, unfair competition under state law, and a declaration of non-infringement. The Browns and the NFLP answered and asserted seven counterclaims that mirrored HP’s claims. HP replied to the counterclaims, and then filed an amended reply to the counterclaims asserting additional counterclaims for copyright infringement. After discovery as to liability only, the parties filed cross-motions for partial summary judgment on the issue of priority of use.

The initial issues addressed by the court considered the applicable law concerning priority of use and the right to exclusive use of a trademark. The exclusive use of a trademark stems from its appropriation and subsequent use in the marketplace. In *H.W. Carter & Sons, Inc. v. Williams Carter Co.*, the court held that “the user who first appropriates the mark obtains an enforceable right to exclude others from using it, as long as the initial appropriation and use are accompanied by an intention

to continue exploiting the mark commercially.”<sup>3</sup> Therefore, only the senior user of a trademark can bring a claim for trademark infringement or state or federal unfair competition.<sup>4</sup>

In reaching its decision the court reasoned that not every use of a mark would suffice to create enforceable rights. Rather, the test for establishing the sufficient prior use in commerce of a mark is “whether a person’s use of the mark was sufficiently public to identify or distinguish the marked goods in an appropriate segment of the public mind as those of the adopter of the mark.”<sup>5</sup>

Use of a mark by a licensee to identify or distinguish goods is sufficient to create enforceable rights in favor of the licensor. “The Lanham Act definitely contemplates that a trade or service mark may be acquired through its use by controlled licensees, even though the registrant itself may not have used the mark.”<sup>6</sup> However, a licensor must exercise some degree of control over the use of the mark by the licensee, at the risk of abandonment of the mark.<sup>7</sup>

In applying the law to the instant case, the district court found that the NFLP and the Browns were entitled to summary judgment on HP’s claims of infringement because the defendants licensed the “Dawg Pound” mark to third party manufacturers and distributors, including Logo-7, Hallmark, Reebok, and Nutmeg Mills, years before HP alleged to have first used the mark in 1994. The court held that no reasonable jury could find that HP was the senior user of the “Dawg Pound” mark.

HP conceded that “it could be argued that use by a licensee qualifies as ‘use’ for trademark ownership purposes in some situations.” However, it argued that the NFLP and the Browns did not control their licensees in the Dawg Pound mark as required by law. The court disagreed with HP’s analysis. The facts of the case showed that in order for a licensee to begin using the “Dawg

Pound” mark on approved merchandise, the licensee had to sign lengthy licensing agreements with the NFLP. The licensing agreements required the licensee to submit samples of their products to the NFLP in order to receive quality control approval prior to placing their goods in the stream of commerce.

The court concluded its analysis regarding the priority of use issue by stating that “because the Browns and NFLP licensed goods that contained the words ‘Dawg Pound’ together with some general reference to the Browns or the NFL years before HP ever used the ‘Dawg Pound’ mark in commerce, no reasonable jury could find that HP was the senior user.”<sup>8</sup> The court held that the Browns’ and the NFLP’s licensing of the Dawg Pound mark was sufficient, as a matter of law, to establish priority of use, and granted partial summary judgment to the Browns and the NFLP.<sup>9</sup>

Finally, the court addressed whether the Browns and the NFLP had abandoned their rights to the “Dawg Pound” mark. HP argued that defendants’ use of the mark was only sporadic at best between 1995 and 1999 (the period that the Browns did not have a NFL franchise in Cleveland) and defendants failed to oppose HP’s registration of its “Lil Dawg Pound” mark in 1996.<sup>10</sup> In fact, Shepard testified at his deposition that he was not aware that the words “Dawg” and “Dawg Pound” commonly referred to the fans of the Cleveland Browns until the NFLP opposed HP’s “Dawg Pound” registration.

A finding of abandonment requires proof by clear and convincing evidence that use of the mark “has been discontinued with intent not to resume such use,”<sup>11</sup> and it would defeat an alleged owner’s claim of priority. “Once abandoned, the mark reverts back to the public domain whereupon it may be appropriated by anyone who adopts the mark for his or her own use. Hence a party that is found to have abandoned its mark is deprived of any claim to pri-

ority in the mark before the date of abandonment."<sup>12</sup>

The court held that no reasonable jury could find that the Browns and/or the NFLP abandoned the mark. Indeed, the record reflects that through letters from assistant counsel for NFLP to alleged trademark infringers, defendants enforced what they perceived to be their rights in the "Dawg Pound" mark during the period between 1995 and 1999.<sup>13</sup>

The Browns and the NFLP established their status as senior users of the "Dawg Pound" mark by showing that they had licensed the mark years before HP's alleged first use, and the court granted them summary judgment on this issue accordingly. As a result, three of the four claims in HP's complaint were dismissed and the Browns' and the NFLP's counterclaim for a declaration of non-infringement was similarly granted—giving the famed "Dawg Pound" something to bark about.

## Endnotes

1. See *Cleveland Browns Football Co., LLC v. Hawaii-Pacific Apparel Group, Inc.*, 90 Fed. Appx. 868, 2004 WL 232731 (6th Cir. 2004).
2. *Hawaii-Pacific Apparel Group, Inc. v. Cleveland Browns Football Co., LLC*, 418 F. Supp. 2d 501 (S.D.N.Y. 2006).
3. *H.W. Carter & Sons, Inc. v. Williams Carter Co.*, 913 F. Supp. 796, 802 (S.D.N.Y. 1996) (quoting *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1271 (2d Cir. 1974).
4. See *Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 150 (2d Cir. 1997) ("To recover for unfair competition [a plaintiff] must show . . . an association of origin by the consumer between the mark and the first user") (emphasis added); *id.* at 149 ("Under New York law, common law unfair competition claims closely resemble Lanham Act claims except insofar as the state law claim may require an additional element of bad faith or intent") (quoting *Girl Scouts v. Bantam Doubleday Dell Publ'g Group, Inc.*, 808 F. Supp. 1112, 1131 (S.D.N.Y. 1992)).
5. *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.*, 15 F. Supp. 2d 389, 396 (S.D.N.Y. 1998).
6. *Turner v. HMH Pub. Co.*, 380 F.2d 224, 229 (5th Cir. 1967).
7. See *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 277 F.3d 253, 259 (2d Cir. 2002) ("Marvel, as the licensor of the 'X-Men' property, is obliged to maintain some control over the quality of the licensed property as an incident of valid licensing or risk abandonment of its mark").
8. *Hawaii-Pacific Apparel Group, Inc. v. Cleveland Browns Football Co., LLC*, 418 F. Supp. 2d 501, 508 (S.D.N.Y. 2006).
9. *Id.* at 509.
10. *Id.* at 508.
11. 15 U.S.C. § 1127.
12. *Emmpresa Cubana Del Tabaco v. Culbro Corp.*, 213 F. Supp. 2d 247, 267-68 (S.D.N.Y. 2002).
13. *Hawaii-Pacific Apparel Group, Inc. v. Cleveland Browns Football Co., LLC*, 418 F. Supp. 2d 501, 509 (S.D.N.Y. 2006).

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# Be the Guide They Can Trust

By Elliott Wilcox

My first thought was, “My, what big teeth you have!”

I’d never seen teeth that big before. Never. They were **huge**.

If you’ve never seen a hippopotamus up close before, you’re missing a memorable experience. In cartoons, they’re portrayed as peaceful, docile creatures that wouldn’t harm a fly. In the Hungry, Hungry Hippos game, they’re colorful, cute, and cuddly. But that’s not quite true. They’re huge, temperamental creatures, capable of biting a man in two. And here I was, less than ten feet away from not one, not two, but **three** of them!

But I wasn’t scared.

Why? Because I had a guide that I trusted. My guide’s name was Tim. Tim looked the part of an adventurer. He was clad in khaki clothing, with a pith helmet on his head and a pistol by his side. He didn’t just **dress** the part—he carried himself with the confidence of someone who had been down this river hundreds of times before. When he spoke, it was obvious that he was well trained and knew these waters like the back of his hand.

I wasn’t scared.

With Tim as our guide, I, and everyone else on the boat, felt safe.

Just as he’d done before when we’d encountered elephants, giant snakes, and other dangers, Tim guided us safely past the hippos, safely returning us to our initial port of call. We thanked him with a round of applause and stepped ashore, relieved that we had chosen the right guide.

Your role in trial is similar to Tim’s role on that jungle river cruise.



You must be the guide the jurors can trust. Trials are foreign territory for most jurors. They want a guide to lead them past pitfalls, show them the landmarks, and get them safely to their destination. In trial, that destination is a just verdict. From the moment they walk into the courtroom, they’re looking for that guide. Here are three steps you can take to become the guide they trust.

