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A Message from the Chair

Dear Colleague,

The term of a Section Chair passes very quickly but the passage of time does not dull the efforts of the Section to benefit its members.

In July the Section was one of the sponsors of an evening boat trip around New York City's harbor. This event, the inspiration of President Bernice Leber, was a serious venture to bring together potential new members of the Bar Association with representatives of the sponsoring Sections to explain their activities, answer any questions and seek new members. In addition to fine weather and views of the New York skyline, our participating Section members were able to talk at length with many younger lawyers and law students to understand their needs, concerns and expectations when considering whether to join the Association or any of its Sections. The evening was successful, netted us many new members, and we will certainly participate in similar events in the future.

One of the concerns expressed at the boat trip and similar activities is the desire of younger lawyers to network with more experienced lawyers who can advise them on career opportunities and help them recognize the challenges of developing a practice or moving into new practice areas. That situation exists for lawyers in large firms as well as small firm and solo practitioners and raises a challenge and opportunity for the General Practice Section.

Unlike most substantive law Sections, our members practice in nearly every field of the law and many have expertise in multiple areas. This circumstance affords the Section a real opportunity for our experienced members to share their knowledge and advice with less seasoned practitioners in the field or the local area. Our challenge is bringing the parties together.

Inside

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In a state as large and diverse as New York it is not always possible, even in good economic times, for lawyers to travel long distances to attend Section events and meet with their peers. We have been meeting the challenge primarily through our listserve, which affords any Section member an opportunity to post an inquiry about a discrete matter of substantive or procedural law and receive advice from members more experienced in the field. The benefits thus generated flow not merely to the immediate parties but also to the entire membership in alerting them to matters of concern in areas outside their own. Additionally members use the listserve to discuss technology, Web sites and useful products in their practice. The increased use of the listserve each year is proof of its value.

The Section is working to overcome the distance problem by creating opportunities for members to meet fellow practitioners in their local judicial districts and discuss local issues of mutual concern. We are also examining other methods of assisting our members, including the possibility of establishing mentoring panels in different practice areas in each district to accommodate the differences in local procedures throughout the state.

Although the term of the Chair may be short, the efforts of the Section to facilitate and improve the professional and personal satisfaction of its members are ongoing and will continue unabated.

Sincerely,
Paul J. O'Neill, Jr.

From the Editor

Dear Colleague,

As editor, I wish to thank all those who contribute to the General Practice Section and our newsletter.

At the moment, our industry has changed dramatically and the current economic climate is in a severe downturn. Federal Regulation, new legislation and how we do business, day-to-day, have affected all of us. As we move into a new year, it is vital for attorneys to stay apprised of these changes and to remain fully informed.

The General Practice Section offers those who specialize, and those who do not, the resources needed to gain insight and to further our professional practice. Responding to these types of emerging situations has become much more complex in our industry. Through our publications and activities, we are able to address some of the unique situations and challenges presented in our unstable climate and touch upon a wide array of specialties, some of which you may be involved in.

Our Section's Web site is continuously updated with current information and should be utilized as a valuable resource for those both in private practice and corporate law. If you are not currently a member of our Section, we welcome you to join.

As we move into 2009, and what we believe will be a year of uncharted waters, I wish all of you continued success in your practice.

Sincerely,
Martin Minkowitz

Catch Us on the Web at WWW.NYSBA.ORG/GP

The General Practice Section invites you to browse our Web page for information to help you manage your daily practice of law. One of our primary goals is to enhance the competence and skills of lawyers engaged in the general practice of law, to improve their ability to deliver the most efficient and highest quality legal services to their clients and to enhance the role of general practitioners to provide a medium through which general practitioners may cooperate and assist each other in the resolution of the problems and issues of practicing law.

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Seagate Changes the Equation: Federal Circuit Creates New Test for Proving Willful Infringement and Preserves the Attorney-Client Privilege

By Brian Ferguson

I. Introduction

In a landmark decision, a unanimous Federal Circuit, sitting *en banc*, established a new, more stringent standard for proving willful patent infringement and reaffirmed the sanctity of the attorney-client privilege in our adversarial system of justice. The case, *In re Seagate Technology LLC*,[1] will have a profound effect on future patent litigation, as a finding of willful infringement often leads to an award of enhanced monetary damages to the patentee under 35 U.S.C. § 284. The decision also provides much-needed clarity concerning the scope of waiver of the attorney-client privilege when a patent infringement defendant asserts the "advice of counsel" defense to a charge of willful patent infringement.

". . . In re Seagate Technology LLC will have a profound effect on future patent litigation, as a finding of willful infringement often leads to an award of enhanced monetary damages to the patentee under 35 U.S.C. § 284."

II. Willful Infringement and the Advice of Counsel Defense

Patent infringement is a form of strict liability tort; a defendant may be found liable for patent infringement regardless of his or her motive or intent.[2] However, the nature of a defendant's actions may be relevant to the question of *willful* infringement.[3] In the absence of any statute defining what constitutes willful infringement, the courts historically equated willful infringement with bad faith or wanton and malicious conduct.[4] As noted, a finding of willful infringement is significant because it opens the door to the possibility of the patentee being awarded enhanced damages pursuant to 35 U.S.C. § 284.[5] While the statute is silent as to what justifies an award of enhanced damages, the Federal Circuit has long held that an award of enhanced damages generally requires a showing of willful infringement.[6]

Prior to the formation of the Federal Circuit, a "widespread disregard of patent rights was undermining the national innovation incentive."[7] This widespread disregard was contrary to the Constitution, which empowered Congress to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[8] The judicial system's inability or refusal to enforce patent rights was seen as a disincentive to scientists to continue to innovate, as unscrupulous infringers were allowed to take the fruits of the inventors' labor without any adverse consequences.[9] This was the legal landscape of patent law when the Federal Circuit came into being on October 1, 1982.[10]

One of the Federal Circuit's purposes was to "promote greater uniformity" in the area of patent law.[11] One of its early efforts in this regard was the *Underwater Devices* case.[12] In that case, the court was confronted with a fact pattern typical of the time: A competitor of the patentee was essentially told by its attorney that it should not be overly concerned about its competitor's patent rights because "courts, in recent years, have—in patent infringement cases—found [asserted patents] invalid in approximately 80% of the cases."[13] The attorney thus concluded that it was unlikely his client would ever be sued for patent infringement.[14]

The Federal Circuit did not approve of such "willful disregard" for the patent rights of others.[15] It thus established the modern test for determining willful infringement: "where . . . a potential infringer has actual notice of another's patent rights, he has an affirmative duty to exercise due care to determine whether or not he is infringing."[16] This "duty of due care standard" reflected the fact that "patent property should receive the same respect that the law imposes on all property. Industrial innovation would falter without the order that patent property contributes to the complexities of investment in technologic R&D and commercialization in a competitive marketplace."[17]

As expressed in *Underwater Devices*, the duty of due care included "the duty to seek and obtain competent legal advice from counsel *before* the initiation of any possible infringing activity."[18] This resulted in the "advice of counsel defense" to a charge of willful infringement. "Under this defense, an accused willful infringer aims to establish that due to reasonable reliance on advice from counsel, its continued accused

activities were done in good faith. Typically, counsel's opinion concluded that the patent is invalid, unenforceable, and/or not infringed."[19]

As implemented, the duty of due care standard effectively resulted in a *de facto* requirement that a defendant accused of willful infringement produce an opinion of counsel in defense to the claim.[20] This was especially the case prior to 2004, when the law imposed an "adverse inference" on defendants who failed to produce an opinion of counsel in defense to a willfulness charge: "[A defendant's] silence on the subject, in alleged reliance on the attorney-client privilege, would warrant the conclusion that it either obtained no advice of counsel or did so and was advised that its [activities] would be an infringement of valid U.S. patents."[21]

In the face of the duty of due care standard and the adverse inference, patent defendants routinely obtained, and then produced during litigation, opinions of counsel as part of the advice of counsel defense to a willful infringement claim.[22] This practice resulted in numerous complications for courts and defendants alike. First, reliance on an advice of counsel defense results in waiver of the attorney-client privilege. This was a serious concern, as "the attorney-client privilege rests at the center of our adversary system and promotes 'broader public interests in the observance of law and administration of justice' and 'encourages full and frank communication between attorneys and their clients.'"[23] Given the importance of the attorney-client privilege to the effective administration of the adversarial system, it is little wonder the courts would interpret the scope of any waiver narrowly.[24] In 1991, the Federal Circuit recognized the tension between the duty of due care standard and the importance of the attorney-client privilege: "[P]roper resolution of the dilemma of an accused infringer who must choose between the lawful assertion of the attorney-client privilege and avoidance of a willfulness finding if infringement is found, is of great importance not only to the parties but to the fundamental values sought to be preserved by the attorney-client privilege."[25] Waiving the attorney-client privilege in the hope of insulating a defendant from a finding of willful infringement allows the patentee insights into possible weaknesses in the defendant's case concerning the underlying issues on the merits: infringement and validity.[26]

Second, the question of whether a defendant would rely on the advice of counsel defense, and the associated questions regarding the scope of any resulting waiver of privilege, resulted in the courts and parties having to engage in extensive and expensive satellite litigation before the actual trial on questions of invalidity and infringement. This was eloquently explained by then–district court judge Roderick McKelvie in 1995:

> [T]hese decisions [*Underwater Devices et al*.] have changed how patent cases are litigated. The current convention in patent litigation strategy is as follows: the patent owner opens with a claim for willful infringement; the alleged infringer answers by denying willful infringement and asserts good faith reliance on advice of counsel as an affirmative defense; then the owner serves contention interrogatories and document requests seeking the factual basis for that good faith reliance defense and the production of documents relating to counsel's opinion; the alleged infringer responds by seeking to defer responses and a decision on disclosure of the opinion; the owner counters by moving to compel; and the alleged infringer moves to stay discovery and for separate trials. In this case, the parties have played out their moves. Now it is the court's turn to join in.[27]

Judge McKelvie further recognized the potential prejudice a defendant faced by having to make the decision whether to assert the advice of counsel defense to a charge of willfulness before the patentee had established liability on the underlying merits; nonetheless, the Federal Circuit's precedent left no other option.[28]

Third, another unappealing result of the application of the duty of due care standard was the rise of so-called "window-dressing" opinions. Companies obtained such opinions not for the purpose of making informed business decisions but solely for protection from a willful infringement claim in any litigation concerning the patents in question.[29] This unnecessarily added to the already expensive cost of patent litigation.

But perhaps the most alarming consequence of the duty of due care standard was that it had facilitated "opportunities for abusive gamesmanship" by certain patentees.[30] In many instances, patent holders would send a copy of the patent in question to large numbers of potential defendants and demand the companies buy a license to the patent without providing any analysis or other rationale. This resulting "knowledge" of the patentee's rights, satisfying the notice requirement, exposed the recipients to an increased threat of willful infringement under the duty of due care standard, even when the companies were provided no real basis for believing they were infringing the patent in question. Many companies viewed the risk of trebled damages in a later litigation to be unacceptable and would agree to pay the patentee for a license that they arguably did not need.

This unintended result of the duty of due care standard was brought to the forefront in 2003, when the Federal Trade Commission (FTC) reported that companies were wary of investigating what patents existed in their industries for fear of later being charged with willfully infringing those patents.[31] The FTC concluded that this fear stifled, rather than encouraged, innovation.[32] Thus, the threat to innovation—the underlying goal of the patent system—had come full circle since the Department of Commerce's 1979 report cited by the Federal Circuit in *Knorre-Bremse*.[33]

The Federal Circuit took its first major step toward reversing the impact of the duty of due care standard with the 2004 *en banc* decision in *Knorre-Bremse*. There, the court recognized that the adverse inference imposed "inappropriate burdens on the attorney-client relationship"[34] and held that maintaining the attorney-client privilege for opinions of counsel would not give rise to an adverse inference.[35] The court also stated that an accused infringer's failure to obtain legal advice would likewise not give rise to an adverse inference.[36] However, with the duty of due care standard still requiring "the duty to seek and obtain competent legal advice from counsel,"[37] few companies felt comfortable forgoing obtaining opinions of counsel. Thus, issues regarding the timing of the production of opinions, and the attendant scope of the attorney-client privilege waiver, remained.

In addition, the district courts continued to struggle with the question of the scope of the waiver. While it had long been the rule that if a defendant chose to rely on the advice of counsel in defense to a willfulness claim, the associated waiver would extend to all communications with counsel who provided such advice,[38] it was far from clear whether the waiver should extend to communications on the same subject matter with other attorneys, particularly those with defendants' trial counsel. District courts reached varying results in addressing this question. Some extended waiver to communications with trial counsel; others declined to do so; and still others looked for a middle-ground approach.[39]

Further confusing the matter was the Federal Circuit's 2006 *EchoStar* decision.[40] There, the court affirmed a lower court's holding that there should be no distinction between in-house counsel who provides advice concerning patents and outside counsel; the waiver rules were the same.[41] The court also stated the following:

> [O]nce a party announces that it will rely on advice of counsel, for example, in response to an assertion of willful infringement, the attorney-client privilege is waived. "The widely applied standard for determining the scope of the waiver of attorney-client privilege is that the waiver applies to all other communications relating to the same subject matter."[42]

While *EchoStar* did not concern trial counsel, the above language nevertheless resulted in some district courts extending the scope of the waiver to communications with trial counsel.[43] With the district courts issuing widely varying answers to this question concerning the scope of the waiver, the patent bar was badly in need of guidance from the Federal Circuit.[44]

III. *Seagate*

In July 2000, Seagate Technology LLC ("Seagate")[45] was sued for patent infringement in the Southern District of New York. Prior to the lawsuit, Seagate had retained opinion counsel to provide advice regarding the patents in question. Seagate also retained trial counsel, and Seagate's opinion and trial counsel were kept separate and distinct at all times.[46]

With the case progressing in the pre-*Knorre-Bremse* era, Seagate chose to rely on the advice of counsel defense to the patentee's claim of willful infringement. Seagate produced the noninfringement opinions from its opinion counsel, and depositions of Seagate's decision-makers and opinion counsel were taken. The patentee thereafter moved to compel discovery of all communications and work product of Seagate's other counsel, including trial counsel. In May 2004, a magistrate judge agreed with the patentee that Seagate's waiver extended to communications with trial counsel.[47] Seagate filed objections with the district court, which were denied by the district court in July 2006. After Seagate unsuccessfully requested that the district court certify its discovery orders for interlocutory appeal under 28 U.S.C. § 1292(b), Seagate filed a petition for a writ of mandamus with the Federal Circuit on September 29, 2006. On the same day, the Federal Circuit stayed the district court's discovery orders while it considered the merits of Seagate's petition.

On January 26, 2007, the Federal Circuit issued an order *sua sponte* to hear Seagate's petition *en banc*.[48] As part of that order, the court asked the parties to address the following three questions:

1. Should a party's assertion of the advice of counsel defense to willful infringement extend waiver of the attorney-client privilege to communications with that party's trial counsel? *See In re EchoStar Commc'n Corp.*, 448 F.3d 1294 (Fed. Cir. 2006).
2. What is the effect of any such waiver on work-product immunity?
3. Given the impact of the statutory duty of due care standard announced in *Underwater Devices,*

Inc. v. Morrison-Knudsen Co., 717 F.2d 1380 (Fed. Cir. 1983), on the issue of waiver of attorney-client privilege, should this court reconsider the decision in *Underwater Devices* and the duty of care standard itself?

The parties thereafter briefed the three issues, and the Federal Circuit heard oral argument on June 7, 2007. On August 20, 2007, the court handed down its unanimous ruling.

A. The Federal Circuit's *Seagate* Decision

1. A New Standard for Proving Willful Infringement

The court first addressed the question concerning the duty of due care standard. The court noted that the term "willful" is not unique to patent law but has a well-established meaning in the civil context.[49] Citing to decisions in the copyright infringement realm, the court pointed out that a finding of willful copyright infringement requires reckless behavior.[50] The court also relied on a recent Supreme Court case addressing willful violations of the Fair Credit Reporting Act, where the Court held that the "standard civil usage" of "willful" required "reckless behavior."[51]

The duty of due care standard, in contrast, did not require such reckless behavior. Rather, it "sets a lower threshold for willful infringement that is more akin to negligence. This standard fails to comport with the general understanding of willfulness in the civil context."[52] Therefore, the court concluded that the current duty of due care standard would allow for punitive damages to be assessed for merely negligent acts, in a manner inconsistent with Supreme Court precedent:

> Accordingly, we overrule the standard set out in *Underwater Devices* and hold that proof of willful infringement permitting enhanced damages requires at least a showing of objective recklessness. Because we abandon the duty of due care, we also reemphasize that there is no affirmative obligation to obtain opinion of counsel.[53]

The court also set forth a new, two-part test for determining whether willful infringement had occurred. First, a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.[54] Of particular note, "the state of mind of the accused infringer is not relevant to this objective inquiry."[55]

Second, if the threshold objective standard is met, the patentee also must demonstrate that this objectively defined risk (determined by the record developed in the infringement proceeding) was either known or so obvious that it should have been known to the accused infringer.[56] In other words, not only must the patentee show that the defendant was objectively reckless in its conduct, it must also show that the defendant either knew it was acting recklessly or clearly should have known its actions were reckless.

2. Waiver Does Not Extend to Communications with Trial Counsel

Turning to the question of the scope of any associated waiver of the attorney-client privilege, the court found persuasive Seagate's argument that opinion counsel and trial counsel perform significantly different functions:

> Whereas opinion counsel serves to provide an objective assessment for making informed business decisions, trial counsel focuses on litigation strategy and evaluates the most successful manner of presenting a case to a judicial decision maker. And trial counsel is engaged in an adversarial process. . . . Therefore, fairness counsels against disclosing trial counsel's communications on an entire subject matter in response to an accused infringer's reliance on opinion counsel's opinion to refute a willfulness allegation.[57]

The court also reaffirmed the importance of maintaining the confidentiality of trial counsel's thought process, stating that the "demands of our adversarial system of justice will far outweigh any benefits of extending waiver to trial counsel."[58] The court thus held, as general proposition, that "asserting the advice of counsel defense and disclosing opinions of opinion counsel do not constitute waiver of the attorney-client privilege for communications with trial counsel."[59]

3. Waiver Does Not Extend to Trial Counsel's Work Product

For similar reasons, the court held that "relying on opinion counsel's work product does not waive work-product immunity with respect to trial counsel."[60] While the court distinguished between "tangible work product," which is addressed in Fed. R. Civ. P. 26(b)(3),[61] and "non-tangible work product," wherein courts continue to apply the Supreme Court's *Hickman v. Taylor* decision, its decision was the same for both. The court noted that the distinction was relevant because the patentee in the*Seagate* case sought to depose Seagate's trial counsel:"[W]e agree that work product protection remains available to 'nontangible' work product under *Hickman*. Otherwise, attorneys' files would be protected from discovery, but attorneys themselves would have no work product objection to depositions."[62]

The court thus granted Seagate's petition and remanded to the district court in order to reconsider its discovery orders in light of its opinion.[63]

IV. The Federal Circuit's Holdings Were Correct

The Federal Circuit's decision was welcome and needed. With respect to the standard for proving willfulness, Judge Dyk pointed out in his concurring and dissenting opinion in *Knorr-Bremse* that the duty of due care standard neither conformed to other areas of the law that defined "willful" behavior[64] nor was it of any recent benefit to the patent system.[65] The court's new "objectively reckless" standard brings this area of the patent law in line with Supreme Court precedent and places the burden of proving willful infringement back on the patentee. As to the first point, as the court stated, the Supreme Court defines willful conduct in the context of its "standard civil usage," i.e., reckless behavior and/or reckless disregard of the law. Second, since the *Underwater Devices* decision, a *de facto* requirement that a defendant obtain an opinion of counsel once it had notice of a patent effectively turned the *patentee's burden* of proving willful infringement into a *presumption* of willfulness that required rebuttal by defendants. By restoring the burden to prove willful infringement on the patentee and clarifying that there is "no affirmative obligation" to obtain an opinion of counsel, the court's decision brings the focus in patent cases back to the underlying merits—infringement and validity—as opposed to the willfulness/attorney-client privilege waiver sideshow into which too many cases devolve. Further, the decision motivates organizations involved in research and development to more freely explore technological advances, with the resulting benefit being increased innovation and product development.

As to the scope-of-waiver issues, the court balanced the patentee's need for trial counsel's communications with the defendant's right to full and frank advice from its attorneys and correctly concluded the latter far outweighed the former. Prior to the *Seagate* decision, the uncertainty surrounding the scope of the waiver left accused infringers with a Hobson's choice between relying on the advice of counsel defense to a charge of willful infringement and losing the right to communicate openly with trial counsel. In many cases where the district court extended waiver to trial counsel, the defendant's litigation strategy was exposed to its adversary. In such cases, merely alleging willfulness would have ensured the patentee access to strategic communications between trial counsel and its client with respect to the ultimate issues in the case: infringement, invalidity, and unenforceability. This turned the question of *willfulness* of the infringement, rather than infringement itself, into the paramount issue in the case—a consequence the law never intended. *Seagate* eliminates this dilemma and recognizes the different roles played by opinion counsel and trial counsel in a patent case. The court's decision further instills confidence in the patent bar by confirming the sanctity and vital importance of the attorney-client privilege and the work-product immunity doctrine.

V. Questions Not Answered by the *Seagate* Decision

Seagate provides broad rules of law but leaves it to future cases to develop the application of the new willfulness standard.[66] Provided below is a brief overview of two questions that will undoubtedly arise in the wake of the decision.

A. Are Opinions of Counsel a Thing of the Past?

The short answer is "no." While the new willfulness standard undoubtedly makes it harder to prove willful infringement, until the courts sort out exactly what type of conduct is "objectively reckless," it will still be prudent, at least in certain situations, to obtain opinions of counsel.

