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A Message from the Chair

Welcome to our second issue of *General Practice and Beyond*. Last year's issue was such a resounding success that we thought it only fair to our members to have an encore presentation, one which nearly doubles in size our issue from 1999.

As general practitioners, our practices span the spectrum of substantive areas of the law. We may draft wills and conduct closings, while representing a criminal defendant at arraignment or handling a contested divorce case. We incorporate our business clients while drafting pre-nuptial agreements for our individual clients. We are often referred to as the "family lawyers," unique among our peers.

In this special issue, you will find a compilation of articles from the magazines, newsletters and journals of many Sections of the State Bar that reflect the diversity that is General Practice. All of the articles were chosen for their interest to General Practitioners.

This year, we have included articles on the Internet and law practice management to provide and provoke new ideas and techniques in maintaining more efficient practices. But never a Section to stray too far from our roots, we have maintained one of most popular features, our trivia column. This one was crafted by Bill Helmer, so it is probably much easier than my previous concoctions. Good luck.

We hope you enjoy this special issue. As always, it is a privilege to serve as your Chair. I hope to see you all at this year's Summer Meeting in Alexandria Bay from July 20-23, 2000.

Please take a moment to complete and fax back the poll on page 3 with your suggestions to assist us in improving our Section and our service to you. Thank you.

Steven L. Kessler

REQUEST FOR ARTICLES

If you have written an article and would like to have it published in
One on One
please submit to:

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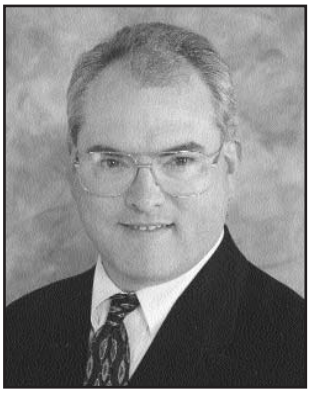
Albany, NY 12207

Articles should be submitted on a 3 1/2" floppy disk, in WordPerfect or another major word processing format, together with two printed originals and biographical information, and should be spell checked and grammar checked.

From the Hacienda



My cable television company in Schenectady just added an all Spanish-speaking network to the basic lineup, and that got me to thinking about languages. Let's face it, every one of the three major North American republics is bilingual. In Canada, the languages are French and English. In the United States and Mexico, the languages are English and Spanish. With your permission, I will now digress for a moment, for there is a major dose of poetic justice in that fact.

Don't believe Bill Clinton (in his Memorial Day 2000 speech) and Pat Buchanan (in his book *A Republic not an Empire*) when they attempt to exonerate America from its "manifest" imperial pretensions. With the exception of the Phillipines, we have retained all the territory seized from Mexico and Spain in the last century, including Florida, California, and a half dozen other states. In this century, our troops have fought in Panama, Grenada, the Dominican Republic, and Nicaragua without the benefit of a declaration of war. The consequences of this history are all around us. In Puerto Rico, every child learns at least some English. Here in upstate New York, virtually every school offers a Spanish program, and other language programs (including French ones) are hard to find.

For some reason, the majority of my fellow conservatives find this situation distressing. George Bush, who is fluent in Spanish, seems to be a laudable exception. For my part, I think that we should embrace the Spanish language and culture as a core element of the American identity. At one level, it is practically a matter of national survival. Keep in mind that, if it were not for the constant infusion of immigrants, the great majority of which arrive from Spanish-speaking lands, America would at this very moment be experiencing a significant and accelerating drop in population, with woeful consequences for our economy and society.

I have a few thoughts about how we might better incorporate our Spanish heritage into our public life. First and foremost, we should repromulgate the Constitution in two official languages: Spanish and English. Secondly, we should cease trying to micromanage the internal affairs of our neighbors to the south. It is true that President Fujimori of Peru has offended the editors of the *New York Times* through his continued popularity among the multitude of poor in his country, but that does not justify the strong-arm diplomatic efforts now being undertaken by the Clinton administration.

In general, we should clean out the spooky old diplomatic attic where we keep such antiques as the sanctions against Cuba and the "School for the Americas." Through the Organization of American States, we should be promoting cooperative solutions to the environmental and economic problems that commonly affect us. And we should be prepared to forgive debt and to pressure the World Bank and the International Monetary Fund to forgive debt whenever it bears too heavily on a developing people (both the *Times* and the *Wall Street Journal* will be angry with me for expressing that opinion).

I also reject the idea that Spanish-English bilingualism must become a "zero-sum" game. In fact, we can and should take steps to bolster our connections to other English-speaking nations. Today, the United States is the only major English-speaking country that remains outside the Commonwealth of Nations. Why be yoked with Fiji in the UN and Belize in the OAS and not with Australia, Canada, and the United Kingdom in the Commonwealth? It is true that the British monarch is the symbolic head of the organization, but residual Anglophobia should not be allowed to stand in the way of cultural fellowship (now the *Irish Times* will be calling for my head).

Yet there is a third language that I would like to see restored to an honored place in American culture—the language of poetry. Among its many crimes, television may be accused of banishing poetry from our intellectual landscape. I acknowledge that Shakespeare and Milton may be too remote to be of much use to today's schoolchildren, who represent the fourth generation raised in front of the tube. But I would maintain that most of the poetic literature in English written during the past two centuries is still very accessible to the young.

So there you have my three-ingredient prescription for linguistic health. Embrace the Spanish language and culture as a partner in our national destiny, and alter America's western hemisphere foreign policy accordingly. Cozy up to the other English-speaking countries by joining the Commonwealth of Nations. Make the study of poetry central to the curriculum in our public schools. I suppose that there is not much chance of any of these things coming to pass, but I know that nothing happens until you challenge people's assumptions. I will close with the words of the blind (Spanish-English) poet Jorge Luis Borges, who said towards the end of his life, "Who moved the furniture around in here?"

William S. Helmer

FAX POLL

Tell us what you think about *General Practice and Beyond*

Thank you for reading this special issue of *General Practice and Beyond*. To enable us to meet your information needs, after you've read the issue please fill out the questionnaire and fax back to Steve Gallagher at 518-487-5787.

1. Did you find the information contained in *General Practice and Beyond* to be:

__ Very useful.
__ Somewhat useful.
__ Not at all useful.

2. Which areas of law do you practice in? (Check all that apply.)

__ Business and commercial law.
__ Domestic relations law.
__ Estate and financial planning.
__ Real estate law.
__ Trial practice.
__ Practice management.
__ General practice.
__ Other (please specify).

_____
_____
_____
_____

3. Articles in *General Practice and Beyond* are arranged in 11 topic areas. Did you find this arrangement helpful?

__ Very helpful.
__ Somewhat helpful.
__ Not at all helpful.

4. Did you find articles of interest outside your main area(s) of practice?

__ No.
__ Yes (please specify).

_____
_____
_____
_____
_____
_____

5. What do you think of the length of the articles?

__ Too short to be useful.
__ Good length.
__ Too long.

6. How much time did you spend reading *General Practice and Beyond*?

__ 0 to 15 minutes.
__ 15 minutes to an hour.
__ An hour or more.

7. Did you pass your copy of *General Practice and Beyond* on to someone else to read?

__ Yes.
__ No.

8. What is your firm size?

__ 1 lawyer.
__ 2-4 lawyers.
__ 5-9 lawyers.
__ 10-25 lawyers.
__ 26 or more lawyers.

9. What is your practice setting?

__ Rural.
__ Small urban.
__ Large urban.

10. Any other comments:

_____
_____
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_____

Lawyer-Client Privilege Update

By Robert A. Barker

Certain of the late developments in lawyer-client privilege are not directly tied to business or commercial matters since they have occurred in the governmental context, but the contrast between how the privilege applies in the private and governmental areas is interesting. In bringing these and other developments down to date, I alert the reader to the 1999 supplement in Barker and Alexander, *Evidence In New York and Federal Courts* (West, 1996) which reflects much of what follows, and my colleague Vincent Alexander's supplement commentaries to McKinney's CPLR 4503.

I. Statute Updates

a. E-mail

The New York Legislature created a new section in article 45 of the CPLR, with regard to the privileges. Section 4547 provides:

> Privileged communications; electronic communication thereof. No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.

Since access to e-mail seems to be fairly easy for those willing to make the effort, I am not sure why lawyers or clients would want to convey confidential information in this manner. But if they do, this provision, while perhaps not preventing the cat from getting out of the bag, will nevertheless protect the message from being introduced in evidence. It cannot be argued in court that the message was not intended to be confidential. The statute covers all the existing privileges and, of course, all the aspects of a privilege must be in place—the message must be confidential and, in the case of the lawyer-client privilege, must involve the giving or seeking of legal advice. Clearly, if the message is highly sensitive and should not be revealed, regardless of admissibility in evidence, some other more secure means of communication ought to be selected, or if e-mail is used, the message should be encoded.

b. Accountant privilege

For years there has been some uncertainty whether, when a lawyer and an accountant were working together for the client—usually on tax matters—the accountant's communications were protected. Certainly with no lawyer in the picture there has been no accountant-client privilege. Now there is to a limited degree.

As part of the IRS Restructuring and Reform Act of 1998,[1] Congress created a new taxpayer-accountant privilege in civil tax proceedings before the IRS and in federal courts.[2] The protection covers confidential communications concerning tax advice between the taxpayer and tax practitioner authorized to practice before the IRS. The privilege applies only in noncriminal matters. Otherwise, the applicable criteria are the same as those applied in the lawyer-client privilege. The text of the statute follows:

> **Confidentiality privileges relating to taxpayer communications**
>
> (a) Uniform application to taxpayer communications with federally authorized practitioners.—
>
> (1) General rule.—With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.
>
> (2) Limitations.—Paragraph (1) may only be asserted in—
>
> (A) Any noncriminal tax matter before the Internal Revenue Service; and
>
> (B) Any noncriminal tax proceeding in Federal court brought by or against the United States.
>
> (3) Definitions.—For purpose of the subsection—
>
> (A) Federally authorized tax practitioner.—The term "federally authorized tax practitioner" means any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code.
>
> (B) Tax advice.—The term "tax advice" means advice given by an individual

> with respect to a matter which is within the scope of the individual's authority to practice described in subparagraph (A).
>
> (b) Section not to apply to communications regarding corporate tax shelters.—The privilege under subsection (a) shall not apply to any written communication between a federally authorized tax practitioner and a director, shareholder, officer, or employee, agent, or representative of a corporation in connection with the promotion of the direct or indirect participation of such corporation in any tax shelter.[3]

c. Disclosure under Federal Rule of Civil Procedure 26

Under the mandatory disclosure rules as respects expert witnesses,[4] there is a waiver of privilege which may include the lawyer-client privilege where there are litigation-prepared materials which were considered by the expert in giving an opinion; i.e., all such material, including attorney's opinions and mental impressions, must be disclosed if considered by the expert witness.[5] In *Haworth, Inc. v. Herman Miller, Inc.*[6] it was held that an expert witness must disclose all facts "considered" in formulating an opinion, even if not relied on by the expert and even if assembled by the attorney; but, as distinguished from material prepared for litigation, the lawyer's work product (his opinions and mental impressions) would still be protected. And in *The Herrick Co. v. Vetta Sports, Inc.*,[7] a legal malpractice action, plaintiff was allowed to see all prior confidential opinions on legal ethics that the defendant law firm's expert had prepared for defendant on the same subject matter. It did not matter whether the expert had considered them or not. Rule 26(a)(2)(B), it was said, does not exhaust all the material that may be consulted by experts. Here, the expert's prior opinions would have impeachment value, and defendant opened the door to discovery of the otherwise privileged material by naming its previous expert as its expert in this case.

d. Keeping a log under Rule 26

A court may require the keeping of a privilege log in order to facilitate its determination of whether or not material sought in discovery is privileged.[8] As stated in *United States v. Construction Products Research, Inc.*[9]:

> To facilitate its determination of privilege, a court may require "an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps. . . ." The privilege log should:
>
> identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between . . . individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony. Even under this approach, however, if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected.

e. Material prepared for litigation under Rule 26

In *United States v. Adlman*[10] the court used a broad standard to determine whether a document was prepared "in anticipation of litigation" under Federal Rule of Civil Procedure 26(b)(3). Some courts have held that work product immunity is not available unless the materials in question were prepared primarily "to assist in litigation." This approach is too narrow, the Court of Appeals held, because it fails to take account of the situation in which a client, in determining whether to enter into a business transaction, desires an analysis of the potential outcome of litigation that is likely to follow in the wake of the transaction. A memorandum that assesses the litigation ramifications of such a transaction is made "because of" litigation but not "to assist in" such litigation. Under the narrow approach, a memorandum of this nature would not qualify as work product even though the policies of the immunity are applicable, i.e., protection of materials that candidly discuss litigation strategy and assess the strengths and weaknesses of a client's litigation posture. The court thus held as follows:

> [A] document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation. Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3).[11]

At issue in *Adlman* was a lawyer's analysis of potential litigation with the IRS that was expected to result from a business restructuring in which the client planned to file a claim for a major tax refund. The Court of Appeals directed the district court to decide the applicability of the work product immunity in accordance with the standard that it had articulated.

II. Government Related Cases

Business corporations are entitled to the lawyer-client privilege for the protection of communications between their functionaries and counsel involving legal matters.[12] But the privilege will not apply to communications between federal attorneys and employees of the federal government when they would reveal criminal wrongdoing and are sought by a federal grand jury. In *In re Grand Jury Subpoena Duces Tecum*,[13] Hillary Clinton could not claim the privilege concerning her communications with White House staff attorneys concerning her activities following the death of Vince Foster. She was summoned before the grand jury following the discovery of certain pertinent records in the White House. The White House does not face the liability—civil and criminal—that could befall business corporations, and the public interest concerning affairs in the highest echelons of government would outweigh any privilege considerations. Where a government official is concerned over personal liability, a private lawyer should be consulted.

In *In re Lindsey*,[14] Bruce Lindsey, Deputy White House Counsel, could not claim the privilege respecting matters discussed with President Clinton concerning the Lewinsky scandal. The duty of government attorneys, unlike private lawyers, is not to defend clients, but to see that the public laws are upheld. Government lawyers are obliged to expose governmental wrongdoing. Again, any traditional privileges claim is outweighed by the public interest.

Incidentally, a new privilege called the "protective function privilege" that would insulate secret service officers from testifying about their observations of the President was rejected.[15]

III. Elements of the Protection and Coverage Generally

a. Is the communication confidential? Does it involve legal information?

Plaintiff brought an action alleging that the defendant bank charged plaintiff and others a fee at mortgage closings, part of which was wrongly kicked back to defendant lawyer. In a related case, it was held that the lawyer could not assert the lawyer-client privilege concerning communications made by him to the bank's attorneys since those commentaries were not of the sort protected. In the action against the bank, the court held that communications between the bank's attorney and the bank's CEO, even if otherwise protected, could not be privileged where confidentiality was lacking because of the presence of another attorney who was not acting as counsel to either party.[16]

In *Bertalo's Restaurant v. Exchange Insurance Co.*[17] it was held that reports by a lawyer after examining property damage claims made to an insurance company before the company denies coverage are not protected from disclosure either as work product or materials prepared for litigation. The decision whether to pay or reject claims is not a legal decision, but rather a business decision. The fact an investigation leading to such a decision is conducted by lawyers will not cloak the report with the privilege.

But when lawyers were assigned by the senior partner of a law firm to investigate another lawyer's conduct in the handling of a client's funds, the resulting report would be protected under the privilege because the fact-finding pertained to legal matters. The court discussed the distinction between fact-finding on the one hand and lawyering on the other, as a question which has vexed courts. Thus, where a business enterprise conducts an internal investigation by non-lawyers, there would be no privilege; but where, as here, the object of the investigation is the lawyering conduct of an associate and the investigation is conducted by lawyers who would be imparting their legal interpretation and advice, the privilege will apply.[18] Likewise, in *In re Woolworth Corp. Securities Class Action Litigation*,[19] the fact-finding by outside counsel as part of a corporate internal investigation entailed the giving of legal advice and thus counsel's report was protected.

The distinction between the *Bertalo's Restaurant* case and these federal cases is fuzzy at best.

b. Employee Retirement Income Security Act

An interesting discussion concerning communications related to employee benefit plans under the Employee Retirement Income Security Act (ERISA) of 1974,[20] is found in *In re Long Island Lighting Co*[21] (LILCO). The district court had ordered LILCO to produce documents pertaining to the plan and LILCO went to the Second Circuit for mandamus claiming that the material was privileged. The lower court's order compelled production of documents relating to communications between a manager of LILCO's insurance department and Leiman, a LILCO attorney. Respondents, the plan's beneficiaries, argued that the privilege may not be asserted, but the Second Circuit panel found the material privileged.

The issue was framed as one of first impression: "whether an employer waives the attorney-client privilege with respect to all communications regarding a plan covered by ERISA by seeking advice as a plan fiduciary and as a non-fiduciary from the same attorney."[22] The employer's invocation of the privilege turns on whether or not the communication concerns a matter as to which the employer owes a fiduciary obligation to the beneficiaries. If there is a fiduciary obligation, then the privilege may not be invoked because there is a duty to provide full and accurate information to the beneficiaries regarding the administration of the plan. But the lawyer's work on the plan also will involve non-fiduciary matters that will be protected. For example, communications regarding the plan's design or amendment would be protected because of its non-fiduciary nature.[23]

The lawyer's work in the LILCO case presented a problem because it involved both fiduciary and non-fidu-

ciary matters. The beneficiaries argued that the protection accorded the non-fiduciary communications is waived when combined with the information to which they are entitled. The court refused to accept this and held the privilege secure as to the non-fiduciary matters pertaining to the plan's design and amendment; the plan's ongoing administration and management, constituted the fiduciary aspect which was not protected.

The beneficiaries also argued that they were joint clients with LILCO since one attorney handled all matters for the benefit of both parties. This was rejected by the court, which pointed out that the beneficiaries did not retain the lawyer to advise them. It is only when the same attorney represents the interests of two or more clients on the same matter that there is no privilege between or among the clients. Here the matters were not the same, being divided between the fiduciary and non-fiduciary.

c. Other corporation and organization matters

The question for the Second Circuit in *United States v. Intern. Broth. of Teamsters, AFL-CIO*[24] was whether communications between a campaign manager for Ron Carey's reelection bid for the office of president of the union and counsel for the campaign concerning campaign contribution violations were privileged. The union was willing to waive any privilege it might have in order to cooperate with the investigation. It was the campaign manager who asserted the privilege. The court held that he had no individual protection since the attorney was the union's attorney and not his, and the communications related to matters of the campaign and not to his individual interests.

When corporate ownership changes, what happens to any privilege possessed by the predecessor corporation? Where there is a merger, the surviving corporation succeeds to privileges of the merged corporation.[25] If the privilege resides with a divested subsidiary, control would pass to the new managers of the subsidiary, unless the parties contract otherwise.[26] Sale of corporate assets, as opposed to sale of stock, would not result in transfer of control over the privilege as respects the communications pertinent to the transferred assets.[27] And when a corporation simply sells assets to another corporation, the seller's disclosure to the buyer of the seller's communications with its counsel waives the privilege.[28]

IV. Common Interest or Joint Defense

In addition to the common interest argument raised in the LILCO ERISA case, *supra*, note the following:

- The common interest doctrine, which holds that communications between joint clients and their lawyer, while not protected as between them, are privileged as to the rest of the world, does not apply when the discussion concerns joint business strategy which happens to include as one of its elements a concern about litigation. Thus, where discussions with the lawyer concerned whether members of a bank group ought to assume certain obligations, a business matter, expressions of concern as to whether such a move might trigger shareholder litigation was not the focus and could not transfer the business matter into a legal matter.[29]

- While work product may be shared with other parties having the same interests against a common adversary without waiving the privilege,[30] a waiver was held to occur when a party voluntarily submitted work product to a government agency in order to induce the agency to move against the party's competitors.[31] In this case the court found that shared material falls "roughly into three categories." First, there is no waiver where the material is shared with a litigation ally. Second, the protection adheres where a private party shares material with a government agency, while both were prosecuting separate but parallel claims against the same defendant. And third, where, as in the case before the court, the private party gives privileged information to the government in order to incite it to attack the party's adversary, the privilege is waived because the party and the government were neither adversaries nor allies when the documents were voluntarily turned over. "This vindicates the principle of full disclosure, prevents the unfairness of selective revelations, and reflects the common sense perception that in most such cases the privacy attending creation of the work-product had either served its purpose or was of little importance in the first place."[32]

- Where counsel attended meetings of an industry-wide group of London reinsurance underwriters which involved discussions of potential losses on environmental liability claims against reinsureds in the United States, and the meetings centered on economic solutions, the privilege would not attach on the basis of a joint interest since the focus of the meetings was not on legal matters in the first place. Even though issues of antitrust law and reinsurance treaty interpretation were discussed, counsel was never asked to provide legal analysis or interpretations, and took a role as little more than a scrivener. Notations in the minutes indicating that they were "privileged and confidential" and "attorney work-product" could not transform material otherwise not privileged.[33]

V. Death of the Client

Vincent Foster, Deputy White House Counsel at the time certain employees were dismissed from the staff of the White House Travel Office, consulted with private counsel nine days before his death. Counsel made extensive notes of the interview, which were sought by the Office of the Independent Counsel, which was looking

into whether various individuals made false statements, obstructed justice or committed other crimes during its investigation of the Travel Office matter. Foster's counsel argued that his notes were protected by the lawyer-client privilege even though Foster was no longer alive, and the District Judge agreed. The D.C. Circuit Court reversed,[34] reasoning that in the criminal context the risk of posthumous revelation would have little to no chilling effect on client communication, whereas the cost of protecting such communications would be high. A balancing test was instituted wherein the importance of the communication in a particular criminal case would be weighed against the traditional reasons for preserving confidentiality. In this situation the need for the information was held to outweigh the privilege.

The Supreme Court reversed[35] in an opinion written by Chief Justice Rehnquist for a six-justice majority. It was noted that while a posthumous privilege is generally recognized, there is very little case law to that effect except for that relating to the distribution of the client's estate where his expressions of intent to his lawyer would facilitate the resolution of disputes among the client's heirs. Despite the lack of comprehensive authority for the posthumous privilege, Chief Justice Rehnquist eschewed the Circuit Court's balancing test and held there to be a firm privilege surviving the client's death, except for the well-established testamentary exception. The rationale is summed up as follows:

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.[36]

Endnotes

1. Pub. L. No. 105-206, 112 Stat. 685.
2. 26 U.S.C.A. § 7525.
3. As defined in section 6662(d)(2)(C)(iii).
4. Federal Rules of Civil Procedure 26(a)(2).
5. *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57 (S.D.N.Y. 1997).
6. 162 F.R.D. 289 (W.D. Mich. 1995).
7. 1998 WL 637468 (S.D.N.Y. 1998).
8. See Federal Rules of Civil Procedure 26(b)(3)(5) and S.D.N.Y. and E.D.N.Y. Civil Rule 26.2.
9. 73 F.3d 464, 473 (2d Cir.), *cert. den.* 117 S.Ct. 294 (1996), *quoting from Bowne of N.Y. City, Inc. v. Am Base Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993).
10. 134 F.3d 1194 (2d Cir. 1998).
11. *Id.* at 1195.
12. *Upjohn v. United States*, 449 U.S. 383 (1981).
13. 112 F.3d 910 (8th Cir.), *cert. den.* 117 S.Ct. 2482.
14. 158 F.3d 1263 (D.C. Cir.), *cert. den.* 119 S.Ct. 466 (1998).
15. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir.), *cert. den.* 119 S.Ct. 461 (1998).
16. *Doe v. Poe*, 244 A.D.2d 450, 664 N.Y.S.2d 120 (2d Dep't 1997), *aff'd* 92 N.Y.2d 864, 677 N.Y.S.2d 770 (1998).
17. 240 A.D.2d 452, 658 N.Y.S.2d 656 (2d Dep't), *appeal dismissed* 91 N.Y.2d 848, 667 N.Y.S.2d 683 (1997).
18. *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996).
19. WL 306576 (S.D.N.Y. 1996).
20. 29 U.S.C. § 1001.
21. 129 F.3d 268 (2d Cir. 1997).
22. *Id.* at 270-271.
23. The court cites *Siskind v. Sperry Retirement Program*, 47 F.3d 498, 505 (2d Cir. 1995); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524-25, n.33 (5th Cir. 1994); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1161 (3d Cir. 1990).
24. 119 F.3d 210 (2d Cir. 1997).
25. *See O'Leary v. Purcell Co.*, 108 F.R.D. 641 (M.D.N.C. 1985).
26. *See Medcom Holding Co. v. Baxter Travenol Labs, Inc.*, 689 F. Supp. 841 (N.D. Ill. 1988).
27. *See Sobol v. E.P. Dutton, Inc.*, 112 F.R.D. 99 (S.D.N.Y. 1986).
28. *In re In-Store Advertising Securities Litigation*, 163 F.R.D. 452 (S.D.N.Y. 1995).
29. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437 (S.D.N.Y. 1995).
30. *In re In-Store Advertising Securities Litigation*, *supra*, n. 21.
31. *Information Resources, Inc. v. Dunn & Bradstreet Corp.*, 999 F. Supp. 591 (S.D.N.Y. 1998).
32. *Id.* at 593.
33. *Aetna v. Certain Underwriters At Lloyd's*, 176 A.D.2d 605, 676 N.Y.S.2d 727 (Sup. Ct., N.Y. Co., 1998).
34. *In re Sealed Case*, 124 F.3d 230 (1997).
35. *Swidler & Berlin v. United States*, 118 S.Ct. 2081 (1998).
36. *Id.* at 2086.

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Dead Men Tell No Tales? Hearsay from Beyond the Grave and a Proposal for More

By Thomas F. Shea

As the existence of the federal witness protection program indicates, criminals do not look kindly upon those who are likely to give evidence against them in a court of law. Such would-be witnesses have a way of dying, disappearing or suffering total or selective memory loss at an inopportune time—e.g., just prior to their scheduled appearances at criminals trials. Often, however, prospective witnesses have already told their stories under oath to grand juries or have given oral or written statements to prosecutors, police or other persons prior to their untimely demise or unavailability. Prosecutors have then sought to substitute these earlier statements for the testimony in court of the now-unavailable witnesses. Naturally, defendants have responded with the objection that these out-of-court versions of events constitute hearsay and do not fall within any recognized exception to the general rule that hearsay is not admissible at trials.[1]

Hearsay can be defined as a statement made out of court offered in court for the truth of the fact asserted in it.[2] Since a witness's grand jury testimony to the effect that he saw the defendant shoot the victim would obviously be offered for its truth if a transcript of that testimony were introduced at the defendant's homicide trial, it would certainly fall within the definition of hearsay. However, that is not the end of the inquiry, because the rule against hearsay has many exceptions.[3] The inconvenient fact that an expected witness has been killed prior to trial does not necessarily mean that the jury will not hear his sepulchral voice and rely on it in determining an accused's guilt.

Long-established hearsay exceptions have been employed to permit the words of deceased victims of violent crime to reverberate against their assailants in open court. The "dying declaration" exception allows a homicide victim's statements concerning the cause of his own impending death and the identity of his slayer to be received in evidence.[4] The "excited utterance" exception permits the jury to hear of an emotional identification of his attacker soon after the event by an out-of-court declarant who may or may not be alive to testify at the trial.[5]

Other inculpatory declarations by murder victims have been deemed admissible, not as genuine exceptions to the rule against hearsay, but because they are not considered hearsay at all since they are not received for the truth of their content but only as evidence of the speaker's state of mind. Also known as "declarations of intention," they are statements indicating the declarant's purpose to meet with a particular individual in the future and are received as circumstantial evidence that the meeting actually took place and that the person intended to be met is probably the murderer of the declarant, who was found dead at the intended location.[6]

The use of out-of-court declarations to incriminate a defendant also has been attacked as violative of his Sixth Amendment right to confront the witnesses against him,[7] but the U.S. Supreme Court has responded that, because the rule against hearsay and the confrontation clause are designed to protect similar values and stem from the same roots, no independent inquiry into the reliability of the out-of-court statement is needed "when the evidence falls within a firmly rooted hearsay exception."[8] That is, historically recognized hearsay exceptions were created because each has some built-in indicia of reliability, and the confrontation clause demands no more. Of course, the defendant does have an opportunity to confront the *witness* to the out-of-court statements, who appears in court to tell the jury what he has heard.

With regard to a deceased witness who has testified before a grand jury, however, none of the aforementioned exceptions would apply. He has not spoken concerning his own death as he lay dying and any excitement arising from the event he observed has long since subsided. Nor would his grand jury testimony qualify under the "former testimony" exception to the hearsay rule. Rule 804(b)(1) of the Federal Rules of Evidence, after requiring that the declarant be unavailable as a witness in court, provides admissibility for "[t]estimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Of course, criminal defendants are not permitted to be present in the grand jury room when witnesses testify against them and so are not afforded the opportunity to cross-examine them. The same situation obtains under New York law, where the former testimony exception for criminal cases is codified in section 670.10 of the N.Y. Criminal Procedure Law (hereinafter CPL).[9] An essential for the admission of former testimony at New York criminal trials is that the defendant against whom it is received has been given a full and fair opportunity to cross-examine the witness when the earlier testimony was provided[10]—e.g., at a preliminary hearing or at the conditional

examination of a witness whose illness makes it unlikely he will be physically able to testify at the coming trial.

Accordingly then, even where a prospective witness has already incriminated a defendant in grand jury testimony, the temptation to do away with him prior to trial remains strong because the hearsay rule appears to stand as an insurmountable barrier to that deceased witness's story ever being told in court. But miscreants favoring the "a good witness is a dead witness" approach to their legal difficulties received an unpleasant surprise as the result of an imaginative ruling by the U.S. Court of Appeals for the Second Circuit. Rather than employing the "catch-all" provision[11] for creating new hearsay exceptions having "circumstantial guarantees of trustworthiness" under the Federal Rules of Evidence, with the attendant confrontation clause difficulties inherent in newly adopted hearsay exceptions, the court ruled in *United States v. Mastrangelo*[12] that both confrontation and hearsay objections could be obviated by the doctrine of waiver.

On the way to the United States Court House to testify in a marijuana distributing case, the prime government witness against Mastrangelo was chased by two men and shot dead in the street. The Circuit Court held that the deceased witness's grand jury testimony could be received as direct evidence against the defendant if, at a hearing out of the presence of the jury, the government could convince the trial judge by a preponderance of the evidence that the defendant had ordered the murder or had at least known about the plot and failed to warn the authorities. The court reasoned that by his misconduct in preventing a witness's appearance on the stand a defendant would be deemed to have waived his Sixth Amendment right to confront that witness and also the right to assert that the grand jury transcript of the witness's testimony constituted hearsay.

At the hearing on remand, the government offered evidence showing that Mastrangelo, while free on bail, had told the murdered witness to say that someone other than he was involved in the crime and had assured the witness's nephew that the witness would not be permitted to testify against him. Further, after the killing, Mastrangelo told a fellow detainee that a phone call had been made and that the witness "had to get whacked out."[13] The trial court found that the government had proved Mastrangelo's prior knowledge and inaction by a preponderance of the evidence, but not by clear and convincing evidence, and upheld the admission of the witness's grand jury testimony. The Second Circuit affirmed[14] and adhered to its prior ruling that to require proof of the defendant's misconduct by clear and convincing evidence would place so heavy a burden on the prosecution as to encourage attempts to silence government witnesses.

One year later, a similar scenario was presented to a New York trial court. An estranged husband, Neil Sirois, was charged with shooting his wife's male companion to death outside a restaurant. Mrs. Sirois testified against her husband before a Kings County grand jury, but later resumed her relationship with him and, despite a grant of transactional immunity, refused to testify at his trial. The prosecutor, citing the federal court's ruling in *Mastrangelo* as persuasive authority, asked the trial judge to hold a hearing to determine whether the defendant was responsible for his wife's recalcitrance. When the court refused, the prosecutor sought a writ of mandamus from the Appellate Division for the Second Department. Although it denied the writ, the appellate court endorsed the *Mastrangelo* approach as a guide for future cases. However, it rejected the preponderance test and stated that the prosecution would have to prove a defendant's misconduct in silencing a witness by clear and convincing evidence.[15] In support of this higher standard, the Appellate Division cited what it termed the legislative intention, expressed in CPL section 670.10,[16] that grand jury testimony not be used at trials. That statute, however, is merely consistent with the rule that former testimony is only admissible as a hearsay exception where the party against whom it is offered has had a prior opportunity to cross-examine the witness. In the grand jury, of course, the defendant is not afforded this right. But CPL section 670.10 does not speak to the situation where the entire right of cross-examination is waived by misconduct and therefore is a doubtful buttress for the court's choice.

Nevertheless, the N.Y. Court of Appeals embraced the "clear and convincing" standard when it was given the opportunity to do so 12 years later in *People v. Geraci*.[17] There, after voluntarily giving oral statements to investigators, a sworn statement to an assistant district attorney and full testimony before the grand jury which indicted the defendant, the witness to a nightclub stabbing homicide suddenly disappeared. He had not been claimed by the grim reaper, however, because he surfaced in Florida and was returned to New York pursuant to a material witness order, albeit as a changed man. He announced that he would not repeat his grand jury testimony inculpating the defendant if he were called as a trial witness and now claimed that he had been outside the nightclub when the stabbing occurred.

At the *Sirois* hearing,[18] the prosecution offered the testimony of police investigators who had interviewed the witness. He told them that he had been approached post-indictment by the defendant, free on bail, who said to him, "You were there that night; I want you to come down to my lawyer's with me."[19] The witness did not comply and fled to Florida. While there, strangers approached him with a police report containing an outline of his grand jury testimony and shoved it in his face. Back in New York, a friend intervened with people coming to break his legs. After another friend spoke to the defendant's uncle, the witness received $2,000 and a promise of $10,000 more when the defendant's trial was over. The

witness also stated, "I don't know if I'm gonna have problems with *him*,"[20] referring to the defendant.

The Court of Appeals held that circumstantial evidence may be sufficient to establish a defendant's involvement in discouraging a witness and had in fact met the "clear and convincing" standard in this case. The Court rejected the asserted need to disprove every reasonable hypothesis of the defendant's innocence to a moral certainty because that was another formulation of "proof beyond a reasonable doubt," a higher standard reserved for determining a defendant's guilt at trial. Because the witness had been made "unavailable" as a practical matter, his grand jury testimony was properly received against the defendant, whose conviction was affirmed. The Court added that the term "forfeiture" rather than "waiver" of confrontational and hearsay rights was a more accurate description of the consequences of the defendant's misconduct.[21]

The N.Y. Court of Appeals' most recent application of its "clear and convincing" test came in 1998 in *People v. Cotto*,[22] in which it stated that if the prosecution demonstrates a "distinct possibility"[23] that a criminal defendant has engaged in witness tampering, the trial court must grant a *Sirois* hearing to test that claim. While making a call from a public telephone one evening, a witness observed a man approach the victim and shoot him to death. The witness, the victim and the murderer knew one another in the neighborhood. After the shooting, the killer turned and saw the witness watching. He pointed his gun at the witness without firing and then fled the scene. The witness told this story twice to detectives and an assistant district attorney but did not testify before a grand jury. The day before he was to testify at the defendant's trial, the witness notified the prosecutor that he would not identify him because his family was in jeopardy. Although he later promised to tell the truth, when actually called at the trial he claimed that he could not identify the shooter and later told the trial judge that his family lived in Spanish Harlem, a small place, and he had to think of them.

At the *Sirois* hearing, detectives testified to earlier statements made by the witness and his sister. His sister said that neighborhood people asked her about her brother's location. She added that there was word on the street that her brother was talking, and she knew that anyone who talked against the defendant's family would be killed. The witness said that his fiancée had expressed fear for herself and her child because someone had asked his mother and sister where he could be found. Although at the hearing the witness and his sister denied making these statements, his mother testified that his sister had made similar statements to her.

The Court of Appeals agreed that implied threats had been made and that the defendant's own action in pointing his gun at the witness at the crime scene showed that he was connected to them, satisfying the prosecution's burden by clear and convincing evidence. It added that oral statements by the witness to prosecutors and police, as well as prior grand jury testimony, could serve as evidence-in-chief against the defendant as long as they were reliable. Here, the witness had identified the defendant as the murderer soon after the event in a lucid and calm manner on two separate occasions, satisfying that requirement as well.

A common denominator in the above cases is that in each of them the defendant himself took action with respect to the targeted individual in his capacity as a prospective witness. In *Mastrangelo* (telling the witness to change his story) and *Cotto* (pointing a gun at the witness) each respective defendant's intention to neutralize an adverse witness was clear. But even in *Geraci* (asking witness to come to the defendant's lawyer), the defendant manifested his awareness of the witness's status and an interest in the nature of his testimony. Accordingly, when coercive activities were undertaken by other persons which could benefit only the particular defendant concerned, it is a fair inference that the beneficiary was responsible for those actions, or at least had knowledge that they would occur. Even under the "clear and convincing evidence" standard, the defendant's knowledge of the coercive efforts of others need not be established beyond a reasonable doubt. The matter before the trial court is only whether a particular item of evidence ought to be admitted, not whether the defendant is guilty of the offense charged in the indictment.

But what if a crime is committed against a person without regard to his witness status, which nevertheless has the unintended effect of rendering the victim unavailable to testify against the perpetrator? Should that wrongdoer also be deemed to have forfeited his confrontational rights? Both the Federal Rules of Evidence and the N.Y. Court of Appeals have answered this question in the negative.

The Federal Rules of Evidence were amended in 1997 to codify the *Mastrangelo* doctrine by adopting a new hearsay exception, under the heading "Forfeiture by wrongdoing," for "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was *intended to*, and did, procure the unavailability of the declarant as a witness."[24]

It is clear from the use of the language "intended to . . . procure the unavailability of the declarant as a witness" that Federal Rules of Evidence 804(b)(6) would not permit receipt of the victim's out-of-court statements in the posed hypothetical. The intent to silence the victim as a witness is the *sine qua non* of the federal rule.

The N.Y. Court of Appeals reached the same result in *People v. Maher*[25] in 1997, a case in which the female victim was shot to death by her estranged lover. The victim had

obtained an order of protection and later told the police that Maher had grabbed her and thrown her to the ground. She also told a hospital security guard that Maher had brandished a pistol at her, handcuffed her to him and said, "Talk to me and I won't kill you." After her carefully planned murder, the prosecution sought to introduce these statements at trial to show that her rejection of the defendant provided his motive to kill her. It further argued that by killing her the defendant made her unavailable as a witness and therefore should be found to have waived his confrontational and hearsay rights. The Court of Appeals rejected this invitation to expand *Geraci* on several grounds.

First, said the Court, the *Geraci* rule was formulated out of the need to reduce the incentive to tamper with witnesses, not because of the reliability of the hearsay which was admitted, and there was no evidence here that the victim was killed because the defendant feared her future testimony. Second, it is New York's policy to construe exceptions to the hearsay rule narrowly. Third, the trial court would be deciding the ultimate issue reserved for the jury—i.e., whether the defendant had killed the victim. Fourth, the conditions surrounding the dying declaration exception to the hearsay rule would no longer have to be satisfied.

It is submitted that none of the above justifications is compelling. Although *Mastrangelo* and *Cotto* were crafted for instances involving the prevention of a witness's testimony, the underlying basis for those decisions was that the defendant, by his criminal act, had made an adverse witness unavailable to be confronted. Accordingly, the defendant could no longer in good faith demand a right of confrontation. He is in the position of the storied young man who killed his parents and then threw himself on the mercy of the court because he was an orphan. No one should be permitted to profit by his own wrong. The situation is the same where a defendant kills a victim for a reason unrelated to his witness status. By the defendant's intentional criminal act he has *in fact* made it impossible for the victim to testify against him, and therefore, he has made it impossible for the victim to be confronted as a witness. He, too, should be deemed to have forfeited his right of confrontation.

Suppose an organized crime chieftain suspects gang member A of testifying before a grand jury concerning the gang's importation of heroin and suspects that gang member B has been withholding more than his share of the proceeds of drug sales. The gang leader executes A and B. Actually, both A and B have testified against the boss before a grand jury concerning his drug activities. If both A and B had survived, both would have testified in court and been confronted by the gang boss. However, his killing them, obviously wrongful, has rendered their appearance in court impossible. Therefore, the grand jury testimony of both A and B should be received as direct evidence against him at his drug conspiracy trial. He should not be rewarded by the suppression of B's testimony because he was unaware when killing B that he was also a prospective witness against him. With criminal intent (the intent to kill) he has in fact prevented B from being a confrontable witness, and so the forfeiture rule should apply with the same force as it does in A's case. Of course, as the law now stands, A's grand jury transcript would be received against the gang leader, but B's would not.

As to narrow construction of the hearsay rule, in this instance any protection under that rule is waived or forfeited in its entirety, so no question of construction or interpretation of the rule is presented. It simply doesn't apply.

With regard to the judge's deciding the ultimate jury issue, the court's finding as a basis for its ruling on admissibility that the defendant killed the victim is made out of the presence of the jury and is never conveyed to them. Therefore, it can have no improper influence on the jury as finder of fact.

Although the application of a broad waiver or forfeiture rule to those who kill without the clear intention of silencing the victim would render the dying declaration exception redundant, the law of evidence is constantly being revised in the light of experience. The idea of forfeiture by misconduct of the right to object to hearsay is a relatively new one and probably did not occur to common law courts or the drafters of early codes of evidence. But the concept is sound and worthy of adoption by modern legislatures. As Mr. Justice Holmes remarked, a law should not persist if the only reason for keeping it is that "it was laid down in the time of Henry IV."[26] Indeed, in the recent Delaware prosecution of a prominent attorney for murdering his girlfriend, the trial court apparently applied an expanded version of the forfeiture rule by permitting the reading of the victim's diary, written two months prior to her death, to the jury to establish that her termination of their relationship was the motive for the defendant's killing her. The entry read, "I have finally brought closure to Tom Capano. What a controlling, manipulative, insecure, jealous maniac."[27] The jury convicted the defendant of her murder even though her body, which had been thrown from a boat at sea, was never recovered. As Shakespeare wrote, "For murder, though it have no tongue, will speak with most miraculous organ."[28]

Endnotes

1. Fed. R. Evid. 802 provides: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."
2. *See* W. RICHARDSON, EVIDENCE 497 (11th ed. 1995). Fed. R. Evid. 801(c) defines hearsay as "a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

3. Fed. R. Evid. 801, 803, 804 list at least 31 exceptions to the hearsay rule. They include admissions (considered not to be hearsay), declarations against interest, excited utterances, dying declarations, declarations of intent and former testimony.

4. Fed. R. Evid. 804(b)(2) provides a "dying declaration" exception to the hearsay rule, on the condition that the declarant is unavailable. "In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death" is admissible. *Id*. In New York, the common law rule permits the receipt of a dying declaration only in criminal homicide cases, not in civil cases, and then only with the additional requirements that the declarant knew that he was actually dying and had abandoned all hope of recovery. *See* People v. Nieves, 67 N.Y.2d 125, 501 N.Y.S.2d 1 (1986).

5. Fed. R. Evid. 803(2) creates a hearsay exception for "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *See also* People v. Edwards, 47 N.Y.2d 493, 419 N.Y.S.2d 45 (1979) (admitting, for its truth, the decedent's identification of her attacker heard through a closed door as she was being stabbed).

6. *See* People v. Hodge, 550 N.Y.S.2d 346 (1st Dep't 1990). The court admitted into evidence the deceased victim's statement that he intended to meet the defendant on the day he was killed as proof that the meeting took place. The deceased had a legitimate business reason to meet the defendant, a former tenant who had been evicted, to enable the defendant to gather his personal property from the apartment.

7. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

8. Bourjaily v. United States, 483 U.S. 171, 183 (1987) (ruling "the coconspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that . . . a court need not independently inquire into the reliability of such statements").

9. CPL § 670.10 provides:

> 1. Under circumstances prescribed in this article, testimony given by a witness at (a) a trial of an accusatory instrument, or (b) a hearing upon a felony complaint conducted pursuant to section 180.60, or (c) an examination of such witness conditionally, conducted pursuant to article six hundred sixty, may, where otherwise admissible, be received into evidence at a subsequent proceeding in or relating to the action involved when at the time of such subsequent proceeding the witness is unable to attend the same by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court. Upon being received into evidence, such testimony may be read and any videotape or photographic recording thereof played. Where any recording is received into evidence, the stenographic transcript of the at examination shall also be received.
>
> 2. The subsequent proceedings which such testimony may be received in evidence consist of:
>
> (a) Any proceeding constituting a part of a criminal action based upon the charge or charges which were pending against the defendant at the time of the witness's testimony and to which such testimony related; and
>
> (b) Any post-judgment proceeding in which a judgment of conviction upon a charge specified in paragraph (a) is challenged.

10. *See* People v. Simmons, 36 N.Y.2d 126, 365 N.Y.S.2d 812 (1975).

11. *See* Fed. R. Evid. 804(b)(5). That Rule was transferred to Rule 807 in 1997 and now provides:

> Residual Exception
>
> A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 807.

12. 693 F.2d 269 (2d Cir. 1982).

13. United States v. Mastrangelo, 561 F. Supp. 1114, 1117 (E.D.N.Y. 1983), *cert. denied*, 467 U.S. 1204 (1984).

14. United States v. Mastrangelo, 722 F.2d 13 (2d Cir. 1983).

15. *See* Holtzman v. Hellenbrand, 92 A.D.2d 405, 460 N.Y.S.2d 591 (2d Dep't 1983).

16. *See supra* note 9.

17. 85 N.Y.2d 359, 625 N.Y.S.2d 469 (1995).

18. The term for these hearings was provided by the name of the defendant in the prosecution underlying the decision in Holtzman, 92 A.D.2d 405.

19. 85 N.Y.2d at 363, 625 N.Y.S.2d at 471.

20. *Id*. (emphasis added).

21. *See id*. at 366, 625 N.Y.S.2d at 473.

22. 92 N.Y.2d 68, 677 N.Y.S.2d 35 (1998).

23. *Id*. at 72, 677 N.Y.S.2d at 37.

24. Fed. R. Evid. 804(b)(6) (emphasis added).

25. 89 N.Y.2d 456, 654 N.Y.S.2d 1004 (1997).

26. Loschiavo v. Port Auth. of New York & New Jersey, 58 N.Y.2d 1040, 1043, 462 N.Y.S.2d 440, 442 (1983) (Fuchsburg, J., dissenting) (citing HOLMES, THE PATH OF THE LAW *reprinted in* JURISPRUDENCE IN ACTION 275).

27. N.Y. TIMES, Oct. 30, 1998, at A16, col. 6.

28. WILLIAM SHAKESPEARE, HAMLET, act 11, sc. 2, lines 622-623.

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Impeachment by Omission: If *Victory* Met *Savage* Which Would Win?

By Martin B. Adelman

Criminal practitioners, especially defense counsel, meet *People v. Bornholdt and Victory*[1] when they attempt to impeach prosecution witnesses on omission of a crucial fact in a prior statement. Trial judges instinctively cite *Bornholdt*, or its rationale, to bar such inquiry. Yet, seven years after deciding *Bornholdt*, the Court of Appeals ruled in *People v. Savage*[2] that prosecutors may impeach defendants by cross-examination on *their* omission of a crucial fact in a prior statement, without any discussion of *Bornholdt*.

Most intriguing is that, in over a hundred cases discussing impeachment by omission and applying either *Bornholdt* or *Savage* since then, the two cases have never been cited in any opinion. *Bornholdt* remains the standard to preclude defense cross-examination of prosecution witnesses on omissions in prior statements, while *Savage* is cited to uphold prosecution cross-examination of defendants on the same issue, with a few interesting exceptions, noted below.

The facts in the two cases seem to be parallel. Bornholdt and Victory were in an altercation with a police officer, who announced that they were both under arrest. Bornholdt shot the officer to death and was convicted of intentional murder. Victory was convicted of felony murder because he had kneed the officer in the groin—assault in the second degree—been arrested, and next attempted the crime of escape, during which the officer was killed by Bornholdt. Thus, Victory's kneeing was a critical first link in the chain to convict him of felony murder.[3] Judge Jasen's decision[4] makes this clear: "The significance of this testimony is that Victory could not have been found guilty of felony murder unless he had been arrested for a felony and then escaped . . . [t]he kneeing incident was the predicate for the felony arrest and all that followed."

The evidentiary ruling arose during defense cross-examination of the key civilian witness, Francisco Garcia, on his critical testimony that Victory kneed the officer. The defense was barred from eliciting that in his two statements to the police, Garcia omitted any reference to having observed Victory knee the officer.

The *Bornholdt* opinion acknowledges the age-old rule that a witness's prior *inconsistent* statement may be used to impeach his trial testimony. The "weight of authority," however, bars impeachment by omission unless it is also shown "that at the prior time the witness' attention was called to the matter and he was specifically asked about the facts embraced in the question propounded at trial."[5]

The authorities cited were cases from California, Missouri, Alaska, Kentucky and Arizona, Wigmore and Chadbourn on *Evidence*, and a New York civil case. The Court also opined that "[t]he rule, we would say, accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative's description."[6]

Some eight years after Victory's loss, the equally poorly named Savage was on trial for assault with a gun. He testified that when the complainant tried to rob him, he had to draw his gun, and it discharged accidentally. The prosecution was allowed to impeach Savage by cross-examination on his failure to mention that the complainant tried to rob him in his statements to the police.

The Court of Appeals first noted that the case did not present a problem under *Doyle v. Ohio*,[7] in that it was not Savage's *silence* which was being used but a factual omission in his prior statement. Turning to the key point, *Savage* held: "It is an elementary rule of evidence, and of common sense, in our State and in almost every other jurisdiction, that when given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for purposes of impeachment [citing Wigmore and Richardson on *Evidence*].[8] This rule is firmly embedded in behavioral expectations." Indeed, the opinion continued, Savage's omission in his earlier statements "was, to say the least, extraordinarily probative in enabling [the jury] to evaluate the reliability of the explanation when it surfaced for the first time at trial."[9]

The writer contends that the two cases are in irreconcilable conflict. The only seeming distinction is that cross-examination on omission is barred when it is the defense seeking to dispel incriminatory testimony, but it is allowed for the prosecution to attack exculpatory assertions. One is hard-pressed to reconcile how the *Bornholdt* holding "accords with human experience" while the *Savage* rationale is an "elementary rule . . . of common sense." Isn't human experience the basis for common sense?

Later decisions supply guidance in applying *Savage*. It has been held that the People may not use omission as direct proof of guilt,[10] as by eliciting a limited statement from the arresting officer and arguing the omission on summation. Properly applied, *Savage* requires confrontation—that the defendant have the opportunity to explain the omission, either during cross-examination or on redirect. On the other hand, even if the degree of alleged inconsistency between the prior statement and the current testimony is arguable, "the court should admit the evidence for whatever weight the jury might give it."[11] That the defendant's statement was obtained in violation of *Miranda* rights does not bar its use for impeachment by omission on cross-examination.[12]

In an anomalous case, the Fourth Department[13] cited *Savage*, did not discuss *Bornholdt* at all, and it *reversed* a conviction where the trial court barred impeachment of investigating officers on their failure to report their observation of a distinctive footwear pattern at the crime scene, later tied to the defendant. The ruling was perhaps driven by the fact that the footprint was the linchpin of a strictly circumstantial evidence case.

Similarly, the First Department[14] held impeachment of an undercover officer was proper, with the omission on the "buy report" of "scratches on his face," as a distinctive characteristic of the seller, stating that *Bornholdt* "had no application." The opinion noted that the report also clearly qualified as a business record. NYPD buy report forms (P.D. 321) have a space for "description," so the rationale may be that the form asked the question, which the officer did not answer, although obviously a counterargument is that "description" is not a focused question, as "distinctive characteristics" would be.

In counterpoint is a line of cases[15] approving impeachment of officers by proof of their silence on their activities, *where the officers were defendants*. In each, the officer-defendant testified that the charged activities were in the line of duty and was cross-examined on the failure to inform superiors thereof. Impeachment was held probative on the theory that the defendant-officer *had a duty*[16] to so report to superiors, and thus the silence was particularly significant. Query: Doesn't this rationale apply to the officer as prosecution witness under a duty to make accurate reports, and not only to the officer as defendant?

Attorneys trying criminal cases should be aware of both *Bornholdt* and *Savage* and be prepared to argue their applicability as appropriate. Appellate counsel might well argue the obverse side on an appeal concerning the issue. Most important, appeals courts should announce one rule, applicable in all cases, based on both human experience and common sense.

Endnotes

1. 33 N.Y.2d 75, 350 N.Y.S.2d 369, *cert. denied sub nom. Victory v. New York*, 416 U.S. 905 (1974).
2. 50 N.Y.2d 673, 431 N.Y.S.2d 382, *cert denied*, 449 U.S. 1016 (1980).
3. N.Y. Penal Law § 125.25(3).
4. Bornholdt, 33 N.Y.2d at 88 n.8.
5. *Id*. at 88.
6. *Id*. at 89.
7. 426 U.S. 610 (1976).
8. People v. Savage, 50 N.Y.2d 673, 679, 431 N.Y.S.2d 382, *cert denied*, 449 U.S. 1016 (1980).
9. *Id*.
10. People v. Spinelli, 214 A.D.2d 135, 631 N.Y.S.2d 863, 868 (2d Dep't), *lv. dismissed*, 87 N.Y.2d 1025 (1996).
11. People v. Bishop, 206 A.D.2d 884, 615 N.Y.S.2d 163 (4th Dep't), *lv. denied*, 84 N.Y.2d 933 (1994). *See also* People v. Jones, 136 A.D.2d 740, 524 N.Y.S.2d 79 (2d Dep't), *lv. denied*, 71 N.Y.2d 969 (1988).
12. People v. Blacks, 221 A.D.2d 351, 633 N.Y.S.2d 793 (2d Dep't), *lv. denied*, 87 N.Y.2d 970 (1996).
13. Bishop, 206 A.D.2d 884.
14. People v. Medina, 249 A.D.2d 166, 672 N.Y.S.2d 53 (1st Dep't), *lv. denied*, 92 N.Y.2d 901 (1998).
15. People v. Hardwick, 137 A.D.2d 714, 524 N.Y.S.2d 798 (2d Dep't), *lv. denied*, 71 N.Y.2d 969 (1988); People v. Bowen, 65 A.D.2d 364, 411 N.Y.S.2d 573 (2d Dep't), *aff'd*, 50 N.Y.2d 915 (1980).
16. People v. Rothschild, 35 N.Y.2d 355 (1974).

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Pretext Vehicle Stops: The New York Evolution Following *Whren v. United States*

By Richard Van de Stouwe

In 1996, the U.S. Supreme Court handed down its decision in *Whren v. United States*,[1] which upheld the constitutionality of a pretextual vehicle stop. As long as there is a reasonable, objective basis for the traffic stop, the underlying motivation of the police officer would not be considered. Therefore, under federal law, if there is a lawful basis for a traffic stop, the fact that it is a pretext to investigate another suspected activity is irrelevant.

The Supreme Court recently heard the case of *Knowles v. Iowa*,[2] which had the potential to expand the authority of officers not only to stop but to search a vehicle and its driver, based upon the observance of a traffic infraction. The Iowa Supreme Court had held that the issuance of a traffic citation in lieu of arrest gave the police the authority to conduct a full search as if an arrest had taken place. Their rationale was that the search incident to arrest doctrine was based on the probable cause to arrest and not whether an arrest actually occurred. The Supreme Court declined to allow such an extension and unanimously reversed the lower court ruling.

The case was treated as a search incident to arrest case. The Court held that the rationale underlying the search incident to arrest doctrine—i.e., officer safety and preservation of evidence—are, respectively, "not present to the same extent and . . . not present at all."[3] While pretext was not an issue in the Supreme Court's decision and *Whren* was not mentioned, it would seem that, had the Iowa Supreme Court been upheld, *Whren* would have allowed a pretextual traffic citation to be a sound basis for a vehicle search. Fortunately, there is no need to ponder how New York would have treated such a result.

Although the *Knowles* ruling leaves *Whren* intact, a review of New York pretext cases decided after *Whren* reveals that New York has had some inconsistencies in its application. Presently, there is a split between the Departments in how pretext stops are treated—some courts adhere to *Whren* and some courts continue to apply the New York rule, suppressing evidence found as the result of a pretextual stop.[4] The current state of case law leaves a disparity of treatment, depending on where in the state the pretextual stop took place.

An automobile stop can be said to be a pretext when the police officer is not truly interested in the observed traffic violation but merely uses that as a reason to stop a vehicle and to make inquiries or observations for an ulterior purpose, such as to look for evidence of drug or weapons possession or other evidence of a crime. Many of the pretext cases involve traffic stops by police officers who are assigned to specialized units which normally do not make traffic stops or issue traffic summonses. Such was the factual scenario leading up to *Whren v. United States*.

Michael Whren was a passenger in a vehicle that was being driven in a "high drug area" of Washington, D.C. The vehicle drew the attention of a passing plainclothes vice-squad officer who made a U-turn to take another look. As the officer turned around, the vehicle suddenly turned without signaling and sped off at "unreasonable" speed. Upon stopping the vehicle, the officer observed Whren holding two plastic bags of what appeared to be crack cocaine. The defendant was arrested and ultimately convicted of federal drug charges.

The Supreme Court held that an automobile stop constitutes a "seizure" of a person and thus may "not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."[5]

That holding effectively authorizes the police to pull over and detain the occupants of a motor vehicle based upon probable cause to believe that a traffic violation has occurred, even if a reasonable officer would not have stopped the motorist absent some ulterior motive. The important consideration is whether the officer had the authority and the probable cause to issue a summons. While the car is stopped, any contraband that the officer observes in plain view would then provide probable cause for an arrest completely unrelated to the initial stop.

The Court followed its 1973 decision *United States v. Robinson*,[6] which held that an arrest for a traffic violation would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search."[7] After discussing *Robinson* and its companion case, *Gustafson v. Florida*,[8] the *Whren* Court concluded that "these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved . . . subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis."[9]

The *Whren* holding currently allows the "pretextual stop" wherein a police officer may stop a vehicle for an alleged traffic offense, and the reasonableness of the stop will not be questioned so long as the police officer possessed probable cause to believe that a traffic offense occurred. The fact that that particular officer would not have issued a traffic citation or had a totally unrelated motive is of no consequence. In *Robinson*, for example, the arresting officers were plainclothes vice detectives who normally would not issue traffic summonses. In discussing a case involving the pretextual boarding of a boat, the Court "flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification."[10]

Prior to *Whren*, the use of the pretext stop was approved in the Second Circuit in *United States v. Scopo*.[11] In that case, the Second Circuit adopted the "Authorization Test" which looked only to whether the police officer had probable cause to believe that a traffic offense had occurred—i.e., was he authorized to stop the vehicle—and did not look at any ulterior motive that may have been present, such as suspicion of drug or weapons possession. The court rejected the "'usual police practices' test, i.e., would a reasonable police officer have made the stop in the absence of an invalid purpose."[12]

In the *Scopo* case, FBI agents, who were part of a joint NYPD/FBI task force investigating the Colombo crime family, stopped Scopo, an alleged member of that family, for changing lanes without signaling. He was stopped 2.2 miles from the observation of the violation and was approached by FBI agents with guns drawn. After observing Scopo discard an object, the police pulled the front seat forward and observed a revolver in plain view. Scopo was subsequently indicted for weapons possession in violation of 18 U.S.C. section 922(k). Although FBI agents normally do not issue traffic summonses, the search was upheld as the agents were acting within their authority. The interesting result of *Scopo* is that "[t]he Court allows the government to benefit from the state law for traffic violations to justify the stop, yet a federal standard of review justified the search."[13] (Under then existing New York law, pretextual stops were invalid.) In addressing that issue, the court stated that "[f]ederal courts must apply federal law to evaluate search and seizure issues."[14]

If *Scopo* left any doubt as to the validity of pretext stops under federal law, all such doubt was removed with the *Whren* decision.

New York Pretextual Stop Law

Under New York law, however, the validity of the pretextual stop is not so clear. Prior to *Whren*, New York law was consistent in suppressing evidence obtained where it was found that the stop was pretextual in nature.[15] What have been inconsistent are the standards that were applied to determine whether the stop was pretextual. Some courts looked to the officer's primary motivation in making the stop, while other courts looked to subjective factors surrounding the officer's stop of the vehicle, such as whether a summons was issued, the amount of time and distance that the vehicle was followed, the officer's assignment, etc.[16] However, since *Whren*, the issue has further fragmented as different jurisdictions take different approaches to applying the Supreme Court ruling. The Court of Appeals has not ruled on the applicability of *Whren* nor has the Court specifically relied upon the New York State Constitution to rule to the contrary. The various appellate and trial courts have either rendered conflicting opinions as to *Whren*'s applicability or have chosen not to recognize a claim of pretext in the fact patterns presented and, therefore, have not needed to decide if *Whren* must be followed or if the state constitution mandates a different result.

It seems that, at the present, the pretextual stop is in a somewhat ambiguous position in New York. Shortly before the *Whren* decision, it was said by one authority on the matter that, "under [New York] state law, officers may not use traffic infractions as a pretext to investigate a person on an unrelated matter."[17] That fact is now in doubt, and that same commentator's concern that New York courts may "cast out the pretext doctrine"[18] seems closer to reality in some parts of the state than in others.

The First Department addressed the applicability of *Whren* in *People v. Martinez*.[19] In that case, the court declined to apply *Whren*'s holding. The *Martinez* court upheld a lower court's suppression of physical evidence based on a determination that the stop in question was pretextual. The court held that the "application of a subjective test is in accordance with the previous decisions of this Court. The holding of the United States Supreme Court in *Whren v. U.S.* does not compel a contrary result."[20] While not specifically mentioning the state constitution, the *Martinez* court relied on the authority of its decision in *People v. Scott*[21] which allows, on the basis of the state constitution, greater protections than are afforded under the federal Constitution. *Martinez* is quite clear in its rejection of *Whren*. However, the decision is quite short and does little to explain the rationale behind the rejection other than its reliance on *Scott*.[22]

On the same day as the *Martinez* decision, a different bench of the First Department decided *People v. Washington*.[23] In that case, the court found, contrary to the finding of the hearing court, that the stop of a livery cab by anticrime officers was a valid stop for a traffic infraction and was not pretextual. Therefore, there was no need to address whether the federal standard should be applied. While the court pointed out that the Court of Appeals never expressly found a pretext search invalid under article 1, section 12 of the state constitution, it did

refer to the "apparent New York rule" that is in conflict with *Whren*.[24] The court noted that while intermediate appellate courts have generally found pretextual stops to be unjustified, they have not "provided a uniform analytical framework for determining whether a stop is pretextual. . . . As a result, each Appellate Division Department has applied a variety of factors in determining an officer's primary motivation."[25]

As long as the courts decide, by applying a subjective analysis, that the officer's primary motivation was non-pretextual, the courts will not need to address whether *Whren* controls. If the primary motivation is traffic enforcement, the case is not a pretext case, the stop is upheld, and *Whren* is not a consideration. By using the subjective analysis, the courts are rejecting *Whren* without coming out and saying so.

The Second Department has chosen to follow *Whren* in the leading case of *People v. McCoy*.[26] In *McCoy*, the arresting officers had information that two robbery suspects were identified as "one white male by the name of Raymond Thompson, approximately thirty years old, and another white male named Theodore McCoy, approximately thirty years old, driving a 1977 green Dodge Aspen."[27] After observing a vehicle matching the description with a defective taillight fail to signal a turn 100 feet in advance, the officers pulled the vehicle over. The officer asked the defendant (passenger) for identification to "know whether or not he was the individual that was possibly wanted for the robbery."[28] As the defendant opened the glove compartment, the butt end of a revolver was observed. The *McCoy* court held that a valid traffic stop is "no less valid merely because the officer might also have been entertaining more serious suspicions . . . the officer's conduct was objectively lawful at every stage, and 'subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis' (*Whren v. U.S.*, 517 US at 813)."[29]

In a decision authored shortly after *McCoy,* Justice Blumenfeld of the Queens County Supreme Court discussed the lack of clarity in New York on the pretext issue and concluded that "until there is a Court of Appeals ruling on whether the decision in *Whren* is inapplicable to the citizens of New York, this court finds that it is now constrained to apply its holding to the case at bar, and so upholds the stop of the vehicle on the basis of the traffic infraction, despite its pretextual nature."[30] Justice Blumenfeld noted that the Second Department case of *People v. Roundtree*[31] invalidated a pretextual stop and was decided after *Whren*. However, *Roundtree* neither cites *Whren* nor relies on the New York constitution to escape *Whren*'s ruling. Also noted by Justice Blumenfeld is the fact that the same court one year later decided *McCoy,* which clearly supports adherence to *Whren.*

Justice Blumenfeld noted that while New York courts have the authority to interpret the state constitution to provide broader protection than is afforded under the federal Constitution, that interpretation "is not one which may be made by a lower court Judge."[32]

The Second Department subsequently issued several decisions which bear out Justice Blumenfeld's conclusion concerning adherence to *Whren* in the Second Department. All of those decisions hold that where a stop of a vehicle is based upon the observation of a traffic infraction, the stop "is no less valid because the officer might have been entertaining more serious suspicions."[33] With *Dougherty*, *Citron* and *Otero*, it seems clear that *Whren* is the law of the land in the Second Department.