1. **Be sincere.** There’s no magic formula or 12 Step Program you can follow here. You either are, or you aren’t. If you can’t do this, none of my other advice can help you. When you’re sincere, you’re telling the jurors a story that you believe. When you don’t believe the story you’re telling, the jurors sense that, and you can’t be effective. Re-examine your evidence and the law until you find a different story . . . one that fits the facts and the law, one that you **do** believe.
2. **Don’t ask them to believe the impossible.** Each lawyer starts the trial with a credibility account. You make small deposits over time, building up your credibility with the jurors. When you ask jurors to believe the impossible or to doubt their common sense, you make a **huge** withdrawal from your account. You’re asking them to believe **you**, rather than a lifetime of experience. Who do you think they’ll believe?

Lawyers thrive on examining the nuances and the minutiae. Admit it—you’ve read the **back** of a ticket to a sporting event or a parking garage, right? Most people won’t delve into a matter that deeply. That’s why you need to ask someone who’s **not** a lawyer to evaluate your arguments. If they feel you’re asking them to ignore their common sense, you need to re-work your

argument. The closer you align your arguments with common sense, fairness, and general expectations, the better your chances of becoming the guide they can trust.

3. **Admit weaknesses.** Admit your weaknesses before your opponent trumpets them, and you’ll take the wind out of his sails. The jury thinks, “Yeah, we already knew that. The other attorney already told us the strengths **and** the weaknesses of his case. He’s the guide we can trust to lead us through the evidence.”

When you expose your weaknesses, you show them why you win, **despite** the weaknesses in your case. If you **don’t** mention the weaknesses in your case, your opponent gets to say, “And [BAD FACT] is so damaging to Mr. Wilcox’s case, he didn’t even mention it to you. Why? Because there’s **nothing** he can say to make it go away!”

A good guide is essential to a safe journey. Just as Tim guided our boat to safety, you’ll guide the jurors to a safe destination. When you become the guide the jurors can trust, they will look to you to guide them through the evidence. When the evidence leads to a fork in the road, they will trust **you** to guide them to safety. They will trust **you** to guide them to a just verdict. Follow these simple guidelines and you’ll become the guide your jurors can trust. You’ll lead them through the evidence, and lead them to safety.

Oh, and if you ever find yourself at Disney World, waiting in line to ride the Jungle Cruise, please do me a favor, and say “Hi!” to Tim!

Elliott Wilcox is the creator of *Trial Tips Newsletter*, a free weekly ezine for trial lawyers ([www.TrialTheater.com](http://www.TrialTheater.com)).



# Book Review

## *In the Shadow of the Law* by Kermit Roosevelt, Farrar, Straus and Giroux, 2005

Reviewed by Weston Donehower

The great-great-grandson of Teddy Roosevelt is an Ivy League law professor, a former clerk to Justice Souter, and—here’s the surprise—the author of fun new legal



thriller. The novel’s main characters work for a large D.C. law firm, and they grapple with the choices and questions familiar to many recent law school graduates: Where do I want to work? What kind of law do I want to practice? What do I expect from a job? Lots of money? Intellectual fulfillment? How do these partners feel about me, and how do I feel about them? And how in the world do I find love in this big city?

Part of the novel’s attraction is the presentation of several different kinds of lawyers, several different variations on what it means to work in a firm. First among them is Peter Morgan, the chairman of the firm. In Peter’s life, the law is primarily a business. He envies his banker clients because they make more money than he does; he wonders whether a recently hired Supreme Court clerk could possibly be worth the extravagant signing bonus the firm paid him; and he states that pro bono work is literally not worth his time: “A good legal claim is worth money. Anyone who has one can at least get a contingency-fee lawyer.” Fulfilling the

author’s grave warning that it’s easy to become what you do, Peter ends up treating even his most intimate relationship as if it were an arm’s-length business transaction. I’m not saying you’ll like Peter, but as with Shakespeare’s Iago, he’s ruthless in a way that fascinates.

The other characters are also fun to watch. They include Harold, a litigation partner who compares the process of pretrial discovery to a striptease; Ryan, a girl-crazy associate on a quixotic quest for the perfect pick-up line; beautiful young Katja who tries to balance work, running, and reading poetry; and finally, Walker Elliot, the former Supreme Court clerk for whom the law is sacred. Arguments should be made, Walker says, so as to improve the law, to make the law as clean and reasonable and just as possible. Watching lawyers argue for their client’s position, careless of the law’s purity, he quickly starts applying for professorships where he can write without chains, unencumbered by the need to win.

Roosevelt gets most of the details right, from the bridges in D.C. to the street names in Ann Arbor, but then he strangely botches associate salaries and billable rates. And he pretends as if one tort can easily bankrupt a large company. Maybe, but in my experience, companies are generally covered by layers upon layers of insurance, and those insurers make darn sure that torts are well defended.

More importantly, I’m skeptical of Roosevelt’s repeated message that working in a large law firm will

change you for the worse. Katja, for example, “had compartmentalized her life, segmented herself . . . there was a brisk and competent lawyer, and there was a girl who read Rilke at night.” To me, Katja’s regimen sounds healthy and balanced, but Roosevelt implies that it doesn’t work: “No one told her that we grow into our masks, that we become who we impersonate.” Sure, most of us change our behavior in reaction to praise and criticism; does that mean becoming better workers makes us worse at the other parts of our lives? At the end of her workday, Katja changes into her running gear: “She rode the elevator down to the ground floor and waved to the security guards. Then she was out the door, striding into the night. Her suit and its world behind her now, she was stepping lighter, faster, breaking free.” It reminds me of how a Renaissance philosopher once described his daily reading: “When evening has come, I return to my house and go into my study. At the door I take off my clothes of the day, covered with mud and mire, and I put on my regal and courtly garments; and decently reclothed, I enter the ancient courts of ancient men . . . and for the space of four hours I feel no boredom, forget every pain, I do not fear poverty, death does not frighten me” (Machiavelli, Letter to Vettori).

Roosevelt’s *In the Shadow of the Law* is fun and thoughtful. Two thumbs up.

**Weston Donehower graduated from the University of Michigan Law School in 2003 and works as an associate in Washington, D.C.**

# Stipulators Beware: The Perils of CPLR 2104

By Richard L. Weber

To a young lawyer, the process of settling a lawsuit or entering a stipulation with an opponent looks simple enough: just reach an agreement.

However, any lawyer entering a stipulation or agreement must take care to comply with the requirements of CPLR 2104.

As a matter of public policy, courts seek to encourage stipulations as a way to provide litigants with predictability and to promote judicial economy.<sup>1</sup> To facilitate that goal, CPLR 2104 sets forth three alternate options for memorializing agreements between parties (or their attorneys) in an action: (a) the agreement must be made between counsel “in open court,” or (b) the agreement must be set forth in a writing subscribed by the party against whom enforcement is sought, or (c) the agreement must be reduced to the form of an order and entered.<sup>2</sup> Failure to satisfy one of the three acceptable options will render the stipulation unenforceable.<sup>3</sup>

Of the three alternatives, the third option—reducing the agreement to an order entered with the Court—presents the least difficulty from an enforcement standpoint. After all, under this option, the express terms of the stipulation are documented in a writing, signed by a judge, and filed with the court. As a matter of course, state courts frequently utilize scheduling orders and other stipulations to control timing of discovery and motion practice.<sup>4</sup>



Option number one agreement—between counsel “in open court”—hinges on the definition of “open court,” a term of art not to be taken lightly. *In re Dolgen Eldrich Corp.* sets forth the traditional description of the “open court” requirement:

The term “open court” . . . is a technical term in the law. It refers to a judicial proceeding in a court, whether held in public or private, and whether held in the courthouse, a courtroom, or any place else, so long as it is, in an institutional sense, a court convened, with or without a jury, to do judicial business. Typically, in a court of record, an open court has in attendance a clerk who makes entries of judicial events in a docket, register, or minute book, and in modern times there is a court reporter, who makes record of all the proceedings. An open court is not a “judge in chambers,” in the technical sense of that phrase, and it is neither a judge nor a clerk acting in its proper person anywhere, whether in the courtroom or elsewhere.<sup>5</sup>

With that in mind, it should come as no surprise that a telephone call between counsel—without

participation by the Court—fails to meet the “open court” requirement.<sup>6</sup> Similarly, documentation of the agreement in a stenographic record created at a deposition is insufficient.<sup>7</sup> In fact, a stenographic record made in chambers and in front of a judge’s law clerk will not suffice unless the judge is also present.<sup>8</sup> On the other hand, an agreement made during a pre-trial conference may fail to satisfy the “open court” requirement if the material terms of the agreement are not properly documented in a stenographic record.<sup>9</sup> For example, one recent case noted that a mere notation on the trial judge’s case calendar, marking the case “settled,” was not sufficient documentation of the agreement.<sup>10</sup> In short, the “open court” requirement demands both the presence of a judge *and* a full stenographic record of the terms of the stipulation.<sup>11</sup>