For example, contrast the situation where a patentee sends a letter that explains in detail why the patentee believes the target company needs a license, identifying specific products and including claim charts and other analysis, with one where the patentee merely sends a letter enclosing the patent with no in-depth analysis. In the former, the courts may well determine that it would be objectively reckless to ignore the patent in question. On the other hand, the patentee in the second instance should not expect to prove the target company was objectively reckless in a later litigation merely for choosing to forgo the expense associated with obtaining an opinion of counsel. A "wait and see" approach in the latter case may well be a reasonable one.

Another factor in determining whether to obtain an opinion is when the accused infringer first learned of the patent in question. Certainly, the court made it clear that there is no need to obtain an opinion if the defendant first learned of the patent upon being sued.[67] The court noted that in ordinary circumstances, willfulness will depend on an infringer's pre-litigation conduct; a willfulness claim asserted in the original complaint "must necessarily be grounded exclusively in the accused infringer's pre-filing conduct."[68] A defendant who first learned of the patent upon being sued could not have engaged in pre-suit willful infringement by definition.[69] Thus, opinions obtained after litigation commenced "will likely be of little significance."[70]

Ultimately, we may well see the law develop to the point where opinions of counsel are simply not relevant in determining the issue of willful infringement. After all, the point of opinions of counsel is to "provide an objective assessment for making informed business decisions,"[71] not to protect a company from a finding of willful infringement. These business decisions typically

include deciding whether a company should introduce a new product to the marketplace or enter a new market altogether. The real value provided by opinions of counsel is in analyzing the risks associated with the making of such decisions vis-à-vis the patent rights of others; indeed, most prudent and conscientious companies obtain opinions for this very purpose. These companies should be allowed to rely on such standard business practices to demonstrate their lack of objective recklessness in any future patent litigation without requiring them to waive the attorney-client privilege as to specific communications regarding specific patents. Conversely, companies that have a "shoot first, ask questions later" attitude should not be heard to complain if their actions are later found to be objectively reckless.

Ultimately, eliminating the use of opinions of counsel in patent litigation would be a welcome development. It would simplify the case for both the parties and the court by removing the often complex issues associated with determining the scope of any waiver. It would also reduce the amount of discovery that would take place. The net result would be a decrease in the cost of patent litigation for everyone involved.

B. Can Opinion Counsel Also Be Trial Counsel?

The *Seagate* decision does not answer this question. As explained above in *Seagate,* opinion counsel and trial counsel were separate and distinct.[72] This remains the preferred course, as courts prior to *Seagate*, faced with facts showing that trial counsel and opinion counsel were the same, have held that the waiver extends to all communications the client had with that counsel concerning the subject matter of the opinions, regardless of whether they were in the context of discussing the litigation.[73]

There are other concerns associated with having opinion counsel also act as trial counsel. In most cases where the client asserts the advice-of-counsel defense at trial, the attorney who prepared the opinions will be a witness in the case. But ethical rules governing the conduct of attorneys, such as The Model Rules of Professional Conduct, prevent an attorney from acting as both an advocate and a witness in a case.[74] This results in the likelihood that the attorney will be disqualified from representing the client in the litigation. Accordingly, the wiser choice for a company is to retain separate opinion counsel and trial counsel.[75]

VI. The *Seagate* Decision: The Early Returns Are In

Since the August 20, 2007 decision in *Seagate*, several district courts have had the opportunity to consider the new willfulness standard, and a sampling of the early results demonstrates that the courts recognize the new standard makes willfulness much more difficult to prove.

In *Lucent Tech. Inc. v. Gateway, Inc.*, Judge Marilyn Huff in the Southern District of California granted the defendants summary judgment of no willfulness. The court noted that "close questions" of invalidity (including evidence that the PTO granted a request to reexamine the patent in suit), as well as the fact that the case involved complex technology with competing expert analyses, precluded any reasonable possibility that the patentee would be able to show the defendants' conduct was objectively reckless by clear and convincing evidence.[76]

Similarly, in *Franklin Electric v. Dover Corp.*,[77] Judge John Shabaz granted the defendant summary judgment of no willfulness, based on his earlier grant of a summary judgment motion of noninfringement, even though the Federal Circuit overturned that ruling on appeal. According to the court, "given the substantial support in the language of the patent, the specification and prosecution history for defendants' non-infringement contention, plaintiff cannot meet its burden to prove objective recklessness. . . ."[78]

In *Broadcom Corp. v. Qualcomm Inc.*,[79] Judge James Selna granted Qualcomm a new trial on the issue of willfulness based on a jury instruction "drawn from a now-discredited line of authority."[80] The Court also provisionally ordered a new trial on the question of infringement because "where trial of an issue such as willfulness is necessarily bound up with the basic liability determination, a new trial on all issues should be granted."[81]

In *TGIP, Inc. v. AT&T Corp.*,[82] Judge Ron Clark granted AT&T's motion for judgment as a matter of law on the issue of willfulness following an adverse jury verdict. This case was particularly significant because the jury was instructed on the new willfulness standard set forth in *Seagate*. As Judge Clark found, "[e]ven though AT&T did not prove its invalidity defense by clear and convincing evidence, its position was hardly objectively unreasonable. . . . Even if the jury's finding of infringement is ultimately upheld, it was, at best, a very close question."[83]

A similar result obtained in *Trading Tech. Int'l, Inc. v. eSpeed, Inc*.[84] There, Judge James Moran granted the defendants' motion for judgment as a matter of law that it did not willfully infringe plaintiff's patent, even though the jury so held. As in *AT&T*, the jury was instructed based on the new *Seagate* willfulness standard. The district court found that "validity of plaintiff's patents has been hotly contested in this litigation. . . . [T]hose defenses were neither unreasonable nor frivolous."[85]

These cases demonstrate that district courts, not juries, are more readily able to distinguish between when a defendant's conduct resulted in a violation of a "duty of due care" versus conduct that is "objectively reckless." These cases also show that district courts will not be reluctant to grant motions for summary judgment on the issue of willfulness, thereby reducing the complexity and cost of the case going forward. Accordingly, defendants in patent cases going forward should give serious consideration to filing a motion for summary judgment on the question of willfulness before the issue reaches a jury.

"The Federal Circuit's holdings were welcome [in Seagate*], as they reconciled the standards for proving willful patent infringement to other areas of the law and upheld the importance of the attorney-client privilege and work-product immunity in patent cases."*

Conclusion

The *Seagate* decision truly represents a "sea change" in the law governing patent litigation. The Federal Circuit's holdings were welcome, as they reconciled the standards for proving willful patent infringement to other areas of the law and upheld the importance of the attorney-client privilege and work-product immunity in patent cases.

Endnotes

1. 497 F.3d 1360 (Fed. Cir. Aug. 20, 2007) (*en banc*), *cert. denied*, __ U.S. __ (Feb. 25, 2008).
2. *Seagate*, 497 F.3d at 1368; *see also Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1523 (Fed. Cir. 1995), *rev'd on other grounds*, 520 U.S. 17 (1997) ("Accidental or 'innocent' infringement is still infringement.").
3. *Seagate*, 497 F.3d at 1368.
4. *See Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 (Fed. Cir. 1996) (holding that bad-faith infringement is a type of willful infringement); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 479, 508 (1961) (willful or bad faith infringement); *Seymour v. McCormick*, 57 U.S. 480, 489 (1853) ("wanton or malicious" injury).
5. The current version of section 284 provides in relevant part that "the court may increase the damages up to three times the amount found or assessed." The courts have had such discretion since 1836. Patent Act of 1836, ch. 357, 5 Stat. 117 (1836) ("it shall be in the power of the court to render judgment for any sum above the amount found by such verdict . . . not exceeding three times the amount thereof, according to the circumstances of the case").
6. *See Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 923 F.2d 1576, 1578 (Fed. Cir. 1991); *but see* Judge Gajarsa's concurring opinion in *Seagate*, advocating the elimination of "the grafting of willfulness onto section 284." *Seagate*, 497 F.3d at 1377 (Gajarsa, J., concurring). In Judge Gajarsa's view, enhanced damages should not be limited to instances of willfulness but left to the discretion of the trial judge based on the circumstances of each case. *Id*.
7. *See Knorr-Bremse Systeme Fuer Nutzfahreuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1343 (Fed. Cir. 2004) (*en banc*), *citing* Advisory Committee on Industrial Innovation, Final Report, Dep't of Commerce (Sept. 1979).
8. U.S. Constitution, art. I, sec. 8.
9. *See, e.g., Fromson v. Western Litho Plate & Supply Co.*, 853 F.2d 1568, 1575 (Fed. Cir. 1988) (the courts' historical refusal to grant injunctions to individual patentees resulted "in a lowered respect for the rights of such patentees and a failure to recognize the innovation-encouraging social purpose of the patent system. . . . That 'survival of the fittest' jungle mentality was intended to be replaced, not served, by the law").
10. The court was enacted as part of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. *See South Corp. v. United States*, 690 F.2d 1368, 1371 (Fed. Cir. 1982).
11. *See, e.g., Manildra Milling Corp. v. Ogilvie Mills*, 76 F.3d 1178, 1181 (Fed. Cir. 1996).
12. *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380 (Fed. Cir. 1983).
13. *Id*. at 1385.
14. *Id*.
15. *Id*. at 1390.
16. *Id*. at 1389.
17. *Seagate*, 497 F.3d at 1385 (Newman, J. concurring).
18. *Underwater Devices*, 717 F.2d at 1390 (emphasis in original).
19. *Seagate*, 497 F.3d at 1369.
20. In *Seagate*, the Federal Circuit acknowledged this *de facto* requirement stemming from the *Underwater Devices* decision: "[A]lthough an infringer's reliance on favorable advice of counsel, or conversely his failure to proffer any favorable advice, is not dispositive of the willfulness inquiry, *it is crucial to the analysis*." *Seagate*, 497 F.3d at 1369 (emphasis added).
21. *Kloster Speedsteel AB v. Crucible Inc.*, 793 F.2d 1565, 1580 (Fed. Cir. 1986). *See also Electro Medical Sys., S.A. v. Cooper Life Sciences, Inc.*, 34 F.3d 1048, 1057 (Fed. Cir. 1994) (the district court was free to draw an adverse inference).
22. *Seagate*, 497 F.3d at 1369 ("in light of the duty of due care, accused willful infringers commonly assert an advice of counsel of defense").
23. *United States v. Philip Morris, Inc.*, 314 F.3d 612, 618 (D.C. Cir. 2003), *quoting Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
24. *See, e.g., In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005) ("Courts must impose a waiver no broader than needed to ensure the fairness of the proceedings before it. A broad waiver would no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that the attorney-client and work product privileges are designed to promote"); *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir.) (*en banc*), *cert. denied*, 540 U.S. 1013 (2003) ("Courts, including ours, that have imposed waivers under the fairness principle have therefore closely tailored the scope of the waiver to the needs of the opposing party in litigating the claim in question."). As the Sixth Circuit recognized in *Lott*, a narrow interpretation of the waiver is required, because "if we eat away at the privilege by expanding the fiction of waiver, pretty soon there will be little left of the privilege." 424 F.3d at 446.
25. *Quantum Corp. v. Plus Development Corp.*, 940 F.2d 642, 643 (Fed. Cir. 1991).

26. *See id.* at 643-44 (an accused infringer "should not, without the trial court's careful consideration, be forced to choose between waiving the privilege in order to protect itself from a willfulness finding, in which case it may risk prejudicing itself on the question of liability, and maintaining the privilege, in which case it may risk being found to be a willful infringer if liability is found").

27. *Johns Hopkins Univ. v. CellPro*, 160 F.R.D. 30, 34 (D. Del. 1995).

28. *Id*. at 35-36 ("[Defendant] is correct that moving forward with discovery will subject it to the harm of having to disclose the advice of counsel before it has been found liable to the plaintiffs. That is the natural consequence of the Federal Circuit's decisions that suggest an alleged infringer must respond to a claim of willful infringement by disclosing the advice of counsel or face a negative inference for invoking the attorney-client privilege.").

29. *See Johns Hopkins Univ. v. CellPro*, 978 F. Supp. 184, 193 (D. Del. 1997), *aff'd in part, rev'd in part*, 152 F.3d 1342 (Fed. Cir. 1998) (the opinions in question "were so obviously deficient, one might expect a juror to conclude the only value they had to [Defendant] in the world outside the courtroom would have been to file them in a drawer until they could be used in a cynical effort to try to confuse or mislead what [Defendant], its Board, and counsel must have expected would be an unsophisticated jury"); *Scott Paper Co. v. Moore Business Forms, Inc*., 594 F. Supp. 1051, 1085 (D. Del. 1984) ("the opinions of counsel were nothing more than window dressing"); *Knorre-Bremse*, 383 F.3d at 1351 (Dyk, J. concurring-in-part and dissenting-in-part: "[the duty of due care standard has resulted in] a cottage industry of window-dressing legal opinions by third party counsel designed to protect the real decision-making process between litigating counsel and the company's executives").

30. *Seagate*, 497 F.3d at 1385 (Newman, J. concurring).

31. To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, A Report by the FTC, at Ch. IV, p. 29 (Oct. 2003).

32. *Id.* at Ch. V, p. 49.

33. *Knorre-Bremse*, 383 F.3d at 1343, *citing* Advisory Committee on Industrial Innovation, Final Report, Dep't of Commerce (Sept. 1979).

34. *Id.*

35. *Id*. at 1344-45.

36. *Id*. at 1345-46.

37. *Underwater Devices*, 717 F.2d at 1390.

38. "The voluntary waiver by a client, without limitation, of one or more privileged documents passing between a certain attorney and the client discussing a certain subject waives the privilege as to all communications between the *same* attorney and the *same* client on the *same* subject." *Hercules Inc. v. Exxon Corp*., 434 F. Supp. 136, 156 (D. Del. 1977) (emphasis added); *see also Duplan Corp. v. Deering Milliken Research Corp*., 397 F. Supp. 1146, 1161 (D.S.C. 1974).

39. *See Seagate*, 497 F.3d at 1372-73 (collecting cases).

40. *In re EchoStar Commc'ns Corp*., 448 F.3d 1294 (Fed. Cir. 2006).

41. *Id*. at 1299 ("when [Defendant] chose to rely on the advice of in-house counsel, it waived the attorney-client privilege with regard to any attorney-client communications relating to the same subject matter").

42. *Id*. (*quoting Fort James Corp. v. Solo Cup Co*., 412 F.3d 1340, 1349 (Fed. Cir. 2005)).

43. *See Informatica Corp. v. Business Objects Data Integration, Inc*., 454 F. Supp. 2d 957, 959, *aff'd* 2006 U.S. Dist. LEXIS 58976 (N.D. Cal. Aug. 9, 2006); *Iridex Corp. v. Synergetics, Inc*., 2007 U.S. Dist. LEXIS 7747, *2-3 (E.D. Mo. Feb. 2, 2007).

44. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

45. Seagate is one of the world's leaders in the development and marketing of computer disc drives. *See* www.seagate.com.

46. *Seagate*, 497 F.3d at 1366 ("there is no dispute that Seagate's opinion counsel operated separately and independently of trial counsel at all times").

47. *See Convolve, Inc. v. Compaq Computer Corp*., 224 F.R.D. 98 (S.D.N.Y. 2004).

48. *In re Seagate Tech., LLC*, 214 Fed. Appx. 997 (Fed. Cir. 2007).

49. *Seagate*, 497 F.3d at 1370.

50. *Id*. (*citing*, *inter alia*, *Yurman Design, Inc. v. PAJ, Inc*., 262 F.3d 101, 112 (2d Cir. 2001)).

51. *Seagate*, 497 F.3d at 1370 (*citing Safeco Ins. Co. of Am. v. Burr*, 551 U.S. ___, 127 S. Ct. 2201 (2007)).

52. *Seagate*, 497 F.3d at 1371 (*citing McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 132-33 (1988)).

53. *Id.*

54. *Id.*

55. *Id*.

56. *Id*.

57. *Id*. at 1373. The court cited to its *Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l, Inc.* opinion where it previously recognized that "defenses prepared [by litigation counsel] for a trial are not equivalent to the competent legal opinion of non-infringement or invalidity which qualify as 'due care' before undertaking any potentially infringing activity." 246 F.3d 1336, 1352 (Fed. Cir. 2001).

58. *Seagate*, 497 F.3d at 1373 (*citing*, *inter alia*, *Hickman v. Taylor*, 329 U.S. 495 (1947); and *Jaffee v. Redmond*, 518 U.S. 1 (1996)).

59. *Seagate*, 497 F.3d at 1374. The court qualified this holding by noting that trial courts could, in unique situations, extend waiver to trial counsel, such as if a party or counsel engages in "chicanery." *Id*. at 1375.

60. *Id*. at 1376. The court again qualified this holding, should a trial court determine that the defendant or its counsel engaged in chicanery.

61. Fed. R. Civ. P. 26(b)(3) provides in pertinent part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such ma-terials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

62. *Seagate*, 497 F.3d at 1376.

63. *Id*.

64. *Knorre-Bremse*, 383 F.3d at 1348-49 (Dyk, J. concurring-in-part, dissenting-in-part).

65. *Id*. at 1351-52.

66. *Seagate*, 497 F.3d at 1371.
67. *Id*. at 1374.
68. *Id*.
69. *Id*.
70. *Id*. The court noted that a patentee who wishes to prove a defendant's post-filing conduct is reckless should ordinarily move for a preliminary injunction. If the patentee is unsuccessful, "it is likely the infringement did not rise to the level of recklessness. . . . A substantial question about invalidity or infringement is likely sufficient not only to avoid a preliminary injunction, but also a charge of willfulness based on post-filing conduct." *Id*.
71. *Id*. at 1373.
72. *Id*. at 1366.
73. *See, e.g., Akeva L.L.C. v. Mizuna Corp.*, 243 F. Supp. 2d 418, 419-20 (M.D.N.C. 2003).
74. *See* Model Rules of Professional Conduct, Rule 3.7(a): "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client."
75. This does not necessarily mean different law firms. Many companies use a single law firm for opinion work and trial work, but use different attorneys for each role. This is expressly permitted under the Model Rules of Professional Conduct. *See* Rule 3.7(b).
76. The case is *Lucent Tech. Inc. v. Gateway, Inc.*, Case No. 07-cv-2000H (S.D. Cal.) (Judge Huff) (Oct. 30, 2007 Order).
77. 2007 U.S. Dist. Ct. LEXIS 84588 (W.D. Wisc. Nov. 15, 2007).
78. *Id*. at *23.
79. 2007 U.S. Dist. Ct. LEXIS 86627 (C.D. Cal. Nov. 21, 2007).
80. *Id*. at *7.
81. *Id*. at *17.
82. 2007 U.S. Dist. Ct. LEXIS 79919 (E.D. Tex. Oct. 29, 2007).
83. 2007 U.S. Dist. LEXIS 79919 at *37.
84. 2008 U.S. Dist. Ct. LEXIS 295 (N.D. Ill. Jan. 3, 2008).
85. 2008 U.S. Dist. LEXIS 295 at *7-*8.

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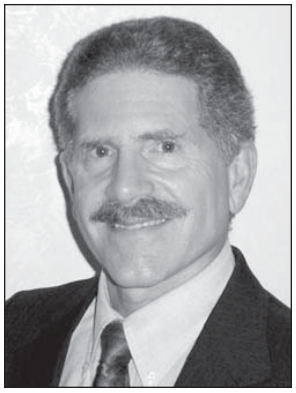
Boards of Ethics: Public Disclosure?

By Robert J. Freeman



This is an interesting time for government in New York, and boards of ethics are being called upon more frequently, and in some instances, for the first time in years, to review matters involving the conduct of public officers and employees. Often the activities of those boards will lead to questions involving access to their records under the Freedom of Information Law (FOIL)[1] and to their meetings under the Open Meetings Law (OML).[2]

Section 806(1)(a) of the General Municipal Law provides that the governing body of every county, city, town, village, school district and fire district *shall* and the governing body of any other municipality *may* by local law, ordinance or resolution adopt a code of ethics. Section 808(1) states that the governing body of a county may establish a county board of ethics, and subdivision (2) indicates that it "shall render advisory opinions to officers and employees of municipalities wholly or partly within the county. . . ." Subdivision (3) authorizes any municipality other than a county to establish a local board of ethics, which has the same powers and duties with respect to that municipality as the county board of ethics. In short, although thousands of municipalities other than counties are required to adopt codes of ethics, while many choose to do so, they are not required to create ethics boards.

Ethics at the State Agency Level

Before considering the application of open government laws, it is emphasized that the statutory guidance concerning the Commission on Public Integrity—the state agency that recently supplanted the State Ethics Commission—is largely irrelevant. The Commission functions in accordance with § 4 of the Executive Law. Paragraph (a) of subdivision (17) of § 4 specifies that the records of the Commission are not subject to FOIL, and that only certain records listed in that provision are accessible to the public; similarly, paragraph (b) states that the meetings of the Commission are not subject to the OML. There are no similar statutes that deal with the records and meetings of municipal ethics boards. Therefore, their records and meetings are subject to FOIL and the OML respectively.

Boards of Ethics Under the Open Meetings Law

As indicated earlier, the General Municipal Law states that a board of ethics renders advisory opinions, and questions frequently arise concerning the status of advisory bodies under the Open Meetings Law. However, since boards of ethics are creations of and carry out their functions based on statutory direction, they clearly constitute "public bodies" required to comply with the Open Meetings Law. A "meeting" is a gathering of a majority of the members of a public body, and every meeting must be preceded by notice of the time and place given in accordance with § 104. When a meeting is convened, the OML is based on a presumption of openness: meetings must be conducted and open to the public, except to the extent that an executive session may be held. Section 102(3) defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and § 105(1) prescribes a procedure that must be accomplished during an open meeting before an executive session may be held. In brief, a motion to enter into executive session must be made in public; the motion must indicate the subject or subjects to be considered; and the motion must be carried by a majority of the total membership of the body. Most importantly, paragraphs (a) through (h) specify and limit the grounds for entry into executive session.