The Third Department, in July 1997, decided *People v. Young and McKnight*.[34] In that case, the court found that a traffic stop by a plainclothes state police investigator driving an unmarked car was pretextual and therefore suppressed evidence found as a result. In reaching that conclusion, the court relied on several pre-*Whren* decisions[35] and a subjective analysis of the officer's conduct, including the failure to inquire about the alleged traffic infraction and the lack of any summons.

Given the court's reliance on pre-*Whren* case law, *Young* would appear to be a rejection of *Whren* since the case had been in existence for over one year.

In December 1997, the Third Department addressed what appeared to be a pretextual case in *People v. Peterson*.[36] In *Peterson*, a state trooper had observed the defendant driving a blue Ford Escort at a high rate of speed. After pacing the vehicle, the speed was confirmed, and the vehicle was pulled over. While in the process of writing a speeding ticket, the trooper asked the passenger to step out of the vehicle where he observed a bulge in the passenger's pocket, which turned out to be marijuana.[37] After arresting the defendant and the passenger, a search of the defendant revealed a packet of cocaine. The defendant was subsequently convicted of possession of a controlled substance.

The court held that although the trooper was aware that a blue Ford Escort driven by the defendant would be transporting drugs in the vicinity, the stop was not motivated by that knowledge. Significantly, the officer testified that he was about to release the defendant with a speeding ticket when he discovered the marijuana on the passenger, thereby leading to the arrest of the defendant and subsequent discovery of the cocaine. With that conclusion, the court held that the stop of the vehicle was not pretextual. Therefore, there was no need to decide whether *Whren* would apply. Again, the court used a subjective analysis to decide if pretext was an issue. This time, they decided that it was not.

Most recently, in *People v. Califano*,[38] the court considered a traffic stop leading to a DWI conviction based on an observation of a failure to stop at the end of a driveway before entering the roadway. Although the officer knew the defendant and was aware that he had a history of DWI convictions, the court found that the "primary motivation" for the stop was the Vehicle and Traffic Law violation and therefore was not pretextual. However, the court went on, in dicta, to say: "Furthermore, even if the police officer entertained suspicions about defendant based upon previous contact with him, that is not enough to invalidate the traffic stop under these particular circumstances (see, People v. Dougherty)."[39]

Prior to *Califano*, the Third Department had continued to treat pretext stops as improper. While the cases analyzed since *Whren* had found no pretext, the underlying assumption was that a pretext stop would be improper, consistent with pre-*Whren* case law in that Department.[40] However, *Califano*'s dicta questions whether that trend is shifting toward a view more consistent with the Second Department's acceptance of *Whren*. *Califano* did not give a clear signal, but there seems to be a hint of what may be to come.

The Fourth Department has not had the opportunity to review an allegedly pretextual stop in light of *Whren*. Its decisions on the subject have all come prior to *Whren* and hold that a traffic infraction may not be used as a pretext to investigate other suspected conduct.[41]

Conclusion

The Second Department has ruled that *Whren* controls, and the First Department has ruled that it does not. The Third Department has indicated in dicta that it will follow the Second Department. As far as actual holdings, it has thus far avoided the issue by applying the traditional analysis to decide that there was no pretextual stop, thereby avoiding the necessity of applying *Whren*. However, the fact remains that by applying a subjective analysis to decide that there is no pretext, the courts are effectively rejecting *Whren* which held that subjective intentions do not play a role in the analysis. Ironically, by using a subjective analysis to uphold a vehicle stop, the courts are taking a different road to arrive at the same destination. It is only when the subjective analysis finds a pretext will a conflict with *Whren* present itself, as in *Martinez* and *McCoy.* So far, there is no clear resolution of that conflict.

In light of the disparity in treatment between the Appellate Division Departments, one must wonder when the Court of Appeals will rule on the matter. The Court denied certiorari for *McCoy* in November 1997. Would they have granted certiorari had the First Department's conflicting ruling in *Martinez* been in existence? Probably not, since the Court denied certiorari for *Martinez* in June 1998 and denied certiorari for *Dougherty* in August 1998. Will the Court wait to grant certiorari until the Third and Fourth Departments have addressed the issue? When they do finally consider the issue, will they follow the U.S. Supreme Court as the Second Department did or will they continue New York's traditional "subjective rule" on the basis of the state constitution, as the First Department seems to prefer? Whatever the outcome, a Court of Appeals decision should be made to settle the issue and give some uniformity to an issue that results in different outcomes depending on the jurisdiction of occurrence, clearly not a desirable situation.

Endnotes

1. 517 U.S. 806 (1996).
2. 67 U.S.L.W. 4027 (1998).
3. *Id.* at 4030.
4. The pretext cases mainly deal with situations where there is probable cause to believe that a violation of the N.Y. Vehicle & Traffic Law has occurred. For a discussion of the legitimacy of traffic stops based on observation of "suspicious activity" or simply "bad driving," see Fiandach, People v. Ingle, *What Does It Take?* 6 CRIM. JUST. J. 40 (1998).
5. Whren, 517 U.S. at 808.
6. 414 U.S. 218 (1973).
7. Whren, 517 U.S. at 812.
8. 414 U.S. 218.
9. Whren, 517 U.S. at 812.
10. United States v. Villamonte-Marquez, 462 U.S. 579 (1983).
11. 19 F.3d 777 (1994).
12. *Id.* at 782.
13. *See* Liotti & Fasano, *Pretext Without Precedent—Say Goodbye to the Fourth Amendment*, 67 N.Y. ST. B. J. 40 (1995).
14. 19 F.3d at 785.
15. *See* People v. Laws, 213 A.D.2d 226, 623 N.Y.S.2d 860 (1st Dep't 1995); People v. David, 223 A.D.2d 551, 636 N.Y.S.2d 374 (2d Dep't 1996); People v. Ynoa, 223 A.D.2d 975, 636 N.Y.S.2d 888 (3d Dep't 1996); People v. Camarre, 171 A.D.2d 1002, 569 N.Y.S.2d 223 (4th Dep't 1991).
16. For a discussion of New York history of the pretext theory, see Kamins, *The Pretext Automobile Stop: Have New York Courts Clipped* Whren*'s Wings?*, 6 CRIM. JUST. J. 44 (1998).
17. *See* Liotti & Fasano, *supra* note 13.
18. *Id.* at 43
19. 246 A.D.2d 456, *lv. denied*, 92 N.Y.2d 856 (1998).
20. *Id.*
21. 79 N.Y.2d 474 (1992).
22. *Id.*
23. 238 A.D.2d 43 (1998).
24. *Id.* at 50.
25. *Id.* at 51. *See also* People v. Sanchez, 1998 N.Y. LEXIS 517 (N.Y.C. Crim. Ct., Apr. 20, 1998), wherein Judge Billings found that Washington, 238 A.D.2d 43, "blurs the distinction between the fed-

eral and state standards and appears to move toward the federal standard in practical application." The decision goes on to state that "the logical extension all but abandons the subjective test." The decision does not consider the clear statement to the contrary in People v. Martinez, 246 A.D.2d 456, *lv. denied*, 92 N.Y.2d 856 (1998).

26. 239 A.D.2d 437, *lv. denied*, 91 N.Y.2d 835 (1997).
27. *Id.*
28. *Id.* at 438.
29. *Id.* at 439.
30. People v. Brewer et al., 173 Misc. 2d 520 (1997).
31. 234 A.D.2d 612 (1996).
32. Justice Rice of the Bronx Supreme Court did not feel so constrained in deciding *People v. Williams and Haynes*, N.Y.L.J. Aug. 5, 1996, wherein the stop of a livery cab was held to be pretextual and in violation of the N.Y. State Constitution. For a detailed discussion of that case see Nadler & Amera, *Recent Developments in New York Law:* People v. Williams and Haynes: *A New York Supreme Court Concludes that Pretextual Traffic Stops Violate the New York Constitution*, 71 ST. JOHN'S L. REV. 487 (1997).
33. People v. Dougherty, __ A.D.2d __, 673 N.Y.S.2d 742, 1998 N.Y. App. Div. LEXIS 6284 (June 1, 1998), *lv. denied*, 92 N.Y.2d 896 (1998) N.Y. LEXIS 3357 (Aug. 12, 1998); People v. Citron, 1998 N.Y. App. Div. LEXIS 12375 (Nov. 16, 1998); People v. Otero, 1998 N.Y. App. Div. LEXIS 13459 (Dec. 16, 98).
34. 241 A.D.2d 690, 660 N.Y.S.2d 165 (1997).
35. *See* People v. David, 223 A.D.2d 551 (2d Dep't 1996); People v. Smith, 181 A.D.2d 802 (2d Dep't 1992); People v. Mikel, 152 A.D.2d 603 (2d Dep't 1989).
36. 254 A.D.2d 815 (1997).
37. The court noted that the appropriateness of the search of the passenger was not before the court as the defendant lacked standing to challenge that aspect of the case. *Id.* at 817 n.1.
38. 1998 N.Y. App. Div. LEXIS 11917.
39. *Id*.
40. In a series of cases prior to *Whren*, the Third Department held that police may stop a motor vehicle upon observing a traffic infraction "so long as they are not using the traffic infraction as a mere pretext to investigate the defendant on an unrelated matter." *See* People v. Ynoa, 232 A.D.2d 975 (1996); People v. Letts, 180 A.D.2d 931 (1992); People v. Melendez, 195 A.D.2d 856 (1993).
41. *See* People v. Camarre, 171 A.D.2d 1002 (1991); People v. James, 217 A.D.2d 969 (1995). *Cf.* People v. Gadsden, 192 A.D.2d 1103 (1993).

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Criminal Law

The Uneven Playing Field: Ethical Disparities Between the Prosecution and Defense Functions in Criminal Cases

By Thomas F. Liotti and Christopher W. Zeh

I. Introduction

Since the early 1900s criminal defense lawyers have been subject to governmental and prosecutorial scrutiny for methods they use in conducting trials and securing verdicts.[1] Defense lawyers challenge the *status quo*. Indeed, in fighting for freedom, due process and the Constitution, it is their obligation to do so.[2] Clarence Darrow, arguably the greatest lawyer of this century, nicknamed the "Attorney for the Damned," devoted much of his professional life to representing workers' rights.[3] Darrow's career had its ups and downs. As a passionate advocate and fierce litigator, Darrow was recruited by Samuel Gompers and other high profile labor leaders to represent two brothers charged with bombing the Los Angeles Times building and killing 20 men.[4] The case, known as the "McNamara Trial," pitted Darrow and his defense team against powerful Los Angeles prosecutors.[5] The McNamara brothers pleaded guilty in exchange for reduced sentences.[6]

Two days before the final plea agreement was reached, word got out that a member of the defense team allegedly bribed a juror who sat in on the trial. The Los Angeles prosecutor contended it was Darrow himself who initiated the bribery scheme.[7] The prosecutors' office alleged that if Darrow could show he was participating in the plea negotiations he had no motive for bribing the jury should the story ever come to light.[8] Shortly after the first arrests had been made in connection with this alleged bribery scheme, information about the earlier, alleged bribery of a different juror came to the prosecution's attention.[9] Within two months Darrow was indicted for alleged involvement with both bribery schemes.[10] Darrow was ultimately acquitted of the bribery charges.[11]

This is an early example of how the government will stop at nothing to oppress individuals whose voice and actions are feared.[12] Those voices and actions project constitutionally protected messages that may contradict governmental policy.[13] The Los Angeles County Prosecutor's Office had no direct evidence of the alleged bribery scheme in which they claimed Darrow was involved.[14] The prosecutors acted on a hunch, a gut feeling.

Today we see the same kind of misconduct from prosecutors' offices, both federal and state.[15] On May 17, 1996, F. Lee Bailey ended a standoff with federal prosecutors when he relinquished approximately $18 million on stock owned by a former client who had pleaded guilty to federal drug trafficking charges.[16] Bailey sat in a federal jail for over a month after he failed to surrender the stock and to pay the Government $700,000, the amount he apparently received after selling shares of stock and borrowing money against the remainder.[17] Federal prosecutors said they thought Bailey was holding the stock in trust for the government, while Bailey asserted it was his fee for representing his client. P. Michael Patterson, U.S. Attorney for the Northern District of Florida stated: ". . . Mr. Bailey's alleged claim to the stock was without merit."[18]

Mr. Bailey's incarceration was a result of his alleged refusal to account for legal fees. Bailey's legal troubles stemmed from an unusual plea bargain in which stock owned by an accused drug smuggler client, Claude Louis Duboc, was transferred to Bailey's Swiss bank account.[19] No doubt prosecutors were angry with the deal struck by Bailey and wanted to seize the money of his client. They determined the best way to do this was to go after Bailey himself.[20]

A blatant abuse of government power occurred in this case. There are many alternatives that could have been followed in order to receive an itemized accounting of attorney's fees from Bailey without incarcerating him to compel their return. For example, the Government might have sued him civilly. The Government could employ the same retrieval methods used to recover money from Swiss banks on behalf of Holocaust survivors.[21]

Rarely is there a case where a prosecutor is punished for alleged wrongdoing.[22] However, former Attorney General John Mitchell was suspected of criminal wrongdoing in connection with the Watergate scandal.[23] After criminal proceedings were initiated against Mitchell and other high ranking officials, guilty pleas were entered.[24] Mitchell was also convicted of perjury

before a Senate Select Committee and perjury before a grand jury.[25]

In addition to the Watergate scandal, it has been alleged that Mitchell received $230,000 in bogus consulting fees from Deborah Gore Dean, a top aide to Samuel Pierce, former Secretary of Health, Education and Welfare.[26] Due to Mitchell's death in 1988, he avoided prosecution on that charge.[27]

On the other hand, former Attorney General Edwin Meese, an aide to President Reagan, allegedly with ties to the Iran-Contra affair, was never prosecuted.[28] Attorney General Janet Reno was not prosecuted when she ordered the FBI to use deadly force to end a 51-day standoff in Waco, Texas.[29] At the time she had been in office for approximately two months. Seventy-six men, women and children, members of an obscure, 50-year-old religious group called the Branch Davidians, were gassed, suffocated, shot and burned to death.[30]

In the late summer of 1971, the nation's focus was on a small New York town where the bloodiest prison uprising had just occurred, Attica.[31] Prisoners, confined to unbearable living conditions, revolted and took over the prison in what turned into a four-day standoff with police.[32] The standoff ended in unconscionable violence when police stormed the prison, killing 39 people.[33] Initially, it was believed that the victims were killed by inmates.[34] However, after New York began prosecuting scores of Attica inmates, former Governor Hugh Carey pardoned all those involved in the revolt amid findings that prosecutors ignored evidence of police and law enforcement misconduct.[35] The prosecutors were not disciplined.

In the abovementioned instances there was never an investigation by any Grievance Committee. These federal prosecutors and top legal aides were never subject to disciplinary actions. Janet Reno remains Attorney General of the United States and Edwin Meese is back practicing law in California.[36] Ironically, the worst calamity, by far, of the Clinton presidency was probably Waco, not Monica Lewinsky.[37] Yet, Waco never became a campaign issue, most likely because the Congress would have to take on the FBI and Ms. Reno, a prosecutor, in order to do so.

II. Prosecutorial Advantages

It is a given that prosecutors have far more at their disposal in the way of financial resources than do defense lawyers.[38] Defense lawyers generally expect to be outgunned in that respect.[39] But, when it comes to ethics and the Code of Professional Responsibility, most attorneys taking their oaths start their careers believing that all lawyers are treated equally before the Bar.[40] Sadly, this is not the case. Most experienced attorneys come to appreciate the disparities between the prosecution and the defense functions.[41] Typically, they realize these disparities in financial resources.[42] But, in recent years a new trend is emerging where prosecutors are now taking affirmative steps to remove their conduct from the scrutiny of the Canons of Ethics and state disciplinary proceedings while at the same time using these and other avenues to attack defense lawyers.[43]

No matter how wanton the misconduct, prosecutors always seem to be insulated from disciplinary sanctions whereas defense lawyers appear to be held to a higher standard. While few prosecutors are prosecuted or disciplined, until recent years, prosecutors have been content with this malaise on the part of grievance committees. Yet, most practicing attorneys believed that there was a backstop in place, namely the Code of Professional Responsibility, its Canons, Disciplinary Rules and Ethical Considerations. This, they believed, would stop prosecutors from going too far. And while grievance committees have traditionally closed their eyes to prosecutorial misconduct,[44] defense lawyers believed that they might just be napping rather than taking a long sleep.

This article suggests that prosecutors are no longer content to rely upon the ambivalence of grievance committees. This article will demonstrate that in the past 15 years prosecutors have turned our State and Federal Constitutions on their heads and become so aggressive in their attacks on defendants and their lawyers that they now believe that their own actions can no longer withstand the scrutiny of grievance committees.

III. American Bar Association Standards

The Criminal Justice Section of the American Bar Association has given us a model set of standards for both the prosecution and defense function. They have been written and published due to the limitations and lack of specificity in state ethical codes. The standards provide that prosecutors will utilize their discretion in determining which cases to prosecute and that their first obligation is to insure that justice is done.[45]

The standards, if adhered to, can be the foundation upon which both the prosecution and defense may rely.

"Standard 3-1.2 The Function of the Prosecutor:

"(a) The office of the prosecutor is charged with the responsibility for prosecutions in its jurisdiction.

"(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her function.

"(c) The duty of the prosecutor is to seek justice, not merely to convict.

"(d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

"(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in Standard 4-1.5.

"Standard 4-1.2 The Function of Defense Counsel:

"(a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.

"(b) The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

"(c) Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

"(d) Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.

"(e) Defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct. Defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. Defense counsel is the professional representative of the accused, not the accused's alter ego.

"(f) Defense counsel should not intentionally misrepresent matters of fact or law to the court.

"(g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.

"(h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession applicable in defense counsel's jurisdiction. Once representation has been undertaken, the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program."[46]

Clearly, defense attorneys are held to a higher standard. For example, in 3-1.2(e) the drafters list a set of standards describing how prosecutors should conduct themselves.[47] That list includes ". . . professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction."[48] Defense counsel, as stated in Standard 4-1.2(e), is subject to "standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct."[49] If the drafters of these provisions intended both prosecutors and defense attorneys to be treated equally, they simply would have used the same language in subdivision (e) of each standard. Their failure to do so is conclusive evidence of the higher standard that is imposed on defense attorneys.

Often prosecutors are able to pick and choose which cases they will pursue. Promotions, raises, and praise are often based on the number of convictions one attains.[50] Often prosecutors who are assigned a "winless" case will be more willing to strike a deal in an attempt to avoid tarnishing their conviction rate. This practice is unethical and does not comport with the administration of justice. The Standards are not binding on prosecutors and therefore they are frequently ignored by them.

IV. The Federal Courts

Until 1997, the federal courts, for the most part, allowed state grievance committees to do their work for them. This is so because lawyers are admitted state by state. Their federal court admission is derivative, following state oaths and the signing of the role of attorneys there. In 1997, the General Rules of the U.S. District Courts for the Eastern and Southern Districts of New York were amended to establish a Special Panel of Attorneys who are members of the Bar of those federal courts to advise and assist the Committee on Grievances of the Boards of Judges in connection with the discipline of attorneys pursuant to Rule 1.5(a).[51]

This Panel ordinarily springs into action following a determination on disciplinary conduct in the state court or on a referral or recommendation from a Judge of the Court. In the year and a half since their establishment, the work of these Panels has been benign.[52]

V. The State Code of Professional Responsibility

The New York State Code of Professional Responsibility illuminates the roles to be played by prosecutors. DR7-103 provides:

> "A. A public prosecutor . . . shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.[53]
>
> "B. A public prosecutor . . . in criminal litigation shall make timely disclosure to counsel for the defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment."

The disparities between the defense and prosecution functions are rampant. In the genre of professional responsibility, prosecutors may argue that defense lawyers are more prone to ethical conflict since they often, by virtue of their contact with clients accused of criminal activity, are placed into situations of conflict, ethical dilemmas and even illegality. Some defense lawyers may even have difficulty in separating their roles from that of the accused. The defense lawyer must be constantly on guard against actions suggested by clients that may cause the lawyer to traverse the ethical thin line that usually separates him from his clients. Sometimes that line can become blurred or even fade entirely. When it does, the lawyer may be exposed to ethical conflict or more poignantly, illegality and possible prosecution.[54]

Prosecutors, as will be seen in this article, may be exposed to their share of ethical dilemmas. In their quest to prosecute they may be over-zealous, selective or even vindictive.[55] Yet, when these actions occur, unlike defense lawyers, prosecutors are rarely prosecuted or grieved against through Bar Committees.[56] This writer could not find a single reported case where a prosecutor was disciplined for any of these actions or misconduct. Similarly, there are few reported cases where prosecutors have been chastised for their actions and none where a judge has referred the actions of a prosecutor to a Grievance Committee for further consideration. A defense attorney must object to prosecutorial misconduct at the time it occurs, or any subsequent claim of error predicated on that misconduct may be waived.[57]

This may be explained in several respects. First, Grievance Committee lawyers are prosecutors and former judges[58] and their inaction may be explained under the "birds of a feather . . ." theory.[59] Second, many judges are former prosecutors while few judges are former defense lawyers. Similarly, even the Judicial Conduct Commission is comprised of prosecutors. While it takes disciplinary action against state judges such as removal from office, it does not, as a practice, make referrals to Grievance Committees for disciplinary proceedings by them against judges or former judges. Generally they rely upon Grievance Committees to follow their proceedings or for complaining witnesses to contact Grievance Committees after the Judicial Conduct Commission has completed its work.[60]

VI. The Thornburgh Memorandum

A Memorandum, dated June 8, 1989, written by former Attorney General, Dick Thornburgh, had a major impact on the legal community. The purpose of the Memo was to advise all Justice Department litigators that federal prosecutors were exempt from adhering to Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility and its successor, Rule 4.2 of the ABA Model Rules of Professional Conduct in the course of a criminal investigation.[61]

The Memo stated: "contact with a represented individual in the course of authorized law enforcement activity does not violate DR7-104."[62] The Memo further stated: "under the Supremacy Clause of the U.S. Constitution, state regulation placing a substantial burden on the federal government was invalid, and that DR7-104 as adopted by the states represented such a burden."[63]

The "Thornburgh Memorandum" represents an attempt by the former Attorney General to make law via an unauthorized fiat. Prosecutors who rely upon the Memorandum do so at their peril, since it is not law.[64]

The American Bar Association and many other organizations have railed against the Memorandum.[65] The courts have nearly unanimously expressed their dissatisfaction with the Memorandum.[66]

Historically, attorneys are licensed to practice by the states following their passage of a bar exam, including an ethics section.[67] Each state, territory and the District of Columbia have their own rules governing the conduct of attorneys.[68] States have their own Character and Fitness process whereby attorneys are required to complete a lengthy application, be investigated and submit to interviews, generally encompassing ethical questions, before they may be admitted to practice.[69] There is no bar or ethics examination for admission to the federal courts.[70]

There are times when attorneys would like nothing better than to communicate with adverse parties, thus

circumventing opposing counsel. They usually resist the temptation to do so because of DR 7-104. Even when an adverse party, on their own, attempts to communicate with opposing counsel, they do not accept these overtures and the initiator of the communication is directed to communicate through their counsel. Naturally, this is a source of frustration if it is believed that a matter could be resolved but for the conduct of opposing counsel. However, it may also be recognized that the preservation of the adversary system is paramount to illegal contacts with adverse parties in violation of DR 7-104.

Throughout the long history of the common law, certain of our rules have remained sacrosanct. DR 7-104 never created a problem for the Government in its prosecution of crime.[71] Government attorneys are protected against civil liability for their actions by immunity and the protective arms of the Government with its considerable resources.[72] The Department of Justice suggests that the "Thornburgh Memo" will enable it to keep the defense honest; ascertain their strategies; take away witnesses and target new defendants, including lawyers.[73]

While the Government has sought to skirt or even usurp DR 7-104(A)(1) by allowing prosecutors to contact represented parties directly, courts have condemned similar conduct by defense lawyers.[74]

Recently, however, the Tenth Circuit Court of Appeals handed down a decision sure to ripple through the entire legal community.[75] 18 U.S.C. § 201(c)(2) states:

> Whoever . . . directly or indirectly gives, offers or promises anything of value to any person for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years, or both.

The Tenth Circuit held in *United States v. Singleton*,[76] that leniency in return for testimony was considered something of value.[77] The Court held "the state of mind required to violate the statute is knowledge that the thing of value is given for or because of the testimony." The Court referred to the practice of offering lenient sentences in exchange for testimony as "buying testimony."

While the decision in *Singleton* must be praised, prosecutors who violated the statute and broke the law were not disciplined. Their conduct was not subject to review by a Grievance Committee. Prosecutors declined to even comment on the holding.[78]

This decision will totally change the way prosecutors handle some cases. It will be interesting to see how many convictions are overturned and how many prosecutors are disciplined for such illegal practices. At this writing, none have been.

Accordingly, the conduct of Independent counsel Kenneth Starr may come under scrutiny in light of *Singleton* and other ethical considerations. Starr, in an attempt to extract information from Monica Lewinsky, used federal agents and prosecutors to confront Ms. Lewinsky and present her with photographs and transcripts of recorded conversations with Linda Tripp.[79] Ms. Lewinsky was confined to a hotel in Washington for several hours and questioned without counsel's knowledge or consent.[80]

The Department of Justice has been characterized as the world's largest law firm and its various Divisions "work together toward the ultimate objective for which they were created—to promote the interests of the sovereign and of the public . . . As the nation's litigator, the Department and its attorneys must be held accountable to the same court-adopted ethical rules that govern all attorneys."[81]

There are also a great many other unfair burdens placed on the defense by all three branches of government acting in tandem with each other. Meanwhile, the powerless, to wit: defense lawyers and defendants, have lost more and more ground. They are confronted by the "Draconian" Federal Sentencing Guidelines.[82] A mean and vindictive spirit now permeates our courtrooms.[83] Defense lawyers are viewed as a disease that prevents the free flow of the toboggan to the penitentiary.[84]

The advent of sanctions, including substantial fines, being levied against defense lawyers (see Federal Rules of Civil Procedure Rule 11 and Uniform Rules for all State Courts Part 130); "gag" orders imposed against them and being prosecuted for criminal contempt when it is alleged that we have violated "gag" orders, has produced a chilling effect within our courts.[85] Strong advocacy for defendants has been blunted by judges and prosecutors joining forces together to prosecute, discipline, jail and disbar outstanding defense lawyers.[86] Judges, all too pro-prosecution, not only allow it to happen, but encourage it by holding recusal hearings and permitting the government to advance speculative and non-existent claims of conflict.[87]

VII. Recusal

Recusal is another weapon frequently used by prosecutors to remove formidable defense lawyers as adversaries.[88] In the last John Gotti, Sr. case, Bruce Cutler and Gerald Shargel, two prominent defense lawyers, were recused by trial judge, I. Leo Glasser. Glasser acted on the basis of then prosecutor John Gleeson's claim that Cutler and Shargel would be called as witnesses and as in-house counsel to the Gambino crime family. This, however, proved to be a ruse in order to remove Cutler and Shargel.[89] Gleeson never called Cutler and Shargel as witnesses. He accomplished his objective by forcing John Gotti, Sr. to lose his lawyer of choice. Mr. Gotti was convicted and received a life sentence. The prosecutor became a federal judge. Bruce Cutler was also charged with criminal contempt as a misdemeanor for allegedly violating a "gag" order imposed by Judge Glasser.[90]

Just prior to Gleeson becoming a federal judge, this writer came to represent Gene Gotti, the brother of John Gotti, Sr., and John Carneglia, in an application to secure the names and addresses of sequestered jurors from their last trial.[91] Gleeson appeared on the Government's brief in the Second Circuit as an attorney of record. Shortly after he became a federal judge and on the heals of his appearance in the aforementioned case, this writer became counsel to a defendant in a drug importation case assigned to a new federal judge, John Gleeson. This writer moved for his recusal. That was denied. This writer also moved for the severance of his case from the co-defendant. When that failed he moved for the recusal of the co-defendant's counsel, since his client was cooperating with the Government and the co-defendant's counsel had been the prosecutor of Gene Gotti and John Carneglia during their last trial where they had been convicted and given life sentences. Gleeson had also worked on and supervised that case. Gleeson refused to recuse himself or the co-defendant's Criminal Justice Act counsel. Thereafter, this writer made a motion to be relieved alleging that the Court could not be fair to his client as long as this writer remained in the case. The Court granted the application and immediately assigned a Criminal Justice Act lawyer to the defendant. While the defendant had previously stated his desire to proceed to trial, he soon became a cooperating witness.[92]

Gerald Lefcourt of New York City, and former defense counsel to Abbie Hoffman in the Chicago 7 Conspiracy trial and past president of the National Association of Criminal Defense Lawyers had been retained to represent a law firm, its principals and their wives. The firm represented the New York City Police Benevolent Association and was accused of, among other things, paying kickbacks to union officials in order to obtain the pre-paid legal services contract and other business. The Government sought and obtained Lefcourt's recusal.[93] The defendants were then convicted following a jury trial.[94]

VIII. Free Speech and Advocacy

There can be little doubt that prosecutors and the police usually get first dibs at defendants, extracting confessions, completing their investigations and orchestrating what has been described as "the Walk."[95] "The Walk" is usually accompanied by press releases and press conferences by the police and prosecutors. The press is alerted to the fact that the defendant will be available for a photo opportunity as he or she is led from the stationhouse to the courthouse for arraignment. Naturally, after hours of being arrested and questioned by the police, most defendants appear unshaven or disheveled, hardly a portrayal that enhances their presumption of innocence. When the parade of the defendant before the cameras is accompanied by the release of mug shots or graphic photos of the crime scenes, the presumption of innocence is all but destroyed. The police and prosecutors have not only informed but they have presented their evidence before the public at large, thus contributing to the demise of the defendant's rights, the pollution of potential jurors and by the prosecutor's "spin," making the defendant into a most unpopular figure, all but insuring a guilty verdict.

A defendant being led before the cameras is handcuffed by the police so that among other things he or she is unable to shield themselves from the onslaught of camera crews. The defendants are not allowed to have a polite chat with the media. There is no rebuttal of the police or prosecution claims. Rather, they are escorted past the cameras in a manner that is conducive to excited utterances or comments by them, again making their future representation and possible acquittal, problematical.

When defense lawyers speak out as advocates either inside or outside the courtroom, their words and conduct may expose them to criticism from lawyers groups.[96] On the other hand, statements by prosecutors go uncriticized.[97]

Efforts by prosecutors, judges and Grievance Committees to silence defense lawyers are well known. In 1994, a prosecutor in Nassau County, New York sought to enjoin Bill Kunstler and his partner, Ron Kuby from speaking out to the media in *People v. Colin Ferguson* (Indictment No. 86739), the Long Island Railroad gunman case. At the same time, the same prosecutor, George Peck, now a District Court Judge in Nassau County, sought to "gag" this writer from speaking out in the case of *People v. Emiliano*. In both

instances, the prosecutors relied upon DR 7-107 re: trial publicity in order to prevent defense lawyers from discussing their cases with the media.

DR 7-107 provides:

> A. A lawyer participating in or associated with a criminal or civil matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably shows that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

In both cases, the prosecutors' attempts at "gagging" failed.[98] Presumably, prosecutors got this idea because they were successful in securing a "gag" order against defense lawyers in another well known Nassau County case, to wit: *People v. Joseph Buttafuoco*,[99] where Hon. Jack Mackston, a former County Court Judge in Nassau County, New York, enjoined defense lawyers in the case from engaging in public comment.[100]

Apparently, the U.S. Supreme Court's earlier decision upholding the right of attorney advocacy and free speech did not dissuade the prosecutors from making their applications.[101]

While Bruce Cutler and other defense lawyers have incurred the wrath of judges and Grievance Committees, few prosecutors have, even when, for example, there have been blatant grand jury leaks or other serious misconduct by prosecutors.[102] In the 1970s Maurice Nadjari was appointed by then-Governor Nelson Rockefeller as a Special Prosecutor in New York City to prosecute cases of corruption in the criminal justice system. Mr. Nadjari's many investigations, then pursued lawyers and judges in Senator Joseph McCarthy style inquisitions. Nadjari's tactics reeked of prosecutorial arrogance and vindictiveness. Nadjari addressed fellow prosecutors and told them their "true purpose is to convict the guilty man who sits at the defense table, and to go for the jugular as viciously and rapidly as possible . . . You must never forget that your goal is total annihilation."[103]

Nadjari's office was accused of being overzealous and insensitive to defendants' constitutional rights, which resulted in a string of dismissals, convictions overturned on appeal, and ultimately the end of Nadjari's career.[104]

While numerous legal and judicial careers were ruined during the so-called "Nadjari era," due to the misconduct in the Special Prosecutor's Office, neither Nadjari nor a single prosecutor in his office were prosecuted or disciplined. Mr. Nadjari is back practicing law on Long Island.[105]

VIII. Forfeiture

Generally "forfeiture clauses" render property which constitutes the proceeds of a crime subject to a civil action for recovery of such proceeds.[106] Oftentimes, third parties such as attorneys claiming an interest in forfeited property, in order to prevent a forfeiture, have the burden of proving at a post-trial hearing either: (a) that his/her interest was superior to the defendant's at the time the criminal acts were committed; or (b) that he is a bona fide purchaser for value who, at the time of the purchase, "reasonably without cause to believe that the property was subject to forfeiture."[107] However, in New York, subdivision 12 of C.P.L.R. § 1311 exempts property acquired in "good faith" by an attorney in payment for legal services rendered in connection with a civil or criminal forfeiture proceeding or a related criminal matter.[108] The federal government offers no such provision.

In order to provide an adequate defense in a criminal case, a defense lawyer will need to draw upon financial resources given to him/her in the form of legal fees. The government, both federal and state are able to prosecute and try cases to the fullest extent because of ample funding. It would be impossible for criminal defense lawyers to devote the time and energy required for the highest quality of representation if they are not paid. Forfeiture clauses essentially allow monies necessary for quality representation to be attacked and attached by the government.[109] This is yet another example of the government stopping at nothing to lock up defendants and "throw away the key." Not only are they (the government) going after the defendant, but by using the above-mentioned tactics they are depriving defendants of quality defense representation by making it impossible for lawyers to be paid the necessary fees.[110]

IX. Conclusion

The deck is stacked against defense lawyers. The prosecution is not content just to use superior resources against defendants. They are in hot pursuit of defense lawyers, especially those that are highly skilled with reputations to match. Some prosecutors want civil, criminal and disciplinary immunity for their actions. They seek to further their reputations by trapping, prosecuting or obtaining disciplinary sanctions against defense lawyers. In some cases where they are found to go overboard in their zeal, they want immunity and their own Code of Ethics whose violations, if any, they shall determine. The gross disparities between the

defense and prosecution functions are glaring in their apparent injustices. Bar Associations, Grievance Committees and others must have dialogue on this important subject. At the same time, all must recognize that prosecutors must live by the same Canons of Ethics as all other lawyers. They must be treated the same as other lawyers and prosecuted by Grievance Committees for their misconduct. Their misconduct should not be excused because they are prosecutors or because their wrongdoing occurred in a criminal court or on the backs of defendants or the poor. Indeed, it is precisely because of the enormity of their power from the Government they represent, that they should not be cloaked with special privileges. If we continue to provide otherwise, we will be creating a special class of impervious prosecutors, unchecked in whatever violations of the Constitution and law that they may commit. The last champions of liberty—defense lawyers—will then be no more.

Endnotes

1. Singer, Shambie, *The People v. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer*, 19 J. Legal Prof. 235 (1994). *See also*, footnote 12, *infra*. *See*, Shirley E. Perlman and Tom Demoretsky, *No Charge In Foot Fetish Case: Queens Teen Alleged Advances By Ex-ADA*, Newsday, March 4, 1994 at 3. Former Nassau County Prosecutor Kenneth Littman was forced to resign after asking a 17-year-old girl if he could be her "sex slave." In an 11-page report to State Supreme Court Justice Leo F. McGinity, then Chief Administrative Judge for Nassau County, Suffolk District Attorney James M. Catterson, Jr. concluded Littman's suggestions to the girl "may appear bizarre and socially unacceptable," but were not criminal.

   Littman, 44 years old at the time, allegedly offered Kelly Charron $150 to put on high-heeled shoes so that he could "worship" at her feet. Charron was disappointed at the outcome of this incident, feeling as if she was solicited like a prostitute. It is unclear what Littman is currently doing. He was never criminally prosecuted or professionally disciplined for these alleged acts. In contrast, Amy Fisher, the Long Island Lolita, recently made a bid for resentencing in part based upon an alleged sexual relationship between her and her attorney at the time of her plea. Amy Fisher was originally sentenced in accord with her attempted murder of Mary Jo Buttafucco. See Klond, Kara, *Mary Jo, Amy to Meet Again, Both Due In Court Thursday In Step Toward Freedom*, Newsday, April 19, 1999 at A6.

2. The Canons of Professional Responsibility require defense lawyers to represent clients zealously and within the bounds of the law. See DR 7-101, 102 and 22 N.Y.C.R.R. 1200.32. Traditionally, these Canons have been applied to defense lawyers, but not prosecutors. See *People v. Appel*, 120 AD2d 319, 509 N.Y.S.2d 438 (1986), *appeal denied* 69 N.Y.2d 824, 513 N.Y.S.2d 1030, 506 NE2d 541; *Matter of Malone*, 105 A.D.2d 455, 480 N.Y.S.2d 603 (1984) *affirmed* 65 N.Y.2d 772, 492 N.Y.S.2d 947, 482 NE2d 565, *In re Robinson*, 151 App. Div. 589 (1912), *affirmed* 209 N.Y. 354, 103 NE 160 and *People v. Salquerro*, 107 Misc. 2d 155, 433 N.Y.S.2d 711 (1980) which establishes specific obligations for a trial attorney if he learns that his client plans to commit perjury. *See also*, Nassau County Committee on Professional Ethics, Opinion 91-12. *See*, Jan Hoffman, *Police Tactics Chipping Away at Suspects' Rights*, The New York Times, March 29, 1998 at 1 and 40; and Jan Hoffman, *Police Refine Methods So Potent Even the Innocent Have Confessed*, The New York Times, March 30, 1998 at 1 and B4.

   While these obligations apply to defense lawyers, prosecutors routinely allow police officers to avoid compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966). See also Hoffman articles. During the *Knapp* and *Mollen* Commissions we learned about police corruption and "testilying", lying under oath by police officers. See Liotti, Thomas F. and Ginnis, Katherina, *Testilying: Law Enforcement's Specialty?*, The Attorney of Nassau County, August, 1995 at 4 and 6.

   "Testilying" is practiced and learned during police training. This problem of police perjury and lying is so prevalent that Professor Alan Dershowitz, when testifying before the House of Representatives Judiciary Committee (the "Impeachment Committee"), in December, 1998, suggested to the Committee that they condone perjury by the police. By raising this point, a Congressman during Professor Dershowitz's testimony accused him of not being a "real American." Professor Dershowitz is a defense lawyer. He has recently published a book entitled *Sexual McCarthyism* concerning the investigation of the President of the United States by Special Prosecutor Kenneth Starr and the House Judiciary Committee hearings on impeachment. *See*, News: Police/Court Digest, Newsday, July 8, 1987 at 39. Former Chief of the Nassau District Attorney's Civil/Forfeiture Bureau, Eric Bettelheim was arrested at a service station in Bellmore, Nassau County. Bettelheim, along with another young man, were spotted by neighbors engaged in an act of oral sex. Bettelheim resigned from the District Attorney's Office to go into private law practice. His criminal case was resolved by a disposition of an Adjournment in Contemplation of Dismissal (A.C.O.D.). No disciplinary action was taken or reported.

3. 19 J. Legal Prof. 235 (1994). *See*, The Associated Press, *Trial Tape Hints Ex-DA Dropped Mob Linked Case*, Newsday, January 25, 1986 at 10. Former Brooklyn District Attorney Eugene Gold was disbarred by the State Appellate Division in 1984 after he confessed to sexually molesting the 10-year-old daughter of an Alabama prosecutor during a convention of District Attorneys in 1983.

4. *Id.*

5. *Id.* at 240.

6. *Id.*

7. *Id.* at 240, 241.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *See Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed.2d 810 (1957). The Supreme Court of California denied Raphael Konigsberg certification to practice law because they claimed that he did not satisfactorily prove to them that he was of good moral character and that he did not advocate the overthrow of the Government of the United States or California by unconstitutional means. The Supreme Court of the United States reversed holding that Konigsberg's membership in the Communist Party in 1941 was not a sufficient basis to deny him admission. Opponents to Konigsberg argued that his rhetoric, beliefs and disloyalty made him unfit to practice law. Yet, Konigsberg's language is not unlike what most defense lawyers must say and do every day of their lives. Konigsberg had written:

   > Loyalty to America, in my opinion, has always meant adherence to the basic principles of our Constitution and Declaration of Independence—not loyalty to any man or group of men. Loyalty

> to America means belief in and militant support for her noble ideals and faith of her people. Loyalty to America today therefore, must mean opposition to those who are betraying our country's traditions, who are squandering her manpower, her honor and her riches.

See also, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed.2d 796 (1957) cited by the Court in support of its opinion.

Today, Judiciary Law § 466 and Article 13 § 1 of the New York State Constitution require all attorneys to take the following Constitutional Oath upon admission: "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of attorney, according to the best of my ability. . . ."

13. *See*, U.S. Const. Amend. 1.

14. *See* footnote 1, *supra*.

15. *See* footnote 37 *infra*, and lecture by Thomas F. Liotti, Hofstra University School of Law, March 21, 1987 to Professor Roy D. Simons' class on Professional Responsibility.

16. *See*, Wharton, Joseph, *F. Lee Bailey Wins Freedom With Deal*, ABA Journal, July, 1996.

17. *Id.*

18. *Id*.

19. *Id.*

20. One of the more astonishing cases of attacks on the defense bar has occurred in *People v. Lynne Stewart*, 230 A.D.2d 116 (1997), where the Appellate Division, First Department reversed a decision of the trial court and reinstated an indictment against a prominent defense attorney. Lynne Stewart had refused to reveal the source of fee information in a criminal case and was thereafter charged with criminal contempt in the first degree (Penal Law § 215.51). According to the prosecution, Ms. Stewart represented the head of a drug ring who had provided a fee to her to represent one of six persons charged in a drug conspiracy case. The trial judge on the drug conspiracy case, Leslie Crocker Snyder, had assigned a "shadow counsel" to represent Ms. Stewart's client, while Ms. Stewart represented him and without Ms. Stewart's knowledge or consent. In a stinging rebuke, the former Presiding Judge of the Appellate Division issued an extraordinary dissent:

> Finally, while I agree with the majority that lawyers are not entitled to special treatment and, accordingly, that a felony prosecution is not avoidable simply because conviction entails the loss of one's license to practice law, it would seem to me equally and corellatively clear that lawyers—and particularly defense lawyers representing a particularly despised clientele—ought not to be singled out by reason of their vocation for disparate prosecutorial treatment. I doubt that there is another case—and certainly research reveals none—in which an attorney's basic right to litigate on her own behalf and that of her client has been so grievously and systematically subverted. Ms. Stewart has been treated in an uncommonly deplorable way by her prosecutorial adversaries, and it is for that reason and not upon some claim to preferential treatment by reason of professional status, that Ms. Stewart is entitled to dismissal in the furtherance of justice. Parity of treatment is a fine concept. It would be well if the majority applied it, not to some hypothetical selected out of thin air to facilitate nice-sounding utterance, but to the case at bar.

at 158.

Before leaving the underlying case, Lynne Stewart was able to negotiate a plea bargain of 15 years to life which her client rejected upon the advice of "Shadow Counsel," who also advised the client to cooperate. The defendant then received a sentence of 115 years and committed suicide in an upstate penitentiary. 668 N.Y.S.2d 1000 (1998).

21. *See*, Bone, James, *Swiss Pay $1.25b To End Feud with Holocaust Jews*, The Times of London, Friday, August 14, 1998.

22. Prosecutors in fact seem to go to extraordinary lengths to protect one another. For example, in *People v. Eric Michael*, 48 N.Y.2d 1, 394 N.E.2d 1134, 420 N.Y.S.2d 371 (1979), the New York Court of Appeals admonished a sitting judge for just the second time in its long history. The judge was Supreme Court Justice Arnold Fraiman, a former prosecutor. He was admonished by the High Court for declaring a mistrial in a criminal case over the objection of the prosecutor. Justice Fraiman stated that he and several jurors had vacation plans requiring the mistrial after a defense counsel absented himself from the trial due to the death of his father. The charges against Michael were then dismissed by the High Court on double jeopardy grounds. Michael had been charged with rape, assault, robbery and other serious charges. He had been convicted in the second trial and sentenced to over 20 years in prison, serving seven at the time of the reversal. The Association of the Bar protected its own by appointing a special committee headed by Whitney North Seymour, a former federal prosecutor to review Justice Fraiman's conduct. Justice Fraiman received a clean bill of health. Robert Morgenthau, the New York County prosecutor and a former federal prosecutor, wrote to the federal prosecutor at the time, Robert Fiske, urging Michael's prosecution. He was prosecuted and acquitted in Federal Court. Then Department of Immigration prosecutors went after *Michael*. He was voluntarily deported back to his native country of Haiti. This writer represented him in his federal and immigration cases.

23. *See*, Levin, Senator Carl and Bean, Elise, J., *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 Hofstra L. Rev. 11, Fall, 1997.

24. *Id*.

25. *See*, Underwood, Richard H., Perjury: An Anthology, 13 Ariz. J. Int'l. & Comp. L. 307, 363, Fall, 1996.

26. *See*, Hornstein, Robert, *Mean Things Happening In This Land: Defending Third Party Criminal Activity Public Housing Evictions*, 23 S.U. L. Rev. 257, at 259, Spring, 1996.

27. *Id*.

28. *See*, Lazarus, Simon and Larson, Jane E., *The Constitutionality of the Independent Counsel Statute*, 25 Am. Crim. L. Rev. 187, Fall, 1987.

29. *See*, Beck, Henry Cabot, *A Cold Clear Look at Waco Raid*, The Star Ledger, Friday, June 13, 1997 and Rodriguez, Yolanda, *Lawyer: Jury Saw Through `Coverup,' Government Faulted for Role in [Waco] Tragedy*, Newsday (national desk), February 27, 1993 at 19.

30. *Id.* See also, Ballard, Mark, *Clinton Unlikely to Be Disbarred, Arkansas, Ethics Experts Say Civil Contempt Finding Isn't Enough*, The National Law Journal, April 26, 1999 at A4. Notwithstanding a finding by a U.S. District Court Judge that the President lied under oath during a civil disposition and a referral to the Arkansas Grievance Committee for these alleged ethical violations, it is unlikely that the President will be disbarred by the State of Arkansas according to legal experts in that state.

31. *See*, Getlin, Josh, *Attica After 20 Years, the Bloody Prison Uprising Is Being Replayed at the Trial of Inmates' Class-Action Suite*, Los Angeles Times, Wednesday, January 8, 1992.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* footnote 22, *supra*.

37. *See*, *supra*, footnote 27.

38. *See*, *generally*, County Law § 18-b and 722-c. Also see, Bright, Stephen B., *Counsel For the Poor: The Death Sentence Not For The Worst Crime But For The Worst Lawyer*, The Yale Law Journal, Vol. 103, No. 7, May, 1994 at 1835.

39. Liotti, Thomas F., *A Commentary, Advocating The Assigned Case*, The Defender, January/February, 1983 at 17 and 18; Liotti, Thomas F., *Despite Inferior Resources, Keep Standards High While Serving The Poor*, The National Law Journal, Monday, July 21, 1986 at 28 and 19; Liotti, Thomas F., *Thoroughness Is Key When Representing The Poor*, The Nassau Lawyer, October, 1986 at 11 and 13 and Colwell, Carolyn, *Indigent - Lawyer System Facing A Trial Of Sorts*, and Colwell, Carolyn, *He's The King Of The Caseload*, Newsday, February, 1987.

40. See Speech by Thomas F. Liotti to Italian-American law students on March 15 1997 for the Confederation of Columbian Lawyer Associations at the Italian Consulate of New York. Topic: *Your Oath As An Attorney: What Does It Mean?* and a lecture by Thomas F. Liotti, Hofstra University School of Law, March 21, 1987 to Professor Roy D. Simon's class on Professional Responsibility. Topic: *Prosecutorial Misconduct.* See also, Liotti, Thomas F., *Why Should You Have Clients If You Do Not Deserve Them? Or, Getting Clients The Old Fashioned Way*, The Attorney of Nassau County, June, 1995 at 8 and 14.

41. See Liotti, Thomas F., *A War On Drugs: At What Cost To Our Liberty*?, Perspective, N.Y.L.J., February 28, 1990 at 2 and The Nassau Lawyer, April, 1990 at 2 and Liotti, Thomas F., *The Rape Of Our Profession: A Prophylactic Defense Is Too Sublime*, The Mouthpiece, a publication of the New York State Association of Criminal Defense Lawyers, June/July, 1992 at 5. This article is taken from a reprinting of remarks given in an address by Mr. Liotti to the Criminal Law and Procedure Committee of the Bar Association of Nassau County, Inc. at or about the time of said publication. See also, Tarlow Barry, *Hitting Rogue Prosecutors Where it Hurts*, The Champion, March, 1999 at 40. "When a rogue prosecutor commits misconduct during trial that does not prejudice the defendant so as to require reversal, there are essentially no meaningful consequences."

42. In *People v. Richard Warren Williams* (Nassau County, 1974-1997) the defendant was charged with kidnapping. This became and is at this writing, the largest kidnapping case in U.S. history since a $750,000 ransom was paid and never recovered. The defendant was convicted in 1978 at his first trial and given 25 years to life in prison. He appealed claiming that the prosecutor chose the jury on racial grounds. The prosecutor, Edward McCarty, could not remember or explain the rationale for his challenges. Mr. Williams served nearly 19 years in prison at the time of his reversal. He then, through counsel, negotiated a Serrano/Alford plea, received credit for time served in prison and was released. For this grave miscarriage of justice, the prosecutor became a Justice of the Supreme Court. This writer represented Mr. Williams. See Topping, Robin, *Around The Island/Crime and Courts, Jailhouse Attorney Can't Appeal Mortality Health May Dictate a Plea in Kidnapping*, Newsday, July 9, 1996 at A22; Bowles, Pete, *Man Convicted in '74 Kings Pt. Kidnap Wins Bail Reduction*, Newsday, October 18, 1996 at A38; Demoretsky, Tom, *Plea in '74 Kidnap to Free Defendant*, Newsday, May 22, 1997 at A28; Crowley, Kieran, *Kidnapper Walks After He Pleads No Contest*, New York Post, June 25, 1997 at 22 and McQuiston, John T., *Decades After Kidnapping, Victim Vents His Anger in a Courtroom*, The New York Times, The Metro Section, June 25, 1997 at B1 and B5.

    In re Cooperman, 82 N.Y.2d 745 (1994), a well known defense lawyer received an unprecedented suspension from the practice of law because he utilized non-refundable fee retainer agreements. This writer testified as an expert on legal fees for *Cooperman* and obtained the support of the New York State Bar Association as *amicus curiae* for *Cooperman*. See also, Adams, Edward A., *Fallout From Fee Decision: Some Arrangements Doomed, "If . . . defendants,"* N.Y.L.J., March 1, 1994 at 1 and *Judges Weigh Non-Refundable Fee Retainers; Client's Rights Balanced Against Effect On Lawyers*," N.Y.L.J., February 9, 1994 at 1.

43. Joseph F. Soviero, Esq. was a well known federal prosecutor; former counsel to and law partner of the former Speaker of the New York State Assembly. Mr. Soviero was president of many legal organizations. He was also a renowned and controversial defense lawyer. In the early 1990's, he and other lawyers statewide were charged with failing to file state tax returns. Mr. Soviero pled guilty to one misdemeanor charge in satisfaction of the charges against him. He paid fines and penalties. The Grievance Committee and its lawyers followed the criminal proceedings. When they concluded, the Committee charged Mr. Soviero with disciplinary charges arising out of the incident. He was censured. Shortly thereafter, Mr. Soviero came to represent a defendant in a criminal case, at the same time also representing the defendant and his wife in a real estate transaction. Mr. Soviero did not have a written retainer on the criminal matter and had received only a portion of his fee from the defendant. Later, while the criminal case was pending, the buyers and Mr. Soviero's client had a dispute with respect to the real estate transaction. Mr. Soviero claimed that the buyers defaulted and breached the contract, enabling his clients to retain the downpayment proceeds. When the buyers failed to attend a closing or to obtain a stay regarding the release of the downpayment monies, Mr. Soviero released from escrow $13,500 in downpayment monies to his clients and $5,000 to himself, with his client's approval and written release. The later $5,000 represented the balance of legal fees owed Mr. Soviero for the criminal matter. Thereafter, the Grievance Committee proceeded against Mr. Soviero alleging a conversion of the clients' monies. It is noteworthy that his clients did not complain to the Committee against him. The same prosecutor who had pursued Mr. Soviero in the first case, came after him in the second. Was this a case where the prosecutor was unhappy with the result he achieved in the first case and vindictively pursued him in the second? Mr. Soviero retired from the practice of law in 1995. The Committee and the Appellate Division, Second Department would not accept his resignation from the Roll of Attorneys. He was disbarred three years later. This writer represented Mr. Soviero. See *In re Joseph F. Soviero*, 211 A.D.2d 62, 627 N.Y.S.2d 933 (2d Dept. 1995). *See also*, *In re Joseph F. Soviero*, 246 A.D.2d 240, 676 N.Y.S.2d 667 (1998).

44. *See generally*, Gershman, Bernett L., *Prosecutorial Misconduct*, Clark Boardman Company, Ltd., New York, New York (1986).

45. *See*, *People v. Miller*, 149 A.D.2d 439, 539 N.Y.S.2d 782 and A.B.A Opinion 150 (1936). *See also*, *People v. Pugh*, 107 A.D.2d 521, 487 N.Y.S.2d 415 *appeal denied* 65 N.Y.2d 985, 494 N.Y.S.2d 1055, 484 NE2d 685, on reconsideration, *appeal denied* 67 N.Y.2d 764, 500 N.Y.S.2d 1037, 491 NE2d 294; *People v. Brown*, 66 A.D.2d 158, 412 N.Y.S.2d 522 (1979); *People v. Castelo*, 24 A.D.2d 827, 264 N.Y.S.2d 136 (1965); *People v. Gelfand*, 131 Misc. 2d 268, 499 N.Y.S.2d 573 (1986); *People v. Heller*, 120 Misc. 2d 85, 465 N.Y.S.2d 671 (1983); *People v. Bolla*, 112 Misc. 2d 703, 447 N.Y.S.2d 398 (1982) and *People v. Fox*, 157 Misc. 2d 238, 596 N.Y.S.2d 984 (1993) and McKinney's Consolidated Laws of New York Annotated, Book 62A, Supplemental Practice Commentaries by Carrieri, Joseph R., where a prosecutor was collaterally estopped from denying his earlier dismissal of similar offenses on other cases for the same reasons, to wit: the obliteration of posted speeding signs

by foliage. *See also*, Kohn, Al, *Collateral Estoppel Defeats Prosecution For Speeding*, N.Y.L.J., March 9, 1993 at 2.

When a prosecutor has committed misconduct, the Appellate Division may, but usually does not, condemn the prosecutor publicly, direct commencement of disciplinary proceedings and preclude the prosecutor from making court appearances for a specified period of time. *See People v. Roopchaud*, 107 A.D.2d 35, 485 N.Y.S.2d 332, *affirmed* 65 N.Y.2d 837, 493 N.Y.S.2d 129, 482 NE2d 924. When a prosecutor in a homicide investigation issues a subpoena returnable to him to out-of-state banks, a sanction was imposed, albeit, not a disciplinary one. *See People v. Warmus*, 148 Misc. 2d 374, 561 N.Y.S.2d 111 (1990).

46. It should be noted that guidelines for the assignment of attorneys for persons unable to afford counsel are obtained in ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992).

47. *See*, ABA Standards for Criminal Justice Prosecution Function and Defense Function (3d ed. 1993).

48. *Id.*

49. *Id.*

50. See footnote 3. When Rudolph Guiliani was a prosecutor at the Department of Justice and later U.S. Attorney for the Southern District of New York, he was frequently criticized for being overzealous in pursuit of prosecutions and headlines. There is no doubt that he successfully parlayed his publicity and high profile prosecutions into a career in politics which, at this writing, includes being elected to two terms as Mayor of the City of New York. Yet, he was never prosecuted or disciplined for grand jury leaks, misconduct or violations of the Canons of Ethics. See, Guttenplan, D.D. and Preston, Jennifer, *Rudy Guiliani's Roots Show Him As a Man Apart: He's Banking On Ambition, Drive to Bring Him Success*, Newsday, October 22, 1989 at 6.

51. Liotti, Thomas F. and Fasano, H. Raymond, *Federal Courts Focus on Attorney Discipline*, The Attorney of Nassau County, April, 1997 at 11.

52. The Department of Justice has its own Internal Affairs Section for investigations of alleged breaches of the Canons of Ethics or other misconduct on the part of prosecutors. See Tarlow, Barry, RICO Report, *Invasion Of The Defense Camp*, The Champion, April, 1997 at 50-52. This article by a prominent Los Angeles lawyer reviews a problem of prosecutorial misconduct in the Southern District of New York where a paralegal posing as a lawyer and acting as a spy for a Columbian drug cartel attended joint defense meetings unbeknownst to Mr. Liotti and his client, thereby endangering their lives. She was prosecuted in a neighboring District (E.D.N.Y.) where she had engaged in similar conduct. The Department of Justice found no evidence of an ethical breach by their prosecutors.

53. It has been determined that a prosecutor's discretion is not unlimited. *See People v. Nelson*, 103 Misc. 2d 847, 427 N.Y.S.2d 194. There are many instances where prosecutors and government agencies are notorious for issuing "mail covers" or agency subpoenas for the production of business records. Agency or administrative subpoenas as they are sometimes called, do not require judicial oversight. They may be issued *ex parte* by prosecutors and federal agents. After the issuance of a subpoena for this writer's phone records in order to obtain information about a fugitive and possibly use that information to charge or prosecute this defense lawyer with obstructing justice, a change in Department of Justice policy occurred. After vigorous complaints to the Department of Justice, supervisory approval within the U.S. Attorney's Office must be obtained before an agency or an Assistant U.S. Attorney may issue an administrative subpoena. See Fox, Martin, *Defense Bar Alarmed Over Use of Agency Subpoenas*, N.Y.L.J., May 11, 1992 at 1 and 6, col. 4; Fox, Martin, *Phone Info Subpoenas Draws Fire*, The National Law Journal, May 25, 1992 at 14; Cobb, Joan L., *Underhanded DEA Subpoena Seeks Lawyer's Phone Records*, BNA Criminal Practice Manual, Trial Practice Series, June 24, 1992, Vol. 8, No. 13 and *Foresight Can Ease Task of Handling Fugitive Case*, BNA Criminal Practice Manual, March, 1994 at 135.

54. See Liotti, Thomas F., *The Act of Avoiding Prosecutions*, The Attorney of Nassau County, August, 1994 at 6, 8 and 15 and also published in the New York State Bar Journal, February, 1995 at 49.

55. The right to a jury trial in the Sixth Amendment was incorporated within the concept of due process and hence applicable to the states in serious criminal cases because a jury was deemed to give the defendant "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complainant, biased or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145 and *Young v. U.S.*, 481 U.S. 787 (1987). Prosecutors may, on occasion, be overzealous and become overly committed to obtaining a conviction. *U.S. v. Goodwin*, 457 U.S. 368 (1982).

56. In *Imber v. Pachtman*, 424 U.S. 409 (1976), the Court held that prosecutors are absolutely immune from liability in suits challenging their decision to initiate criminal prosecutions as well as suits challenging their decisions concerning the conduct of trial and the presentation of evidence. In *Bertiz v. Economou*, 438 U.S. 478 (1978), the Court found that agency officials who initiate administrative proceedings and agency attorneys who present evidence at such proceedings are absolutely immune from suits challenging their actions. In *Barrett v. U.S.*, 798 F.2d 565 (2d Cir., 1986), the Second Circuit held that an Assistant Attorney General defending New York State in a medical malpractice action was absolutely immune from liability in a suit charging that he had participated with federal officials in a conspiracy to "cover up" the federal government's involvement in illegal drug testing.

57. See *U.S. v. Colony-Vacuum Oil Co.*, 310 U.S. 242 (1939); *U.S. v. Molina*, 934 F.2d 1440 (9th Cir. 1991); and *People v. Lambert*, (1975) 52 Cal. App. 3d 905 [125 Cal. Rptr. 4104].

58. See, *Massameno v. Statewide Grievance Committee*, 663 A.2d 317 (Conn. 1995). There plaintiffs (prosecutors) did not acknowledge the power the judiciary shares with the executive branch to investigate, discipline or recommend the suspension or removal of prosecutors. They argued that such power lies exclusively within the executive branch of government and, furthermore, that any attempt by the judicial branch to regulate the ethical conduct of prosecutors is an unconstitutional interference with the essential functions of another branch of government. See also, Green, Bruce A., *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement*?, 8 St. Thomas L. Rev. 69, Fall 1995. "When federal prosecutors appear to have violated professional standards such as those incorporated by reference in local rules of the court, district courts may rely equally on state or federal disciplinary bodies. This is not to say that district courts simply ignore prosecutorial misconduct. In some instances, courts themselves refer errant prosecutors to the relevant disciplinary authorities. In the view of some commentators, however, courts do so too infrequently."

59. The exact quote is: "Beast knows beast; birds of a feather flock together." From Aristotle, *Rhetoric*, BK i, Ch. 11, Sec. 25, quoted as Proverbs. See Stevenson, Burton, *The Home Book of Quotations, Classical and Modern*, Eighth Edition, Dodd, Meade & Company (1956).