Option number two—a “signed writing”—presents other traps for the unwary. In *Bonnette v. Long Island College Hospital*,<sup>12</sup> the parties entered into an out-of-court oral settlement of a medical malpractice action. To finalize the settlement, the defendant hospital required plaintiff to complete settlement paperwork. The hospital provided the forms to plaintiff parent, who delayed returning the necessary forms while she sought an appropriate annuity plan from the hospital’s chosen annuity company. The infant plaintiff died prior to execution of the settlement paperwork; the hospital responded by informing plaintiff parent that no enforceable settlement existed, as no signed writing complying with CPLR 2104 was ever delivered. Plaintiff moved to enforce the settlement. Ultimately, the Appellate Division determined that plaintiff’s failure to obtain any writing *with the complete settlement terms*, or any recitation in open court of the

settlement terms (i.e., CPLR 2104 option number one), precluded enforcement of the settlement agreement. The Court of Appeals affirmed.<sup>13</sup>

*Bonnette* is emblematic of the traps associated with the second CPLR 2104 option: there is no enforceable agreement until all material terms of the agreement are in a writing, signed by the parties. Simply drafting and circulating a stipulation or release is not enough; the documents must be executed to be enforceable.<sup>14</sup> Mere enclosure letters—even those acknowledging the existence of an agreement—will not suffice unless they incorporate all material terms of the settlement.<sup>15</sup> Stipulations that are contingent on a subsequent event or agreement will not be enforceable in the absence of the contingency.<sup>16</sup> Also, reliance on arguments of “substantial compliance” or partial performance will be unlikely to save a stipulation not properly committed to writing.<sup>17</sup> In sum, the “signed writing” option requires both an express record of all material terms and the signature of the opponent.<sup>18</sup>

CPLR 2104 leaves little room for challenges by the parties. The strongest argument available to a party seeking to enforce a non-compliant stipulation is that the party seeking enforcement was misled by the stipulation and detrimentally relied upon its terms, thereby warranting estoppel upon the breaching party.<sup>19</sup> Where there is no dispute between the parties to the terms of a settlement agreement made during pending litigation, courts will refuse to allow CPLR 2104 to be used against a party who has been misled or deceived.<sup>20</sup> On the other hand, a party attempting to set aside a compliant

stipulation has the tall order of demonstrating fraud, collusion, mistake, accident or duress in order to be relieved from the consequences of the stipulation.<sup>21</sup>

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*“CPLR 2104 demands the prompt and proper documentation of the material terms of any stipulation or settlement between the parties. Failure to heed its requirements may render any agreement a nullity.”*

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In sum, CPLR 2104 demands the prompt and proper documentation of the material terms of any stipulation or settlement between the parties. Failure to heed its requirements may render any agreement a nullity.

#### Endnotes

1. *McCoy v. Feinman*, 99 N.Y.2d 295, 302 (2002).
2. CPLR 2104. Note that stipulations of settlement of an action carry an additional requirement—the “filing” of the terms of settlement, by the defendant, with the county clerk. *Id.*
3. *See Hicks v. Schoetz*, 261 A.D.2d 944 (4th Dep’t 1999).
4. *See generally* Uniform Civil Rules for the Supreme Court and County Courts, Rule 202.12; *see also Chadbourne & Parke v. Warsaw*, 287 A.D.2d 119, 122 (1st Dep’t 2001) (noting “courts have long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes”).
5. *In re Dolgen Eldrich Corp.*, 31 N.Y.2d 1, 4-5 (1972).
6. *Tocker v. City of New York*, 22 A.D.3d 311 (1st Dep’t 2005).

7. *Marpe v. Dolmetsch*, 256 A.D.2d 914 (3d Dep’t 1998).
8. *Conlon v. Concorde Pools Ltd.*, 170 A.D.2d 754 (3d Dep’t 1991).
9. *See generally* Uniform Civil Rules for the Supreme Court and County Courts, Rule 202.26(f) (requiring “complete minutes” of any stipulation of settlement made at a pretrial conference); *see also Zenteno v. Geils*, 17 A.D.3d 457 (2d Dep’t 2005); *Gustaf v. Fink*, 285 A.D.2d 625 (2d Dep’t 2001).
10. *Andre-Long v. Verizon Corp.*, 2006 N.Y. Slip Op 5300 (2d Dep’t July 5, 2006); *see also Gustaf*, 285 A.D.2d at 626.
11. *Shenoy v. Buffalo Medical Group*, 213 A.D.2d 1012 (4th Dep’t 1995) (no settlement entered in “open court” where no court minutes document the fact of the stipulation or its terms).
12. 3 N.Y.3d 281 (2004).
13. *Id.* at 285.
14. *Klein v. Mount Sinai Hospital*, 61 N.Y.2d 865 (1984); *Deleo v. Civitano*, 304 A.D.2d 520 (2d Dep’t 2003).
15. *Bonnette*, 3 N.Y.3d at 286 (citing *In re Galasso*, 35 N.Y.2d at 321).
16. *Luisi v. Luisi*, 244 A.D.2d 464 (2d Dep’t 1997) (where written stipulation was made “subject to” agreement of the parties, stipulation not enforceable unless and until parties executed a further stipulation).
17. *Bonnette*, 3 N.Y.3d at 286.
18. *Id.*; *Shenoy*, 213 A.D.2d at 1012.
19. *See generally Tiwumasi v. TJMT Transportation Services, Inc.*, 267 A.D.2d 153 (1st Dep’t 1999); *Marpe*, 256 A.D.2d at 914; *Bedrosian v. McCollum*, 209 A.D.2d 778 (3d Dep’t 1994).
20. *Id.*; *Conlon*, 170 A.D.2d at 756.
21. *French v. Quinn*, 243 A.D.2d 792 (3d Dep’t 1997).

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# How to Make an Effective Bail Application

By R. Graham McNamara

*The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. . . . Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.<sup>1</sup>*

*The Constitution states that bail may not be "excessive." U.S. Const. Amend. VIII. Excessive bail is for practical purposes no bail at all. In this regard too there is a general misconception as to the purpose of bail. Bail may not be used to "punish" a defendant. Being presumed innocent, he is entitled to release on bail in a sum which he can furnish.<sup>2</sup>*

You are standing next to your handcuffed client. He really wants to get out of jail and go home. The judge says bail has been set at a certain amount, more than

your client can come up with. Now is when a good argument can make an important difference to the outcome of your client's case. For whatever reason, defendants released on bail, or released on their own recognizance, have a far lower chance of facing conviction than those who are not released.<sup>3</sup> Arguing on behalf of a defendant client for reduced bail, however, often exposes new defense attorneys to their first adversarial setting in which they are challenged to think on their feet and orally persuade a judge. The task can be daunting.

The good news is that more than two-thirds of felony defendants are released before their cases are disposed of.<sup>4</sup> Despite this hopeful statistic, in a study of the 75 largest counties in the United States in 2000, the median time felony defendants spent in custody between arrest and sentencing was 153 days, with the longest median time (369 days) for homicide offenses, and the shortest median time (90 days) for vehicle theft.<sup>5</sup> Ultimately, whether to set bail



and at what amount is for the court to decide as a matter of "discretion rather than of law."<sup>6</sup> Fortunately, the court's discretion must be guided by factors prescribed by the law; although sometimes this may not seem to be the case.<sup>7</sup>

In New York, a judge's decision on bail should be determined by "the kind and degree of control or restriction that is necessary to secure court attendance."<sup>8</sup> In determining the amount of control necessary, pursuant to New York Criminal Procedure Law § 510.30, a court "must" consider a number of factors about the defendant:

- character, reputation, habits and mental condition
- history of employment and financial resources
- family ties and length of residence in the community
- criminal record
- history of attending or missing court appearances
- weight of the evidence and probability of pending conviction
- length of sentence if convicted<sup>9</sup>

Because the court must consider these factors in determining whether the defendant is a flight risk, it is absolutely required for a successful bail argument that new defense attorneys thoroughly quiz their clients about these categories and their client's life. The more facts the defense at-

torney has, the more effective the argument will be. It is important to keep in mind throughout a bail argument that these categories "are used to gauge 'the only matter of legitimate concern' . . . : 'whether any bail or the amount fixed [i]s necessary to insure the defendant's future appearance in court.'"<sup>10</sup>

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*"In New York, a judge's decision on bail should be determined by 'the kind and degree of control or restriction that is necessary to secure court attendance.'"*

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Assistant District Attorneys will tend to make much out of the fact that a defendant has a prior criminal record, or that a defendant has failed to appear in court in the past. The fact is that almost half of felony defendants will have a prior record,<sup>11</sup> and more than a third who have been released in the past and failed to show up at court will fail to show up again.<sup>12</sup> If time has passed since prior arrests or missed court dates, it is important to emphasize this fact. It is also useful to solicit reasons from your client why he or she didn't show up at a court appearance. Often there will be an excuse; sometimes the excuse will be legitimate.