The most pertinent basis for conducting an executive session relative to the functions of boards of ethics is also the most commonly cited, and perhaps the most misunderstood. A term heard constantly as a basis for entry into executive sessions is "personnel," even though it appears nowhere in the OML. To be sure, some personnel-related issues may clearly be considered during an executive session. Nevertheless, others cannot. Moreover, often the so-called "personnel" exception has nothing to do with personnel matters. That provision permits a public body to enter into an executive session to discuss: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation. . . ." If, for example, the issue before a board of ethics involves a policy concerning outside employment, the issue would be a personnel matter, but there would be no basis for closing the doors. On the other hand, when an issue involves a particular person in conjunction with one or more of the subjects listed in § 105(1)(f), an executive session could appropriately be

held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, § 105(1)(f) may be cited for the purpose of entering into an executive session.

It is emphasized that a motion indicating the issue to be discussed involving "personnel," without more, is inadequate, for it does not provide sufficient information to enable the public to know whether the subject matter is appropriate for consideration in executive session. It has been advised and confirmed judicially that a motion under § 105(1)(f) should include two elements: first, the inclusion of the key word "particular," so that the public can know the focus is on a specific individual; and second, one of the qualifying terms appearing in that provision. For example, a proper motion might be: "I move to enter into executive session to discuss the financial history of a particular person." Although the identity of the subject of the discussion need not be given, a motion of that nature demonstrates a recognition of the scope of the exception and the topic may properly be considered in executive session.[3]

The executive session is one of two vehicles that potentially permits a public body to confer or meet in private. The other involves "exemptions," and § 108 of the OML contains three. When an exemption applies, the OML does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the OML, a public body need not follow the procedure imposed by § 105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the OML.

Often relevant to the functions of boards of ethics is § 108(3), which exempts from the OML: "any matter made confidential by federal or state law." When an attorney-client relationship has been invoked, it is considered confidential under § 4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would be confidential under state law and, therefore, exempt from the OML.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney.[4] However, such a relationship is operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

Insofar as a board of ethics seeks legal advice from its attorney and the attorney renders legal advice, the attorney-client privilege may validly be asserted and communications made within the scope of the privilege would be outside the coverage of the OML. Therefore, even though there may be no basis for conducting an executive session pursuant to § 105 of the OML, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to § 108, and legal advice may be requested even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session[5] would not apply, there may be a proper assertion of the attorney-client privilege.

Following a meeting, minutes must be prepared, and § 106 provides what might be viewed as minimum requirements pertaining to their contents, stating that:

> 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

In view of the foregoing, as a general rule a public body may take action during a properly convened executive session.[6] If action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to § 106(2) of the OML. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Minutes of executive sessions need not include information that may be withheld under FOIL, which may be more significant in many ways than the OML.

FOIL

An initial key point regarding FOIL involves its breadth, for it pertains to all government agency records and defines the term "record" in § 86(4) to mean:

> any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

In consideration of the definition, information "in any physical form" maintained by or for a municipality, irrespective of its function, origin, or the means by which it is stored or transmitted, constitutes a "record" falling within the scope of FOIL.

Like the OML, FOIL is based on a presumption of access, directing that all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in § 87(2)(a) through (j) of FOIL.

In consideration of the functions and the kinds of records likely maintained by or for boards of ethics, it is likely that two of the grounds for denial are particularly relevant.

Section 87(2)(b) authorizes an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. The courts have found, as a general rule, that records that are relevant to the performance of the duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy.[7] Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy.[8]

Several of the decisions referenced above dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available.[9] However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may be withheld, for disclosure would result in an unwarranted invasion of personal privacy.[10] Further, to the extent that charges are dismissed or allegations are found to be without merit, they may be withheld.

There may also be privacy considerations concerning persons other than employees who may be subjects of a board's inquiries. For instance, the name of a complainant or witness could be withheld in appropriate circumstances as an unwarranted invasion of personal privacy. Ordinarily, the identity of a complainant is irrelevant to the board; what is relevant is whether the complaint has merit. Moreover, if the identities of complainants or whistleblowers are made known, they are less likely to complain or blow the whistle. In that event, the government would not learn what it needs to know to carry out its duties effectively and accountably.

The other provision of relevance, § 87(2)(g), states that an agency may withhold records that:

> are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government . . .

The language quoted above contains what is in effect a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like may be withheld.

Records prepared in conjunction with an inquiry or investigation by a board of ethics would constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, they may be withheld. Factual information would be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

Because a board of ethics provides advisory opinions, which may be accepted, rejected or modified by the person or entity making a final decision, those opinions may be withheld under § 87(2)(g). If the decision maker specifies that it has adopted the recommendation of the board as its own, the opinion has become a final agency determination. When that determination reflects a finding of misconduct or imposes a penalty, it is accessible under subparagraph (iii) of § 87(2)(g).[11]

An area of frequent controversy and requests by the public and the news media involves financial disclosure statements. One of the issues relates to a former provision of the statute dealing with statements filed with what had been the State Ethics Commission, which indicated they were available for inspection, but not for copying. Again, that provision pertained only to that state agency; it never applied to a municipality. Consequently, when financial disclosure statements are prepared pursuant to a municipal ethics law, they are subject to FOIL, which requires that agencies prepare copies of records pursuant to § 89(3)(a) and authorizes the assessment of fees for copying in accordance with § 87(1)(b)(iii). When a local law permitting only the inspection of financial disclosure statements was challenged, it was held that FOIL applied and required the agency to produce photocopies.[12]

In terms of access to those statements, they are typically available to the public, except those portions indicating the value of an asset or liability of a public officer or employee, or other portions which are demonstrated to be irrelevant to the performance of that person's duties.

In short, although municipal boards of ethics are required to comply with both FOIL and the OML, those statutes generally offer those boards the flexibility and the capacity to withhold records or to conduct their meetings in private to enable them to carry out their duties effectively.

Endnotes

1. Public Officers Law, Article 6, §§ 84–90.
2. Public Officers Law, Article 7, §§ 100–11.
3. *Gordon v. Village of Monticello*, August 5, 1993 (Supreme Court, Ulster Co.), *modified*, 620 N.Y.S.2d 573, 207 A.D.2d 55 (3d Dep't 1994), *reversed on other grounds*, 87 N.Y.2d 124 (1995).
4. *People ex rel. Updyke v. Gilon*, 9 N.Y.S. 243 (Sup. Ct., N.Y. Co. 1889); *Pennock v. Lane*, 36 Misc. 2d 253, 231 N.Y.S.2d 897, 898 (Sup. Ct., Albany Co. 1962).
5. Public Officers Law § 105(1)(d).
6. Public Officers Law § 105(1).
7. *See, e.g., Farrell v. Village Board of Trustees*, 83 Misc. 2d 125, 372 N.Y.S.2d 905 (Sup. Ct., Broome Co. 1975); *Gannett Co. v. County of Monroe*, 59 A.D.2d 309, 399 N.Y.S.2d 534 (4th Dep't 1977), *aff'd*, 45 N.Y.2d 954 (1978); *Sinicropi v. County of Nassau*, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dep't 1980); *Geneva Printing Co. v. Village of Lyons*, March 25, 1981 (Sup. Ct., Wayne Co.); *Montes v. State*, 94 Misc. 2d 972, 406 N.Y.S.2d 664 (Ct. Cl. 1978); *Powhida v. City of Albany*, 147 A.D.2d 236, 542 N.Y.S.2d 865 (3d Dep't 1989); *Scaccia v. NYS Division of State Police*, 138 A.D.2d 50, 530 N.Y.S.2d 309 (3d Dep't 1988); *Steinmetz v. Board of Education, East Moriches*, N.Y.L.J., Oct. 30, 1980 (Sup. Ct., Suffolk Co.); *Capital Newspapers v. Burns*, 67 N.Y.2d 562 (1986).
8. *See, e.g., In re Wool*, N.Y.L.J., Nov. 22, 1977 (Sup. Ct., Nassau Co.).
9. *See Farrell*, *Sinicropi*, *Geneva Printing Co.*, *Scaccia*, and *Powhida*, *supra* note 7.
10. *See, e.g., Herald Company v. School District of City of Syracuse*, 104 Misc. 2d 1041, 430 N.Y.S.2d 460 (Sup. Ct., Onondaga Co. 1980).
11. *Miller v. Hewlett-Woodmere Union Free School District #14*, N.Y.L.J., May 16, 1990 (Supreme Court, Nassau Co.).
12. *See, e.g., Herald Company, supra* note 10.

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Virtual Legality: Copyright in Second Life

By Jonathan M. Purow

The Internet enables people from across the world to interact as if they were standing next to each other. This capacity initially manifested itself in the popularity of online fantasy games, but in the past few years virtual worlds like Second Life have seen their citizenry swell into the millions. Unfortunately, technology also enables citizens to steal the virtual creations of their fellow users, implicating copyright rather than traditional property rights.

This article will provide an introduction to the virtual world Second Life, its economy, and creation. It will give an in-depth analysis of how the Second Life program works technologically. The article will also discuss recent issues and copyright lawsuits based on actions in Second Life and will discuss how Linden Labs has attempted to resolve in-world disputes through enforcement of various provisions in the Second Life Terms of Service. Finally, this article will examine current case law and precedents that are relevant for analysis of copyright disputes in Second Life.

Introduction to Second Life

Second Life is a "3D online, 3D digital world imagined and created entirely by its Residents," that was started by the company Linden Labs.[1] In order to interact in this virtual world, citizens of Second Life create online representations of themselves known as "avatars." Second Life is not a game in that there are no set goals, and the world is merely an environment in which people interact. As of late January, Second Life claimed over 12 million user accounts, and over $1 million was exchanged on a daily basis.[2] Second Life has a functioning in-world stock exchange, with a conversion rate of approximately 240 Linden dollars (the currency in Second Life) to U.S. dollars.

There are numerous signs that Second Life has begun to infiltrate the collective consciousness. In 2006, Reuters created a news division specifically to cover events within the world.[3] In addition, Judge Richard Posner of the Seventh Circuit Court of Appeals conducted a question-and-answer session within the world.[4] In the fall of 2007, Second Life was featured in episodes of "The Office" and "CSI:NY." Perhaps the most telling sign of Second Life's legitimacy is that Congress has even contemplated taxing in-world gains.[5]

Creation in Second Life

In Second Life, the users create most of the content inside the game, such as buildings, landscapes and any sort of product. Second Life provides users with a "3D modeling tool" program that enables users to easily create objects inside the game.[6] More advanced users can create objects outside the world and then upload them into Second Life. When a user creates an object in Second Life, he gets to specify certain rights associated with the object within the virtual world (analogous to copyright), such as 1) the right to copy the object, 2) the right to modify the object, and 3) the right to transfer the object to another owner.[7] These copy restrictions are attached to the object so any avatar that interacts with it is put on notice of the rights associated with it. Users can create objects that have a specific appearance online called a "texture" (like a piece of clothing) that serve no particular function outside of their appearance. They can also create objects that employ a "script," which allows the object to display autonomous and functional behavior (such as a door that opens automatically when approached.)

The Technology of Second Life

The architecture of Second Life is similar to that of a Massive Multiplayer Online Role Playing Game.[8] Two separate programs are necessary to view Second Life on a user's computer— the "client" program and the "server" program.

The client program operates on a user's computer to enable the person to view portions of Second Life.[9] While the program is functioning it is stored in the random access memory ("RAM") of the user's computer. RAM is a computer's temporary memory, and it is deleted when a user stops using a program or turns off the computer. The user inputs actions into the client program, such as instructing the avatar to walk or fly.

The server program resides on Second Life servers and dictates how multiple users interact within Second Life. When a client modifies its avatar or inputs an action into its client program, that command is communicated to the server program, which processes the action and then alerts all other users' programs that are influenced by the action (e.g., when one user tells his avatar to walk and it collides with another user's avatar.).[10] The Second Life server contains all of the data in Second Life, including objects and avatars. Each object resides on the Second Life server in a single location. The object appears in different parts of the virtual world not because there are multiple copies, but because there are "addresses" that dictate to the server where to place the object on the different individual user's client program. When a user views an object on its client program, a copy of the texture of the object is stored in the RAM of the user's computer, but the scripts that dictate how that object functions remain on the Second Life servers.

Second Life Copyright Problems and Lawsuits

Recently, Second Life has been home to a number of different copyright disputes. First, a software tool called Copybot was modified so that it could copy the textures of objects in Second Life (but not the scripts that give objects functionality.)[11] The threat of Copybot impacting the in-world economy prompted several online merchants to boycott Second Life.[12]

A second means of copying items in Second Life is through the manipulation of a "rollback." A rollback is when a server restores to a prior point in time to recover from a system crash. For example, hackers can remove an item like the SexGen bed from the Second Life simulation seconds before inducing a server crash that causes a rollback.[13] The rollback re-creates a point in time prior to the removal of the bed so it reproduces an entirely new bed that can also be removed. Through this process hackers can essentially duplicate any object in the game. Relatively little is known about this method, as only very advanced hackers can achieve it.

The first copyright infringement lawsuit arose last year when successful Second Life adult business owner Kevin Alderman sued the avatar "Volkov Catteneo" (later identified as defendant Robert Leatherwood) in Florida District Court for trademark and copyright infringement in relation to his "SexGen Bed," which enables avatars to engage in virtual intercourse.[14] Alderman sold the beds on a "no copy" basis in Second Life. The complaint alleged that the defendant had infringed on Alderman's rights by "copying, displaying, distributing and selling copies" of the SexGen Beds, and it was later discovered that the copying had occurred through the manipulation of rollbacks.[15] The lawsuit was eventually resolved when a default judgment was entered against Leatherwood, who did not contest any of the filings.[16]

The case illustrated a separate but important issue of Second Life—sometimes it is a task in and of itself to determine the identity of the person underlying an avatar. "Volkov Catteneo" boasted that he could not be caught because he was not a "newbie" (online lingo for an unsophisticated user). Alderman had to obtain a subpoena to compel Second Life to turn over information that enabled the identification of the avatar Volkov Catteneo as Robert Leatherwood.[17]

More recently, six major Second Life content creators, including Alderman, sued Thomas Simon (a/k/a "Rase Kenzo") for copyright infringement in the Eastern District of New York.[18] Like Alderman, the other plaintiffs had applied for copyright registration, and asserted the ownership of copyrights under 17 U.S.C. § 101. In an unorthodox move, the plaintiffs posted screen shots depicting Simon's unauthorized copying of their items on Flickr as evidence for their complaint.[19] The lawsuit was resolved when a judgment by consent was filed with the court.[20] Simon agreed to: 1) pay damages totaling $525, 2) present his transactional records from Second Life and PayPal to the plaintiffs' attorney and 3) inform the plaintiffs of any other accounts he creates in Second Life in the future. The judgment could possess some import if the judge enters it as written, for it would stand as the first recognition of virtual property in the U.S.[21]

Linden Labs Usage of Contract Law to Resolve Copyright Issues

Linden Labs has attempted to resolve infringement claims within the world through enforcement of certain provisions in the Terms of Service (to which every occupant of Second Life must agree).[22] The company responded to Copybot by posting on its official blog that any use of the software constituted a violation of Clause 4.2 of the Terms of Service agreement.[23] It is worth noting that Linden Labs is immune from lawsuits due to a provision in the Terms of Service, although it would otherwise presumably be able to qualify as an Internet Service Provider under the Digital Millennium Copyright Act's ("DMCA") safe harbor provisions. Linden Labs has repeatedly revised the Terms of Service in response to varying situations that have arisen within its world.[24] Unfortunately, the most severe penalty that Linden Labs can mete out is a ban from Second Life.

The Terms of Service contain various clauses that can be interpreted to address the problem of copying within the virtual world. These include Clause 4.1, which states:

> You agree to abide by certain rules of conduct, including the Community Standards and other rules prohibiting illegal and other practices that Linden Lab deems harmful. . . . In addition to abiding at all times by the Community Standards, you agree that you shall not: (i) take any action or upload, post, e-mail or otherwise transmit Content that infringes or violates any third party rights; . . . (iii) take any action or upload, post, e-mail or otherwise transmit Content that violates any law or regulation.

Additionally, Clause 4.2 states: "You agree to use Second Life as provided, without unauthorized software or other means of access or use. You will not make unauthorized works from or conduct unauthorized distribution of the Linden Software." Clause 4.3 stipulates that all users must comply with the provisions of the DMCA regarding copyright infringement claims.

While Linden's actions might resolve disputes in Second Life, they do not serve to redress injured parties for the loss of profits from sales of infringing items, and so standard legal action is still necessary.

Copyright Analysis of Second Life

While the recent lawsuits have come to successful resolutions, there are copyright issues that will inevitably be implicated in lawsuits of a similar nature. The first issue is whether or not the items within the virtual world are protected by copyright law and, if not, whether they should be. This can be broken down further into two questions: 1) Are the copyrightable design aspects of virtual property conceptually separable from their utilitarian aspects? and 2) which of the incarnations of these objects (the code on the Second Life server and/or the RAM of the client program) are currently protected under copyright case law? The second issue is what standard of liability should be utilized to judge infringement when the means of infringement (i.e., Copybots and rollbacks) could vary greatly.

Conceptual Separability

One of the initial hurdles that any plaintiff in an infringement lawsuit would need to prove is that the item in question is entitled to copyright protection. Under the Copyright Act, "useful articles" as a whole are not eligible for copyright protection, but individual design elements may be to the extent that they "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[25]

When examining whether a virtual item can be copyrighted, the nature of the article must first be examined. An item like the SexGen bed, which contains a script that permits avatars to have sex, clearly has a function outside of its appearance. Since scripts are the pieces of code that imbue objects with a function, it is possible to separate these aspects from the design element. Yet what about the objects that have no scripts or functions and possess purely ornamental value, such as a piece of virtual clothing? Courts have struggled enough to separate the fashion aspects from the function aspects of real-world clothing. Whereas certain aspects of a piece of clothing or a lamp could be determined to have artistic substance outside of their functionality, it is more difficult to determine which portions of code are aesthetic and which are functional. There is unfortunately little guidance in the case law, and so this issue will have to be litigated in order to establish precedent.

Copyrighting Computer Programs

Since infringers could potentially copy different incarnations of the virtual objects to reproduce them, it is important to understand which of these incarnations are protected by copyright law.

Object Code/Source Code

There are two different forms of software code—object code and source code. Source code is the set of instructions written by programmers that performs varying functions and is readable only by humans. Source code is converted automatically into object code so that a computer can then read the code and follow embedded instructions. Luckily, the distinction is irrelevant, as courts have held that copying either form of code infringes the reproduction right.[26]

Random Access Memory

When an infringer creates an illegal copy within Second Life, it does not necessarily reproduce the software code on the Second Life server. The Second Life server could be deceptively given the address to send the object to an unentitled user's computer. Therefore, the only illegitimate copy of the object would be in the RAM of the unentitled user's computer. The question of whether or not copies stored in RAM are copyrightable hinges on the perceived permanence of these copies. Under 17 U.S.C. § 101, a work is only "fixed," and therefore copyrightable, if it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." RAM copies are ephemeral, for they cease to exist when a program ends or the computer shuts down. Despite this fact, a line of cases starting with *MAI Systems v. Peak Computers* has held that reproductions in RAM are sufficiently fixed for purposes of the Act's requirement.[27]

The Substantial Similarity Test for Computer Programs

In cases where direct and complete copies of virtual items are made, the determination of infringement should be relatively straightforward. Inevitably, conflicts will arise where the question of copying is not as clear-cut, and a substantial similarity test should be utilized. In *Computer Associates International v. Altai,* the Second Circuit created a three-part "abstraction, filtration, and comparison" test to resolve this issue in relation to computer programs.[28]

The abstraction step is meant to determine what elements of a computer program are unprotectable ideas and which are protectable expression:

> At the lowest level of abstraction, a computer program may be thought of in its entirety as a set of individual instructions organized into a hierarchy of modules. As a higher level of abstraction, the instructions in the lowest-level modules may be replaced conceptually by the functions of those modules. At progressively higher levels of abstraction, the functions of higher level modules conceptually replace the implantation of those modules . . . until finally one is left with nothing but the ultimate function of the program.[29]

The second step is filtration, which involves separating out other unprotectable elements, such as "elements dictated by efficiency, elements dictated by external factors, and those taken from the public domain."[30] The final step is to contrast the remaining elements with the alleged infringement. With this relatively vague test as a guide, courts will have some capability to compare similar items to judge infringement.

Conclusion

It is inevitable that virtual worlds will increase in popularity as the capacity for human interaction evolves with the underlying technology. A world like Second Life has built a booming economy on the premise that every user owns all Intellectual Property rights over its creations. Linden Labs has ensured the growth of Second Life by enforcing certain provisions in its Terms of Service to protect wronged creators. The question is whether the legal system will fulfill its part and protect items of virtual property from copyright infringement. Courts have laid the groundwork by establishing that software code is protected in its permanent form on hard drives, and in its temporary form in RAM. The glaring unresolved issue however, is whether items of virtual property fall under the purview of copyright law, for it is difficult to split them into their respective aesthetic and functional parts. If the courts can create a standard or means to adjudicate this issue, then it is likely that an economy based on the sale of virtual objects would be sustainable.

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At Long Last: The Court of Appeals Authorizes Ex Parte Interviews of Treating Physicians

By Nancy May-Skinner

After decades of silence on the issue, the Court of Appeals weighed in to the ex parte interview debate and confirmed that an attorney may privately interview an adverse party's treating physician when the adverse party has placed his or her medical condition in controversy.[1] In order to address the procedural requirements of HIPAA (Health Insurance Portability and Accountability Act of 1996), the Court ruled that upon request, plaintiffs must provide a HIPAA authorization permitting the defendant to *request* an ex parte interview. It remains the treating physician's prerogative to accept or reject the request.