60. Some prosecutors just "push the envelope" so far that their conduct cannot be overlooked. Recently, one former prosecutor turned judge saw himself as invincible and so powerful that he could threaten this defense lawyer and his family; commit perjury before the Judicial Conduct Commission and encourage others to do likewise. He managed to secure character testimony from lawyers, judges and prosecutors. At the same time, state and federal prosecutors declined to prosecute him for his

attacks on a defense lawyer. However, the Judicial Conduct Commission sought and secured his removal from the Bench while a Grievance Committee sought his suspension and disbarment. At this writing he has been removed from the Bench as a County Court Judge and disbarred. See, *In re Judge B. Marc Mogil*, Freedman, Mitchell, Newsday, September 11, 1995, *Did Judge Harass Lawyer?*; Tayler, Letta, Newsday, September 13, 1995, *Markings Cited In Threat Letters*; Tayler, Letta, Newsday, September 14, 1995, *Lawyer, Judge Square Off*; Tayler, Letta, Newsday, September 15, 1995, *Lawyer Accused of Judge Bias*; Kowal, Jessica, Newsday, September 16, 1995, *Judge Claims Fax Is a Phoney*; Tayler, Letta, Newsday, September 18, 1995, *Public Battle at the Bar*; Tayler, Letta, Newsday, September 18, 1995, *Judicial Hearings Are Rare*; Tayler, Letta, Newsday, September 19, 1995, *Judge Denies Devilish Threats*; Kowal, Jessica, Newsday, September 19, 1995, Around The Island - Crime & Courts, *Rare Decision Makes Judge's Case Public*; Newsday, Editorial, September 20, 1995, *Hearings on Judges' Misconduct Should Be Public*; Kowal, Jessica, Newsday, September 20, 1995, *Mogil: Liotti Asked to See Gun*; Kowal, Jessica and Tayler, Letta, Newsday, September 21, 1995, *Devil Of A Time At Hearing*; Kowal, Jessica, Newsday, September 22, 1995, *Of Lawyers and 'Looney Tunes'*; Kowal, Jessica, Newsday, September 23, 1995, *Judge Contradicted*; Topping, Robin, Newsday, Around The Island, Crime & Courts, September 28, 1995, *Judge Is Flying Too High for Low Profile*; Tayler, Letta, Newsday, October 10, 1995, *Flamboyant Judge's Battle*; Kowal, Jessica, Newsday, December 22, 1995, *Ruling Against Judge*; Photo and caption, *Disciplinary Panel Urged to Recommend Nassau Judge's Removal*, January 12, 1996 at 6; Topping, Robin, *Mogil's Fax To Foe Questioned*, Newsday, January 12, 1996 at A7; Topping, Robin, Newsday, February 22, 1996, *State Panel Wants Judge Removed*; Milton, Pat, Daily News, February 22, 1996, *Judge Linked To Threats Axed*; Goldstein, Matthew, N.Y.L.J., February 22, 1996, *Removal of Nassau County Judge Urged by Judicial Conduct Panel*; Hoffman, Jan, The New York Times, February 22, 1996, *The Judge and the Lawyer: Some Not-So-Judicious Letters*; *Matter of the Proceeding Pursuant to § 44, subdivision 4, of the Judiciary Law in Relation to B. Marc Mogil, a Judge of the County Court, Nassau County*, N.Y.L.J., Disciplinary Proceedings (for full decision), February, 26, 1996; Daily News, Long Island Section, *'Hate Mail' Judge Suspended*, March 27, 1996 at A24; N.Y.L.J., Today's News, March 27, 1996 at 1; Miller, A. Anthony, The Attorney of Nassau County, *Judge Marc Mogil Appeals Ouster*, March, 1996; Bowles, Peter, *Judge Fails To Win LI Libel Case*, Newsday, Long Island, August 21, 1996 at A23; Slackman, Michael, Newsday, *High Court Reviews Ouster Case*, September 6, 1996 at A16; The Associated Press, *Judge's 60M Suit Is Tossed*, Daily News, Long Island, October 2, 1996 at QLI 1; Topping, Robin, *Suspended Judge's Lawsuit Tossed Out*, Newsday, October 7, 1996 at A18; Bowles, Pete, *Deposed Judge Loses Pistol Permit*, Newsday, October 31, 1996 at A28; Miller, A. Anthony, *Court Of Appeals Ousts Mogil*, The Attorney of Nassau County, October, 1996 at 1; New York State Bar Association, New York State Law Digest, *Vendetta Against Lawyer, Both Overt and Secretive, and Lying to Commission on Judicial Conduct, Costs County Judge His Job*, No. 443, November, 1996 at 3; Miller, A. Anthony, *Court Strips Former Judge's Law License*, August, 1997 at 3; Suspension and prosecution for disbarment ordered by the Appellate Division Second Department (By Mangano, P.J.; Bracken, Rosenblatt, Miller and Ritter, J.J.). The Appellate Division, among other things, stated: "The respondent also committed actions involving dishonesty, fraud, deceit, or misrepresentation in that he repeatedly gave false testimony under oath to the Commission on Judicial Conduct during its investigation and reported false information to the Nassau County Police Department." See N.Y.L.J., August 1, 1997 at 23; Topping, Robin, *Stop Practicing Law, Mogil Told*, Newsday, August 6, 1997 at A22. An article concerning the suspension of former Judge Mogil from the practice of law and the Appellate Division authorizing the Grievance Committee to initiate disbarment proceedings against Mogil. See also, Today's News, N.Y.L.J., August 6, 1997 at 1. See also, *In re B. Marc Mogil*, 682 N.Y.S.2d 70 (1998). Mogil was then disbarred. See N.Y.L.J., December 28, 1998.

61. Disciplinary Rule 7-104(A)(1) states:

> During the course of his representation of a client a lawyer shall not: communicate or cause another to communicate on the subject of the representation by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Rule 4.2 of the Model Rules of Professional Conduct, adopted by the House of Delegates of the ABA in August, 1983, and amended in February, 1983, provides with respect to *ex parte* contacts: "In representing a client a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The rule was derived from Canon 9 of the American Bar Association Canons of Professional Ethics, which was superseded by the American Bar Association Model Code of Professional Responsibility in 1970.

62. See, "Thornburgh Memorandum" at 7.

63. *Id.* at 3, 7.

64. When the Bar Association of Nassau County, Inc. honored Attorney General Thornburgh, this writer and others, including the New York State Association of Criminal Defense Lawyers at this writer's urging, protested his invitation primarily due to the Thornburgh Memo. See Nagourney, Eric, *Objections to Thornburgh Award, County Bar to Fete Attorney General*, Newsday, April 16, 1991 and see Todd S. Schulman, Note: *Wisdom Without Poser: The Department of Justice's Attempt to Exempt Federal Prosecutors from State No-Contact Rules*, 71 N.Y.U. L. Rev. 1067 (1996) and footnote number 43 therein, a Letter from Thomas F. Liotti to President William Jefferson Clinton (August 23, 1993) on file with the New York University Law Review objecting to positions expressed in Reno Rule and suggesting that defense attorneys will mount an "avalanche of litigation" and will not "submit to allowing Government attorneys into the Defense camp" and a Letter from the New York State Association of Criminal Defense Lawyers to the Office of the Associate Attorney General (March 21, 1994) (on file with the N.Y.U. L. Review) (asserting that members of the association will report any violation of the no-contact rule by New York licensed federal prosecutors because notwithstanding Reno Rule, Association members are bound to do so).

65. See, ABA Standing Committee on Professional Discipline, Report to the House of Delegates No. 301, at 3 (1990). See also, CLE Seminar: *Defending on All Fronts, Prosecutorial Misconduct: A Domain Without Borders* at 15 (1993).

66. See, *U.S. v. Lopez*, 765 F. Supp. 1433, 1447-48, (N.D. Cal. 1991), Judge Marilyn Hall Patel rejected Thornburgh's Supremacy Clause argument and held that communications by prosecutors with represented parties were not "authorized by law" because there were no judicial decisions permitting them, and because the Memorandum did not constitute "law." Similarly, Chief Judge Juan Burciaga of New Mexico expressed his horror at the Memorandum. See, *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992). See also, *In re Gorence*, 810 F. Supp. 1234 (D.N.M. 1992) and *U.S. v. Ferrara*, No. 92-2869, memo. op. at 7-8 (D.D.C. May 28, 1993). See also, *U.S. v. Hammond*, 858 F.2d 834 (2d Cir. 1988); *U.S. v. Pinto*, 850 F.2d 927 (2d Cir.0; cert. denied, 488 U.S. 867 (1988) and *U.S. v. Sam Goody, Inc.*, 518 F. Supp. 1223 (E.D.N.Y. 1981), appl. denied, 675 F.2d 17 (2d Cir. 1982).

67. See, *Leis v. Flynt*, 439 U.S. 438, 442 (1929); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Bates v. State Bar of Arizone*,

433 U.S. 350 (1977) and *Feldman v. Gardner*, 661 F.2d 1295 (D.C. Ct. App. 1981).

68. *Id.*

69. *Id.*

70. *Id.*

71. See, *U.S. v. Kenny*, 645 F.2d 1323 at 1339 (1981). Tape of represented person made in non-custodial, pre-indictment, pre-arrest context does not implicate the ethical problems addressed by DR 7-104(A)(1); *U.S. v. Partin*, 601 F.2d 1000 (1979) though the government attorney, who was in charge of the trials of defendant and his former co-defendants, violated a disciplinary rule when he communicated with a former co-defendant without informing the former co-defendant's attorney, any infringement of the former co-defendant's Sixth Amendment right to counsel arising from the violation did not provide a basis for reversing defendant's conviction . . . defendant did not have standing to assert the alleged violation of the prosecutor's ethical duty to the former co-defendant as ground for reversal of defendant's conviction; *U.S. v. Hammond*, 858 F.2d 834 (2d Cir. 1988), the use of informants by government prosecutors in a pre-indictment, non-custodial situation will generally fall within the "authorized by law" exception to DR 7-104(A)(1) and therefore will not be subject to sanctions; *U.S. v. DeVillio*, 983 F.2d 1185 (2d Cir. 1993), the court found no violation of the disciplinary rule where pre-indictment conversations with two suspects, who were represented by counsel, were recorded by a government informant; *U.S. v. Scozzafaua*, 833 F. Supp. 203, (W.D.N.Y. 1993), the court held that an Assistant U.S. Attorney responsible for the investigation, did not violate DR 7-104 when she originated the plan of using the informant to communicate with an individual known to be represented by counsel; *U.S. v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982), the court rejected a rule that would allow criminal suspects to avoid investigation simply by retaining counsel; and *U.S. v. Chestman*, 704 F. Supp. 451 (S.D.N.Y. 1989), the court held that a prosecutor who authorized tape recordings of a defendant and a cooperating witness was not a violation of DR 7-104.

72. *Hill v. City of N.Y.*, 45 F. 3d 653 (2d Cir. 1995), "Assistant District Attorney's failure to turn over alleged Brady material during a prosecutorial phase of a case was a discretionary advocacy function for which an Assistant District Attorney was accorded absolute immunity from liability under 42 U.S.C. § 1983"; *Friedman v. Younger*, 282 F. Supp. 710 (C.D. Cal. 1968), District Attorney and his deputies are immune from liability for damages under the Federal Civil Rights Act; *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the defense of immunity is based upon the fact that officials are oftentimes required to exercise a degree of discretion in the course of performing their official duties and that immunizing them from civil liability for discretionary actions within the scope of their authority protects the important decision making process essential to effective government; *Dale v. Kelley*, 908 F. Supp. 125 (W.D.N.Y. 1995), "Assistant District Attorney was absolutely immune from liability in civil rights action on malicious prosecution claim."

73. See, footnote 49, *supra*.

74. *In Re Simels*, 1993 U.S. Dist. Lexis 17454 (SDN.Y.), a highly regarded defense attorney was censured by the Court for interviewing a represented witness, citing *U.S. v. Jamel*, 546 F. Supp. 646 at 653-54 (EDNY, 1982) *reversed on other grounds*, 707 F.2d 638 (2d Cir. 1983).

75. Liotti, Thomas F. and Zeh, Christopher W., *Will Decision Affect 'Art Of The Deal?'*, The Attorney of Nassau County, August, 1998 at 4 and 17. It is commonplace in the Department of Justice and throughout state prosecutor's offices to offer lenient sentences in exchange for the testimony of defendants. These, however, are not the average defendants. These defendants turn against their partners in crime, usually through interrogation by police and prosecutors, and become cooperating witnesses. Often the offer of leniency is made to the defendant without defense counsel present or by contacting the defendant individually. This is a clear violation of the Canons.

    The Tenth Circuit in *U.S. v. Singleton*, 144 F3d 1343 (1998), held that it was illegal for prosecutors to offer leniency in exchange for testimony. They rocked the field of criminal law, especially the prosecution side. Prosecutors no longer had the proverbial "ace-in-the-hole." They would have to resort to real "lawyering," preparation, and deal with the fact that their unblemished conviction record is most likely a farce. A farce because when prosecutors are trying to convict using these methods, trying to do justice; they are merely breaking the law.

76. 144 F. 3d 1343 (1998).

77. In *Singleton*, the defendant was appealing a conviction of one count of conspiracy to distribute cocaine and seven counts of money laundering. The District Court sentenced her to 46 months imprisonment on each count, to be served concurrently, and to be followed by three years of supervised release.

    Before trial the defendant moved to suppress testimony obtained from one Douglas, a co-conspirator who had entered into an agreement with the government whereby he would testify against the defendant in return for a lenient sentence. Subsequently, this decision was reversed, *en banc*, by the Tenth Circuit.

78. See, Glaberson, William, *Ruling Puts Leniency, a Top Tool For Prosecutors, Under Scrutiny*, The New York Times, Tuesday, October 27, 1998 at 1, A20.

79. See, Abramowitz, Elkan, *Ex Parte Contacts From the Justice Department*, N.Y.L.J., March 3, 1998 at 3, col. 1.

80. *Id.*

81. *Id.*

82. See Liotti, Thomas F., *Departing From The Federal Sentencing Guidelines*, Verdict, Vol. 4, No. 3, July, 1998 at 3.

83. See, Luban, David, *Are Criminal Defenders Different*? 91 Mich. L. Rev. 1729, June, 1993.

84. *Id.*

85. See Liotti, Thomas F., *Lawyers and the First Amendment - Mutually Exclusive Terms*?, N.Y.L.J., December 30, 1991 at 2 and The Champion, August, 1992 at 23. This article is about two (2) lawyers, a defense lawyer (William Kunstler), and a prosecutor (Elizabeth Holtzman), and the treatment they received in attempting to advocate for their respective positions. Mr. Kunstler was found in contempt in the Central Park jogger case because he referred to the judge as a "disgrace" for not considering his motion for a new trial. See *Kunstler v. Galligan*, (1st Dept., 1991) 168 A.D.2d 146, 571 N.Y.S.2d 930, leave to appeal granted 176 A.D.2d 1252, 586 N.Y.S.2d 447, [main volume] *affirmed* 79 N.Y.2d 775, 579 N.Y.S.2d 648, 587 NE2d 286. Holtzman, a former member of the House of Representatives Judiciary Committee who voted for the impeachment of President Nixon was the District Attorney in Kings County when she erroneously claimed in an out of court press conference that a trial judge had compelled a complaining witness in a rape case to crawl on all fours in the well of the courtroom in order to demonstrate how a rape had allegedly occurred. Ms. Holtzman refused to back away from her position even after her own trial assistant told her that she was in error. The incident was referred to the Grievance Committee by the trial judge. The local Committee recused itself and referred the matter out to the Committee on Long Island for prosecution. Ms. Holtzman was censured and lost her bid for reversal of that holding in the New York Court of Appeals and the Supreme Court of the United States. *See*, *In re Elizabeth Holtzman*, 78 N.Y.2d 184 (1991); *Elizabeth Holtzman v. Grievance Committee for the Tenth Judicial District*, 502 U.S. 1009 (1991).

86. See Liotti, Thomas F., *The Rape Of Our Profession: A Prophylactic Defense Is Too Sublime*, The Mouthpiece, a publication of the New York State Association of Criminal Defense Lawyers, June/July, 1992 at 5. A reprinting of remarks by the author from an address given by him to the Criminal Law and Procedure Committee of the Bar Association of Nassau County, Inc.

87. Such was the case in the John Gotti case in the Eastern District of New York. Thus, John Gotti will always have the satisfaction of knowing that the fight which he lost was not a fair one. See, *U.S. v. John Gotti*, 90 CR 1051 (ILG) (E.D.N.Y. 1992).

88. See *People v. T&C Design Inc. and Carmela Cardoza*, 178 Misc. 2d 971, 680 N.Y.S.2d 832 (1998) N.Y. Misc. LEXIS 555, September 9, 1998, Decided, September 9, 1998 Entered, 1998 N.Y. Slip Op. 98641, 1998 WL 828233. N.Y.L.J., Decisions of Interest, September 24, 1998 at 1, 21 and 28, col. 5 (2DS:04700278), *Judge Refers Issue Of Recusal to Another Judge For Determination*. See, Official Reporter for New York State, Advance Sheet No. 106, March 17, 1999. See also, Miller, A. Anthony, *Should Judges Decide Own Recusal Motions?*, The Attorney of Nassau County, October, 1998 at 18.

89. The lawyers had beaten the Government many times. The lawyers had been so successful that John Gotti, Sr. became known as the "Teflon Don."

90. Cutler was found guilty before Judge Thomas Platt, the former Chief Judge in the Eastern District of New York and suspended from the practice of law in the federal courts for six months. *U.S. v. Bruce Cutler*, 840 F.Supp. 959 (E.D.N.Y., 1994).

91. *U.S. v. Carneglia*, 850 F.Supp. 186 (E.D.N.Y., 1994).

92. *U.S. v. Oluwafemi*, 883 F.Supp. 885 (E.D.N.Y. 1995).

93. See, *U.S. v. Reale*, 1997 WL 225829 (S.D.N.Y.); *see also*, *U.S. v. Curcio*, 680 F.2d 881 (2d Cir. 1982).

94. Lefcourt has also been a proponent of partial compliance with Treasury Department Form 8300. This form requires the disclosure of client and benefactor information on fees of more than $10,000. Lefcourt had filed the form but refused to reveal client and benefactor information. He was fined and paid $25,000. He then litigated the issue and lost. (Citation for Lefcourt tax case.) *Lefcourt v. U.S.*, 1996 WL 252363 (S.D.N.Y.).

    Many argue that Form 8300 and its related Currency Transaction Reports (for smaller, suspicious banking transactions), are nothing more than a means to push defense lawyers out of business by making it more and more difficult to earn a living.

95. See Liotti, Thomas F., *Inflaming The Jury: The Prosecution's Techniques*, Community Newspapers of Long Island, Inc., August 10, 1995. During the Mollen Commission hearings the public learned of an expertise taught to police officers at the Police Academy and on "the job"—"testilying." "Testilying" is perjury offered by police and prosecutors seeking to insure convictions. See Liotti, Thomas F. and Ginnis, Katherina, *Testilying: Law Enforcement's Specialty*?, The Attorney of Nassau County, August, 1995 at 4 and 6.

96. See Liotti, Thomas F., *A Perspective On Yagman: The Outer Limits of Judicial Criticism*, The Attorney of Nassau County (May, 1996) at 6 and 19, where a California lawyer was suspended from the practice of law, a sanction later reversed on appeal, for accusing a judge of being incompetent, asleep during cases, an anti-Semite and drunk on the Bench. The Ninth Circuit found this to be protected speech and matters of opinion, protected by the First Amendment. See also, *contra*, *People v. Ira Raab*, 163 Misc. 2d 382, 621 N.Y.S.2d 440 (1994), where this writer represented a candidate for judicial office in a trespass case. The charges were dismissed in the interests of justice by the Appellate Term of the State Supreme Court. The candidate was charged with trespass at a church feast for giving out political literature there. He made a motion to dismiss on First Amendment grounds which was denied. Following a 10-day non-jury trial, he was convicted. At sentencing, his defense lawyer, this writer, alleged that his client was arrested, charged, prosecuted and convicted, in part, because he was a Democrat, a lawyer and Jewish. Two lawyer groups, The Nassau Lawyers' Association and The Criminal Courts Bar Association of Nassau County, forwarded letters to the judge in support of him and criticizing this writer. See Fan, Maureen, *Lawyer's Tack Ticks Off Judge*, Newsday, March 25, 1995; Nagourney, Eric, *The Trials of a Pol Nabbed For Trespass*, Newsday, January 4, 1995; Fan, Maureen, *Lawyer Sentenced For Trespass*, Newsday, April 4, 1995; McCue, Daniel J., *Raab Trespass Appeal Heard*, The Westbury Times, November 20, 1997 at 3 and Miller, A. Anthony, *Appellate Term Reverses Judge's Conviction*, The Attorney of Nassau County, December 1997 at 14. Mr. Liotti then represented Judge Raab on appeal (Judge Raab was elected to the Bench in 1996) and secured a reversal of his conviction and a dismissal of the charges. Appellate counsel, also this writer, in *People v. Raab*, 175 Misc. 2d 287, 669 N.Y.S.2d 1018, 1998 N.Y. Slip Op. 98106 (1998). (Appellate Term, Ninth and Tenth Judicial Districts, decided November 24, 1997) secured a unanimous reversal of the conviction on the law and facts (Stark, J.P., Ingrassia and Floyd, J.J.). The charges were dismissed in the interests of justice by the Appellate Term. Mr. Liotti was trial appellate counsel to Judge Raab. *See also*, *People v. Robert Delloff* (Nassau County District Court) where a defense lawyer was falsely arrested for trespass in trying to see a client at a police precinct. Fox, Martin, *Lawyer Cleared In Representation Hassle*, N.Y.L.J., October 2, 1991 at 1 and 2 and Perlman, Shirley E., *Charges Against Lawyer Dropped*, Newsday, October 4, 1991. Mr. Liotti represented Mr. Delloff. The charges against Mr. Delloff were dismissed in the interests of justice.

97. See Colwell, Carolyn, *Tankleff Defense: ADA Anti-Semitic*, Newsday, October 16, 1990 at 3 and 32. This article reports Mr. Liotti appearing as the Strike Force Attorney for the New York State Association of Criminal Defense Lawyers (NYSACDL) on behalf of Robert Gottlieb, a defense attorney in a Suffolk County, New York, murder trial where it was alleged that the Assistant District Attorney on the case had made some out-of-court, anti-semitic statements about Gottlieb during the trial. The murder trial judge made no inquiry and no referral was made to the Grievance Committee. Not a single bar association aside from NYSACDL took any action.

    Seemingly, Mr. Gottlieb, Of Counsel to this writer's law firm, was compelled to revisit the disparities in the defense and prosecution functions in 1997 and 1998 when he became counsel to Amy Grossberg, a young college student in Delaware charged with her boyfriend in a capital case for allegedly killing her newborn, out-of-wedlock baby. Mr. Gottlieb participated in a television interview with Barbara Walters and his client. Notwithstanding the tremendous publicity generated by the prosecutors, the trial court judge recused Gottlieb from the case and initiated a disciplinary proceeding against him.

98. *See People v. Urbelina Galindo Emiliano* (Nassau County, Hon. Raymond Harrington), N.Y.L.J., June 24, 1994 at 1 and June 27, 1994 at 33, col. 1 for full decision and *see also*, Rodriguez, Yolanda, *Order To Curb Lawyers' Comments Denied*, Newsday, June 24, 1994 at A31.

99. 158 Misc. 2d 174, 599 N.Y.S.2d 419 (1993).

100. One of the defense lawyers at the time remarked that it was necessary to go "tit for tat" with the prosecution concerning statements to the media. This statement was enough for the trial court to issue a restraining order. *See contra*, *In re Sullivan*, 185 A.D.2d 440, 586 N.Y.S.2d 322 (3d Dept., 1992), where a defense lawyer's extrajudicial comments to a live television broadcast did not warrant discipline because the remarks did not pose a substantial likelihood of materially prejudicing the trial.

101. *See Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991). See also, *National Broadcasting Co., Inc. v. Cooperman*, 116 A.D.2d 287, 501 N.Y.S.2d 405 (2d Dept., 1986) and *Markfield v. Association of the Bar of the City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82 (4th Dept., 1975), *appeal dismissed*, 37 N.Y.2d 794, 375 N.Y.S.2d 106 (1975).

102. See Lewis, Neil A., *Judge Cites Possible Improper Leaks by Starr Office* and *Excerpt From Ruling on Starr's Investigation*, The New York Times, October 31, 1998 at A9. U.S. District Court Judge Norman Holloway Johnson ordered members of the office of the independent counsel Kenneth Starr, to show cause why they should not be held in contempt of court for disclosure of 24 news reports in possible violation of Federal Rule of Criminal Procedure 6(e), which provides for secrecy in grand jury proceedings. The Rule specifically pertains to Government attorneys or United States' Agents concerning testimony which they either gave or to which they were privy to in the grand jury.

103. See, footnote 67, *supra*.

104. See, Goldstock, Ronald and Chananie, Steven, *Criminal Lawyers: the Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing*, 136 U. Pa. L. Rev. 1855, June, 1998. Footnote 54.

105. See, 1998 New York Lawyers Diary And Manual, Bar Directory of the State of New York, Skinder-Strauss Associates.

See also,

> over two decades.Arguably, the experience of Maurice H. Nadjari, Special State Prosecutor for the New York City Criminal Justice System from 1972-'76, effectively illustrates these assertions. Following a number of early successes, Nadjari's office was accused of being overzealous and insensitive to defendants' constitutional rights, which resulted in a stunning string of dismissals, convictions overturned on appeal and, ultimately, the end of Nadjari's otherwise respected prosecutorial career—one that had spanned over two decades.

136 U. Pa. L. Rev. 1855, 1877.

Mr. Nadjari, among other things, succeeded in overturning the absolute immunity doctrine which, prior to his reign, fully protected state prosecutors from civil claims. In *Patrick J. Cunningham v. The State of New York (Claim No. 61891)*, the State was sued by a former Bronx Democratic Leader because allegedly Mr. Nadjari's Office "failed to properly instruct the grand jury on the law, introduced inadmissible evidence, lacked an impartial attitude, lacked probable cause to bring the matter before the grand jury, overzealously cross-examined witnesses, selectively presented evidence, and introduced altered recorded conversations." The Third Department determined that:

> Consequently, when engaged in the role of investigator, like that of a policeman, he should not enjoy absolute but only qualified immunity. *Guerro v. Mulhearn*, 498 F.2d 1249; *Robichard v. Ronan*, 351 F.2d 533. In *Schanbarger v. Kellogg*, 35 A.D.2d 902, 315 N.Y.S.2d 1013, this Court held that the defendants therein were acting in a quasi-judicial capacity and, thus, were entitled to the defense of absolute immunity from suit. While we would reach this same conclusion today, we are of the view that the language used in that case to the effect that persons acting under an Assistant District Attorney are immune from civil suit for official acts performed by them in the investigation of a crime is no longer valid insofar as it may be interpreted as conferring absolute immunity upon those engaged in investigative actions. Accordingly, it is the opinion of this Court that the Court of Claims properly granted claimant permission to replead in those instances where the prosecutor was acting in other than a quasi-judicial capacity.

See Cunningham v. State of New York, 71A.D.2d 181, 422 N.Y.S.2d 497, 498 (1979).

106. *See*, 18 U.S.C. § 1963(1), 21 U.S.C. § 853(n), and C.P.L.R. § 1311(1).

107. *See*, 18 U.S.C. § 1963(1) and U.S.C. § 853(n).

108. *See*, C.P.L.R. § 1311(12).

109. *See*, *Caplin & Drysdale Chartered v. U.S.*, 491 U.S. 617 (1989) and *U.S. v. Monsanto*, 491 U.S. 600 (1989). In addition, the "relation-back" doctrine gives the government title to the proceeds of a crime at the time of its commission by statute. *See*, 18 U.S.C. § 1963(c). If an attorney is retained prior to forfeiture proceedings or before he has notice of same, he may be entitled to claim he is an innocent owner and therefore entitled to retain a fee. *U.S. v. 92 Buena Vista Avenue*, 113 St. Ct. 1126 (1993). *See also*, *U.S. v. Moffit, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996). Defendants were forced to forfeit over $100,000 in attorneys' fees they received from a client charged with drug trafficking and money laundering. Client paid all legal fees in cash and refused to accept a receipt. Defendants spent most of the fee and maintained that recovery was limited to the unspent portion. However, this did not stop the government in its effort to attach and ultimately secure a forfeiture judgment.

110. This was the case in the attack on F. Lee Bailey, mentioned *supra*. This is the case with many defense lawyers who, in addition to having knowledge of the law, must have knowledge of banking in order to account for fees. Liotti, Thomas F., *Avoiding Prosecutions*, N.Y. St. B.J., February, 1995.

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CRIMINAL LAW

Challenging Blood Tests

By Peter Gerstenzang

Introduction

The prevalent belief in the Criminal Justice System is that blood tests are beyond challenge. In actuality, blood tests are neither as accurate, nor as invulnerable as popular mythology would have us believe. Since blood testing is far less common than breath testing, there has been little litigation in regard to the issues that affect the validity of blood testing.

Generally, we see blood tests in the context of prosecutions of vehicular crimes. Few of these go to trial and blood test results are accepted at face value. Attorneys are justifiably impressed with the contrast between a police officer with possibly 40 hours of training in regard to a breath test instrument; and the qualifications of a toxicologist or "trained laboratory technician." In addition, we are all daunted by the prospect of confronting "scientific evidence."

Ironically, it is this relative lack of litigation which makes blood testing vulnerable. Contrary to popular belief, the instrumentation is not exact, and results can vary depending upon the procedures followed by the individual laboratory. Two laboratories can analyze the same sample of blood and come up with different results without either laboratory having erred.

While an in-depth discussion of the methodology of blood alcohol testing is beyond the scope of this article, and the competence of this author, there is a large volume of literature dealing with intoxication test evidence. Two of the best, insofar as lawyers are concerned, are *Intoxication Test Evidence* by Edward F. Fitzgerald, Esq. and *Drunk Driving Defense* by Lawrence Taylor, Esq.

Intoxication Test Evidence is published by West Group. The details of the physiology of alcohol as well as the methodology surrounding the analysis of blood and breath are thoroughly discussed. The author tries to avoid technical jargon and to make the book intelligible to those of us who went to law school, in part, because of our aversion to physics and chemistry. *Intoxication Test Evidence* can be obtained from West Publishing by calling (800) 328-9352.

Drunk Driving Defense by Lawrence Taylor is an essential reference for the defense of a DWI case. The book is an outstanding treatment of virtually every aspect of the litigation of a DWI case. The book is published by Aspen Law and Business and may be ordered by calling their Customer Service Department at (800) 234-1660. *Drunk Driving Defense* and *Intoxication Test Evidence* should be a part of the library of every lawyer doing DUI defense.

I gratefully acknowledge the debt that I owe these two fine attorneys for the information that went into this article, and for their permission to quote their work as extensively as I did. I would also like to express my appreciation to Michael Snure, Esq. for allowing me to requote him from Lawrence Taylor's book and for providing additional assistance to me. Finally, my thanks to Fleming Whited, Esq. and Edward Fiandach, Esq. for their permission to quote from their respective articles.

In General

While these materials outline a series of potential challenges that can be used to impeach a blood test result, the fact pattern of your particular case will determine the nature of the challenge or challenges you decide to use. Neither judges nor juries are prepared to believe that blood alcohol tests as a whole are completely erroneous and should be discounted. Obviously, your challenge is to the blood test result that was erroneously obtained in your case. Accordingly, avoid a blanket approach in which you throw everything you can think of into the fray. Rather, select those approaches most consistent with your theory of the defense and focus on them.

The Blood Was Improperly Withdrawn

Two of the most commonly raised issues is whether the person who withdrew the blood had the authority to do so, and whether the method they followed was appropriate. Insofar as authority to withdraw blood is concerned, each state has regulations in that regard. In New York, VTL § 1194(4)(a)(1) authorizes the following people to withdraw blood for the purpose of determining alcohol or drug content. It should be emphasized that their authority is triggered by a request having been made by a police officer:

(i) A physician, a registered professional nurse or a registered physician's assistant.

(ii) Under the supervision and at the direction of a physician: a medical laboratory technician or medical technologist as classified by civil service; a phlebotomist; an advanced emergency medical technician as certified by the Department of Health; or a medical laboratory technician or medical technologist employed by a clinical labo-

ratory approved under Title 5 of Article 5 of the Public Health Law.

In an accident where the defendant is being taken to a hospital, police officers will frequently ask an EMT to withdraw blood from the defendant. This is particularly the case where they see that the EMTs are setting up an IV. Always check the qualifications of the person who drew the blood. At the very least, this issue may result in a far more favorable disposition. At best, it can result in outright suppression.

Supervision of Blood Withdrawal

In *People v. Moser*, 70 N.Y.2d 476, 522 N.Y.S.2d 497, 517 N.E.2d 212 (1987), the Court considered the issue of whether a physician has to be present to observe the procedure when a laboratory technician draws a blood sample. In finding that this was not required, the Court set forth the standards for physician supervision:

> Although the personal supervision of a physician is an important safeguard for the health of the suspects to be tested, it would be anomalous in light of the purposes of the amendment to require the physician to put his other duties aside to watch the technician perform the procedure. If that were the requirement, there would be no reason to allow the technician to take the sample in the first place.
>
> In our view, the concerns addressed by the supervision requirements are adequately served by the physician's authorization of the test, which presumably reflects his medical judgment that it will not put the patient at risk, and his presence to respond to inquiries and emergencies.

Id. at ___, 522 N.Y.S.2d at 498.

In *People v. Ebner*, 195 A.D.2d 1006, 600 N.Y.S.2d 569 (4th Dept.1993), the Court reversed the defendant's DWI conviction on the ground that the procedure used to draw blood from the defendant did not comply with the statutory supervision requirements. Specifically, the test in this case was authorized by a registered nurse, who did not personally observe the extraction of the sample.

In finding error in the failure of the trial court to suppress the blood test, the Court held that VTL § 1194(4)(a)(1) required that a physician supervise and direct the drawing of blood by a medical laboratory technician:

> Although a physician need not be "personally present" when a medical laboratory technician draws blood, the evidence must show that a physician "directed and supervised all activities in the emergency room and that he authorized the taking of the sample." (*People v. Moser*, 70 N.Y.2d 476, 477, 522 N.Y.S.2d 497, 517 N.E.2d 212). Here, the test was authorized by a registered nurse, who did not personally observe the taking of the sample. That procedure failed to safeguard the health of the patient, which is the purpose behind the supervision requirement. There was no showing that a physician had reached a "medical judgment" that drawing blood would not put defendant, who was seriously injured at risk or that a physician was present "to respond to inquiries and emergencies." (*People v. Moser, supra*, at 478, 522 N.Y.S.2d 497, 517 N.E.2d 212).

Id. at ___, 600 N.Y.S.2d at 570B71; *see also People v. State*, 233 A.D.2d 837, 649 N.Y.S.2d 624 (4th Dept.1996).

Alcohol Swabs

Another area of challenge is the antiseptic used to swab a person's arm prior to the withdrawal of a blood sample. Part 59.2(c)(3) of the New York State Department of Health Rules and Regulations requires that:

> An aqueous solution of nonvolatile antiseptic shall be used on the skin. Alcohol or phenol shall not be used as a skin antiseptic.

10 NYCRR § 59.2(c)(3).

Obviously, sterilizing a person's arm with an alcohol swab raises the issue of whether the sample withdrawn was contaminated by the alcohol on the skin. In addition, the use of a swab containing alcohol violates the Department of Health Regulations. One of the most common alcohol swabs was that contained in the Becton Dickinson blood test kits. This swab contains Betadine. In 1990, Michael Sexton, Esq., of the New York State Defenders Association, Inc., submitted a Betadine swab to National Medical Services, Inc. for analysis. The resulting toxicology report found that there was no ethyl alcohol present, but did detect .01 percent of isopropyl alcohol. Their conclusion was that:

> The povidone-iodine solution on the swab contains 0.01 percent isopropyl alcohol. This constitutes a negligible concentration.

Report of the National Medical Services, Inc. Laboratory dated June 12, 1990. Since this analysis was performed, Becton Dickinson sold the portion of their company deal-

ing with blood test kits to NIK Public Safety, Inc., an Armor Holdings, Inc. Company.

In *People v. Ward*, 14 Misc. 2d 5181, 178 N.Y.S.2d 708 (Westchester County Ct. 1958), the Court reversed a conviction and held that it was error to admit the result of a blood test where the blood had been extracted from a defendant whose arm was swabbed with alcohol as antiseptic. The basis for the suppression was the fact that the procedure was not in accordance with standard operating procedures; and the chemist who performed the analysis testified that it was "possible" that alcohol used as an antiseptic "might have entered the blood withdrawn from the defendant's arm, and affected the result of the test." *Id.* at 708.

Ethyl alcohol has been found in measurable quantities in three types of antiseptic swabs, and in a disinfectant used routinely for the same purpose. The three swabs tested, which were found to include ethyl alcohol, were Clinipad antiseptic towelette, PDI antiseptic towelette, and Triad antiseptic towelette. The disinfectant that contained ethyl alcohol is Zepphrian. *Drinking/Driving Law Letter*, Vol.8, No.25, 12/8/89.

Plasma, Serum and Whole Blood

In evaluating any blood test result, you should know whether the test was performed on plasma, serum or whole blood. Blood is made up of cellular material, plasma and serum. Plasma is the whole blood without the cellular material. Serum, on the other hand, is the whole blood without the cellular material or the clotting element. You obtain plasma by centrifuging blood. Serum is obtained by allowing blood to stand and clot. The serum is the liquid that surfaces above the clotted, red, cellular material. Edward F. Fitzgerald, *Intoxication Test Evidence* § 19:16, at 19-16 (2d ed. 1995).

> The distinction between plasma and serum is clear: Plasma is the liquid part of whole blood; serum is the liquid left after clotting has occurred. The chemical composition of the two is almost identical but plasma contains fibrinogen and serum does not. In the clotting process, the soluble fibrinogen is converted to insoluble fibrin, the gel, that comprises the firm part of the clot.

Claude A. Villee, *Biology*, at 250 (4th Ed.1962, W.B. Saunders Co.).

Essentially, the removal of the cellular material decreases the volume of solution in which the alcohol is found. The analysis of plasma as opposed to a whole blood sample will result in a higher blood alcohol test result than would be the case if whole blood were analyzed. The same is true when serum is analyzed as opposed to whole blood.

This problem has been recognized by the New York State Department of Health Rules and Regulations. Part 59.2(a)(2) provides for the following conversion factor when serum or plasma are analyzed:

> Nine-tenths of the determined concentration of alcohol in the serum or plasma shall be equivalent to the corresponding whole blood alcohol concentration.

In essence, the Department of Health provides for a 10% conversion factor. Unfortunately, physiology is nowhere near that precise. To obtain an accurate reflection of whole blood alcohol concentration through an analysis of plasma or serum, you have to know what percentage of the volume of whole blood is made up of cellular material versus plasma. This percentage is commonly referred to as a person's hematocrit, which is the numerical value reflecting the ratio of plasma to cellular material. For example, the normal range for males is 40B54 with an average of 47. For females it is an average of 42 with a range of 36 to 47. Edward F. Fitzgerald, *Intoxication Test Evidence* § 4:11.1, at 136 (1993).

According to Fitzgerald, the blood alcohol concentration determined from plasma or serum will average about 16 percent higher, and may be 18 to 20 percent higher or more than whole blood. Consequently, a standard mathematical conversion or reduction to a whole blood value may not be accurate.

> The 16% conversion factor is an average for persons with the normal hematocrit ratio. When blood is drawn in a hospital setting as part of the medical treatment of accident victims, a full hematological work-up will usually be performed, and one of the results obtained will be the hematocrit ratio of the subject. The higher the actual hematocrit ratio of a subject, the higher the suggested conversion factor which ought to be used to convert plasma to whole-blood alcohol values.
>
> The hematocrit ratio number (*i.e.*, male average 47) describes the proportion of the blood which is made up of the cellular material. The whole blood of a male with a 47 would have approximately 53% plasma. The higher the hematocrit result, the more cellular material present and the less plasma. If a male has an actual hematocrit ratio of 60 instead of 47, we need to make a greater adjustment to convert a plasma alcohol to a

> whole-blood alcohol. In general, the higher the actual hematocrit value reported, the higher the conversion factor needed to convert the plasma alcohol to whole blood alcohol. If, conversely, prior to the drawing of the sample, the patient's hematocrit had been dropping due to his medical condition or circumstances (let's say to a 30, instead of 47), the plasma value obtained would be more nearly correct for that specimen (less cellular materials is "added back," in effect, when the whole blood value of that sample is considered), so less than the normal correction factor would be required to estimate the whole blood value of the sample delivered to the lab.

Edward F. Fitzgerald, *Intoxication Test Evidence* § 19:13, at 19-12-13 (2d ed. 1995).

> In a Pennsylvania case, reported in the *Drinking/Driving Law Letter*, Vol.9, No.2, 1/19/90, Dr. Charles Winek, Director of Laboratories for Allegheny County, Pennsylvania, noted that serum alcohol measurements may be as much as twenty percent higher than whole blood alcohol measurements. In *Commonwealth v. Upcraft*, Criminal Division No. CC8812784, the following testimony was introduced:
>
> Q: Isn't it true that serum alcohols are higher than whole blood alcohols?
>
> A: Yes, it's true.
>
> Q: And isn't it true that the range of difference is up to twenty percent?
>
> A: Yes.
>
> Q: So that if a serum alcohol were done on [the defendant] and that result were given to the court and jury, that result could be twenty percent higher than the result would be than if you ran a whole blood?
>
> A: Yes. It could be as high as twenty percent. I don't know if it is, but it could be.
>
> Q: A minimum of ten and as high as twenty?
>
> A: I usually use fifteen percent, halfway in between.

Drinking/Driving Law Letter, Vol.9, No.2, 1/19/90, at pg. 3.

Insofar as Larry Taylor is concerned, he quotes materials obtained from Michael J. Snure, Esq., of Winter Park, Florida, which were prepared for the National College for DUI Defense, Third Annual Summer Session at Harvard Law School, 1997, for the proposition that whole blood is not the sample of choice for hospitals which normally test blood serum. Mr. Snure indicates that such a hospital test can be "up to 30 percent higher than those obtained in tests of a true homogeneous whole blood sample." Lawrence Taylor, *Drunk Driving Defense* § 8.3, at S-8:150 (Release 3-9/98).

Effect of Intra Venous Transfusions (IV's)

Contrary to popular belief, the introduction of IV fluids does not reduce the blood alcohol concentration. Rather, the increased water content draws alcohol from the muscle tissue and tends to increase the blood alcohol concentration. The court in *State of North Carolina v. Matthew Thomas Rich*, (No. 96-CRS-80158, 80159) in its decision filed September 19, 1997, at footnote 33, said, in response to defendant's motion to suppress blood alcohol analysis:

> As such, IV fluids make blood more watery, and, as a result, increased water content of the blood will draw alcohol from the muscle tissue. Such will serve to only increase the alcohol level above and beyond the disparity inherently present. The plasma alcohol concentration (PAC) and whole blood alcohol concentration (BAC) ratio depends on the water content of the plasma and the whole blood. The amount of alcohol in plasma depends on the amount of water present in the blood component chosen for testing.
>
> Conversion of plasma alcohol test results to an equivalent BAC test result depends upon a conversion factor that varies for individuals and may fluctuate from individual to individual anywhere from 1.10/1 to 1.35/1 or a 10% to 35% variation. Put another way, the plasma blood alcohol content is invariably higher than the blood alcohol content and must be converted if it is to be meaningfully understood by a lay person.

DWI Journal: Law & Science, Vol. 13, No. 8, August 1998, at 8 (citing *North Carolina v. Rich*).

The Blood Test Kit

In most cases, the blood sample will be drawn using a kit. One of the most commonly used by law enforcement is sold by NIK Public Safety, Inc., the successor company to Becton Dickinson. This kit purportedly contains:

1) two 10 milliliter vacutainer brand tubes, each containing 100 mg. sodium fluoride and 20 mg. potassium oxalate;

2) a disposable vacutainer holder;

3) one sterile and disposable vacutainer multiple sample needle—21 gauge X 1-1/2 inches;

4) one antiseptic swab (non-alcoholic);

5) two seals for blood vial;

6) two evidence seals for mailer box;

7) two integrity seals for plastic box;

8) one absorbent pad;

9) one instruction sheet blood collection system;

10) one New York instructions to police officer;

11) one submission/lab examination form.

NIK Public Safety, Inc. can be contacted at 13386 International Parkway, Jacksonville, Florida 32218. Their instruction sheet lists their phone number as (904) 741-5400. Their fax number is (904) 741-5404. There are two sets of instructions in the kit. The first set of instructions are to the police officer who is requesting the blood withdrawal. The second set of instructions are for the person withdrawing the blood. The instructions to the police officer are as follows:

> CAUTION: The Needle and Holder should be discarded by the Medical Staff after use.

1. Ask the person withdrawing the blood to use the VACUTAINER Tube, Needle and Holder supplied with this kit. DO NOT REMOVE THE GRAY STOPPER FROM ANY VACUTAINER TUBE.

2. Ask the person withdrawing the blood to cleanse the withdrawal site with aqueous Betadine, Phisohex or other non-alcoholic solution.

3. For DWI–Alcohol or DWAI–Drugs, get the blood specimen within 2 hours AFTER the time of arrest.

4. Get approximately *20 ml (2 full gray stopper tubes)*.

5. INVERT tubes immediately after withdrawal of blood to ensure proper mixing with anticoagulant powder. INVERT slowly and completely at least 20 times. DO NOT SHAKE.

6. Write the full name of the person and your initials ON EACH BLOOD TUBE. Then completely fill in all 6 seals provided with the kit.

7. Seal each VACUTAINER Tube with a completed seal by pressing the center of the seal to the top of the rubber stopper; then firmly press the ends of the seal down on sides of VACUTAINER Tubes.

8. Place sealed tubes with blood specimen back into the original plastic box. The needle, holder and Betadine swab should have been discarded after use by the Medical Staff. Do not place these items back into the kit box.

9. Place the white absorbent pad back on top of sealed tubes with blood specimen. Snap the plastic lid back on to kit box, tightly closing box. Seal both ends of the plastic kit box with the two red Integrity Seals.

10. Complete the LAB-t form. LIST suspected drugs (if any). PLACE the laboratory copy (original) and Results of Analysis Copy (yellow) around the kit and place back into the cardboard mailer box. Retain the pink Submitting Agency copy on file.

11. Close the cardboard mailer box, locking postal seal. Affix the two remaining seals onto box; one on each side of postal lock seal, taping box closed for security.

12. Deliver specimen to the Laboratory in person OR by Certified OR Registered Mail.

13. The Cardboard box is designed as a mailer. Print on the top of box the LABORATORY ADDRESS and your RETURN ADDRESS. DO NOT insert box into an envelope.

NIK Public Safety, Inc. Instructions for Use - Vacutainer Brand Blood Collection System.

The instructions to the person withdrawing the blood are as follows:

IMPORTANT: Use Only Vacutainer Tubes, Needle, Holder, Swab Pad and Seals provided in this kit.

1. Open needle cartridge. Twist to break the tamper-evident seal. Remove cap, exposing the back portion of the needle and threaded hub. Do not remove front needle cover.

2. Assemble needle holder. Thread needle into holder until firmly sealed.

3. Insert VACUTAINER tube into holder. Push straight onto needle, no further than the guideline on the holder.

4. Apply tourniquet, prepare venipuncture site using only the non-alcoholic antiseptic pad pro-

vided in this kit. Position the arm in a downward or lowered altitude.

5. Remove needle cover, perform venipuncture in the usual manner, keeping the tube in an upward position with the stopper uppermost.
6. Push VACUTAINER tube forward to end of holder, piercing the rubber stopper. When blood flows into tube, REMOVE TOURNIQUET AS SOON AS BLOOD BEGINS TO FILL TUBE. DURING THIS PROCEDURE, DO NOT ALLOW CONTENTS OF VACUTAINER TUBE TO CONTACT STOPPER. SPECIAL ATTENTION SHOULD BE GIVEN TO ARM POSITION, TUBE POSITION IN ORDER TO PREVENT POSSIBLE BACKFLOW FROM THE TUBE AND ITS ATTENDANT POSSIBILITY OF ADVERSE REACTION TO THE PATIENT.
7. When the tube fill is complete and blood ceases to flow, remove the tube from the holder. Insert the second VACUTAINER tube straight into the holder until blood flows.
8. When sampling is completed, immediately remove the needle/holder assembly with the last VACUTAINER, then remove the tube from the assembly. Apply and hold a dry sterile compress to the venipuncture site. Elevate the arm.
9. To assure proper mixing with anticoagulant powder, slowly invert the tubes at least five times immediately after blood collection. DO NOT SHAKE VIGOROUSLY. If this kit is only a blood collection kit, instructions stop here. If kit is for the collection of blood and urine, read step 10.
10. Collect the urine sample in the provided urine collection tube.

NIK Public Safety, Inc. Instructions, New York State Police Instructions-Blood Specimen form, rev. 2/97.

Out of Date Blood Test Kit

It appears that the use of a blood test kit that has "expired" does not, without more, constitute a basis for the suppression of a blood test result. In *People v. Hagin*, 238 A.D.2d 714, 657 N.Y.S.2d 105 (3d Dept.1997), the Appellate Division, Third Department, stated that it was:

> [U]nconvinced that use of the blood kit beyond its labeled expiration date or defendant's speculation that the blood sample may have been tampered with provide any basis for rejection of the test results. Notably, the People's toxicologist, Donald Loomis, was able to determine that the vials had not malfunctioned and that their seals remained intact because of the existence of a vacuum at the time of his testing. Under the circumstances, we conclude that Loomis' trial testimony provided "reasonable assurance of the identity and unchanged condition of the evidence."

Id. at 107 (quotation omitted).

However, the above-quoted language does suggest that, in order for such results to be admissible, the People must lay an adequate foundation that the blood test kit was still properly functioning subsequent to its expiration date.

In an article entitled "How Blood Alcohol Can Be Created After Extraction," Dr. Stanley J. Broskey, a forensic chemist and toxicologist in Holland, Pennsylvania indicates that vacutainers can begin to lose some of their internal vacuum while sitting on a shelf. When this occurs, room air containing microorganisms enters the collection containers. These microorganisms will ultimately cause fermentation which will convert blood sugar to blood alcohol. He suggests inquiring as to whether a bacteriological assay was done of the defendant's blood to rule out production of a "post-collection-forensic-artifact." How Blood Alcohol Can Be Created After Extraction by Stanley J. Broskey, Ph.D., *DWI Journal Law & Science*, Vol. 13, No. 8, at 6 (August 1998).

At a suppression hearing in *People v. Lanfear*, in which the defense had moved for the suppression of the blood test result, the People called Shayna Geller to testify as a representative of Becton Dickinson in regard to an out of date blood test kit that had been used to test the blood of the defendant. She indicated that she had worked for Becton Dickinson for 16 years and that she was the assistant manager for medical affairs. She indicated that the expiration date related to the vacuum.

Q: Okay. You testified that the expiration date has to do with the—what did you call it?

A: Vacuum.

Q: Vacuum. What kind of effect does it have on the vacuum?

A: The vacuum in the tube decreases over time from the day it's made, and so that over time the vacuum will be less than that which is stated on the tube.

Q: Okay. Which would cause what?

A: It changes what's called the additive to blood ratio.

Q Okay. So that if I can understand this properly, it :would cause less blood to go into the tube?

A: Correct.

Q: Okay. And that would cause what kind of results as far as the reading?

A: It doesn't change the reading.

Q: It doesn't change at all?

A: No.

Transcript of *People of the State of New York v. William Lanfear* hearing held in the Lake George Town Court, Warren County, before the Honorable Robert Radloff on November 13, 1992, at pages 40-41.

This testimony is very interesting when juxtaposed with Mr. Snure's observations in regard to the importance of obtaining the proper volume of blood in the tube:

> The expiration dates on blood-alcohol collection kits generally refer to the date beyond which the vacuum will not be warranted by the manufacturer. The vacuum is important for two reasons. First, the vacuum is calculated by design to pull the proper volume of blood into the container when punctured by the vacutainer needle. Second, the vacuum, when properly sealed, maintains the sterile environment. If the vacuum has been compromised, then the proper volume of blood will not be drawn into the vial and the calculated amount of chemicals introduced into the vial as a preservative or anticoagulant will be out of specification with possible effect on the blood test results. Additionally, if the vacuum has been compromised, the tube is no longer sterile and bacteria may have entered the tube, which could cause spoiling or fermentation of the later collected blood alcohol sample.

Lawrence Taylor, *Drunk Driving Defense* § 8.3, at S-8:148-149 (Release 3-9/98).

Blood Clotting

While clotting of the sample will not affect the amount of alcohol in the blood, it will concentrate the alcohol in the liquid portion of the sample, the part which is tested. Accordingly, this will result in an erroneously high test result. In order to prevent this, an anticoagulant is required to be present in the tube into which the blood is drawn. Part 59.2 of the New York State Department of Health Rules and Regulations, entitled "Methods and Procedures of Determining Blood and Urine Alcohol" requires that blood be drawn with a

> (i) sterile dry needle into a vacuum container containing a solid anticoagulant; or
>
> (ii) sterile dry needle and syringe and deposited into a clean container containing a solid anticoagulant, which container shall then be capped or stoppered and identified.

10 NYCRR § 59.2(c)(4)(i) and (ii).

In *Intoxication Test Evidence*, Edward Fitzgerald explained that an anticoagulant combines with calcium ions in the blood to prevent the formation of Thrombin. He indicates that that chemical is usually sodium citrate or potassium oxalate. Edward F. Fitzgerald, *Intoxication Test Evidence* § 19:17, at 19-22 (2d ed. 1995). The NIK Public Safety, Inc. kit indicates that their two 10 milliliter vacutainer tubes contain 20 mg. of potassium oxalate.

While it is clear that the anticoagulant is essential to prevent clotting and an erroneously high test result, there is a real issue as to whether the proper quantity and quality of the anticoagulant is present in the vacutainer. In *People v. Lanfear*, the Becton Dickinson (predecessor company to NIK Public Safety, Inc.) representative testified that her company did not manufacture the chemicals, but purchased them from a vendor.

What tests are run to determine whether the anticoagulant contains the correct chemical composition? How do we know that the vacutainer contained the correct amount of anticoagulant? For that matter, how do we know that the particular vacutainer used in our case contained any anticoagulant?

Is it possible to test the blood sample to see if the anticoagulant or preservative are present? Mr. Snure indicates that this can be done after the blood sample has been drawn, but before analysis of the blood. The process is called ion chromatography. In a homicide or vehicular assault case, is it too much to ask that there be some check on the vacutainer to ensure the integrity of the sample? The blood test kits are presumably being purchased in bulk for law enforcement use. Is there any sampling done of "a scientifically acceptable random number for the presence of the preservative and anticoagulant in the proper amounts?" *Id.* at S-8:152.

Generally, the laboratory that analyzes the blood does not test to determine the presence of either the preservative or the anticoagulant. What the prosecution may cite is the absence of any visible clotting and you should anticipate redirect examination that inquires into whether the chemist checked for evidence of clotting. In that regard, Lawrence Taylor, citing Michael J. Snure, Esq. advises that the blood can form microclots which cannot be seen without the aid of a microscope. He quotes Mr. Snure's materials as follows:

> Blood that has been microclotted will not represent a true value because, even with a small degree of clotting, the blood-alcohol concentration in the remaining serum is artificially high. Most analysts only do a naked-eye visual inspection of the blood sample and either do not recognize the phenomenon of microclotting or claim that, if present, it would make such a small difference that it is insignificant, or that the pipettes or syringes they use are so small in diameter that if the blood sample was clotted to any significant degree it would not be testable.

In *People v. McDonagh*, App.Term, 9th & 10th Jud.Dist.1992, *lv. to appeal denied* 80 N.Y.2d 931, 589 N.Y.S.2d 859, 603 N.E.2d 964 (1992), the Court ruled that a blood alcohol test was inadmissible for failure of proof in regard to the chemicals present in the tubes containing the defendant's blood:

> The only evidence adduced was in the form of testimony by the supervisor of the Suffolk County toxicological laboratory that he had received oral assurances from an unspecified employee of the manufacturer that the requisite chemicals were present in the proper amount. No certification to this effect was introduced into evidence, and the supervisor stated that random testing was not attempted. In view of this deficiency, the results of the test should have been excluded. In the absence of any indication that the requisite foundation cannot be provided, a new trial is required. . . .

People v. McDonagh, Slip Op. at 2.

In *People v. Boyst*, 177 A.D.2d 962, 577 N.Y.S.2d 1007 (4th Dept.1991), the Court reached the opposite result. The basis for the decision seemed to be the Court's presumption that the conversion factor of .9, as referenced in 59.2(a)(1) of the New York State Department of Health Rules and Regulations, cures the problem created by the clotting:

> Defendant's sole contention is that the drawing and testing of a sample of her blood was not in compliance with 10 NYCRR 59.2(c)(4), and that the results were therefore improperly received into evidence pursuant to Vehicle and Traffic Law '' 1194(4)(c) and 1195(1). Specifically, she contends that, because no anticoagulant was added to her blood sample, the subsequent clotting of that sample and testing of the serum (the unclotted liquid portion of the sample) rendered the results invalid and inadmissible. We disagree. The procedure that was followed is authorized by the regulations (*see*, 10 NYCRR 59.2[a][1]) and thus did not violate the statute. That regulation expressly permits the testing of blood serum, provided that, as was done here, a conversion factor of .9 is used to translate the serum alcohol reading into a blood alcohol reading. Consequently, the court did not err in admitting the test results.

Id. at ___, 577 N.Y.S.2d at 1007.

Fermentation of Blood

Blood samples have a tendency to ferment and produce alcohol over a period of time. Accordingly, samples that are preserved for testing for forensic purposes are supposed to contain a preservative to prevent fermentation. The effects of fermentation can be dramatic. For example, a blood sample with no alcohol can generate a reading of .25% or even higher as it decays. Refrigeration is not a substitute for sodium fluoride. While cold will slow the process, it will not prevent it. Lawrence Taylor, *Drunk Driving Defense* § 8.3.2, at S-8:154.9 (Release 3-9/98).

As with the anticoagulant, the use of a preservative poses all kinds of issues. The quality and the quantity of the preservative should be subject to scrutiny. Michael Snure points out that the chemicals used in the blood test kit are purchased in bulk and mixed in bulk. These mixed chemicals are then dispensed into the test tube vials by weight. Michael Snure indicates that while samples are taken from the bulk mixture to ensure the proper ratio, testing of samples from the vials themselves is not performed. Lawrence Taylor, *Drunk Driving Defense* § 8.3, at S-8:147 (Release 3-9/98).

The most common preservative is sodium fluoride which is used in the NIK Public Safety, Inc. kit. The amount of sodium fluoride in the vacutainer can be a fruitful area of inquiry. Larry Taylor points out that most blood alcohol kits contain only 20 mg. of sodium fluoride. He cites A.W. Jones for the proposition that, in order to avoid fermentation, 100 mg. is required. *Id.* at S-8:154.10.

It is interesting to note that the NIK Public Safety, Inc. kit reflects the presence of 100 mg. of sodium fluoride. While that quantity of sodium fluoride will preserve the blood sample, Larry cites A.W. Jones for the proposition that this preservative may actually increase the amount of alcohol in the sample when headspace gas

chromatography is used to analyze it. Citing Dr. Jones' article entitled, "Salting-Out Effect of Sodium Fluoride and Its Influence on the Analysis of Ethanol by Headspace Gas Chromatography, 18 Journal of Analytical Toxicology 292 (September 1994), Larry says:

> Dr. Jones also found that using sodium fluoride to preserve a blood sample actually *increased* the amount of alcohol in the sample when gas chromatography was used to analyze it. According to his research, even 10 mg of sodium fluoride "increased the concentration of ethanol in the equilibrated (34 degrees centigrade) headspace by 8.9% when compared with heparinized blood" (i.e., a blood treated with an anticoagulant). This was due to a "salting-out" effect from the sodium fluoride.

Id. at 8:154.10.

For demonstrative purposes, Larry suggests bringing in a fresh vial of blood and allowing the jury to compare it with the evidentiary sample. He indicates that the fresh blood will be bright red while the test sample will be nearly black. *Id.* at S-8:154.12.

Mixing the Chemicals in the Blood

On a far more mundane level, the mixing of the chemicals with the blood is critical to the integrity of the analysis. The instructions call for the vacutainer to be inverted slowly 5 times by the person withdrawing the blood and 20 times by the police officer to ensure the proper mixing of the chemicals with the blood sample. It should be understood that blood drawn by nurses in hospitals for hospital analysis do not usually contain any such chemicals. These samples are analyzed immediately and neither require the chemicals, nor the mixing.

In speaking to physicians familiar with emergency room procedures, I was greeted with laughter and incredulity at the thought of emergency room personnel taking the time to follow this procedure. Larry Taylor cites *State v. Schwalk*, 430 N.W.2d 319 (N.D. 1988) which "reversed a DUI conviction where a foundation had not been laid showing that the collecting officer mixed the blood and chemicals. The court refused to presume "compliance with step four, which requires that immediately upon placing the blood in the glass vial, it must be inverted several times to dissolve the chemicals contained in the vial." Lawrence Taylor, *Drunk Driving Defense* § 8.3.2, at S-8:154.10-11 (Release 3-9/98).

Maintenance of the Blood Test Kit

In addition to attacking the integrity of the components of the blood test kit which are ostensibly there to protect a defendant from an erroneously high test result, Mr. Snure suggests inquiring as to where the kit had been and how it had been maintained prior to the blood draw:

> In conducting discovery, you should learn where the blood kit was kept prior to its being employed in the collection of the blood sample from your client. The most common response is that the kit has been in the trunk of a patrol car for many months. Although the chemicals contained within the vials are relatively inert and are probably not subject to decomposition or degradation as a result of high temperatures, most juries would view that as an unsatisfactory storage condition for the blood collection kit.

Id. at S-8:150.

Chain of Custody

The prosecutor must demonstrate a proper chain of custody from the time the blood was drawn until the time that the blood was tested. The chain of custody protects the defendant from the possibility of contamination which may result in an inaccurate blood alcohol reading. This chain should establish who handles the blood sample and for what purpose.

While the People have the burden of establishing that "fungible evidence," such as blood samples, is the identical evidence extracted from the defendant, the failure to establish a chain of custody is excusable where the circumstances reasonably establish the identity and unchanged condition of the evidence in question. *People v. Arthur*, 99 A.D.2d 595, 471 N.Y.S.2d 412 (3d Dept.1984). *See also*, *People v. Slater*, 166 A.D.2d 828, 562 N.Y.S.2d 985 (3d Dept.1990).

The Court of Appeals addressed the issue of chain of custody in *People v. Julian*, 41 N.Y.2d 340, 392 N.Y.S.2d 610, 360 N.E.2d 1310 (1977). Here, in a drug case, the Court upheld the admission of physical evidence because the proof established that there existed "reasonable assurances of identity and unchanged condition." The identity prong was established by the identification seal attached to the packages at the time the evidence was seized. As for the "unchanged condition" prong, although there was a gap in the chain of evidence, the Court concluded that such gap occurred following the testing of the seized evidence and, thus, there was no possibility that the gap could have permitted any prejudicial alteration of the contents of the drugs.

The general rule is that a break in a chain of custody goes to the weight of the evidence, not its admissibility.

Some breaks, however, have resulted in the suppression of the evidence:

> When we consider that the tube was unsealed when given to the nurse and was kept in two households in unlocked refrigerators for two days and the seal had been broken on the cardboard box, together with the fact that there was no testimony as to the sufficiency or identity of the preservative, we conclude that cumulatively such circumstances rendered the evidence inadmissible.

People v. Snyder, 90 A.D.2d 894, 456 N.Y.S.2d 536, 537B38 (3d Dept.1982). On retrial, the People filled in the gaps of the chain of custody and the Court permitted the test result of the blood sample to be admitted. On appeal, the Third Department affirmed, finding that a reversal for failure to establish a chain of custody of the blood sample did not preclude the admission of the blood sample in a subsequent reprosecution where the People cured the chain of custody defect. *People v. Snyder*, 110 A.D.2d 296, 494 N.Y.S.2d 481 (3d Dept.1985).

While the courts have not been overly impressed with most "breaks" in the chain of custody, juries tend to hold the police and prosecution to a higher standard. Accordingly, painstaking attention should be paid to developing any deviations from standard procedure. In a close case, an otherwise insignificant "break" in the chain of custody may constitute the reasonable doubt the jury needs to acquit your client.

Gas Chromatography

Gas chromatography functions on the principle that different substances will pass through the column used in this process at different rates. Essentially, the gas chromatograph utilizes a steel column filled with a granular substance through which the substances to be tested are passed. The rate at which they pass is monitored and a record made of their passage. This record is called a chromatogram. One of the best descriptions of this process is set forth by Fitzgerald in *Intoxication Test Evidence*:

> The basic principle on which gas chromatography works is fairly simple. The instrument consists of a lengthy piece of tubing (the column), usually made of stainless steel, which has been filled with granular material such as diatomaceous earth (a soft, fine, porous sedimentary deposit) or crushed firebrick. A small amount of non-volatile liquid is used to coat the particles. A slow stream of inert gas, such as helium or nitrogen, is passed continuously, at a steady rate, through the column, which is kept in an oven at a constant temperature. If a very small amount of a mixture of volatile liquids is injected into the entrance to the hot column, it evaporates immediately, and the components are carried through the column by the gas flow—entering at one end, exiting at the other.

The various compounds do not pass through the column at the same rate, however. Some go through quickly and others more slowly as they dissolve temporarily in the non-volatile liquid which coats the column particles. As a result, the various components of the mixture are separated from each other, and if the column is a suitable one, they will come out one by one in an order which, by repetition, becomes known and identifiable. A detector attached to the exit of the column is used to monitor the passage of the components of the mixture as they pass out of the column.