Judges have reason to look upon defendants seeking release with a jaundiced eye. In 1998 in the 75 larg-



est counties in the United States, 40% of felony defendants released prior to case disposition either failed to appear in court (24%), or were rearrested on new crimes before case disposition (16%).<sup>13</sup> A useful tool in convincing the judge and the Assistant District Attorney that your client is different is having the client sign an affidavit with a *Parker* admonishment before you begin your argument. You may then give the affidavit to the judge during the course of your argument to emphasize the seriousness of your client's promise to return. A *Parker* admonishment informs your client that if your client fails to appear at the appointed court date, he or she may be tried in absentia and sentenced to the maximum sentence. In addition, your client may be charged with the separate crime of Bail Jumping.<sup>14</sup> Let the judge know that you have acquainted your client with the *Parker* warning and that your client understands it. You may also wish to inform the judge that you have thoroughly informed your client that almost all defendants who flee are captured and returned to jail within one year.<sup>15</sup> It is worth reminding the judge that bail should not be used to punish your client prior to trial.<sup>16</sup> Under the same rationale, bail should not be used to re-punish your client for past crimes.

Unfortunately, sometimes judges forget that bail should not be used to punish, and bail is set too high. Nearly one-third of felony defendants for whom bail is set remain incarcerated.<sup>17</sup> In a study from 1992, 76% of felony cases where a bail amount was set, it was set at \$2,500 or more; and in 41% of felony cases, it was set at \$10,000 or more.<sup>18</sup> Inability to raise the necessary funds is the probable reason for defendants not bailing out once bail is set. One reason for the inability to raise the funds is that almost one half of defendants (45.3%) in the United States are under the age of 25.<sup>19</sup> Another reason is that in the United States, in a 1996 study of the 75 most populous counties, over 80% of felony defen-

dants were represented by publicly funded organizations, for which, in order to receive representation, defendants are usually required to qualify as indigent or meet some low income guideline.<sup>20</sup>

While history of employment is an important and positive factor for the court to consider in its decision to set bail, as a defense attorney you should emphasize that poverty and unemployment should also be taken into account by the judge when determining bail amounts; an amount that is reasonable for one defendant may be beyond "excessive" for another. For some defendants, no matter how low the amount of money, it will not constitute reasonable bail. In a 1998 study of the 75 most populous

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*"[W]hen a defendant is released on his or her own recognizance, statistics show that he or she will make the scheduled court appearance almost as frequently as a defendant who posts a cash bond."*

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counties, it was determined that of 64% of felony defendants released before case disposition, only 18% were offered release on their own recognizance.<sup>21</sup> To move the judge's decision closer toward releasing your client on his or her own recognizance it is useful to have the judge see the anticipated bail amount in terms of the defendant's annual income. If the bail amount is greater than 25% of the defendant's past year's income, this might strike the judge as excessive. Ironically, when a defendant is released on his or her own recognizance, statistics show that he or she will make the scheduled court appearance almost as frequently as a defendant who posts a cash bond. In a 1992 study of the 75 largest counties, 22% of defendants who were

released on cash bond failed to make a scheduled court appearance, compared with 26% who failed when released on their own recognizance.<sup>22</sup>

Personally, I have found that if your client has strong ties to the city where he or she is being prosecuted, emphasizing the extent of the ties and the length of residence can be the most beneficial points to argue. It is useful to list every family member, especially children if they live nearby, as well as friends, and acquaintances. List them all by name and if they have a respectable job, mention it. If you can get any of them to appear in the courtroom in support of your client, do so. It is important that the judge understand that your client has somewhere to go to when he or she walks out of the courthouse, and that your client has people standing on his or her side in support. If your client is unemployed, but will be living with his or her parents, focus on the responsible nature of the parents and their employment. If your client will be living with friends, do the same with friends. Moreover, while this is often quite impracticable, any documents you can show the court—such as pay stubs, rental agreements, deeds, tax returns, or treatment certifications—will be beneficial toward proving that your client is a negligible flight risk. You may even wish to offer up your client's passport, as an extra showing of good faith.

One last thing to keep in mind is that you will lose, and lose often. Your clients will be kept in jail when there seems no reason for it. It will be frustrating and it will make defending their cases that much more difficult. When they are not released, it will be more difficult to speak with them and to work out a defense together. You will have to regularly visit them in jail instead of conveniently having them come to your office. Luckily, you will also help some clients to get out of their cells early; hopefully these techniques will make the ones who get out early appear more often.

## Endnotes

1. *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L.Ed. 3 (1951).
2. *People v. Rezek*, 25 Misc. 2d 705, 707 (N.Y. Co. Ct. 1960).
3. *Sourcebook of Criminal Justice Statistics* 497, Tbl 5.64 (1994) (hereinafter *Sourcebook*). In 1992 in the 75 largest counties in the United States, 79% of detained defendants were convicted, while only 61% of released defendants were. *Id.* 70% of detained defendants charged with a felony were convicted, while only 45% of released defendants were convicted of a felony. *Id.*
4. *Id.* at 453, Tbl 5.54 (2002). In 1998 in the 75 largest counties in the United States, 64% of felony defendants were released before case disposition, while 36% were detained until disposition. *Id.*
5. *Id.* at 451, Tbl 5.50.
6. N.Y. Criminal Procedure Law § 510.30.
7. See generally *id.*
8. *Id.* (2)(a).
9. *Id.*
10. *People ex rel. Masselli v. Levy*, 126 A.D.2d 501, 503 (1st Dep't 1987) (holding that "Criminal Term's denial of such bail was arbitrary and an abuse of discretion" when defendant had a pending homicide charge against him, but had no history of flight, and it was unknown whether the co-defendant accusation against him could be corroborated) (citations omitted).
11. *Sourcebook* 452, Tbl 5.53 (2002). In 1998 in the 75 largest counties in the United States, 42% of felony defendants had prior felony convictions. *Id.*
12. *Id.* at 495, Tbl 5.62 (1994). In 1992 in the 75 largest counties in the United States, 38% of those released defendants who failed to appear in court had failed to appear in court in the past. *Id.* 22% of those released defendants who failed to appear in court had made all appearances in the past, and 20% of those released defendants who failed to appear in court had no prior criminal history. *Id.*
13. *Id.* at 454, Tbl 5.56 (2002).
14. See N.Y. Penal Law §§ 215.55-.57.
15. *Sourcebook* at 454, Tbl 5.56 (2002). Of the 24% of felony defendants who failed to appear in court, only 5% remained fugitives for one year or more. *Id.*
16. *People v. Silvestri*, 132 Misc. 2d 1015, 1018 (N.Y. Sup. 1986) ("[P]reventive detention must be unconstitutional if its purpose is punitive rather than regulatory") (citing *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986)); see also *People v. Kennedy*, 128 Misc. 2d 937 (N.Y. Sup. 1985) ("Due process forbids the punishment of pretrial detainees since they are presumed innocent and because punishment can only be imposed after conviction") (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).
17. *Sourcebook* at 453, Tbl 5.55 (2002) (noting statistics for 1998).
18. *Id.* at 494, Tbl 5.61 (1994).
19. *Sourcebook of Criminal Justice Statistics Online*, Tbl 4.4, available at <http://www.albany.edu/sourcebook/pdf/t442004.pdf> (noting statistics for 2004).
20. U.S. Department of Justice, Bureau of Justice Statistics, *Two of Three Felony Defendants Represented by Publicly-Financed Counsel*, November 29, 2000, available at <http://www.ojp.usdoj.gov/bjs/pub/press/iddcpr.htm>.
21. *Sourcebook* at 453, Tbl 5.55.
22. *Id.* at 495, Tbl 5.62.

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# Avoiding Common Pitfalls in Doing Business with Foreign Governments

## A Primer on the Foreign Corrupt Practices Act's Anti-Bribery Provisions

By Allison B. Tomlinson

### Introduction

In this globally interconnected economy, many U.S. firms are choosing to do business in foreign markets as a way to increase their profitability. In the normal course of business in some of these countries, money or other items of value are routinely given in exchange for business.

This article is intended to give a brief overview of the Foreign Corrupt Practices Act, which all U.S. firms seeking to do business or currently doing business in foreign markets must familiarize themselves with.