A. Historical Background

Over the past four decades, the lower courts had grappled with the propriety of ex parte interviews. During the 1970s, the courts were asked to decide whether ex parte interviews should be permitted during the discovery phase of personal injury actions.[2] The courts answered in the negative based upon the absence of any authority in the local rules or the Civil Practice Law and Rules ("CPLR") expressly authorizing them.[3] Subsequently, in the late 1980s and early 1990s the appellate courts revisited the issue and limited their prior holdings to ex parte interviews sought during discovery.[4]

After this judicial distinction was drawn between pre– and post–Note of Issue ex parte interviews, defense counsel began routinely seeking and conducting interviews of plaintiff's treating physicians after discovery was concluded. The interviews remained voluntary on the part of the treating physician and were initiated by the service of a non-party subpoena and request to meet informally. Neither the court nor the plaintiff's attorney was involved in requesting or conducting the interview. In fact, the interviews were typically conducted without notice to either.

This informal practice came to a screeching halt with the enactment of HIPAA and the associated Privacy Standards, enforced effective 2003.[5] While neither HIPAA nor the Privacy Standards expressly addressed this practice, they presented a practical obstacle to ex parte interviews by requiring physicians to obtain HIPAA authorization before making any disclosures. Treating physicians began to refuse defense counsel's requests for ex parte interviews absent provision of a HIPAA authorization. Not surprisingly, when defense counsel requested authorizations from the plaintiffs, they were not inclined to voluntarily comply. As a consequence, defendants were forced to involve the courts, and a flurry of motions to compel provision of HIPAA authorizations followed.

The Supreme Court decisions addressing these motions yielded a variety of outcomes, leaving counsel with no consistent guidance regarding the permissibility, scope or method for obtaining ex parte interviews under HIPAA.[6] Some courts allowed pre-HIPAA type ex parte interviews while others completely denied them.[7] Not surprisingly, the bulk of the decisions struck a balance between the two extremes, allowing ex parte interviews with certain limiting conditions.[8]

B. The Appellate Courts Weighed In

After two years of conflicting Supreme Court–level decisions, the Second and Fourth Departments of the Appellate Division took on the ex parte interview issue. Relying upon long-standing provisions or the Civil Practice Law & Rules ("CPLR") and not HIPAA, each court ruled that the absence of statutory authority for ex parte interviews precluded the courts from compelling plaintiffs to provide HIPAA authorizations for ex parte interviews. As a practical matter then, ex parte interviews were history.

1. The *Arons* Case

In December of 2006, the Second Department became the first appellate court to rule on the effect of HIPAA, if any, on ex parte interviews.[9] The court noted that this was an ". . . issue of first impression regarding the interplay of . . . HIPAA . . . and the defense bar's informal practice of privately interviewing plaintiffs' non-party treating physicians after a Note of Issue has been filed."[10] The Second Department started with the premise that prior to HIPAA, it had *not declared* that defendants had a right to ex parte interviews.[11] Rather, it had *merely allowed* the testimony of treating physicians who had voluntarily submitted to these interviews. The Court noted that while the enactment of HIPAA did not alter the precedent allowing ex parte interviews, it did present a practical obstacle to defense counsel, who were now being asked to provide HIPAA authorizations before subsequent treating physicians would participate in the interviews.[12] Not surprisingly, insofar as plaintiffs were not willing to authorize these ex parte interviews, defendants were required to move to compel provision of HIPAA authorizations allowing the in-

terviews.[13] In this case, the Supreme Court had granted the motion requiring provision of authorization.

The Second Department reversed, finding that there was no authority for conducting ex parte interviews under CPLR Article 31.[14] In the absence of this statutory authority, the ". . . courts should not become involved in post–Note of Issue trial preparation matters and should not dictate to plaintiffs or defense counsel the terms under which interviews with non-party witnesses may be conducted."[15] Finally, in recognition of the unsettled nature of the law regarding ex parte interviews, the appellate division granted the defendants leave to move for permission to conduct pre-trial discovery regarding the treating physician.[16]

2. The *Webb* Case

Following *Arons*, the Second Department revisited the ex parte interview issue in *Webb v. New York Methodist Hospital*.[17] In *Webb*, the court referred to the *Arons* decision and granted the same relief.

3. The *Kish* Case

Becoming the second appellate court to consider the ex parte interview issue, the Fourth Department of the Appellate Division followed suit and denied the defendant's motion to compel plaintiff's production of HIPAA authorizations to conduct ex parte interviews.[18] The court concurred with the Second Department's analysis, finding that the absence of authority for interviews in CPLR Article 31 precluded the relief sought by defendants. It then went on to identify four "compelling reasons for prohibiting such interviews."[19] First, there was no statutory authority for the interviews.[20] Second, other discovery procedures were available to obtain records and non-party depositions.[21] These procedures provided for the presence of opposing counsel and as such, guarded against privileged disclosures.[22] Third, the information sought was subject to the doctor-patient privilege; and fourth, there was no reason to allow interviews after the filing of the Note of Issue that were not permitted before the filing of the Note of Issue.[23]

In a spirited dissent, two justices of the Fourth Department argued that the order compelling plaintiff to provide HIPAA compliant authorizations should have been affirmed. The dissenters argued that the rationale for permitting ex parte interviews and the case law supporting them were still valid after HIPAA. The rationale cited was fairness and equal access to the evidence.

> [A] rule disallowing ex parte communications with a plaintiff's treating physicians attempts to ensure the confidentiality of the physician-patient relationship at the expense of the defendant. Allowing a plaintiff to have free access to potentially important facts and/or expert witnesses, while requiring the defendant to use more expensive, inconvenient, and burdensome formal discovery methods tilts the litigation playing field in favor of the plaintiff (*Conning the IADC Newsletters*, 71 Def. Couns. J. at 210, quoting Jennings, *The Physician-Patient Relationship: The Permissibility of Ex Parte Communications between Plaintiff's Treating Physicians and Defense Counsel*, 59 Mo. L. Rev. 441, 475 [1994]).

The dissenters distinguished *Arons*, holding that post–Note of Issue interviews constituted trial preparation, not discovery.[24] Consequently, the absence of statutory authority in CPLR Article 31 was not determinative.[25] Rather, as with any other non-party fact witness, interviews were permissible trial preparation.[26]

The dissenters then responded to the majority's four compelling reasons. First, the absence of statutory authority in the CPLR permitting ex parte interviews was irrelevant as there were no such rules for any non-party interviews.[27] Second and fourth, formal discovery techniques were more expensive, inconvenient and burdensome than ex parte interviews.[28] The resulting interruption in the practice of physicians was particularly burdensome.[29] Third and finally, authorizations for ex parte interviews could be limited in scope and the plaintiff waived the physician-patient privilege by raising his/her medical condition as an issue.[30]

Finally, the dissenters cited to out-of-state and in-state precedents supporting their determination that HIPAA had not changed the law in New York permitting ex parte interviews.[31] Accordingly, the Supreme Court's order compelling the provision of HIPAA authorizations should have been affirmed.

C. Appeal to the Court of Appeals

Motions for leave to appeal to the Court of Appeals were granted by the Second and Fourth Departments pursuant to CPLR 5602(b)(1). The cases were joined for purposes of the appeal and oral argument. In addition to the briefs filed by the five appellants and three respondents in the *Arons*, *Webb* and *Kish* cases, amicus briefs were filed by the New York State Trial Lawyers Association and the New York City Health and Hospitals Corporation. The Court heard oral argument on October 17, 2007.

At oral argument, the Court explored the ex parte interview issue from the perspective of all of the rel-

evant players: the parties, the physicians, the attorneys and the courts. In addressing the rights of plaintiffs, the Court focused on the existence and scope of the physician-patient privilege. While the parties were willing to concede that the commencement of litigation constituted a waiver of the privilege,[32] there was disagreement regarding the scope of that waiver. Not surprisingly, plaintiffs argued that the waiver applied only to the specific medical condition at issue in the litigation, whereas the defendants advocated for a much broader view. The Court suggested that limits could be placed on interviews to preserve a limited waiver, but the plaintiffs steadfastly maintained that this would not prevent abuses by defense counsel in an unsupervised interview. The Court asked about leveling the playing field. While the defendants posited that fairness required equality of access to this relevant medical evidence, the plaintiffs argued that the field is not level to begin with as the bias of treating physicians against plaintiffs often prevents or limits their access. The Court inquired as to the efficacy of other discovery devices as an alternative to ex parte interviews. The plaintiffs supported this alternative while defense counsel maintained that formal discovery was no substitute for informal interviews.

The Court also focused on the concerns of treating physicians over the time and money spent addressing requests for ex parte interviews. The relative costs of depositions versus informal interviews were discussed. The Court noted that treating physicians remain free to refuse requests for ex parte interviews. It also addressed the alternative federal system of deposing all experts or the possibility of deposing IME physicians as well as treating physicians.

The Court also addressed relevant precedent, HIPAA and the role of the courts in supervising the interviews, if permitted. On the precedent issue, the Court raised two recent cases in which it allowed informal interviews of non-physician fact witnesses.[33] Responding to the Court's inquiries regarding HIPAA, the parties conceded that nothing in HIPAA or the Privacy Standards affected New York State precedent allowing post–Note of Issue interviews. Rather, HIPAA merely presented a practical obstacle to the process. Finally, the Court inquired as to the effect its decision would have on the lower courts. If interviews were allowed, the trial courts would be charged with ordering and policing them. If interviews were not allowed, the lower courts would face a surge in motions for non-party depositions and the burden of policing those proceedings.

D. The Decision

The Court of Appeals reversed in all three cases, finding that the defendants were entitled to HIPAA authorizations permitting them to request ex parte interviews with plaintiffs' treating physicians. The Court specifically rejected the practice of requiring disclosure following ex parte interviews.[34]

The Court started by acknowledging the importance of informal discovery and citing to the recent precedent allowing private interviews of fact witnesses in other contexts.[35] In *Niesig*, *supra*, the Court allowed private interviews of corporate employees with the exception of employees whose acts or omissions were binding on or imputed to the corporation or employees implementing the advice of counsel.[36] In *Siebert*, *supra*, the Court allowed ex parte interviews of a party's former employee.[37] Relying on these precedents and the absence of any ". . . reason why a non-party treating physician should be less available for an off-the-record interview than the corporate employees in *Niesig* or the former corporate executive in *Siebert*," the court extended the common law rule to include ex parte interviews of non-party treating physicians.[38]

The Court noted that by bringing a personal injury action, a plaintiff placed his or her mental or physical condition in issue and thereby waived the physician-patient privilege.[39] Fairness required this waiver as a plaintiff ". . . should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim."[40]

The Court held that the absence of a specific statutory provision authorizing ex parte interviews was not determinative of their permissibility. Interviews have long been part of an attorney's trial preparation and ". . . Article 3101 does not 'close off' these 'avenues of informal discovery' and relegate litigants to the costlier and more cumbersome formal discovery devices."[41] These more informal methods would interfere less with the treating physician's practice of medicine.[42]

The Court also dismissed plaintiff's complaints regarding the "danger of overreaching" in a private interview.[43] An attorney is ethically required to identify his client and interests in a private interview and make it clear to the physician that the interview is voluntary and limited in scope to the medical condition at issue.[44]

Finally, the court rejected the long-standing practice of not seeking an ex parte interview until after the filing of the note of issue.[45] While post–Note of Issue interviews are permissible, they are not recommended as a party is left with no recourse if a treating physician refuses the interview at this late stage in the litigation.[46] If the interview is sought and refused while discovery is still pending, the party seeking the interview can pursue formal discovery against the doctor.[47]

E. The Dissent

In a spirited dissent consistent with his questioning at oral argument, Justice Pigott argued that ex parte interviews are neither necessary nor authorized.[48] He rejected the majority's characterization of ex parte interviews as trial preparation. Citing to the absence of any statutory authority for ex parte interviews, Justice Pigott characterized the interviews as unauthorized discovery. He particularly objected to ex parte interviews conducted after the filing of the Note of Issue based upon the Uniform Rules' limitation of post–Note of Issue discovery to cases of "unusual or unanticipated circumstances."[49]

F. Future Impact of *Arons*

While the Court of Appeals has now confirmed that ex parte interviews are permissible, the practical application of this ruling may require further decisions "fine tuning" the process. It is clear that a defendant is entitled to HIPAA authorizations permitting the interview. It is equally clear that defendants must "reveal the client's identity and interest" and "advise physicians that they need not comply with the request for an interview."[50] Whether the plaintiffs will be permitted to weigh in to this notification process and if so, how, are likely to be sources of debate between plaintiffs and defendants.

Similarly, while it is clear that defendants must make it clear to physicians that the interview is ". . . limited in scope to the particular medical condition at issue in the litigation," the definition and scope of the "medical condition" is likely to be a source of continued disagreement among the parties.[51] Whether plaintiffs will be allowed to weigh in to define the scope of the interviews and the extent of their involvement remains to be seen.

It is not difficult to predict that defendants will begin routinely demanding HIPAA authorizations for all treating physicians, and plaintiffs will seek to limit those authorizations as much as possible. It is equally likely that the parties will turn to the courts to "fine-tune" the mechanics of the ex parte interview process. Thus, while Arons answered the fundamental question regarding the permissibility of ex parte interviews, it is likely that the courts will be called upon to weigh in and refine that answer in the future.

Endnotes

1. *Arons v. Jutkowski*, 2007 NY Slip Op. 09309 (2007).
2. *Cwick v. City of Rochester*, 54 A.D.2d 1078 (4th Dep't 1976); *Anker v. Brodnitz*, 98 Misc. 2d 148, *aff'd*, 73 A.D.2d 589 (2d Dep't 1979), *lv den.*, 51 N.Y.2d 703 (1980).
3. *Id.*
4. *Fraylich v. Maimonides Hosp.*, 251 A.D.2d 251 (1st Dep't 1998); *Levande v. Dines*, 153 A.D.2d 671 (2d Dep't 1989); *Tiborsky v. Martorella*, 188 A.D.2d 795 (3d Dep't 1992); *Luce v. State of New York*, 266 A.D.2d 877 (4th Dep't 1999).
5. HIPAA, passed by Congress in 1996, required Health and Human Services ("HHS") to issue regulations governing the disclosure of protected health information ("PHI"). HHS published the Privacy Standards in 2000, modified them in 2002, and began enforcing them in 2003.
6. *Valli v. Viviani*, 7 Misc. 3d 1002(A) (2005) (HIPAA did not change the law permitting post–Note of Issue interviewing); *Holzle v. Health Care Servs. Group*, 7 Misc. 3d 1027 (2005) (HIPAA authorization not required for ex parte interview); *Browne v. Horbar*, 6 Misc. 3d 780 (2004) (motion for ex parte interview denied); *see Hitchcock v. Suddaby*, 7 Misc. 3d 1026 (2005)(ex parte interview conditioned on service of subpoena and letter with specified disclosures); *Smith v. Rafalin*, 6 Misc. 3d 1091 (2005) (interview allowed with condition that any records received at the interview be disclosed); *Steele v. Clifton Springs Hospital*, 6 Misc. 3d 953 (2005) (ex parte interview limited to medical condition at issue and any recorded statements by the doctor were required to be disclosed); *O'Neil v. Klass* (Supreme Court, Kings County 2004) (interview permitted with prohibition to disclose PHI); *Keshecki v. St. Vincent's Med. Ctr.*, 5 Misc. 3d 593 (2006) (interview would require special authorization and post-interview disclosure); *Beano v. Post* (Supreme Court, Queens County 2006) (interview allowed with special authorization and post-interview disclosure).
7. *Valli v. Viviani*, 7 Misc. 3d 1002(A) (2005) (HIPAA did not change the law permitting post-Note of Issue interviewing); *Holzle v. Health Care Servs. Group*, 7 Misc. 3d 1027 (2005) (HIPAA authorization not required for ex parte interview); *Browne v. Horbar*, 6 Misc.3d 780 (2004) (motion for ex parte interview denied).
8. *See Hitchcock v. Suddaby*, 7 Misc. 3d 1026 (2005) (ex parte interview conditioned on service of subpoena and letter with specified disclosures); *Smith v. Rafalin*, 6 Misc. 3d 1091 (2005) (interview allowed with condition that any records received at the interview be disclosed); *Steele v. Clifton Springs Hospital*, 6 Misc. 3d 953 (2005) (ex parte interview limited to medical condition at issue and any recorded statements by the doctor were required to be disclosed); *O'Neil v. Klass* (Supreme Court, Kings County 2004) (interview permitted with prohibition to disclose PHI); *Keshecki v. St. Vincent's Med. Ctr.*, 5 Misc. 3d 593 (2006) (interview would require special authorization and post-interview disclosure); *Beano v. Post* (Supreme Court, Queens County 2006) (interview allowed with special authorization and post-interview disclosure).
9. *Arons v. Jutkowski*, 37 A.D.3d 94 (2d Dep't 2006).
10. *Id.* at 95 (2d Dep't 2006).
11. *Id.* at 97 (2d Dep't 2006).
12. *Id.*
13. *Id.* at 98-9 (2d Dep't 2006).
14. *Id.* at 100 (2d Dep't 2006).
15. *Id.* at 101 (2d Dep't 2006) *quoting Holzle v. Healthcare Sers. Group*, *supra* at 7 (2005).
16. *Id.*
17. 35 A.D.3d 457 (2d Dep't 2006).
18. *Kish v. Graham*, 40 A.D.3d 118 (4th Dep't 2007).
19. *Id.* at 123 (4th Dep't 2007).
20. *Id.*
21. *Id.*

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 129 (4th Dep't 2007).
29. *Id.*
30. *Id.*
31. *Id.* at 133 (4th Dep't 2007).
32. See *Koump v. Smith*, 25 N.Y.2d 287 (1969).
33. *Niesig v. Team 1*, 76 N.Y.2d 372 (1990); *Siebert v. Ituit*, 8 N.Y.3d 506 (2007).
34. *Arons*, *supra* at 24-25 (2007).
35. *Niesig v Team I*, 76 N.Y. 2d 372(1990); *Siebert v. Ituit*, 8 N.Y.3d 506 (2007).
36. *Niesig* at 374 (1990).
37. *Siebert* at 511 (2007).
38. *Arons* at 12 (2007).
39. *Id.*
40. *Id.*
41. *Id.* quoting *Niesig*, *supra* at 372 (1990).
42. *Id.*
43. *Id.*
44. *Id.*
45. *See Anker v. Brodnitz*, *supra*.
46. *Arons*, *supra* at 17 (2007).
47. *Id.*
48. *Id.* at 31 (2007).
49. *Id.* citing 22 N.Y.C.R.R. 202.21(d).
50. *Id.* at 15; fn. 6 (2007).
51. *Id.* at 15 (2007).

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Adverse Possession: What Hath the New York Legislature Wrought?

By Prof. Robert E. Parella and Prof. Robert M. Zinman

On July 7, 2008, Governor Paterson signed S. 7915-C into law (attached hereto as Appendix A), which makes major changes in this state's adverse possession law. Adverse possession is the doctrine that determines the running of the 10-year statute of limitations for ejectment from real property. While the new law contains some improvements to the prior law (based on portions of a rejected proposal of the Real Property Law Section of the New York State Bar Association), the new law is ambiguous, contradictory and, because it looks to the mind rather than the acts of the adverse possessor to determine the validity of the adverse possession claim, it undermines the property rights of thousands of real property owners, especially homeowners, in this state and will encourage litigation. The Real Property Law Section opposed the legislation and urged a veto. A copy of the Memorandum in Opposition by the Section is attached as Appendix B to these materials.

The New York Court of Appeals in *Walling v. Przybylo*[1] held that an adverse possessor's state of mind did not affect the running of the 10-year statute of limitations for ejectment from real property. While the decision correctly articulated the law of New York, the decision had been perceived by some as unfairly permitting a possessor to take property from an unsuspecting owner by stealth. In response to this perception the legislature in 2007 enacted legislation that would have prevented acquisition of property by adverse possession unless proof were shown that the possessor and predecessors in possession had no knowledge that the property belonged to another.

Because this knowledge approach would have potential disastrous unintended consequences for titles in New York, the Section, then under the chairmanship of Karl B. Holtzschue, urged that the Governor veto the legislation, which he did. The Section then created a Task Force on Adverse possession to propose amendments to the adverse possession law that would prevent acquisition of property through adverse possession by stealth, while at the same time preserving the sanctity of real estate titles in this state. The proposal of the Task Force was adopted unanimously by the Section's Executive Committee and the Executive Committee of the New York State Bar Association, and was introduced in the legislature as S. 7915. A copy of the NYSBA's Memorandum in support of the Task Force Bill is attached as Appendix C.

The Task Force proposal was gutted and rewritten by the legislature as S.7015-C based on objections raised by a combination of individuals and certain members of the New York State Land Title Association (NYSLTA) who, in our judgment, did not appear to understand adverse possession law or the consequences of the bill, or had special motives for objecting.

Part I of these materials will discuss the *Walling* decision, which gave rise to the legislative proposals, and the origin of the Task Force proposal in the context of the history of adverse possession law in New York, and demonstrate how the newly enacted legislation has overturned hundreds of years of settled law. **Part II** will review the irresponsible drafting flaws made to the Task Force proposal, pointing out how the newly enacted legislation threatens to create havoc and endless litigation with respect to determination of ownership of real property in this state. The materials **conclude** by suggesting the urgent need for a comprehensive revision of the statute in an atmosphere in which drafters would put aside preconceived notions and personal advantage to achieve a statute that could set a precedent for enlightened adverse possession law throughout the nation.