Many different devices have been used as detectors. Ideally they should be sensitive enough so that very small amounts can be measured, and they should have linear response so that the signal they generate is directly proportional to the amount of the substance in the sample. The electrical signal from the detector is fed into a recorder which makes a continuous record of the detector output as a function of time. This record is called a chromatogram. When a mixture of volatile compounds is analyzed, the positions of the peaks (*i.e.*, the lengths of time it took the various components of the mixture to come through the column) on the graphs will identify which compounds are present. Both the peak heights, and the areas underneath each peak, are measures of the amounts of each substance that were present in the mixture. (Usually a test sample "run" in the typical forensic lab will have at least two significant peaks: ethanol, and the internal standard.)

Blood and other body liquids can be analyzed for alcohol by direct injection of the liquid sample into the chromatograph, but this approach has a number of drawbacks. Repeated injections of blood will result in a buildup of solid residues in the injection port and may

> eventually plug the column. The volume of blood injected is very small, which means that its exact measurement is uncertain. A necessary part of the G.C. procedure is the use of an internal standard such as n-propyl alcohol or t-butyl alcohol, and in turn, this means that a less exact measurement of the volume of sample "as injected" is required.

Edward F. Fitzgerald, *Intoxication Test Evidence* § 19:8, at 19-7-8 (2d ed. 1995) (footnotes omitted).

Headspace Gas Chromatography

Headspace gas chromatography is significantly different than gas chromatography in that here you are working with an indirect sample. Specifically, in regard to blood-alcohol testing,

> [A] measured sample of blood is placed in a rubber-capped bottle and held for 20 to 30 minutes in a constant temperature water bath until the alcohol in the blood sample and the vapor are in equilibrium. A sample of the vapor (the "headspace"), usually about 1 ml. is taken by syringe and injected into the chromatograph. The method has the advantage of not fouling the column with the decomposition products of blood. Also, the larger syringe can deliver a more accurate volume of sample and is easier to handle than a microsyringe. The principal disadvantage of the method is that it is not a direct measurement of the alcohol in the blood but an indirect measurement of the vapor *presumably* in equilibrium with the blood. The partition ratio of alcohol between air and blood is not a fixed number but varies with the composition of blood. This results in the same complications which are found in breath testing where the blood: breath ratio in the body varies widely from person to person, and where the use of an average value (2100:1) has been applied to all persons, with at times questionable results.

Edward F. Fitzgerald, *Intoxication Test Evidence* § 19:9, at 19-10 (2d ed. 1995) (footnote omitted).

The immediate issue that arises is the validity of the sample. With headspace gas chromatography, we are two steps removed from the defendant. Initially, a representative blood sample is drawn from the defendant. Instead of a direct analysis of the sample, we are now dealing with a vapor derived from that blood sample. This is very much akin to breath testing where a representative sample of the alcohol vapor percolating from the defendant's bloodstream is tested for the purpose of determining the blood-alcohol concentration. Both are indirect tests and both are subject to the variables inherent to an application of *Henry's Law*. Simply stated, *Henry's Law* states that there is a relationship between volatile chemical substances in liquid and those same volatile chemical substances in vapor. That relationship, whatever it may be, is directly affected by changes in temperature. Accordingly, the validity of the sample that is obtained for introduction into the gas chromatograph is the subject of legitimate inquiry. Did the vapor sample accurately reflect the alcohol concentration in the blood? What factors affect that relationship?

Clearly, temperature will have a dramatic impact upon the concentration of alcohol in the vapor sample trapped in the "headspace." Headspace is simply the space that exists above the level of the liquid. Think of a closed jar that is three-quarters full. The headspace would be the top portion of the jar not filled with liquid.

Salting Out the Blood

Michael Snure points out that the process by which the alcohol rises from the liquid into the headspace is helped along by chemicals known as "salting agents." The salting agents are part of the standard solution that is mixed with the blood in the preparation of the blood sample for testing. The preservative, sodium fluoride, and the anticoagulant, potassium oxalate, are, also, salting agents. He suggests a line of inquiry as to the effect of too much salting agent in the blood. Inasmuch as there is no analysis of the sodium fluoride or potassium oxalate, this is a real possibility. He indicates that:

> This phenomenon, known as "salting out the blood," results in an artificially high alcohol value in the headspace gas.

Lawrence Taylor, *Drunk Driving Defense* § 8.3, at S-8:154.3 (Release 3-9/98).

Extracting the Vapor From the Headspace

Another area of inquiry is the process by which the vapor sample is extracted from the headspace and injected into the gas chromatograph. Is there any possibility of contamination of the gas?

Tracing the Sample

Once the gas has been extracted from the headspace, it is injected into the gas chromatograph. This vapor sample is carried through the column of the gas chromatograph by an inert gas, usually helium, which is

injected into the gas chromatograph from another port. The substances, working their way through the column, are defined by the speed at which they progress to the end of the column where they are met by a "flame ionization detector."

> This burns or ionizes the chemicals. The ions then become electrical charges that can be measured by the gas chromatograph computer. The assumption is that the combination of the time it takes the chemical to come off the column combined with the measurement of the flame ionization detector will produce data that identify and quantify the substance. The computer in the gas chromatograph then creates a picture of the chemical.

Id. at S-8:154.4.

Inherent Error

The prevalent belief in the Criminal Justice System is that blood testing is superior to breath testing in that blood testing is far more accurate. Most of us are familiar with the concept of breath testing equipment having am acceptable margin of error of .01 deviation from the standard solution of .10 used to test breath testing equipment. Accordingly, we use the range of .09 to .11 to argue a 20% deviation in impeaching results obtained on breath testing equipment.

Gas chromatography is also subject to an "inherent error." Succinctly, the identical sample of blood can be tested on two perfectly functioning gas chromatographs and come up with a variation of .02 which will be attributed to the idiosyncracies of two perfectly functioning instruments. It is not uncommon to obtain two different results from the same gas chromatograph testing the same blood sample twice. In those cases, the lower test result is the one reported. In one vehicular homicide case, the defendant's blood was retested by a reputable private laboratory whose director routinely testified for the prosecution. The result obtained was .04 lower than that of the State Police Laboratory.

Larry Taylor sets forth a series of potential problems or errors that can occur in gas chromatography. These include a leaking syringe where a manual method is used, or a defective auto-injector which can occur as a result of misuse or lack of maintenance. In addition, the septum which is the rubber-plastic insert through which the sample to be tested can leak if it is not changed after "every dozen or so injections." Lawrence E. Taylor, *Drunk Driving Defense* § 8.3, at S-8:138 (Release 3-9/98).

In addition, a defective regulator can result in an improper gas flow through the column, or if the temperature of the column is not properly maintained, it can result in incorrect retention times. Similarly, a dirty or erratic detector can impact on the test result. *Id.* at S-8:138. Succinctly, there are a significant number of factors which can impact upon the accuracy and consistency of the gas chromatograph.

One of the safeguards in this regard is a fairly uniform procedure followed by the police of drawing two vacutainers of blood. One is kept preserved for the defense should a demand be made for defense analysis. While such reanalysis is a risky proposition at best, there are occasions when it is called for. While the retest may produce a result that is higher than the police laboratory, the chances are that the idiosyncracies of the individual gas chromatograph and the standards used will produce results that are different.

Linearity—Challenging the Standards

Linearity is the ability of the gas chromatograph to distinguish a .10 blood alcohol concentration from a .18 BAC. A gas chromatograph is an exercise in comparisons. The gas chromatograph determines blood alcohol concentrations by comparing the unknown with the known. In order to determine what the alcohol concentration of your client's blood was, the chromatograph must first be provided with definitions of what a .10 versus a .05 and a .20 are. In other words, known levels of alcohol must be run in order to establish the linearity of the instrument. In this regard, it is critical that the solutions used to calibrate the chromatograph are properly prepared. It is only by the comparison of these known samples with the defendant's sample that a chromatograph is enabled to come up with a result in regard to the unknown. Michael Snure suggests that you should:

> [I]nquire how the solutions are prepared at those various levels to be used in the calibration process. Are they aqueous (water) solutions containing levels of alcohol? If so, how did the alcohol get into the water? Who measured the alcohol? Was the volume of the alcohol in the aqueous solution measured by some other device before it was used to calibrate the gas chromatograph? How does one know that the mixture was done properly? Another possibility is that the gas chromatograph could be calibrated using whole blood standards, which are human whole blood samples obtained from a chemical supply house, purportedly containing known levels of alcohol concentration. If so, how were these samples obtained? Who measured the alcohol level in the sample before it was shipped? Has anyone measured the

> alcohol level in the sample since it was shipped to determine that it contains the level of alcohol that it is purported to contain by the manufacturer?

Lawrence Taylor, *Drunk Driving Defense* § 8.3, at S-8:154 (Release 3-9/98).

It is not uncommon for the quality of a gas chromatograph's performance to vary based upon the level of blood alcohol being tested. For example, the instrument may be centered at .10 and the quality of its linearity may deteriorate at higher and significantly lower levels. Accordingly, the laboratory's checks on the linearity of the instrument should be closely examined. Clearly, more than one known value should be run to check the instrument's performance. Edward Fitzgerald suggests:

> Linearity checks covering the full range of test results which are regularly observed in -the lab (for example, from 0.01 to 0.35%).

Dr. Martha Hass, Professor of Chemistry, suggests that five different values be run. She also indicates that the further you move from your standards, higher or lower, the less confidence you can have in the results obtained. Accordingly, the parameters of linearity which you establish as your standards should encompass a range of values you expect to obtain from the samples you are testing.

The Chromatogram

The Chromatogram is created by the action of the flame ionization detector which burns the component of the mixture leaving the column. This rather complicated procedure is succinctly set forth by Fleming K. Whited in the materials he prepared for the National Association of Criminal Defense Lawyers "The Ultimate in DUI Defense: Mastering Science, Maximizing Success," September, 1998.

> The rate at which various components of the homogeneous mixture exit from the column is monitored by a detector. The most common detector is known as the flame ionization detector, or FID, which functions by burning the individual components which pass through it, thus creating charged particles which are attracted to an electrically charged grid. This transfer of charged particles from the flame to the charged grid gives rise to a flow of current which is detected and displayed on some readout device. The larger the amount of component exiting the column at any single time, the larger the number of charged particles produced and the greater will be the response of the detector. Because each component passes through the column at separate, identifiable rates, the time of response (retention time) of the detector qualitatively identifies the component. That is, a sample of ethyl alcohol will pass through the column at a more rapid rate than a sample of normal N-propyl alcohol. Additionally, the size of the response of the detector represents the quantitative measure of the component present in the mixture.

Fleming K. Whited, III, *NACDL's The Ultimate in DUI Defense: Mastering Science, Maximizing Success, Cross-Exam of Prosecutor's Expert: Blood—A Non-Mystical Method* § 13.11 (September 1998).

Insofar as reading and understanding the chromatogram is concerned, Edward Fitzgerald provides a comprehensive analysis at Chapter 20 of Intoxication Test Evidence. Essentially, the chromatogram consists of a graph reflecting the peaks of the substances that have been burned by the detector. A control or internal standard is run to ensure that the column is functioning properly. This is to be distinguished from the calibrating samples or alcohol standards used to establish the linearity of the chromatograph. The chromatogram may have two peaks representing the internal standard and the other representing the alcohol in that blood sample. Two separate tests of the same blood sample may be run and the chromatogram will then reflect four peaks representing the two alcohol and two internal standard results. Edward F. Fitzgerald, Intoxication Test Evidence § 20.1, at 20-2 (2d ed. 1995).

It is the relationship of the area under the peak of the unknown test sample to the area under the peak of the known ethanol sample which defines the results of the unknown sample. The area under the peak is different from simply the height attained by the particular peak. The height, in and of itself, does not define the concentration of the substance reflected by that peak. It is rather the area under that peak or encompassed by that peak that determines the concentration of the substance. For example, the peak would tend to be taller and skinnier if the substance being tested came out of the column relatively all at once; i.e., the peak would tend to be higher and narrower.

If the substance came out over a relatively longer period of time, the peak would tend to have a wider area under it, but not be as high. Conceivably, the area under both of these peaks could be identical and would reflect identical concentrations of the substance, but would have different heights on the chromatogram.

On a day to day basis, the peak height obtained running a .10 BAC standard might differ from another day using that same standard. The reason for this is that internal variables will affect the peak obtained, but will not affect the relationship of the substances appearing in the chromatogram. While the peak heights will vary, the proportional relationships between the areas covered by the peaks should remain consistent depending upon the concentrations of the substances being analyzed. Such variables as the volume of the sample being injected and the speed at which the carrier gas proceeds through the column will affect the heights obtained. Fitzgerald, *Intoxication Test Evidence*, at § 20-7.

In evaluating your client's chromatogram, you need to obtain a copy of a quality control (QC) chromatogram produced by a gas chromatograph. It should have been generated at approximately the time of the test of your client and will typically reflect a peak for a known alcohol and the lab's internal standard. Fitzgerald points out that it may not be referred to as a quality control chromatogram, but whatever its designation, it will show a peak for the known ethanol and the peak for the internal standard. The QC chromatogram is used to verify the accuracy of the gas chromatograph. The closer in time to the test run on your client, the more relevant it becomes. Edward F. Fitzgerald, *Intoxication Test Evidence* § 20:4, at 20-6.

Multiple Samples

While most of us are not familiar with blood testing, we have a tendency to relate what we know to that which we do not. Accordingly, we tend to assume that blood testing is akin to breath testing. For example, a breath test device runs only one sample at a time. It may be an air blank, a simulator solution, or the defendant's test. Whichever, there is only one sample being run at one time.

This is not the case with a gas chromatograph. Multiple tests are generally run at the same time. What this means is that the technician is dealing with several vacutainers containing blood from many different defendants. The more samples being tested, the greater the chance for error. This is particularly the case where the common procedure is to take two samples of blood from each defendant's vacutainer. How is the blood extracted from the vacutainer and where does it go from there? How is that sample identified and kept separate from the samples of other defendants being run? What is the effect of the defendant's sample being run following multiple samples from other defendants? Can a build up of residue in the column contaminate the defendant's sample? Lawrence Taylor, *Drunk Driving Defense* § 8.3, at 8:154.2 (Release 3-9/98).

Proficiency Testing

In addition to the performance of tests and maintenance on the individual gas chromatograph, laboratories are subject to proficiency testing. These proficiency tests consist of the submission of samples to the lab for analysis. The submitting authority knows what the samples contain, but the testing laboratory does not. Records of the results of this proficiency testing are kept and should be the subject of a discovery demand.

Sample Cross-Examination

The key to the impeachment of a blood test result is to make points that a jury can understand. Too often, the lawyer and the technician are engaging in an incomprehensible dialog which is completely lost upon the jury. It is our ability to translate complexity into simplicity which determines our effectiveness in the courtroom. Many years ago, a lawyer was seeking a hearing on the issue of whether improper testing of the chemicals used in a Breathalyzer required the suppression of his client's blood-alcohol concentration.

The lawyer explained how the company supplying the chemicals had failed to provide a representative sample to the State Police Laboratory for testing. After hearing the People's vigorous opposition to the hearing, the lay-judge stated that the defense motion for a pre-trial hearing was denied because it was the judge's opinion that such a hearing was completely unnecessary.

Turning from the dismayed defense attorney to the prosecutor, the farmer-judge continued saying that the procedure followed by the chemical supplier would be wholly unacceptable in regard to milk samples. Consequently, no hearing would be required because the court was suppressing the test result based upon the court's own experience and knowledge.

While the judge was a farmer and not a lawyer, his experience with the testing of milk samples rendered the issue clearer to him than to either the prosecutor or defense counsel. In this spirit, Attorney Ed Fiandach produced the following sample cross-examination in his New York DWI Bulletin which he derived from the study of Edward Fitzgerald's *Intoxication Test Evidence*. This sample cross is reproduced with Mr. Fiandach's kind permission:

Q: Would you explain for me the term Hematocrit Ratio?

A: The Hematocrit Ratio is the proportion of blood plasma to cellular material.

Q: The solid to liquid?

A: Roughly.

Q: Now, when alcohol is analyzed in a sample of blood, where is it to be found?

A: Could you explain that further?

Q: Will the alcohol be found in the liquid or solid particles of the blood?

A: Oh, the liquid.

Q: And why is that?

A: Because alcohol is, for the most part, water soluble.

Q: And the results of an alcohol blood analysis are reported how?

A: As a ratio of the weight to volume or w/v.

Q: Now to return to the hematocrit ratio, you said that it is a means of describing the percentage of blood which is composed of cellular material?

A: That's correct.

Q: Then a person who has a ratio of 47 would have blood made up of 47 percent cellular material and 53 percent plasma?

A: That's correct.

Q: And the higher the hematocrit the higher the more non-alcohol absorbing cellular material is present?

A: That's correct.

Q: By the way, do you know what Mr. Hadenough's Hematocrit Ratio was at the time of his arrest and test?

A: I do not.

Q: Then when you calculated your results you assumed a particular Hematocrit Ratio?

A: Correct.

Q: But if the hematocrit value was higher than that which you assumed, to get an accurate result you would have to use a higher conversion factor?

A: That's correct.

Q: Then, without assuming Mr. Hadenough's ratio as it existed on June 11, 1998, you cannot determine what his true blood alcohol content was, can you?

A: I can only do the calculations.

Q: That's not what I asked you. Without assuming Mr. Hadenough's ratio as it existed on June 11, 1998, you cannot determine what his true blood alcohol content was, can you?

A: Well, not without the assumption. No I cannot.

Likewise, it is important to verify whether or not the sample that was tested was clotted or unclotted. In the event that it was clotted, a productive avenue of cross-examination can be as follows:

Q: Tell me, was the sample, at the time you tested it, clotted or unclotted?

A: A little of both.

Q: Now, when you say a little of both, do you know the percentages?

A: I do not.

Q: Now you previously testified that the alcohol will be found in the liquid, non-cellular portion of the blood?

A: That's correct.

Q: How about a clot, will the alcohol go into a clot?

A: Not generally.

Q: And what portion of the blood is heavier, the cellular material or the liquid?

A: The cellular material.

Q: In what percentage?

A: That depends upon the Hematocrit Ratio.

Q: When blood coagulates or clots, what occurs?

A: The cellular material draws together and hardens.

Q: And you tested the liquid portion?

A: I did.

Q: Which was but a portion of the overall weight of the sample?

A: If that's a question, the answer is correct.

Q: But even though it was but a portion of the weight it contained almost all of the alcohol, did it not?

A: That's correct.

Q: Then the concentration of the alcohol in the plasma was higher than that contained in the entire sample of the blood when drawn, was it not?

A: In the plasma, yes.

Arguably a non-issue, even the addition of the preservatives can be used to some advantage.

Q: Now, the heparin, why was that added?

A: To prevent clotting.

Q: It did not, did it?

A: No, not completely, it did not.

Q: There was also added some sodium fluoride?

A: Correct.

Q: Why was that?

A: Sodium fluoride is a preservative.

Q: Why is a preservative used?

A: Because an unpreserved alcohol sample can undergo a process of neo-alcohol formation.

Q: Could you explain that for me?

A: Yes, neo-alcohol formation is when bacteria acts upon material naturally present in the blood and causes it to ferment or form alcohol on its own.

Q: Can you, in the course of your testing differentiate between this fermented alcohol and that which may have been present in the sample when drawn?

A: No, I can not.

Q: And theoretically the preservative is supposed to prevent this process from occurring?

A: Not theoretically, it does prevent such formation.

Q: Well, theoretically the heparin was to prevent the formation of clots?

A: That's correct.

Q: All clots?

A: Theoretically.

Q: In this case it did not did it?

A: Well, no.

Q: But you know that because the clot can be visibly verified and we know it was not present in the blood when drawn.

A: That's correct.

Q: But you cannot visibly verify the formation of alcohol through fermentation can you?

A: No, no one can.

Q: For that matter you can't tell whether that occurred at all can you?

Finally, if you're confronted with a headspace analysis, don't miss the opportunity to convert the blood test into a less reliable breath test.

Q: Now, this Perkin-Elmer F-45 gas chromatograph, did it directly measure Mr. Hadenough's blood?

A: You mean did I put it directly into the instrument?

Q: Yes.

A: No, it did not.

Q: Could you explain what you did?

A: I withdrew a sample of the vapor which had accumulated above the sample and injected that into the column.

Q: And the amount of alcohol contained in that vapor is the same as the amount of alcohol in the sample of blood, how can that be?

A: It's not, but it bears a relationship to the overall alcoholic content by means of Henry's Law.

Q: Is that the 2100 to one rule?

A: Yes it is.

Q: But that rule relies on certain assumptions such as Mr. Hadenough's Hematocrit Ratio does it not?

A: Yes it does.

Q: And preservatives play a role in altering the ratio, do they not?

A: They might.

Q: And temperature?

A: It might.

Q: Even barometric pressure?

A: Unlikely, but it could.

Q: Just so I understand, you did not utilize the alcohol present in the sample of blood but in the air above it, is that correct?

A: That's correct.

The Test Is Not Relevant

One fairly consistent aspect of blood test cases is that there is almost always a substantial delay between the time of the alleged operation and the time that the blood is drawn from the defendant. Blood tests are usually associated with motor vehicle accidents and there is an inherent delay involved with getting emergency equipment to the scene of an accident, determining facts sufficient for an arrest, and obtaining a blood sample. In most states, the crime is driving *while* intoxicated. The issue is not what the defendant's blood test was an hour or two after operating his vehicle; rather, what was it at the time of operation. It is this time lapse which opens up the door for what is commonly referred to as "extrapolation evidence." Extrapolation is an attempt to "back-calculate" what the person's blood alcohol concentration must

have been at the time of operation. This is done by assuming an "average" elimination rate of alcohol from the person's system. The usual rate utilized is .015 per hour. Taking the number of hours that elapse from the time of the operation of the vehicle to the time that the blood was withdrawn, the alcohol that was presumably eliminated is added back and the blood-alcohol concentration at the time of operation is determined.

Extrapolation is frequently attempted by the prosecution where they have a low test result and they are trying to prove that the blood alcohol concentration must have been higher at the time of operation. Extrapolation is a highly questionable procedure regardless of who is attempting to use it. Fortunately, the defense does not have to prove a particular blood alcohol concentration. What we have to do is raise a reasonable doubt as to the relevancy of an inculpatory result obtained at some time after operation, to what the defendant's blood alcohol concentration was at the time of operation. In that regard, there are numerous factors which affect the rate at which alcohol is absorbed into the bloodstream and the rate at which, once absorbed, the alcohol is eliminated from the bloodstream.

Effect of Stomach Content

Upon consuming an alcoholic beverage, the beverage travels to the stomach, where 5% to 20% of the alcohol consumed is absorbed into the blood stream. If the individual's stomach is empty, the alcohol remains in the stomach for a short period of time before entering the small intestine, where the majority of the alcohol is rapidly absorbed through the walls of the small intestine into the blood stream. Edward F. Fitzgerald, *Intoxication Test Evidence* § 2:5, at 2-4 (2d ed. (1995). Once in the blood, the alcohol is carried throughout the body. The characteristic signs of intoxication are exhibited when the alcohol reaches the brain.

When a person is drinking on an empty stomach, alcohol is absorbed into the blood at a rate greater than it is being eliminated, resulting in a BAC that is rising. It takes approximately 30 to 90 minutes to reach a peak BAC level on an empty stomach. Following a study on individuals who drank alcohol on an empty stomach, it was learned that the peak BAC was reached within 45 minutes for 77% of the subjects and within 75 minutes for 97% of them. As expected, greater quantities of alcohol consumption resulted in a higher peak BAC. However, the time required to reach the peak was not significantly influenced by the quantity of alcohol consumed. Jones, A.W., Jonsson, K.A., and Neri, A., "Peak Blood Ethanol Concentration and the Time of Its Occurrence After Rapid Drinking on an Empty Stomach," *Journal of Forensic Sciences*, JFSCA, vol. 36, no.2, March, 1991, pp. 376-85.

Eventually, the BAC will reach a maximum and begin to decrease as more alcohol is being eliminated than being absorbed. Thus, if a driver is stopped while his BAC is increasing, and a period of time elapses prior to testing, the BAC at the time of testing will be higher than the BAC at the time the individual was driving.

If the person is eating food while drinking alcohol, the alcohol will remain in his stomach with the food for a period of time before it is released into the small intestine through the pyloric valve. While the stomach contents are being broken down, the pyloric valve remains clenched and absorption is delayed. The pyloric valve is muscle that resembles the clutch portion of a woman's clutch purse. The valve clenches shut when the stomach contains food and liquid being digested. Food is broken down into the stomach into a semi-liquid mass called chyme which is of a composition and in a form acceptable to the small intestine. The food leaves the stomach and goes into the small intestine. Fitzgerald and Hume, *Intoxication Test Evidence, Criminal and Civil*, § 2:5, p. 13. Thus, the passage of the alcohol into the small intestine, where the alcohol is absorbed more rapidly, is delayed by the presence of food. Bayly and McCallum, *Some Aspects of Alcohol in Body Fluids. Part II: The Change in Blood Alcohol Concentration Following Alcohol Consumption*, 2 Med. J. Austl. 172, 173 (1959); Sedman, et al., *Food Effects on Absorption and Metabolism of Alcohol*, 37 J. Stud. Alcohol 1197 (1976). Studies have shown that it will take up to three hours to reach a maximum BAC level when alcohol is consumed with or after a meal.

However, there is a study that says that most of the alcohol is absorbed through the walls of the stomach into the bloodstream and is not dependent upon getting into the small intestine. This study revealed that the average time required to reach maximum BAC was 41 minutes for both full and empty stomach conditions. The average time required to return to zero BAC was also similar in both conditions. However, this study revealed that the presence of food in the stomach reduced the peak BAC by an average of 21.5 percent. Watkins and Adler, *The Effect of Food on Alcohol Absorption and Elimination Patterns*, Journal of Forensic Sciences JFSCA, Vol. 38, No. 2, March 1993, pp. 285B291.

Not only does the *presence* of food affect the rate at which alcohol is absorbed into the blood, the *type* of food present in the stomach will also affect the rate of absorption. Fatty foods, which take longer for the stomach to digest, will increase the period of time the alcohol remains in the stomach. A greasy hamburger is far more of a challenge than a piece of watermelon.

Consider the following scenario:

> An individual enjoys cocktails while consuming a high fat content meal.

> Assume that upon complete absorption, the individual's blood alcohol level will reach a peak of 0.14 percent. Complete absorption, however, will not occur for three hours due to the large quantity of fat food consumed.
>
> The individual is involved in a minor accident thirty minutes after his last drink while his blood alcohol level is only 0.04 percent. This low blood alcohol level could be found if an individual were booked immediately. The suspect is taken to police headquarters, however, and waits for testing.
>
> A test thirty minutes after the accident would show 0.065 percent. Testing at one hour, one and one-half hours and two hours would show 0.088 percent, 0.110 percent, and 0.127 percent, respectively. The individual's .14 percent peak would not be reached until two and one-half hours after the accident.

Fitzgerald and Hume, *The Single Chemical Test for Intoxication: A Challenge to Admissibility*, 66 Mass. L. Rev., 23, 29-30 (1981).

The peak is the highest BAC attained as a result of the absorption of alcohol. Considering these factors (i.e., the amount of alcohol consumed; the amount and type of food ingested; and the amount of time which has elapsed), the determination of an actual BAC by extrapolation is highly dubious.

> Some experts testify that it "can't" take longer than two hours for all of the alcohol to absorb to a peak *after the end of drinking*. That is false. The authors have personal experience with cases where significantly "higher" BACs were obtained on tests 1.5 hours to 2 hours after the driving incident. In one case, a third test was obtained which affirmed the validity of the first two, gave shape to the curve, and confirmed that the BAC was still rising 3 hours after drinking and 2 hours after the "arrest." The values were also consistent with the eating and drinking history. Some studies have also confirmed that alcohol absorption may be continuing, although in small amounts, for even longer periods. Clearly, this area needs considerably more attention than it has been given to date.

Edward F. Fitzgerald, *Intoxication Test Evidence* § 2:8, at footnote 16 (2d ed. 1995).

Strength of the Beverage

The strength of the beverage may also affect the absorption time. Generally, the stronger the concentration of alcohol in the stomach or intestine, the greater the driving force pushing it into the blood and the faster it will be absorbed. However, a very strong and highly concentrated alcoholic beverage can be an irritant and may cause a pylorospasm which causes the pyloric valve to stay shut. Since this valve must be open to allow stomach contents to get into the small intestine, the absorption of alcohol will, under these circumstances, be delayed.

Trauma and Shock

In the event there is an accident, blood supply may be preferentially diverted to the heart, lungs and kidneys and away from the digestive system. The body, attempting to cope with the emergency, diverts the blood supply to those places where it is needed most. Thus, the rate of absorption is reduced.

> I will be the first to admit that if any physical or even mental disturbance occurs soon after the food is swallowed, the whole digestive process can be drastically altered. For example, if a person is assaulted or frightened or taken ill, or knocked unconscious half an hour after a meal, the digestive process can either stop entirely or proceed very slowly or irregularly.

Edward F. Fitzgerald, *Intoxication Test Evidence* § 2:10 (2d ed. 1995) (quoting *Autopsy* by Dr. Milton Helpern).

Gastric Juices

Gastric juices break down food in the stomach and prepare the stomach contents for absorption into the small intestine. Obviously, the action of these gastric juices has a bearing on the rate at which alcohol is absorbed into the bloodstream. As with virtually every other aspect of physiology, there are significant differences among people. As one individual stated:

> If normal facial features varied as much as gastric juices do, some of our noses would be about the size of navy beans, while others would be the size of 20 lb. watermelons.

Williams, *You Are Extraordinary*, Pyramid Books, N.Y., 1957, p. 24.

Gender

Studies have shown that the gender of the individual has an impact on the absorption and elimination of alcohol. One study found that it takes men 1.35 times longer to absorb alcohol than women. Further, the elimination of alcohol by women was 23.6 percent faster than men. K. M. Dubowski, *Human Pharmacokinetics of Ethanol*, Alc. Tech. Rep. 5; 55B63, 1976.

In an article entitled *High Blood Alcohol Levels in Women*, N. Engl. J. Med., 1990; 322:95B9, Dr. Mario Frezza, et al., discussed the significance of the metabolism of alcohol in the stomach. Essentially, the article reports the fact that alcohol is oxidized in the stomach as the result of "gastroalcohol dehydrogenase activity." Essentially, this activity is far greater in men than it is in women. Further, alcoholism tends to cut this activity in half in men and virtually eliminate it in women.

Alcohol Elimination

In 1932, E. M. P. Widmark, a Swedish chemist, gave a fixed amount of alcohol to thirty individuals on an empty stomach and then tested their BAC at regular intervals. Widmark concluded that the body eliminates alcohol at an average rate of .015 percent per hour. Initially, prosecutors used this .015 percent figure to argue that a suspect's BAC was higher at the time of driving than at the time of testing. However, without knowing whether the BAC was increasing or decreasing at the time of testing, it is impossible to determine whether the BAC at the time the individual was driving was lower or higher than the BAC at the time of the test. If the individual's BAC was increasing (*i.e.*, the rate of absorption of alcohol exceeded the rate of elimination), the BAC at the time of testing would result in a BAC that is higher than the BAC at the time of driving. If the BAC was decreasing (*i.e.*, the .015 elimination rate was greater than the absorption rate), the test result would be lower than the BAC at the time the driver operated the vehicle.

While the elimination of alcohol is principally through the liver, some alcohol is eliminated through urine, breath, perspiration, and other routes. Although the average alcohol elimination rate is .015 percent per hour, research has demonstrated that individual elimination rates vary from .006 percent to .04 percent per hour. M. Bogusz, *Comparative Studies on the Rate of Ethanol Elimination*, 22 J. Forensic Science 446 (1977); Kurt M. Dubowski, *Absorption, Distribution and Elimination of Alcohol; Highway Safety Aspects*, Supp. 10 J. Studies on Alcohol 98 (1985). Just as food affects the rate of absorption, food affects elimination of alcohol as well. Allen J. Sedman, et al., *Food Effects on Absorption and Metabolism of Alcohol*, 37 J. Studies on Alcohol 1197 (1976).

As a person increases in age, there is a significant increase in blood alcohol elimination rates. K. M. Dubowski, *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, Journal of Studies on Alcohol 10, (July 1985). Further, absorption and elimination rates vary within the same day depending on the time of day. B. M. Jones, *Circadian Variation and the Effects of Alcohol on Cognizant Performance*, U. J. Stud. Alcohol 35: 1212B1219 (1974).

As you can see, the defense of relevancy requires circumstances such as evidence that the defendant had been eating and drinking prior to the accident which resulted in his arrest. If the blood alcohol concentration is relatively high, the absence of such physical evidence as slurred speech, impaired motor coordination and other overt signs of intoxication are helpful in buttressing the assertion that the defendant did not attain a high blood alcohol concentration until some time after the operation of the vehicle and the occurrence of the accident. As with the rest of these materials, extrapolation is a defense to be used where the facts of the case support this thesis. There is no question that blood tests can be effectively challenged. The art is in selecting those challenges that are most consistent with the facts of the case and the theory of the defense.

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Elder Law

Put It in Trust

By Jonathan G. Blattmachr

One major mistake in estate planning is the failure to use trusts to the maximum extent the law permits. Trusts are probably the most important developments under English common law. Despite the "globalization" of world economies and political relationships, trusts continue to be a product almost exclusively of common law countries such as Great Britain, the United States, Canada, Australia, and New Zealand. Trusts may be used for business, employment, and personal reasons. In many ways, they are the most powerful and important tools in planning for our clients' needs. Unfortunately, trusts are not used with the frequency or duration they should be.

Disabilities of Beneficiaries

Few, if any, attorneys would fail to recommend strongly that a client put his or her assets in trust for a family member who is under a legal disability, such as being a minor or being incompetent. Giving or bequeathing assets outright to a minor or an incompetent is a recipe for disaster, resulting in maximizing court interference with the management of the property, reducing flexibility in using the property for the benefit of the person for whom it was set aside, and increasing the attorneys' fees relating to the transmission, management, and expenditure of the property.

Change the facts slightly, however, to a case where a client wishes to leave property to a grown daughter. At present, the daughter is 50 years old and legally competent, but what if she were diagnosed with Alzheimer's Disease, for example? Certainly almost all attorneys would recommend placing the assets in trust for the daughter as the probability of her becoming legally incompetent relatively soon is quite high. But most attorneys do not seem to appreciate that the immediacy of a beneficiary becoming incapacitated is not the key in pursuing a trust. In fact, the ravages of age continue to be so severe that for the foreseeable future a high percentage of individuals will suffer substantial difficulty in managing financial affairs prior to death. The 50-year-old daughter in the example, even if completely healthy today, very likely will someday be in a nursing home, not only unable to write checks, but incapable of understanding what options are available for the management of her property.

Of course, there are things the daughter could do later in her life to protect against certain adverse effects of disability and subsequent incapacity to manage assets. She could create a revocable trust, execute a power of attorney or take other steps. However, if she is like most people, she will do none of these. Therefore, it makes sense to start with a trust for virtually any transfers for beneficiaries. Remember, it is always easier to get toothpaste out of the tube (or remove assets from a trust) than to get the paste into the tube (or get assets back into a management vehicle, such as a trust, after they been removed).

Protection from Claims

In many ways a trust's greatest attribute is its ability to protect assets against claims—not just claims of creditors, which will be discussed later in this article—but claims or demands by others to the property. The 50-year-old daughter in the example may someday be subject to unwise, unfair and unreasonable demands that she cannot resist. Those demands may come from financial charlatans, unethical lawyers or unbalanced accountants, but they also may arise from friends, relatives or someone else looking to take advantage of her. As is well known, older individuals are more prone to financial scams than are younger people, and because everyone (if he or she is lucky) ultimately becomes a senior citizen, the chance of becoming a scam victim increases.

Trusts help to protect against these events occurring, at least when there is a trustee other than the beneficiary. If a client is living in a nursing home and someone were to suggest that funds should be invested in land on Mars, an independent trustee likely would decline the investment opportunity—even if the beneficiary (who may or may not be a co-trustee) desperately wanted to make it.

Marriage represents another situation in which individuals commonly are subject to unwise demands or suggestions. When a spouse wants something, such as money to be invested in his or her business, it becomes almost impossible for the spouse holding the money to refuse. However, if the assets are in a trust where the investment can be made only with the consent of a trustee other than the spouse, the investment demand by the other spouse may be declined by the independent trustee, and the assets, therefore, are more likely to be preserved.

Although in most jurisdictions property received by gift, bequest or inheritance (sometimes called "separate property") is not subject to award to the "other" spouse upon a divorce, usually the person claiming that exemption must prove the separate "pedigree" nature of the property. Especially in long-term marriages, separate

property often becomes mixed with marital property and, therefore, may be subject to division between the spouses by the courts upon divorce. Also, in some states, such as Connecticut and Massachusetts, property received by gift, bequest or inheritance is subject to division by a court (in some jurisdictions, income received or receivable by a divorced spouse may be used by the courts to fund alimony and/or child support). With nearly 60% of American marriages ending in divorce, it seems appropriate to consider a trust at least for any beneficiary who might be married at some time.

From a historic standpoint, trusts have been especially effective in protecting assets from claims of creditors. Nearly 24 million lawsuits are filed each year in the United States. Almost everyone in America is sued one or more times during his or lifetime. The judgment usually can be enforced against any property owned by the defendant subject, with minor exceptions. Yet the United States Bankruptcy Code provides an exemption for interest in trusts to the extent governing state law protects trusts from claims. In almost all states, a trust created for a beneficiary by someone else, such as by one spouse for the other or by a parent for a child, may be entirely immunized from claims of such creditors. Because of the extremely high risk of a lawsuit, it makes sense to provide for the property to be placed in trust for beneficiaries.

Tax Reduction

When it comes to tax reduction, a trust outshines virtually every other type of arrangement. For instance, a trust usually can provide for its income to be paid among a class of beneficiaries. The trustee in such a case, for example, may distribute the income to the beneficiaries who are in the lowest income tax brackets either because their other income places them below the threshold at which the maximum federal tax rate occurs or because the beneficiaries reside in a state or location where there are no (or relatively low) income taxes.

In fact, by accumulating income, trusts usually can be structured to avoid state and local taxes that would be imposed upon beneficiaries if the income were received. Several states, including Alaska and Florida, have no state income taxes. Even some states, such as New York, that have incomes taxes provide an exemption for a trust administered in their states provided that the person who created the trust did not reside there when the trust was created. By accumulating the income in such a trust and distributing it at a later time to beneficiaries, it usually is possible to avoid most of the state and local income tax that beneficiaries otherwise would face if they received the income currently, which, of course, they would if they owned the property directly.

Although a generation-skipping transfer (GST) tax is imposed when property is transferred from one generation to the next, such as from the generation of children to that of grandchildren, that tax may be avoided to the extent that property owner's GST exemption (which was $1 million for years before 1999 and now is adjusted for inflation) is allocated to the trust. When the trust is protected from tax by the allocation of that exemption, it is protected from the tax regardless of how long the maximum length of time a trust can last under the laws of most states, whether or not one uses the exemption by applying it to such a long-term trust can make a difference of 24 times the amount which is available for family members at the end of the trust—24 times! The only way to gain that tremendous advantage is by putting assets in trust.

Even for the balance of a taxpayer's property that cannot be protected from GST tax by allocation of the GST exemption (because it is used elsewhere, such as for other trusts), long-term trusts nonetheless can save estate, gift and GST taxes compared to transferring property outside of a trust. One reason for that is that property is not subject to GST tax if it is instead subject to estate or gift taxes.

There are several differences between estate and gift tax on the other side. Sometimes, one tax may be preferable to another. Keeping the property in trust is the only way to be able to choose. Often GST tax will be significantly lower, by employing planning strategies, such as "generation jumping." That can occur only if the property remains in trust.

Structuring Trusts

The Internal Revenue Code sometimes prescribes the form a trust must take in order to achieve a certain tax result. For instance, most trusts that qualify for the estate or gift tax marital deduction must provide that the income be paid to the beneficiary spouse at least once a year and that spouse must have the absolute right to force the trustee to make the trust productive of a reasonable amount of income.

Most trusts, however, do not have to be in a certain form in order to achieve some of the beneficial results described above. In fact, a trust providing no specific benefits to beneficiaries probably is the best of all. It provides the greatest opportunity for safeguarding the property and minimizing taxes with respect to the assets.

However, the questions of how the individuals will benefit from the trust naturally arises. Benefits are bestowed through the exercise of discretion by the trustees. Usually, it is best for the property owner who creates the trust to provide the trustees with guidance as to what he or she wishes to accomplish for the beneficiaries. Even a suggestion like "it is my hope and expectation, if not my direction, that the trustee will pay my daughter $1,000 each month (adjusted for inflation)" is the kind of guidance almost all trustees will follow.

Experience indicates that corporate fiduciaries (such as banks and trust companies) readily welcome such guidance and, unless it would cause an adverse effect, almost certainly will follow it. Further guidance may include a statement of expectation that trust funds will be used to pay for education, to provide funding to start a business, and/or to make investments the trustee would not otherwise feel comfortable in doing (for example, those that are more speculative than a trustee would normally make).

Trusts also can be used to try to enhance "good" behavior and/or discourage "bad" behavior by beneficiaries. For instance, the grantor might provide that he or she prefers that the beneficiary receive no distributions except for education until the beneficiary graduates from an accredited college or it is determined that some factor, such as a disability, prevents him or her from doing so. Alternatively, the trust might allow a beneficiary to appoint an amount of trust corpus to charity equal to what the beneficiary personally has donated to it.

Use Trusts

In addition to permitting the trustees to make distributions to the beneficiaries, there may be another way to accomplish proving benefits while at the same time continuing to preserve the protective nature of the trust. That is to authorize and, in fact, encourage the trustees to acquire assets for the use of the beneficiaries.

Although it is not widely known, the law appears to be relatively well settled. The rent-free use of property owned by a trust by its beneficiary does not result unimpeded income to either the trust of the beneficiary. Acquiring property (such as a home, recreational property or works of art, for example) for beneficiaries and allowing them to use it for free means the assets continue to be owned by the trust. As such, they are not subject to claims, taxes are minimized and it prevents the foolish dissipation of the assets by the beneficiaries. In some ways, therefore, a trust can be used to allow beneficiaries to live like millionaires but not have to face the potentially adverse effects of being millionaires.

When the Beneficiary Dies

Trusts may be structured so the beneficiary may specify by his or her will where the property passes when the beneficiary dies. The class of persons to whom the beneficiary may appoint the property could be quite narrow, such as only among the grantor's descendants, or very broad, such as anyone other that those (such as the beneficiary's own estate) who would cause the trust to be taxed as part of the beneficiary's estate. The power to specify a successor to the trust property held by the beneficiary may be made exercisable only with the consent of an independent trustee if that appears desirable, and, in fact, if carefully structured, can be exercised by the beneficiary to cause the property to be subject to estate tax rather than GST tax when the beneficiary dies. (In many cases, estate tax will be lower than generation-skipping transfer tax.)

How Long Should It Last?

Beneficiaries may and often should serve as trustees holding certain duties, such as to make or participate in investment decisions. Beneficiaries, however, should not be permitted to participate in investment decisions to pay themselves income or principal—such a power may cause tax and/or creditor claims problems.

In any case, some person or institution needs to be the independent (nonbeneficiary) trustee. Often, someone of some entity will be the clear choice. However, many times that is a perplexing decision for the property owner. Even if one individual is the ideal choice now, that person probably will not serve as long as the trust lasts. Therefore, the difficult issue of selecting a successor arise.

Experience indicates that the trust should build in a system of checks and balances just as the U.S. Constitution does. That may be structured in several ways. One way allows a group of independent persons (typically called "trust protectors") to remove and replace trustees for stated cause or for any cause, but does not permit the trust protectors to appoint themselves or persons or institutions "close" to them. It even may be appropriate to allow the beneficiaries for cause or at stated intervals (such as once every five years) to be removed as the trust protectors and appoint other independent persons to take over the position.

What Is it All About?

Sometimes individuals will claim that trusts are an invention of lawyers to keep heirs from receiving the property to which they are rightfully entitled. That claim is wrong for two reasons: there is no entitlement to an inheritance as a general rule, and trusts are not used to deny the beneficiaries benefits. Rather, trusts, if properly structured and administered, are used to make sure the benefits will always be there.

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Listening in on Other People's Conversations

By Gary Muldoon

The subject of overhearing, recording and later using of other people's conversations is an area of law layered by state and federal, procedural and substantive, civil and criminal law.

Sections 2510 et seq. of Title 18, U.S. Code governs wiretapping and eavesdropping. In addition, the Penal Law provides state criminal penalties.[1] Procedurally, the CPLR weighs in, along with the federal statute, to govern the use of such statements in Court, or in any forum, for that matter, including administrative proceedings.[2]

Party to the Conversation

In New York, one party to a conversation legally may tape it, even though the other party is unaware.[3] This is why an undercover officer may wear a body wire without obtaining a warrant. Absent a reasonable expectation of privacy, overhearing as well as recording is proper.[4] Similarly, it is legal for one party to a conversation to consent to another person is eavesdropping in on it.[5]

Where tapes are properly obtained—recorded by a party to the conversation, or with a party's consent, for example—they are admissible. So are recordings such as voice mail or answering machine messages, which are left by the speaker knowing of the recording.

Listening in on a conversation from a telephone extension is improper.[6] Cordless telephones provide significantly less privacy, but the recording of those conversations is nonetheless illegal under state law.[7]

Procedural Bar

Both federal law and the CPLR bar the introduction into evidence of illegally wiretapped conversations. The statutes are similar, and in broad strokes seek to bar the admission of such conversations in any forum, civil or criminal.[8] CPLR 4506 provides the procedural remedy where no eavesdropping warrant was issued: a suppression motion prior to the trial or hearing, returnable before a state Supreme Court Justice.[9] Where the issue arises at trial, caselaw approves objections and suppression motions in the trial Court.[10]

Family Law

In reported New York cases, the subject of wiretapping comes up most frequently, perhaps not surprisingly, in the area of domestic relations. Husbands wiretap their wives' telephone conversations. Wives wiretap husbands'. And, given the younger generation's precocity with electronic gizmos, it is perhaps not surprising to learn of a child overhearing and taping his parent.[11]

Following the federal and state statutory bars on using such conversations, several domestic relations decisions have denied admission into evidence.[12] The fact that the tapping/taping person is the subscriber to the telephone service does not allow for conversations to be overheard. Nor is there an interspousal (and certainly not an ex-interspousal) exception.[13]

Children's Interest

Privacy is at the heart of the statutory proscription on eavesdropping and wiretapping. The extent of a child's privacy interest has been discussed in a few decisions. Is a child capable of giving consent to another person—a parent—to eavesdrop?[14]

Does the child's guardian, in the *parens patriae* exercise of duties, have a right to know what is being said to a child? At what age does a child's privacy rights emerge, *vis-a-vis* a parent?[15] How about when the other party to the conversation is the other parent, with arguably equal rights to the child? Caselaw holds that one parent may not tape record the other parent's conversations with a child. As one custody decision stated,

> These children . . . are entitled to feel that they may communicate freely with their parents without fear that those communications will be recorded and revealed later. [The Court will preclude the tapes'] use in this proceeding, although otherwise admissible, to protect the spirit of trust and confidence that needs to exist between child and parent in Order for the children's emotional health to be safeguarded.[16]

Other Considerations

Putting statutory considerations aside, eavesdropping upon a current or former spouse is a tactic almost guaranteed to raise, not diminish, distrust in a disintegrating family unit and aggravate the already-high tensions that accompany most domestic relations cases, whatever the forum. Courts should also be sensitive to what lessons a child may be learning from a parent who uses such a tactic.

Attorney's Considerations

The attorney representing a parent or spouse who has improperly listened in on conversations should caution the client about the criminal law ramifications[17] and also be sure to not engage in an independent unethical act, such as advising a client to commit a crime. Such improper advice could be grounds for, among other things, disciplinary proceedings or disqualification in representing a litigant.

It should also be noted that an attorney's taping a conversation, whether face-to-face or telephonic, without another person's knowledge is unethical.[18]

Endnotes

1. Penal Law § 250.05 (class E felony). *See also*, Annotation, 24 ALR4th 1208, permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer. Under 18 USC § 2520, a civil cause of actions exists, including equitable relief, punitive damages and attorneys fees.
2. *Ruskin v. Safir*, 17 Misc 2d 190, 676 NYS2d 451 (Sup. Ct., 1998), Order vacated 1999 WL 427456 (1st Dep't 1999) (police disciplinary proceeding).
3. *People v. Gibson*, 23 NY2d 618, 298 NYS2d 496 (1969), *cert denied* 402 US 951 (1971). *See also, Harry R. v. Esther R.*, 134 Misc 2d 404, 510 NYS2d 792 (Fam. Ct. 1986).
4. *People v. Kirsh*, 176 AD2d 652, 575 NYS2d 306 (1st Dep't 1991).
5. *People v. Erwin*, 236 AD2d 787, 653 NYS2d 990 (4th Dep't 1997).
6. *People v. Lasher*, 58 NY2d 962, 460 NYS2d 522 (1983). As discussed below, however, it is improper for an attorney who is a party to a conversation to record it where the other person is unaware of it. *People v. Dunham*, 157 Misc. 2d 289, 596 NYS2d 289 (County Court 1992).
7. *People v. Fata*, 159 AD2d 180, 559 NYS2d 348 (2d Dep't 1990); see *Ruskin v. Safir, supra* note 2; *Sharon v. Sharon*, 147 Misc 2d 665, 558 NYS2d 468 (Sup. Ct., 1990).
8. CPLR 4506(1); 18 USC § 2515.
9. CPLR 4506(3), (4).
10. *See, e.g. Sharon v. Sharon, supra* note 7; *People v. Dunham, supra* note 6. In civil cases, whether one party has any statements of the other is a normal part of discovery, CPLR 3101(e).
11. *Sharon v. Sharon, supra* 7.
12. *Pica v. Pica*, 70 AD2d 931, 417 NYS2d 528 (2d Dep't 1979); *Connin v. Connin*, 89 Misc2d 548, 39 NYS2d 530 (Sup. Ct. 1976); *Sharon v. Sharon, supra* note 7. *See also, Jaeger v. Jaeger*, 207 AD2d 448, 616 NYS2d 230 (2d Dep't 1994) (harmless error); *Harry R. v. Esther R., supra* note 3.
13. *Pica v. Pica, supra* note 12; *Connin v. Connin, supra* note 12, *People v. Dunham, supra* note 6.
14. *See People v. Hills*, 176 AD2d 375, 574 NYS2d 82 (3d Dep't 1991) (in sodomy prosecution, 15-year old victim consented to uncle taping conversation between victim and defendant, and mother approved).
15. In the area of constitutional law, specifically searches by school officials, students have a recognized privacy right. *See New Jersey v. TLO*, 469 US 325, 105 S Ct 733, 83 L Ed 2d 720 (1985).
16. *Harry R. v. Esther R., supra* note 12. *See also, Berk v. Berk*, 70 AD2d 943, 417 NYS2d 785 (2d Dep't 1979), reversing 95 Misc 2d 33, 406 NYS2d 247 (Fam. Ct. 1978).
17. The district attorney of a county has the discretion to decline prosecution of a case, *People v. Eboli*, 34 NY2d 281, 357 NYS2d 435 (1974), a power that may be utilized particularly with interspousal bickering.
18. NYS Bar Association Ethical Opinion 328 (1974). *See also In re Wittner*, 264 App Div 576, 35 NYS2d 773 (1st Dep't 1942), *affd* 291 NY 574, 50 NE2d 660 (1943); Muldoon and Feuerstein, Handling a Criminal Case in New York (West Group 1998), § 1:23. A more liberal approach to attorney taping conversations is discussed in Hall, Professional Responsibility of a Criminal Lawyer, 2d ed., § 16.5 (West Group 1996).

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New York's Adoption and Safe Families Act

By David J. Lansner

On February 11, 1999, New York enacted its implementation of the federal Adoption and Safe Families Act (ASFA). The new law may have profound changes on child welfare law and practice in New York.

The Adoption and Safe Families Act of 1997 (ASFA), P.L. 105-89, was enacted on November 19, 1997. It made numerous amendments to Title IV-e of the Social Security Act, 42 USC sections 670 *et seq.*, as well as to Title IV-b, 42 USC sections 620 *et seq*. Title IV-e provides federal reimbursement to states for 50 percent of their foster care costs for qualified children. (Almost all foster children qualify for such reimbursement.) ASFA requires the states, as a condition for continuing to receive reimbursement, to make certain changes in their law and practice. The changes, discussed in detail below, concern requirements for providing efforts to preserve or reunify families, filing proceedings to terminate parental rights to free children for adoption and other provisions.

States are required to enact conforming legislation by certain dates, depending on the schedule of the state's legislative session. New York's legislation was required by December 31, 1998. On June 1998, Assemblyman Roger Green, Chair of the New York State Assembly Committee on Children and Families, introduced a bill, A. 11463, to enact New York's version of ASFA. The bill was reported out of the Committee on Children and Families and the Committee on Codes, but no further action was taken before the Assembly adjourned in June. The bill was later amended in December.

Neither the State Senate nor the governor took any action during this period. However, many advocacy groups representing parents, children, foster parents, foster care agencies, social services districts and the courts held meetings, developed positions and met with legislators and staff. On November 25, 1998, the day before Thanksgiving, the governor finally released his proposal. On December 2, 1998, at a special session of the legislature called to consider pay raises for members, the governor's bill was introduced into the Senate by Senator Stephen Saland, Chair of the Senate Committee on Children and Families and, without any public comment, passed the same day. That same week, negotiations on the bills began between the Assembly, Senate and governor's staff.

December 31, 1998, passed without a new law or any agreement amongst the parties. On January 6, 1999, Assemblyman Green introduced A. 962, a revised version of his previous bill. The staffs continued intensive negotiations. On February 8, 1999, the parties reached agreement and the Assembly passed the agreed-upon language as A. 962-a. Senator Saland introduced its counterpart, S. 2346, which was passed by the Senate the next day. The bill was signed by Governor Pataki on February 11, 1999, as Chapter 7 of the laws of 1999. The new law became effective immediately. Because the law does not have a name, it will be referred to as NYASFA.

The new law amends the Social Services Law (SSL), the Family Court Act (FCA) and the Domestic Relations Law (DRL) in several areas: dispositional orders, provision of reasonable efforts, permanency hearings, termination of parental rights and criminal records checks on foster and adoptive parents.

Determination of the Need for Reasonable Efforts

Federal law generally requires states to make reasonable efforts to prevent the removal of children from their homes and to reunite families after children have been removed. New York statutes reflect such requirements.[1]

Congress, concerned about cases (real or imagined) in which children remained in or were returned to unsafe homes because of a blind adherence to family preservation, inserted in ASFA a provision that reasonable efforts are not required in certain cases. ASFA is not a model of clarity, and debate raged about whether that provision meant that states were simply not required to make such efforts in order to receive federal reimbursement, that states could allow such efforts but were forbidden from requiring them, or that states were forbidden from making efforts in such cases.

The Assembly and Senate bills took polar opposite positions. The Senate bill stated that foster care and child welfare agencies were excused from making reasonable efforts if any of the enumerated conditions existed. The Assembly bill required a court order to terminate efforts, based upon a finding that these conditions existed and that there was a compelling reason to terminate efforts.

On the issue of procedure, the Assembly prevailed. An agency must make an application and obtain a court order to be relieved of its obligation to provide reasonable efforts. That application can be made at any time in the proceedings, even upon the first approval of a voluntary placement agreement or, in a child protective proceeding, before a child has even been found to be neglected or abused.

Substantively, the new law comes between the positions of the Assembly and the Senate. Reflecting the federal language, an agency may be relieved from providing reasonable efforts in cases where the parent has subjected the child to aggravated circumstances, has been convicted of certain crimes or has had parental rights to another child involuntarily terminated. SSL sections 358-a(b), (c), (d) and 392(6-a) and (8); FCA sections 352.2(2)(c), 754(2)(b), 1039-b and 1052.[2] However, NYASFA adds a provision that agencies must still make reasonable efforts when the Family Court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and child in the foreseeable future.

"Aggravated circumstances" are defined, in SSL section 358-a(12) and FCA sections 301.2(15), 712 and 1012(j),[3] as severe or repeated child abuse, which are themselves defined in SSL section 384-a(8).

The crimes permitting a determination that reasonable efforts are not required are those listed in ASFA: murder in the first or second degree or manslaughter in the first or second degree of another child of the parent, provided, however, that the parent must have acted voluntarily in committing such crime; an attempt or criminal solicitation or conspiracy or facilitation to commit such a crime, and the victim or intended victim was the child or another child of the parent; assault in the first or second degree or aggravated assault upon a person less than 11 years of age, and the commission of the crime resulted in serious physical injury to the child or another child of the parent.

These sections of NYASFA contain an inconsistency. A finding that reasonable efforts are not required can be made by a showing of a conviction of manslaughter in the second degree, but only if the parent acted voluntarily, thereby excluding reckless acts under Penal Law section 125.15(1). A finding can also be based upon aggravated circumstances, i.e., that the child was severely or repeatedly abused, a definition that includes a conviction for manslaughter in the second degree. However, SSL section 384-b(8)'s definition of severe abuse contains no "voluntary" limitation on a conviction for manslaughter. Given the inconsistency, the proper interpretation would be that the more specific limits the general.

There is no provision for foster care agencies to obtain criminal records of parents, and the agencies are not permitted to conduct criminal history checks through fingerprinting of parents.

Obviously, if the parent or law guardian opposes the application to dispense with reasonable efforts, the court must hold a hearing. NYASFA does not specify a standard of proof at such a hearing. The default standard, in article 10 and SSL section 358-a and section392 proceedings, is preponderance of the evidence. That standard may prove to be a problem, as discussed below in the section on termination of parental rights.

If the Family Court finds that reasonable efforts are not required, a permanency hearing must be held within 30 days of such finding.

NYASFA's substantive provisions on determining that reasonable efforts are not required are in many ways a continuation of current law. Reasonable efforts in New York were always required to be in the best interests of the child and not contrary to the child's health and safety, and were to be provided only where appropriate.[4] Thus, although the new law has extensive new language and procedures regarding reasonable efforts, the changes will probably have little practical effect. In fact, numerous studies have found that social services districts and foster care agencies have not provided much in the way of reasonable efforts up to now. Preventive services have also been severely cut back as a result of the Family and Children's Services Block Grant, SSL section 153-i, which stopped reimbursing districts for preventive services and lumped most child welfare reimbursement into a single grant.

Permanency Hearings

NYASFA uses the federal term "permanency hearing." In most cases, the new law simply changes the name of current dispositional and extension of placement hearings to "permanency hearing." "Permanency hearing" is defined in amendments to SSL section 392(1)(e), FCA sections 301.2, 712(h) and 1012(k)[5] as a hearing to review the foster care status of the child and to determine the appropriateness of the permanency plan prepared by the local social services district. Using federal ASFA language, NYASFA provides that, at such a hearing, the Family Court is to consider and determine: whether and when the child (1) will be returned to the parent; (2) should be placed for adoption with the commissioner of social services filing a petition for termination of parental rights; (3) should be referred for legal guardianship; (4) should be placed permanently with a fit and willing relative; or (5) should be placed in another planned permanent living arrangement if the commissioner of social services has documented to the court a compelling reason for determining that it would not be in the best interest of the child to have one of the prior alternatives. The social services official is then required to make reasonable efforts to place the child in a timely manner and to complete whatever steps are necessary to finalize the permanent placement of the child as set forth in the permanency plan approved by the court.[6]

If the court determines that reasonable efforts are not required, the social services official may immediately file a petition to terminate parental rights. However, such a filing may be meaningless: If grounds for termination do not yet exist, the petition must be dismissed.

Permanency hearings must be held within 12 months after the child enters foster care (defined as the date of the fact finding of abuse or neglect, or 60 days after the child was removed from the home, whichever is earlier.[7]

These sections provide an interesting twist. When the Family Court determines that reasonable efforts to reunify the family are not required, the local commissioner of social services must make reasonable efforts to complete whatever steps are necessary to finalize the dispositional alternative that the court has selected at the permanency hearing. One of the possible dispositional alternatives is return of the child to the parent. Thus, a determination that reasonable efforts to reunite the family are not required could nevertheless lead to an order requiring that such services be made.

NYASFA does not specify how the permanency hearing will be scheduled and what issues will be considered which were different from those heard at the hearing held to determine whether reasonable efforts are not required.

The permanency hearing language makes some significant changes in New York law. Courts have previously held that once a child is freed for adoption or has a plan for termination of parental rights, adoption is the only option for that child, and the courts have rejected efforts by relatives to obtain custody.[8] However, NYASFA specifies legal guardianship and placement with a fit and willing relative as equally acceptable options. NYASFA also allows for placement in another planned permanent living arrangement if the commissioner of social services has documented to the court a compelling reason for determining that one of the other alternatives would not be in the best interest of the child. This language will now allow relatives to petition for, and obtain, custody of children who have been freed for adoption. This language should end reliance on the old decision of the Court of Appeals in *In re Peter L.*,[9] which has been used to block relatives' custody efforts. It will also encourage the Family Court and foster care agencies to resist moving for termination of parental rights simply as a matter of policy and will require a closer consideration of the child's best interests. Hopefully, the new law will temper New York's blind rush toward adoption as a cure-all for foster children's problems.

Currently, dispositional hearings are not required in termination of parental rights cases based upon abandonment[10] or mental illness or mental retardation.[11] The requirement of permanency hearings in NYASFA may mean that dispositional hearings will now be required in every type of termination proceeding.

NYASFA fails to comply with the federal law in an important aspect, which appears in section 53 of the bill, which amends FCA section 1055-a(6)(a) to list the dispositional alternatives in proceedings to review the status of children who have been freed for adoption but not yet adopted. Federal law includes, as one dispositional alternative, return of the child to the parent. NYASFA excludes that dispositional alternative. The omission is unfortunate. First, it jeopardizes federal funds. Second, that alternative is in the best interests of some children: children whose parental rights have been terminated but who have spent years waiting for adoption. During that period, some parents become rehabilitated and are willing and able to care for the child again. For those children, return home may be the best option available.

The new law provides for the possibility of an additional hearing in every article 10 case, which could wreak havoc on an already overburdened Family Court. It is to be hoped that social services districts and foster care agencies will use restraint in seeking orders allowing them to dispense with reasonable efforts, since reunification is in the best interests of children in the vast majority of cases.

Dispositional Orders

The new law amends SSL sections 358-a(3)(e) and 392(6)(h) and FCA section 1055(b)(vi)[12] to require that all dispositional orders in voluntary placement approvals and reviews and court-ordered placements and extensions of placement include a description of the visitation plan between the child and parent. While the Family Court currently specifies visitation plans in great detail in private custody cases, the court usually ignores its obligation on this important issue in foster care cases. As a result, foster care agencies often limit visitation to the minimum required by state regulations: one brief visit every two weeks at an agency office.

Such limited visitation hurts reunification. Studies have shown that regular visitation is one of the most important steps in reuniting children with their parents.

The Family Court will now be required to make a detailed order, which should include the frequency, length and location of visits. The order may also specify the day of the week and time of day, to overcome the obstacle that some agencies set up when they refuse to provide evening or weekend visits to working parents.

Dispositional orders must also contain a directive requiring that the parent be notified of the planning conferences that are to be held pursuant to SSL section 409-e, and of their right to attend the conference and to bring counsel or other representative or companion with them. These rights are currently provided by regulations, but foster care agencies too often ignore them. Indeed, some agencies have refused to allow parents to attend the conferences if they attempt to bring counsel with them.

Parents must be given a copy of the court's dispositional order and of the service plan provided by the agency. The court should review the plan and amend it as necessary, before issuing the dispositional order. The plan will clarify the responsibilities of the foster care agency

and parents, to assist in working towards discharge of their children from foster care.

Length of Placement

In accordance with ASFA, NYASFA requires that all foster care placements be reviewed every 12 months, shortening the time for SSL section 392 reviews from 18 to 12 months after the child entered foster care, which is defined as 60 days after the child was removed from his or her home.[13]

Health and Safety Concerns

NYASFA, echoing the federal law, requires that the child's health and safety shall be the paramount concern in determining whether to make reasonable efforts and in making such efforts (SSL sections 358-a(3)(c), 384-b(1), and 392(5-a)(i)).[14] That concern has always been the rule in New York. As the Assembly Memorandum in Support (p. 3) states, this provision "does not represent a change in law, policy or emphasis in New York." New York had blindly adhered to a policy, over the best interests of the child, in requiring that children be pushed into adoption instead of kinship care, guardianship or other plans. NYASFA eliminates that policy.