### What Is the Foreign Corrupt Practices Act? And What Are the Anti-Bribery Provisions?

The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78 dd-1 *et seq.* (FCPA or the Act), was passed in order to diminish bribery of foreign officials and to improve the image of the American business system. The Act prohibits corrupt payments, including paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value to foreign officials for the purpose of obtaining or keeping business. This prohibition extends to foreign officials, a foreign political party or party official, or any candidate for foreign political office.<sup>1</sup>

In 1997, the United States and 33 other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was ratified in 1998, as a means to level the playing field for the United States when competing against foreign nations without similar prohibitions on bribery.

The Department of Justice (DOJ) is the chief enforcement agency, with the Securities and Exchange Commission (SEC).

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*"This article is intended to give a brief overview of the Foreign Corrupt Practices Act, which all U.S. firms seeking to do business or currently doing business in foreign markets must familiarize themselves with."*

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### Whom Does the Act Apply To?

The Act applies to *any* individual, firm, officer, director, employee or agent of a firm or any stockholder acting on behalf of a firm. It also applies to foreign corporations if these corporations are causing an act in furtherance of the corrupt payment to take place within the territory of the United States.

Last, the Act also applies to U.S. parent corporations, which may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the subject activity, as well as U.S. citizens or residents who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

A key element of proving violation of the FCPA is to show that the accused must have had corrupt intent and the payment must have been intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person.

### Common Pitfalls

While in certain types of businesses, it is common practice to take potential clients to dinner and to offer gifts or enticements to solicit their business, this behavior is in strict violation of the Act. This prohibition extends to items that we may not consider to be of extreme value, i.e., a \$200 baseball game ticket may not seem like an expensive gift, but in some countries, \$200 is considered a lot of money. Therefore, when in doubt, officers, directors and employees should be instructed to adhere to strict internal reporting controls in order to avoid and/or mitigate this problem. The Act has entire sections devoted to creating internal reporting structures in adherence to the requirements, and the DOJ's Fraud Section will work with corporations as well. Corporations should also be sure to institute acceptable whistleblowing mechanisms to encourage employees to report potential problems to the appropriate department, and test these mechanisms to ensure that employees are aware of these measures.

The Act also required corporations whose securities are listed in the U.S. to provide adequate internal accounting controls, in accordance with its accounting provisions.

Last, when corporations are partnering with third parties, joint venture partners, or agents, special due diligence should be exercised to ensure that these parties are reputable and qualified partners and representatives. Such due diligence includes investigating potential partners to determine whether [they] have personal or professional connections to the foreign government in question,



the composition of their clients, their reputation with the U.S. Embassy or Consulate, etc. In general, business partners or agents should have transparency in their accounting records and listing of clientele, which can be discovered upon completion of their "representations and certifications" prior to partnering.

### Consequences of Violating the FCPA

There are both criminal and civil consequences for violation of the Act. On the criminal side, the corporation is subject to a fine up to \$2 million and the officers, directors, stockholders, employees and agents are personally liable for a fine up to \$100,000 and imprisonment for up to five years. The Alternative Fines Act may result in higher fines.

On the civil side, the SEC or Attorney General may charge up to \$10,000 in fines against the corporation and officers, directors, employ-

ees or agents of the firm or stockholder acting on behalf of the firm, along with additional fines. Civil action may also include enjoining any act or practice of the firm, which

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*"For in-house counsel, creating appropriate internal controls, testing their efficiency and training officers, directors, employees and agents is the key to managing and reducing potential liability under the Act."*

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is a major consequence. Further, the corporation may be barred from doing business with the federal government, including any procurement activity.

Last, other federal statutes and their related penalties may apply.

### Conclusion

FCPA is an important statute for all attorneys advising corporations that do business in foreign countries, especially with foreign governments, to understand. For in-house counsel, creating appropriate internal controls, testing their efficiency and training officers, directors, employees and agents is the key to managing and reducing potential liability under the Act.

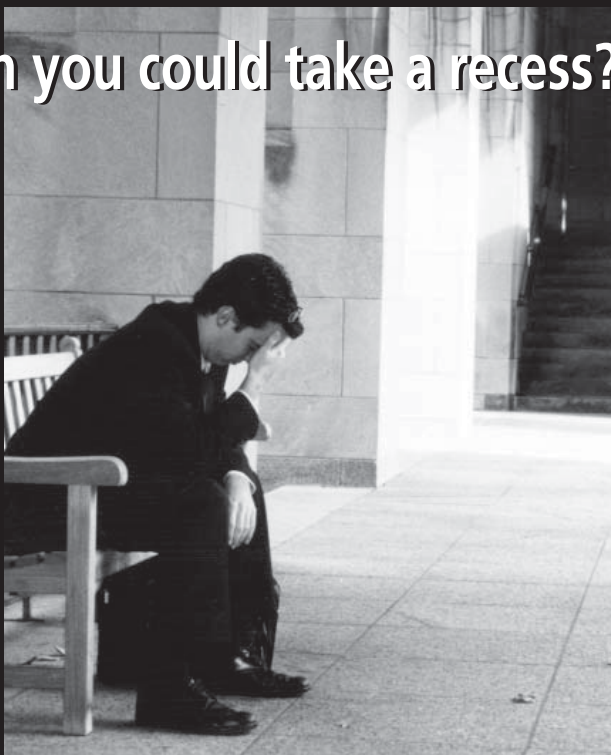
For more information on the topic, please refer to the Department of Justice and SEC websites.

### Endnote

1. Exceptions include facilitating payments for routine governmental action.

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## (Trade)Mark My Words

(Continued from page 1)

contradictory and do not conclusively resolve the issue.

### The Lawsuits

On May 4, 2004, the Government Employees Insurance Co. (Geico), an insurance company based in Alexandria, Virginia, filed a claim with the U.S. District Court for the Eastern District of Virginia against Google and Overture (owned by Yahoo) for infringement of its trademarks in search-related advertisements.<sup>2</sup>

**The claim centered on the following issue:** When a user conducts a search in Google, sponsored advertisements appear next to the search results. What happens when a user conducts an online search for trademarked word “Geico” and the results which appear include advertisements for Geico’s competitors?

Geico claimed this practice causes customer confusion as to the origin of the advertised products and allows Google to capitalize on Geico’s brands and goodwill on the development of which it spent a great deal of time and money. Therefore, said Geico, Google infringes its trademarks in violation of the Lanham Act. Geico sought \$9 million in damages for lost profits and an injunction against Google’s and Overture’s use of its marks in their advertising programs.<sup>3</sup>

Google maintained that it is not the role of the search engine to decide trademark issues and that any complaints should be brought to the advertisers themselves. Google and Overture claimed that this practice is not confusing and that the usage of the trademarks for the computer algorithms used in the creation of the search results is not an infringing use.

Suits with similar causes of action and arguments were filed by other companies, including

American Blind and Wallpaper<sup>4</sup> and recently Check ‘N Go.<sup>5</sup>

Other companies with online activities chose to file suit against the competitor who purchased the keywords, rather than Google, as the primary defendants. This was the case in *Merck & Co., Inc. v. Mediplan Health Consulting, Inc. d/b/a RXNorth.com*<sup>6</sup> and in *Edina Realty, Inc. v. TheMLSonline.com*.<sup>7</sup>

### Google’s Adwords

Google’s *Adwords* creates advertisements that appear pursuant to a keyword search which a user conducts in the Google search engine. The ads appear next to the search results as well as on other websites which use Google advertisements.<sup>8</sup> As part of this program, Google allows advertisers to choose the keywords that would trigger the advertisements and to specify the maximum price they are willing to pay for each click. The advertisements are priced per each click of a potential buyer on the advertisement, in a method called “Cost per Click” (CPC).

The placement of an advertiser’s advertisement in the search results is determined by a combination of the Cost per Click it chose to pay and the Click Through Rate (CTR)—which is the number of clicks on the advertisement during a given time period. Google reserves the right to remove ads with a low CTR and notifies the advertisers of this, advising them to improve and refine their ads.

The *Adwords* keyword advertising program has been proven very successful and it is said to account for over 98 percent of Google’s revenues. This may be because in the *Adwords* system advertisers pay money only for advertisements seen by an audience which already may be interested in the product—the audience that clicks on the advertisements.