I. *Walling*, the Task Force, and the Law of Adverse Possession

a. *Walling*

There were reasons to consider the *Walling* decision as unexceptional. First, a virtually unbroken line of authority in the Court of Appeals, over about 150 years, had held that the subjective state of mind of the adverse possessor is immaterial. Rather, it is sufficient that the possession is not permissive. Second, *Walling* was in accord with the majority rule in this country, a view recently reaffirmed this year by a Maryland appellate court, *Yourik v. Mallonee*, 921 A.2d 869 (Md. App. 2008). Third, title by adverse possession rests upon a cause of action in ejectment on which the statute of limitations has run. The historical and logical view is that there is a cause of action in ejectment whether the adverse possessor thinks he is on his own land or knows that he is not. But *Walling* soon became controversial in certain quarters.

The losing parties, joined by some other landowners, took their fight to the legislature and the popular press. There were two principal arguments made. First,

Walling allowed one person, who knew he or she did not own the land, to steal another's property. Second, the stealing occurred even though the record owner had no reasonable opportunity to know of the adverse possession. The fact is that there was no finding that the Wallings knew they did not have record title to the disputed strip, and the Wallings have vigorously protested that they had no such knowledge. Further, no appeal was taken from the lower court finding that there were sufficient acts to constitute possession of the improved portion of the strips. The popular press did not address these aspects of the case. The provocative and newsworthy event was an alleged legally sanctioned stealth taking of another's property, especially a taking by a knowledgeable lawyer who happened to be working in the courts.

b. The Task Force Proposal

The legislature responded with passage of a terse bill in 2007. The Section submitted a memorandum to the governor urging a veto and the governor did veto the bill. The Task Force was then organized and undertook its promised study of the law of adverse possession. The result was a proposed bill, substantially revising article 5 of the RPAPL, and a Legislative Memorandum in support. The principal recommendations were: (1) the objective standard should be retained and not replaced with a knowledge standard, and (2) stealth taking should be prevented by mandating that acts of adverse possession must be sufficiently open to give reasonable notice of an adverse claim. In addition, certain ameliorative changes were made including a significant change with regard to the troublesome problem of boundary line disputes among neighbors, and the inclusion of the first statutory definition of adverse possession.

With respect to state of mind, the Task Force analyzed whether the law should prevent a possessor from acquiring title if the possessor knew he was not the record or true owner. Today there is considerable support, at least with some of the public, for the proposition that knowledge should disqualify an adverse possessor because it smacks of legal larceny. The difficulty is with crafting such a statute that does not scuttle the many continuing beneficial effects of the doctrine of adverse possession. There may be some technical defect or break in the chain of title for any of several different reasons, e.g., inadvertent failure to record a deed lost or not indexed at the recorder's office. Thus there is no good paper chain back to the sovereign. In such cases the doctrine will often be protecting a true owner by making title marketable, mortgageable and insurable.

Further, a statute that requires lack of knowledge inevitably places the burden on the possessor. Often the possessor would have to prove the state of mind upon entry of a predecessor in title, perhaps an ancestor, who is missing or dead. This can easily frustrate the fundamental goals of statutes of limitations—eliminating or minimizing the dispositive effect of lost and stale evidence, and providing for repose after reasonable passage of time. In some cases there may be no effective statute of limitations at all and, consequently, loss of the value of substantial capital improvements made by a possessor or predecessor. In *Walling* itself, a trial on the issue of knowledge would have turned upon credibility and recollection of witnesses about a 1986 conversation as testified to in 2004. Walling had sworn that a certain barbed-wire tree had been pointed out as the boundary line by the developer-seller. The Przybylos submitted an affidavit from the prior owner-developer contradicting Walling and, on that basis, the lower court vacated the judgment and ordered a hearing, which never occurred. If the Wallings had inherited or purchased the property from someone who had died, there would likely be no evidence to offer in their behalf. Indeed, in a given case, a title could actually turn upon which party was the more effective or more willing perjurer.

A special case can arise in New York City and other urban areas. Parcels are often assembled for development. Frequently there are relatively small gores or strips between parcels. The common practice in the title industry is to insure, either on the existing facts or with a deed purporting to transfer the gore or strip, because passage of time will make the title secure. However, knowledge exists in these cases and a knowledge standard would place a cloud over development.

On balance, the Task Force believed there would be a greater loss with a knowledge standard, especially in routine real property transactions. It also believed that there are relatively few cases of a possessor knowingly taking possession of a tract owned by another, making expensive improvements on it, and hoping to get away with it for the required 10 years. At any time prior thereto, the adverse possessor could be easily discovered, ejected, liable for damages for up to six years, and unable to recover the value of improvements made.

The Task Force did see boundary-line disputes between neighbors as a special, troublesome, and frequently occurring problem. These could involve a misplaced fence or shrub, or routine maintenance across a boundary line. Often these acts involve no great reliance and expenditures; they may have originated with predecessors of one or both parties, may well have been impliedly if not expressly permissive originally, and can upset record and survey boundaries over relatively minor intrusions. The Task Force proposed a new section 543. Routine acts of maintenance across a boundary line would be deemed permissive as

a matter of law and thus not subject to adverse possession. Encroachments of removable fences, shrubbery and the like for up to twelve inches would be deemed permissive. The 12-inch distance was chosen because of the practice of title companies to insure against such encroachments, based upon D&B-4 of the NYSLTA Recommended Practices (1995). Further, the Monroe County Contract of Sale provides that a fence encroachment of less than one foot shall not be an objection to title.

In *Walling*, there were various acts recited in the appellate opinions although, as indicated above, the sufficiency of the acts was not before the Court of Appeals or the Appellate Division. One act recited was an underground pipe and another was placement of a birdhouse on the disputed strip. These seemed to be singled out as the basis for the complaint that a record owner could lose title without even knowing of an adverse claim. The Task Force research indicated that the law was satisfactory with respect to underground pipes and the like, and that they were typically deemed not open and notorious. The Task Force's proposed bill added a definition of adverse possession that included the familiar open and notorious requirement. But it went further and provided that the acts had to be "sufficiently open to put a reasonably diligent owner on notice." It was felt that this explicit legislative mandate would underscore the salutary purpose of the open requirement to alert record owners, and perhaps avoid any potential injustice. The Task Force believed this would prevent any taking by stealth because the adverse possessor's acts would have to be sufficient to put the owner on notice.

c. The Legislative and N.Y.S. Land Title Association Response

The Task Force Memorandum and Proposed Bill (see Appendix C) were unanimously approved by both the Executive Committees of the Real Property Law Section and the Executive Committee of the NYSBA. The bill was introduced along with the Memorandum in Support and a Sponsor's Memorandum. As the legislative session was nearing its close, the Task Force was hopeful, and had some reason to be hopeful, that the bill would be enacted into law. At the eleventh hour, however, NYSLTA indicated that it wished some amendments. It then got introduced separately almost all of the Task Force bill, but with a "reasonable belief" requirement that undermined a central purpose of the bill. Under the requirement, title by adverse possession could not occur unless the possessor had a "claim of right," which was defined to mean that the adverse possessor must have had a reasonable basis for the belief the property belonged to the adverse possessor, which cut the heart out of the Task Force proposal. It also represented a departure from settled principles of law.[2]

The NYSLTA opposition was puzzling. The Task Force believed, in January of 2008, that NYSLTA had approved the proposal. Apparently some within NYSLTA, presumably the claims people, saw their version as an easy vehicle for defeating adverse-possession claims against their insureds. But title companies often rely on statutes of limitation in general, and adverse possession in particular, in writing policies in their office practice and transaction business. It would be ironic if a new cottage industry developed of opportunists who search titles to find some gap or defect in the chain. The present successor to the last record owner of 50 or more years ago could put the present possessor to proof of the state of mind of the original entrant, or perhaps the possessor's own state of mind on a matter that may never have been considered. The ironic result could be a new category of claims and litigation against insureds and their insurers.

Finally, title policy boiler plate usually excepts rights of persons in possession, thus putting the burden on the purchaser-insured so long as the title company does not negotiate away the exception. Apart from the boundary-line cases where intrusions can go undetected, it seems a small burden for a record owner to view the property at some time for open acts of possession, improvement or cultivation by another. In short, perhaps the enacted statute may indeed help defeat some claims but at a considerable price, and not on a principled, but rather on an arbitrary, basis. The State Bar submitted a Memorandum in Opposition to the amended bill (Appendix B) but this so-called amended version became the law. It is believed here that the statute now enacted is unsound in policy, is self-contradictory, and raises very difficult if not insoluble interpretation issues.

II. Irresponsible and Unintelligible Drafting

While the changes the legislature made to the Task Force proposal (primarily the requirement that the adverse possessor must have a claim of right) were ill-conceived, the hasty drafting of the revisions to the Task Force language made the resulting legislation virtually unintelligible. The following is a summary of some of the interpretative problems the legislature left for the courts to resolve.

a. Claim of Right as Defined in § 501(3) Conflicts With the "With or Without Knowledge" Language of § 501(1).

The amended law requires in § 501(2) that the adverse possessor enter with a claim of right, which is defined in § 501(3) as requiring proof that the adverse possessor had a reasonable basis for the belief that it owned the property in dispute. However, § 501(1) retains the Task Force language that defines an adverse possessor as one who occupies property "with or with-

out knowledge" of another's superior rights. It would seem impossible for an adverse possessor to have both knowledge of another's superior rights ***and*** no reasonable basis to believe that someone had superior rights.

The two provisions seemingly are in direct conflict. This places the heart of the modifications to the Task Force proposal in doubt. It would seem that the conflict gives the judge the ability to go any way he or she wants. We suspect that the courts may eventually conclude that a person may be an adverse possessor without a reasonable basis for belief it owns the property, but without such belief cannot acquire title even after the running of the statute of limitations.

b. Definition of "Claim of Right" Does Not Make Sense.

Although it would seem that the intention of those who objected to the Task Force proposal was to require the adverse possessor to have a reasonable basis for belief that the adverse possessor owned the property, the definition of "claim of right" in the enacted legislation doesn't say that. Section 501(3) defines "claim of right" as having a reasonable basis for the belief that the property "belongs to the adverse possessor ***or property owner***, as the case may be" (emphasis added). The quoted language literally indicates that an adverse possessor could meet the "claim of right" requirement even if the adverse possessor had a reasonable basis for belief that the *true owner and not the adverse possessor* owned the property![3]

Is "reasonable basis for belief" an objective or subjective standard, or both? Stated another way, if the adverse possessor enters knowing that someone else is the owner of record, but still has a reasonable basis for belief of ownership, has the test been met? For example, a possessor knowing who is record owner thinks an ancestor acquired title previously.

c. Inconsistent Results Due to Inconsistent Language

(i) Time of testing "claim of right." "Claim of right" is tested under § 511 (adverse possession under a written instrument) at the time the adverse possessor or its predecessors "entered" into possession.[4] "Claim of right" is tested under section 521 (adverse possession under a claim not written) throughout the continued occupation of the property.[5] Did the legislature actually intend that claim of right should be interpreted differently depending on whether or not the adverse possessor entered under a written instrument? If the statute is interpreted in accordance with its plain language, the existence of a written instrument will determine the result. For example, where claim of right is tested on entry, the occupier who enters without knowledge but subsequently acquires knowledge would nevertheless be protected when the ejectment action is brought. On the other hand, where claim of right is tested throughout the period of adverse possession, the occupier entering without knowledge of the owner's rights but subsequently acquiring such knowledge could be ejected.

Furthermore, for claim of right under a written instrument, § 511 states that the occupant "or those under whom the occupant claims" must have entered under a claim of right. Since the disjunctive is employed, if the predecessor in possession had no claim of right (i.e., deliberately took the owner's property by adverse possession), the current occupant would still be protected if the current occupant had a reasonable basis for belief that it owned the property.

(ii) Reachback of "claim of right." A related problem involves the extent of the reachback of the claim-of-right requirement. For adverse possession under a written instrument, § 511 requires a claim of right for the occupant and its predecessors at the time of entry, while for adverse possession not under a written instrument, § 521 requires a claim of right throughout the "actual continued occupation." Do these provisions mean that a claim of right must be determined for every predecessor in possession, some of whom may be dead?

With respect to § 511 (adverse possession under a written instrument), as indicated above, claim of right is required for the occupant "or those under whom the occupant claims." With respect to § 521 (adverse possession not under written instrument) claim of right is required during the "actual continued occupation of premises," which seems to refer to all possessors. At the Real Property Law Section Summer Meeting in 2008, Ben Weinstock suggested that one would have to find a claim of right for those occupying the premises only over the previous 10-year period, the statutory period for adverse possession. The Weinstock argument makes sense, and, if successful, would mitigate the impossible burden that claim of right for all occupants would place on the adverse possessor and allow possessors of property to breathe easy after 10 years under a claim of right. However, only future court decisions will determine if the argument will succeed.

d. Other Complexities

(i) Burden of proof for claim of right. The statute is silent on who has the burden of proof as to claim of right. If the adverse possessor is bringing a quiet title action, it would seem that the adverse possessor should have the burden of showing that there was a reasonable basis for belief that it owned the property. On the other hand, in the normal situation it would be the owner who brings an action in ejectment against the adverse possessor. The adverse possessor still has the burden of proof but might then defend claiming that the owner

is time barred by the statute of limitations. However, under § 501(3), the adverse possessor is not required to establish claim of right if the owner of the real property cannot be ascertained in the land records and located by reasonable means. This was apparently intended to deal with the gores and strips problem mentioned above, but the statute is not limited to such situations.

(ii) Vague language. The Task Force proposal contained some innovative approaches to avoid litigation among homeowners. Among these were provisions that would exclude as grounds for adverse possession the mowing of lawns and other acts of routine maintenance. In addition, discrepancies caused by fences, hedges and shrubbery within one foot of the property line were excluded. The one foot limitation was certainly negotiable. However, as changed by the legislation, the exclusion, somewhat modified, was limited to *de minimis* encroachments. No definition of *de minimis* is provided. Thus, the statutory language will most probably raise litigable issues of fact, and it could be interpreted differently by judges throughout the state.

(**iii) Unexplained deletions.** One of the essentials of adverse possession in the New York statute has traditionally been that the property has been "usually cultivated or improved."[6] The Task Force proposal, in order to deter stealth taking of property, added that acts of adverse possession would have to be sufficiently open to put a reasonably diligent owner on notice. When the Task Force proposal was revised by the legislature, the reference to cultivation and improvement was deleted without explanation. We understand that the deletion was a compromise between those who wanted to delete "cultivation" and those who wanted to retain both "cultivation" and "improvement."

Perhaps both cultivation and improvement are surplusage in light of the Task Force language that all acts will be tested on whether they would put a reasonably diligent owner on notice. However, the deletion without explanation raises concern that certain types of traditional cultivation might not pass muster as a sufficient basis for adverse possession.

(iv) To what does the law apply? Section 9 provides that the act shall take effect immediately, "and shall apply to claims filed on or after such effective date." Does the law apply only to actions in ejectment, or quiet title actions instituted after the effective date? Suppose a person has occupied property pursuant to the unamended statute for the period of the statute of limitations, thus giving the adverse possessor title. Can the adverse possessor be ejected after the statute has been amended on the ground that the possessor did not have a claim of right during the statutory period? If so, would this constitute a retroactive taking of property? In any case, the effective date can easily become another source of troublesome litigation.

III. Conclusion

Our examination of the new adverse possession law in New York reveals that it is unsound in policy, raises very troublesome questions of interpretation, and should be revisited and revised by reasonable people acting in the best interest of the State of New York and its citizens.

Endnotes

1. *Walling v. Przybylo*, 7 N.Y.3d 228 (2006).
2. *See Brand v. Prince*, 35 N.Y.2d 634 (1974) where the Court of Appeals stated: "Reduced to its essentials, [adverse possession] means nothing more than that there must be possession in fact of a type that would give the owner a cause of action in ejectment against the occupier throughout the prescriptive period." (citing 3 American Law of Property, § 15.3).
3. This drafting problem was raised before the Governor signed the legislation. The reaction was that there was no problem because of the words "as the case may be." This explanation appears to make as much sense as the language itself.
4. Section 511 states: "Where the occupant or those under whom the occupant claims entered into the possession of the premises under claim of right. . . ."
5. Section 521 states: "Where there has been actual and continued occupation of premises under a claim of right. . . ."
6. This was contained in section 512 as one of the essentials to adverse possession under a written instrument and in section 521 not under a written instrument.

Professor Robert E. Parella was the Reporter and Professor Robert M. Zinman was the Chair of the New York State Bar Association Real Property Law Section's Task Force on Adverse Possession. However, the opinions expressed in these materials are their own and not necessarily those of any organization with which they are associated. Professor Parella is a full-time Professor of Law at St. John's University School of Law. Professor Zinman retired as a full-time law Professor at St. John's in 2007 but continues to teach two courses a year.

Appendix A

LAWS OF NEW YORK, 2008

CHAPTER 269

[EXPLANATION—Matter in ***italics*** is new; matter in brackets [-] is old law to be omitted.]

AN ACT to amend the real property actions and proceedings law, in relation to adverse possession

Became a law July 7, 2008, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 501 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 501. [~~Action after entry. An entry upon real property is not sufficient or valid as a claim unless an action is commenced thereupon within one year after the making thereof and within ten years after the time when the right to make it descended or accrued~~.] Adverse possession; defined. For the purposes of this article:

1. Adverse possessor. A person or entity is an "adverse possessor" of real property when the person or entity occupies real property of another person or entity with or without knowledge of the other's superior ownership rights, in a manner that would give the owner a cause of action for ejectment.

2. Acquisition of title. An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for an action to recover real property pursuant to subdivision (a) of section two hundred twelve of the civil practice law and rules, provided that the occupancy, as described in sections five hundred twelve and five hundred twenty-two of this article, has been adverse, under claim of right, open and notorious, continuous, exclusive, and actual.

3. Claim of right. A claim of right means a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be. Notwithstanding any other provision of this article, claim of right shall not be required if the owner or owners of the real property throughout the statutory period cannot be ascertained in the records of the county clerk, or the register of the county, of the county where such real property is situated, and located by reasonable means.

§ 2. Section 511 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 511. Adverse possession under written instrument or judgment. Where the occupant or those under whom [~~**he**~~] **the occupant** claims entered into the possession of the premises under claim of [~~**title**~~] **right**, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely; except that when they consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot.

§ 3. Section 512 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 512. Essentials of adverse possession under written instrument or judgment. For the purpose of constituting an adverse possession [~~**by a person claiming a title**~~]**,** founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in [~~**either**~~] **any** of the following cases:

1. Where [~~**it has been usually cultivated or improved**~~] **there has been acts sufficiently open to put a reasonably diligent owner on notice**.

2. Where it has been protected by a substantial [~~**inclosure**~~] **enclosure, except as provided in subdivision one of section five hundred forty-three of this article**.

3. Where, although not [~~**inclosed**~~] **enclosed**, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant. Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared or not [~~**inclosed**~~] **enclosed**, according to the

usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 4. Section 521 of the real property actions and proceedings law, as amended by chapter 116 of the laws of 1965, is amended to read as follows:

§ 521. Adverse possession [~~**under claim of title not written**~~] **not underwritten instrument or judgment**. Where there has been an actual continued occupation of premises under a claim of [~~**title**~~] **right**, exclusive of any other right, but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

§ 5. Section 522 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended to read as follows:

§ 522. Essentials of adverse possession [~~**under claim of title not written**~~] **not under written instrument or judgment**. For the purpose of constituting an adverse possession [~~**by a person claiming title**~~] not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where [~~**it has been usually cultivated or improved**~~] **there have been acts sufficiently open to put a reasonably diligent owner on notice**.

2. Where it has been protected by a substantial [~~**inclosure**~~] **enclosure, except as provided in subdivision one of section five hundred forty-three of this article**.

§ 6. Section 531 of the real property actions and proceedings law, as amended by chapter 375 of the laws of 1975, is amended to read as follows:

§ 531. Adverse possession, how affected by relation of landlord and tenant. Where the relation of landlord and tenant has existed [~~**between any persons**~~**],** the possession of the tenant is deemed the possession of the landlord until the expiration of ten years after the termination of the tenancy; or, where there has been no written lease, until the expiration of ten years after the last payment of rent; notwithstanding that the tenant has acquired another title or has claimed to hold adversely to his landlord. But this presumption shall cease after the periods prescribed in this section and such tenant may then commence to hold adversely to his landlord.

§ 7. Section 541 of the real property actions and proceedings law, as amended by chapter 375 of the laws of 1975, is amended to read as follows:

§ 541. Adverse possession, how affected by relation of tenants in common. Where the relation of tenants in common has existed [~~**between any persons**~~], the occupancy of one tenant, personally or by his servant or by his tenant, is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises has acquired another title or has claimed to hold adversely to the other. But this presumption shall cease after the expiration of ten years of continuous exclusive occupancy by such tenant, personally or by his servant or by his tenant, or immediately upon an ouster by one tenant of the other and such occupying tenant may then commence to hold adversely to his cotenant.

§ 8. The real property actions and proceedings law is amended by adding a new section 543 to read as follows:

§ 543. Adverse possession; how affected by acts across a boundary line. 1. Notwithstanding any other provision of this article, the existence of de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse.

2. Notwithstanding any other provision of this article, the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse.

§ 9. This act shall take effect immediately, and shall apply to claims filed on or after such effective date.

The Legislature of the STATE OF NEW YORK **ss:**

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

JOSEPH L. BRUNO
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly

Appendix B
Memorandum in Opposition

RPLS #XX
S. 7915-C
A.11574-A

July 1, 2008
By: Senator Little
By: M of A Gordon

Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the real property actions and proceedings law, in relation to adverse possession

LAW AND SECTIONS REFERRED TO: Sections 501, 511, 512, 521, 522, 531, 541 and 543 of the Real Property Actions and Proceedings Law.

THE REAL PROPERTY LAW SECTION OPPOSES THIS LEGISLATION

1. This bill contains the same disabilities that caused the Governor in message No. 153 of 2007 to veto S. 5364-A / A.9156 last year.