Termination of Parental Rights (TPR)—Filing Petitions

The new law, in compliance with federal law, adds paragraph (l) to SSL section 384-b(3)[15] to require the authorized agency having the care of the child to file a proceeding to terminate parental rights whenever 1) a child has been in foster care for 15 of the most recent 22 months; or 2) a court of competent jurisdiction has determined the child to be an abandoned child; or 3) the parent has been convicted of murder in the first or second degree or manslaughter in the first or second degree of another child of the parent, provided, however, that the parent must have acted voluntarily in committing such crime; or 4) the parent has been convicted of an attempt or criminal solicitation or conspiracy or facilitation to commit such a crime, and the victim or intended victim was the child or another child of the parent or another child for whose care the parent is or has been legally responsible; or 5) the parent has been convicted of assault in the first or second degree or aggravated assault upon a person less than 11 years of age, or an attempt to commit any such crime, and the victim was the child or another child of the parent or another child for whose care such parent is or has been legally responsible.

Notwithstanding the existence of such facts, the agency does not have to file a petition where (echoing federal ASFA) the child is being cared for by a relative; or the agency has documented in the most recent case plan, a copy of which has been made available to the court, a compelling reason that termination would not be in the best interest of the child; or the agency has not provided the parents the services which it deems necessary for the safe return of the child, unless such services are not legally required.

New York has set out in NYASFA a non-exhaustive list of compelling reasons regarding best interests:

a) the child was placed in foster care as a juvenile delinquent or person in need of supervision, an exception based upon the fact that TPR proceedings are almost never brought for such children and such children are basically unadoptable. In addition, many of the children are in the care of OCFS (the former Division for Youth), which is not authorized to bring termination proceedings;

b) and c) the child has a permanency goal other than adoption or is 14 years of age or older and will not consent to adoption, a recognition that adoption is not in the best interests of some foster children, and that termination of parental rights should be pursued only as a step towards adoption and not an end in itself. The New York State Office of Children and Family Services, in an Informational Letter sent to social services districts, 98 OCFS INF-3, p.3, stated that "Legally freeing a child but failing to find a legally permanent home for such child cannot be considered acceptable public policy, nor would it be in the best interest of the large majority of children who are unable to be safely returned to their families of origin."

d) there are insufficient grounds for filing a TPR petition;

e) the child is the subject of a pending disposition under FCA Article 10, except where the child is already placed under some other proceeding, thus recognizing that TPR proceedings cannot be commenced until the Family Court has determined that the child is actually neglected and abused and in need of placement, as opposed to temporary remand pending trial.

98 OCFS INF-3, p. 5, also listed additional compelling reasons:

- A family setting will not currently meet the child's needs because of the child's severe emotional, behavioral or psychiatric problems;
- At least one parent is actively being considered as a discharge resource for the child, and it is anticipated that such discharge is likely to occur within 6 months;
- The child is in placement with a sibling(s) and the sibling(s) is not being freed for adoption;

- The parent makes regular contact with the child and maintaining their relationship benefits the child;
- The child is in care for a child-related problem, at least in part, and there would be little or no benefit to the child in ending the child's relationship with the child's parent(s).

If the social services official or authorized agency fails to file a TPR petition within 60 days of the time required by this section or within 90 days of a court direction to file a proceeding not required by the section, the proceeding may be filed by the foster parent of the child without further court order or by the law guardian on the direction of the court (paralleling the existing language of SSL section 384-b(3)(b)). In the event of such filing, the official or agency shall be served with notice of the proceeding and join the petition. It is not clear what role the official or agency will play in court if either opposes the petition.

For the purposes of this section, the date of the child's entry into foster care is, as required by ASFA, 60 days after the date on which the child was removed from the home or the date of the order of fact-finding pursuant to FCA Article 10, whichever is earlier. Agencies will have to file petitions or document exceptions in the case record for all children who were in foster care on November 19, 1997, by a schedule set forth in ASFA: one-third of the children by July 1999, one-third by January 2000 and the remainder by July 2000.[16]

Petitions to terminate parental rights on the grounds of permanent neglect or severe or repeated abuse may not be filed unless the child has been in foster care for at least one year. However, an amendment to SSL section 384-a(4)(e)[17] will allow an earlier filing on the grounds of severe abuse based upon a conviction for murder, manslaughter or assault, if the Family Court has determined that reasonable efforts to reunite the child and parent are not required. However, the fact-finding hearing on the petition may not commence sooner than one year from the date the child first entered care. In addition, unlike current TPR proceedings in which the court only considers events which occurred prior to the filing of the petition, the court must consider the parent's efforts at rehabilitation during the entire period prior to the hearing.

Termination of Parent Rights New Grounds and Rules of Evidence

Although ASFA does not require states to enact any new grounds for termination of parental rights, NYASFA does add new grounds for termination. SSL section 384-b(8)[18] was amended to add to the grounds for termination based upon severe abuse: convictions for attempts, conspiracy, solicitation and facilitation of the homicides which are currently listed; assault in the second degree and aggravated assault upon a person less than 11 years old; and attempts to commit such assaults. In any of these cases, the victim or intended victim must have been a child of the respondent or another child for whose care such parent is or has been legally responsible.

NYASFA also adds another basis for termination of parental rights for severe abuse: a Family Court finding of sexual abuse in which the parent has committed or knowingly allowed to be committed a felony sex offense defined in various sections of Penal Law Article 130. In practice, many parents who are found to have committed sex abuse already lose their rights because they do not admit that they have committed such abuse and courts have often held that such an admission necessary for treatment and recovery.[19]

NYASFA also changes some of the evidentiary rules in TPR proceedings. New York has allowed termination of parental rights based upon severe or repeated abuse for a number of years, but the section has almost never been used. One problem has been the standard of evidence. Findings of abuse in Article 10 child protective proceedings are made by a preponderance of the evidence.[20] Until 1982, findings for termination of parental rights had a similar standard. In *Santosky v. Kramer*,[21] the Supreme Court held that, as a constitutional matter, such determinations require proof by clear and convincing evidence. New York changed its statute accordingly.[22] Therefore, the findings of abuse made in article 10 could not be used for termination for severe or repeated abuse, and courts in several states so held. New York courts never reached the issue. (Termination could also be based upon convictions for certain abusive crimes, beyond a reasonable doubt, but agencies have not brought TPR proceedings based on convictions.)

To overcome this evidentiary problem, NYASFA now allows the Family Court in an article 10 abuse case to make a finding of facts which constitute severe or repeated abuse by clear and convincing evidence.[23] Such a finding will establish that the child was severely or repeatedly abused, as the case may be.[24] The agency must still prove at the TPR hearing the other elements for termination: that the child has been in care for one year, that the agency provided diligent efforts to strengthen the parental relationship, and that such efforts were unsuccessful and are likely to be unsuccessful in the foreseeable future. Findings by a preponderance of the evidence are admissible in the TPR proceeding, to show how the child entered placement and the reason for such placement, but not as proof of severe or repeated abuse. In order to use the Article 10 finding for clear and convincing evidence, the Article 10 petition must contain a notice in conspicuous print that a fact-finding of severe or repeated abuse by clear and convincing evidence could constitute a basis to terminate parental rights in a proceeding pursuant to SSL section 384-b. At the initial court appearance, the court must inquire of the child protective agency whether the

agency intends to prove that the child is severely or repeatedly abused by clear and convincing evidence. If the agency does intend to do so, the court must so advise the respondent.[25]

NYASFA makes two other evidentiary changes in TPR proceedings. First, where the Family Court has determined, pursuant to SSL sections 358-a(3)(b) or 392(6-a) or FCA sections 352.2(2)(c), 754(2)(b), 1039-b or 1052(b)(i)(A), that reasonable efforts to make it possible for the child to return home are not required, the agency is not required to demonstrate diligent efforts as part of its termination case.[26] However, questions have been raised about the constitutionality of such a provision, since Santosky requires that all elements of a termination case be made by clear and convincing evidence. Determinations that reasonable efforts are not required are made using the preponderance of the evidence standard, and NYASFA does not allow the Family Court to make such a finding by clear and convincing evidence. Second, SSL section 384-b(8)(c) was amended to provide that repeated abuse can be established for purposes of termination of parental rights if only one of the two required findings is made by clear and convincing evidence. Questions have been raised about the constitutionality of this section for the same reasons.

The new law amends SSL section 384-b(12)[27] to provide that, if the court determines to commit the custody and guardianship of the child or to suspend judgment, the court must determine if there is any parent to whom notice of an adoption would be required by DRL section 111-a, and must indicate whether such person or persons were given notice of the proceeding and whether such person or persons appeared. Such determinations shall be conclusive in all subsequent proceedings relating to the custody, guardianship or adoption of the child. The new provision "does not change any of the existing requirements that such parents receive proper notice."[28]

Notice to Foster Parents

Echoing federal ASFA language, the new law amends SSL sections 358-a(4)(c) and 392(4)(i) and FCA sections 1040 and 1055-a(4)[29] to require that foster parents, pre-adoptive parents or relatives caring for the child be given notice of any permanency hearing and afforded an opportunity to be heard at such hearings. However, no such foster parent, pre-adoptive parent or relative may become a party to the hearing solely as a result of such notice. Foster parents who have had a child in their care for more than one year and certain relatives are or may be parties to some proceedings based upon other sections of law.[30] The failure of these persons to appear at a hearing constitutes a waiver of the opportunity to be heard. No procedures set forth how such persons will be heard in these normally adversarial proceedings. These persons will not be able to questions witnesses or present other witnesses or legal arguments.

Warnings to Parents

SSL sections 358-a(2)(a) and (3)(e), 384-a(2)(c) and 392(6)(i) and FCA sections 1051(f)(ii) and 1055(b)(vi)[31] are amended to require that a voluntary placement agreement, the petition to approve it, and the dispositional order in voluntary placement approval and review proceedings and in child protective proceedings include a warning to the parent that if the parent's child remains in foster care for 15 of the most recent 22 months, the foster care agency may be required by law to file a petition to terminate parental rights.

Juvenile Delinquents (JDs) and Persons in Need of Supervision (PINS)

ASFA applies to all children who receive reimbursement under Title IV-e. Juvenile delinquents who are placed in OCFS non-secure facilities of 25 beds or less and JDs and PINS who are placed in foster homes qualify for such reimbursement. NYASFA applies all of the provisions of ASFA to these children, even though certain sections do not appear to make much sense in these contexts. The law amends FCA sections 301.2, 352.2, 355.5, 712, 741-a, 754(2), 756(b), 756-a(b), (c), (d), (e)[32] to define permanency hearings and aggravated circumstances, set up the same procedures for finding that reasonable efforts to return the child home are not required, give notice to foster parents, and set out the dispositional alternatives for permanency hearings.

NYASFA does make two significant changes to current law on juvenile delinquents. First, JDs who are placed in foster homes and non-secure facilities for an initial period of 18 months must have a permanency hearing after being in care for 12 months. FCA section 355.5 will now require that such a hearing be held within 12 months, and that the court must determine in its order whether and when the respondent child will be returned to the parent. However, subdivision (8) prohibits the court from reducing or terminating the placement of the respondent prior to the completion of the period of placement ordered pursuant to sections 353.3 and 355.3. These two provisions are contradictory. The prohibition would seem to violate ASFA's requirements about dispositional alternatives as well as violating FCA section 355.1, which permits the court to modify or terminate an order of placement. In addition, it would be poor policy indeed to require an overburdened Family Court to hold a permanency hearing after 12 months while also prohibiting the court from carrying out its determination.

Second, the law amends FCA section 352.2(2) to add a paragraph (d),[33] which states that when the court determines that reasonable efforts are not required, the juvenile delinquent's health and safety shall be the paramount concern in determining and making reasonable efforts to reunite the delinquent with his or her family. This provision appears to modify current law, as expressed in FCA

section 352.2(b), which states that reasonable efforts must be consistent with the need for protection of the community.

A third problem arises from sections 29 and 33 of NYASFA, which permit the Family Court in JD and PINS proceedings to determine that reasonable efforts to reunite the child and parent are not necessary, as previously discussed. In addition, as set out above, such a determination would have a collateral estoppel effect in a subsequent TPR proceeding. However, in addition to the constitutional infirmity described in the discussion on TPR evidence, such determinations in JD and PINS cases have even more problems, because parents are generally not represented by counsel in JD and PINS cases. There is no provision in current law for the appointment of counsel for them in such cases, and NYASFA does not make any provision. Thus, a finding that reasonable efforts are not required, and its collateral effect, would be a due process violation.

Criminal Records Screening of Foster Parents

NYASFA, in compliance with federal law, amends SSL section 378-a[34] and requires that foster care and adoption agencies conduct criminal history record checks of all prospective foster parents and adoptive parents applying to the agency for certification or approval for placement of a child, as well as checks on all person over the age of 18 who are residing in the home of the applicants. The requirement for conducting a check also applies to "final approval" of kinship foster parents, and to foster parents licensed by OCFS and other state agencies. Certification or final approval cannot be granted until the check has been completed. The requirement does not apply to emergency or temporary approval of kinship foster parents or direct placements made by Family Court.

Current foster parents who have not been checked will be checked when they apply for annual recertification. The New York State Division of Criminal Justice Services (DCJS) will maintain a record of all current foster and prospective adoptive parents and inform OCFS if a foster or prospective adoptive parent is later arrested or convicted of a crime.

Applicants must submit fingerprints to the authorized foster care or adoptive agency, which will send them to OCFS, which will send them to DCJS. OCFS, not the applicant, will pay DCJS the processing fee, although applicants may be charged by a local agency for the actual fingerprinting. DCJS will check its own records (but not the national records maintained by the FBI) and will provide OCFS with a criminal history record. OCFS may then request, and is entitled to receive, information from any state or local law enforcement agency or court relating to a conviction or pending charge. OCFS will then notify the authorized agency that there is no criminal history record or provide a summary of the criminal history record. The summary is to be held as confidential and not open for public inspection.

Again echoing federal law, certification or approval must be denied where an applicant has been convicted at any time of a felony for child abuse or neglect; spousal abuse; a crime against a child, including child pornography; or a crime involving violence, including rape, sexual assault or homicide, other than a crime involving physical assault or battery. Certification or approval must also be denied where an applicant has been convicted within the last five years of a felony for physical assault, battery or a drug-related offense.

Certifications and approvals will be held in abeyance where charges for such crimes are pending. Certifications and approvals may be denied based upon convictions for other crimes or convictions of other adults in the household. In all likelihood, agencies will deny certification or approval to applicants with any significant criminal record.

"Spousal abuse" is defined as an assault in the first or second degree where the victim was the defendant's spouse. An applicant who was disqualified for spousal abuse may apply for relief from the mandatory disqualification by requesting a fair hearing before OCFS and showing a domestic violence defense: That he or she was the victim of physical, sexual or psychological abuse by the assault victim and that such abuse was a factor in causing the applicant to commit the assault.

Crimes against a child are not defined, but would presumably apply only to those crimes in which the age of the victim is relevant, and not to, for example, an ordinary larceny where the victim happened to be under the age of 18.

When a criminal history record shows a conviction for one of the mandatory disqualification crimes, the authorized agency must remove any foster children from the home. The Governor's original proposal for "immediate" removal was deleted. Although the agency must act as soon as necessary, the agency must give consideration to minimizing any traumatic effects of the removal. In some cases the agency may believe that it would still be in the best interests of the child to remain with the foster parent (such as a kinship case or where the child has resided with the foster parent for a long time and the conviction was an old one). Although the foster parent could no longer serve as a paid foster parent, the agency could ask the Family Court to consider ordering direct placement of the child with such person.

Where the criminal history record reveals a conviction for a non-disqualifying crime, the agency must make a safety assessment of the foster home.

When an agency denies an application based upon a criminal record, it must provide the applicant a written

statement setting forth the reasons for the denial and a description of the DCJS record review process and of any OCFS remedial process.

The new law also amends Domestic Relations Law section 115-d[35] to require that a court considering an application by a person wanting to be certified as a qualified adoptive parent, in order to adopt a child privately, must also be fingerprinted and the court must order a criminal history record from DCJS. Petitions for certification must be denied if the applicant has been convicted of any of the crimes which would disqualify a person as a foster parent. However, unlike foster care applications, other adults in the home of the prospective private adoptive parents will not be fingerprinted or have their criminal history records checked.

NYASFA does not prohibit a court from approving a private adoption by people who have been convicted of the disqualifying crimes. A court might do so in a case where the adoptive parent is a step-parent or relative or has had custody of the child for a long period of time. Such people are not usually required to become qualified adoptive parents, the position to which the prohibition applies.

Miscellaneous Provisions

ASFA provides incentive payments to states which finalize more foster care adoptions. NYASFA amends SSL section 409-a(10)[36] to require that any sums New York receives for adoption incentives must be paid to the social services districts in proportion to the amount earned by each district and that at least 70 percent of the funds be used in preventive services and the remainder for post-adoption services.

OCFS is also required to study the extent to which victims of domestic violence lose their children under FCA article 10, due to the conduct of the perpetrator of the domestic violence. OCFS must submit its report on its findings by October 31, 2000.[37]

Several provisions required by ASFA have been enacted in New York by regulation, including a provision that children who were adopted with a subsidy and are now being readopted are still eligible for the subsidy (an interesting recognition of the heretofore well-kept secret that many foster care adoptions fail and the children wind up back in foster care), and a provision granting fair hearings to prospective adoptive parents who are denied placement because they reside outside the district of the agency. 18 NYCRR sections 421.18(n)(1), 426.5(g).

Endnotes

1. SSL §§ 358-a(1), (3)(b), 384-a(2)(b)(iv), 384-b(1)(a)(iii), (7)(a), (8), 392, 409-a; FCA §§ 352.2(b), 754(2), 1022(a)(iii), 1027(b)(i), 1028(b), 1055(c).
2. NYASFA §§ 4, 22, 23, 29, 33, 43 and 48.
3. NYASFA §§ 6, 28, 31 and 40.
4. *See, e.g.*, SSL §§ 358-a(3)(a), 384-b(7)(a) and (8).
5. NYASFA §§ 15, 28, 31 and 40.
6. SSL §§ 358-a((3)(b), 392(5-a); FCA §§ 355.5, 754(2)(b), 756-a(d), 1039-b(b)(6), 1052(b)(i)(A), 1055(b)(iv)(B), and 1055-a(6)(a).
7. SSL §392(5); FCA §§ 355.5(4), 756(b), 1055(b)(i) and 1055-a(3)(c). NYASFA §§ 19, 30, 34, 50, 51.
8. *See, e.g., In re Genoria SS.*, 233 AD2d 827, 650 N.Y.S.2d 830 (3rd Dep't. 1996), *leave to appeal denied*, 89 NY2d 811, 657 N.Y.S.2d 403, 679 N.E.2d 642 (1997); *In re Jennifer A.*, 225 AD2d 204, 650 N.Y.S.2d 691 (1st Dept. 1996).
9. 59 NY2d 513, 466 N.Y.S.2d 251, 453 N.E.2d 480 (1983).
10. *In re Israel R.*, 200 AD2d 498, 606 N.Y.S.2d 639 (1st Dept. 1994).
11. *In re Sylvia M.*, 83 AD2d 925, 443 N.Y.S.2d 214 (1st Dept. 1981), *aff'd*, 57 NY2d 636, 454 N.Y.S.2d 61, 439 N.E.2d 870, reargument denied 454 N.Y.S.2d 1033, 440 N.E.2d 1343 (1982).
12. NYASFA §§ 4, 21 and 50.
13. NYASFA §§ 16, 17, 19 and 24.
14. NYASFA §§ 4, 9, 20.
15. NYASFA § 10.
16. 98 OCFS INF-3, p. 6.
17. NYASFA § 11.
18. NYASFA § 13.
19. *See, e.g., In re Tina D.*, 213 AD2d 714, 624 N.Y.S.2d 455 (2d Dept. 1995).
20. FCA § 1046(b).
21. 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed. 2d 599 (1982).
22. SSL § 384-b(3)(g).
23. FCA §§ 1046(b)(ii), 1051(e). NYASFA §§ 45 and 46.
24. SSL § 384-b(8)(d), (e). NYASFA §§ 13.
25. FCA §§ 1031, 1033-b. NYASFA §§ 41 and 42.
26. SSL § 384-b(7)(a), (8)(a)(iv), (8)(b)(iii). NYASFA §§ 12 and 13.
27. NYASFA § 14.
28. Assembly Memorandum in Support, p. 2.
29. NYASFA §§ 5, 18, 44 and 52.
30. *See, e.g.*, SSL §§ 383(3) and 392(4)(c); FCA § 1055-a(4).
31. NYASFA §§ 2, 4, 8, 21, 47 and 50.
32. NYASFA §§ 28 through 38.
33. NYASFA § 29.
34. NYASFA § 7.
35. NYASFA § 54.
36. NYASFA § 25.
37. NYASFA § 56.

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Competing! Risky Business: Seven Timeless Truths About Legal Fees

By Milton W. Zwicker

How do you charge for your services? If you want to establish and keep a competitive edge, you must set your fee structure carefully. The angles are many and complex. These guidelines will help you address them all.

Lawyers' fees are clients' costs. That makes fees the most powerful lever for growing your revenue and, at the same time, the most risky and controversial.

Smart lawyers recognize that one misstep and their chief competitors may take charge of their best clients. So they try to bolster revenue without increasing fees. They add associates and legal assistants to increase the volume of fees. Some firms expand revenues geographically by opening branch offices or finding new niches.

There are other ways to boost revenues without boosting fees. For example, law firms in some jurisdictions start ancillary businesses such as career counseling agencies.

Any of these strategies can be revenue-generating alternatives to fee increases. But sooner or later, you'll face a harsh reality. With mounting costs for associates, rent, marketing, technology, legal assistants and other expenses, you may need to increase fees in order to grow or sustain profits.

Come to grips with the challenge—and reduce your risks—by thinking through the "timeless truths about fees." Here are seven of them.

1. The right fee structure depends on the correct market share strategy.

Fee structure and market share are like Siamese twins. Here is an example.

For many years, the well–established firm of Gold & Marble enjoyed record growth in fees and profits from the health care industry. Then an out-of-state firm moved in and offered fees 18 percent lower than Gold & Marble's. This firm captured 45 percent of Gold & Marble's health care market—including much of the high-profit work—within two years. Gold & Marble also lost some of its bright young lawyers to the new firm.

Gold & Marble faced a clear choice: Cut fees or lose all of its health care industry clients. It cut fees.

Today, the firm is back in the game. It has recovered many of its former clients and added new ones. Gold & Marble was able to recapture market share by emphasizing new skills, improving quality, reducing fees and aggressively automating its services.

Your fee arrangements must include a market share strategy. Once you decide to hang onto market share, you usually have to rough it out and take your lumps. This can mean losing money until you can improve your margins and get your clients back.

2. Setting fees always must involve cost analysis.

All fees are made up of cost and profit components. Many firms may not know what these components are. If you know what costs are include in your rate structure, you are better able to revise rates and set rates for new services. In marketing language, you must know how and where costs are incurred for the core services you offer (80 percent of your total volume).

Firms incur costs within activity centers. Your entire firm, in theory, can be an activity center. The delivery of legal services involves both direct and indirect costs. (See the ABA monograph *Cost Accounting for Law Firms* by Robert J. Arndt and James F. Rabenhorst.) If you know how these costs behave, you can decide what profit margins you can give up or hang onto as you set fees.

Knowing these costs encourages the people in your firm to find ways to save. You might save through better use of time and budgets or by substituting legal assistants for more expensive lawyers. In some cases, your service itself must be reformulated. In others, it will mean automation or various other improvements.

There's another reason a good understanding of costs is such a key part of fee setting. At some point, a firm has to decide how much will flow to the bottom line. You may decide you can be more fee-competitive within your market, so all the cost saving will go into lower fees. This is a dangerous strategy unless you know your costs.

3. A good billing strategy must take into account the legal service supply and demand in each marketplace.

If you provide standard client services—residential real estate, for example—you probably are not going to get much more than bargain basement fees. If, on the other hand, you offer cutting edge services in emerging fields of law, you should expect premium fees. Instead of asking "How fee sensitive are clients?," ask the reverse: "How value sensitive are clients to our extra performance, experience and reputation?" This reflects a mindset, a confidence about the value and benefits of your services rather than a continuous struggle to reduce your fees to some common standard.

Win-Win Billing Strategies (ABA Law Practice Management Section) describes a fee experience of Wachtell Lipton. Its fee was $20 million for representing Kraft Inc. in the takeover by Philip Morris Companies. A lead firm lawyer maintained that in this business, clients don't shop for price, but quality: "In a transaction of that size of this complexity, who is to say what is an appropriate fee? One has to look at the value created and the responsibility assumed by the law firm."

This notion of value billing, where the worth of services rises or falls with the size of the fees charged, is important in service marketing.

4. Fees always must reflect the market segment you are after.

Do you use "standard fees" such as hourly rates to price your services across market segments? If so, you are leaving money on the table because you are not exploiting the fragmented and splintered nature of most markets. For example, who do you think cares most about the size of legal fees—household clients or businesses?

A recent survey of small businesses asked managers, "What are the factors you use to choose a lawyer?" They answered that the law firm's reputation, recommendation by a firm and time projected to complete the work were most important. Where did fees place on their list of factors? Sixth.

But if you look at the fees many lawyers charge, you'll see across-the-board hourly rates. Many lawyers don't differentiate between the household client who is looking for the lowest fee and the business manager who needs to protect a vital business interest.

Lawyers must learn to identify the various segments within a "client fee center." Each segment thinks of fees differently, so you often must present your fee differently—sometimes within the same client company.

Consider a small manufacturing company making ultralight aircraft—a high-liability product. The CEO of the company is interested in the best legal advice to protect his company from liability. His view of legal fees is much different from that of the CEO of a small finance company with a large portfolio of land mortgages; the latter is concerned with the unit collection cost on defaulting mortgages.

Every client has a different concern and a different way of thinking about how fees relate to his or her needs.

5. Upward fee leverage requires continuous investment in cutting edge legal services.

In the commercial world, many companies attain their higher prices by investing in brand equity. High brand equity naturally goes with high price.

In the legal world, what services go with high fees? Answer: unique and experiential services that are common to emerging fields of law. Consultant William C. Cobb says this explains why some New York firms are so profitable. They are able to leverage the unique and experiential classifications of work. These classifications require continuous investment because they come and go.

Cobb describes one of these situations in *Win-Win Billing Strategies.* In the early 1980s, there were few bankruptcy lawyers in the Southwest. Creditors' rights suits were rare. The best lawyers were hired at very high rates to defend banks against catastrophic losses. By the late 1980s, creditors' rights defense had become low-end brand name work. Lower fees followed.

The question lawyers should ask is "How and what services do I invest in to ensure that I can keep my fees as high as possible?"

Three factors are involved. First, you have to position your firm as a leader in the markets it serves. Firms that have leadership positions are those that consistently have positioned themselves over the years so client know exactly what to expect when buying their services. Yours should be the first firm clients think of when they want the best.

Second, you have to know what clients consider to be good value. Taking on and developing unique and experiential legal work helps build a loyal clientele. You can show you are on the cutting edge by, for example, writing, lecturing and presenting seminars that deal with the new and unusual. You must reinforce in the minds of clients the nature of your practice.

Third, you have to deliver on the explicit and implicit promises you make. You can't be lecturing and writing and lack the talent and resources that make good on your promises. Y2K litigation, for example, is now a hot topic. Without a sound knowledge of technology, the

best litigator will find it difficult to handle one of these cases.

Thus, lawyers who don't invest in the time, training and other resources necessary to work in new and developing fields of law will fall by the wayside or survive on a low-profit retain or survive on low-profit retainers.

6. Use a plan that meets the value needs of each client.

Clients in each market have a sense of value that results from a combination of things—mostly from the benefits that flow from your service. You can offer different clients different fees based on buying habits and other characteristics.

Lawyers have more breathing room with fees than they can imagine. How do you extract the best fee for the services you have to offer? First, make sure your services reflect the value you believe clients receive from your services. Second, make arrangements that capture as much of this value as possible. Possible fee arrangements vary widely (see *Win-Win Billing strategies*):

1. Fixed or flat fee
2. Contingent fee
3. Hourly rate
4. Blended hourly rate
5. Fixed or flat fee plus hourly rate
6. Hourly rate plus contingency
7. Percentage fee
8. Retrospective fee
9. Retainer
10. Retainer deposit against future services
11. Unit fee
12. Lodestar method
13. Relative value method
14. Statutory or other scheduled fee system
15. Fees are among the least

Measured Marketing Activities

In most firms, there are all kinds of statistics as to the percentage of billings that come from various services. Firms collect data on how these percentages change from year to year. Firms often measure how much of their work each lawyer handles. Some chart fees from their top clients.

But if you ask firms how they measure performance, you will find their tracking systems inadequate.

To improve your fee performance, you need a measurable tracking system. A fee tracking system needs several components. One component should include the fees quoted in beauty contests and the like. Before making a new bid, you can analyze your "win-loss ratios." What kind of batting average do you have on different bids or quotes? Is your average, on a rolling basis, getting better or worse? If you batted .300 last year, are you doing the same or better this year? Batting averages help in fee forecasting by giving you a better feel for potential client volumes in key markets.

Another good practice when you track fees is to graph the information. By putting competitors' fees on a line graph, you can get a picture of how they stack up and whether competitors are pursuing specific strategies.

Last, measure slippage form fee structures within your firm. Slippage could result from giving particular clients special rates or discounts related to payment terms, or other allowances that are really fee cuts.

Discuss fee tracking information at partnership and committee meetings where you review marketing and financial data. Look at data and at win-loss averages, and ask key questions (i.e., "How can we prevent activities that result in fee discounts?"). By showcasing fee data in a team setting, you can get a much better handle on the issue.

Ultimately, you have to put your fee plan into action. This means communicating it to all lawyers and other timekeepers who will implement it on a daily basis. Make sure they understand it. Test how well your compensation plans reward lawyers for fee performance. See how well they handle clients' fee objections; they may need training and coaching.

Fees are never as sexy a topic to lawyers as clients and legal specialties. But sensible approaches to these seven truths can put enough money in the bank to warm the heart of even the most fee-shy attorney.

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50+ Web Sites You Shouldn't Practice Without

By Mary Micheletti

It's hard to imagine now, but there was a time not too long ago when attorneys didn't have the vast resources of the Internet at their fingertips. Now, however, it's an indispensable tool for legal research, cases and overall practice purposes.

From bankruptcy to securities, as a litigation aid, the list of excellent Web sites keeps on growing. *LAW OFFICE COMPUTING* asked litigators in different practice areas which sites they find invaluable and how they use them. Here are the results:

Bankruptcy

Each day, Summer Bourne of Rafool & Bourne in Peoria, Ill., makes a point of checking the American Bankruptcy Institute (ABI) page for daily headlines covering legislative updates and general news in the bankruptcy world. "The ABI is by far the best site on the Net for bankruptcy attorneys," Bourne says.

Bourne primarily uses the Internet for continuing education, and legislative and case law updates. A great resource, he says, is the link for the 7th Circuit case law search engine maintained by Chicago's Kent College of Law. "As far as bankruptcy in a federal court goes, this is the site I use most," says Bourne. "It has the full text of all of the 7th Circuit cases for the past few years, and also has a search feature."

The InterNet Bankruptcy Library is also worthwhile, he adds. The site has an archive of the bankruptcy roundtable LISTSERV, as well as other documents involved in large Chapter 11 cases. In addition, the site boasts a substantial listing of bankruptcy firms nationwide for referral purposes.

"I also look over individual sites of bankruptcy courts across the country," he says. Some of the courts have started putting case opinions online, including the U.S. Bankruptcy Court for the Northern District of Illinois, which allows users to search and download all of the documents in cases filed within the past year.

Mike Berger, a bankruptcy litigator based in Beverly Hills, Calif., recommends the site for the U.S. Bankruptcy Court for the Central District of California. "This site has all of the bankruptcy forms, plus the local rules that are essential to successful practice," Berger says.

California statutes are available online on the Legislative Counsel of California site which, he says, are helpful when you need to check any California codes, including the latest exemptions that set forth what property a California debtor can retain even after filing a Chapter 7 bankruptcy.

Berger, who suggests checking out his own Web site for bankruptcy advice, also recommends KnowX.com for getting information on debtors assets, and liabilities and residences.

Business Litigation

Milwaukee litigator R. Timothy Muth, whose practice at Reinhart, Boerner, Van Deuren, Norris & Rieselbach centers its focus on technology disputes, often visits Hoover's Online for descriptions and financials of U.S. and foreign public-and privately-held companies. For public companies, Muth uses the site as a front-end to the U.S. Securities and Exchange Commission's EDGAR Database.

Muth also likes Excite's NewsTracker personal news clipping service, which allows visitors to customize relevant news topics. The site collects and filters thousands of late-breaking articles from a wide variety of online newspapers and magazines, including the *Chicago Tribune* and *Russia Today*.

Because his practice involves international business disputes, Michael L. Novicoff of Reuben & Novicoff in Beverly Hills, Calif., often refers to the U.S. State Department Web site. The site provides country-by-country and subject-by-subject summaries of the rules, treaties and resources implicated by most international civil disputes.

"For example," Novicoff says, "the site explains how to serve American process on a defendant in Canada or New Zealand, or how to obtain a deposition from a witness in Fiji or Germany." The site also provides links to the full text and procedures for most of the private litigation treaties to which the United States is a party.

Medical Malpractice

Jerry Meyers, of the Pittsburgh-based Kapetan Meyers Rosen & Louik, uses PubMed and Medscape for free access to MEDLINE, the National Library of Medicine's search engine. This service enables users to access approximately 3,900 biomedical journals published in the United States and 70 foreign countries.

Meyers also finds Northern Light to be an effective practice tool. Northern Light facilitates at the location of government agency-approved practice guidelines and the published guidelines of various professional organizations, including the American College of Obstetricians and Gynecologists. In addition, Northern Light offers a fee-based database service that provides full-text articles from more than 4,500 periodicals, scholarly journals and newswires.

Meyers adds that the National Guideline Clearinghouse, a public resource for evidence-based clinical practice guidelines, is another full-text Web site invaluable to medical malpractice litigators. He also subscribes to Scientific American online. According to Meyers, the site provides a comprehensive source of monthly updated state-of-the-art internal medicine and its subspecialties.

Product Liability

"It's sort of stunning, the amount of information available about corporations on their Web sites," says Paul Keisel of Beverly Hills, Calif.'s, Keisel, Boucher & Larson.

According to Keisel, companies often make statements about the quality of their products and services that end up working against them in lawsuits. In one instance, Kiesel was able to put together an entire case against the manufacturer of a defective ladder by simply referring to the company's Web site. The site contained recall information that outlined the exact problem that caused his client's injury. Moreover, he was able to make a trial exhibit based on information gathered from the site.

Another powerful tool, according to Kiesel, is DepoConnect, which provides information on thousands of expert witness depositions. The database, however, is only available to plaintiffs' attorneys who are members of state trial lawyer associations.

Employment

Marlene Muraco, a partner at Littler Mendelson, the largest employment and labor firm in the country, relies on American lawyer Media's Law News Network site to keep up with developments involving national clients, among other things. "I get a daily e-mail from this site, which provides me with information about all the legal news of the day, [except] published decisions."

Muraco, who is based in Littler Mendelson's San Jose, California, office, also recommends the California Courts' information page with links to related Web sites. "This is a very handy Web site that provides links to every court in California that has a Web site." These sites often contain addresses, phone numbers, local rules and information about the judges, setting motions, fees and other details. It also contains links to various local, state and national bar associations, links to the major government agencies and bodies, and all sorts of other helpful links.

Another great resource is Corporate Information, a meta-search site for company research. Before meeting with potential or new clients, Muraco visits the site and gets an overview of the company's business, and information about its subsidiaries, size and key personnel.

> **'It's sort of stunning, the amount of information available about corporations on their Web sites.'**
>
> -PAUL KIESEL,
> Keisel, Boucher & Larson

The Ultimate White Pages site is also an effective tool, which Muraco uses to find the addresses and phone numbers of witnesses. Of particular value to Muraco, however, is the "reverse search" directory, which allows a user to enter a phone number, and receive the identity and address of its owner. "I have done reverse searches in the past when I've had cases in which I had a phone number a plaintiff or witness had called, but needed to determine to whom they had spoken." Muraco says.

Muraco also finds the Federal Web Locator a convenient site. "It allows you to find the Web page of virtually any government agency, which is very helpful when you're looking for the latest version of a regulation, trying to find out the status of a particular piece of legislation, or trying to find out what types of materials a particular federal agency is providing to the public regarding the statutes it administers," she says. Muraco adds that her most frequent stops are to sites maintained by such government organizations as the U.S. Equal Employment Opportunity Commission, Immigration and Naturalization Services, and the U.S. Department of Labor.

Probably the best legal links page around, according to Muraco, is the Law Engine. The site includes links to top law and general libraries, searchable dictionaries, directories of attorneys, litigation aids, litigation forms and other resources. "There's definitely something for everyone," she says. "I often start my searches from here if I don't know exactly where to go."

Environmental

As a toxic tort litigator, Raphael Metzger finds several Web sites indispensable. First and foremost, however, is the National Library of Medicine site, which provides free searches of TOXLINE, MEDLINE and other databases.

Also helpful, adds the Long Beach, Calif., attorney, are Web sites containing material safety data sheets, which provide chemical-specific information. Although there are a number of sites that provide MSDS information, Metzger's favorites are located on the University of Vermont's and the University of Kentucky's MSDS pages.

"Government sites are also invaluable," Metzger notes, adding that his own Web site includes links to some of the best, along with medical and health other organizations' sites.

Environmental litigator Kirk Marty of the Corporate Counsel Group in Kansasy City, Mo., says the Internet has not only been useful in environmental litigation, but environmental compliance work and proceedings with environmental agencies. In addition, Marty and his partners use the Internet to locate more information about parties either prior to, or in the early stages of litigation.

> **'Although most state environmental agencies now have Web sites, the utility of such sites varies greatly.'**
>
> -KIRK MARTY,
> Corporate Counsel Group

For example, a company's Web site might include information about the corporate structure of the entity or its corporate history. "This may be useful in locating other appropriate parties, such as parent or subsidiary corporations, and predecessor or successor corporations," Marty says. Some corporations will also post corporate environmental information, such as a company's environmental mission statement, or ISO 9000 or 14000 compliance information.

Government Web sites have proved particularly helpful when determining appropriate environmental standards, Marty offers. "The information available on the sites is often useful to determine whether a party is in compliance with environmental regulations," he says.

Specifically, the U.S. Environmental Protection Agency (EPA) has been particularly good about posting environmental information, including statutes, regulations and agency guidelines on its Web site. Also very useful are the sites for the Code of Federal Regulations and the Federal Register.

Although most state environmental agencies now have Web sites, the utility of such sites varies greatly, according to Marty. "A starting point that we have used for links to state environmental agencies is clay.net's Environmental Professionals' Homepage."

In addition, he says, a number of Web sites provide facility-specific environmental information useful in litigation. The Envirofacts Database includes information from the EPA about the status of regulated facilities, such as the amount and types of emission for a facility.

This Web site is useful for locating potential parties who may have contributed to environmental contamination, formulating discovery, and determining other avenues of research about a party, such as Freedom of Information Act requests. Other sites that provide similar information are the Right-to-Know Network and the Environmental Defense Fund's Scorecard site.

Finally it is often critical to understand the chemical properties of contaminants at issue in environmental litigation, Marty says. One excellent source for toxicity information is the Agency for Toxic Substances and Disease Registry. The site provides toxicity information on numerous contaminants, including information on the Federal Comprehensive Environmental Response Compensation and Liability Act sites where the contaminants are located.

For material safety data sheets, Mary often uses the Cornell University searchable MSDS database. The Environmental Defense Fund's Scorecard database also contains some useful chemical-specific information.

Securities

Boris Feldman, a partner at Wilson, Sonsini, Goodrich & Rosati in Palo Alto, Calif., recommends the Stanford Securities Class Action Clearinghouse as a key source for briefs and decisions regarding securities litigation.

He is also a frequent visitor to the Yahoo! List of Most Active Stocks. The site "helps keep track of which of my clients are having big stock swings." Feldman says.

For developments in the technology industry, Feldman says the best information source can be located by visiting the CNET New site. And for updates on breaking news in Silicon Valley, Feldman checks the San Jose Mercury News Center's Silicon Valley news site.

Wilson, Sonsini's site, he adds, is also an excellent resource, with articles written by the firm's attorneys on securities litigation.

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The Sites:

American Bankruptcy Institute headlines:
ww.abiworld.org/headlines/todayshead.html

Agency for Toxic Substances and Disease Registry:
www.atsdr.cdc.gov/atsdrhome.html

California Courts information:
www.courtinto.ca.gov/otherwebsites.htm

Central District of California U.S.B.C.:
www.cacb.uscourts.gov.com

CNET News:
www.news.com

Code of Federal Regulations:
www.access.gpo.gov/nara/cfr/index.html

Cornell University MSDS database:
http://msds.pdc.cornell.edu

Corporate Information:
www.corporateinformation.com

DepoConnect:
www.depoconnect.com

Envirofacts Database:
www.epa.gov/enviro/index_java.html

Environmental Defense Fund's Scorecard:
www.scorecard.org

Environmental Professionals' Homepage:
www.clay.net/ep.html

Environmental Protection Agency:
www.epa.gov

Federal Register:
www.gpo.gov/su_docs/aces/aces140.html

The Federal Web Locator:
www.cilp.org/FedAgency/fedwebloc.html

FreeEDGAR:
www.freeedgar.com

Hoover's Online:
http://hoovers.com

InterNet Bankruptcy Library:
www.bankrupt.com

KnoxX.com:
www.knowx.com

The Law Engine:
www.fastsearch.com/law/index.html

Law News Network:
www.lawnewsnetwork.com

Legislative Counsel of California:
www.leginfo.ca.gov

Martindale Hubbell's Lawyer Locator:
www.lawyers.com

Medscape:
http://.medscape.com

Mike Berger:
http://lawinfo.com/law/ca/mjberger/advice.html

National Guideline Clearinghouse:
www.guideline.gov

National Library of Medicine:
www.nlm.nih.gov

NewsTracker:
http://nt.excite.com

Northern District of Illinois U.S.B.C.:
www.ilnb.uscourts.gov

Northern Light:
www.northernlight.com

PubMed:
www.ncbi.nlm.nih.gov/PubMed

Raphel Metzger:
www.toxictorts.com

Right-to-Know Network:
www.rtk.net

San Jose Mercury News breaking news in Silicon Valley:
www.mercurycenter.com/svtech/news/breaking

Stanford Securities Class Action Clearinghouse:
http://securities.stanford.edu

Scientific American:
www.sciam.com

Ultimate White Pages:
www.theultimates.com/white

University of Kentucky:
www.chem.uky.edu/resources/msds.html

University of Vermont:
http://siri.uvm.edu/msds

U.S. 7th Circuit Court of Appeal:
www.kentlaw.edu/7circuit

U.S. State Department Web site:
http://travel.state.gov/judicial_assistance.html

West Legal Directory:
www.lawoffice.com

Wilson Sonsini securities articles:
www.wsgr.com/resource/sec_lit/recent/index.htm

Yahoo! List of Most Active Stocks:
http://finance.yahoo.com/20?u

1999 Top 50 Legal Research Web Sites

By Kenneth E. Johnson and Richard J. Krzminski

Searching the Web has become a standard practice in legal research.

There are a great many useful sites out there, and quite a few that often seem more trouble than they are worth. To separate the stars from the also-rans, here is *Law Office Computing's* 1999 list of the top 50 legal research Web sites.

These choices were based on several years of experience in a large law firm setting, covering almost all practice areas. We started by collecting sites that are favorites of both law librarians who are constantly bombarded by research questions, as well as those personally used and bookmarked by attorneys and paralegals doing their own research.

We also looked at sites based on their usability. A site might have a lot of information, but if it isn't organized effectively and is hard to navigate, it's not a good site. The sites listed here have a good layout, easy-to-use interfaces and load into your Web browser relatively quickly. We also explicitly ruled out any sites that required Java or JavaScript in order to use. While Java can bring much functionality to a Web site, many older browsers don't support Java—so those sites effectively keep people out. Any site using Java can also have a non-Java alternative, so a site that requires Java simply doesn't feel it necessary to make their information available to everyone. In research, that's not an acceptable attitude.

We also considered the type of site. The following sites fall into one of two categories. First, there are starting points. These "meta" sites provide lots of content with easy links to what you are looking for. In addition, you're likely to find some other useful information along the way. Perhaps you don't need it for this client, but may for the next one. Second, we included specialty sites—sites for specific practice areas, and sites that have good information for that particular field. In any good researcher's bookmark list, you're going to find a healthy mix of both. We tried to provide that mix here.

Finally, in coming up with the Top 50 list, some useful sites that weren't specifically legal research sites were omitted. This was particularly true with business news sites, which we didn't include even though they are often common stops for researchers. We'd like to give honorable mentions to Reuters (**www.reuters.com**) and InfoBeat (**www.infobeat.com)**.

Now, log on and avoid those sites your Mother warned you about!

Well, at least wait until your case work is done.

Meta Index Sites

These sites are starting points for legal research because they offer organized links to other legal resources on the Web. If you are not sure where to begin, try one of these sites.

CEO Express
www.ceoexpress.com

CEO Express bills itself as "designed by a busy executive for busy executives." It contains links to well over 100 news, business, financial, technology, governmental, legislative and legal links. The number of links on the home page can be intimidating, but you don't have to drill down to sub-pages to find the link you want.

Legal Information Institute
www.law.cornell.edu

Cornell Law School's Legal Information Institute contains recent and historic Supreme Court decisions, hypertext versions of the U.S. Code, U.S. Constitution, Code of Federal Regulations, Federal Rules of Evidence and Civil Procedures. You'll also find on this site current news information, newsworthy opinions, the Cornell Law Review, the American Legal Ethic Library and statutes organized by state or topic.

FindLaw
www.findlaw.com

Probably the premier legal search engine/directory, FindLaw provides a wealth of links to legal subjects, law firms, continuing legal education, legal organizations, consultants and experts, law cases and codes, federal, state and international law resources legal practice materials, and legal news. You can also search the Web with FindLaw's companion, Law Crawler.

Internet Legal Research Guide
www.ilrg.com

An index of more than 3,000 legal-related international Web sites, the Internet Legal Research Guide (ILRG) bills itself as "a comprehensive resource of the information available on the Internet concerning law

and the legal profession." An annotated index on the home page includes categories for academia, the legal profession and legal research. ILRG developed LawRunner (**www.lawrunner.com**), a legal research tool that works with the Alta Vista search engine.

'Lectric Law Library
www.lectlaw.com

An eclectic site which offers a great deal of legal information, all with an irreverent wit. The Rotunda offers access to forms and some of the best legal humor on the Web, with sections for legal professionals, law students, businesses and lay persons. The Reference Room contains links to a variety of legal topic areas.

Law Library

Resource Xchange (LLRX)
www.llrx.com

This is one of the best Web resources for law librarians and those responsible for legal research. Maintained by research wizards Sabrina Pacifici and Cindy Chick, LLRX includes features articles and regular columns updated twice a month, so there is always new and updated information available. The "LRXinks" page provides links to a variety of law library and research resources, including federal and state court rules.

Meta-Index for
U.S. Legal Research
http://gsulaw.gsu.edu/metaindex

From George State University College of Law, this site lets you search a variety of U.S. legal indexes on the Web. Included are links to Supreme Court opinions, federal circuit opinions, U.S. Code, Thomas Legislative Information, Code of Federal Regulations, FindLaw, Law Crawler and West's Legal Directory.

World Wide Web

Virtual Library: Law
www.law.indiana.edu/law/v-lib/lawindex.html

Indiana University College of Law—Bloomington hosts the World Wide Web Virtual Library, a collection of subject-related Web sites. Links are categorized by organization type (e.g., law schools, law firms, U. S. government), by topic (e.g., constitutional law, taxation), and "search tools and other comprehensive sites."

Hieros Gamos
www.hg.org

Hieros Gamos includes a variety of links to legal and governmental materials, including practice area sources, as well as international and foreign governments. You can also search both the Hieros Gamos site and multiple legal government sites at the same time.

The Law Engine
www.fastsearch.com/law/index.html

Well over 100 legal links, categorized and displayed on a single page. Each link is organized under a particular category, such as federal courts, online CLE and legal employment.

Practice Area Resources

From antitrust to tax, the Internet offers many excellent practice-specific sites. Here's our list of the best in several categories.

Antitrust

Competition Online

An Irish site, Competition Online provides links to worldwide competition, antitrust and regulatory sites. It is not updated as frequently as some other sites on this list, but is a great starting point for antitrust law information.

Ethics
www.legalethics.com

One of the best resources for ethical issues raised by the Internet and Internet technology, including state-specific requirements. Included are articles, ethical resources on the Web, a discussion forum on the ethical issues of Internet use by legal professionals and a search engine.

Intellectual Property

Intellectual Property Law
www.intelproplaw.com

Information about intellectual property law, including copyright, patent and trademark areas on their own pages. Also included are news items, discussion forums and links to other IP Web resources and online publications.

U.S. Patent and Trademark Office
www.uspto.gov

The official source for patent and trademark information. A full-text patent database has recently been added, updated with patents issued since Jan. 1, 1976. Images are expected to be added to the database by March 1999.

Medical

Health Care Financing Administration
www.hcfa.gov

Home of the Health Care Financing Administration, which administers Medicare, Medicaid and Child Health insurance. The site's information clearinghouse includes forms, laws and regulations, publications, and statistics.

Health Hippo
http://hippo.findlaw.com

Hosted by FindLaw, Health Hippo is a collection of policy and regulatory materials related to health care.

Securities

Securities Lawyer's Deskbook
www.law.us.edu/CCL/sldoc.html

Published by the Center for Corporate Law, this site contains information (including rules and forms) on the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, as well as regulations S-K, S-B,S-X and S-T.

Tax

Tax Links
www.taxlinks.com/main.htm

Tax Links includes IRS rulings, forms and procedures, as well as federal tax links and tax organizations. It also has the most organized and thorough state tax links on the Web.

Tax Resources
www.biz.uiowa.edu/faculty/adunbar/acct_tax.thml

Tax resources from this University of Iowa College of Business Administration Web site include links to federal tax information, court decisions, IRS documents and information, tax rates, state and foreign taxes, as well as links to academic and professional tax associations, certified public accountancy firms, and economic data.

General Legal Sites

These sites offer comprehensive overviews of the practice of law, a multitude of legal topics and available print resources.

American Bar Association
www.abanet.org

Information from the American Bar Association (ABA), for members and non-members. The site includes home pages for ABA sections, divisions and forums, which provide current information on various areas of law.

IndexMaster
www.indexmaster.com

IndexMaster provides indices and tables of contents from a large number of legal treatises, from both small and large publishers. You can search by keyword, topic, title, author or publisher. Participating publishers include Matthew Bender, PLI, Aspen Law and Business, Lexis Law Publishing and the New York State Bar Association. You can also order copies of the treatises directly from the publishers.

Federal Government

The following Web sites help lawyers go directly to the source.

U.S. Federal Government Agencies Directory
www.lib.lsu.edu/gov/fedgov.html

From Louisiana State University, this site boasts hundreds of government links organized into executive, judicial, legislative, independent, boards/commissions/committees and quasi-official categories.

FedStats
www.fedstats.gov

Government statistical data from the Federal Interagency Council on Statistical Policy. Includes links to Census Bureau, Bureau of Labor Statistics and Social Security Administration information.

Thomas—U.S. Congress
On the Internet
http://thomas.loc.gov/home/thomas2.html

Search for legislative action by bill number or word/phrase, and view the schedule of the House for this week. Also review legislation, the Congressional Record, and information on current and past congresses.

Government Printing Office
www.gpo.gov

Source of printed and electronic publications of the federal government, the GPO provides access to many federal databases, such as The Federal Register, Code of Federal Regulations and legislative documents.

Federal Government
Resources on the Web
www.lib.umich.edu/libhom/Documents.center/federal.html

The University of Michigan Documents Center provides links to federal government resources, including

agency directories, bibliographies, links and directories of all three branches of the U.S. government, executive orders, GAO and historic documents.

State and Local Governments

State and Local Government on the Net
www.piperinfo.com/state/states.html

Links to specific states and multi-state sites, federal resources and national organizations.

American Law Sources On-Line (Also!)
www.lawsource.com/also/

Also! provides links to U.S. states and territories, Canadian provinces and Mexican states, as well as federal sites in each of the three countries.

Municipal Codes Online
www.spl.org/govpubs/municode.html

From the Seattle Public Library, links to municipal codes in U.S. cities.

Foreign and International Governments

Essential sites for when your most important client gets thrown into that Turkish jail—again!

Official Sites of Foreign Governments
www.mel.lib.mi.us/government/GOV-international-sites.html

Links to the official Web sites of foreign governments, from the Michigan Electronic Library.

The United Nations
www.un.org

Official site of the United Nations, including U.N. documents and databases, and U.N. member sites. Includes the United Nations Treaty Collection in image format.

Electronic Reference Desk: Other Countries
www.law.emory.edu/LAW/refdesk/country/foreign

Emory Law Library's links to foreign government and related sites, listed by country. Includes parliaments, ministries, offices, embassies and law courts.

World Factbook
www.odci.gov/cia/publications/factbook

The Word Factbook (currently the 1998 annual edition) from the Central Intelligence Agency. Provides country profiles including geography, people, government, economy and whether the country is involved in any international disputes.

Free Company Research Sites

Doing due diligence? These sites provide the inside scoop on companies.

U.S. Companies/Mutual Funds
www.wsrn.com/home/companyResearch.html

Company and mutual fund research, SEC documents, home pages, news, charts and statistical analysis from Wall Street Research Net. Great "one-stop" shopping for company information; however; some information (such as financial spreadsheets and research reports) requires a fee.

Companies Online
www.companiesonline.com

From Dun & Bradstreet and Lycos, search for company information by name, industry, ticker symbol or URL. You can also browse by industry.

Sedar
www.sedar.com/homepag.htm

Sedar; the System for Electronic Document Analysis and Retrieval, provides access to securities information for Canadian public companies and mutual fund groups. Included are new filings, company profiles, links to regulatory and stock exchange sites and a searchable database.

FreeEdgar
www.freedgar.com

From Partes Corporation, FreeEdgar provides access to Edgar data, e-mail alerts of targeted companies, and the ability to download financial information in an Excel spreadsheet. Exhibits are listed separately for convenience.

U.S. Securities and Exchange Commission
www.sec.gov

The "mother ship" of securities information, the SEC site includes access to the Edgar database.

Attorney Directories

Looking for a lawyer? Start with one of these two leading sites.

Martindale-Hubbell Lawyer Locator

Find biographies and practice areas of lawyers and law firms using the Lawyer Locator.

West Legal Directory
www.wld.com

Find lawyers and law firms. A new feature is a lawyer services guide to companies providing goods and services to the legal community. Contains some lawyers not found in Martindale-Hubbell, particularly those in private practice; however, the information may be less reliable, since lawyers submit their own profiles.

News and Media

AJR NewsLinkhttp
http://ajr.newslink.org

Articles and links to over 9,000 newspapers, magazines, broadcasters and news services.

NewsDirectory.Com
www.ecola.com

Over 7,000 links to national and foreign newspapers and magazines, and to local, national and cable TV broadcasters.

Fee-based Company Research Sites

The best things in life are not always free. They can be highly efficient, however. Pay the price and let these sites find it for you.

LivEdgar Web
http://login.gsioonline.com/webedgar.htm

Searchable database of Edgar filings. This site can be economical if you need a large number of documents. Plus, exhibits are listed separately, so they are easier to access.

Hoover's Online
www.hoovers.com

In-depth company and financial profiles, IPO information, and a search engine to find companies by location, industry, sales or company type. An excellent source of information on private companies.

Dun & Bradstreet
www.dnb.com

Online access to the D&B database of company information. The premier site for company profiles, both public and private.

Courts

Before making your next appearance, consult these Web sites to get critical information, such as the right address of the court.

Courts.Net
www.courts.net

Directory listings for federal and state courts, as well as links to judicial opinions and other court-related sites.

Federal-State Court Directory, 1999
www.courts.com/directory.html

Detailed information on federal and state courts, including judge and clerk names and contact information.

Fee-based Research Sites

It goes without saying that Lexis-Nexis and Westlaw are standard research tools for the lawyer; both are now available through the Internet.

Westlaw.com
www.westlaw.com

Lexis-Nexis Xchang
www.lexis.com/xchang

Law Review

Looking for a legal article? Browse this virtual magazine newsstand to find the right publication.

Legal Journals on the Web
www.usc.edu/dept/law-lib/legal/journals.html

From the USC Law School and Law Library, this site includes extensive links to general and subject-specific law reviews, commercial and foreign journals, and computing periodicals on the Web.

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Who Is the Client of the Government Lawyer?

By Jeffrey Rosenthal

The question for the government lawyer performing routine functions—providing research, litigation support, legislative or regulatory initiatives—is to whom responsibility and allegiance is owed. Unlike the lawyer engaged in private practice, whose client is typically clear, the government lawyer does not *necessarily* represent a single client and, as a result, the client of the government attorney is not so easily identified. Dilemmas concerning who the government lawyer is representing and potential conflicts of interest[1] will arise for the government attorney for which no parallels or comparisons with the private attorney can be drawn.[2] Emphasis is placed on the word "necessarily," since, as this discussion reveals, the government lawyer may arguably owe ethical responsibilities to a number of "clients," in the same or related matters, but the lawyer engaged in private practice generally owes his or her allegiance to a single client in a matter. The purpose of this article is, first, to identify a number of possible clients of the government lawyer and, second, based on ethical considerations applicable to all attorneys and common sense, determine who is the true client and to whom the concomitant responsibilities are owed.[3]

The Government Lawyer

The lawyer employed by a government agency[4] does not undertake his or her work with a specific client's interests in mind in the same sense as the private practitioner does. The government lawyer, generally speaking, is assigned, for example, to draft legislative initiatives, address regulatory issues, or provide litigation support or general legal advice for matters pertinent to the agency. The private attorney is employed by a law firm, which is retained by a client to represent his or her legal interests; the government attorney is employed by the agency, which has as its purpose the implementation of an enabling statute enacted by Congress or a state or local legislature. The government agency must implement the enabling statute in a way that fulfills the policy goals of the executive branch, for example, president, governor, mayor and so on, of which the agency is a part.[5]

An enabling statute such as the New York Environmental Conservation Law provides the general purposes for which the New York Department of Environmental Conservation (DEC) is established and the general policies to be implemented.[6] Generally speaking, the responsibility of the DEC, as set forth in statute enacted by the legislative body, is to promote the public health and welfare by the protection and most efficient and effective use of the state's natural resources. The DEC lawyer, in commencing his or her routine duties, begins to recognize that differing interests can be advocated and goals achieved in fulfilling the legislative mandate, depending upon who is deemed to be the client. Initially, the lawyer must discern what the general requirements in the various statutory provisions are. Specific implementation of those provisions must, however, be accomplished amidst various, often competing, interests. For example, environmental or health advocacy groups, businesses, industries, developers, local governments or municipalities, and neighborhood associations will undoubtedly have different views as to how the overall goals prescribed in statute are to be implemented. Individual legislators or legislative committees will maintain views as to how the statute is to be implemented. The agency head, counsel and staff members may have differing views or interpretations of the statutory mandates and the best means of implementing those requirements, and they may have differing views or interpretations amongst themselves. The chief elected official, the governor, also may have his or her own goals and policy considerations in implementing statutory requirements. Furthermore, judicial opinions may exist that interpret and otherwise give meaning to the statutory mandates. The underlying ethical considerations to preserve, advocate and advance the interests of the "client" remain constant. The specific interpretation given to the enabling statute, as well as the approach, direction and advice of the lawyer will depend on whose interests are to be preserved, advocated and advanced.

Identifying Potential "Clients" Hypothetically

It has been stated that the dilemma in identifying the client of the government lawyer rests in the very dynamics and tension amongst the three branches of government itself and the role that the lawyer plays within such framework.[7] One writer offers a hypothetical wherein the lawyer is assigned to work on a project for which the goal is antithetical to what the lawyer perceives to be in the pubic interest. Additionally, the project may violate a decision of the Supreme Court involving a case that concerned issues similar to those that the lawyer faces in the assignment, or it may not be authorized by the enabling statute enacted by Congress. The author advances two arguments to be made in articulating the role and responsibility of the government lawyer. First, he recognizes but rejects the argument that a government lawyer, as an advocate of a government agency, has a special responsibility to advance the "public interest." The article points out the impossibility of concluding that the government

lawyer represents the public interest as "[i]t is commonplace that there are as many ideas of the "public interest" as there are people who think about the subject."[8] The article continues:

> If attorneys could freely sabotage the actions of their agencies out of a subjective sense of the public interest, the result would be a disorganized, inefficient bureaucracy, and a public distrustful of its own government. More fundamentally, the idea that government attorneys serve some higher purpose fails to place the attorney within a structure of democratic government. Al-though the public interest as a rarified concept may not be ascertainable, the Constitution establishes procedures for approximating that ideal through election, appointment, confirmation, and legislation. Nothing systematic empowers lawyers to substitute their individual conceptions of the good for the priorities and objectives established through these governmental processes."[9]

The public interest in this argument is cast in subjective terms of what the lawyer himself or herself has identified to be in the public interest, not what might be considered to be the public interest as established by one or more of the branches of government.

Addressing this latter notion of the public interest the author raises a second argument that the agency lawyer works for the government as a whole, a notion that "assumes that the public interest is determined through the constitutional processes of government."[10] In the hypothetical the dilemma is that, by undertaking efforts to implement the program, the lawyer may not be fulfilling his or her responsibility to the government as a whole since, to do so, might violate established judicial decisions or exceed statutory authorization. He concludes that the idea that the government lawyer represents the government as a whole "fails to situate the attorney within a system of separation of powers and checks and balances."[11] In making such a conclusion, however, the article does not examine how the processes of government within each of the branches may be viewed as determinative of the public interest.

The Public as the Client

In attempting to identify who is the client, it is helpful to explore some postulates that might be advanced that the public interest is determined by such branches of government, and in exercising professional judgment the lawyer's responsibility is to follow such public interest. An extreme argument might be made that, since the enabling statute has been enacted by the duly elected legislators, the "public interest" is expressed in the statute as the embodiment of universally held beliefs or goals. Therefore, the role of the lawyer is to interpret the statute and provide legal advice that best fulfills the public interest as expressed in such statute. However, such an approach ignores several things. First, an enabling statute does not reflect the views of every citizen, since legislation results not from a universally agreed-upon good or public interest, but from the personal ideals or agendas of the governor and legislators and their constituents, lobbying efforts of different interest groups, negotiation and compromise. Legislation is also driven, in large measure, by budget and political considerations. A legislator may support a proposed piece of legislation, not because he or she necessarily wants to advance the principles enunciated in such legislation, but rather because it serves his or her purpose of having a different, unrelated piece of legislation supported by another legislator. Further, a statute most often establishes only broad policies, not the specific details to implement those policies. While everyone can agree, for example, that having clean water or clean air are in the public interest, specific requirements and methods to achieve these goals may not be so easily agreed upon. The statute authorizes an agency within the executive branch of government to interpret and implement the policies that have been articulated only in general terms. Thus, a more logical interpretation is that the public interest as expressed in a statute, such as the New York Environmental Conservation Law, is the result of the legislative process, not the expression of universally agreed-upon environmental goals or desired outcomes.

Whether the public interest established through legislation is considered to be the embodiment of universal agreement or the result of the legislative process, to conclude that the lawyer is bound to represent such public interest would juxtapose the lawyer between this "public interest" client and the agency heads or supervisors by whom the lawyer was hired and to whom the lawyer is immediately responsible. Their interpretation of the "public interest" may differ from the meaning that the lawyer gives to the statute and, moreover, the views of the agency head, supervisors, or other policy makers of the agency also may conflict with one another. The view that the government lawyer is duty bound to advocate only such interest presupposes that the lawyer possesses the ability to interpret the statute consistently with and on behalf of such public interest on every occasion, and do so for every issue that may arise. This also assumes that the lawyer is ethically bound to advocate for what he or she perceives as the public interest, not only ignoring the wishes or direction of supervisors or other agency superiors who have been appointed to determine policy issues, but also sacrificing the right of the client to be independently represented by agency counsel.[12]

It also might be argued that the lawyer is obliged to follow judicial interpretations and other legal precedent of

an enabling statute. If a particular statute is the expression of public interest, then a court decision that interprets the meaning of such statute could be considered a further expression of public interest. Such an approach assumes that the court decision provides additional guidance regarding the meaning of the statute and, thus, additional guidance to the lawyer in advising the agency head or other agency policy makers about the agency's statutory obligation. However, this interpretation of the lawyer's responsibility is too simplistic and assumes, as in the case of determining a statute's meaning, that every lawyer will interpret court precedents the same.