### Google’s Trademark Policy

In April 2004 Google changed its policy with regard to the usage of trademarks in the *Adwords* program. Previously Google did not sell keywords containing trademarks of others (with the possible exception of descriptive or generic words). However, in April 2004, Google’s policy was amended to allow advertisers to bid on any keyword, including trademarked items. In addition, Google has declared that “it is not in a position to arbitrate trademark disputes” and thus encourages trademark owners to sue the advertisers directly. In its trademark policy applicable in the U.S. and Canada, Google states that “it will only review trademark complaints with regard to text appearing in the sponsored link, as opposed to the words used in the search on which an advertiser bid.”<sup>9</sup> However, outside the U.S. and Canada, Google’s policy allows trademark holders to object to their trademarks being used as triggers to others’ advertisements.<sup>10,11</sup>

In contrast, Overture uses a stricter fair use policy. Before entering into an engagement with Overture, an advertiser must declare that its search terms, listing titles and descriptions, as well as the content of its websites, do not violate the trademark rights of others. Advertisements for websites containing trademarked content are allowed only if (a) in reference to the trademark or to a related product in a permissible manner which does not create likelihood of consumer confusion or (b) if the trademarked terms are used in a generic or descriptive manner. Advertisements found to be non-compliant with these requirements are modified or removed.<sup>12</sup>

### If They Don’t See It—How Can They Be Confused?

The argument cited by Google and by the competitors-defendants in the proceedings was that usage

of a trademark as a keyword in a search does not constitute trademark infringement since it is used only in internal computer algorithms that determined the sponsored links to display and did not identify the search engines as the source of the trademark holders' product or imply an endorsement by the trademark holder.<sup>13</sup> As the users do not actually witness the process whereby the keyword triggers the advertisement, they cannot be confused by the origin of the goods displayed.<sup>14</sup> Google argued that its *Adwords* program is actually "No different than getting a competitor's coupon when you buy something at the supermarket."<sup>15</sup> Consequently, Google argued that its *Adwords* program does not violate trademark law.

### **Geico v. Google**

The Geico case was finally resolved by a settlement reached by the parties, the terms of which were confidential.<sup>16,17</sup> However, the Court did hand an interim decision. In this decision<sup>18</sup> the U.S. District Court for the Eastern District of Virginia held Google did not violate Geico's trademark when it allowed advertisers to use words trademarked by Geico as keywords to trigger search-based advertising and granted Google's motion for summary judgment in this regard. The Court stated that Geico "has not established that the mere use of its trademark by Google as a search word or keyword or even using it in their AdWord program standing alone violates the Lanham Act. . . . There was not sufficient evidence," she stated, "that that activity standing alone causes confusion."<sup>19</sup> However, as for advertisements which included the trademarked words *in the text* the Court held that such usage may constitute trademark infringement.<sup>20</sup>

### **American Blind**

In a decision labeled by the Court "not for citation" the Court decided not to grant Google's mo-

tion to dismiss the case, holding that "in light of the uncertain state of the law" the parties' arguments are not sufficient for dismissing the suit with regard to the trademark infringement issues. The Court cited *Playboy Enterprises*<sup>21</sup> which held that usage of search engine keywords containing competitor's trademarks to trigger banner ads may result in users' confusion<sup>22</sup> as well as *Brookfield Communications*<sup>23</sup> where the Court held that usage of a competitor's trademark in the meta-tag of a website is likely to cause initial interest confusion. The Court finally concluded that the resolution of such novel legal questions should be made following a full factual record at a later stage of the case.

### **Edina v. TheMLSONline.com**

In this case Edina Realty, a large real estate brokerage firm, sued its competitor TheMLSONline.com, for various trademark infringement claims under federal and state law for purchasing keywords which were trademarked terms as part of the Google *Adwords* system. In this case, as in *American Blind*, the Court also refused to grant the motion for summary judgment stating that the purchase of search terms that include the Edina Realty mark to generate a sponsored link advertisement constitutes "use in commerce" as required by the Lanham Act. In examining the "likelihood of confusion" in this case, the Court took into consideration evidence of actual confusion presented by Edina Realty and held that there are factual issues which must be determined and thus the case cannot be concluded at the summary judgment stage.

In so holding the Court cited *Brookfield Communications* which held that usage of a trademark in a meta-tag constitutes "use in commerce"<sup>24</sup> even though such use of the trademark is "internal" and not viewable to the Internet users. When examining defendant's argument of a "fair use" defense, the Court held

that TheMLSONline.com's use of the Edina marks did not constitute "nominative fair use" since it was not the minimal use necessary for the purpose of its advertisement (e.g., usage of the Edina mark in large bold letters). In May 2006, the parties settled the case under terms which were not disclosed.

### **Merck**

Only 10 days after the decision in Edina Realty, the U.S. District Court of New York reached a contradicting decision in *Merck & Co. v. Mediplan*. In this case, the large pharmaceutical company Merck filed suit for trademark infringement, trademark dilution and false advertising under Federal and State law against several Canadian online pharmacies for using the Merck trademark "Zocor" (which is also the name of the popular cholesterol medication) as a keyword triggering sponsored links for their websites which sell Zocor and generic substitutes of it.

Addressing the question of "use in commerce" under the Lanham Act the Court held that "the internal use of the mark 'Zocor' as a keyword to trigger the display of sponsored links is not use of the mark in a trademark sense."<sup>25</sup> Under the Lanham Act, stated the Court, a "trademark is 'used in commerce' in connection with goods when 'it is placed in any manner on the goods or their containers or the displays associated therewith.'"<sup>26</sup> However, no such use is made in the search engine context nor do the defendants use the mark in any way to indicate source or sponsorship.

The Court cited *1-800 Contacts, Inc.*<sup>27</sup> which held that the usage of competitors' trademarks to trigger pop-up advertisements does not constitute "use in commerce" under the Lanham Act since such "internal utilization of a trademark in a way that does not communicate it to the public is analogous to a[n] individual's private thoughts about a trademark."<sup>28</sup> In addition the Court em-

phasized the significance of the fact that the defendant actually did sell the Zocor medicine on their websites.

In *Merck*, the Court's determination was made solely with regard to the competitor's practice in the purchase of keywords—not that of Google. The Court mentioned that such practice has been recognized in previous case law (*American Blind* and *Geico*) as "use commerce."

### Significance of the Decisions

Following several decisions in this case, the question of whether the Google *Adwords* system constitutes trademark infringement, on the part of Google or on the part of the competitors purchasing the keywords, has not yet been conclusively decided by U.S. Courts.

On the question of the competitor's liability—two conflicting decisions were handed in *Merck* and in *Edina Realty*.

The question of Google's liability can be summarized in the words of J. Thomas McCarthy in *McCarthy on Trademarks & Unfair Competition*:<sup>29</sup>

"[W]here keyword placement of . . . advertising is being sold, the portals and search engines are taking advantage of the drawing power and goodwill of these famous marks. The question is whether this activity is fair competition or whether it is a form of unfair free riding on the fame of well known marks."

In this regard, it has been held that Google's policy may constitute trademark infringement but such decision has to date been made only in interim decisions: e.g., the *Geico* case where the Court emphasized that the ruling "applies only to the specific facts of the case"<sup>30</sup> and the *American Blind* case which the Court

explicitly declared "not for citation." Consequently this question, among others raised in these cases, is now left to be settled in future cases.

### Similar Lawsuits—The Trademark Is Not Always Greener on the Other Side of the Ocean

Similar suits have been filed and decided in Europe as well—all ruling against Google and ordering payment of significant amounts of money.

In February 2005, the Paris District Court ruled that Google's practice of selling advertisements triggered by searches for trademarked brand names infringes the *Louis Vuitton* trademark. The Court charged Google with trademark counterfeiting, unfair competition and misleading advertising and ordered the company to pay the plaintiffs €200,000.<sup>31</sup>

A month earlier, in January 2005 the Court of Nanterre ruled against Google, holding that the usage of trademarks owned by the *Le Meridien* hotel chain to trigger advertisements for its competitors constitutes trademark infringement. The Court enjoined Google from selling such words and fined Google €2,000. Google was also ordered to pay costs, and was warned that an additional fine of €150 per day would be imposed on it for further infringements.<sup>32</sup> In another French case, issued by travel agencies *Luteciel* and *Viaticum*, Google was enjoined from allowing advertisers to bid on the trademarked terms "bourse des vols" (flight market) and "bourse des voyages." Google was ordered to pay €70,000 in damages.<sup>33</sup> Google appealed the ruling but lost.<sup>34</sup>

### You Say Trademark, I Say Free Speech

The trademark infringement suits filed against Google and users of the *Adwords* advertising program all address one concern—customer confusion between the trademarked

product and the advertised competing products.

The trademark owners are concerned that by using the trademarked terms to trigger advertisements appearing next to the search results, the Internet user is diverted and lured to competitors' websites and confused into thinking that such sites are associated with the trademark owner. As held in the *Playboy* case, even if the confusion is resolved at a later stage, once in a competitor's website, the users may be distracted and no longer wish to spend the time and energy to backtrack and find the trademark owner's site.<sup>35</sup>

The trademark owners believe that when the competitors use their trademarked terms in this manner, they unlawfully gain from the millions of dollars and the time invested by companies to build brand awareness,<sup>36</sup> goodwill and reputation at an infinitesimal fraction of the cost. They are also concerned that this may consequently lead to a loss of their control over the commercial use of their own name and trademark.