By requiring proof that the adverse possessor had a reasonable basis for believing the property belongs to the adverse possessor, the bill would, like the knowledge requirement of S. 5364-A of 2007, shift "the focus . . . from the owner's notice that the property is being occupied by someone else, to the possessor's knowledge that a third party may have an ownership interest in the property."[1]

The change from belief in S.5364-A of 2007 to "reasonable basis for belief" in the current bill makes no substantive change to allieviate the unreasonable burden on the possessor. Indeed, the possessor will still have to prove that he or she, or the persons under whom they claim believed it was their property, and in addition, prove that there was a reasonable basis for such belief. Thus, even where it is clear that the adverse possessor sincerely believed the property belonged to him or her, the possessor could lose the property if a court found that the belief by the possessor or those under whom the possessor claims, was not reasonable. What is a reasonable basis for belief is so indefinite that it would permit courts to reach different conclusions based on similar fact situations. As a result homeowners would be deprived of certainty that their property and their improvements will not be taken from them by persons claiming to be the "true owner."

Under this legislation, homeowners who may have purchased and openly occupied property for many years may be called upon to prove that they or those under whom they claim entered the property with a reasonable basis for belief that the property belonged to them, thus requiring knowledge of conversations that may have occurred decades before, or to find other witnesses to dispute claims "after memories have faded, or indeed long after they have passed away."[2] In addition this legislation contains significant drafting ambiguities and raises important issues concerning the ability of New Yorkers to own and convey real property.

This legislation, like last year's bill, was obviously sincerely introduced to remedy a perception that existing law sanctioned or encouraged willful and stealth takings of others' property. Unfortunately, the legislation, if it should become law, will have significant adverse consequences for real estate ownership in New York.

2. The perceived inequity in present law that led to the introduction of this legislation would have been remedied by S. 7915 (unamended), proposed by the New York State Bar Association after a thorough study by its Task Force on Adverse Possession.

The New York State Bar Association's Real Property Law Section established a Task Force on Adverse Possession, charged with the task of proposing language that would deal effectively with the perception (which gave rise to the vetoed proposal) that the present law enabled a person to acquire another's property through stealth. After many months of deliberation and study, the Task Force's conclusions were unanimously approved by the Executive Committee of the New York State Bar Association and resulted in the introduction of S. 7915 (unamended). Under this proposal, acquisition of property by adverse possessors without a reasonable belief the property belonged to the acquirer was made so uneconomic as to render any attempt of acquisition by stealth extremely remote if not highly irrational.

S. 7915 (unamended) would have accomplished this by limiting acquisition by adverse possession to situations where the adverse possessor's actions were "sufficiently open to put a reasonably diligent owner on notice."

Under this specific statutory direction to the courts, the "willful" adverse possessor would have been required to expend funds and effort sufficient to alert the owner that someone was on the property, in the vain hope, over a ten year period, that he or she would not be ejected, while risking extensive damage liability and loss of all improvements. S. 7915 (unamended) would have had none of the adverse consequences of the legislation now before the Governor, and would have protected the innocent homeowner whether that person is the "true owner" or the one who acquired defective title. Attached is a copy of the New York State Bar Association's memorandum in support of S.7915 (unamended), which explains how the proposal would have worked in greater detail and why any attempt to require an analysis of the mind of the adverse possessor would create severe problems of the people of New York.

3. The legislation before the Governor contains numerous inconsistencies, ambiguities and confusing changes that will result in extensive litigation.

In addition to the basic problem of looking to the mind rather than the actions of the adverse possessor discussed above, the bill that passed the legislature represented a hurried attempt at compromise that resulted in numerous drafting problems that will only increase litigation and costs. For example:

(a) The definition of claim of right is unclear in that it requires a reasonable basis for the belief that the property belongs to the adverse possessor ***or*** the property owner. While apparently not intended, the language indicates that an adverse possessor would have a claim of right if the true owner had a reasonable basis for belief that he or she was the true owner. This makes no sense and will only lead to increased litigation.

(b). The words "usually cultivated and improved," long a part of New York's adverse possession law and also a part of the concept of possession from the beginnings of Anglo-American jurisprudence, have disappeared from the legislation without any explanation or justification, leaving only the requirement proposed by the New York State Bar Association in S. 7915 (unamended) relating to the acts of the adverse possessor and intended as a limitation on the words "usually cultivated and improved." There is no indication as to why those words were removed and it is not clear how the courts will interpret that deletion in the litigation that will surely follow.

(c). "Claim of right" is tested under Section 511 for adverse possession under a written instrument at the time the adverse possessor or its predecessors entered into possession. Under Section 521 "claim of right" for possession not under a written instrument is tested throughout the "actual continued occupation" of the property. Similarly, "claim of right" by those under whom the occupant claims is provided in Section 511 but not in Section 521. Extensive litigation will be required as parties try to resolve these issues.

(d) Section 543 deems certain *de minimis* non-structural encroachments, including fences, to be permissive. It is unclear what *de minimis* means. One court might find that a one foot encroachment is not *de minimis* while another may find two feet to be *de minimis*. The *de minimis* language replaced the suggested 12 inch permissive requirement in the New York State Bar Association bill. While 12 inches is certainly open to negotiation, the use of *de minimis* creates confusion and uncertainty and will lead to litigation in very many encroachment situations.

(e) We note that the reference to knowledge in section 501(1) is inconsistent with the insertion of claim of right in Section 501(3). We do not know how the courts will handle this conflict, but are certain that there will be extensive and conflicting decisions as a result of the litigation that will follow.

RECOMMENDATION

The New York State Bar Association Real Property Law Section respectfully requests that the Governor veto this hastily negotiated legislation and urges all parties in interest to sit down and draft an acceptable statute that would protect the interests of all the people of New York.

Endnotes

1. *See* Veto Message No. 153. The veto message went on to conclude that this shift of focus "adds an element for measuring this statute of limitations that will often be unknown and unknowable to a true owner." The message also states: "In many instances, an invidivual who purchased property in good faith may believe that he or she is the rightful owner of the property, and may openly occupy and improve the property for many years. As a result, it is appropriate to place time limits on the ability of others to claim that they are the 'true' owner of the property. Indeed, given the frequency with which property is sold and transferred, the imposition of strict time limits on the ability of owners to seek to eject possessors of property is the only way to give homeowners throughout New York State the comfort of knowing that their homes cannot be taken away from them. . . ."
2. *Id.*

Memorandum Prepared by: Prof. Robert M. Zinman
Section Chair: Peter V. Coffey, Esq.

Appendix C
Memorandum in Support of Legislation

(X) Memo on original draft of bill

( ) Memo on amended bill

BILL NUMBER: Assembly Senate

SPONSORS: Member(s) of Assembly:
Senators:

TITLE OF BILL:

An Act to amend Article 5 of the Real Property Actions and Proceedings Law relating to Adverse Possession.

PURPOSE OR GENERAL IDEA OF BILL:

1. Need for Revision

The New York Court of Appeals in *Walling v. Przyblo*, 7 N.Y. 3d 228 (2006) held that an adverse possessor's state of mind did not affect the running of the ten year statute of limitations for ejectment from real property. While the opinion correctly articulated the law of New York, the decision was perceived by some as unfairly permitting a possessor to take property of an unsuspecting owner (the actual acts of ownership in the *Walling* case were not before the Court of Appeals).

As a result of this concern, the New York legislature enacted S.5364-A, A.9156, designed to protect the property owner. The approach taken by the legislature would have overturned *Walling* to prevent acquisition of title by adverse possession unless proof were shown that the possessor or predecessor possessor (who may no longer be alive) had no knowledge that the property belonged to someone else. While well intentioned, the approach taken would have placed an impossible burden on the possessor of property, and would virtually have eliminated a statute of limitations for actions of ejectment from real property in New York, placing a cloud on real estate titles in this state.

Our Section submitted a letter to the Governor urging veto of the legislation and pointing out that Chairman Holtzschue had appointed a Task Force on Adverse Possession to review the law and recommend changes that would prevent unsuspecting property owners from losing their property while preserving the essentials of adverse possession law in New York. In his veto message, Governor Spitzer referred to the establishment of this Task Force and its mission. The attached proposed amendments are the result of the work of the Task Force.

2. Thrust of the Proposed Legislation

The mission of the Task Force was to preserve the viability of adverse possession law in New York while protecting the innocent landowner from stealth takings of his property. The approach of the proposed legislation was to look to the acts, rather than the mindset of the adverse possessor, and permit the statute of limitations to run only when the adverse possessor's acts were sufficiently open throughout the ten year statutory period so as to put a reasonably prudent owner on notice.

The changes also provide that minor property discrepancies of less than one foot would be deemed permissive for ten years before the statute of limitations would begin to run, and that mere mowing of lawns would be considered permissive without limitation on time.

The existing section 501, which was difficult to understand and largely meaningless, was deleted and in its place the Task Force inserted a definition of "adverse possession" that would reflect the virtually continuous line of authority in this state and avoid future misinterpretations of those lines of authority.

Other technical changes made by the Task Force included elimination of the word "under claim of title exclusive of any other right" where they appear as being a source of controversy and confusion under existing law. Each change proposed by the Task Force is analyzed in the comments that follow each section of the amended law.

3. Recommendation.

The Task Force on Adverse Possession respectfully recommends that the Executive Committee approve this Report at its December 7, 2007 meeting for submission to the Executive Committee of the New York State Bar Association at its January meeting.

SUMMARY OF SPECIFIC PROVISIONS:

NEW YORK REAL PROPERTY ACTIONS AND
PROCEEDINGS LAW ARTICLE 5
ADVERSE POSSESSION

§ 501 [Action after entry.] Adverse Possession Defined.

[An entry upon real property is not sufficient or valid as a claim unless an action is commenced thereupon within one year after the making thereof and within ten years after the time when the right to make it descended or accrued.]

(a) Adverse Possessor. A person is an "adverse possessor" of real property when the person occupies real property of another with or without knowledge of the other person's superior ownership rights, in a manner that would give the owner a cause of action for ejectment.

(b) Acquisition of Title. An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for ejectment from real property as specified in N.Y.C.P.L.R. sections 211 and 212, provided that the occupancy, as described in sections 512 and 522 of this Article has been adverse, open and notorious, continuous, exclusive and actual.

§ 511 Adverse possession under written instrument or judgment.

Where the occupant or those under whom he claims entered into the possession of the premises [under claim of title, exclusive of any other right], founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and there has been a continued occupation and possession of the premises included in the instrument, decree or judgment, or of some part thereof, for ten years, under the same claim, the premises so included are deemed to have been held adversely; except that when they consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot.

§ 512 Essentials of adverse possession under written instrument or judgment.

For the purpose of constituting an adverse possession by a person claiming a title founded upon a written instrument or judgment or decree, land is deemed to have been possessed and occupied in [either] any of the following cases:

1. Where it has been usually cultivated or improved, by acts sufficiently open to put a reasonably diligent owner on notice.
2. Where it has been protected by a substantial [i]enclosure.
3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant.

Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time as the part improved and cultivated.

§ 521 Adverse possession [under claim of title not written.] not under written instrument or judgment.

Where there has been an actual continued occupation of premises, [under a claim of title, exclusive of any other right], but not founded upon a written instrument or judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

§ 522 Essentials of adverse possession [under claim of title not written.] not under written instrument or judgment.

For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases: [and no others]

1. Where it has been usually cultivated or improved, by acts sufficiently open to put a reasonably diligent owner on notice.

2. Where it has been protected by a substantial [i]enclosure.

§ 531 Adverse possession, how affected by relation of landlord and tenant.

Where the relation of landlord and tenant has existed between any persons the possession of the tenant is deemed the possession of the landlord until the expiration of ten years after the termination of the tenancy; or, where there has been no written lease, until the expiration often years after the last payment of rent; notwithstanding that the tenant has acquired another title or has claimed to hold adversely to his landlord. But this presumption shall cease after the period prescribed in this section and such tenant may then commence to hold adversely to his landlord.

§ 541 Adverse possession, how affected by relation of tenants in common.

Where the relation of tenants in common has existed between any persons, the occupancy of one tenant, personally or by his servant or by his tenant, is deemed to have been the possession of the other, notwithstanding that the tenant so occupying the premises has acquired another title or has claimed to hold adversely to the other. But this presumption shall cease after the expiration of ten years of continuous exclusive occupancy by such tenant, personally or by his servant or by his tenant, or immediately upon an ouster by one tenant of the other and such occupying tenant may then commence to hold adversely to his cotenant.

§ 543 Adverse Possession, how affected by acts across a boundary line.

> (a) Placement of non-permanent enclosures including fences, shrubbery, plantings, and similar additions no more than twelve inches into an adjoining landowner's property shall be deemed permissive. But this presumption shall cease after the expiration of ten years at which time the ten year period of limitations shall begin to run, or after an assertion of title communicated to the adjoining landowner, whichever is earlier.
>
> (b) Acts of lawn mowing or similar maintenance for short distances across a boundary line and onto an adjoining landowner's property shall be deemed permissive.

Summary of Statutory Changes

Section 501 is new and constitutes a definition of adverse possession. Paragraph (a) embodies the well-settled view that the subjective state of mind of the adverse possessor is immaterial. Rather the focus is upon the acts of the adverse possessor. Paragraph (b) restates the familiar requirements that, in addition to being adverse, the possession must be open and notorious, continuous, exclusive, and actual. The word "hostile" is not used because, properly understood, it is synonymous with adverse. However, it has occasionally been used in the past for holding that possession under a good faith mistake is not adverse.

The phrase "claim of title," has been deleted where it appeared in the statutes, i.e., text of § 511; title and text of § 521; and title of § 522. It has at times been erroneously relied upon by some courts, which also add the phrase "claim of right," as a basis for inquiring into the subjective state of mind of the adverse possessor.

Sections 512 and 522 list usual cultivation or improvement among the essentials of adverse possession. The phrase "by acts sufficiently open to put a reasonably diligent owner on notice" has been added to cultivation and improvement to emphasize the importance of opportunity for awareness on the part of the putative true owner.

Section 543 in entirely new. It tracks § 541 which addresses adverse possession as between or among tenants in common. Relatively minor intrusions on a neighbor's property, by fences, shrubbery and the like, and in routine mowing, arise quite frequently. Neither party may be aware of the true boundary line. Paragraph (a) would cause certain intrusions of twelve inches or less to be deemed permissive for ten years, and thus require twenty years of occupation in most cases. Paragraph (b) establishes a rule that mowing or similar acts for short distances across a boundary line are permissive.

The former § 501 has been deleted in its entirety because it has proved inscrutable and not meaningful. In § 512, "either of the following cases," followed by three cases, was ungrammatical and replaced with "any" of the following cases. In §§ 512 and 522 "enclosure" was substituted for "inclosure," which seemed somewhat archaic.

JUSTIFICATION:

A new § 501 defines adverse possession. This formulation states the objective standard and rejects the subjective state of mind approach. The statutory definition would reinforce the settled law as it was, prior to *Van Valkenburgh v. Lutz*, 304 N.Y. 95 (1952), and reaffirmed in *Walling*. As early as 1840, the Court of Appeals held that mere knowledge that another holds title will not defeat an adverse possessor's claim. *Humbert v. Trinity* Church, 24 WEND. 587 (1840). IN *Belotti v. Bickhardt*, 228 N.Y. 296, 302 (1920), the court stated that adverse possession, even when held by mistake, can ripen into title. In *Ramapo Mfg. Co. v. Mapes*, 216 N.Y. 362, 370-371 (1915), the court stated that "the bona fides of the claim of the occupant is not essential and it will not excuse the negligence of the owner in forbearing to bring his action until after the time in the Statute of Limitations shall have run against him to show that the defendant knew all along that he was in the wrong." We would have an unbroken line of authority from the earlier precedents were it not for *Van Valkenburgh.* In two conclusory sentences, without analysis or citation of authority, the court implicated the subjective state of mind. The court , in the course of holding against the possessor, stated that Lutz knew the small shed was not on his land, and that he thought the garage was entirely on his own land. *Van Valkenburgh* was a 4-3 decision with the unruly and unusual fact of an adverse possession claimant who had previously obtained a judgment establishing a prescriptive easement (a right to use someone else's land) over the very land as to which he was now claiming title and ownership. Additionally, the acts in question arguably did not constitute cultivation, improvement, or an enclosure.

In *Walling* the Court referred to the statement in Van Valkenburgh about knowledge as "perhaps mistaken dictum" that did not change the law. 7 N.Y.3d at 233. See also *West v. Tilley*, 33 A.D.2d 228 (4th Dep't 1970) (*Van Valkenburgh* deemed distinguishable).

There are several reasons in support of the objective standard, apart from the fact that it has been the settled law in New York for more than a century and one-half. First, any requirement that the possessor must prove that he, and those under whom he claims, entered without knowledge that another had title would undermine the functioning of the statute of limitations. These statutes eliminate or minimize the dispositive impact of stale and lost evidence in litigation. They also provide for repose after a sufficiently long period of time. If the subjective state of mind were material in adverse possession cases, often it would be the mind-set of some ancestor or predecessor who was deceased or missing. There would be no effective period of limitations in many cases.

The reasoning above is underscored by the fact that very often the doctrine of adverse possession promotes the interest of a true owner. There may be some technical defect in the chain of title such that there is no unbroken chain back to the sovereign. Perhaps a deed was lost or not indexed at the recorder's office. Perhaps it was not offered for recording. There could have been an installment sale but no deed was obtained when the last installment was paid. In these and other cases the putative adverse possessor is in fact the true owner; there is no *bona fide* thirty party claimant. The issue here will most often arise in office practice, i.e., whether the apparent owner has a marketable title and is able to sell his property. Thus it is the doctrine of adverse possession that enables a buyer to purchase, a lender to finance, and a title company to insure the interest of both. The objective standard of adverse possession also enables parties, especially in urban areas, to market and develop commercial property even though there may be an unusually small "gore" or strip between assembled parcels.

The doctrine also gives legal sanction to long-settled boundaries and the reasonable expectations of persons who may have improved property over a period of time. In that regard, a possessor or the possessor's predecessor may have expended substantial money and effort in making capital improvements. If a statute of limitations has not and cannot run in favor of the improver, he can be ejected and will have no restitution claim against the "true owner" who will now be unjustly enriched. See, e.g., *Miceli v. Riley*, 79 A.D.2d 165, 436 N.Y.S.2d 72 (2d Dep't 1981).

Governor Spitzer, in his Veto Message—No. 153 referenced above in the Purpose of the Bill, indicated that "adverse possession is an essential mechanism for resolving disputes regarding title to property." He noted that a homeowner could be sued by a third party who claims to be a "true owner" and who asserts that the homeowner, or a predecessor, was told or knew of the claim many years earlier. The homeowner would have to recall or find witnesses to such a conversation after memories faded or witnesses had died. In *West v. Tilley*, *supra*, the lower court judgment in the ejectment action was entered in 1969 in favor of Mrs. Tilley, the adverse possession claimant. A critical fact was the construction of a breakwater wall in 1925 by Mrs. Tilley's father, apparently deceased at the time of the litigation. It would have been an impossible burden for Mrs. Tilley to establish her father's subjective state of mind more than forty years earlier.

Walling itself is pertinent in this regard. Plaintiff Walling claimed title to a long triangular wedge used as his northerly side yard. He testified that he had been told that a certain barb-wired tree that formed the northwestery

point of the triangle was his boundary point. After the lower court granted his motion for summary judgment, the defendants moved to renew. They relied upon a new affidavit from the predecessor in title of both parties, a Mr. Maine, who had been on extended vacation in New Mexico. Maine's affidavit contradicted Walling's testimony about the tree being pointed out to him. The lower court then amended its earlier order and held that there was a disputed and material issue of fact as to whether Walling knew he did not have title to the disputed strip when he entered. (Respondents' Brief and Appendix in the Appellate Division.) Thus, the title could have turned upon credibility and recollection of witnesses about a 1986 conversation as testified to in 2004. If Walling had transferred title at any time in that span, his testimony may not have been available at all. The factual dispute was never resolved because the only issue in the Appellate Division and in the Court of Appeals was whether such knowledge on the part of an adverse possessor is material.

A true owner's burden will ordinarily be easily met. A purchaser routinely inspects property before buying. Indeed, failure to do so may subject a purchaser to unrecorded claims because of the familiar doctrine of inquiry notice. Further, there will generally be a survey, often updated, and a title report showing survey exceptions. Finally, the ten year period is longer than any other limitations period, including those of many other states.

For all the above reasons, the well-settled rule, that the subjective state of mind is immaterial, is sound and also in accord with the great majority rule in the United States. Nonetheless, there is a particular category of cases involving relatively minor intrusions on a neighbor's property by a fence, shrubbery, or the like that is troublesome. One or both parties may be unaware of the true boundary line; they may have expressly or impliedly assented to the structure on the assumption that it is on the boundary line. A subsequent claim of title can easily result in contentious neighbors warring over a strip that title companies would consider *de minimis*. Therefore, a new § 543, which tracks § 541 dealing with tenants in common, is included. It would deem such intrusions of twelve inches or fewer as permissive for ten years, thus requiring twenty years of possession unless there had been an express assertion of title communicated to the owner. This was the interpretation of § 541 in *Myers v. Bartholomew*, 91 N.Y.2d 630, 674 N.Y.S.2d 259 (1998). For similar reasons, the new section would also deem routine acts of mowing and similar maintenance to be permissive. Such acts are usually sporadic rather than continuous in any event, but the new provision could alleviate the concern of a neighbor about any need for legal action.