Comparing the agency lawyer's role to that of the private lawyer further demonstrates the weakness of such an argument. Should the private lawyer be guided blindly by court decisions, the interests of the individual client would undoubtedly take a back seat to the "objective" interpretation of the court precedent. It would be unnecessary for the private lawyer to thoroughly scrutinize and distinguish case law from the facts and circumstances underlying his or her client's case. The lawyer's role would necessarily be relegated to reading relevant case law and advising the client what the outcome of his or her case would be. Although the lawyer should bring to bear his or her professional judgment what the probable outcome will be based on judicial precedent, the lawyer, nevertheless, is bound to proceed in accordance with the client's desires.[13] Otherwise, the ethical responsibility to advocate the client's case "zealously within the bounds of the law" would surely be a rather hollow obligation.[14]

Ethical Consideration 7-2 of the Code recognizes that statutes and court decisions are not definitive. "The limits and meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes."[15] Both legislative enactments and judicial opinions are only expressions of an ever-changing public interest. More often, court decisions turn on a particular set of facts, rather than larger fundamental principles. Just as the "public interest" cannot be said to be expressed absolutely in any statute, it cannot be concluded—for purposes of identifying the government lawyer's client—that court decisions provide definitive statements of what constitutes the public interest, never subject to different interpretation or legitimate challenge. The frailty in such an argument is also demonstrated by the fact that legislators often disagree with a court decision and pass or amend statutes to override a judicial decision. Furthermore, Ethical Consideration 7-22 of the Code recognizes that a lawyer has a responsibility to challenge judicial interpretations when appropriate for the proper representation of a client. "Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal."[16] If the government lawyer were to base his or her advice on some subjective sense of the public interest, as somehow expressed by the courts, the ethical obligation to challenge judicial opinions when necessary to advance the client's interests would be undermined.

Bearing in mind that the agency lawyer does not advocate the legislators' interests in formulating laws nor assist the court in deciding the issues surrounding those laws, neither the legislative nor judicial branch of government can be considered the "client" of the government agency lawyer. Therefore, to the extent that the so-called "public interest" has been articulated either by the legislators' enactment of a statute or the court's interpretation of that statute, such "public interest" cannot be said to be the government lawyer's client.

Identifying the client of the government lawyer remains difficult when examined in the context of the executive branch of government. Although there is a paucity of definitive statutory authority or case law that articulates who is the client of the government lawyer,[17] the application of general tenets and ethical considerations of a lawyer's responsibility to his or her client provides guidance about who the client is. It is first helpful to recognize certain facts surrounding the government lawyer's employment, as well as the dynamics in the operations of a government agency itself. Although an agency is part of the executive branch of government, day-to-day operations of the agency are not overseen or controlled by the governor; further, the agency lawyer is rarely hired directly by the chief executive, unless perhaps the lawyer is counsel to the governor.[18] More often, the lawyer is employed by a particular agency, one of many constituting the executive branch, which is charged with the responsibility of fulfilling the mandates of an enabling authorization. The enabling authorization may arise in a statute enacted by the state legislature, or by executive order of the governor. If the authority is provided in statute, the purposes may be set forth in provisions of the statute; if such authority emanates from an executive order, the preamble clauses or paragraphs will identify the purposes and goals for which the agency has been established.[19] The role of the lawyer is to advise agency personnel regarding how to properly implement such enabling authorization.

Even if it is recognized that the client is limited to the executive branch of government, the issue of advising the client remain complex. The considerations and the advice depend on whether the agency lawyer's client is the governor, that is, the chief officer of the executive branch, an individual or individuals within the agency that employs the lawyer, or the specific agency itself.

Arguably the governor is the ultimate client of the government agency lawyer. He or she, as the chief elected official, speaks for the government on behalf of all citizens and appoints the various heads of the executive branch

agencies who, in turn, directly or through designees of the agency, hires the agency lawyer. Thus, all government employees owe their ultimate allegiance to the governor. For the government lawyer this would mean that the governor is the client to whom ethical responsibilities are owed. Such an argument, however, ignores several facts. Most government lawyers are hired by the separate agency head and undertake routine responsibilities relative to the particular agency, not the governor. Agency heads, usually appointed by the governor, are charged with implementing, consistent with the enabling legislation, the policy goals of the governor. In the example of the DEC, the agency undertakes the responsibility of implementing and enforcing the Environmental Conservation Law, mindful of the environmental policies or goals enunciated by the governor. The governor has his or her own legal staff from whom advice is sought. If every government lawyer's client is the chief elected officer there would be no need for each agency to have counsel separate from the governor's staff counsel. Giving advice on the proper implementation of a statute would be a simple task of ascertaining what the governor's desires or interpretation are and proceeding accordingly. This view, as in the previous examples regarding the legislative or judicial branches, would place the government lawyer in a position of having to maintain two loyalties—one to the governor and another to the agency head or other superior in the agency who hired the lawyer. Notwithstanding that the agency heads are usually appointed by the governor and thereby expected to have similar policy goals, there may be situations when the governor and a particular agency head do, in fact, have differing opinions respecting the manner of implementing or enforcing a particular statute. In such a case, if the government agency lawyer bears allegiance to the governor, the interests of the agency head—the lawyer's immediate supervisor—would be sacrificed.[20] Recognizing that a government lawyer does not represent the legislators or the courts, nor the governor, the task of identifying the client of the agency lawyer is narrowed.

However, questions remain as to whether the client is the "agency" as an entity itself or individuals within the agency. The examination must begin by understanding the general operations of a state agency. The overall agency policy goals will be articulated by the agency director, commissioner or similarly titled agency head.[21] A larger agency may have divisions or bureaus within the agency which are charged with the responsibility of implementing specific aspects of an enabling authorization and headed by their own bureau or division chief. Again, in the example of DEC, separate divisions are charged with implementing and enforcing air quality standards, water quality standards and the like. While the division or bureau chiefs may have a role in determining policy for the particular division or bureau, those policies must yield to the goals as determined for such division or bureau by the agency head, since he or she is ultimately responsible for the conduct of the agency. Since division or bureau chiefs are ultimately accountable to the agency head it would be unlikely that they would implement or enforce provisions of an enabling authorization in a manner antithetical to the desires of such agency head. If such a circumstance should arise, the agency lawyer should adhere to the wishes of the agency head, not the separate division or bureau chief.

Federal Ethical Consideration 5-1 of Canon 5 of the American Bar Association Code of Professional Responsibility as adopted by the Federal Bar Association in 1973 provides guidance that the government lawyer represents the agency by whom he or she is employed:

> The immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency. He is required to exercise independent professional judgment which transcends his personal interests, giving consideration, however, to the reasoned views of others engaged with him in the conduct of the business of government.

The federal ethical consideration does not make clear whether the language "department or agency" is meant to identify the same governmental organization with different commonly used names or suggests a responsibility of the lawyer to a department—division or bureau—within an agency, when employed within such department. Practically speaking, both "department or agency" should mean the same larger governmental organization, for the reasons outlined above. However, if responsibility to a department within an agency is intended, the ethical consideration fails to address the issue, mentioned above, of the lawyer's obligation when there is a conflict between the department head and the agency head. And if this is the intended interpretation, the lawyer could be forced to advocate interests which would undermine the interests of the agency, as determined by the agency head. It is submitted that, in such a case, the lawyer has an obligation to express to the department chief his or her conclusion that the department chief's desires are not consistent with those held by the agency head and discourage the department chief from proceeding in such manner. In the event that the department chief is insistent that the lawyer proceed, he or she must advise that the intended course of action must be disclosed to and discussed with the agency head. While such approach would undoubtedly be difficult or uncomfortable, the lawyer's obligation to the agency, through the agency head, must remain paramount.

Additionally, the federal ethical consideration, although instructive, may be of limited assistance, as it attempts to superimpose an obligation on , in fact the ability, of the government lawyer to exercise independent judgment while being ever keenly aware of the "public interest function" of the agency. To the extent that its guidance is to suggest that, for example, the United States Environmental Protection Agency's (EPA) public interest function is to implement environmental legislation—however it may be interpreted—then it provides direction that the agency lawyer's responsibility is limited to matters concerning the EPA, but not other agencies. If its meaning is to suggest a broader obligation to a universal "public interest" then, as previously discussed, its guidance is less helpful.

The Federal Bar Association has stated that the federal government lawyer's client "is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business."[22] Opinion 73-1 more clearly provides the proper approach for the government agency lawyer. It identifies the agency as the overall client and recognizes the fluidity of individuals who make up an agency and, therefore, the changing interests of the agency as established by such individuals. In recognizing that an agency can only speak through its administrators, that is, those authorized to make policy for the agency, this approach more closely approximates the role of the private lawyer who must advocate the interests of the individual who hires the lawyer to do so. When the private practitioner represents a client there is no infusion of some greater obligation to which the lawyer owes his or her allegiance. Opinion 73-1 does not attempt to impose such a responsibility. Although the federal ethical consideration and Opinion 73-1 are applicable to the federal government lawyer, parallels can be drawn for the government lawyer of a state agency.

At least one state has adopted ethical rules applicable to government lawyers.[23] The comments to the Hawaii Code recognize that the government lawyer faces issues in identifying his or her client, not encountered by the private lawyer: ". . . defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole." However laudable this effort to clarify the ethical obligation owed, the guidance may be of limited utility. First, the comment assumes that it is possible to articulate the interests of the agency entity independently of the individuals who make up the agency. Second, although the comment does remove the notion that the agency lawyer represents a "public interest" superior to any other consideration, it nevertheless clouds the ability to identify the client by casting the ethical responsibility owed in terms of an overall government good, as amorphous a concept as the public interest.[24] If, however, the "government as a whole" can be interpreted to place the lawyer's ethical obligation in the context of the tension between the branches of government, with the recognition that it is through this tension that the democratic process is best served, then the effort to characterize the lawyer's ethical responsibility is of some value.[25] That is, in advocating exclusively on behalf of the agency, with the recognition that the legislature will advocate for its own interests and the court system will independently exercise its role, the fundamental operation of the checks and balances in democratic government will be advanced.[26]

A government agency also has been likened to that of a corporation. Similar to the view that the corporate lawyer represents the corporate entity, but not the officers, directors or shareholders, one court has concluded that the government lawyer represents the agency by which he or she is employed and not the agency head or other employees.[27] The majority of case law concerning the issue of the corporate lawyer's client has generally been addressed to the issue of the attorney-client privilege pertaining to communications between the corporate lawyer and certain individuals within the corporation.[28] And the issue has arisen generally when an individual who has conferred with the corporate lawyer engages in conduct antithetical to the interests of the corporation. The question becomes whether the lawyer is bound to honor the attorney-client privilege of confidentiality of the information received from the client. It has been held that when the individual's conduct is at odds with the lawful corporate interests, the attorney-client relationship does not exist and the lawyer is not bound to maintain confidentiality; in fact, he or she is bound to disclose the information so as to preserve and protect the corporate interests. The conclusions concerning the representation of the corporate entity and not the individuals within the entity parallel the conclusion that the government lawyer represents the agency by whom he or she is employed, but not the individuals within the agency. Citing an opinion of the New York State Bar Association Committee on Professional Ethics, an article by Josephson and Pearce provides support to the conclusion that the agency by whom the government lawyer is employed is owed the ultimate ethical obligation, and not a larger concern such as the "government" or "public interest."[29] Although specifically concerned with issues regarding governmental lawyer conflicts and questions of dual representation when conflicts arise between the individual clients, the article provides:

> When a governmental body is organized into a number of separate departments or agencies, such department or agency, and not the parent governmental unit, should be treated as the client for purposes of the rule which forbids the concurrent

> representation of one client against another.

While the private lawyer's ultimate ethical responsibility is to safeguard the interests of the corporate entity,[30] the private lawyer also can be representing individuals who comprise the corporation, when and as long as those interests are not in conflict with one another. The ABA Model Rules of Professional Conduct recognize this possible duality of representation.[31] The comment to Rule 1.13 makes its provisions applicable to the government lawyer. Such "duality" of representation is consistent with the discussion herein of the role that the government lawyer fulfills in advocating the interests of the agency, as spoken for through its agency head and other agency policy makers.

The conclusion to be drawn is that the government lawyer is ethically bound to represent the agency by whom he or she is employed, recognizing that the agency speaks through—and its specific interests are formulated by—the individuals within the agency who are authorized to do so.

Particular policies or goals in the implementation of the agency's enabling authority will necessarily be the expression of and articulated by these individuals. As long as the expressions, acts, or desires are not clearly unlawful, the government lawyer has the obligation, both ethically and practically, to advance those interests. Similar to the role of the private lawyer, the government lawyer may not second-guess the feasibility or viability of advancing arguments in support of those interests to the ultimate detriment of arguing in favor of them, nor should the government lawyer substitute his or her personal judgment whether such interest should be advanced.[32] The government lawyer must exercise professional judgement in pointing out the strengths and weaknesses in pursuing the agency head's desired course of action. However, as in the case of the private lawyer, the government lawyer is ethically bound to pursue the course chosen by the agency head. However, the government lawyer must carefully scrutinize the position or argument to be advanced and discern by whom such position or argument is being proffered. The lawyer must not advance a position being articulated by an agency staff member who is not in the role of making policy or setting agency goals, unless it is evident that the position or argument is consistent with and will advance the interests of the agency as articulated by those in the position of making policy or defining agency goals. Further, the government lawyer still must be mindful that he or she, as a public servant, is faced with obligations that the private lawyer is not. The government lawyer carries the obligation to fulfill his or her responsibilities to the agency in a manner which is not clearly inconsistent with lawful requirements. Federal Bar Association Ethics Opinion 73-1 provides:

> [T]he government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client's personal or private interest. . . . [W]e do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the government organization of which he is a part.[33]

In this context, the responsibility to the public interest is parallel to the ethical responsibility of a public prosecutor, not simply to seek a conviction, but rather to see that justice is served.[34] Similarly, such responsibility mirrors the obligation of all lawyers to strive to maintain the integrity of the legal profession and improve the legal system.[35] Additionally, with the conclusion that the government lawyer represents the agency by which he or she is employed, the arguments that the lawyer is bound to advance the public interest or the government as a whole also can more reasonably be understood. The public interest is that which results from separation of powers amongst the legislature, the courts and the executive branch. The government lawyer promotes the public interest when he or she advocates the agency client's interests; by doing so, the proper functioning of the government as a whole is fulfilled.

Conclusion

In the last analysis, the Code of Professional Responsibility governs the conduct of all lawyers in New York, without distinction concerning the particular field or discipline in which the lawyer practices. The cornerstone of the legal profession is the ethical responsibility owed to clients and the profession itself. The Code prescribes the minimum ethical standards by which all lawyers must abide. While some of the ethical considerations or disciplinary rules to the canons may not be operational in the government context, this is due to the nature of government lawyer employment, rather than an exception to their facial application. To the extent the lawyer's activities are within the scope of a specific ethical consideration or disciplinary rule, they govern such activities. No single commentary, however, can provide answers to every ethical situation faced by the government lawyer, (or for that

matter, any lawyer) and none is intended. Rather, the government lawyer must resolve difficult ethical dilemmas by examining the Code of Professional Responsibility, utilizing professional skills and experience, and applying common sense to the issues presented. The agency lawyer has no independent responsibility to the public interest or the government as a whole. Those interests are served when the lawyer, adhering to ethical requirements, advocates for the agency, just as any other lawyer advocates for his or her client.

Endnotes

1. This chapter discusses issues regarding the identification of the government attorney's client itself and not issues pertaining to conflicts of interest that can arise for government lawyers who may potentially have to advocate conflicting interests of different government clients at the same time. For a discussion of such topic see, for example, William Josephson and Russell Pearce, To *Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients are in Conflict?*, 29 How. L. J. 539 (1986).
2. See, e.g., Catherine J., Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. Cal L. Rev. 951-967 (1991).
3. This article does not address identification of the government lawyer based on issues of confidentiality. That topic is the subject of another article in this issue.
4. The term "agency" will be used throughout to mean any governmental agency, unit, authority, department, bureau, division or other body of the executive branch of the state, federal or local municipal government.
5. This chapter specifically addresses the role of a government attorney employed by an agency within the executive branch of government; parallels to attorneys employed within the judicial or legislative branches of government are indicated where appropriate.
6. N. Y. Envtl. Conserv. Law §§ 1-0101, 3-0101 (McKinney's 1984).
7. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. Chi. L. Rev. 1293 (1987).
8. See *id.* at 1294, 1295.
9. *Id*. at 1295.
10. *Id.*
11. *Id*. at 1296.
12. A.B.A. Code of Professional Responsibility, Canon 1, EC 1-1(1969) as adopted by N.Y. State Bar Association, 1/1/1970 (hereinafter referred to as the "Code," "Canon" or "Ethical Consideration," respectively).
13. Code, Canon 7, Ethical Consideration 7-5.
14. Code, Canon 7.
15. Code, Canon 7, Ethical Consideration 7-2.
16. Code, Canon 7, Ethical Consideration 7-22.
17. *See, e.g.*, Hi. Prof. Cond. Rule 1.13 *et. seq.* (1996), (hereinafter referred to as the "Hawaii Code") discussed below, which attempts to identify the government lawyer's client and define the ethical responsibility owed.
18. This discussion assumes that the lawyer is employed by an agency within the executive branch of government, but not the executive chamber itself. However, the conclusions drawn herein are equally applicable to government lawyers employed within the executive chamber, in which case the governor should be considered the "agency head."
19. *See, e.g. supra* note 3; N.Y. Exec. Order No. 20, Governor George E. Pataki, 9 N.Y.C.R.R. § 5.20, November 30, 1995, establishing the Governor's Office of Regulatory Reform which has as its purpose, among other things, the "careful examination [of proposed regulations] to assure that they faithfully execute the laws of the State without unduly burdening the State's economy and imposing needless costs and requirements on the businesses, local governments and citizens of this State."
20. Code, Canon 1, Ethical Consideration 1-1.
21. Hereinafter, for convenience, director, commissioner or other agency head shall be referred to singularly to mean the senior most individual within a state agency.
22. Federal Bar Association Professional Ethics Committee; The Honorable Charles Fahy, Chairman. The Government Client and Confidentiality: Opinion 73-1, 32 F.B.A.J. 71 (1973) (hereinafter referred to as "Opinion 73-1").
23. Hawaii Code. Notes and Comment: Government Agency [7],
24. See Miller, *supra* note 7 at 1296.
25. *See Id.*
26. *Id.*
27. *See, e.g. Dooley v. Boyle*, 140 Misc. 2d 177, 531 N.Y.S.2d 161 (N.Y. Supreme Court, 1988); *Cf. United States v. American Tel. & Tel. Co.* 86 F.R.D. 603 (D.D.C. 1979); Lori A. Barsdate, *Lawyer-Client Privilege for the Government Entity*, 97 Yale L. J. 1725 (1988); *see* Josephson and Pearce, *supra* note 1.
28. *See e.g. Upjohn Co. v. United States*, 449 U.S. 383 (1981).
29. *See* Josephson and Pearce, *supra* note 1 at 121., (*citing* N.Y. State Bar Ass'n. Comm. On Professional Ethics, Op. 501 (1979)); *But see*, Miller, *supra* note 7 at 1298, (to the contrary that the government agency lawyer does owe ethical responsibility to the executive branch as a whole).
30. Code, Canon 5, Ethical Canon 5-18 (1986); *See also* Barsdate, *supra* note 27 at 1731.
31. Model Rules of Professional Conduct, Rule 1.13(a), (e) (1983); *see also, E.F. Hutton v. Brown*, 305 F. Supp. 371, 388 (S.D.Tx. 1969).
32. Code, Canon 5, Ethical Consideration 5-1.
33. Barsdate, *supra* note 27 at 1731, (*citing* Federal Bar Association Ethics Committee, The Government Client and Confidentiality: Opinion 73-1).
34. Code, Canon 7, Ethical Consideration 7-13, as adopted by N.Y. State Bar Association, 1/1/1970.
35. Code, Preamble and Preliminary Statement.

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Ethics Matters: Ethical Issues in Insurance Defense Work

By John Gaal

If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact John Gaal at (315) 422-0121.

Over the past few years we have all experienced the dramatic increase in the role of insurance carriers in employment law litigation. With this trend promising to continue in the future, we must be sensitive to the fact that the involvement of carriers brings with it a number of ethical dilemmas, particularly for defense lawyers.

A threshold issue in insurance defense work necessarily focuses on the identity of the client when a lawyer is appointed by an insurance carrier to defend an insured. Many jurisdictions recognize the creation of a tripartite relationship in these circumstances, in which both the carrier and the insured are the lawyer's clients.[1] Even in those jurisdictions it is generally recognized that the greater ethical duty is owed to the insured. New York appears to be within the minority of jurisdictions which hold that the insured alone is the client.[2] Of course, in either type of jurisdiction, the lawyer is free to create by agreement an alternative attorney-client relationship. In other words, in jurisdictions using the tripartite model as the "default," a lawyer and insurance carrier may nonetheless agree that the lawyer will represent only the insured. Similarly, in New York, the carrier, the insured, and the attorney may agree that the attorney will represent both the carrier and the insured. So long as the "usual" rules for multiple representation are met, joint representation is permitted.[3]

Although multiple representation is permitted, it is probably the unusual situation in which it is wise. By specifically taking on the carrier as a client, in addition to the insured, the lawyer may be creating an unnecessary conflict for himself in other cases. For example, if a lawyer represents Client A and the Carrier in a particular matter, and that lawyer is subsequently approached by Client B to represent it in a coverage dispute it is having with that same Carrier, the lawyer cannot undertake that second representation without the consent of Client A, the Carrier and, of course, Client B. If, on the other hand, the lawyer only represents Client A in the original matter, and does not also represent the Carrier, there is no actual conflict in undertaking to represent Client B in its coverage dispute with that same Carrier, and the consent of the Carrier to the representation is unnecessary.[4] In addition, representing both the insured and the carrier can lead to numerous potential conflicts within the context of that particular representation. For example, if coverage issues arise, or there is disagreement between the insured and the carrier over litigation or settlement strategies, and the lawyer represents both the insured and the carrier, she can find herself in the midst of an untenable conflict, and may well have to withdraw from further representation of both clients.

The identity of the client in insurance cases is also of interest to the plaintiff's bar. Disciplinary Rule 7-104 prohibits a lawyer from communicating "on the subject of the representation with a party the lawyer knows to be represented by a lawyer in the matter," unless the other lawyer has consented (or the communication is otherwise authorized by law). Consequently, whether the plaintiff's attorney may communicate directly with the carrier's claims adjuster in an effort to bypass the insured's defense counsel and settle a case may well depend on who the defense lawyer actually represents.

Even beyond this threshold question, defense attorneys face a second, particularly troubling, ethical dilemma when confronted with a carrier's litigation defense guidelines. It is common for carriers to "impose" on defense counsel detailed guidelines for the handling of a case designed to control costs in the litigation process. These guidelines might include, for example, a requirement that no research above some stated minimum amount (e.g., 3 or 5 hours) be conducted on any issue without advance carrier approval; that the lawyer make use of a carrier's internal research bank whenever possible instead of conducting its own research; that the number or duration of depositions be limited to some predetermined levels; etc. Typically, these guidelines are imposed pursuant to the carrier's right, under its insurance contract with the insured, to control the defense of a matter.

Lawyers often lose sight of the fact that, despite the requirements of the underlying insurance contract, the lawyer has an independent ethical obligation with

respect to their representation of a client which must be met in all cases. While New York recognizes that a lawyer and a client may agree to certain restrictions on the scope of the lawyer's representation (and thus, by insurance contract, the carrier can stand in the client's shoes with respect to setting those restrictions), the lawyer has an overriding obligation to provide "competent" representation.[5] Accordingly, a lawyer may not agree to limit its representation to such a degree that it will impair his or her ability to meet that obligation.[6]

As a result, a defense lawyer faced with insurance litigation guidelines has certain obligations it must meet in order to fulfill its duty to its client, the insured. First, it must independently disclose to and discuss with the insured the requirements of any carrier-imposed litigation guidelines. Relatedly, the lawyer must obtain the client's consent that she abide by those guidelines. Neither the fact that the insurance contract discloses the carrier's "right" to control the defense nor that it provides the insured's "consent" to that arrangement is relevant. The lawyer's duty is independent of that contract and the lawyer may not rely on that pre-existing disclosure as the necessary consent. Naturally, the disclosure to the insured should not only detail the specific nature of the guidelines, but also the potential impact of those guidelines on the representation to be provided, whether the insurance policy actually commits the insured to accept those restrictions, and the implications to the insured of a decision not to consent to the guidelines. (If the lawyer initially undertook the representation of both the insured and the carrier, she likely cannot even have this discussion with the insured because this issue, itself, creates a potential conflict, given the insured's and the carrier's diverse interests in the guidelines.) If the insured fails to provide consent to the guidelines, the lawyer's options are to withdraw from the representation, continue the employment and risk the carrier's nonpayment of legal fees, or petition a court to instruct the carrier to pay reasonable fees despite non-compliance.[7]

The lawyer's obligation to the client does not end with the client's consent. Even with consent, a lawyer cannot agree to limitations on its representation of a client which will impair her ability to provide competent representation.[8] Thus the lawyer must independently review the guidelines and determine whether the restrictions contained therein are such that they prevent her from providing a competent defense. If that is the case, she may not undertake the representation, regardless of the client's desires. Presumably, the lawyer should make this independent analysis before even seeking consent from the client, and if she concludes that competent representation cannot be provided in the face of the carrier's restrictions, consent should never be sought.

Some jurisdictions seem to have taken a very hard line in this area, and have indicated that it would be unethical for a lawyer to undertake representation in a case in which the carrier's guidelines purport to reserve to the carrier the ultimate right to determine the scope of services to be provided by the lawyer.[9] New York seems to be a bit more lenient, suggesting that the issue is not so much what is actually in the guidelines, but rather how the lawyer handles their application in a given situation.[10] Thus it may be permissible to undertake representation despite guidelines which indicate that control rests with the carrier, so long as when specific issues arise the lawyer is in fact guided by her own determination of what is appropriate representation and not the decision actually made by the carrier. Thus, for example, a lawyer may be permitted to represent an insured in a case in which the carrier's guidelines require the attorney to make use of the carrier's legal research bank, so long as the attorney in fact independently reviews the research provided by that bank and, if she determines that it is not adequate for the representation at hand, undertakes on her own the necessary research required to provide competent representation.[11]

Despite this apparent ability in New York to make a determination regarding compliance with carrier guidelines as issues arise, prudence certainly dictates that defense counsel address concerns over defense guidelines with the carrier at the start of the representation, and attempt to negotiate changes to the guidelines as needed. The lawyer also would be well advised (assuming client consent) to explicitly notify the carrier that while she may endeavor to comply with the guidelines, she retains the right to provide competent representation regardless of the limitations of those guidelines. Especially in cases where the lawyer represents only the insured,[12] it might be necessary to remind the carrier that the imposition of guidelines which are so onerous as to interfere with competent representation may constitute a failure on the carrier's part to provide its contractually required defense of the insured.[13]

Insurance defense work is replete with ethical issues. The above reflect just a few of the issues you may have to confront when you undertake an insurance case. Unfortunately, with the growth of employment practices liability insurance, it is an area with which most of us will have to become far more familiar.

Endnotes

1. *See, e.g., State Farm Mutual Automobile Insurance Company v. Federal Insurance Company*, 72 Cal. App. 4th 1422 (1999).
2. *American Employers Ins. Co. v. Globe Aircraft Sp.* 205 Misc. 2d 1066 (Sup. Ct., N.Y. County 1954); NYSBA Opinion 716 (1999); NYSBA Opinion 721 (1999); *see also* Restatement of the Law Governing Lawyers § 215 (Proposed Final Draft No. 2 (1998).
3. Disciplinary Rule 5-105(C) permits multiple representation where a disinterested lawyer would believe that a lawyer could competently represent the interests of both parties, there has been full disclosure of the implications of the joint representation to all of the parties concerned, and all of those parties consent to the representation.
4. To the extent undertaking representation on behalf of Client B adverse to the Carrier could potentially have some adverse impact on the representation of Client A, albeit indirect, there might be a need to disclose the proposed representation to Client A and obtain its consent.
5. NYSBA Opinion 721. *See also* DR 5-107(B) ("A lawyer shall not permit a person who . . . pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services.").
6. *Id.*
7. NYSBA Opinion 721; *see also Nelson Electrical Contracting Corp. v. Transcontinental Insurance Co.*, 231 A.D.2d 207 (3d Dep't 1997).
8. NYSBA Opinion 721.
9. Rhode Island Opinion 99-18 (lawyer may not ethically agree to guidelines which have the effect of directing and regulating counsel's independent professional judgment); Wisconsin Opinion E-9901 (lawyer cannot accept restrictions or limitations on the defense of claims that are so financially or otherwise burdensome that they would prevent lawyers from satisfying their ethical obligations to their clients); *In re Youngblood*, 895 S.W.2d 322 (Tenn. 1995)("Any policy, arrangement or device which effectively limits, by design or operation, the attorneys professional judgment of behalf of or loyalty to the client is prohibited by the Code").
10. NYSBA 721.
11. Of course, even beyond the lawyer's ethical obligations, she remains liable to a client for malpractice if she fails to provide competent representation, and the insurance company's guidelines are not likely to provide a defense.
12. Again, if the lawyer actually represented both the insured and the carrier, the inherent conflict between their interests in this area would preclude the lawyer from resolving this issue with the insured.
13. *See Dynamic Concepts, Inc. v. Truck Insurance*, 71 Cal. Rptr. 3d 882 (1998); *cf. Nelson Electrical Contracting v. Transcontinental Insur.*

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The Retroactive and Prospective Application of the 1996 Three-Year Statute of Limitations in Nonmedical Malpractice Cases in New York State

By Kevin G. Faley and Andrea M. Alonso

The New York State Legislature amended N.Y. Civil Practice Law and Rules 214(6) (CPLR), effective September 4, 1996, to repeal the rule enunciated by the Court of Appeals in *Santulli v. Englert, Reilly & McHugh, P.C.*[1] that the statute of limitations to be applied in actions for professional malpractice (other than medical, dental or podiatric) is not solely the three-year negligence limitation but can also be the expanded six-year contract limitation.

In *Santulli*, a claim involving legal malpractice, the Court of Appeals found that the choice of the applicable statute of limitations was properly related to the *remedy* rather than to the theory of liability. Thus, "an action for failure to exercise due care in the performance of a contract insofar as it seeks recovery for damages to property or pecuniary interest recoverable in a contract action is governed by the six year contract statute of limitations [CPLR 213(1)]."[2]

Whereas the pre-1996 CPLR 214(6) simply provided that an action to recover damages for nonmedical malpractice "must be commenced within three years," the new amendment, with *Santulli* clearly in mind, now provides that such an action must be commenced within three years "regardless of whether the underlying theory is based in contract or tort."[3]

As with most new statutes, two questions that are of immediate concern are whether the statute is retroactive and, if it is not, then how the statute is to be applied prospectively. This prospective application is especially important when a statute of limitations is shortened, since there will be an issue of whether the application will result in abrogation of a vested right of a party.

The question of retroactivity appears to have been answered with a resounding "no"; however, an equally important question is how the statute is to be applied to cases filed after September 4, 1996. Does the six-year statute of limitations apply to cases which have accrued before the date the statute was enacted but filed after, or will the three-year statute of limitations apply? Or, will the court fashion some sort of reasonable time frame in which to file a professional malpractice claim that was viable on September 3, 1996, but extinguished on September 4, 1996?

This article will address the retroactivity issue and then discuss those cases which have had to deal with professional malpractice claims filed after CPLR 214(6) was enacted and for which the application of the new three-year statute of limitations would have immediately extinguished otherwise viable claims.

Retroactivity

Not surprisingly, once the shortened statute of limitations was enacted, defendants began to file motions to dismiss claiming that the newly enacted three-year statute of limitations was retroactive and applied to claims filed *prior* to September 4, 1996. Obviously, what the defendants were attempting to do was to have a court dismiss a pending claim—which essentially had become a vested right of the plaintiff. The dismissal of a claim which had been viable on September 3, 1996, but which was no longer valid on September 4, 1996, through an act of the legislature, would have constitutional and due process implications.

The defendants, apparently aware of these repercussions, argued that CPLR 214(6) did not *change* the statute of limitations but *clarified* that the period of limitations as intended by the legislature was and always had been three years. The amendment merely reaffirmed the legislative intent that the statute of limitations was three years, the argument went; the *Santulli* decision never changed the legislative intent that the statute of limitations was and always had been three years. In other words, pay no attention to *Santulli* and its progeny for the courts were mistaken in ever holding that the statute of limitations was six years.

It was not surprising that defense attorneys would make this argument, as attorneys have always been extremingly resourceful in representing clients. What is surprising is that one court actually credited this argument and held that the three-year statute of limitations applied to cases filed before September 4, 1996.

In *Russo v. Walker*,[4] Nassau County Supreme Court Judge Marvin Siegel held, in effect, that the statute as amended was not really being applied retroactively, as the intent of the legislature "was not to *change* the statute of limitations governing nonmedical malpractice, but to *clarify* that the period of limitation as intended by the Legislature was and always had been three years."[5]

Judge Siegel noted that the legislative comments accompanying the 1996 bill referred to the courts having recently "expanded" the statute of limitations in nonmedical malpractice cases to six years under a breach of contract theory and that this expansion "abrogated and circumvented the original legislative intent."[6] The comment continued and stated that

> it is essential that . . . Section 214(6) of the CPLR be amended to reaffirm the legislative intent that where the underlying complaint is one which essentially claimed that there was a failure to utilize reasonable care or where acts or omissions of negligence are allegedly claimed, the statute of limitations shall . . . be three years if the case comes within the purview of CPLR 214(6) . . . regardless of whether the theory is based in tort or breach of contract.[7]

The court found that this language "was clearly intended by the Legislature not to shorten the statute of limitations but to clarify that the statute, as previously enacted, was intended only to provide for a three-year period of limitations."[8]

Accordingly, while one could argue that Judge Siegel did not find that the statute was retroactive but rather that the statute had always been three years and hence the Court of Appeals was "wrong" in its *Santulli* decision, the consequence of his decision was to allow the amended three-year statute of limitations to apply to a case filed before September 4, 1996, and thus to give it retroactive effect.

Although *Russo* was one of the first cases decided after the statute was enacted, and is the first decision addressed in this article, its star fell fast, and it was without consequence. All the other reported decisions, except one, have held that the defendant's arguments in *Russo* were not persuasive and that the statute could not be retroactive.[9] One case in particular, *Ruffolo v. Garbarini & Scher, P.C.*,[10] essentially shredded the defendant's arguments and the court's opinion in *Russo*.

In *Ruffolo*, the legal malpractice action was commenced on March 29, 1996, approximately five months before the enactment of the shortened statute of limitations. The cause of action had accrued, at the latest, on February 5, 1991. Obviously, the action was timely under a six-year statute of limitations but untimely under a three-year statute of limitations. The question on appeal was "whether plaintiff's legal malpractice claim is rendered time barred by a recent amendment to CPLR 214(6) which applies the three-year statute of limitations to such malpractice claims, irrespective of the underlying legal theory."[11]

Judge Sullivan, writing for a unanimous First Department, noted that, while comment to the 1996 amendment stated that the expansion of the statute of limitations to six years "abrogates and circumvents the original legislative intent," the legislative history accompanying the original passage of CPLR 214(6) suggested otherwise.

Judge Sullivan quoted language which illustrated that, when CPLR 214(6) was being drafted for enactment in 1975, it was suggested at that time that the three-year limitation on non-medical malpractice actions be extended to include contract claims. In fact, the recommendation was that the three-year statute be explicitly worded to refer to an action to recover damages for malpractice "whether based on tort, contract or any other theory." This language was rejected in 1975 and, accordingly, Judge Sullivan questioned whether it was ever the legislature's original intent to have a three-year statute of limitations for these type of cases.

Additionally, the court stated that even if it was the legislature's original intent to confine these cases to a three-year statute of limitations, "the Court of Appeals, by repeatedly interpreting that statute so as not to apply to malpractice actions based on breach of contract, fixed its meaning as definitively as if it had been so amended by the Legislature." Accordingly

> at least from the date on which *Santulli* was decided until the effective date of the amendment of CPLR 214(6), the time for commencing an action for legal malpractice alleging breach of contract and seeking damages recoverable under a contract claim was six years, and any such action commenced within that period would not be untimely.[12]

Finally, the court added, application of the amendment to render actions untimely which were timely when commenced would be impermissible and would impair vested rights and violate due process. The sound reasoning of the First Department in *Ruffolo* seems to indicate that *Russo*, a lower court case in the Second Department, will be overturned on appeal.

The only case that has actually held that the legislature intended that the statute be retroactive is *Estate of Joseph Re v. Kornstein Veisz & Wexler*.[13] The statute, how-

ever, was not applied retroactively as the court concluded that such an application would be unconstitutional.

In *Estate of Joseph Re*, Judge Sotomayor found that although "New York's Legislature intended for the amended CPLR 214(6) to apply retroactively, the court finds that such an application would offend the basic notions of due process under New York law."[14] Judge Sotomayor stated that, generally, statutes are applied prospectively, unless there is a clear legislative indication to the contrary. If there is a clear legislative indication to the contrary—that it is intended that the statute be retroactive—then the statute is to be given retroactive construction "to the extent that [it] do[es] not impair vested rights or create new rights."[15]

Judge Sotomayor quoted the legislative comment and noted that the legislature "adopted unusually blunt language expressing dissatisfaction with the approach taken by the Court of Appeals in *Santulli*."[16] She found that "the Legislature did not conceive of its amendment as a new provision, but as a rebuke of the Court of Appeals, designed to reaffirm that the limitations period applicable in malpractice actions is, and has properly been, three years."[17] Judge Sotomayor added that by "assailing *Santulli* as a misguided aberration, the Legislature announced its intent to end the continued application of that decision—effective immediately—in all cases."[18]

In rejecting the retroactive application of CPLR 214(6), Judge Sotomayor found that, in order to pass constitutional muster, legislation retroactively shortening the period of limitations must provide a party with a reasonable time to commence an action. If the statute of limitations deprives a party of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law.

Further, the decision provides that "the validity of a statute of limitations which purports to bar a right which existed before the statute becomes effective depends upon whether the statute allows a reasonable time after it became a law within which a party may enforce this right."[19]

Judge Sotomayor found that retroactive application of the amended provision would go further than merely depriving the plaintiffs of a reasonable time in which to file their action and would extinguish a viable claim. Judge Sotomayor stated that there is a well-defined body of law which counsels against retroactivity in this case, as it would offend long-held notions of equity and fairness; it would affront federal due process; and it would result in the loss of a vested right. Accordingly, while Judge Sotomayor found that it was certainly the legislature's "intent" that CPLR 214(6) be retroactive, and apply to cases filed prior to its enactment, she ruled that this intent could not be enforced.

It would certainly appear that, barring an extremely novel interpretation of the statute by the Court of Appeals, the shortened statute of limitations will not be given retroactive effect.

Claims Filed after September 4, 1996

Since the courts have essentially put to rest the question of whether the statute will be applied retroactively to cases pending as of the effective date of the statute, the remaining question is what happens to claims filed after September 4, 1996, but which had accrued before that date. Specifically, what happens to cases where the professional malpractice occurred more than three years but less than six years before September 4, 1996?

If the statute had not been amended, the six-year statute would have applied to these cases. However, once the statute was amended, these cases became immediately time barred. The courts that have dealt with this issue all agree that the immediate extinguishment of these claims is unconstitutional and that a party should be afforded "some reasonable opportunity and period following enactment within which to pursue a claim."[20] The question then becomes what is a "reasonable time" to commence an action which would have been timely before the amendment of the statute of limitations.

The initial Appellate Division department to decide this issue was the First Department in *Coastal Broadway Assoc. v. Rafael*. Unfortunately, however, the First Department merely issued a memorandum decision which did not discuss the facts of the case but simply held that

> due process requires that plaintiff be given a reasonable period of time after September 4, 1996 to pursue a claim therefore existing but immediately barred upon the immediately effective enactment of the amendment. . . . *Based upon the record before us, we find that the commencement of the action five and one-half months after September 4, 1996 was reasonable*.[21]

The Fourth Department, in *Shirley v. Danziger*,[22] decided that the institution of a legal malpractice claim within 20 days after the effective date of the amendment was a reasonable time but, as in *Coastal Broadway*, there was no detailed treatment of the reasoning behind the decision.

For a discussion of the issues involved in the prospective application of CPLR 214(6), it is necessary to examine three lower court decisions.

Davis v. Isaacson, Robustelli,[23] a lower court case decided on November 12, 1997 (two months before *Coastal Broadway*), deals with a claim that was commenced five months *after* the effective date of the statute. Another legal malpractice action, *Davis*, involved a claim which accrued in November 1991; accordingly, under the *Santulli* case, the statute of limitations would have expired in November 1997. The claim was filed on January 29, 1997, approximately five months *after* the effective date of the statute, but within the *Santulli* time period. Under the new three-year period, the action would be barred; the court had to determine whether to allow the malpractice claim to stand.

Judge Gans noted that this was a case of first impression and that "no court has determined on the merits the precise question of retroactivity presented in this case, where the action was commenced after enactment of the amendment, based on claims which accrued beforehand and became time barred immediately upon the effective date of the amended statute."[24]

The court held that the amendment "must be treated as *technically retroactive* in this situation" but decided that "under the facts of this case, overriding constitutional prohibitions controlled the ultimate outcome."[25] Judge Gans then noted that both the U.S. Supreme Court and the N.Y. Court of Appeals "have long recognized the Legislature's power to create a new or curtail an existing statute of limitations intended as a retrospective law. . . . That power is restricted only to the extent that it be exercised within . . . constitutional parameters."[26] Under these situations, the court continued, it is essential that such statutes allow a

> reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the Legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.[27]

The lower court stated that while it was up to the legislature to determine what a "reasonable time" would be, the legislature, in this case had abrogated this responsibility, and it was up to the court to determine what would be a reasonable time. The court found that in a case

> such as this one, where in shortening the statute of limitations, the Legislature affords plaintiff no time to prosecute his claim, and no time whatever remains for him to sue under the shortened statute, as a matter of law plaintiff is deprived of a reasonable time to bring suit, which violates the constitutional provision that no person shall be deprived of property without due process of law.[28]

The court not only found that five months was a "reasonable time" to bring the suit, but went further and stated that the plaintiff's action is "*subject to the six year statute of limitations previously enforced and untimely*."[29]

Accordingly, the *Davis* court further opined that the claim was governed by the six-year statute of limitations; in effect, there was no prospective application of CPLR 214(6). Although that precise question was not before the court, this reasoning meant that the plaintiffs would have been able to bring suit until November 1997, 13 months after the statute had been amended.

Is a 13-month period a "reasonable time" to bring a claim after a shortened statute of limitations has been enacted? Not according to the later lower court case of *Kelly v. Cesarano, Haque & Kahn, P.C.*[30] That case, decided by Judge David Goldstein on July 24, 1998, came to the exact opposite decision of the court in *Davis*.

In *Kelly*, Judge Goldstein noted that the plaintiff's claims accrued on April 14, 1994, and were viable as of September 4, 1996. Accordingly, the plaintiff had until April 14, 1997, under the three-year statute of limitations. However, suit was not filed until October 29, 1997, 13 months after the new statute was passed. The court noted that the amendment did not have retroactive application to cases filed before September 4, 1996, but that it would apply in "some way" to cases filed after September 4, 1996.

The court held that

> in this case, it is clear that had plaintiff instituted suit on or before April 14, 1997, seven months after the amendment and within three years after the accrual of the claim, the action would have been timely. Here, however, plaintiff waited until October 29, 1997, more than thirteen months after the effective date of the amendment to CPLR 214(6) and more than six months after the expiration of the three-year statute of

> limitations. . . . To institute suit some thirteen months after September 4, 1996 . . . was unreasonable in terms of time.[31]

Kelly appears to hold that while the shortened statute of limitations will not apply to cases which were filed *before* the effective date of the statute, claims accruing before, but filed *after*, the effective date of the statute will not get the total benefit of the *Santulli* six-year statute of limitations and must be filed within a "reasonable time." Thirteen months is not a reasonable time.

The same reasoning was applied by the federal court in *Panegeon v. Alliance Navigation Lines, Inc.*,[32] a situation where the malpractice accrued as early as October 18, 1993 but, in any event, no later than December 31, 1993. However, plaintiffs filed their complaint in March 1997, six months after the statute was enacted.

The court concluded that "the amended three-year statute of limitations governing malpractice claims should apply to claims *accruing* prior to the 1996 amendment's effective date, but not filed until a reasonable time after its passage."[33] The court found that the malpractice claims before it were subject to a three-year statute of limitations, and therefore, the statute expired no later than December 31, 1996. As noted above, the claim was not filed until March 1997.

In a footnote, the court addressed whether or not the plaintiff filed the action within a reasonable time after the shortened statute. The court stated that it need not

> address the issue of how to define the term reasonable time in this context because . . . plaintiffs had at least forty-four days—and as many as one hundred eighteen days—in which to file timely their malpractice claim after the enactment of the 1996 amendment. Plaintiffs therefore cannot argue that they did not have a reasonable time in which to file their claims after the statute of limitations was amended.[34]

Finally, in the federal court case of *Middle Market Financial Corp. v. D'Oranzio*,[35] Judge Kram held that a legal malpractice action commenced 56 days after the statute was instituted timely.

Accordingly, what appears to be the trend is that for all claims filed after September 4, 1996, the three-year statute of limitations will apply. However, the courts will consider how much time elapsed between the effective date of the statute and the filing of the summons and complaint in order to determine whether the plaintiff had a reasonable time to file the summons and complaint. Apparently, this will have to be done on a case-by-case basis as what constitutes a reasonable time is *sui generis*.

The *Panegeon* case strictly construed the statute and what constitutes a reasonable time. *Kelly* refrained from defining what a reasonable time would be, but found that 13 months was unreasonable. *Coastal Broadway* decided that five and one-half months was reasonable. *Davis* held that five months was reasonable, but, in dicta, can be interpreted to hold that the six-year *Santulli* statute of limitations applies to claims accruing before the statute was amended. *Shirley* held that 20 days was reasonable, and *Middle Market* found 56 days also to be appropriate.

As these cases have illustrated, courts may be divided as to what constitutes a reasonable time. Certainly, any claim which accrued before September 4, 1996, and filed as of the date of this article would probably be untimely. It also appears clear that such claims filed within six months after the new amendment would be timely, except, perhaps, in federal court. It is the cases that fall between these two boundaries which will be the subject of future litigation.

For plaintiffs, their strong suit is the *Davis* case, which can be read as holding that the six-year statute of limitations still applies to cases accruing before September 4, 1996.

To temper defense arguments that this will give plaintiffs more than three years to file a claim after September 4, 1996, plaintiffs should concede that the statute of limitations should be the shorter of either six years from the date of accrual or three years from the effective date of the amendment.[36] This will avoid another inequity—that is, a case which accrued on September 3, 1996, would be governed by a six-year statute of limitations, while a case which accrued the next day would be subject to a three-year limitation.

Defendants, on the other hand, should argue that the statute is effective immediately and applies to all cases filed after September 4, 1996, and that, at most, a reasonable period of time to commence a suit is up to six months.

While professionals such as accountants, architects and engineers still do not enjoy the two and one-half year statute of limitations that physicians have, they have certainly closed the gap with CPLR 214(6).

Endnotes

1. 78 N.Y.2d 700, 579 N.Y.S.2d 324, 586 N.E.2d 1014 (1992).
2. *Id.* at 707, 579 N.Y.S.2d at 327, 586 N.E.2d at 1017 (high/low caps).
3. CPLR 241(6) (McKinney's 1997).
4. 171 Misc. 2d 707, 655 N.Y.S.2d 313 (Sup. Ct., Nassau Co. 1997).
5. *Id.* at 708, 655 N.Y.S.2d at 314 (emphasis supplied).
6. *Id.* at 709, 655 N.Y.S.2d at 314.
7. *Id.*
8. *Id.*
9. *White of Lake George, Inc. v. Bell*, 173 Misc. 2d 423, 662 N.Y.S.2d 362 (Sup. Ct., Albany Co. 1997); *Garcia v. Director*, N.Y.L.J., Jan. 1, 1997, p. 26, col. 2 (Sup. Ct., N.Y. Co.); *Federal Deposit Ins. Corp. v. Pelletreau & Pelletreau*, 965 F. Supp. 381 (E.D.N.Y. 1997); *Keller v. Lee*, 1997 WL 218435 (S.D.N.Y. Apr. 30, 1997); *Mason Tenders District Council Pension Fund v. Messera*, 958 F. Supp. 869 (S.D.N.Y. 1997); *Durtin v. Shea*, 957 F. Supp. 1360 (S.D.N.Y. 1997); *Kent v. Brofman*, 1997 WL 305254 (S.D.N.Y.); *Romeo v. Schmidt*, 244 A.D.2d 861, 668 N.Y.S.2d 113 (4th Dep't 1997); *Ruffolo v. Garbarini & Scher*, 239 A.D.2d 8, 668 N.Y.S.2d 169 (4th Dep't 1998); *Dowd v. Law Plan Hyatt Legal Services*, ___ A.D.2d ___, 671 N.Y.S.2d 344 (2d Dep't 1998); *Martin v. Canale*, ___ A.D.2d ___, 676 N.Y.S.2d 349 (3d Dep't 1998); *Vogel v. Lymann*, 246 A.D.2d 422, 668 N.Y.S.2d 162 (1st Dep't 1998); *Amateur Hockey Ass'n of the U.S. v. Parson*, 244 A.D.2d 222, 664 N.Y.S.2d 919 (1st Dep't 1997). One court found that it was the legislature's intent for the statute to be retroactive (*Estate of Joseph Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907 (S.D.N.Y. 1997)) but refused to give it retroactive effect.
10. *Ruffolo*, 239 A.D.2d 8.
11. *Id.* at 9, 668 N.Y.S.2d at 169.
12. *Id.* at 12, 668 N.Y.S.2d at 171.
13. 958 F. Supp. 907.
14. *Id.* at 918.
15. *Id.*
16. *Id.* at 917.
17. *Id.*
18. *Id.* at 918.
19. *Id.*
20. *See Panegeon v. Alliance Navigation Line, Inc.*, 1997 WL 473385 (S.D.N.Y.); *Coastal Broadway Assoc. v. Raphael*, 246 A.D.2d 445, 668 N.Y.S.2d 586 (1st Dep't 1998); *Davis v. Isaacson Robustelli, Fox, Fine, Greco & Fogelgamren, P.C.*, 175 Misc. 2d 40, 667 N.Y.S.2d 608 (Sup. Ct., N.Y. Co. 1997); *Kelly v. Cesarano, Haque & Khan, P.C.*, 678 N.Y.S.2d 708 (Sup. Ct., N.Y. Co. 1998); *Shirley v. Danziger*, 676 N.Y.S.2d 369 (4th Dep't 1998); *Middle Market Financial Corp. v. D'Orazio*, 1998 WL 397867 (S.D.N.Y.).
21. *Coastal*, 246 A.D.2d at 445 (emphasis supplied).
22. *Shirley,* 676 N.Y.S.2d 369.
23. *Davis*, 175 Misc. 2d 40.
24. *Id.* at 43-44, 667 N.Y.S.2d at 610.
25. *Id.* at 44, 667 N.Y.S.2d at 610 (emphasis supplied).
26. *Id.* at 45, 667 N.Y.S.2d at 612.
27. *Id.*
28. *Id.* at 46, 667 N.Y.S.2d at 613.
29. *Id.* (emphasis supplied).
30. *Kelly v. Cesarano, Haque & Khan, P.C.*, 678 N.Y.S.2d 708, 709 (Sup. Ct., N.Y. Co. 1998).
31. *Id.*
32. *Panegeon v. Alliance Navigation Line, Inc.*, 1997 WL 473385, at 3 (S.D.N.Y.).
33. *Id.* at 3.
34. *Id.* at 4.
35. *Middle Market Financial Corp. v. D'Orazio*, 1998 WL 397867 (S.D.N.Y.).
36. This "solution" has been suggested by Professor Vincent C. Alexander in the Supplementary Practice Commentaries for 1997. CPLR 214(a) McKinney's, Book 7B, Cumulative Pocket Part, pp. 133-34.

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LITIGATION

Appellate Practice and Advocacy

By Hon. Joseph M. McLaughlin

Introduction

Appellate practice is different from trial practice and requires a different attitude and strategies. In federal courts, procedures are governed by the Federal Rules of Appellate Procedure (F.R.A.P.).

I. What Goes on in Chambers

Each panel of three judges sits for one week and handles 32 cases during each sitting. The week involves hearing more than 50 lawyers and reading well over 2,000 pages of briefs. Each judge may have three law clerks, some less, and chambers receive two copies of the briefs. The judge keeps one and the other set goes to a clerk who will prepare a bench memo on the case. Each memo will be 15 to 20 pages in length, dealing with the facts of the case, a summary of the issues and a suggestion on how the case is to be resolved.

II. Practice Before the Court

A. The Argument

The bench is a "hot" bench, with the briefs and record reviewed prior to oral argument. The Second Circuit prides itself on being the only Circuit where oral argument is always granted if requested. Arguments are usually 10 minutes for each side and at most 15 minutes. This is very different from appeals in England, where the emphasis is on long oral arguments, some running for a day or more!

The cases are not discussed before the argument. Consultations take place only after argument and usually by exchanging memoranda. There are few conferences.

At the end of the week, the presiding judge issues a memo to all the judges on the Court to alert the others as to what significant issues have been raised.

B. The Brief

I. The word "brief" is an oxymoron, and is certainly not related to any term meaning "short." Its origins are Anglo-Saxon.

II. A maximum of 50 pages is allowed, unless the Court upon timely application allows more. In the New York State Court of Appeals, there is no limit set. Making a brief shorter always requires more work and thought than a longer memorandum of law.

III. A brief should begin with a short story of the case. This story should catch the judge's interest. Language used should be ordinary, in words and phrases with simple declarative sentences.

IV. Each sentence should be short and clear, avoiding awkward and pretentious legalese. Daniel Webster had stated it well: "The power of a clear statement is the great power of the bar!" Use of phrases like "with respect to" should be avoided, as well the endless repetition of the words "appellant, petitioner, plaintiff" etc. It is better to use word-images, "the employer," "the debtor" or even the party's real name, etc. See, F.R.A.P., Rule 28(d).

In reciting the facts, do not mention only those favorable to your side; you lose credibility. If certain facts or dates are in dispute, say so. Don't state as a "fact" what is really an inference.

V. Eliminate indiscriminate details that are not relevant. There is a distinct (and distracting) tendency to insert an endless parade of dates in the narrative. Dates are rarely significant, except in a controversy over the statute of limitations.

VI. Standards of Review, F.R.A.P. 28(D)(B). It is most important to state in the brief the standard of review that governs the decision below. This must be done for each issue. The standards vary from *de novo* review, to an abuse of discretion, to that of being clearly erroneous (exercises of discretion), or that the decision below had no rational basis. *De novo* review is the strictest, where the appellate court comes to its own conclusion, with no deference to the district court. Actually, the appellate court sometimes manipulates the standard to suit its decision.

VII. Point Headings

A. In the play, *Amadeus,* Emperor Joseph II complained to Mozart that a piece of his music had "too many notes." Mozart had assured the Emperor that there were just enough. You should not try to overstate the number of mistakes by the district judge. Four or five are enough and any more sounds like nit-picking. You must not throw everything against the wall in the hope that something sticks. Limit the issues; keep the most important one in focus.

B. Forget the Bluebook Paradigm. The brief is not a law school final exam. You do not need to spot and

highlight every question. Just address the big issues and suggest answers to the important questions raised.

1. What do you want the court to do?

2. Why?

3. What reasons do you have?

An example would be (1) a request to dismiss a case for lack of jurisdiction; (2) even if there is jurisdiction, dismissal is required because the defendant was not operating the vehicle within the meaning of the statute; then give your reasons.

VIII. Alternative Arguments. When using alternative arguments, you can, without going on at great length, make clear that you are not waiving a prior argument. Be discrete in using an alternative argument; if it doesn't pass the giggle test, it will undermine your principal argument—and your credibility with the Court.

IX. Matters to Avoid. Some brief writers believe they write well when they do not have the gift. Lawyering is a profession centered on writing and the ability to make words flow. The lead sentence should be punchy, just as journalists are taught to do. Use short sentences and edit your work carefully. Michelangelo always claimed that his statue was encased in a block of marble and all he had to do was chip away what was unnecessary. Avoid redundancies; as an example, "he did x every Tuesday, weekly." Avoid bombast.

Hemingway in his short stories showed his genius at this special skill. Most of his thirty or so stories were told in just a few pages. His language was plain and clear with short sentences, unadorned with adjectives and adverbs. This was magnificent language, eminently suited to brief writing.

Do not use long quotations with "emphasis added." Quotations are most effective when used only occasionally.

Certain phrases are fig leaves designed to conceal mental nudity. Such words are "manifestly," "clearly," "egregious," "mere gossamer," "totally inapposite." You sound more reasonable when you don't use those phrases.

The new technologies using computers can lead to poor organization. Revisions should be made first on hard copies (where your eye can sense the flow) and then transferred to the computer.

Limit the length of a paragraph since a visual break is needed. But single sentences should be avoided.

The spell check can often lead to problems: "trial" can become "trail"; "condemned" can become "condomed."

X. Footnotes. Noel Coward was quoted as saying that footnotes are like being required to go downstairs to answer the door while you are making love. They interrupt the train of thought. Arguments should not be made in a footnote, but only in the text, otherwise the argument will be disregarded.

The worst abuse of footnotes is when they are employed to come within the 50-page limit. One plaintiff submitted a brief with 58 footnotes, many over a page long. This really represented a text of 70 pages.

The Court could have really penalized him but, in fact, he won on appeal. However, he was denied costs. See *Varda, Inc. v. Insurance Co. of No. America*, 45 F.3d 634 (2nd Cir. 1995). In the late sixteenth century, a party was sent to prison for making his pleadings too long. The less clutter in a brief, the better.

C. Oral Argument

Certain roads to disaster in an oral argument are to be avoided. Your beginning should be simple: "May it please the Court" and introduce yourself with your full name. The Court tapes all arguments and they are listened to. If you don't state your name, the listener cannot be sure who is talking.

If there is an error in the memorandum, don't waste a lot of time explaining it. Send the Court a letter.

The Court does not want to be introduced to actual litigants.

Discourage your associate from handing up notes—it is distracting.

It is also very bad to sit at counsel table and grimace or make head motions while your adversary is presenting his or her argument.

Don't fawn on the Court.

Rehearse your argument; do not read it, since you lose eye contact and emphasis. And do not merely rehash what is in the brief.

You can use charts and diagrams if needed, but make sure your opponent and each judge has a copy.

D. The Decalogue of J.W. Davis

John W. Davis was the greatest advocate of the twentieth century. He was the founder of the Davis, Polk firm and he issued his Ten Commandments in a 1940 speech to the ABA. Chief Justice White said that there was no due process of law when John Davis was

on the other side. Mr. Davis argued 140 cases before the U.S. Supreme Court, surpassed only more recently by an attorney in the Solicitor General's office.

Time and calendar congestion have eroded some of his points, but most are still vital.

1. "Change places, in your imagination, of course, with the Court."

   Know how the court works. Find out beforehand which judges will be sitting. The names appear each Thursday in the *Law Journal*. Know something about the judges.

2. "State the nature of the case and its prior history." Now this can be shortened since the Court is a hot court.

3. "State the facts." This is now archaic since the brief details the facts and they will be read by a hot Court. But the Court should be reminded of any pivotal facts. A diagram may be helpful.

4. "State the applicable rules of law on which you rely." Don't run a string of cites.

5. "Always go for the jugular." This saying came from Rufus Choate through Joseph Choate to Mr. Davis. These three are legendary lawyers. You must emphasize your most important point. There is always a cardinal point around which lesser ones revolve, like planets around the sun.

6. "Rejoice when the Court asks questions." This shows a judge has been listening and is interested. Stop when the question is asked and answer it. Come back to your argument later, don't tell the judge you will answer it later. This gives you a good idea of what is on the judge's mind. Give a yes or no when possible, or qualify it or explain why you can't answer yes or no.

You may be asked a hypothetical question. Most attorneys would like to avoid such a question. You should not say "that is not this case." Obviously, it is not, but answer the question and, if necessary, then distinguish the case at hand.

7. "Read sparingly and only from necessity." Reading from a paper places a barrier between the reader and the listener like lead in front of an x-ray.

8. "Avoid personalities."

9. "Know your record from cover to cover."

10. "Sit down." Sit down when your argument is finished. Don't use the allotted time if it is not needed. The allotted time "does not constitute a contract for the Court to listen."

The following are sweet words which judges like to hear—they may even allow a longer lunch hour.

"If there are no more questions, I have finished"; "I waive my rebuttal."

This shows self confidence and a strong belief in your case.

There is a story that when a toreador frustrates the bull with his infuriating passes, the bull stops. The toreador in contempt turns his back on the bull to cries of "Olé." Be careful though, the bull can still get you from the rear.

III. The Decision

The Court sometimes issues summary orders stating that they are not to be read as a precedent. I believe this type of aspersion on the precedential value of such orders is unwise. Such a decision may suggest that the case was not given the attention it deserves. I also believe that the rule will be changed eventually.

This paper was given at the meeting of the Section at Bermuda in October 1999.

This article originally appeared in the Winter 2000 issue of the *Torts, Insurance & Compensation Law Section Journal*.

Residential Building and Zoning Checklist

By James S. Grossman

I. Many attorneys believe that title issues are the sole concerns of their clients in residential real estate transactions. However, for the client who merely seeks counsel to advise them regarding the purchase of a home, compliance with building and zoning laws and regulations at the time of purchase, and in the future, are important considerations. This checklist contains an overview of common zoning and building code issues. The practitioner should supplement the list with any issues which are important in the municipality in which the sale is to occur.

A. Ask buyer about intentions or plans for expansion and use of the residential property *prior to* signing the contract. At a minimum, the contract should provide that the existing structures/uses are in compliance with all applicable zoning and building codes and that purchasers' intended expansions/uses are in compliance.

B. Check local zoning codes and other local codes and ordinances to determine if the existing structures and/or your client's intended expansion or use may be impacted. A legal use or structure at the time of construction may not remain in compliance if structural modifications have been made or are made.

C. To assure that the existing structures/uses or proposed additions/uses comply with zoning requirements, review of local zoning ordinances for any purchase should include review of the following:

1. Setback requirements (i.e., distance from structure to lot line)

   a. Rear;

   b. Front;

   c. Side; and

   d. Be sure to analyze applicable setback for corner lots, where both frontages may require compliance with front setback requirements.

2. Area or height requirements—i.e., acreage or lot size limitations or height of structures (especially sheds).

3. Frontage requirements—i.e., required amount of frontage at the street line to allow maintenance of a single-family dwelling.

4. Limitations on the kind, size and number of structures on the property:

   a. Sheds;

   b. Garages, attached and unattached;

   c. Saunas;

   d. Fencing;

   e. Decks or patios;

   f. Satellite dishes;

   g. Dog runs; and

   h. Pools, tennis courts, etc.

5. Miscellaneous restrictions:

   a. Storage of recreational vehicles on the property.

   b. Restrictions relating to the number of dogs or other animals or kind of animal allowed on the property.

6. Restrictions on non-single-family uses:

   a. In-law apartments—are they allowed? Do they require a permit?

   b. Tenants or boarders permitted?

   c. What are the customary home occupations? Some uses often not permitted are the following:

   (1) Hair cutting/beauty salon;

   (2) Occupations which are commercial enterprises, such as landscaping ser-

vices, especially any use requiring parking of commercial vehicles on site;

(3) Professional offices not limited to residents of the dwelling or with more than a limited number of employees;

(4) Uses which exceed a statutory percentage of the structure's floor space;

(5) Retail operations—i.e., storage of merchandise on site;

(6) Uses which include exterior displays or goods visible from the outside;

(7) Uses requiring external structural alterations not normally associated with residential use;

(8) Uses which produce noises, such as lawnmower repair, or which cause dust, smoke or vibrations;

(9) Dance lessons or group music lessons; and

(10) Review limitations on signs if a home occupation is proposed.