On the other hand the search engines argue that the usage of the words to trigger advertisements in a search engine is not an infringement of the trademark, but rather a fair use of it which is deserving of protection under the First Amendment as commercial speech.<sup>37</sup>

*First:* Internet users are not necessarily confused or misled by advertisements for products which compete with the trademarked product. The search engines argue that when typing a keyword into a search engine, Internet users sometimes look for competing products, different products, etc.<sup>38</sup>

*Second:* Using a trademarked keyword in a search engine enables Internet users to obtain information about a full range of the competitors of the company owning the trademark. Such use is very important for the educated consumer in a free market. This is no different, the search



engines argue, than the experience of shopping at the supermarket. If a customer walks into a supermarket and asks for *Tylenol* and the store employee directs him to the medication aisle in which he finds various competing products—is the store employee guilty of infringing the *Tylenol* trademark?<sup>39</sup>

*Third:* The competitors of the company owning the trademark are entitled to use the trademarked name to call their competing products to the attention of potential customers.<sup>40</sup> For example: If an article is published about a certain company in the newspaper and a competing company purchases advertising space next to such article, does this constitute trademark infringement?<sup>41</sup>

*Finally:* The search engines reject the role of assessing trademarks, which the trademark owners are attempting to attribute to them. They argue that search engines do not have the capability to ascertain whether a term is a trademark, particularly in countries, such as the United States, where a trademark need not be registered. In addition, they do not have the ability to deal with cases of trademarked generic words (such as “Apple” or “Windows”), a term trademarked by more than one entity, or advertisements for non-infringing products which use trademarked words in the description.<sup>42</sup>

## Conclusion

The trademark infringement cases filed against Google and others revolve around a question which is yet to be conclusively decided by the Courts—Is the use of a trademark as a keyword triggering a search-based advertisement an infringing use? At the core of this question lies customer confusion and consequent loss of profits to the trademark owners. It is up to the Courts to decide whether Internet users are confused by such advertisements. What is clear, as indicated in the opening paragraph, is that despite Internet

users’ growing experience with browsing and Internet-advertising many users are finding it difficult to distinguish such “sponsored” advertisements from regular search results. This situation affects all parties and must be addressed. However it seems that a large part of the confusion may be found in the appearance of the “Sponsored Links” and may be alleviated by a change in appearance and the provision of more explanations as to the nature of the “Sponsored Links” as links paid for by advertisers and not part of the search results. If indeed the confusion is not about whether the company whose trademark was used as a keyword in the search is the source of the listings, but rather whether the listing is in fact an advertisement, the solution for it is not found in the world of trademark law but should rather be sought elsewhere.<sup>43</sup>

## Endnotes

1. Jesdanun, Anick, “Survey: Users Confuse Search Results, Ads,” Findlaw.com, January 24, 2005.
2. *Government Employees Ins. Co. v. Google, Inc.*, Civ. No 1:04-cv-507 (E.D. Va. May 4, 2004).
3. Olsen, Stefanie, “Geico Sues Google, Overture over Trademarks,” CNet.com, May 18, 2004, at [http://news.com.com/2100-1024\\_3-5215107.html?part=rss&tag=feed&subj=news](http://news.com.com/2100-1024_3-5215107.html?part=rss&tag=feed&subj=news) (visited: 2006, August 13).
4. Case 5:03-cv-05340-JF in the U.S District Court for the Northern District of California. On January 2004, American Blind filed a suit against Google and other key Internet companies alleging trademark infringement, unfair competition, dilution and other causes of action arising from the defendants’ sale of American Blind’s trademarks to competitors as keywords. This followed an earlier complaint filed by Google itself in November 2003 with the U.S. District Court for the Northern District of California, seeking a declaratory judgment that its trademark keyword policy does not infringe trademarks owned by American Blind and Wallpaper Factory Inc.
5. January 24, 2006 in the District Court of Cincinnati, by cash advance firm Check ‘N Go. The claim stated that Google permits other payday lenders to purchase advertisements which are triggered when the trademarked phrase

“Check ‘N Go” is typed into the search engine. The suit was brought by Check ‘N Go’s parent company, CNG Financial Corp. Wallace, David, “Google in Court Again Over Trademark Disputes,” SearchEngineGuide, February 15, 2006, at <http://www.searchengineguide.com/searchbrief/senews/006795.html> (visited: 2006, August 13). Check ‘N Go moved the Court to enjoin such sale by Google and seeks the award of unspecified trebled and punitive damages as well.

6. U.S. District Court of the Southern District of New York, 05-Civ-3605 and related cases.
7. U.S. District Court of the District of Minnesota, 04-cv-04371-JRT.FLN.
8. <https://adwords.google.com/select/faq/network.html> (visited: 2006, August 13).
9. Olsen, *supra* note 3.
10. Out-law, “Google Sued for Selling Check ‘N Go Keyword,” The Register, February 9, 2006, at [http://www.theregister.co.uk/2006/02/09/google\\_checkngo/print.html](http://www.theregister.co.uk/2006/02/09/google_checkngo/print.html) (visited: 2006, August 13). This is in line with French court rulings against Google with regard to its Adwords policy—see the case of *Louis Vuitton* below.
11. Google’s policy states: “When we receive a complaint from a trademark owner, our review is limited to ensuring that the advertisements at issue are not using a term corresponding to the trademarked term in the ad content or as a keyword trigger. If they are, we will require the advertiser to remove the trademarked term from the ad content or keyword list and will prevent the advertiser from using the trademarked term in the future.” [http://www.google.com/tm\\_complaint\\_adwords.html#2](http://www.google.com/tm_complaint_adwords.html#2) (visited: 2006, August 13).
12. <http://www.content.overture.com/d/USm/legal/trademarkinfo.jhtml> (visited: 2006, August 13).
13. See, e.g., Google’s claims presented in oral arguments held on August 6, 2004. See Roberts, Paul, “Google May Face Another Lawsuit,” PCWorld.com, September 3, 2004 at <http://www.pcworld.com/resource/printable/article/0,aid,117686,00.asp> (visited: 2006, August 13).
14. Olsen, *supra* note 3.
15. Viener, Adam, “Geico vs. Google Case Continues,” posted on Goyami on December 14, 2004 at [http://www.corante.com/goyami/archives/2004/12/14/geico\\_vs\\_google\\_case\\_continues.php](http://www.corante.com/goyami/archives/2004/12/14/geico_vs_google_case_continues.php) (visited: 2006, August 13). See also Olsen, Stefanie, “Geico Gets Green Light to Sue Google, Overture,” CNET, News.com September 2, 2004 at <http://news.com.com/Geico>