As indicated above, the only issue before the Appellate Division and the Court of Appeals was whether Plaintiff-Appellant Walling's possible knowledge was material. Whether the acts were sufficient to constitute cultivation or improvement as a matter of law, and thus justify summary judgment, was not before either court because the defendants did not cross appeal. But various acts were recited in the two appellate opinions. The acts included clearing a hay field; bulldozing and depositing fill and topsoil; digging a trench and installing PVC pipe to carry water from plaintiff's property to and under the disputed parcel; an underground dog wire fence; mowing, grading, raking, planting, and watering the grassy area, none of which was done by defendants; placing a birdhouse on a 10 foot pole; and installing an underground pipe that surfaced in a swale. The judgment found title in Walling only to "the improved portion of the parcel" and not the wooded area. Nonetheless, some of the recited acts, e.g., the underground pipe, have raised concern about whether an owner could lose title without opportunity to know of the possession.

With respect to underground pipes, sewers, etc., the leading case is still *Treadwell v. Inslee*, 120 N.Y. 458 (1890), decided over a century ago. The court held that an underground sewer did not give rise to a prescriptive right because the owner must know, or the adverse use must be so visible open and notorious that knowledge of such use will be presumed. In *Albany Garage Co. v. Munson*, 218 A.D. 240, 218 N.Y. Supp. 78 (3d Dep't 1926) the owner discovered an underground sewer when excavating its property. The court held that there was no knowledge by the owner and no basis for charging the owner with knowledge citing *Treadwell*. In *Town of Irondequoit v. Fischer*, 267 A.D.2d 1016, 701 N.Y.S.2d 548 (4th Dep't 1999) again the court held that an underground sewer was not open and notorious, citing *Treadwell*. Recently, in *City of Kingston v. Knaust*, 287 A.D.2d 57, 733 N.Y.S.2d 771 (3d Dep't 2001) the court found use of underground caves not to be open and notorious. In *Carr v. Fleming*, 122 A.D.2d 540, 504 N.Y.S.2d 904 (4th Dep't 1986), the court cited *Treadwell* and held that the existence of a manhole cover, on the ground above a sewer system, created at best an issue of fact as to whether it imputed knowledge to the owner.

There are two other pertinent cases. In *Panzica v. Galasso*, 285 A.D. 859, 136 N.Y.S.2d 554 (4th Dep't 1955) tenants of the claimant caused their automobiles' front and rear wheels to cross onto the owner's driveway. The court held that such use was of a limited nature and not open and notorious. In *Stupnicki v. Southern New York Fish & Gone Ass'n. Inc.*, 41 M2d 266, 244 N.Y.S.2d 558 (1962), occasional walking over a road and night use for hunting were sporadic uses and not open and notorious.

It seems clear that we have a continuous line of authority that underground pipes and sewers, as well as sporadic acts, are not open and notorious. Consequently, there is nothing wrong with existing law. Nonetheless, the bill would amend the standard of cultivation or improvement. It adds the requirement that the acts be "sufficiently open to put a reasonably diligent owner on notice." This phrase added to §§ 512 and 522 is consistent with existing law but would underscore the importance of the "open and notorious" requirement in insuring that an owner have opportunity to know of the adverse possession.

Finally, the new § 501, defining adverse possession, would replace the prior section, which would be repealed. The latter enigmatic section speaks of the necessity for an action in ejectment within one year of an entry, but also within ten years of the accrual of the original cause of action. It is very clear law that an actual retaking of possession by a true owner will interrupt the running of the statute. Any new and subsequent possession by the adverse claimant will merely cause the statute to start anew. However, a "mere entry" will not constitute an interruption. *Landon v. Townshend*, 129 N.Y. 166, 29 N.E. 71 (1891). Apparently, early statutes in some states confused these two concepts and simply required that an action be brought within one year of entry. See III American Law of Property § 15.9, pp. 809-811 (Casner ed. 1952). Other states, including New York, added the requirement of an action within ten years in all cases. Thus the statute neither shortens nor lengthens the period in the case of a "mere entry" and is superfluous. Repealing the section will eliminate the confusion it has at times created.

Very Respectfully,
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by the Real Property Law Section of the New York State Bar Association.

Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Connecticut is the second state in the nation to allow same-sex marriage

On October 10, 2008, Connecticut joined Massachusetts as the second state to permit same-sex marriage in *Kerrigan and Mock v. The CT Department of Public Health*. The court found that civil unions in Connecticut (permissible since 2005), while providing some protections and responsibilities akin to marriage, were "separate but not equal rights" and therefore violated the state constitution's equal protection clause.

In November, a question is on the Connecticut ballot on whether to hold a constitutional convention which would potentially open the door for anti-gay rights groups to seek a ban on same-sex marriage.

California originally was the second state in the nation to recognize same-sex marriage as a result of a decision of California's highest court overturning the state's ban on same-sex marriage. However, during the November, 2008 general elections, Proposition 8, a proposed constitutional amendment entitled Eliminate Right of Same-Sex Couples to Marry Act, passed. The Supreme Court agreed to hear several challenges to Proposition 8 as early as March, 2009.

Same-sex divorce in New York

CM v. CC, No. 301842-2008 NY Slip Op. 28398, 2008 N.Y. Misc. LEXIS 6011 (Sup. Ct., N.Y. Co., Oct. 14, 2008) (Richter, J.)

The court questioned whether it had subject matter jurisdiction to grant a divorce to a same-sex couple who legally married in Massachusetts but lived in New York. The court held that the common law doctrine of comity required recognition of the parties' marriage in the same way that this court recognized a same-sex couple's Canadian marriage in *Beth R v. Donna M*, 853 N.Y.S2d 501 (Sup. Ct., N.Y. Co. 2008) (Drager, J.), as reported in my previous column. There is no positive law barring recognition of out-of-state same-sex marriage, as the New York Legislature has not enacted any statute that would have prohibited recognition of a same-sex marriage from another jurisdiction, nor is there any constitutional amendment barring recognition of such marriages. Moreover, recognition of foreign same-sex marriage is consistent with Governor Paterson's recent Executive Directive dated May 14, 2008.

As discussed in my previous column, Governor Paterson's Executive Directive dated May 14, 2008 ordered all state agencies to begin to revise their policies and regulations to recognize same-sex marriages performed in other jurisdictions. The New York Taxpayers unsuccessfully challenged such Executive Directive, *Golden v. Paterson*, 2008 N.Y. Misc. LEXIS 5838, 240 N.Y.L.J., 48 (Sup. Ct., Bronx Co. 2008) (Billings, J). The court found that the directive did not violate State Finance Law § 123-b since the directive was lawful, did not encroach on the legislature's power to regulate same-sex marriage within the state, and merely implemented the Appellate Division's ruling of providing comity to out-of-state same-sex marriages.

Recent Legislation

DRL § 240(1)(a) (A7089/S6201), effective September 4, 2008

In the past, some judges have sanctioned parents who brought allegations of abuse and neglect that could not be proven, even though based in good faith, by depriving them of custody or visitation. This caused some parents who had good-faith concerns of their child's safety not to bring abuse and neglect proceedings in fear of losing custody. In response, on September 4, 2008 the Governor signed into law an amendment to DRL § 240(1)(a) (A7089/S6201), which added the following language to the statue:

> If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a

child in the custody of a parent who presents a substantial risk of harm to that child.

Section a-1 added to DRL § 240(1) and section (e) added to FCA § 651, effective January 23, 2009

The new provisions provide that prior to rendering a permanent, temporary or successive temporary order of custody or visitation, the courts must review Article 10 court proceedings relating to the parties, the statewide computerized registry regarding orders of protection and warrants of arrest, and the sex offender registry. Any information obtained from this review must be conveyed to the attorneys, parties (if *pro se*) and the law guardian. However, courts may issue emergency temporary orders of custody or visitation in the event time does not permit such a review, provided such order is in the best interests of the child. However, the mandated review must be conducted subsequent to the issuance of the emergency order.

New DRL § 240 (3)(8), and new FCA § 446(h), effective December 3, 2008

A court may issue an order of protection directing a party to refrain from intentionally injuring or killing any companion animal of the petitioner.

New DRL § 75-l, effective March 24, 2009

Subdivision 1 provides that a court is prohibited from issuing a permanent order to modify, amend or change any judgment or order relating to child custody that existed at the time a parent was activated, deployed or temporarily assigned to military service, where the reason is due to such military service.

Subdivision 2 provides that when a parent is in military service, a court may issue a temporary order to modify or amend a previous child custody judgment or order where it is found, by clear and convincing evidence, that same is in the best interest of the child(ren). An attorney for the child must be appointed in all matters where a temporary modification or amendment will be made. The court shall provide for contact between the child(ren) and the parent in military service (i.e., e-mail, Webcam or telephone) and a parenting schedule, provided it is in the child's best interest.

Subdivision 3 provides that upon the parent's return from military service and upon either parent's request, a hearing shall be held to determine whether a change in circumstances has occurred to warrant a change, amendment or modification of the previously issued child custody order or judgment.

Subdivision 4 clarifies that the provisions of DRL § 75-l do not apply to "assignments to permanent duty stations or permanent changes of station."

Various amendments and additions to CPLR Article 52 regarding collection of money judgments, effective January 1, 2009

Subdivisions (l), (m) and (n) are added to CPLR 5205 (personal property exempt from satisfying money judgments).

Most substantively, subdivision (l) includes as an exemption the first $2,500 in a bank account which contains funds that were directly or electronically deposited within the last 45 days. This amount will be adjusted annually for inflation. The amendment to CPLR 5222(h) makes clear that the first $2,500 containing exempt funds in a bank account cannot be restrained. CPLR 5230(a) is amended to, *inter alia*, reflect that an execution notice must include this new exemption.

Amendments to CPLR 5222 (b), (d), (e) were also made. Amendment to subdivision (e) changes the content of the restraining notice form that must be sent to a judgment debtor.

Subdivision (h) [discussed above], (i) and (j) are added to CPLR 5222.

Subdivision (i) sets forth that funds in a judgment debtor's banking institution account equal to or less than 240 times the federal or state minimum hourly wage, whichever amount is greater, cannot be restrained, except where the court determines that any part of said sum is not necessary for the judgment debtor's and his/her dependents' reasonable requirements [needs]. CPLR 5230(a) is amended to, *inter alia*, include this addition. See also related amendments to CPLR 5231(b) regarding the issuance an income execution for the enforcement of a money judgment.

CPLR 5222-a is added, which sets forth the procedure when serving a restraining notice on a natural person's account at a banking institution.

Related to the additions/amendments discussed above; see also CPLR 5232, which added subdivisions (e), (f) and (g).

Voluntary mediation program Instituted in the Matrimonial Part of the Nassau County Supreme Court

The Matrimonial Part of the Nassau County Supreme Court has instituted a voluntary mediation program. The purpose is to provide a reasonable, cost-effective alternative dispute resolution forum for the parties in divorce litigation. Litigants are encouraged to take advantage of the process with assistance of counsel, while reserving their rights to utilize litigation. All written and oral communications during mediation are confidential. At the preliminary conference, counsel for the parties and the judge can identify

issues that are ripe for mediation. A panel of approximately 15 mediators made up of divorce lawyers and retired judges will be available at a reduced rate. Other counties such as Suffolk, New York, and Erie have similar programs.

Court of Appeals Round-up

Farkas v. Farkas, No. 144, Slip Op. 7988, 2008 N.Y. LEXIS 3294 (Oct. 23, 2008)

This case was reviewed at the appellate level in one of my prior columns. Since then, the Court of Appeals had reversed that decision. The parties' judgment of divorce provided that the wife could enter a money judgment against the husband for the amount due and owing to the bank in a foreclosure action ($750,000) "without further order of the court." Thereafter, the wife made a superfluous motion for the same relief, which was granted. Five years later, the wife served a proposed order with notice of settlement. The husband opposed, claiming that the wife abandoned the judgment because she failed to serve the proposed judgment within 60 days as required by 22 N.Y.C.R.R. 202.48. The Supreme Court signed the proposed judgment, but the Appellate Division vacated it as abandoned pursuant to court rules. The Court of Appeals reversed, finding that 22 N.Y.C.R.R. 202.48 is not applicable to the case at bar, since it only applies to decisions and orders, and not the underlying divorce judgment. The fact that the wife brought a superfluous motion does not change this result.

Graev v. Graev, No. 139, Slip Op. 7945, 2008 N.Y. LEXIS 3252 (Oct. 21, 2008)

Pursuant to the parties' divorce agreement, the husband was to pay the wife $11,000 per month maintenance until, *inter alia*, the wife's "cohabitation" with an "unrelated adult for a period of sixty substantially consecutive days." "Cohabitation" was not defined by the agreement. The ex-husband moved to terminate the ex-wife's maintenance payments based on her boyfriend living with her in her summer home for the aforementioned time period. The lower court denied the ex-husband's request to terminate maintenance, ruling that while the ex-wife may have had a "warm" relationship with her boyfriend, it fell short of "cohabitation," since it was platonic and they were not financially interdependent because her boyfriend maintained a separate residence. The First Department affirmed, finding that cohabitation has been held to involve an element of financial interdependence by the couple sharing living quarters, and in this case, they did not. The Court of Appeals reversed, finding that the word "cohabitation" was ambiguous as used in the parties' separation agreement. In addition, neither the dictionary nor New York case law interpreting Domestic Relations Law § 248 supplied an authoritative or plain meaning. Therefore, the case was remanded to the trial court for further proceedings to determine the parties' intent as to the cohabitation clause.

Author's note: As a result of this ruling, the practitioner should define "cohabitation" in the agreement. One suggestion is as follows: "The wife living in or residing overnight in the same residence with an unrelated male for a reasonably consecutive period of 60 days or more, regardless of whether the wife and the unrelated male have a sexual relationship or receive financial contributions from one another."

Other Cases of Interest

Electronic Discovery

Moore v. Moore, 240 N.Y.L.J., 32, 2008 N.Y. Misc. LEXIS 5221 (Sup. Ct., N.Y. Co., Aug. 4, 2008) (S. Evans, J.)

The husband sought to suppress certain on-line chats with an unrelated female that were downloaded and saved on the hard drive of his laptop computer. The parties stipulated to copying the hard drive of this computer. The court held that the wife did not violate Penal Law § 250.05, because she did not intercept a communication, since this was a saved conversation in a computer file. Nor did the wife violate Penal Law §§ 156.05 (using a computer without authorization), 156.10 (computer trespass) and 156.35 (criminal possession of computer related material) since the parties stipulated to the copying of the hard drive, there was no need to run the operating system while making the copies, and the files on the computer were not encrypted nor were passwords.

Author's note: New York is the only state that does not have a no-fault statute. This case is a typical example of the three-ring circus and "airing the dirty laundry" required to prove grounds. Two no-fault bills are currently pending before the state Assembly, including the Bradley Bill (A-9398) and the Paulin Bill (A-10446).

Federal Crime of Failure to Pay Support

USA v. Kerley, No. 07-1818, 2008 WL 4349237 (2d Cir. Sept. 25, 2008)

Defendant father was convicted by a jury in the Southern District of New York of two counts of willful failure to pay a court-ordered child support obligation for his two daughters ($106,000) in violation of 18 U.S.C. § 228(a). One question of first impression was whether violation of a single child support order that covers two children gives rise to one or two convictions of 18 U.S.C. § 228. The court ruled that the defendant should be prosecuted on only one count.

Author's note: 18 U.S.C. § 228, the Child Support Recovery Act (CSRA), criminalizes willful failure to pay past due support obligation for a period of one year, or more than $5,000) for a child who resides in another state. As noted in my previous column, New York state enacted its own criminal statute regarding failure to pay support, New York Penal Law § 260.05(2), which was effective November 1, 2008.

Support Enforcement

***Brinckerhoff v. Brinckerhoff*, 53A.D.3d 592, 862 N.Y.S.2d 98 (2d Dep't 2008)**

Where the former husband failed to make timely payments of maintenance without litigation, the Supreme Court properly exercised its discretion in directing the former husband to post security with the court to guarantee future maintenance payments. However, the security amount of $350,000 was deemed excessive, and was reduced to $140,000.

QDRO

***Berardi v. Berardi*, 54 A.D.3d 982, 865 N.Y.S.2d 245 (2d Dep't 2008)**

The parties' divorce agreement provided that the wife was entitled to one-half of the husband's "pension, disability payment, variable supplement and 457 Fund with the NYCPD" pursuant to the Majauskas formula, with a cutoff date of July 7, 1998. After the parties divorced, the ex-husband continued working for the NYPD, but in 2001 he sustained significant lung ailments from his involvement in the September 11 rescue and recovery operation. The ex-husband applied for accident disability benefits, which were granted by his employer.

The former wife moved to amend the parties' QDRO to conform it to their stipulation of settlement regarding the allocation of defendant's NYPD retirement pension, and to incorporate her allocable share of a 25% increase in defendant's pension resulting from his retirement on accidental disability. The trial court granted the relief.

On appeal, the order was modified only to the extent of denying that portion of the former husband's retirement which resulted from his accident disability because the agreement did not specifically state "accident disability benefits." The matter was remanded to the court below for further determination as to which portion of the pension constitutes marital property and is subject to equitable distribution rather than compensation for personal injuries, and therefore separate property.

Interim Counsel Fees

In the wake of *Prichep v. Prichep*, 52 A.D.3d 61, 858 N.Y.S2d 667 (2d Dep't 2008)

As discussed in my previous column, the Second Department in *Prichep* held that pursuant to DRL § 237, an application for interim counsel fees by the non-monied spouse in a divorce action should not be denied nor deferred to trial without good cause, articulated by the court in a written decision "because of the importance of such awards in the fundamental fairness of the (divorce) proceedings." Several cases following *Prichep* have granted large interim awards, including *Cohen v. Cohen*, 2008 N.Y. Misc. LEXIS 3890, 239 N.Y.L.J., 121 (June 17, 2008) (Ross, J.) ($30,000 interim counsel fee award); *Rosenbaum v. Rosenbaum*, No. 2007-03316, Slip Op. at 2, 2008 N.Y. App. Div. LEXIS 7679 (2d Dep't Oct. 14, 2008) ($75,000 interim counsel fee award); *Gordon v. Gordon*, No. 202475/06, Slip Op. at 6, 20 Misc. 3d 1133A (Sup. Ct., Nassau Co., July 24, 2008) (Marber, J.) ($75,000 additional interim counsel fee award).

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NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, NY 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

If you have written an article you would like considered for publication in One on One, *(the General Practice Section Newsletter), please contact: Martin Minkowitz, Editor, Stroock & Stroock, LLP, 180 Maiden Lane, New York, NY 10038 or mminkowitz@stroock.com. Articles should be submitted in word format (No PDFs please) and should include your biographical information.*

Table of Contents

Ethics Opinion No. 822

Committee on Professional Ethics of the New York State Bar Association

6/27/08

Topic: Lawyer's duty to report violation of disciplinary rule
Clarifies: N.Y. State 531

Digest: A lawyer who satisfies the prerequisites to trigger mandatory reporting of a Disciplinary Rule by another lawyer must report such conduct to an appropriate authority, such as a tribunal (in a litigated matter) or to the appropriate Grievance Committee. Filing a report with a lawyer assistance program is not sufficient.

Code: DR 1-102(A), 1-103(A); EC 1-4

Question

1. If a lawyer has an obligation to report a violation of a Disciplinary Rule by another lawyer, to whom must the lawyer report? Does filing a report with a lawyer assistance program satisfy the reporting requirement?

Opinion

2. In certain circumstances a lawyer is required by the Code of Professional Responsibility to report a violation of a Disciplinary Rule to the appropriate authority. DR 1-103(A) provides:

> A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

DR 1-102(A) provides:

> A lawyer or law firm shall not: (1) Violate a disciplinary rule. (2) Circumvent a Disciplinary Rule through the actions of another. (3) Engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Unlawfully discriminate in the practice of law. . . .

3. The New York State Bar Association has a Lawyer Assistance Program (LAP) to deal with issues of alcohol abuse, substance abuse, and related mental health issues. There are also 17 similar committees formed by local bar associations. According to its statement of purpose, the NYSBA LAP provides education and confidential assistance to lawyers, judges, law school students, and immediate family members who are affected by the problems of substance abuse, stress, or depression. Its goal is to assist in the prevention and early identification of problems that can affect professional conduct and quality of life and to assist in arranging appropriate intervention where such problems are identified. The services provided by the NYSBA LAP, for example, include early identification of impairment; motivating impaired attorneys to seek help; assessing and evaluating the problem and developing an appropriate treatment plan; providing information on training programs on alcoholism, drug abuse and stress management; and referring impaired attorneys to community resources, self-help groups, outpatient counseling, or detoxification and rehabilitation services.[1] Lawyers who serve on committees or programs have no obligation to report a violation of DR 1-102.[2]

4. This opinion deals with the obligations of lawyers who do not serve on such committees. In N.Y. State 635 (1992) we discussed the four prerequisites that must be met before a lawyer has a reporting obligation under DR 1-103(A). They are:

> (1) The lawyer must possess a sufficient degree of knowledge of ostensibly wrongful conduct; a mere suspicion of misconduct is not sufficient.

(2) Any knowledge included in the lawyer's report must not be protected as a confidence or secret.

(3) The conduct in question must violate a Disciplinary Rule.

(4) The violation must raise a substantial question as to the lawyer's honesty, trustworthiness or fitness.

For purposes of this opinion we assume that a lawyer has satisfied all four tests; that is, the lawyer has a sufficient degree of knowledge of a violation of a Disciplinary Rule by another lawyer that raises a question about the other lawyer's honesty, trustworthiness or fitness and that knowledge is neither a confidence or secret. Thus, the lawyer has a mandatory reporting obligation under DR 1-103(A). The question this opinion addresses is to whom the lawyer must report.