D. Review conditions regarding pre-existing non-conforming use or structure:

1. Any intended extension of the use or expansion of the structure may negate the non-conforming status.

2. Change of use may not be allowed or may require variances to maintain the structure in its current location if it violates setback or other area requirements.

E. Review carefully any double lot where the placement of a new or existing home may eliminate the ability to develop the second lot.

F. Be aware of local and state building codes for standards for construction and construction materials, especially for additions to an existing structure or for new construction:

1. With additions, focus on compliance with plumbing codes and electrical systems.

2. Review location of existing septic fields and requirements for possible expansions or additions to the system.

3. Are certificates of occupancy or required permits available for the existing structures and any additions? Note that the contract should provide that every structure on the property complies with local and state building codes, rather than a catch-all provision stating the property is suitable for single-family use.

G. If property is not in a residential zone or is near a non-residential zone, the potential uses of nearby properties should also be discussed with client.

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Tenant's Checklist of Silent Lease Issues

New York State Bar Association Real Property Law Section
Commercial Leasing Committee
By S.H. Spencer Compton and Joshua Stein

Committee Co-chairs: Dorothy Ferguson and Joshua Stein
Subcommittee Co-chairs: S.H. Spencer Compton and Joshua Stein

When an attorney for a prospective tenant reviews and negotiates a lease, he or she will raise at least two categories of issues and concerns.

First, tenant's counsel will respond to what the lease already says. For example, tenant's counsel may ask for longer notice periods, opportunity to cure defaults, "reasonableness," a narrowing of any open-ended tenant obligations or landlord discretion, flexibility on use and transfers, absolute clarity regarding all monetary and other significant obligations, deletion of inappropriate or excessive obligations and restrictions, correction of errors and internal inconsistencies and the like. To identify issues like these, tenant's counsel needs to read the proposed lease and think about it in the context of his or her experience and knowledge and the tenant's needs.

Second, tenant's counsel might want to raise for its client the issues and concerns tenants have that a landlord's typical standard lease does not consider. These are the "Silent Lease Issues." Unlike the first category of issues, the "silent" issues are not necessarily easy for tenant's counsel to identify, because a landlord's standard lease form does not remind tenant's counsel that these issues even exist.

In 1998, a subcommittee of the Commercial Leasing Committee of the New York State Bar Association began to develop a Tenant's Checklist of "Silent Lease Issues" (the "Checklist") for use by attorneys representing commercial space tenants. The Checklist, which follows, is intended to help tenants' attorneys identify and (if they choose to) raise "Silent Lease Issues" when they review a typical landlord's standard commercial lease.

The scope of the Checklist has expanded to include other significant issues (not just "silent" issues) that tenant's counsel may wish to raise in lease negotiations. Reminders were also added for some, but not all, matters for which a tenant may wish to perform "due diligence" before signing a lease.

The Checklist mentions each issue only once, even if it might reasonably belong under more than one heading. Any user of the Checklist should read it from beginning to end.

The Checklist covers a tremendous range of issues, representing or at least discussing almost all possible issues and events that could arise or occur when two parties have potentially conflicting interests in the same piece of real property over potentially a very long time, where almost anything can happen.

There are ways in which any lease can be seen as a private statute. Unlike a legislative statute, however, a lease can never be changed except by persuading the other party to agree to a change. Therefore, each party should take advantage of the opportunity it has to shape the statute that will govern the relationship. The Checklist is intended to assist tenant's counsel in that process.

Depending on the market, the parties, the transaction, its timing, the scope and terms of counsel's engagement and other circumstances, tenant's counsel may or may not choose to raise any issues from the Checklist. Even to the extent that tenant's counsel raises these issues, tenant's counsel will not necessarily prevail on any of them. Therefore, the fact that any particular lease does not reflect positions suggested in the Checklist does not necessarily mean that tenant's counsel did a bad job. To the contrary, to serve its client best, sometimes tenant's counsel should raise no issues at all and just get the deal signed, or identify and raise issues that are outside the scope of the Checklist.

Conversely, if the tenant's business strategy is to prolong lease negotiations as much as possible (a goal that can always be achieved almost without limit), the Checklist will provide plenty of help. Lease negotiations, almost more than any other category of real estate negotiations, can take as much or as little time as the parties want. For example, the definition of "operating expenses," in and of itself, can raise dozens of knotty issues that may amount to a reinvention of cost accounting.

The Checklist focuses on substantial commercial space leases for both retail and office uses. Most issues mentioned in the Checklist will apply to some leases but not others. Virtually every item in the Checklist should, therefore, be interpreted as if prefaced by the words "if applicable, appropriate, desired, and possible under the circumstances, taking into account the size and nature of the transaction, the condition of the market, the tenant's business and anticipated use of the premises, the needs and negotiating positions of the parties, the timing, and all other circumstances." Some items on the list are appropriate only for very large tenants, occupying all or most of a large building. For a smaller tenant to raise some of the same issues would be odd.

No effort has been made to indicate which issues listed in the Checklist apply only to certain types or sizes of leases. Nor has the issue of whether and how (politely or otherwise) a Landlord might respond to any of these issues been addressed. Because of these exclusions, the Checklist is targeted more toward an experienced lease negotiator (as a way to jog his or her memory) than toward someone new to the area. The latter category of user can nevertheless obtain some value from the Checklist. All users should use the Checklist with care and judgment.

The Checklist is intended more to spark discussion and thought than to set rigorous "standard requirements" (which would be a ridiculous proposition).

The Checklist does not address "triple-net" leases, ground leases, "bondable" leases, "synthetic" leases, "build-to-suit" leases, leases from a seller to a purchaser of a company or other specialized leasing transactions. The Checklist does not represent a position statement or recommendation by the New York State Bar Association or its Real Property Law Section, Commercial Leasing Committee or any subcommittee thereof. It does not establish a "minimum standard of practice" and is not guaranteed to be exhaustive or complete (to the contrary, it is guaranteed to be incomplete). The Checklist merely provides a resource for leasing practitioners. It creates no legal duties or obligations. Users of the Checklist are cautioned not to rely on it in any way or for any purpose.

The authors and the subcommittee members do not necessarily believe that Landlords should accept a tenant's position regarding any issue suggested in the Checklist, though the authors of the Checklist and the subcommittee members will be honored and pleased if anyone reads the Checklist and mentions it in lease negotiations. The Checklist does not estop any author or subcommittee member from taking any position in any lease negotiation.

The Silent Lease Issues Subcommittee is co-chaired by S.H. Spencer Compton and Joshua Stein, who were also the primary authors of the Tenant's Checklist of Silent Lease Issues. The Tenant's Checklist was initiated and edited by Joshua Stein.

Members of the Tenant's Silent Lease Issues Subcommittee included David Badain, Joel Binstok, Bob Bring, Phil Brody, Steven Cohen, Sam Gilbert, Barry Goldberg, Gary Goodman, Andrew Herz, Jonathan Hoffman, Gary Kahn, Huck Qavanaugh, Rob Reichman, Karen Sherman, Barry Shimkin, David Tell, and Allen Wieder.

Changes, additions, and other improvements to this Checklist are welcome. They will be taken into account as appropriate if and when the Commercial Leasing Committee publishes a revised version of this Checklist.

The Silent Lease Issues Subcommittee plans to develop, slowly, a separate "Silent Lease Issues" Checklist for commercial space landlords, which will focus on landlords' concerns that standard lease forms commonly neglect and, in particular, new concerns for landlords based on trends in law and practice since about 1980.

If you have suggestions for this Tenant's Checklist, would like to reprint it, or would like to help work on the Landlord's Checklist, please send email to joshua.stein@lw.com or scompton@paulweiss.com.

Tenant's Checklist of Silent Lease Issues

1. ***Access to Premises by Landlord***

1.1 Prior notice (timing and type).

1.2 Purpose (e.g., repairs, inspection, or to show premises to prospective future tenants).

1.3 Limitations on frequency?

1.4 Limited or no rights of access for "special spaces" (bank vault, securities vault, narcotics, network control rooms, etc.).

1.5 When (business hours, after hours)?

1.6 By whom (Landlord's agent)?

1.7 Tenant's representative to be present (particularly important where Tenant has sensitive, dangerous, or expensive personal property).

1.8 Landlord must minimize interference with Tenant's business and comply with Tenant's reasonable instructions and security requirements.

1.9 Limitation on where pipes and conduits may be placed (e.g., must be within walls or above ceilings). Landlord must disclose any damage.

1.10 Storage of materials only for repairs within the premises (particularly problematic if premises includes a terrace), and only for short periods.

1.11 If Landlord's work in or affecting premises will cause inconvenience, noise, odors, etc., Landlord must work only outside of business hours.

1.12 If Landlord will use hazardous materials for any work in or affecting premises, must notify Tenant in advance and provide "material safety data sheet" disclosures.

2. ***Alterations***

2.1 Attach list of pre-approved contractors, architects, etc., if Landlord has approval rights.

2.2 Reasonableness requirement for Landlord consent to any alterations.

2.3 No consent needed for decorative or minor (less than $_____) alterations or partition walls.

2.4 Flexibility in choosing architects, engineers, other consultants, contractors.

2.5 Right to construct internal stairs or "core" drilling for communications for multi-floor Tenants.

2.6 Right to use "chases" under slab and right of access thereto.

2.7 Right to use vertical shafts and chambers between floors for wiring and supplemental HVAC. Directness and feasibility of pathways (engineering issues).

2.8 No duty to restore if generally usable by other tenants unless improperly made or Landlord reasonably required restoration as a condition to Landlord's consent.

2.9 Right to limit or negotiate fees of Landlord's architects, engineers, or other consultants necessary for Landlord's approval of Tenant's alterations.

2.10 Tenant needs enough time to cure liens, taking into account procedural requirements of applicable law, and related delays. Landlord agrees not to pay any lien that Tenant has bonded.

2.11 Right to install awnings, canopies, crowd control measures on sidewalk.

3. ***Alterations (Initial Occupancy)***

3.1 Landlord's space preparation, including asbestos (abatement? removal?), demolition, refireproofing, leveling of floors if raw space, and closing of floor penetrations.

3.2 Landlord should consent to Tenant's initial work in advance.

3.3 Landlord to cure existing violations that may interfere with Tenant's alterations.

3.4 Credit issues regarding Landlord's contribution or build-out work.

3.5 Building systems: adequacy of existing capacity; upgrades to be performed by Landlord.

3.6 Staging area or storage area for Tenant's construction activities and move-in program. Any other off-site space needed for Tenant's construction and move-in program?

3.7 Required upgrades of bathrooms (overall quality and ADA compliance), elevator lobbies, other common areas and facilities.

4. Assignment and Subletting

4.1 Landlord's consent not required, or at least not to be unreasonably withheld, or automatically given where specified criteria (e.g., net worth, reputation, experience, and proposed uses) are met. Rent cannot be a factor in disapproving subleases.

4.2 Simplified approval procedure (e.g., requiring only term sheet rather than fully executed assignment or subletting documentation). No financial information required if Tenant will remain obligated on Lease.

4.3 Attach required form of Landlord consent as Exhibit, to prevent Landlord from adding new conditions and restrictions (which may be inconsistent with Lease, but Tenant may not be paying enough attention at the time) when Landlord consents to transactions.

4.4 Release of assignor from further liability. Fallback: Structure as a sublease. In the alternative, negotiate protections for unreleased assignors: notice of default and right to regain possession if assignee defaults and Landlord wants assignor to cure (assignor's liability terminates if Landlord doesn't give the notice). If Lease is terminated, new Lease on same terms.

4.5 If stock transfer is deemed an assignment for consent purposes, it should not be for assumption of liability purposes. Purchaser of shares need not assume the Lease. (This is a common drafting flaw in Landlord forms.)

4.6 Right to assign security deposit to assignee of Lease; Landlord to cooperate regarding substitution of any letter of credit security.

4.7 Carve out assignments/sublets to affiliates, successors, or in connection with the sale of business, particularly if multiple locations. Define "affiliate" to include charities, trusts, estates, and foundations in which Tenant or its officers are involved.

4.8 Allow subletting of up to _____ square feet to Tenant's suppliers, vendors, or customers, for Tenant's business convenience.

4.9 No consent required for concessionaires or licensees.

4.10 Landlord to maintain confidentiality of any financial information regarding possible assignee or subtenant. Must sign a standard "confidentiality agreement" if required by (prospective) assignee/subtenant. Similar requirements for final sublease documents delivered to Landlord.

4.11 Right to "sever" a large lease into two or more separate and independent leases, to facilitate assignment in pieces (more flexible exit strategy).

4.12 Nondisturbance protections for specified subtenants.

4.13 If Landlord has recapture right upon proposed assignment or sublease, reserve right to withdraw the request if Landlord exercises the recapture right.

5. Bills and Notices

5.1 Waiver of escalations if not billed within a certain period.

5.2 Effective date of giving of notices.

5.3 Attorneys may give notices on behalf of their clients.

5.4 Copy of notice must go to central leasing personnel, other specified recipients (counsel, etc.).

5.5 Deliver by personal service or nationally recognized overnight courier.

6. Building Security

6.1 Specify security program (including package scanning and messenger interception; operating hours). Right to approve subsequent changes.

6.2 Tenant's right to establish its own security system and connect that system to Landlord's security system.

6.3 Landlord cannot initiate new security measures (e.g., messenger interception) without Tenant's consent.

7. Consents (Miscellaneous)

7.1 For any Landlord consent right, short turnaround time. Silence is deemed consent after ___ days. Any failure to consent must specify all grounds for such failure, which grounds must be reasonable.

7.2 Landlord consents to Tenant's use of name and likeness of building in Tenant's promotional and publicity materials.

7.3 Right for Tenant to consent to site plan and any amendments.

7.4 Press releases, tombstones, and announcements for Lease require Tenant's approval and may not disclose any terms of Lease without Tenant's consent.

8. Defaults and Remedies

8.1 Notice and opportunity to cure (monetary as well as nonmonetary defaults).

8.2 Although "ipso facto" clauses are typically unenforceable against a debtor Tenant, beware of any Event of Default triggered by someone else's bankruptcy.

8.3 Limit Landlord's remedies (to exclude Lease termination or eviction) for defaults or disputes below a threshold level of materiality. Consider eliminating "nonmonetary" defaults entirely, instead requiring Landlord to convert any "nonmonetary" default into a monetary default by curing it and sending Tenant the bill for reimbursement (a common provision in old Woolworth's leases).

8.4 Require Landlord and its mortgagee to waive any statutory or other lien on fixtures, equipment, and other personal property of Tenant, either in all cases or if requested by Tenant's asset-based lender.

8.5 Prorate holdover rent on a per diem basis for partial months.

8.6 Landlord must seek to mitigate damages (still no such legal requirement for New York commercial leases). For example, Landlord must seek to relet premises.

8.7 Landlord waiver of self-help (to retake possession) and right to lock out.

8.8 If Landlord has right to accelerate all rent as liquidated damages, first try to eliminate this remedy. If unsuccessful, then negotiate: (1) Tenant gets credit for fair and reasonable rental value; and (2) discount rate as high as possible.

8.9 If a nonmonetary default is caused by a subtenant, extend the cure period as necessary to enforce the sublease and (if necessary) obtain possession of the subleased premises.

9. Destruction, Fire, and Other Casualty

9.1 Right for Tenant to terminate lease upon a material casualty not repaired within a specified time period, or occurring during the last ___ years of the lease term.

9.2 Right to terminate or abate rent if casualty/restoration causes material change in zoning (e.g., loss of nonconforming use status), access, parking, or visibility of premises.

9.3 Landlord must restore to the extent of available insurance proceeds.

9.4 Abate rent during Tenant's restoration, especially if significant fixturization work needs to be restored (this is just a reallocation of rent insurance versus business interruption insurance).

9.5 If casualty affects other premises, Landlord cannot terminate unless (1) Landlord makes Tenant whole, and (2) Landlord terminates leases of all other similarly situated Tenants.

9.6 Even without a waiver of subrogation, Landlord agrees not to sue Tenant if Tenant negligently caused casualty that would have been covered by typical casualty insurance policy.

9.7 Upon any termination, Landlord must promptly refund prepaid rent and other payments.

10. Electricity

10.1 Totalize multiple submeters, using a third-party service and establishing appropriate security controls regarding access to submetering equipment and computers.

10.2 Allow either party to initiate usage survey.

10.3 Pay for submetered electricity using the same tariff under which Landlord purchases electricity.

10.4 Assurances of sufficient wattage for Tenant's present and near-term anticipated operations.

10.5 Flexibility to obtain more electrical capacity if needed, quickly, at a defined or ascertainable cost.

11. Elevators

11.1 Right to use freight elevators without charge for move in and move out. Use of all elevators at night for same purposes.

11.2 "Night service" for elevators (some cabs out of service) cannot begin before a specified time.

11.3 Prohibit Landlord from changing elevator banks (i.e., if Tenant's space is first stop, should remain so).

11.4 Consider any need for exclusive elevator service.

11.5 Routine elevator repairs and maintenance may not be performed during business hours.

11.6 Specifications for maximum average waiting time for elevators.

11.7 Control over institution and modification of elevator security measures, including keycards.

12. Eminent Domain

12.1 Require Landlord to restore to extent of available condemnation award.

12.2 Right for Tenant to submit separate claim to condemning authority for (1) value of leasehold estate (rarely acceptable to Landlord or its lender) and (2) moving expenses, trade fixtures, goodwill, and damages for interruption of business.

12.3 Right to terminate or abate rent for impairment of parking, access, or visibility (or other adverse impact) if, for example, any road is realigned, widened, or otherwise changed (e.g., loss of curb cuts).

13. End of Term

13.1 No duty to restore alterations if generally usable by other tenants, unless improperly made or Landlord's original approval was reasonably conditioned on such restoration.

13.2 If Tenant must restore (1) right of access to premises after end of lease term as needed and (2) Tenant not deemed a holdover (equitable per diem payments).

13.3 No duty to return premises in any particular condition. For example, no obligation to replace worn-out HVAC compressor in last year of term.

13.4 Landlord cannot terminate under "demolition" clause unless (1) reasonable notice, (2) good faith, and (3) Landlord terminates leases of all other tenants.

13.5 Landlord may not post "for rent" signs until term has actually ended.

13.6 For a reasonable period after Lease termination, Tenant can install a sign directing customers to Tenant's new location.

14. Escalations (Generally)

14.1 For computing Tenant's proportionate share, if the rentable square footage includes Tenant's share of the common areas, then confirm the denominator of the fraction that determines Tenant's proportionate share also includes the common areas.

14.2 Do all tenants' percentages add up to 100%, or is Landlord being over-reimbursed for escalations? Are the anchor tenants paying their share, or is that share being shifted to the other tenants?

14.3 Right to re-measure square footage (at least for a new building).

14.4 Allocate based on occupiable space, not occupied space.

14.5 Beware of multiple escalations that give Landlord more than mere protection against inflation.

14.6 Consider any "base year" to confirm full inclusion of expenses. Were any expenses not yet being fully incurred? Did any exclusions apply?

14.7 Caps on escalations.

14.8 Does "free rent" period apply to pass-throughs or just base rent?

14.9 For "porter's wage" escalation, try to exclude fringe benefits and the value of "time off." Try to limit the measure to reflect only base hourly rate. If fringe benefits cannot be excluded, try to define how they are calculated.

14.10 For CPI adjustment, measure increase annually from starting year of Lease, rather than from preceding year's CPI.

14.11 If Landlord's expenses go down rather than up from the base year, Tenant should try to get a rent credit.

15. Estoppel Certificates

15.1 Require of both Landlord and Tenant. How often?

15.2 Attach form as an Exhibit to prevent subsequent issues.

15.3 Should Landlord reimburse Tenant for its legal fees in researching and preparing future estoppel certificates?

15.4 Tenant should state "to its knowledge," especially for issues involving additional rent claims. Alternatively, Tenant should reserve its rights on these claims. A typical ten-day requirement to deliver an estoppel certificate is too short for Tenant to conduct adequate due diligence to knowingly surrender claims involving complicated and potentially debatable billing of operating expenses and utility charges.

15.5 If estoppel certificate and Lease conflict, then Lease governs. Delivery of estoppel certificate does not waive any rights or remedies of the signer.

15.6 Caveat: Courts do take estoppel certificates seriously. Tenant should not lightly "sign and return."

16. Failure to Give Possession

16.1 Allow Tenant to terminate or abate rent if Landlord does not deliver possession by a date certain (also try to get per diem credit against rent for the delay).

16.2 If Lease is conditioned on lender (or any other) approval, right to terminate if not provided by a certain date.

16.3 If Tenant terminates Lease, refund all payments made on Lease signing.

16.4 If Landlord delivers the space late, push back all rent abatements and adjustments.

16.5 For seasonal businesses, Tenant may not want to be obligated to initially open for business during slow season.

17. Fees and Expenses

17.1 Limit to reasonable, actual, and out-of-pocket.

17.2 Exclude legal fees and expenses relating to claimed default if no default exists or Landlord otherwise does not prevail.

17.3 Mutual reimbursement of legal fees of prevailing party, including the value of time of in-house counsel.

18. Heating, Ventilation, Air Conditioning

18.1 Specifications for HVAC service, with variations by day of week and season, both during and outside business hours.

18.2 Rates (and basis of rates) for overtime HVAC.

18.3 Allocate overtime HVAC charges among multiple simultaneous users.

18.4 Discount on overtime HVAC if Tenant commits in advance to specified level of usage.

18.5 Tenant's right to install supplemental HVAC: How much condenser water must Landlord provide? Chilled water? Who owns the equipment? Who pays costs? Duty to repair/restore? Ability of Tenant to reconfigure building standard HVAC as needed for supplemental service?

19. Improvements

19.1 Term of Lease should be long enough to recover Tenant's investment in improvements.

19.2 Ownership of improvements and right to depreciate.

20. Inability to Perform

20.1 "Force majeure" protections for Tenant, not just Landlord.

20.2 Right of Tenant to cure Landlord's failure to perform (even if caused by "force majeure") where feasible.

20.3 Right to offset rent.

21. Insurance

21.1 No obligation for Tenant to provide more insurance than customarily maintained by similar tenants in similar buildings.

21.2 Right to carry blanket insurance, self-insure, or use "captive" carrier.

21.3 Waiver of subrogation.

21.4 Landlord to carry property and liability insurance, and provide evidence of such insurance on Tenant's request.

21.5 To the extent premises are subleased to others, subtenant's insurance coverage and certificates thereof (if otherwise in compliance with Lease) will fulfill Tenant's insurance obligations.

22. Leasehold Mortgages

22.1 Landlord consent to leasehold mortgage. Rights of leasehold mortgagee to (1) receive notice of default from Landlord, (2) cure, and (3) enter into new lease with Landlord if original lease is terminated due to Tenant default.

22.2 Covenant to amend as requested by leasehold mortgagees, within limits.

22.3 Similar protections for a pledgee of Tenant's stock or other equity interests.

22.4 See other resources regarding "mortgageable leases" (generally beyond scope of this checklist).

23. Maintenance and Cleaning

23.1 Landlord must make structural repairs (including roof, foundation, other structural elements) and maintain and repair building systems, common areas, and sidewalk.

23.2 Landlord must maintain structural elements and electrical, plumbing, sewage, and HVAC systems to the point of entry into leased premises.

23.3 Landlord must maintain building and common areas (including any empty shop spaces, and all common areas on any multitenant floor) in an attractive and first class manner.

23.4 Specify cleaning standards and limit the scope of possible "extras." Cleaning standards are an economic issue and should be reviewed and negotiated accordingly.

23.5 Cleaning work cannot start before a specified time.

23.6 Right to terminate Landlord's cleaning services and take over cleaning.

23.7 Location, access, timing, other arrangements regarding garbage removal.

24. Operating Expenses— Calculation and Auditing

24.1 Preparation of statement by independent managing agent or certified public accountant.

24.2 Limit period in which Landlord may revise.

24.3 In any year the building is not fully occupied, operating expenses are often "grossed up" as if the building had been fully or nearly fully occupied during the entire year. Confirm consistent treatment of base year and adjustment year.

24.4 Landlord should provide annual operating expense statement within a reasonable time (90 - 180 days) after year end, especially where Tenant pays monthly operating expense escalation estimates on account.

24.5 Apportion operating expense contributions if the lease terminates during a calendar year (otherwise, Landlord could argue that annual calculation procedures obligate Tenant to contribute to entire year's operating expenses).

24.6 If Landlord later incurs new categories or items of expense that were not being incurred when the Lease was signed (e.g., addition of an earthquake insurance program), then Landlord must "gross up" the base year to reflect what this expense would have been if Landlord had already been incurring it.

24.7 Meaningful rights to examine and question Landlord's operating expense calculations, surviving expiration/ termination of lease.

24.8 Landlord must keep books and records, for at least ___ years, in a specified place under a unified system.

24.9 Extend time periods to give Tenant reasonable time to (1) notify Landlord it wants to audit expenses, (2) conduct and complete the audit, and (3) specify if, and how, it contests Landlord's calculations. If Tenant discovers egregious errors, should retain right to reopen earlier years.

24.10 Audit right should include base year, expiring no earlier than the expiration date for right to audit the first operating year.

24.11 Landlord to pay cost of audit (credited against next month's rent) if it discloses an overcharge of more than specified percentage (3%?).

24.12 If any other tenant's audit discloses a discrepancy, Landlord to give Tenant (without

Tenant's having to ask) the benefit of any resulting adjustment to operating expenses.

24.13 Lease should not limit Tenant's right to engage a firm of its own choosing (e.g., "contingent fee" lease auditor) to examine Landlord's books and records.

25. Operating Expenses—Exclusions

Tenant may desire to exclude from operating expenses at least the following:

25.1 Cost to correct initial construction defects.

25.2 Cost of repairs due to Landlord's negligence.

25.3 Salaries above building manager.

25.4 Advertising expenses.

25.5 Brokerage fees and commissions.

25.6 Legal fees and expenses to negotiate and enforce leases.

25.7 Accounting fees.

25.8 Any cost reimbursed by insurance proceeds or condemnation award.

25.9 Management fees beyond those charged in comparable first class buildings.

25.10 Expenses paid to affiliates of Landlord unless at market rates (but what's market and how do you know? Tenant may want preapproval rights).

25.11 Capital expenditures unless (1) any project above $_____ is approved by Tenant or (2) a project is justified by cost of repairs or undertaken to reduce operating expenses, and then only to the extent that Landlord demonstrates actual reduction.

25.12 Any expense for a service not provided to all Tenants (for example, the incremental cost of a higher level of service provided to office or retail Tenants).

25.13 Exactions paid to governmental bodies, including infrastructure, traffic improvements, curb cuts, roadway improvements, transit, "impact," etc.

25.14 Costs that under generally accepted accounting principles consistently applied would be considered capital or are otherwise outside normal costs and expenses in connection with operation, cleaning, management, security, maintenance, and repair of similar buildings.

25.15 Purchase or maintenance of any artwork or sculpture.

25.16 Charitable or political contributions.

25.17 Ground rent.

25.18 Amounts that are "operating expenses" but reimbursed or reimbursable to Landlord by Tenants other than through pro rata rent escalations (e.g., excessive use of utilities).

25.19 Costs related to build-out of space for Tenants.

25.20 Fines and penalties.

25.21 Costs of cleaning portions of the building that have cleaning requirements higher than Tenant's (e.g., office space when negotiating a retail lease).

25.22 Costs incurred from any matter constituting a breach of covenant, representation, or warranty by Landlord under any lease.

25.23 Costs of testing for, handling, remediating, or abating asbestos and other hazardous materials or electromagnetic fields.

25.24 Costs to clean up Landlord's construction projects.

25.25 Costs to remove CFC's or accomplish other future retrofitting driven by as-yet-unknown future environmental concerns, or to purchase environmental insurance.

25.26 ADA compliance costs, particularly where triggered by the operations of other tenants.

25.27 Other costs caused by the acts or omissions of particular other tenants.

25.28 Y2K compliance costs.

25.29 Next year's newest area of legal concern (for inspiration, check the latest new and improved carveouts from "nonrecourse" treatment in mortgage finance transactions).

26. Options

26.1 Option or right of first refusal and/or first offer to take additional space.

26.2 As a fallback, consider negotiating a wide-open right to sublet excess space until needed (if this works as a business matter).

26.3 For right of first refusal, seek a "second bite at the apple" if Landlord later decides to market the space in smaller pieces than originally contemplated.

26.4 To facilitate future expansion through transactions with other tenants in the building, require Landlord to waive any prohibitions in other leases against assignment or subletting to Tenant, and against any discussions or negotiations contemplating such a transaction.

26.5 Require Landlord to advise on a regular basis of anticipated available space.

26.6 Early termination options, either complete or partial ("shed rights").

26.7 Option to renew term.

26.8 If rent during option term depends on appraisal, try to reserve right to terminate if Tenant disapproves new rent as finally determined.

26.9 Option to purchase.

26.10 Require Landlord to send reminder notices of any upcoming option exercise deadline, but such reminder notices cannot be sent more than ___ days before the deadline. Extend deadline if Landlord delays sending notice.

27. Parking

27.1 Location, number, and pricing (or assurance of no fee) for parking spaces (reserved and unreserved). Attach diagram as Exhibit.

27.2 Parking for bicycles and motorcycles.

27.3 If Landlord expands building, parking ratio should not worsen.

27.4 Prohibit nearby high parking uses (e.g., movie theater, trade school, restaurant).

27.5 Location/quantity of employee parking. Landlord must enforce employee parking restrictions against other tenants.

27.6 Landlord must maintain and clear snow from parking area.

27.7 Lighting of common areas and parking (especially important to a 24-hour operation).

27.8 Right to require Landlord to install fence to segregate parking lot from adjacent heavy-usage facilities.

28. Percentage Rent

28.1 Rent abatements or other rent reductions should not reduce percentage rent breakpoints (to avoid anomaly where breakpoint drops because of negotiated rent abatements, resulting in increased percentage rent payments equal to such abatements).

28.2 Annualize first year gross sales with seasonal adjustment, to prevent excessive percentage rent if Tenant opens in peak season.

28.3 Affirmatively state that parties do not intend to establish partnership or joint venture.

28.4 Depending on type of business, exclude or subtract certain items from "gross sales" (e.g., sales made by concessionaires, sales not in ordinary course of business, refunds, and returns). Avoid any implication of percentage rent payable on sales via catalog or Internet.

28.5 Time limits on Landlord's right to audit.

28.6 Negate any obligation to operate or to "maximize" revenues. No representation as to volume of business.

28.7 Landlord will preserve confidentiality of sales information, etc., provided by Tenant.

28.8 Lower percentage rate for particular activities or categories of sales.

28.9 Any free rent period covers percentage rent too.

29. Quiet Enjoyment

29.1 Beware of "quiet enjoyment" conditioned on no default. Tenant would prefer to condition "quiet enjoyment" only upon lease not having been terminated because of Tenant's default.

29.2 Abate rent if sidewalk shed impairs access or visibility. Limitation on sidewalk sheds (duration, minimum clearance, frequency, purpose).

30. Real Estate Tax Escalations

30.1 Exclude:

(a) Penalties or interest;

(b) Excise taxes on Landlord's gross or net rentals or other income;

(c) Income, franchise, transfer, gift, estate, succession, inheritance, capital stock taxes; and

(d) Taxes on land held for future development ("outparcels").

30.2 Exclude any increases in real estate taxes resulting from:

(a) Construction during Lease if not done for the benefit of Tenants generally or if it does not create additional proportionate rentable area;

(b) Termination of interim assessment;

(c) Loss or phase-out of abatement or exemption; and

(d) If possible, sale of the property.

30.3 Watch definition of "substitute or additional taxes" that become Taxes. Make sure they are truly appropriate for pass-through to Tenant.

30.4 For base year, review Landlord's tax protest filing to understand Landlord's theories for low value. Will those theories inevitably vanish next year, producing built-in increases? As an extreme case, suppose a Lease provides for "free rent" in the first year (also base year for taxes). Next year the "free rent" will go away. If, under local assessment rules, the first year's free rent produces an artificially low assessment that year, then the assessment may automatically rise by the same amount in future years. Tenant may then over the years pay extra tax escalation payments far beyond the value of the free rent.

30.5 Require Landlord to pay in installments as Taxes are due.

30.6 Exclude all "Taxes" from operating expense escalations.

30.7 Landlord should pay special assessments in installments and treat as Taxes only to extent within Lease term.

30.8 Right to require Landlord to contest, or if Landlord does not, right to contest Taxes in Tenant's or Landlord's name. Check statutory and case law requirements on who may contest taxes. For example, in New York a tenant of only part of a building may lack standing to contest taxes.

30.9 If any tax abatement or deferral program might be available, Landlord should agree to apply for it.

30.10 Landlord must promptly pay Tenant its share of tax refunds even after Lease expires, and must notify Tenant of any such refunds promptly when received. If Landlord fails to do so, or must be reminded, then Landlord must pay a high interest rate or some multiple of amount due Tenant.

31. Representations and Warranties

31.1 Utility location and capacity available at premises.

31.2 Submetering equipment in place for all or specified utilities.

31.3 No asbestos or other hazardous materials in premises. Landlord to provide any document required to confirm this, for purposes of building permit applications (e.g., New York City ACP-5 showing non-asbestos job).

31.4 Attach true and correct copy of certificate of occupancy as Exhibit.

31.5 Tenant's use for any and all purposes permitted by Lease will not violate certificate of occupancy, applicable law, or other leases or agreements of Landlord.

31.6 Compliance with Americans with Disabilities Act.

31.7 Landlord has paid or will pay all impact fees and hookup charges.

31.8 Zoning of property and legality of permitted use.

31.9 All building systems are Y2K-compliant.

31.10 No existing violations.

31.11 All brokerage fees and commissions for Lease have been paid. (If Tenant cares about its relationship with broker, Tenant may want right to offset rent and pay broker if Landlord does not.)

31.12 Landlord's entry into Lease does not violate any rights of third parties (e.g., prior Tenant that was evicted from the space).

31.13 Each party represents and warrants duly authorized, executed and delivered, valid and binding.

32. Requirements of Law

32.1 Landlord responsible for compliance if applies generally to property (e.g., "mere office use").

32.2 Landlord responsible if new legal requirement was not caused by Tenant and failure to comply will impair Tenant's alterations or use in manner contemplated by Lease.

32.3 Landlord must cooperate in obtaining permits and must sign permit applications and provide necessary information.

33. Restrictions Affecting Other Premises

33.1 Radius restrictions must not affect Tenant's ability to relocate existing stores within a mall where Tenant is already doing business.

33.2 Carve out any locations acquired in any future acquisition of a pre-existing business.

33.3 Radius restrictions against Landlord? Any other restrictions on Landlord's activities?

33.4 Exclusive use, both in existing structure and in any future expansions in which Landlord has any interest (or for which Landlord or an affiliate presently controls site). Landlord will not enter into REA or otherwise facilitate any nearby construction by others unless counterparty agrees to honor Tenant's exclusivity.

33.5 Restrict type of retail tenancies or other uses in building. Issues of density, traffic, parking, demographics, circulation, quality, likelihood of picketing or other controversy.

33.6 Prohibit flea markets, carnivals, petting zoos, clothing drop-off boxes, kiosks, drive-up booths, etc., elsewhere on Landlord's property, including common areas.

33.7 Landlord may not interfere with traffic patterns in the parking lot without Tenant's consent.

33.8 Restrictions on location and type of additional construction by Landlord (e.g., on "outparcels").

33.9 Minimum operating hours for other tenants.

33.10 Limit Landlord's activities and installations (e.g., kiosks) on sidewalk (or common area of mall) within a specified area near premises.

33.11 Landlord may not change use of overall building (e.g., change shopping center into a telecommuncations facility or a call center).

34. Rules and Regulations

34.1 Require nondiscriminatory enforcement.

34.2 Landlord must enforce against other tenants if requested by Tenant.

34.3 New rules should be reasonable and of the type customarily imposed for similar buildings.

34.4 New rules require Tenant's approval.

35. Sale of Property

35.1 Purchaser should assume all Landlord obligations, including obligation to return security deposit and refund any previous rent overcharges.

35.2 Require Landlord to transfer security deposit to purchaser of property, with written confirmation of receipt. Right to offset rent if it is not transferred.

35.3 Right of first refusal or first offer.

36. Security Deposit

36.1 Interest earned for credit of Tenant.

36.2 Right to substitute a letter of credit or other alternative form of security.

36.3 Promptly return after Lease expiration.

36.4 Reduce security deposit over time if no defaults.

37. Services (Miscellaneous) Provided by Landlord

37.1 Abate rent if windows are bricked up or covered over for any reason.

37.2 Landlord obligation to install sunscreen film on windows if needed.

37.3 Right to use existing cabling and other systems; Landlord cannot damage or remove.

37.4 Performance standards or criteria for any Landlord services (e.g., comparable to a basket of other buildings).

37.5 Right to require Landlord to replace management company or leasing broker if specified standards are not being met.

37.6 Tenant right to self-help (perhaps using only approved contractors specified on Exhibit to Lease) if Landlord fails to provide required services.

37.7 Promotional association, fund, other similar activities by Landlord.

37.8 If Tenant is not in occupancy, should receive credit for variable costs saved by Landlord (e.g., cleaning). (Such a provision appears in General Services Administration leases but rarely if ever in commercial leases.)

37.9 Location, arrangements, timing, fees (none) for Tenant's receipt of deliveries.

38. Signage and Identification

38.1 Signage requirements (lobby, floor lobbies, elevators, exterior entry area, rooftop, common areas, other exterior), for Tenant and any subtenant. Tenant's right to make future changes in its signage.

38.2 Limitations and requirements relating to other signage and Landlord's signage program (including future changes).

38.3 Right to have top position on pylon and largest sign.

38.4 Name of building. And Landlord can't name building after Tenant or competitor of Tenant.

38.5 Directory entries for Tenant and any subtenant or assignee.

39. Subordination and Landlord's Estate

39.1 Landlord to represent it owns fee estate, with copy of deed attached as Exhibit.

39.2 Landlord must provide nondisturbance agreement from mortgagee(s) and ground lessor(s).

39.3 If lease is "subordinate," try to condition this "subordination" upon Landlord's having delivered specified nondisturbance protections from holders of senior estates. Limit number or type of mortgage(s). Tenant cannot be obligated to "subordinate" to any mortgage if such mortgage is subordinate to any mortgage or other lien that has not provided Tenant with nondisturbance protections. (Foreclosure on that latter, more senior, mortgage could wipe out both the more junior mortgage and the Tenant.)

39.4 Where Tenant leases all or majority of space or an entire building, consider requiring Landlord to covenant that annual debt service payable under any fee mortgage will not exceed specified amount reflecting rent under Lease.

39.5 Required form of nondisturbance agreement. Landlord to reimburse Tenant for legal fees of subsequent negotiations with mortgagees. Remember: future Lease amendments (and any negotiated termination) will require mortgagee's consent.

39.6 Avoid any covenant to be bound by (and do nothing to violate) any present or future mortgages. Such a provision may amount in part to an "end run" around negotiated nondisturbance rights.

40. Tenant's Remedies Against Landlord

40.1 Tenant may cure Landlord defaults (after notice), set-off cost of cure (with interest) against rent, terminate Lease. Similar remedies, as appropriate, if any representation or warranty made by Landlord is inaccurate.

40.2 Abate rent if essential building services are disrupted for longer than specified period.

40.3 Emergency self-help rights if a water leak, power failure, or communications failure in the building imperils Tenant's computer systems or other mission-critical equipment or operations.

40.4 Set-off against rent for claims against Landlord and/or any judgment against Landlord returned unsatisfied (or, if Landlord is in bankruptcy, then based upon mere filing of a claim in the bankruptcy).

40.5 Tenant's payment of rent with knowledge of Landlord default does not waive default.

40.6 Right to terminate Lease if any rent abatement continues more than ___ days.

41. Use

41.1 Try for "any lawful use" or at least "any lawful retail/office use." Build in flexibility on future change of use, if any possibility exists of a change in circumstances (e.g., likely technological obsolescence of Tenant's business).

41.2 Describe permitted use generically so as not to restrict future use by a subtenant or assignee (e.g., "medical or other health practitioner's offices" or "executive offices" rather than "podiatrist's offices" or "main headquarters of XYZ Corp.").

41.3 Include incidental uses (e.g., ATM machines, food, training, duplicating, ancillary retail, gym, day care, other amenities).

41.4 Negate any duty to open or operate. If Landlord counters with request for recapture right, carve out permitted closures (e.g., force majeure, alterations, inventory-taking). Limit Landlord's decision period on any recapture. When recapturing, Landlord should reimburse Tenant's unamortized cost of furniture, furnishings, equipment, and improvements. Any recapture notice by Landlord must be accompanied by mortgagee consent to be effective.

41.5 Satellite dish(es) and antenna(s) on roof, either at no charge or for a defined or ascertainable charge. Ability to relocate if necessary to improve performance. Protection against interference caused by future installations. Connection from rooftop to Tenant's space. No duty to remove at end of term.

41.6 Any need for Tenant to use sidewalk or exterior of building for special events, temporary installations, or other purposes? Exterior loudspeakers? Exterior laser or light displays?

41.7 Delete any provision that Tenant's use will not conflict with other leases or mortgages.

41.8 Right to use building common facilities, such as cafeteria or health club, and common bathroom if premises does not include bathroom. Minimum operating hours and standards.

41.9 Exclusive use of terraces or other outdoor space or facilities. (Landlord's obligation to maintain and clean.)

41.10 Twenty-four hour access, 365 days a year, via elevator or (if elevator is broken) stairway.

41.11 Use of fire stairways for access between floors.

41.12 Tenant reception, security, other facilities in lobby.

41.13 Storage areas ancillary to Tenant's use of premises.

42. Utilities, Generally

42.1 Landlord to bring all utilities to entry point on perimeter of premises.

42.2 Emergency generator and use of fuel tank. Allocation of ownership, responsibilities, and costs between Landlord and Tenant. No duty to remove at end of term.

42.3 Minimum prior notice before any scheduled electrical shutdown or testing of emergency generators; limitation on frequency.

42.4 T-1 lines, multiple points of entry, other special telecommunications requirements, including cabling and connections from service provider to premises.

42.5 Right to select carrier/utility for competing local phone service, telecommunications, electricity.

43. Miscellaneous

43.1 No duty to pay rent until particular anchor(s) are open for business; specified construction shown on site plan is complete, including common areas; Landlord has paid Tenant agreed construction cost reimbursement.

43.2 Limitation of liability of Tenant or Tenant's general partners.

43.3 If Lease requires Tenant to give Landlord any financial or other sensitive information about Tenant, then Landlord must keep it confidential.

43.4 If compensation will be paid for inconvenience caused by work on an adjacent or nearby site, who receives it?

43.5 Criteria and specifications for Landlord's initial construction of building, common areas, parking lot, etc.

43.6 If estimated cost of any capital improvement or replacement for which Tenant is responsible exceeds $_____ (perhaps varying based on remaining term of Lease), then Tenant may Terminate lease or require Landlord to contribute to cost based on expected useful life of improvement or replacement vs. remaining term of Lease.

43.7 Does any other relationship exist between Landlord and Tenant (e.g., purchase and sale of a business) that might give rise to Tenant claims against Landlord, as to which Tenant should be entitled to offset against rent?

43.8 Right to terminate if change in zoning or other law (or inability to obtain or maintain necessary permits) prevents or impairs Tenant from operating its business, in whole or in part.

43.9 Right to terminate Lease (or pay only percentage rent) if specified other tenant(s) shut down.

43.10 In the event of a strike, Landlord will establish separate gate for striking union to minimize any interference with Tenant. If Landlord or any other tenant uses a labor force that causes disharmony with Tenant's labor force, then Landlord shall remove the former labor force from the building.

44. Due Diligence

Caveat: As noted above, this Checklist should not be regarded as exhaustive or complete. That is particularly true as it applies to the following list of "due diligence" that Tenant's counsel may wish to perform.

44.1 Existing condition of premises, including any personal property. Should Landlord be required to remove—or be required to leave in place—any existing improvements?

44.2 Title search and review, or an on-line search to confirm ownership of the fee (easily available in many areas).

44.3 Calculation of actual square footage and scope of premises. Particularly for a full floor Tenant, do all of Landlord's exclusions of space from the "premises" make sense? For example, should the elevator lobby be part of the premises?

44.4 If Landlord's agent signs Lease (or any future amendment or estoppel certificate), require copy of written authority to sign.

44.5 Any additional consents or approvals needed? Especially important where Landlord is governmental entity or charity.

44.6 Do any unusual uses require special measures for permits (e.g., liquor licenses, sidewalk cafes)? What other permits may be required, such as public assembly?

44.7 Adequate ventilation capacity and pathways?

44.8 Due diligence issues related to escalations:

(a) What capital projects are underway or contemplated today? Does Tenant agree with how Landlord plans to treat them?

(b) Historical amounts for operating expenses and taxes, including review of underlying financial information and documents.

(c) Investigate any built-in future increases in tax assessment (e.g., termination of interim assessment, upcoming loss or phase-out of existing abatement or exemption).

44.9 Available capacity for telecommunications and other utilities?

44.10 Tenant's network and other technological requirements.

44.11 Lines of sight for rooftop satellite dish or antenna.

44.12 Landlord's approval requirements (lenders, ground lessors, etc.).

44.13 Present occupancy of premises to be leased? Practical likelihood of delays in possession.

44.14 Disposition of premises currently occupied by Tenant.

45. Preliminary Arrangements and Considerations

45.1 Brokerage agreement and commission negotiations.

45.2 Term sheets and letters of intent—early involvement by attorneys, to try to raise and resolve significant issues while it is relatively easy (and inexpensive) to do so.

45.3 Availability of tax incentives, rebates, etc. Timing requirements and pitfalls for any application (e.g., must sometimes apply before "committed" to the new location).

45.4 During Lease negotiations, Landlord agrees to remove space from market and not negotiate with other parties for specified period. Break-up fee? Reimbursement of expenses if deal does not go forward?

45.5 Selection, coordination, and contract negotiations with Tenant's other professionals: architect, broker, engineer, facilities consultant, signage designer, space planner, etc.

45.6 Tenant's internal approval procedures.

46. Lease-Related Closing Documents

46.1 Memorandum of Lease. Mention any "exclusive use" rights and other Lease provisions that restrict Landlord's activities on other premises. Record against all affected real property.

46.2 Nondisturbance agreement. See "lender's form" as soon as possible, so it can be negotiated along with the Lease.

46.3 Recognition agreement and estoppel from ground lessor.

46.4 Opinion of Landlord's counsel?

46.5 Calculation and allocation of transfer taxes, if any, on creation of Lease (including treatment of any transfer of personal property).

46.6 Title insurance.

46.7 Unusual security arrangements—letters of credit, delivery of marketable securities, etc.—structure and document along with the Lease as needed.

46.8 Consider separate insurance coverage for valuable leasehold.

46.9 Landlord's approval of plans and specifications for initial work (if not attached as Exhibit to Lease).

46.10 Lease exhibit consisting of diagram of premise—review and confirmation by broker, Tenant, other advisers.

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REAL PROPERTY LAW

A Seller's Best Defense: Carefully Drafted Brokerage Agreements

By Linda Gerstel

A recent decision by the New York Supreme Court, New York County held in *Cohen & Company Real Estate, Inc. v. Yassky*,[1] that a Letter of Intent was not enough for a broker to earn his commission. In *Yassky*, the Court granted a real estate developer/seller's motion to dismiss a complaint filed by a real estate brokerage firm. Yassky on his own behalf and as owner of a certain shopping center retained the broker to procure a ready, willing and able buyer for a shopping center. It was agreed that in the event the broker procured a buyer, defendants would pay a commission. The broker procured a buyer which agreed to purchase the shopping center for $4,375,000. The broker had sent the seller a brokerage agreement containing language that a commission would be payable on closing. However, the brokerage agreement was never signed by the seller. A letter of intent was executed between the seller and the potential buyer. Further, the broker had forwarded to the seller a draft purchase and sale agreement. The purchase and sale agreement was not executed, nevertheless it contained language which provided that a commission would be payable only if title had passed.

The broker argued that it had in fact procured a ready, willing and able purchaser, which the broker alleged was evidenced by a letter of intent signed by the purchaser and seller. The broker claimed that the letter of intent and the unsigned purchase and sale agreement contained all the material business terms for the sale of the property and that the "meeting of the minds" was evidenced by the letter of intent. The broker argued that the payment of a commission was never conditioned upon the closing of title on the shopping center and that the seller breached a duty to negotiate in good faith with the purchaser by failing to complete the transaction. Finally, the broker argued that even if that closing of title was a condition precedent to the broker's right to a commission, the developer's bad faith and willful failure to close title entitled the broker to its commission.

The seller relied upon a New York Court of Appeals case which expressly rejected the broker's argument in *Helmsley-Spear, Inc. v. Leasco Realty*.[2] *Leasco* affirmed a dismissal of a complaint as a matter of law, brought by a broker for a commission, on the grounds that a letter of intent does not constitute a final binding agreement as to all the material terms of the potential transaction. The letter of intent expressly provided that the agreements contained in the letter "are expressions of intent only and are not to be considered legally binding until incorporated in a fully executed and delivered joint venture."

With regard to the claim in *Yassky* based upon the seller's willful default, the seller claimed that such a claim was precluded because there was no legally enforceable contract of sale with the purchaser that could have been breached, either willfully or otherwise.[3] The seller relied upon the New York Court of Appeals case of *Graff v. Billet*.[4] *Graff* held that there could be no default of the brokerage agreement unless the seller is bound by a written contract of sale to convey the property to the person located by the broker. The *Graff* court noted the following:

> . . . the rule that where the sale fails due to the seller's fault or default, a broker is entitled to the commission . . . is inapplicable where, as here, the brokerage agreement explicitly provides that the commission is due when "title passes," not merely when the broker has obtained a prospective buyer. In light of such a provision, *the rule would apply only if the seller and the broker's prospective buyer had already entered a sales contract, and the seller's "fault" or "default," within the meaning of the rule, would have reference solely to a breach of that sales contract. . . . Here, there was no executed sales contract to be breached, and the seller's mere refusal to enter into one with the broker's prospective buyer is not a "fault" or "default" of the seller in the absence of any specific commitment by the seller in the brokerage agreement to enter into the sales contract*.[5]

The failure of the parties to agree as to the material terms of the sale for the property simply does not amount to a "willful default" on the seller's part.

The seller successfully argued that, first and foremost, there was no meeting of the minds since the proposed transaction never progressed further than preliminary negotiations. For example, discussions involving price, existing debts, closing date, costs associated with existing debts and essential warranties were sub-

ject to further negotiations. Secondly, the seller argued that the draft purchase and sale agreement forwarded by the broker to the seller stated that a commission would be due only when a closing materialized and title passed to the buyer. The New York Supreme Court granted the seller's motion to dismiss the complaint pursuant to (i) CPLR 3211 (a)(7) for failure to state a cause of action and to (ii) CPLR 3211 (a)(1), i.e., the defense was founded upon documentary evidence.

It has long been well settled that in order to state a claim for a commission, a real estate broker must prove (1) that he or she is duly licensed (2) that he or she had a contract express or implied with the party to be charged a commission and (3) that he or she was the "procuring cause" of the sale. In *Yassky*, the absence of a written brokerage agreement allowed the broker some flexibility to initiate costly litigation claiming that (i) it had earned a commission even though title had not passed and (ii) it was entitled to a commission based upon the developer's willful failure to close title. While the developer had been sent a draft brokerage agreement, he refused to execute it. A developer can take some proactive measures to protect against claims brought by real estate brokers:

- Reduce the understanding with the broker to a *written* brokerage agreement;
- Ensure that the agreement contains a requirement that *title passes* (avoid using the term "payable at closing" since some courts have held that such language merely means that the broker earned its commission under the ready, willing and able standard and has only agreed to defer the payment of the commission until the closing);[6]
- Protect yourself from claims of willful failure to close a transaction with language that spells out that no commission will be due as a result of a failure to close whether by an act of omission, commission, intentional, willful or arbitrary default by either the buyer or seller;
- Spell out the amount of the commission the broker has agreed to accept; and
- Have the agreement provide that if the broker commences an action when title has not passed, the developer would be entitled to legal fees incurred in dismissing the action.

Seller's counsel would be wise to insist on brokerage agreements which state that the seller retains sole discretion to not enter into a contract with the purchaser. Such a brokerage agreement should include the following language:

No compensation shall be earned by Broker for any services which have or hereafter may be rendered with respect to the proposed sale to Purchaser of the Premises, unless and until (a) a written contract of sale, on terms and conditions acceptable to Seller, is entered into between Seller and Purchaser; and (b) the closing of title to the Premises is consummated and the agreed-upon price is paid in full in the manner required by the terms of such contract.

The right of Broker to receive compensation is conditioned upon the actual completion of the proposed transaction, and, in the event of non-completion for any reason whatsoever, including but without limiting the generality of the foregoing, the unmarketability of Seller's title or the failure to perform said contract by either the Seller or the Purchaser (except for Seller's willful default after execution and delivery of a Contract of Sale), no commission or compensation is to be considered as earned and/or due and payable, and Broker shall have no claim whatsoever against Seller for any payment for its services in connection with this transaction.

A carefully worded written brokerage agreement allows for a developer to dismiss a complaint of an overzealous broker. It subscribes the time, manner and amount to be paid a broker. Sophisticated sellers may thereby protect themselves from liability for a commission in the absence of a closing.

Endnotes

1. Index No. 604936/98 (Sup. Ct., N.Y. Co. May 1999).
2. *See Helmsley-Spear, Inc. v. Leasco Realty*, 31 N.Y.2d 1017, 341 N.Y.S.2d. 620, 294 N.E.2d 207 (1973).
3. *See R.L. Friedland Realty, Inc. v. Modern Cabinets Corp.*, 194 A.D.2d 657, 658, 598 N.Y.S.2d 817, 818 (2d Dep't 1993); *See also Jacob Gold Realty, Inc. v. Sckoczylas*, 178 Misc. 2d 409, 412, 499 N.Y.S.2d 502 (N.Y. Civ. Ct., Kings Co. 1998).
4. 64 N.Y.2d 899, 901, 487 N.Y.S. 2d 733, 734, 477 N.E.2d 212, 213 (1985).
5. *Id.*, 64 N.Y.2d at 901-02, 487 N.Y.S.2d at 734 (emphasis added); *See also*, *Levy v. Friedman*, 216 A.D.2d 18, 628 N.Y.S.2d 265 (1st Dep't 1995) (Finding that because closing was a condition precedent to broker tight to obtain commissions, claim of willful default has no merit in the absence of a binding agreement which seller may be said to have willfully breached); *Corcoran Group, Inc. v. Morris*, 107 A.D.2d 622, 623, 484 N.Y.S.2d 7, 9 (1st Dep't 1985) (noting that until consummation of real estate deal occurs, seller is free to negotiate with anyone).
6. *See e.g.*, *Feinberg Bros. Realty v. Berted Realty Co.*, 70 N.Y.2d 828, 523 N.Y.S.2d 439 (1987).

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REAL PROPERTY LAW

What Title Insurance Does Not Cover

By James M. Pedowitz

Title insurance is essential in almost every real estate purchase, mortgage or important leasehold transaction, and its coverages are extremely important, but the protection is limited. Attorneys, owners and lenders must not only understand what is covered, but must also understand what their title insurance policy *does not cover.*

Each of the coverages listed in the title policy is important. Many lawyers and insureds are familiar with them. They also generally understand the Schedule B exceptions, although not always their full effect. Much less is known or understood about the exclusions from coverage. Even less is known or understood about the conditions and stipulations (hereinafter "C & S"), the so-called "boilerplate" provisions that impact on and diminish coverage. None of these factors should be considered alone. The policy coverage depends on the interplay of all of those elements of the policy.

Matters Not Insured

Some appreciation of the foregoing can be gleaned from the following points (without citations and not nearly complete) setting forth what the American Land Title Association (ALTA) policies now in use (absent some special endorsement if available and appropriate), *do not insure:*

1. The value of the property—or that it has any value at all.
2. The manner in which the property can be used, or that the property can be *used* for any economic purpose at all.
3. That a building permit can be obtained to build on or alter the property, not even to make a curb cut.
4. That absent an appropriate zoning endorsement, (which is not available in some states such as New York) that there is no zoning violation, unless notice thereof has been recorded in "Public Records" (as defined in the policy)—and they rarely are.
5. That even if properly zoned, that no special permits are required for the present use of the property, and, if required, that have been obtained or kept in force.
6. That an insured mortgage will be paid or that a mortgage foreclosure will not be delayed, and when finally completed will yield any proceeds to the insured.
7. That the insured premises are not contaminated with hazardous materials, or even that any environmental laws have not been violated, unless the violation is noted in those "public records" as defined in and limited by the policy.
8. That even if an undisclosed defect, lien or encumbrance affecting the property exists, that it will result in a compensable "loss" payable under a loan policy.
9. That damage or loss caused by activities on adjacent properties, such as flooding, lack of adjacent support, or disturbance of the surface by mineral exploration or removal would be compensable under the policy.
10. That any well, cesspool or septic tank servicing the premises lies within the perimeter lines of the premises; or that utility lines servicing the premises will continue to be permitted to do so.
11. That a title problem not excepted by the policy and which causes loss to the insured, but which is timely cured by the title insurer, will be compensable to the insured. It does not matter in most states that the title problem was not excepted because of a negligent title search.
12. That a fee policy may give no protection for monetary loss notwithstanding defects, liens, encumbrances or other matters not excepted if the amount of unpaid insured mortgages equal or exceed the face amount of the fee policy (except for costs incurred under the defense obligation).

All of the foregoing can be gleaned from a careful reading and understanding of the Exclusions from Coverage, and the Conditions and Stipulations.

Survey Coverage

One of the subjects on which there is considerable misunderstanding is the matter of so-called survey coverage in title insurance.

The basic ALTA Title Policy does not insure the accuracy of a land survey used by the title insurer in connection with the transaction. This broad assertion requires some amplification.

The ALTA Title Policy form makes no reference to a survey or any state of facts that a survey would disclose. However, it does insure against loss by reason of title defects, liens, encumbrances or unmarketability of title, among other things. An accurate survey can disclose facts that may evidence a title defect, such as possible adverse possession, prescriptive rights, boundary problems, errors in the record description, etc. and encumbrances such as easements, encroachments, etc., some of which can result in "unmarketability of the title." For that reason, basic title insurance underwriting requires a Schedule B exception such as "any state of facts that an accurate survey would disclose" in the absence of a survey acceptable for use by the title insurer.

A similar exception is frequently also added as to facts that a physical inspection would disclose.

These two basic exceptions are usually deleted by "extended coverage" which may be given by the policy, based upon a survey acceptable to the insurer, in which case new exceptions may be added based upon the survey reading and inspection report.

However, unless poorly phrased, those substitute exceptions do not result in insurance of the accuracy of the entire survey. The survey is merely the basis upon which the title insurer omits the more general survey exception and substitutes the new exceptions, if any, based upon what the survey has disclosed. Of course, if that survey erroneously does not show an encroachment or some other fact that adversely affects marketability of title or some other insuring provision, that omission can result in a loss to the insurer under the policy. So, to the extent that the survey error was incorporated into the policy by reading in the error, it can be argued that the survey was "insured," but that would be wrong. What was insured was what was set forth in the insuring provisions, such as that the title was not unmarketable, or that it was free from defects or encumbrances, except as disclosed by the Schedule B exceptions, which insurance may have been in error because the survey was in error.

Although the title insurer relies on the accuracy of the survey in either deleting, modifying or inserting Schedule B exceptions, it is not normally its intention to act as an insurer or guarantor of the accuracy of the entire survey. That is why the insured should and usually does require that the survey be certified or guaranteed to it as well as to the title insurer. That certification or guaranty creates the contractual privity between the surveyor and the named parties to whom the surveyor recognizes a duty of accuracy as to what is shown on the survey map.

Endorsements to the policy can create insurance coverage that would not exist without them. Some of them deal with the survey. The supplemental materials for the 1989 PLI title insurance program: "Negotiating Additional Coverages" contained various forms of endorsements, including: "butting Direct Endorsement, Location Endorsement - Survey, Encroachment Endorsement, Adjoining land, Encroachment Endorsement, Easement; plus Various California (CLTA) Endorsement Coverages."

Additionally, in some states, various additional custom-crafted endorsements may be available that add many more assurances that are survey related.

In some cases, the normal non-insurance of survey accuracy may be construed judicially as having been transformed into insurance by inappropriate underwriting language in a Schedule B exception dealing with the survey. Starting with the doctrine of "reasonable expectations" in insurance policy litigation, to which we add the principle of construing language against the drafter in a contract of adhesion, such as a title policy, what might a court do with a Schedule B exception that reads:

> Guaranteed survey made by Accurate Surveyors, Inc. dated October 29, 1996 shows a one story brick commercial building set back 26.5 feet from the street; a separate 4 vehicle garage 1.24 feet clear of the easterly line; 12 marked parking spaces; curb cut onto legally opened First Avenue; asphalt driveway leading from street to garage; 6 feet high chain link fence on rear line; no variations?

What might a court hold if it was determined that the building was in fact set back only 23.5 feet from the street, that the chain link fence was actually 18 inches inside the rear line and that an enforceable set-back covenant and restriction (excepted in the policy without affirmative insurance) required a 25 foot set back from the street? What if there were only 10 parking spaces of sufficient width to satisfy the local zoning ordinance?

A knowledgeable title underwriter would either have raised no exception based on that survey or merely have written: "No survey variations, as shown on survey made by Accurate Surveyors, Inc., dated October 29, 1996."

Exclusions From Coverage

The Exclusions from coverage in the ALTA policies are significant. Every attorney and other user of title insurance should be familiar with them. Exclusion No. 1 appears in both the Owner's and Loan policies:

> 1.(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulation) restricting, regulating, prohibiting or relating to (i) the occupancy, use or enjoyment of the land, (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
>
> (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof of a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

The effect of Exclusion 1(a) is to eliminate any possible coverage by reason of the existence or violation of practically every type of building or zoning law, ordinance or regulation, environmental protection laws, or the adverse effect or result of any improper or unlawful lot subdivision, whether current or *back in the chain of title*; unless there is some notice (not otherwise excepted) in the "public records" (as defined in the C & S), as of the date of the policy, of the enforcement thereof affecting the insured property, or of some defect, lien or encumbrance affecting the property resulting from the violation or alleged violation.

In many states ALTA Zoning Endorsements or other zoning endorsements may be available to provide some assurances as to applicable zoning and compliance with them by existing structures, but even those endorsements have only limited coverage.

The effect of the "subdivision" exclusion is also most significant, especially as to those lot subdivisions that occurred back in the chain of title. Inquiry should be made as to the date that any such subdivision law may have become effective as to the insured parcel, and if applicable, some assurance must be obtained as to compliance therewith by the insured parcel.

Although environmental protection laws pretty clearly come within the other broad land use and police power language of Exclusion 1, the specific words "environmental protection" were added in 1987 in order to make it crystal clear that the policy did not cover it unless the public records disclosed a violation.

1(b) excludes from coverage any other exercise of governmental police power not specified in 1(a), with the same exception as to notice in the public records as of the date of the policy with respect to its exercise, or as to violations resulting in a title defect, lien or encumbrance. The breadth of this police power exclusion can be gleaned from a holding that the denial of a curb cut for commercial driveway was an exercise of the police power,[1] notwithstanding that the inability to obtain the curb cut frustrated the known proposed use of the parcel as a "drive in" establishment.

Other examples that have been held to be the exercise of police power are the adoption of a local improvement ordinance for sewer installation (prior to confirmation of the assessment),[2] municipal code violations, including certificate of occupancy violation; and location within a flood plain zone.

Exclusion No. 2 also appears in both the Owner's and Loan policies.

> 2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date Policy which would be binding on the rights of a purchaser for value without knowledge.

This exclusion would have practically no effect in many states (i.e. New York) because of its limiting language and the state's eminent domain taking statutes that provide record notice.

Exclusion No. 3 which also appears in both the Owner's and Loan policies (with only minor variations) is the one most frequently utilized by title insurers in defending against claims made by an insured.

> 3. Defects, liens, encumbrances, adverse claims or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not

known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant became an insured under this policy; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy; or (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

A good starting point for research on this subject could be the now 22-year-old Annotation entitled "Title Insurance: Exclusion of Liability for Defects, Liens or Encumbrances Created, Suffered, Assumed or Agreed to by the Insured."[3] More current decisions can be found in Title Insurance Law Handbook by Robert E. Ellis and its Supplements published by Law Text Publishing Company in Chicago. Mr. Ellis was, for many years, Claims Counsel for Chicago Title Insurance Company.