- +gets+green+light+to+sue+Google%2C+Overture/2100-1024\_3-5345484.html (visited: 2006, August 13).
16. Newcomb, Kevin, "Geico, Google Settle Trademark Dispute," ClickZ News, September 8, 2005, at <http://www.clickz.com/news/article.php/3547356>.
  17. Overture settled the case with Geico in November 2004 also with undisclosed terms. Olsen, Stephanie, "Overture, Geico Settle Trademark Dispute," ZDNET, December 1, 2004.
  18. Handed verbally in December 2004 and in written form on August 8, 2005.
  19. Transcript of the oral decision at <http://www.patentlyobviousblog.com/files/geico1215.txt>. (visited: 2006, August 13).
  20. Mills, Elinor, "Google May Be Liable for Trademark Infringement," CNET, August 17, 2005.
  21. *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004).
  22. In this case, dealing with the sale of banner advertisements containing trademarked terms such as "Playboy" and "Playmate," the Court relied on the "initial interest confusion" theory, and held that "keying comparative ads to trademarks would lead Internet users to initially believe there was an affiliation between search engine advertisers and trademark owner." (see Cody, Jason Allen, "Search Engine Comparative AdWare-tising Under Scrutiny," Findlaw.com., April 2004 at <http://practice.findlaw.com/tooltalk-0504.html> (visited: 2006, August 13)). The Court reasoned that even if the Internet users realize that there is no affiliation before making the transaction, they do visit competing websites due to their initial interest in the trademark and this enables them to impermissibly capitalize on the goodwill associated with the marks.
  23. *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036.
  24. 15 U.S.C 1127.
  25. *Id.*
  26. *Merck*, *supra* note 6, p. 21.
  27. *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400.
  28. 414 F.3d at 409, quoted in *Merck*, *supra* note 6, p. 23.
  29. McCarthy, Thomas J., *McCarthy on Trademarks & Unfair Competition* § 25:70.1 (2004), quoted in *Geico*, 330 F. Supp. 2d at 704.
  30. Out-law, "Judge Clarifies Google AdWords Ruling in the U.S.," The Register, August 15, 2005, at [http://www.theregister.co.uk/2005/08/15/google\\_loses\\_adwords\\_trademark\\_case/](http://www.theregister.co.uk/2005/08/15/google_loses_adwords_trademark_case/) (visited: 2006, August 13).
  31. Sherriff, Lucy, "Google Loses Another Trademark Fight in France," The Register, February 7, 2005, at [http://www.theregister.co.uk/2005/02/07/google\\_loses\\_lvmh\\_france\\_adwords\\_case/](http://www.theregister.co.uk/2005/02/07/google_loses_lvmh_france_adwords_case/) (visited: 2006, August 13). This decision was recently upheld by the Paris Court of Appeals, which ordered Google and its French subsidiary to pay \$376,589 (300,000 euros) in damages (Mills, Elinor, "Google Loses French Trademark Lawsuit," June 28, 2006 at [http://news.com.com/2100-1030\\_3-6089307.html](http://news.com.com/2100-1030_3-6089307.html) (visited: 2006, August 13)).
  32. Sherriff, Lucy, "French Court Says Non! to Google's Adwords," The Register, January 21, 2005, at [http://www.theregister.co.uk/2005/01/21/google\\_adword/](http://www.theregister.co.uk/2005/01/21/google_adword/) (visited: 2006, August 13).
  33. "Axa Sues Google over Keyword Advertising," Out-law.com, April 27, 2004, at <http://www.out-law.com>.
  34. "Google France Loses Adwords Appeal," Out-law.com, March 17, 2005 at <http://www.out-law.com/page-5395> (visited: 2006, August 13).
  35. See the Complaint filed by American Blind and Wallpaper in *American Blind*, *supra* note 4, the "Complaint," p. 11, § 43.
  36. Olsen, Stefanie, "Google Faces Trademark Suit Over Keyword Ads," CNET, January 28, 2004 at [http://news.com.com/Google+faces+trademark+suit+over+keyword+ads/2100-1024\\_3-5149780.html](http://news.com.com/Google+faces+trademark+suit+over+keyword+ads/2100-1024_3-5149780.html) (visited: 2006, August 13).
  37. See Memorandum of Amicus Curiae filed in the *Geico* case by Public Citizen.
  38. See Memorandum, *supra* note 37.
  39. Based on the argument presented by Judge Berzon, in the *Playboy* case, *supra* note 21.
  40. *Playboy*, *supra* note 21, at 12.
  41. *Id.*
  42. Sullivan, Danny, "Google Faces Fight Over Ads & Trademarks in France," SearchEngineWatch, November 5, 2003 at <http://searchenginewatch.com/sereport/article.php/3104481> (visited: 2006, August 13). For example, if you wish to provide repair services for Volkswagens, how can you advertise without using the trademarked term "Volkswagen"? Olsen, Stefanie, "Google Ads a Threat to eBay Trademark?" CNET, August 8, 2003, at [http://news.com.com/Google+ads+a+threat+to+eBay+trademark/2100-1024\\_3-5061888.html](http://news.com.com/Google+ads+a+threat+to+eBay+trademark/2100-1024_3-5061888.html) (visited: 2006, August 13) (from a quote of John Corea, a Google keyword advertiser).
  43. *Playboy*, *supra* note 21, at 17.

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## A Message from the Section Chair

(Continued from page 1)

activities, and initiatives were vetted and a number of new ideas were presented. The results of our summer regional meetings included: the appointment of additional district/alternate representatives and new liaisons to the substantive sections to fill vacancies; a reorganization of the Section's committee structure and the appointment of committee chairpersons and members; the creation of a working group to develop a brown-bag luncheon conference call series; a transition of editorial responsibilities for the Section's electronic newsletter, *Electronically In Touch*, to a new editor; the preparation of the Fall issue of *Perspective*, the Section's print newsletter journal; and the development of the Section's Fall Meeting program.

The summer was also devoted to updates aimed at improving the way in which the Section communicates with our membership, including a complete overhaul of the YLS Website designed to not only capture the breadth of programs and activities of the Section, but also to serve as a comprehensive and ready resource for Section members and visitors to the site interested in learning more about the YLS. An online searchable Section membership directory was launched, and the Section regularly updated and posted announcements about YLS and YLS-sponsored events, programs, and activities, including networking events, CLE programs, meetings and conference calls. *Electronically In Touch* served to keep the membership informed of recent developments in the law, offered practical tools and tips for the young lawyer, provided updates from the substantive sections and the districts, noted scholarship and internship opportunities for law students, highlighted a new Section or Association service or benefit, and featured a calendar of YLS events. Regular email notices were sent to the membership regarding items of interest, save-the-date postcards were mailed notifying

the membership of planned programs and events for 2006-2007, and one-on-one personal contacts were made in an effort to encourage the active participation of new as well as sustaining members of the Section.

By the close of the summer, the Section had submitted its 2007-2008 budget to include line item appropriations for new mentoring, diversity, and community service/pro bono initiatives, networking activities and events, continuing legal education programs, and publications. The budget also included a new line item for the reimbursement of expenses associated with serving on the YLS's Executive Committee. The Section had also participated in several events specifically geared toward our law student members, including a first-year student orientation, a focus group, and a multicultural career forum.

The momentum of the summer has continued into the fall. At the end of October, the Section's Fall Meeting attracted more than 70 participants and was one of the largest gatherings of young lawyers to a stand-alone meeting of the Section held in the last five years. Notable seasoned practitioners from around the State joined the Section at the New York State Bar Association's headquarters in Albany for a memorable weekend that offered three general CLE sessions and thirteen concurrent breakout CLE sessions covering topics in ethics, civil/criminal trial practice and trial advocacy, evidence, criminal law, business and corporate law, real property, land use planning and zoning, municipal law, environmental law, family and matrimonial law, intellectual property, international law, estate practice, alternative dispute resolution, and career and professional development. Young lawyers who attended the meeting had an opportunity to customize the CLE program, choosing topics from the different breakout sessions that would best meet their unique educational,

practical, and professional development interests and needs. Three networking events were held over the course of the weekend and members were invited to participate in committee business meetings. In addition to the Fall Meeting, several district networking events were held this fall through collaborations with the substantive sections of the Association and the young lawyers committees of a various local bar associations from around the State.

As we approach late fall/early winter, the Committee on Mentoring will be working to finish its updates to the YLS Mentor Directory, and planning and coordinating the implementation of a new mentoring project modeled after the Texas Bar Association Young Lawyer Division's 10-Minute Mentor Program. The Diversity Committee will undertake its examination of the Section's Diversity Statement to begin the process of implementing the action items in the YLS Diversity Plan and the Committee on Community Service and Pro Bono will begin organizing its agenda for 2007. The Executive Committee will be reviewing and revising our Bylaws for technical updates and the inclusion of a Executive Committee reimbursement policy currently being developed for presentation and a vote at the Section's Annual Meeting in January. The officers will be working with the Association's Executive Committee to increase the active participation of young lawyers in the American Bar Association's Young Lawyers Division. Planning for the Annual Meeting, Bridge-the-Gap program, and Supreme Court Admissions program are well underway, and spring district events and programs are being scheduled throughout the State. We will continue to bring you our monthly electronic newsletter, and are committed to bringing back and producing, on a semiannual basis, this newsletter journal. Finally, as part of our strategic and long-

range planning efforts, the Section is already preparing for a leadership transition in June and will be working on several transition items in the next few months, including preparing the slate of nominations for the Executive Committee to be voted on at the Annual Meeting in January and scheduling the Section's 2007-2008 calendar of programs and events.

As you can see, this is truly an exciting time for the Young Lawyers Section! We are a vibrant and active group of young lawyers, and I am

truly privileged to be serving as your Chair. As I stated in my first Chair's message to you, the success of the YLS depends on your active involvement and participation in the Section. Please consider serving on the Executive Committee or as a member of a standing committee; writing a piece for publication in one of our newsletters; planning a YLS program, activity, or event; or coordinating a community service or pro bono project. The possibilities are endless, and the rewards are truly invaluable. I also encourage you to take full ad-

vantage of the many opportunities, benefits, and services that the Young Lawyers Section and the New York State Bar Association have to offer, and to find ways to make the YLS your own. Finally, I welcome and invite you to contact me with any questions or comments you may have about the Section and/or ways we can improve to better serve you.

**Justina Cintrón Perino**  
Chairperson

## SAVE THE DATES

NEW YORK STATE BAR ASSOCIATION

# *2007 ANNUAL MEETING*

JANUARY 22-27, 2007

NEW YORK MARRIOTT MARQUIS

YOUNG LAWYERS SECTION

ANNUAL MEETING

WEDNESDAY, JANUARY 24, 2007

BRIDGE-THE-GAP PROGRAM

THURSDAY AND FRIDAY

JANUARY 25 AND 26, 2007





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