5. DR 1-103(A) requires a lawyer to report the knowledge of a violation "to a tribunal or other authority empowered to investigate or act upon such violation." The inquirer asks whether reporting to an LAP would satisfy that obligation. In our opinion, while lawyers are to be encouraged to refer to an LAP lawyers who are abusing alcohol or other substances or who face mental health issues, such a referral would not satisfy the ethical reporting requirement.[3]

6. DR 1-103 requires reporting to a tribunal or other authority empowered to investigate or act upon such violation. Although the Code does not further specify to whom reporting is required, the phrase "investigate or act" suggests that the "authority" must be a court of competent jurisdiction or a body having enforceable subpoena powers. Thus, a violation in the course of litigation could be reported to the tribunal before which the action is pending. In both a litigation and a non-litigation context, the report could be filed with a grievance or disciplinary committee operating under the powers granted to them by the Appellate Division of the State Supreme Court pursuant to Section 90 of the Judiciary Law and court rules.[4] The report could be filed with the grievance committee in the Appellate Department in which litigation is pending or with the grievance committee in the Department where the lawyer is admitted or where the prohibited conduct occurred.

7. The report need not be made immediately or without some reasonable effort at remediation, particularly where the consequences of reporting the violation may be more harmful to the lawyer's client than some alternative course of action.[5] Once a report has been made to an appropriate authority, notwithstanding the existence of other authorities to which the report could have been made, the reporting lawyer's obligation under the Code will be deemed satisfied.[6]

8. In N.Y. State 531 (1981), the Committee, in holding that members of an LAP may ethically refrain from reporting professional misconduct, noted that the LAP "committee of the bar stands in a position analogous to that of 'a tribunal or other authority empowered to investigate or act.'" In this opinion we clarify that an LAP is not an appropriate authority to which misconduct can be reported. In contrast to a tribunal or grievance committee, an LAP has no formal powers. LAP services are voluntary. Although an LAP may seek to assist a lawyer in need of assistance, the lawyer does not need to respond and may refuse the assistance of the LAP. Furthermore, without the assistance of the affected lawyer, the LAP has no power to investigate whether the impairment has resulted in a violation of a Disciplinary Rule.

9. The purpose of the reporting requirement is to assist courts, disciplinary agencies and other authorities in policing members of the bar.[7] The focus of an LAP is on assisting in the lawyer's recovery process, not on any code violations that may have resulted from the lawyer's impairment. Disciplining a lawyer for a Code violation may be at odds with the recovery process. The fact that a lawyer's impairment has resulted in a violation of the profession's disciplinary rules may be a lever to convince the lawyer that he or she needs help. The process of obtaining that help, however, will not satisfy the profession's obligation to regulate itself.

Conclusion

10. A lawyer who is required under DR 1-103(A) to report knowledge of misconduct "that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer" may report that knowledge to those agencies described above. Reporting the lawyer's conduct to a lawyer assistance program, while salutary, does not satisfy the lawyer's ethical reporting requirement.

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Endnotes

1. *See* http://www.nysba.org/Content/NavigationMenu/ForAttorneys /LawyerAssistanceProgramLAP / Lawyer_Assistance_Pr.htm.
2. DR 1-103(A); *see also* Judiciary Law § 499 (treating the confidential information provided to lawyers on such committees as privileged).
3. We note that lawyers may refer other lawyers to an LAP in situations where the alcohol or substance abuse or mental health issue has not resulted in any violation of a Disciplinary Rule. A lawyer in such a situation may not be so impaired that the lawyer's representation of clients is affected. For example, the lawyer may suffer from stress and depression and need assistance but still be able to perform legal work competently. *See generally* ABA Formal Op. 03-429 (obligations with respect to mentally impaired lawyer within a law firm); ABA Formal Op. 03-431 (lawyer's duty to report rule violations by another lawyer who may suffer from disability or impairment).
4. *See*, *e.g.*, Nassau County 98-12 (if reporting is required, lawyer can report to the court or to the grievance committee); N.Y. City 1995-5 (misconduct should be reported to the appropriate disciplinary or grievance committee). *Cf. People v. Romero*, 91 N.Y.2d 750, 698 N.E.2d 424, 675 N.Y.S.2d 588 (1998) (holding that N.Y. Jud. Law § 476-a(1) authorized the attorney general to bring a civil action for unauthorized practice of law).
5. *See*, *e.g.*, *U.S. v. Cantor*, 897 F. Supp. 110 (S.D.N.Y. 1995) ("DR 1-103 must be read to require reporting . . . within a reasonable time under the circumstances"); N.Y. City 1990-3 ("While it may be permissible in certain limited circumstances to postpone reporting for a brief period of time, we reiterate our caution . . . that 'once a lawyer decides that he or she must disclose under DR 1-103(A), any substantial delay in reporting would be improper.'"); N.Y. City 81-40. *Cf. U.S. v. Turkish*, 470 F. Supp. 903, 909 n.7 (S.D.N.Y. 1978) (prosecutor who believes defense counsel's representation of multiple clients is a conflict problem could "in most instances" satisfy DR 1-103(A) by raising the problem directly with the attorney, and then, if necessary, the clients themselves).
6. *See* Nassau County 88–10 ("The code requires that the matter be brought to the attention of the grievance committee, but does not require that it also be reported to the district attorney or other appropriate prosecuting agency having jurisdiction of such matters").
7. EC 1-4 ("The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials"); *see also* Restatement Third, The Law Governing Lawyers § 5 cmt i (collecting authorities regarding the reporting obligation); *Matter of Wieder*, 80 N.Y.2d 628, 636, 609 N.E.2d 105, 108, 593 N.Y.S.2d 752, 755 (1992) (noting that the legal profession relies upon lawyers to report appropriate cases to protect the public and the integrity of the Bar).

Ethics Opinion No. 823

Committee on Professional Ethics of the New York State Bar Association

6/30/08

Topic: Joint representation; conflict of interest; withdrawal

Digest: A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge. The lawyer can continue to represent one of the joint clients in the litigation if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the court's procedures for withdrawal.

Code: DR 2-110(A)(1), (2); 4-101(C); 5-105(A), (B), (C); 5-108(A); EC 7-8, 7-9.

Questions

1. May a law firm continue to represent joint clients whose strategies significantly diverge in litigation?

2. May a law firm continue to represent one of the joint clients in the litigation after the conflict arises and, if so, under what circumstances?

Opinion

3. A law firm represents "X" and "Y" in litigation. Prior to the firm's representation of these two clients, they were co-owners of a business, which they then sold. The purchasers sued X and Y. At the outset of the litigation, the interests of X and Y were identical. X and Y interposed a counterclaim against the purchasers.

4. For unknown reasons, the plaintiff purchasers have not vigorously pursued the litigation. X desires to pursue the counterclaim aggressively. Y, however, has directed the lawyer to do nothing and let things remain quiescent.

5. A lawyer may represent multiple clients in the same or related matters unless (i) the exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by the lawyer's representation of another client, or (ii) the multiple representation would likely involve the lawyer in representing differing interests.[1] In cases where multiple representation would give rise to an adverse effect on independent professional judgment or representation of differing interests, a lawyer may undertake or continue the multiple representation if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.[2]

6. We addressed the representation of joint clients prior to contemplated litigation in N.Y. State 787 (2005). There, the inquiring lawyer was retained to represent a woman on her personal injury claim and her spouse on a derivative loss-of-services claim. The husband subsequently abandoned the wife, and she obtained a divorce. The lawyer and the wife lost contact with the client/former husband. Prior to commencement of personal injury litigation on behalf of the husband and wife, a settlement offer was made to the wife, who wanted to accept it.

7. We observed that if assisting the wife to procure the settlement would prejudice the husband's derivative claim, the lawyer was required to withdraw from both representations:

> Continuing to represent both parties would involve a simultaneous representation of "differing interests." Specifically, the lawyer would be forced to choose between settling the wife's claim and thus barring the husband from pursuing his loss of consortium claim, or advising the wife to reject the settlement offer that she wishes to accept in order to preserve the husband's claim. In this situation the lawyer could proceed only with the husband's informed consent, which would require explaining to the husband the risk that the loss of consortium claim may be compromised.

The consent required under DR 5-105(C) could not be obtained from the husband, who could not be located.

8. Not every disagreement regarding the course to be charted in litigation rises to the level of differing interests. EC 7-7 provides, "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions."[3] EC 7-8 states that, in areas in which the client is to make the decision, the lawyer should "exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations." But where joint clients, having received appropriate advice, determine to pursue diametrically opposed strategies, either of which is consistent with law and the lawyer's ethical responsibilities, a conflict of interest exists. In the circumstances of this inquiry, moreover, the conflict is not consentable, because the firm cannot simultaneously pursue both clients' objectives—a disinterested lawyer could not conclude that the lawyer could competently represent the interests of each client. Therefore, the firm cannot continue to represent both clients in the matter.

9. Whether the firm can continue to represent either X or Y in the litigation is governed largely by DR 5-108(A), which provides:

> A lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. (2) Use any confidences or secrets of the former client except as permitted by section DR 4-101(C), or when the confidence or secret has become generally known.

10. Here, the firm's continued representation of X in this matter, who wishes to pursue the counterclaim aggressively, could be materially adverse to the interests of Y, who prefers that nothing be done, apparently in an effort not to arouse sleeping dogs. Similarly, the firm's continued representation of Y may be materially adverse to X, if achieving Y's goal (no action) would be expected to require the lawyer to take action inconsistent with X's goal of vigorous prosecution of the counterclaim. In either case, unless the clients validly consented in advance to continuing representation of one of them in the event of a conflict emerging, the firm needs to obtain the informed consent of the former client after full disclosure. Insofar as necessary to avoid misunderstanding, the firm should explain that the former client is under no obligation to consent to allow the firm to represent the other client and "that no negative consequences will attend [a] denial of consent."[4]

11. Likewise, while there generally are no confidences between co-clients,[5] to the extent that the lawyer has acquired, under an understanding of confidentiality, information not known to the proposed continuing client, "[t]he former client must also be informed that she has the right to insist that all of her confidences and secrets or specific confidences and secrets be held inviolate."[6] In that circumstance, the firm must also consider whether it can competently represent the interest of the continuing client while keeping the former client's confidence. Any restriction placed on the firm by the former client to preserve certain information protected as a confidence or secret may present a compromising influence that may prevent the firm from representing the current client competently and zealously.[7]

12. In withdrawing from representing X and/or Y, the firm must comply with the court's procedures pertaining to withdrawal.[8] In seeking to withdraw, the firm must take steps "to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client[s], including giving due notice to the client[s], allowing time for employment of other counsel, delivering to the client[s] all papers and property to which the client[s are] entitled and complying with applicable laws and rules."[9]

Conclusion

13. A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge. The lawyer can continue to represent one of the joint clients in the litigation if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the court's procedures for withdrawal.

Endnotes

1. DR 5-105(A), (B).
2. DR 5-105(C).
3. EC 7-9 adds, "In the exercise of the lawyer's professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of the client."

4. N.Y. County 716 (1996).

5. *See*, *e.g.*, *Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977) ("Neither Walston nor anyone connected with it could have thought . . . that any information given to the law firms conceivably would have been held confidential from the primary clients of the firms."); *Moritz v. Medical Protective Co.*, 428 F. Supp. 865, 872 (W.D. Wis. 1977) ("communications by either client to [the lawyer] concerning the subject matter of the . . . suit . . . were not privileged as to the other client and were not confidences. . . . Nor were they 'secrets' within the meaning of Canon 4."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. *l* (2000) ("Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected.").

6. N.Y. County 716 (1996); *see* N. Y. State 555 (1984) (lawyer may not disclose to one joint client confidential communications from the other joint client relating to the subject matter of the representation, absent express or implied consent).

   Attorneys who represent joint clients in the same matter should, in advance of the joint representation, reach an agreement with the joint clients as to the sharing of confidential information. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60, cmt *l* (2000) ("Co-clients . . . may explicitly agree to share information. Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients. . . ."); ABA Model Rule 1.7 cmt. 31 ("The lawyer should, at the outset of the common representation . . . , advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other."). As recently noted by the ABA's Committee on Ethics and Professionalism, "[c]larifying expectations at the onset of the representation is always preferable in these situations, and may affect the ability of the lawyer to continue representing one or the other client after difficulties arise." ABA Formal Opinion 08-450, n.21.

7. *See* ABA Formal Opinion 08-450, at 1 ("a conflict of interest arises when the lawyer recognizes the necessity of revealing confidential information relating to one client in order effectively to carry out the representation of another").

8. DR 2-110(A)(1) ("If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission."); *see, e.g.*, CPLR 321(b) (change or withdrawal of attorney).

9. DR 2-110(A)(2).

Ethics Opinion No. 824

Committee on Professional Ethics of the New York State Bar Association

7/2/08

Topic: Conflicts of interest—lawyer's own interest; providing legal services without compensation

Digest: An attorney may, without compensation, provide a service of monitoring or reviewing a client's investments to identify any potential claims, even though the attorney may later be considered to handle, with compensation, any resulting litigation.

Code: DR 1-106; 2-103; 5-101.

Question

1. May an attorney, at the request of a client, review the client's investment portfolio in order to identify any potential securities fraud claims that the client might have in connection with its investments, without charging the client a fee for this service?

Facts

2. A law firm regularly represents plaintiffs in the field of securities fraud litigation. As part of its practice, the firm monitors the investment portfolios of existing institutional, pension fund clients. The service involves the client retaining a law firm to monitor the client's investments. The lawyer agrees to notify the client when the lawyer identifies a potential securities fraud claim that, in the opinion of the lawyer, might be pursued by the client. Once notified, the client is free to take no action, hire another lawyer to represent it in connection with the claim, or hire the monitoring lawyer to handle the matter. The monitoring lawyer does not charge any fee to the client for the monitoring service. Should the client select the monitoring firm to represent it, the subsequent litigation is handled pursuant to a separate retainer agreement entered into between the client and the lawyer after the client has made the decision to pursue the matter.

Opinion

3. There is nothing in the Lawyers' Code of Professional Responsibility prohibiting an attorney from providing legal services without compensation. The fact that the reviewing attorney would be considered to handle any resulting litigation does not change that conclusion. We note that the arrangement to provide a monitoring service creates an attorney-client relationship, with all rights, responsibilities and obligations that apply whenever an attorney-client relationship is established. Among those responsibilities and obligations under the Disciplinary Rules are those pertaining to conflicts of interest and confidences of clients.

4. DR 5-101 provides that "[a] lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." We do not believe that a lawyer's interest in being hired to pursue any potential securities fraud claim he or she may uncover creates a conflict under this clause. It is inherent in the attorney-client relationship that a lawyer may benefit from a recommendation that legal services are needed with respect to a particular problem.

5. Because the described monitoring services are legal services involving the professional judgment of a lawyer, the provisions of DR 1-106, relating to the provision of legal and non-legal services by a lawyer or law firm, are not relevant to the inquiry. We note that, while it would be prudent to prepare an engagement letter or retainer agreement with respect to the free monitoring service, none is required by the New York engagement letter rules, because the monitoring lawyer is not expected to charge $3,000 or more for the service.[1] The practitioner considering undertaking such an arrangement must, however, assure compliance with the rules prohibiting solicitation.[2] This opinion does not address issues of substantive law.

Conclusion

6. A lawyer may accept retention by a client, without compensation, to review the client's investment portfolio in order to identify any potential securities fraud claims that the client may have, under the circumstances described above, even though the client may retain the lawyer, on a paying basis, to handle any resulting litigation.

Endnotes

1. 22 N.Y.C.R.R. § 1215.2(1).
2. DR 2-103.

Ethics Opinion No. 825

Committee on Professional Ethics of the New York State Bar Association

7/15/08

Topic: Third-party payors; clients referred by, and legal services paid for by, Employee Assistance Program.

Digest: There is no ethical bar to lawyer providing legal services by telephone to client referred to the lawyer, and paid for by, an Employee Assistance Program, nor to accepting ancillary private retention by such clients.

Code: DR 2-103(A), (D), (F)(4); 4-101; 5-101; 5-103; 5-105; 5-105(E); 5-107(A), (B); 5-108; 5-108(A)(2); 6-101. EC 2-34, 8-3.

Questions

1. May a lawyer ethically provide legal services via telephone consultation with clients referred by an Employee Assistance Program that pays the lawyer for those services?

2. May the lawyer ethically accept private retention from such employees when their matters cannot be resolved via telephone, and additional legal work not covered by the EAP is required?

Opinion

3. The evolution of programs intended to make relatively inexpensive legal services available to underserved populations has long been encouraged by the bar.[1] Employee Assistance Programs (EAPs) are employee benefit programs offered by some employers, often in conjunction with a health insurance plan. EAPs are intended to help employees deal with personal problems that might adversely impact their work performance or health. Some EAPs include free or reduced-price legal services offered by one or more lawyers or law firms with which the EAP contracts for this purpose. While employees may be referred to an EAP provider by the employer's human resources department, the employer generally does not otherwise know who is using the program unless there are extenuating circumstances and the proper release forms have been signed.

4. The primary ethical question is one of third-party referral and payment, and provided the Code is in all other respects fully honored, we believe that the proposed arrangement is ethically permissible. A number of the most salient considerations are outlined below.

5. First, while third-party payment for legal services is common, the lawyer receiving such payment must comply with DR 5-107(A) and (B), by making full disclosure to the client and obtaining the client's consent to the arrangement, and ensuring that the employer-payor does not direct or regulate the lawyer's professional judgment or compromise the lawyer's duty to maintain confidences.[2]

6. Second, to the extent the lawyer offers anything of value in exchange for the referral of EAP clients to the lawyer, DR 2-103(F) may be applicable. DR 2-103(F)(4) sets forth the circumstances under which a lawyer may "be recommended, employed or paid by, or may cooperate with," a "bona fide organization which recommends, furnishes or pays for legal services to its members or beneficiaries." As long as the EAP has procedures to provide appropriate relief for employees who assert that representation by counsel furnished by the EAP would be "unethical, improper or inadequate under the circumstances of the matter involved," most EAPs will meet those requirements.[3]

7. Third, the fact that these clients are served by telephone consultations does not limit the lawyer's obligations with respect to conflicts of interest. All of the duties imposed by DR 5-101 (personal interests), DR 5-105 (concurrent representation), DR 5-108 (former client conflicts), and DR 5-102 (lawyer as witness) must be fulfilled. Also, DR 5-105(E) requires that the lawyer keep records sufficient to identify conflicts with respect to these clients.

8. Fourth, the lawyer's duties in respect of client confidences and secrets, as defined in DR 4-101 and DR 5-108(A)(2), must be honored, notwithstanding the brevity of the interaction with these EAP clients.

9. Fifth, the rules on in-person solicitation of work set forth in DR 2-103(A) do not bar in-person or telephone solicitation of existing or former clients, but the lawyer may not seek such work if the particular employee has made known a desire not to be so solicited.[4]

10. Sixth, under DR 6-101, the lawyer must provide competent representation in these matters. A determination that the complexity of a problem is such that a telephone consultation will be insufficient must be communicated to the client. As we opined in N.Y. State 664 (1994), "[c]ompetent representation in a particular [telephone consultation] may require" a great deal more than merely providing general legal advice. Any limitation on the scope of the advice offered must be disclosed.

11. Finally, although we do not opine on issues of law, we note that New York's engagement-letter rules, found at 22 N.Y.C.R.R. Part 1215, may require the lawyer to set forth the scope of the engagement and the billing arrangement (among other things) in an engagement letter to, or retainer agreement with, the employer. Those rules also may require a separate letter to, or retainer agreement with, the employee-client for any matters undertaken that are to be paid for by the employee-client if the fees from that separate engagement are expected to amount to $3,000 or more.

12. We assume in respect of the second question that the EAP has no objection to the lawyer accepting private retention from its referred clients. If that is correct, and the lawyer does not improperly seek to be paid separately for work covered by the EAP, we see no reason under the Code why the lawyer may not accept such work.[5]

Conclusion

13. Subject to the conditions described above respecting compliance with all relevant Code provisions, the two questions are answered in the affirmative.

Endnotes

1. *See* EC 2-34 and EC 8-3, encouraging lawyers to provide services to persons of limited means.

2. *Cf.* N.Y. State 721 (1999) (lawyer may agree to insurance company's requirement that lawyer use a legal research service as long as, *inter alia*, this does not lead to inadequate representation or constrain the lawyer's professional judgment on behalf of the client).

3. DR 2-103(F)(4)(d). We do not decide in this opinion whether a discount offered by the lawyer to the employer, as the person paying fees for representation of another, would constitute giving something of value to obtain employment by the client, but we merely observe that the requirements of DR 2-103(F)(4) may apply to EAPs. DR 2-103(D) states that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment," with certain enumerated exceptions. DR 2-103(F)(4) provides one such exception:

> A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations which promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partners or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:
>
> .*.*.*
>
> Any bona fide organization which recommends, furnishes, or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
>
> a. Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
>
> b. Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
>
> c. The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
>
> d. The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief.
>
> e. The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations.
>
> f. Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

4. DR 2-103(A)(2)(b).

5. *Cf.* N.Y. State 810 (2007) (outlining circumstances in which *public* officer or government-employed lawyer, and private contractors working for county legal services office, may represent those encountered through a legal services program).

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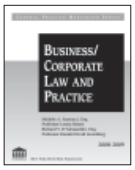

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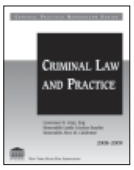

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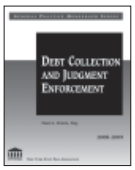

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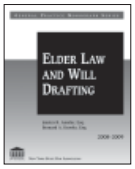

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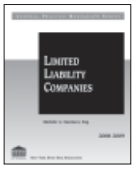

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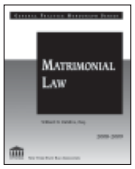
Matrimonial Law



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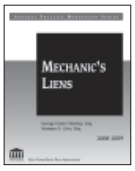

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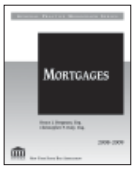
Mortgages



Authors: Bruce J Bergman, Esq.; Christopher P. Daly, Esq.
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