Each of the words "created," "suffered," "assumed" or "agreed to" have separate meanings. Mr. Ellis's book at page 323, in its summary of *First National Bank and Trust Company of Port Chester v. N.Y. Title Insurance Co.*,[4] summarizes these definitions from the decision as follows:

"Created." The word "created" was said to have "reference to some affirmative act on the part of the [insured]." And it was held that the insured had taken the mortgage "but . . . did not create the defect. That was created by operation of law."

"Suffered." As to the term "suffered," the court noted that it "has been variously defined, as to allow, to let, to permit . . . It has been said that every definition of 'suffer' and 'permit' includes knowledge of what is to be done under the sufferance and permission, and intention that what is done is to be done . . . That Federal Court did not adjudge that there was any actual intent on the part of [insured] to obtain a preference . . . The mortgage could constitute a preference without such an actual intent on the part either of the mortgagors or the mortgagee.

"Assumed or agreed to." The words "assumed or agreed to" were held to import some particular defect or encumbrance assumed or agreed to in connection with the conveyance to the insured or "some collateral agreement made . . . with reference to the subject."

Another point that must be emphasized in analyzing the (b) portion of Exclusion 3 dealing with matters not "known" to the Company, but "known" to the insured and not disclosed to the Company in writing before it became an insured under the policy, is the definition in C & S 1(c) as to:

> "Knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matter affecting the land.

It should also be noted that there is no requirement for any disclosure to the insurer as to matters recorded in the public records.

Another significant point to an insured claimant who becomes entitled to policy coverage subsequent to the issuance of the policy is that the requirement to disclose adverse matters is still applicable. It even applies to matters that were learned after the date of policy if it was still prior to the date that the claimant becomes an insured. So, a potential assignee of an insured mortgage who will become an insured when it accepts assignment of an insured mortgage will not be covered with respect to off record defects, etc. that it has not disclosed in writing to the title insurer.

It should also be noted that there are several references in the exceptions to the Exclusions from Coverage as to matters disclosed in the "public records," a term that is specifically defined in C & S, #1(f) as:

> "Public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" hall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

Special note should be made of the fact that the term applies only to records established under "state statutes" enacted for the purpose of imparting the constructive notice specifically set forth in the definition. As such, it will most likely not apply to numerous types of other records that one might mistakenly believe are public records, such as federal records, including those involving bankruptcy (unless also provided for by a state's statute), municipal records, tax records, special district records, and various court records.

Exclusion 3(c) suspends the ability to collect under the policy until the insured claimant can establish that it

has suffered loss or damage. The net effect of this Exclusion is that even though a defect, lien, encumbrance or adverse interest has surfaced, other than the right to a defense, the insured may not yet be able to claim payment of a loss. This is particularly true under a loan policy prior to completion of a foreclosure.

Under a loan policy, the fact that a loss has occurred, as well as the amount of loss, may be difficult or impossible to establish until after enforcement efforts have been exhausted. For, example, XYZ Bank has a loan policy covering a $300,000 first mortgage made by John and Mary Doe on a substantial one-family residence. The loan goes into default and XYZ Bank orders a mortgage foreclosure search before commencing the action. The foreclosure search discloses a prior mortgage in the principal amount of $200,000 recorded about three (3) years earlier, which the title insurer failed to disclose. XYZ Bank calls its title insurer who may respond by asserting that XYZ Bank has not yet suffered a loss notwithstanding their error. In most states, this is the law.

Exclusion 1(d) protects the title insurer against claims based on matters, including charges, liens, or encumbrances, that may have existed on the date of the policy, but which did not "attach" until after the policy date. This problem arises most frequently with respect to special assessments for improvements. The general rule is that unless the lien has attached by the date of the policy, the title insurer need not pay.

Exclusion i(e) does not affect the normal purchase or loan transaction. If, however, title insurance is being purchased to cover an estate or interest received as a gift, unless some special endorsement can be obtained, which is usually unlikely, any loss suffered because the insured is not a B.F.P. will have to be borne by the insured, and not the title insurer.

Exclusion 4 in the Owner's Policy and Exclusion 7 in the Loan Policy are commonly referred to as the "creditor's rights" exclusion, which as revised on 10-17-92 now reads:

> (Owner's) - "Any claim, which arises out of the transaction vesting in the insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditor's rights laws that is based on:
>
> (1) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or
>
> (2) the transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure to timely record the instrument of transfer or the failure of such recordation to impart notice to a purchaser for a value or a judgment or lien creditor."
>
> (Loan) - "Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors, rights laws that is based on:
>
> (1) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
>
> (2) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
>
> (3) the transaction creating the interest of the mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure to timely record the instrument of transfer or the failure of such recordation to impart notice to a purchaser for value or a judgment or lien creditor."

Although endorsements should be available to modify or delete this Exclusion in appropriate circumstances, there has been a reluctance to do so on the part of most title insurers, and as of now, New York is still among the states where no such endorsement can be obtained.

It should be noted though, that the Exclusion applies only to the current transaction creating the insured estate or interest, and not to any prior transfer.

The remaining *two* Exclusions are found only in a Loan Policy and deal exclusively with mortgages.

ALTA Loan Exclusion Number 5 pertains to violations by the insured of usury or consumer protection or truth in lending laws. Lenders generally recognize that these are risks that they and they alone should assume. However, in some states, some form of coverage against loss by reason of a defense of usury are available.

ALTA Loan Exclusion Number 6 (which does not apply in New York because of New York's Lien Law)

deals with statutory liens for services, labor or materials (mechanic's liens) and makes it clear that any such lien arising from an improvement which is contracted for and commenced subsequent to the date of the policy is excluded from coverage unless the improvement is financed in whole or in part by the proceeds of the loan and mortgage that is being insured. This Exclusion ties in with insuring Provision 7 in the ALTA Loan Policy which, in New York, is superseded by the broader statutory lien coverage in the New York Endorsement.

The Conditions and Stipulations ("C&S")

As with all "boilerplate" there can be hidden traps for insureds lurking in this technical language and it should be read carefully. Although most of the C&S are the same in both the Owner's and Loan policies, there are variations, some of which can be quite significant.

Some of the highlights in the C&S that have significance as to what is not insured start with the definitions in C&S 1. Unless you come within the definition of "insured," you have no coverage under the policy.

The named "insured" is obviously the beneficiary of the title insurance, but the definition in C&S 1(a) may also include parties other than the named insured. These definitions should be read together with C&S 2 on "Continuation of Insurance" which deals with the continuation of coverage even after a conveyance by an owner, to a limited extent, and which, after assignment of the insured mortgage, provide coverage to the assignee.

With one exception, an Owner's Policy cannot be assigned to or benefit a new owner; not even to a related party such as a corporate affiliate, partnership or trust, etc., without the benefit of a specific endorsement. The exception is found in the language of the Owner's Policy definition in C&S 1(a):

> (a) 'insured': the insured named in Schedule A, and, "*subject to any rights or defenses* the Company would have had against the named insured, those who succeed to the interest of the named insured *by operation of* law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors. (emphasis added)

The definition of "insured" in the Loan Policy is much more inclusive and includes all subsequent owners of the indebtedness, with some minor conditions.

Notwithstanding that a claimant fits within the definition of an insured, the benefits of the insurance can be lost by failure to comply with the provisions for Notice of Claim (C&S 3), Proof of Loss (C&S 5), or the required degree of cooperation and aid (C&S 4(d)) to the insurer.

C&S 6, 7, 8 and 9 contain important limitations on the determination of and the extent of liability of the insurer under the policies, as well as the options available to them to limit or terminate the policy liability. The insurer is given an option to make payment of the amount of the insurance plus other accrued covered expenses and thereby cut off all then existing and future liability including the conduct of pending litigation.

C&S provision No. 8 can also take away from the amount of the insured's recovery under the policy in the event of a covered loss. These provisions permit the insurer to make a pro-rata apportionment of its policy liability among two or more separate and independent parcels contained within the Schedule A description of the premises if not used as a single site. If in fact a policy covers two or more separate parcels that are more valuable in combination than separately, this problem should be addressed by an endorsement.

Under C&S 9(b) of the Loan policy, partial payment of the principal indebtedness can reduce the amount of policy coverage. Careful consideration must be given to the effect of this provision in a case where the policy covers a mortgage on multiple parcels. In some instances, especially in a multistate transaction, it may be well to add a "Last Dollar Endorsement," if it is available.

Other C&S provisions—No. 10 in the Loan Policy and C&S 11 Owner Policy deal with "Liability Non-Cumulative." One effect of these provisions is that unless an owner carries sufficient coverage in excess of all outstanding insured mortgages, the owner *may* land up either with no coverage at all or some very significant lesser amount of coverage in the event of a serious or total loss. The loss paid to an insured mortgagee or mortgagees is deducted from the insurance available to the owner. Whenever a new mortgage is executed the owner should review and, if necessary, increase the Owner's Policy to cover all outstanding mortgages, plus the owner's equity in the property.

C&S 12 in the Loan Policy and C&S 13 in the Owner's Policy deal with the insurer's right of subrogation. Destruction or material interference by the insured with the insurer's subrogation rights can destroy or severely diminish the policy protection.

The subrogation provisions in the ALTA policies are extensive. The rights of subrogation available to an insurer after a payment to an insured under a policy of insurance are well settled in insurance law. The ALTA subrogation provisions recognize that in those cases where the payment under the policy does not fully

cover the loss of the insured claimant that the subrogation rights of the insured to the extent of the balance of the insured's actual loss that was not recovered under the policy. The loan policy also specifically permits an insured mortgagee to release the personal liability of the debtor or guarantor, to release a portion of the mortgaged premises, and to engage in certain other activities that are normally engaged in by mortgagees, *but these otherwise normal acts are not permitted after the insured has knowledge of any claim of title or interest adverse to the title of the estate or interest as insured, or as to the priority or enforceability of the lien of the insured mortgage*. The policy also protects the Company's right of subrogation against other insurers who may acquire the insured interest as a result of an indemnity guarantee, or other policy of insurance.

No discussion of what is not insured should fail to mention provisions for mandatory arbitration, which can seriously affect one's rights of recovery under a policy. The ALTA policies contain such provisions, which are new with respect to title insurance.

The arbitration provisions may be triggered either by the Company or by the insured when the amount of insurance is one million dollars or less. If the amount of insurance is in excess of one million dollars, arbitration can only be required when agreed to by both the Company and the insured. Special arbitration rules have been prepared by the American Arbitration Association and arbitration can only be utilized if not prohibited by applicable law in the state in which the dispute is to be resolved.

Endorsements may be available to eliminate or modify the Arbitration provisions of the ALTA policy forms in most states.

Conclusion

Title insurance provides very significant coverage to almost everyone acquiring an estate or interest in real property. However, it must be understood that there is no form of insurance available anywhere that is all-inclusive. It is important to understand and appreciate what the title insurance covers and what it does not cover. It is equally as important to understand that title insurance must be supplemented by competent legal advice and expertise. A good lawyer is essential to get the best out of the title insurance that is available for the transaction.

Lastly, but very importantly, a title claim rarely fully compensates the claimant for all of the loss that has been suffered, and nothing can fully compensate for the emotional trauma that frequently accompanies a title claim, particularly to an owner. The very best title policy is one that accurately reflects the status of the title based upon a complete and competent title examination, a title policy that provides peaceful possession to an owner, and an enforceable lien to the mortgage lender.

Endnotes

1. *Marriott Financial Services, Inc. v. Capitol Funds, Inc.,* 23 N.C. App. 377, 209 S.E.2d 423 (1974), *aff'd,* 288 N.C. 122, 217 S.E.2d 551 (1975).
2. *BelAir Motel, Corp. v. Title Ins. Corp. of PA.,* 444 A.2d 1119 (N.J. Super 1981).
3. 87 A.L.R.3d 515 (1978).
4. 12 N.Y.S.2d 703 (Sup. Ct. 1939).

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Adventures in Home Sales: A Case Study in Legal Ethics[1]

By Karl B. Holtzschue

Ethical issues can come up at nearly every stage of a real estate transaction, even a relatively uncomplicated sale or purchase of a home. This article begins with an overview of the New York ethics rules and an example of their structure and then explores the application of the rules in an annotated case study of a home sale.

Get to Know the Rules

To be able to recognize and cope with ethical isses, a New York lawyer should be familiar with The Lawyer's Code of Professional Responsibility of the New York State Bar Association (NYSBA), consisting of 9 Canons of Professional Responsibility, 132 Ethical Considerations and 48 Disciplinary Rules. At a bare minimum, every lawyer must comply with the Disciplinary Rules to avoid being subject to disciplinary action. Extensive changes were made to some Ethical Considerations and many Disciplinary Rules as of June 30, 1999, as a result of the first comprehensive examination of the Code in over a decade.[2] Rulings on specific cases are given in opinions issued by the NYSBA Committee on Professional Ethics and and comparable committees of local bar associations.[3]

> A review of published decisions [as to violations of the Disciplinary Rules] shows that public discipline is largely confined to *failure to segregate client funds*, *stealing from clients*, *neglect* so gross as to delay or deny justice, *conflicts of interest* so gross as to cause identifiable client harm, inappropriate courtroom conduct so gross as to warrant criminal contempt, or *conspicuous dishonesty*.[4]

Conflicts of Interest: An Example of the Canons, Ethical Considerations and Disciplinary Rules

Most of the NYSBA ethics opinions on real estate matters have dealt with conflicts of interest, either between the lawyer and the client or among different clients. Canon 5 states the basic commandment: "A lawyer should exercise independent professional judgment on behalf of a client." This is amplified in twenty-four aspirational Ethical Considerations. EC 5-1 states the overall principle:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

EC 5-2 through 5-13 deal with interests of the lawyer that may affect the lawyer's judgment. EC 5-14 through 5-20 deal with the interests of multiple clients. EC 5-21 through EC 5-24 deal with the desires of third persons.

As to interests of the lawyer, EC 5-2 states:

> A lawyer should not accept proffered employment if the lawyers' personal interests or desires will, or there is reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.

This is codified as a Disciplinary Rule in DR 5-101(A):

> 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, *unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby*[5] and the client consents to the representation after full disclosure *of the implications of the lawyer's interest* [changes effective 6/30/99 italicized].[6]

A further complication is that some conflict situations have been held to be so obvious that they are *per se* impermissible and cannot be cured by informed consent of the client.[7]

As to interests of multiple clients, EC 5-15 states:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, the lawyer must weigh carefully the possibility that the lawyer's judgment may be impaired or loyalty divided if the lawyer accepts or continues the employment. The lawyer should resolve all doubts against the propriety of the representation.

This is codified as a Disciplinary Rule in DR 5-105:

> (A) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment . . .
>
> (C) In situations covered by DR 5-105(A) or (B), a lawyer may represent multiple clients 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* [changes effective 6/30/99 italicized].

Note that DR 5-105(C) is stated positively, unlike DR 5-101(A) and 5-105(A). If, after full disclosure and consent, the interests of the clients become conflicting, the lawyer must withdraw from representing any of them.[8]

Case Study for Home Sales

Purpose of the Case Study

Ethical issues can come up at nearly every stage of any real estate transaction, even a relatively uncomplicated sale or purchase of a home. The following case study is intended to illustrate relevant ethics rules and opinions. The endnotes include citations to the rules and opinions and some commentary on the issues raised.

The actions of the characters in the case study are meant to raise the issues, not to illustrate proper conduct. Describing wrong turns is usually a better teaching tool than describing model behavior. It should go without saying that *most of the conduct described in the case study should not be emulated*.

Advertising

Laura Lawyer, having spent two years as an associate in a medium-sized general practice law firm in Manhattan, eagerly opened an office as a solo practitioner in Southampton. At the firm she had been involved in litigation and corporate matters and a couple of commercial mortgages for a bank. Between college and law school, she had been a licensed salesperson in a real estate brokerage in Suffolk County, where she met her husband, Bob Broker, a licensed broker in a rival firm. To help her get herself known, Bob suggested that Laura take out an ad in his firm's brochure aimed at buyers and sellers of homes. Laura thought that was a great idea.[9]

Referrals

A few days later, Laura got a call from Randy Realtor, another broker, who had brought about a sale for a seller. He asked Laura if she could represent the seller and prepare a contract, suggesting that there could be similar referrals in the future.[10] Laura said she'd be happy to do so.[11] The broker called back, suggesting that if Laura would represent both parties everything would go more smoothly and the parties could benefit from a lower combined fee. Laura said she didn't think she could do that.[12]

But Laura's luck continued. The next day she received a call from a mortgage broker who offered to pay Laura a fee if Laura would refer to the broker purchasers who were looking for loans. Laura wondered if she could still charge the same legal fee to purchasers and just pocket the referral fee from the mortgage broker.[13] The same day, she got a call from a real estate lawyer at her former law firm who offered to answer her questions and refer home sales to her if she would give him a third of her fee.[14] Laura happily agreed.

Laura was approached some time later by Randy Realtor and Marty Mortgage-Broker to participate in a "Home Buyers Program,' under which Marty would pre-qualify the buyer for a mortgage loan, Randy would find the home and Laura would represent both the buyer and the lender for a fixed fee that would be substantially less than the aggregate amount the buyer would customarily pay for those services.[15] Since she had no relationship to Randy or Marty, Laura thought that it sounded like a great idea.

Brokers

Knowing that brokers charge much higher fees (sometimes 6%) than lawyers usually charge for home sales (up to 1%), Laura wondered if she couldn't wear both hats and increase her income. Thinking that must somehow be improper,[16] Laura discussed the problem with her husband Bob, a broker. Bob said that was easy, she could just refer her clients to him and he would refer his clients to her.[17]

Contract Drafting and Negotiation

Randy Realtor called Laura the next day. He said he had found a buyer, Burt Buyer, to buy Sam Seller's house in Smithtown for $350,000. Randy said Sam wanted to close by December 1st because he was trying to buy a house in Boca Raton, Florida for the winter season. Randy told Laura to make sure she used the Smithtown mail address so the purchasers would think that the house was in the Smithtown school district.[18] Using the checklist she got from a book,[19] Laura asked Sam about the deal and his house. Sam said that it was in pretty good shape and that the basement hadn't leaked all summer. Somewhat puzzled, Laura asked what the basement looked like. Sam said it looked fine, especially since he had put up the wall paneling last year.[20] Laura prepared a contract on the Multibar Residential Contract of Sale form,[21] using the Smithtown address, stating that title was subject to "covenants, restrictions and easements of record' and containing the usual 'as is' clause, and sent it to Alan Attorney, the lawyer for the buyer. Sam then called and asked Laura to call Burt Buyer and find out if he wanted to buy the dining room chandelier, which Sam just might decide to leave. She did,[22] but Burt said no, he thought it was included in the sale.[23]

Alan Attorney called back with several comments on the contract. Among other things, he asked that the closing be December 15, not December 1, and Laura agreed.[24] After a lengthy exchange, he concluded by asking for copies of the seller's deed, title policy, survey, certificate of occupancy and any covenants, restrictions and easements. Laura said: "Get them yourself. I've spent too much time on this with you already," and hung up.[25]

Escrow of Downpayment

Somehow the contract was later signed by the parties and Laura received a check for $35,000 made out to her as escrow agent. Linda went to her bank and asked for the forms to open an attorney's escrow account. The bank officer asked Laura whether the account was to be interest-bearing and, if so, for the social security number of the client. Laura didn't know the answer, having failed to get that information or fill in the blank in the Multibar Residential Contract, so she said she guessed it should be in a non-interest bearing account. When she got back to the office, Laura looked at Paragraph 6 of the contract and saw that it said that the seller's attorney (Laura) shall be the Escrowee and that the Escrowee "shall (*not*) (*delete if inapplicable*) hold the Downpayment in an interest-bearing account for the benefit of the parties." Since she failed to make the deletion, she was not required by the contract to put the downpayment in an interest-bearing account, and she breathed a sigh of relief.[26] Having seen the paperwork and time consumed in opening the account, Laura wondered if she could have asked to keep the interest herself to help pay for her trouble.[27]

Between Contract and Closing

Two weeks after the contract was signed by the parties, Alan Attorney called to say that his client wanted to inspect the house after the recent heavy rains and that there was a question about the school district. His client wanted to make sure that the house was in the Smithtown school district. Laura said she didn't know anything about that.[28] When Laura asked Sam Seller about it, he said that the house was on the border line, but actually in the Kings Park school district, even though the post office address was Smithtown. Laura said she thought she ought to give Alan that information, but Sam asked her to "fudge' it, refuse the inspection request and insist that the contract be honored as written, since he needed the money to buy a new house in Florida.[29] Laura decided to tell Alan about the school district but refused to agree to the inspection.[30] Alan responded that his client had been defrauded about the school district and the basement condition, was canceling the contract and was demanding a refund of the downpayment. When Laura told Sam Seller, he said the buyer was just trying to get out of the deal and was in default. Sam demanded that Laura turn over the downpayment to him. Laura was sympathetic, but was not sure she could do so.[31]

If Sam Seller had told Laura that he was glad to be selling because he thought that his underground storage tank was leaking fuel oil and was worried that it may be about to contaminate a neighbor's well or public waterway, would Laura be obligated (or even permitted) to do anything about that?[32]

Closing

Fortunately for Laura, the parties decided to proceed, after agreeing to a reduction in the purchase price. Just prior to the closing, Alan learned that Sam Seller had convinced Burt Buyer to take some cash under the

table to reduce the purchase price and reduce the transfer taxes payable by the seller, offering to split the savings with Burt. Alan called Burt and strongly advised against this. When Burt hesitated, Alan threatened to resign.[33] Burt relented.

Assuming that the transaction takes place in a county where attorneys act as title insurance agents (primarily upstate), Alan Attorney might tell his client, Burt Buyer, that he would be happy to act as the title insurance agent to search the title[34] or to refer Mr. Buyer to Alan's title abstract company.[35]

The lender submitted a bill for its attorney's fee for preparation of the mortgage to the buyer for payment at the closing. Burt Buyer wondered if it was proper for him to pay the fee of an attorney who didn't represent him.[36] That lead Mr. Buyer to the idea that he might have avoided having to pay for his own lawyer by just having the lender's lawyer represent him at the closing.[37] The lender's attorney could also be paid by the title insurer for representing it on the mortgage title insurance at the closing.[38]

At the closing, the lender was represented only by a paralegal. Burt Buyer asked the paralegal several questions about the loan, including how the escrow for taxes and insurance was calculated and what he could do if the bank made an error.[39] At the closing the paralegal delivered checks on the lender's lawyer's client escrow account that were signed by the paralegal using a signature stamp of the lender's lawyer.[40] Representation of the lender by a settlement corporation would appear to violate the prohibition against corporations practicing law.[41]

Eventually, the sale was closed.

Fee

Laura decided that the transaction was such a pain that she should charge double for her trouble.[42] Surprisingly, Sam refused to pay.

Post-Closing

After the closing, Alan Attorney got a call from a tax reduction company interested in hiring him to conduct judicial proceedings after they failed to secure a reduction in Mr. Buyer's real property taxes in administrative proceedings. They offered him a percentage of the tax reduction company's fee, which itself was based on a percentage of the amount by which the taxes are reduced.[43] Alan accepted.

The Bad News

About a month after the closing, Laura got a copy of a letter from Burt Buyer to the Grievance Committee complaining of her conduct in the matter. Too bad she didn't know the rules or when, where or from whom to seek guidance.[44]

Homethic

Ethics In Home Sales

Issues:

1. Not handle if not competent w/o associating DR 6-101
2. Accede to reasonable requests, be courteous DR 7-101(A)(1)
3. May fail to assert a position of client DR 7-101(B)(1)
4. Not assert position that would merely harass DR 7-102(A)(1)
5. Not knowingly make false statement of law or fact DR 7-102(A)(5)
6. Not counsel or assist in fraud DR 7-102(A)(7)
7. If learn of fraud, call on client to rectify DR 7-102(B)
8. Not communicate with party who is represented DR 7-104
9. Not permit non-client who pays to direct DR 5-107
10. Not charge excessive fee DR 2-106
11. Not divide fee with another lawyer unless in proportion DR 2-107
12. Referral (repeated) from broker Op 467
13. Fee for referral from mortgage broker? Op 667
14. Not pay for ad in broker's brochure Op 566
15. Lawyer and broker Op 208, 493
16. Lawyer and broker-spouse Op 244, 291, 340
17. Rep seller and buyer Op 38, 162
18. Title examiner and rep party Op 576, 626
    Own title abstract co Op 595, 621, 626
19. Rep mee, paid by mor Op 438
    Rep seller and lender Op 611

20. Escrowed funds DR 9-102
    Not retain interest Op 532
    Get instructions as to interest Op 575

21. Delegate attendance at closing to paralegal Op 677

22. Release of escrow Op 710

23. Referral from tax reduction company Op 705

24. Participate in CLE EC 6-2

Transaction

Advertising; referrals 14, 12, 13

Broker 15, 16

Initial hiring 1, 17, 24

Negotiation 2, 3, 4, 5, 6, 7, 8, 9

Escrow funds 20

Title exam 18

Loan 19

Closing 22, 21

Fee 10, 11

Tax reduction 23

Endnotes

1. This article was inspired by Green & Stein, "Adventures in the Mortgage Trade: "A Case Study in Legal Ethics," 27 N.Y. Real Prop. L.J. 49 (Spring 1999), which provided a generic overview of ethical issues that can arise in commercial real estate transactions. This article focuses on New York ethical rules and opinions. *See also* Holtzschue, "Ethics and Professionalism," 27 N.Y. Real Prop. L.J. 61 (Spring 1999). The persons in the case study are fictitious. Any resemblance to persons living or dead is unintentional. The author thanks Joshua Stein, Esq. and Prof. Bruce Green for their thoughtful comments on this article.

2. The changes affected jurisdiction and choice of law, lawyer advertising and solicitation, conflicts of interest, business transactions with clients, media rights, sexual relations with clients and other matters. The changes in the Disciplinary Rules are available on the NYSBA website: www.nysba.org under "Ethics" where deletions and additions are indicated. For a discussion of the amendments as proposed, *see* Krane, "Proposed Amendments to the Code of Professional Responsibility: A Continuing Process of Change," 69 N.Y. St. Bar J. 42 (May/June 1997). For annotations and opinions, *see The New York Code of Professional Responsibility: Opinions, Commentary and Caselaw* (Daly, ed. Oceana) and Simon, *New York Code of Professional Responsibility Annotated* (West).

3. Copies of recent NYSBA opinions are posted on the NYSBA website: www.nysba.org under "Ethics." Recent NYSBA and Association of the Bar of the City of New York ("ABCNY") opinions are also available on LEXIS. As noted below, N.Y. State Opinions 621 and 693 have been criticized. The Oceana book cited in the previous note has full text ethics opinions after 1989 from the NYSBA, the ABCNY, the New York County Lawyers' Association and the Bar Association of Nassau County.

4. Fales, "The Bar Association's Role in Maintaining Professionalism," 69 N.Y.S. Bar J. 49 (May/June 1997) [emphasis supplied].

5. The disinterested lawyer test was added. It now conforms to a similar change made in DR 5-105(C) (conflicts among clients). Prior opinions read into
DR 5-101(A) the prior "obvious" test of DR 5-105(C) ("obvious that the lawyer can adequately represent the interest of each"). N.Y. State 694 (1997).

6. Thus, to be permissible, a conflict between the lawyer and her client must both (1) pass the "disinterested lawyer"/"obvious" test and (2) have consent after full disclosure. How does the lawyer prove full disclosure and consent? Disclosure and consent are not required to be written, though new EC 5-3 states a preference for written consent. *Compare* new DR 5-104(A)(3), which expressly requires for the first time that consent be in writing as to transactions between a lawyer and clients. Is the client capable of making a decision about the exercise of professional judgment that properly should be made by an attorney? Comment, "Full Consent: An Invitation to Conflicts of Interest in the Attorney-Client Relationship," 1972 Law & Soc. Ord. 435, 441, 445 (1972). Is "informed consent" by a client to a conflict with its attorney based on the advice of that attorney an oxymoron? New EC 5-4 advises review by independent counsel. But if the client truly consents after full disclosure, shouldn't the client be entitled to choose its attorney?

7. *E.g.*, NYSBA Opinions 694 (1997) (home buyer program), 208 (1971) (lawyer/broker) and 595 (1988) and 621 (1991) (lawyer owning title abstract company; *but see* strong dissent in Opinion 621: "There is no basis in the Code for eliminating the consent provision from
DR 5-101(A), and making a client's consent unavailable when the lawyer has an ownership interest in the agency, yet allowing client consent under identical circumstances when the lawyer represents the insurer and acts as its agent [under NYSBA Opinion 576 (1986)]."

8. EC 5-15; N.Y. State 611 (1990).

9. It may appear to be an attractive marketing tool, but an ethics opinion of the NYSBA Professional Ethics Committee found such an ad to be improper if the attorney paid for an endorsement or recommendation and misleading if it does not appear to be an advertisement paid for by the attorney. N.Y. State 566 (1984).

10. NYSBA Opinion 467 says that it is not *per se* improper for a lawyer to accept repeated referrals from a real estate broker. The concern, of course, is that the lawyer may have a conflict between the interests of a particular client and the longer term interest of the broker in
closing sales to earn a commissions.
DR 5-107(B) says that a lawyer shall not permit a person who recommends him for legal services to direct or regulate the lawyer's professional judgment. The Opinion concludes that a lawyer receiving repeated referrals should be "especially wary" of any influences that may dilute his professional loyalty to his client. N.Y. State 467 (1977).

11. Based on the facts, Laura has no experience in representing sellers or purchasers of real estate. Is it ethical for her to take on such a matter without experience? If not, how can solo practitioners ever take on a matter that varies from the work they have actually done in the past? DR 6-101 says that a lawyer should not handle a matter that the lawyer knows or should know he or she is not competent to handle, without associating with a lawyer who is competent. Does that mean that Laura can take on the matter if she consults with an experienced lawyer? What if she bought a book, such as *Holtzschue on Real Estate Contracts*? Would it matter whether she actually consulted the book? Would taking a CLE course on home sales make her com-

petent? EC 6-2 says that a lawyer should "maintain" competence by participating in CLE. Must she reveal to her client her inexperience (and consultation)?

12. Even Laura knows that the potential conflict of interest is too great for a lawyer to represent the seller and the buyer in the same deal. Curiously, NYSBA Opinion 162 (1970) states that an attorney may do so, but only when there are no actual or potential differing interests and there is complete disclosure to and consent by both clients. The opinion makes clear that this is unlikely ever to be the case, but the positive statement seems disingenuous and unlikely to be followed today.

13. She can do so only if (1) the client consents after full disclosure, (2) the referral fee is credited to the client if the client so requests (what client wouldn't?), (3) the aggregate attorney's fee is not excessive and (4) the attorney exercises independent professional judgment on behalf of the client. N.Y. State 667 (1994). Could the mortgage broker get around this by treating Laura and Bob to dinners and theater tickets? Would that be circumventing a Disciplinary Rule through acts of another in violation of DR 1-102(A)(2)? An attorney who steered a client to a corporate mortgage broker in which the lawyer had an undisclosed interest was suspended for three years. *In re Pine*, 194 A.D.156, 604 N.Y.S.2d (2d Dep't 1993).

14. An attorney may not split a fee with another attorney unless the client consents after full disclosure, the division is in proportion to the services performed by each lawyer, and the total fee does not exceed reasonable compensation. DR 2-107(A).

15. NYSBA Opinion 694 (1997) found such an arrangement unethical as an impermissible third party solicitation under DR 2-103 and conflicts of interest under DR 5-105(C) with respect to the mortgagor and mortgagee and under DR 5-101(A) as to the attorney and broker (not at all obvious that the lawyer could adequately represent the differing interests, so the conflict could not be cured by consent).

16. A lawyer may conduct a law practice and real estate brokerage business from the same office, but she cannot act as lawyer and broker in the same transaction. N.Y. State 493 (1978). The conflict is too great between the broker who gets paid only if the deal closes and the lawyer who must be free to advise her client not to close.

17. The conflict of interest is not cured by using a spouse. N.Y. State 340 (1974). Laura can act as attorney for clients of her spouse's office only if the spouse has not participated in the transaction or benefitted therefrom. *Id*.

18. Would Laura then be engaging in conduct involving a fraud, in violation of DR 1-102(A)(4)?

19. *See*, *e.g., Holtzschue on Real Estate Contracts* (Practising Law Institute), App. A or 1 *New York Practice Guide: Real Estate* (Matthew Bender) § 2.29[1][a][viii].

20. Should Laura have asked why he put up the wall paneling? If he put it up to conceal leaks, that would be actionable fraudulent concealment. *Stephens v. Sponholz*, 251 A.D.2d 1060, 674 N.Y.S.2d 244 (4th Dep't 1998). Is it Laura's job to unearth these problems?

21. Jointly prepared by the Real Property Section of the New York State Bar Association, the New York State Land Title Association, the Committee on Real Property Law of the Association of the Bar of the City of New York and the Committee on Real Property Law of the New York County Lawyers' Association and printed by Blumberg Law Products as form A 125 ("Multibar Residential Contract"). This is the most commonly used form downstate, though (regrettably) still somewhat less so in Suffolk County.

22. Laura should have called Alan first. An attorney may not communicate with a party who is represented, without the prior consent of the party's attorney, regarding any matter within the scope of the representation. DR 7-104(A). A new amendment permits a lawyer to cause his client to communicate with a represented person provided the lawyer gives reasonable advance notice of the communication to the represented person's counsel. DR 704(B). New EC 7-18 defines "reasonable advance notice" as notice sufficiently in advance and of sufficient content as to give the lawyer an opportunity to advise the client.

23. Burt's right, if Paragraph 2 of the Multibar Residential Contract was not modified to exclude lighting fixtures. Laura (and the broker) should have made sure that Sam had agreed to the list of personal property specified in the contract as included in the sale. The failure to do so is one of the most common areas of unnecessary dispute in home sales.

24. An attorney may exercise professional judgment to waive or fail to assert a position of a client. DR 7-101(B)(1). Here, Laura knew that December 1 was a preferred date, but probably not a drop-dead date. Still, she should have checked it out with the client first, if only as a courtesy.

25. The Disciplinary Rules require that an attorney accede to reasonable requests, avoid offensive tactics and treat all persons [even opposing attorneys, who are in fact persons] with courtesy and consideration. DR 7-101(A)(1). Was the request reasonable? Does that depend on whether those documents are reasonably available from other sources and on whether Laura already had copies of them?

26. Not so fast, Laura. An attorney is obligated to get instructions from the contracting parties as to whether the escrowed funds should be held in an interest-bearing account. N.Y. State 575 (1986). DR 9-102 provides detailed requirements as to escrowed client funds: they may not be commingled, must be deposited in a banking institution, and must be kept in separate accounts that are specially identified, and records must be maintained for seven years.

27. Wrong again. N.Y. State 532 (1980).

28. Was that a "white lie" or did Laura violate the Disciplinary Rule prohibiting a lawyer from knowingly making a false statement of law or fact? DR 7-102(A)(5).

29. Is Laura being asked to assist in a fraud by the client in violation of DR 7-102(A)(7)? If an attorney learns of a fraud, the attorney must call on the client to rectify it. If the client refuses to do so, the lawyer *must* reveal the fraud to the affected person, except when the information is protected as a confidence or secret. DR 7-102(B)(1). Is the school district a client secret? If it is a secret, isn't Laura prohibited from revealing it under the client confidence rule of DR 4-101(B)(1)?

30. An attorney must accede to reasonable requests. DR 7-101(A)(1). Paragraph 12 of the Multibar Residential Contract gives the purchaser the right to inspect before the closing. Laura should get to know the contract.

31. Laura should read the contract. Paragraph 6 of the Multibar Residential Contract says that the Escrowee must give prompt notice to the other party of a demand for the downpayment and pay it to the demanding party only if the Escrowee does not receive written notice of objection from the other party within 10 business days. A lawyer who released escrowed funds to his client where it appeared that the purpose of the escrow had been fulfilled (to secure against loss due to a sidewalk violation) was held not to have the power to resolve the dispute if the escrow agreement did not so provide. N.Y. State 710 (1998). On the merits, Sam's position seems weak.

32. Not under the client confidence rule of DR 4-101(B)(1) or Model Rule 1.6 of the American Bar Association, one of the most controversial of the Model Rules. Russell, "Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law," 55 Wash. & Lee L.Rev. 117 (1998) (criticizing the American Bar Association's Model Rule as favoring attorney-client confidentiality too much over positive environmental law protection of third parties). In New York, Laura is *permitted* to disclose a client secret only if the client intends to commit a crime. DR 4-101(C)(3). Is owning a leaking residential fuel oil tank a crime? What if it was a leak in a commercial tank that was required by law to be reported? Is the seller obligated to reveal a leaking underground tank under New York's version of *caveat emptor*? For an analysis of the evolving rule, *see* Holtzschue, "*Caveat Emptor* Ain't What It Used to Be: New Developments, Trends and Practice Tips," 25 N.Y. Real Prop. L.J. 3 (Winter 1997).

33. Good for Alan. If his client insists on going forward, he must withdraw from further representation. N.Y. City 1994-8 (1994), citing N.Y. State 454 (1976), DR 7-102(A)(7) and DR 2-110(B)(2). Having properly withdrawn, the attorney was not *required* to disclose the fraudulent scheme to anyone because it was a protected confidence or secret of a client. The exception in DR 4-101(C)(3) *permitting* disclosure of a client's intention to commit a crime is strictly construed and would apply only if the attorney concludes that the client intends to commit a future crime. *Id*. A willful attempt to evade the New York State Real Estate Transfer Tax is a misdemeanor. Tax Law § 1818.

34. A lawyer representing a seller, purchaser or purchaser's lender may also act as a title insurance agent provided such conduct is legal, no prohibited conflict exists, consent is obtained from all parties after full disclosure, the legal fee is reduced by remuneration to the lawyer from the title company (absent express consent to the contrary from the client), and the legal fee is not excessive. NYSBA Opinions 576 and 626.

    Opinion 576 analyzes services and fees for arrangements such as attorney closer, approved attorney, examining counsel, and agent. *See also* Glasser and Sachs, "Dual Compensation to Attorneys in Real Estate Transactions," 23 N.Y. Real Prop. L.J. 80 (Spring 1995); Lee, "Dual Roles in Real Estate Transactions: Disclosure & Consent," 24 Real Prop. L.J. 16 (Spring 1996) (recommending specific disclosure of the fees and services rendered).

35. NYSBA Opinions 595 and 621 state that it is improper for an attorney to refer a client to an abstract company in which the attorney has an ownership interest. N.Y. State 595 (1988) and 621 (1991). Opinion 621 contains a vigorous dissent and many commentators believe that the courts would not reach the majority's result, but rather the affirmative result in Opinions 576 and 626. *See* Lee article in the previous note.

36. NYSBA Opinion 438 (1976) expressly permitted the mortgagee's lawyer to be paid by the mortgagor. A similar concept appears in paragraph 5(a) of the Multibar Residential Contract, which requires the purchaser to pay a fee (in an amount to be filled in) to the seller's attorney for preparation of a purchase money note and mortgage. Attorneys in some of the larger firms have been uncomfortable collecting such a fee, however. *Holtzschue on Real Estate Contracts* § 2.2.5.

37. Unwise, but not necessarily unethical. A 1964 NYSBA ethics opinion permitted a bank's attorney to represent the bank and the borrower, a not uncommon occurrence upstate, assuming that the representation was not required, the fee not excessive, the fee was set by the attorney, not the bank, the conflict was fully disclosed, and in fact the interests of the bank and the borrower were not adverse, citing then Canon 6. N.Y. State 8 (1964). *Accord*, assuming full disclosure and express consent. N.Y. State 438 (1976), 694 (1997). Representing both the borrower and the lender where their interests were adverse has been found unethical. *In re Gold*, 240 A.D.2d 74, 668 N.Y.S.2d 605 (1st Dep't 1998). Representing both the seller and the lender is frowned upon, and if an actual conflict arises, the lawyer must withdraw from representing either party. N.Y. State 611 (1990).

38. NYSBA Opinion 626 permits the lawyer to be paid both by the borrower and the title insurer if the conditions laid down in Opinion 576 are met. *See* note 34 *supra*.

39. Delegation of attendance at the closing to a paralegal by the lender's attorney is permissible if the paralegal's work is merely ministerial (not requiring the exercise of professional legal judgment) and under the supervision of a lawyer (who may be available by telephone). N.Y. State 677 (1995). The opinion notes that mortgage closings often do not require independent discretion or judgment from a paralegal assigned to monitor the ceremony. Can the paralegal answer questions of the borrower without referring them to the supervising attorney? Does that depend on the nature of the questions?

40. This is permitted by NYSBA Opinion 693 (1997), but that opinion has been strongly criticized. Coffey, "Authorized Signatories on Escrow Accounts: Ethics Opinion 693 is Misplaced," 26 N.Y. Real Prop. L.J. 19 (Winter 1998).

41. Jud. Law § 495.

42. A lawyer shall not charge an excessive fee. A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee was in excess of a reasonable fee (listing eight factors to be considered). DR 2-106. Can Laura change her fee if she had quoted a number to the client in advance?

43. Whether this is permissible depends on the circumstances. It is not permissible if the business of the tax reduction company constitutes the unauthorized practice of law and the attorney's acceptance of repeated referrals assists that improper conduct. N.Y. State 705 (1997).

44. *See e.g.*, reference materials cited in notes 2 and 3 *supra*.

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Sunbelt vs. Snowbelt: An Update

Southern-Fried T&E Practice Tips for the Yankee Practitioner

By Stephen M. Newman

I. Taxes

A. Income Tax Issues

1. Florida has no income tax.
2. Florida residents pay an annual tax imposed on all intangible personal property.
3. As of 1/1/2000, the tax rate is 1.0 mills ($.001) on the fair market value of all property up to $100,000, and 1.5 mills ($.0015) on the fair market value of all property over $100,000: that is, $1,000 or $1,500 per $1,000,000.
4. The assets of a Florida resident are valued on each January 1, and the tax is based on such value.
5. The tax is due by June 30, and discounts from 1% to 4% are available if the tax is paid early.
6. Some assets are exempt from the tax. Exempt assets include cash, real estate, partnership interests (unless the partnership is "registered"), United States obligations, and State of Florida obligations.
    a. Note that interests in LLCs remains subject to the tax, notwithstanding a concerted lobbying effort to obtain an exemption similar to that for partnership interests.
    b. Note also that an unintended by-product of estate planning may be the conversion of exempt assets into taxable assets. For example, if a Floridian contributes exempt assets to a family limited partnership and then sells the limited partnership interest to a "defective" grantor trust in exchange for a promissory note, the note is a taxable asset in the hands of the Florida resident.
7. A Florida resident's "beneficial interest" in a trust is also subject to the tax.
    a. A beneficial interest is defined as at least a current right to income from the trust and either the power to revoke the trust or the power to appoint any portion of the trust to the taxpayer or the taxpayer's estate.
8. In addition to individuals, business entities, estates and trusts are subject to the intangibles tax.
    a. In the case of trusts, Florida looks to the domicile of the trustees. In the case of co-trustees, some of whom are Floridians and some of whom are not, a pro-rata portion of the trust assets may be subject to the tax.
    b. Note the impact of a change in domicile. For example, assume a New York resident and a New York trust company are trustees of a substantial QTIP marital deduction trust created under the will of the individual trustee's late spouse. If the individual trustee becomes a Floridian, one-half of the trust assets may become subject to the tax.
9. Because of the "snapshot" approach to taxation, many Floridians minimize or avoid the tax by converting a portion of their investment portfolio to cash on December 31 of each year or by holding Florida or U.S. government obligations.
10. In the spring of 1998, proposed rules issued by the Florida Department of Revenue were finalized. The rules contain a safe harbor through which the use of a short term trust can exempt assets owned by the trust on January 1 from being subject to the tax. Such trusts, sometimes referred to as "FLINT" trusts, are now in common use and are typically funded in December and terminate in January. Such trusts must meet the following requirements:
    a. The trust must be irrevocable;
    b. The trust must have an out-of-state trustee;
    c. The out-of-state trustee must be given complete discretion over distributions of income and principal to the grantor;
    d. The trust assets must be either located outside of Florida or be held by a Florida bank or trust company as agent for the trustee; and
    e. The trust must not mandate that the same assets contributed to the trust are to be returned to the grantor upon the termination of the trust.

B. Estate Tax

1. The Florida estate tax is equal to the federal credit for state death taxes.
2. The estate of a Florida resident receives a dollar-for-dollar credit against the Florida estate tax for death taxes paid to another state.

3. The estate tax due Florida from the estate of a non-Florida resident is reduced on a pro rata basis by taxes paid to another state.

C. Gift Taxes

1. Florida has no gift tax.

D. Generation-skipping Tax

1. Florida has no GST tax.

II. Right of Election

A. For at least the next two years, Florida will apparently continue as a haven for those wishing to disinherit their spouses.

B. Florida currently limits a spouse's elective share to 30% of the fair market value of all property of a Florida decedent "that is subject to administration except real property not located in Florida."[1]

C. Florida's right of election extends only to decedents domiciled in Florida. No elective share is available with respect to Florida property of a decedent not domiciled in Florida.[2]

D. On April 28, 1999, the Florida legislature enacted a major revision to the statute. The new statute is effective for decedents dying after October 1, 2001. The legislative history indicates that the delay is intended to permit further discussion and analysis of the new statute; many commentators have suggested that significant revisions are likely in the next two years.

E. The legislation contains two significant changes:

1. Florida will use an "augmented estate" concept; and
2. The elective share may be satisfied partly or wholly in trust.

F. With respect to the trust rules:

1. A trust in which the surviving spouse has only an income interest will satisfy the right of election on a $.50 per dollar basis.
2. A trust, that in addition to providing for the payment of income permits discretionary distributions of principal to the surviving spouse, satisfies the right of election on a $.80 per dollar basis.
   a. For example, a decedent may create a trust providing for payment of income to the surviving spouse and permitting distributions of principal to the surviving spouse in the discretion of a child from the decedent's first marriage. Even though as a practical matter, distributions of principal may be unlikely, if 37.5% of the decedent's "augmented estate" passes to the trust, the 30% right of election will be satisfied.
3. A trust that, in addition to providing for payment of income as well as discretionary distributions of principal of the surviving spouse, gives the surviving spouse a general power of appointment, satisfies the right of election on a dollar-for-dollar basis.

III. Homestead Provisions

A. Disposition of residence.

1. The Florida constitution,[3] as well as the Florida statutes,[4] limit the disposition of the principal residence of a Florida decedent who is survived by a spouse or by a minor child.
2. If the decedent is survived by a spouse and descendants:
   a. If none of the descendants is a minor, the homestead property may be left to the surviving spouse.
   b. If any descendant is a minor, or if no descendant is a minor and the homestead property is not left to the surviving spouse, the spouse receives a life estate, with a vested remainder to the lineal descendants in being at the time of the decedent's death.
   c. Real property owned by the decedent and the surviving spouse as tenants-by-the-entirety is not considered homestead property.
3. If the decedent is survived by a spouse and no descendant, the homestead property passes to the surviving spouse.
4. If the decedent is survived by a minor child and by no spouse, the property passes to lineal descendants in being.

B. Creditor Protection

1. The principal residence ("Homestead") is exempt from claims of creditors.
2. The exemption is not limited in amount.

C. Real Property Taxes

1. A Florida resident is entitled to a reduction in the assessed value of his or her principal residence.

IV. Differences Relating to Wills and Trusts

A. A Florida self-proof of will must be executed by the testator.[5]

B. A living trust created after September 30, 1995, by a Florida resident must be executed by the settler in accordance with the formalities required for the execution of a will in order for the testamentary aspects of the trust to be valid.[6]

C. Without authorization in the will or trust agreement, a fiduciary does not have the authority to sell real estate.[7]

D. Tangible personal property, other than money and property used in a trade or business, may be disposed of by a signed written statement or list.[8]

E. A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable.[9]

V. Differences Relating to Estate Administration

A. A non-Florida resident cannot qualify as a personal representative ("Executor") unless the person is:

1. A legally adopted child or adoptive parent of the decedent.
2. Related by lineal consanguinity to the decedent.
3. A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or a descendant or ancestor of any such person; or
4. The spouse of a person otherwise qualified.[10]

B. Florida probate courts normally exercise no jurisdiction over trusts, including testamentary trusts, despite apparent statutory authority to do so.[11]

C. Florida allows a trustee to make discretionary distributions of principal or income to himself or herself.[12]

1. In order to exclude the trust assets from the estate of the trustee-beneficiary, note the need for "ascertainable standard" language as well as the need to prohibit distributions in satisfaction of a legal obligation of the trustee.
2. The statute limits distributions to health, support, maintenance and education and precludes distributions to satisfy the trustee-beneficiary's legal obligation of support. These limitations may be overridden by specific reference to the statute.

D. In a Florida probate proceeding, notice to interested parties is given after the appointment of the personal representative.

E. By statute, attorneys for personal representatives are entitled to "reasonable compensation."[13] **The statute sets forth a schedule of percentage compensation that is "presumed to be reasonable"—the percentages are based on the inventory value of the estate assets and the income earned during the administration of the estate.**

F. Trustee fees are not statutory in Florida. A trustee is entitled to "reasonable compensation."

G. In the case of a sale of Florida real estate from a revocable trust within two years after the settler's death, a probate proceeding may be required in order to convey proper title.

1. See FSA 733.707(3), which subjects the assets of the trust to expenses of estate administration and claims against the estate to the extent the probate estate is insufficient.

H. A Florida Personal Representative may resign and be relieved of his or her office.[14]

Endnotes

1. Florida Statutes Annotated §§ 732.206, 732.207.
2. Fla. Stat. Ann. § 732.205.
3. Article X, § 4.
4. Fla. Stat. Ann. § 732.4015.
5. Fla. Stat. Ann. § 732.503.
6. Fla. Stat. Ann. § 737.111.
7. By way of contrast, see EPTL 11-1.1(b)(5)(B).
8. Fla. Stat. Ann. § 732.515.
9. Fla. Stat. Ann. § 732.517. (By way of contrast, see EPTL 3-3.5).
10. Fla. Stat. Ann. § 733.304.
11. *See* Fla. Stat. Ann. § 737.201.
12. Fla. Stat. Ann. § 737.402(4)(a). (By way of contrast, see EPTL 10-1.1).
13. *See* Fla. Stat. Ann. § 733.6171.
14. Fla. Stat. Ann. § 733.502. (By way of contrast, see SCPA 715, which allows a fiduciary to petition the court for permission to resign).

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TRUSTS AND ESTATES LAW

In Terrorem Clauses—Recent Developments

By Peter C. Valente and Joann T. Palumbo

An *in terrorem* clause, also known as a "no contest" clause, is a condition placed on a legatee's disposition under a will, which is designed to discourage disputes over the will. Typically, an *in terrorem* clause provides that a beneficiary forfeits any interest he or she may have under the will if such beneficiary opposes or institutes any action to upset the testamentary scheme. The use of an *in terrorem* clause is not commonplace among will drafters but is usually reserved for wills which treat distributees unequally, such as when a will provides for a greater distribution to one child over another or when a will provides that one child receives a share in trust but other children receive their shares outright. *In terrorem* clauses are generally disfavored and are strictly construed.[1] The Uniform Probate Code § 2-517, which has not been adopted in New York, provides that such clauses are unenforceable if there is probable cause for challenging the will.

In New York, *in terrorem* clauses are enforceable by statute. EPTL § 3-3.5(b) provides that "[a] condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest."

EPTL § 3-3.5(b), while upholding no contest clauses in wills, permits a number of activities that will not work to forfeit a beneficiary's disposition under a will containing such a clause. EPTL § 3-3.5(b) provides that the following conduct will not trigger the operation of an *in terrorem* clause:

1. Contests based on the fact that the will is a forgery or was revoked by a later will, provided either action is based upon probable cause;
2. An infant's (any person under age 18)[2] or an incompetent's affirmative opposition to the probate of a will;
3. An objection to the court's jurisdiction over the will;
4. Disclosure to any party or to the court of any information relating to any document offered for probate, or relevant to the probate proceeding;
5. A refusal or failure to join in a petition for probate or to execute a consent to or waiver of notice of a probate proceeding;
6. A preliminary examination under SCPA § 1404 of a proponent's witnesses, the person who drafted the will, the nominated executors and the proponents in a probate proceeding;
7. Instituting, joining or acquiescing to a construction proceeding.

The statute's purpose and function are twofold: while it preserves a testator's intent and control over the disposition of his or her estate, including the absolute right to disinherit a party (except a spouse), it addresses public policy considerations by permitting limited inquiries regarding a will's validity and authenticity.[3]

In a case recently decided by the Appellate Division, Second Department, *In re Ellis*,[4] discussed below, the court addressed the scope of the provision under EPTL § 3-3.5(b)(3)(D) dealing with preliminary examinations under SCPA § 1404. Whereas courts have generally permitted broad disclosure and discovery under SCPA § 1404, the Second Department scrutinized the conduct of two siblings in a probate proceeding to define the outer parameters of such examinations, looking to the testator's intent as the ultimate measure of those parameters.

When EPTL § 3-3.5(b)(3)(D) was first enacted, the provision permitted preliminary examination under SCPA § 1404 of a proponent's witnesses in a probate proceeding.[5] In 1992, it was amended to add the person who prepared the will.[6] Nominated executors and proponents of the will were added to the cast of permissible examinees in 1993.[7] Although the expansion of those who may be examined seemingly works against an *in terrorem* clause, the amendments were designed to decrease meritless contests "by affording a beneficiary . . . sufficient discovery to make a rational decision about pursuing risk-laden litigation."[8] The legislature hoped the expanded examination provision would permit a potential contestant to evaluate the merits of his or her objections, thereby avoiding some contests and facilitating settlement in others.[9]

This philosophy is reflected in *In re Muller*,[10] in which Surrogate Radigan allowed the production of the decedent's prior wills as part of a § 1404 examination of an attesting witness, who also was the attorney-draftsman. Surrogate Radigan believed that the *in terrorem* clause and a "broad SCPA 1404 examination"

worked together to prevent destructive, fruitless litigation. Thus, the potential objectant would only go forward with objections if the disclosure sought revealed that a will contest would likely be successful. Therefore, to insure that the will had not been procured through undue influence, the court permitted the examination of the testator's prior wills.

In *In re Cuneo*,[11] the respondents sought production of the decedent's medical records in order to determine whether grounds existed to challenge the decedent's will on the basis of lack of testamentary capacity. Surrogate Emanuelli was persuaded by the respondents' statement that no objections would be filed against the will if the examination revealed that the testator had the capacity to make the radical changes in his testamentary scheme, with which they were concerned. Welcoming the possibility of avoiding needless litigation, the court adopted the rationale of *Muller* to permit the preliminary examination of the decedent's medical records, so that the respondents could determine at the outset whether the filing of objections would be wasteful or fruitless.

Thus, the courts' philosophy tends to be that by broadening the permitted examination under SCPA § 1404(4), as limited by EPTL § 3-3.5(b), challenges to wills in the courts and the corresponding delay of an estate's administration are avoided—the desired result of an *in terrorem* clause.

In *In re Ellis*, the Second Department looked closely at the conduct of two siblings facing the operation of an *in terrorem* clause to determine whether they went beyond the protections of the statute. In making its determination, the court took a "totality of circumstances" approach and looked at the conduct as a whole in conjunction with the legislative purpose of EPTL § 3-3.5(b)(3)(D) permitting preliminary inquiries, and the testator's intent in including the *in terrorem* clause in her will.

The decedent, Laurel Ellis, died in 1994. She named her daughter, Florence, executrix and bequeathed Florence most of her real and personal property and one half of her residuary estate. Mrs. Ellis bequeathed one quarter of her residuary estate to each of her two sons, John and Richard. Although the decedent treated her children equally in prior wills, the illness and subsequent death of her husband marked a period of deterioration in her relationship with her sons, while her relationship with her daughter strengthened. In June 1993 Mrs. Ellis met with a new attorney to have the subject will drafted. She stated to her attorney that she desired to leave the bulk of her estate to Florence and that she feared her sons would "try to cause trouble for Florence." Hence, the will included an in terrorem clause that provided for the forfeiture of a beneficiary's disposition if such beneficiary "in any manner, directly or indirectly, contests this will or any of its provisions."

The decedent died in June 1994 and the will was offered for probate. Preliminary letters were issued to Florence shortly thereafter. The brothers then began a course of litigation that lasted over two years and which consisted of the following: serving an answer to the probate petition in which they objected to Florence's nomination as executrix on grounds of dishonesty, improvidence and substance abuse; serving a verified bill of particulars of over 30 pages alleging that Florence engaged in deceitful, fraudulent and criminal activity as part of an overall scheme to influence the decedent to disinherit her sons; making a motion compelling Florence to post a bond, contrary to the will's provisions; serving objections to probate on Florence in January 1995 alleging that the decedent lacked mental capacity and that the will was a product of fraud and undue influence; serving discovery notices on several nonparties; petitioning for temporary letters of administration in order to bring wrongful death and intentional tort actions against Florence and the hospital where decedent died; commencing an action in Supreme Court against Florence and her husband claiming that they deprived John, Richard and the estate of valuable assets. Throughout the course of these various proceedings, the parties held several conferences with the Surrogate's Court because settlement discussions had failed, and engaged in extensive discovery in preparation for trial. While discovery was being completed, the court noted that it could not find the objections to probate in its file, nor was there any indication that the requisite filing fee was paid. Based on assurances from John and Richard's counsel that the objections were indeed filed, the court permitted continued discovery while inquiries were made concerning the missing objections. Thereafter, counsel for the brothers advised the court that the objections were never properly filed. In a conference on September 4, 1996, the objections to the will were "withdrawn" but the answer was not. Surrogate Emanuelli issued a decree granting probate and struck the words "probate not having been contested" from the decree and inserted in their place "no objection having been filed."

Florence petitioned the Surrogate's Court for construction of the *in terrorem* clause, alleging that the extensive pretrial litigation conducted by her brothers violated the clause. The acting Surrogate found that the clause had not been violated. The Second Department reversed.

The respondents argued that, other than the objections to probate, the proceedings were either legitimate inquiries under the SCPA to determine whether Florence was fit to serve as executrix under SCPA § 707 or to aid the Surrogate in determining whether the will

should be admitted to probate under SCPA § 1408, or otherwise concerned challenges to actions by Florence and her husband prior to the decedent's death that did not implicate the will. As to the objections, the respondents argued that since they were never filed with the court, they were a nullity and should be ignored.

The court rejected this compartmentalized approach, stressing that nothing in the record revealed a series of separate and distinct proceedings, and that although the various proceedings "putatively set forth distinct claims and sought distinct remedies," each turned on one common theme—fraud and undue influence by Florence. Hence, the court found the proceedings to be more properly characterized as "mere aspects of a single concerted effort . . . to attack, either directly or indirectly, the decedent's scheme of testamentary descent and to harass Florence."

The court recognized the paramount rule in construction proceedings—the testator's intent is controlling. Thus, the court looked to extrinsic evidence (e.g., a letter from John to the testatrix while she was alive, threatening to take immediate legal action to nullify her then existing will as a product of undue influence by Florence and threatening to have a conservator appointed for the testatrix; a note indicating that Richard had vowed to tie up the estate in court; the draftsman's testimony that the decedent was afraid that her sons would "cause trouble" for Florence) to determine her ultimate intent, and found that it was adequately expressed in the broad language of the clause that prohibited a beneficiary from contesting the will or any of its provisions "in any manner, directly or indirectly." Moreover, the court focused strongly on the legislative history of EPTL § 3-3.5 and the intent of the legislature in expanding the scope of preliminary examinations permitted without implicating a no contest clause. An important point recognized by the court is that although SCPA § 1404(4) permits broad discovery either before or after filing objections to the probate of the will, EPTL § 3-3.5(b)(3)(D) immunizes only *preliminary* or pre-objection discovery from an *in terrorem* clause.

The court determined that there was nothing preliminary about the proceedings conducted by the two brothers. Although objections were never filed with the court, the parties were operating as though the objections had, in fact, been filed and they were therefore preparing for trial. The court admonished the respondents that they could not hide behind the veil of the statute to convert lengthy pretrial activity into permitted preliminary examinations merely because the parties discovered by happenstance that objections had not been filed.

In essence, the Second Department continued in the vein of previous court decisions that read *in terrorem* clauses and the statute governing such clauses in tandem, recognizing the primacy of a testator's intent, as well as the legislative intent behind the statute, to effectively limit opposition to a will. Attorneys representing potential objectants should be mindful that while certain inquiries may fit neatly into seemingly protected categories of EPTL § 3-3.5(b) or be permitted under certain provisions of the SCPA, a court may examine an entire course of conduct and the testator's intent to determine if the conduct at issue triggers the operation of the *in terrorem* clause.

Endnotes

1. *See Estate of Alexander*, 90 Misc. 2d 482, 395 N.Y.S.2d 598 (1977), *aff'd* 63 A.D.2d 612, 405 N.Y.S.2d 613 (1st Dep't 1978); *In re Ball's Will*, 57 Misc. 2d 683, 293 N.Y.S.2d 561 (1968); *In re Pasternack*, 52 Misc. 2d 413, 275 N.Y.S.2d 703 (1966).
2. *See* EPTL § 1-2.9-a.
3. *See In re Ellis*, 683 N.Y.S.2d 113 at 120-21 (2d Dep't 1998) (citing Reviser's Notes, ' 3-3.4 appendix to L. 1966, ch 952, 1966 Session Laws of NY at 2899-2900).
4. 683 N.Y.S.2d 113 (2d Dep't 1998).
5. L. 1966, c. 952.
6. L. 1992, c. 127.
7. L. 1993, c. 514.
8. *Estate of Doris Duke*, N.Y.L.J. Nov. 28, 1994 at 27 col. 3 (Surr. Ct., N.Y. Co.) (citing Second Report of the EPTL-SCPA Legislative Advisory Committee [1993], p. 29-32).
9. *See* Margaret Valentine Turano, 1993 Practice Commentaries (citing Second Report of the EPTL-SCPA Legislative Advisory Committee, Appendix 14B).
10. 138 Misc. 2d 966 (Surr. Ct., Nassau Co. 1988).
11. N.Y.L.J. March 2, 1992 at 36, col. 4 (Surr. Ct., Westchester Co.).

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The Attorney-Client Privilege and the Fiduciary: Where Ethics and Evidence Collide

By Colleen F. Carew

Overview of Fiduciary Exception to the Attorney-Client Privilege

A preliminary concern for the lawyer hired by a fiduciary, whether an executor, administrator or trustee, is to identify the client. Does the lawyer represent the fiduciary or the fiduciary and the beneficiaries? This question is not easily answered in light of the decisions over the last ten years in which the New York courts have been chipping away at the attorney-client privilege, and by doing so indirectly holding that the lawyer represents both the fiduciary and the beneficiaries. The mechanism by which the privilege has been eroded is the court-created "fiduciary exception to the attorney-client privilege."

The fiduciary exception to the attorney-client privilege excludes from protection communications imparted by a fiduciary to his or her attorney which are sought by a beneficiary. When applied, the fiduciary is required to disclose to a beneficiary relevant communications, provided that litigation has not commenced and/or the beneficiary has shown "good cause" for the disclosure. The rationale for the exception derives from the duty of a fiduciary to disclose information to the beneficiaries.

The Relevant Rules

Fiduciary's Duty to Disclose to Beneficiaries

A fiduciary has a duty to disclose to the beneficiaries of an estate or trust information concerning its administration. This rule derives from the fiduciary's obligation of undivided loyalty to the beneficiaries and his or her duty to act fairly and impartially and in their best interests. Under New York law, a testator cannot exonerate the fiduciary from his or her duty of loyalty to the beneficiaries or the obligation to fully disclose to the beneficiaries transactions of the estate.[1]

In the fiduciary exception cases it appears that the court is imputing the fiduciary's duty of loyalty to the beneficiaries to the lawyer. That is another way of saying that the lawyer represents both the fiduciary and the beneficiaries, which is not the law in New York, nor is it the majority view in the United States.[2] An estate cannot retain an attorney.

Fiduciary's Duty of Loyalty to the Testator or Grantor

A fiduciary also has a duty of loyalty to the testator or grantor, a fact our courts seem to overlook when addressing whether to permit disclosure. The fiduciary's duty to the testator and beneficiaries may create a conflict for him or her because the testator's intent does not always coincide with the wishes of the beneficiaries. A consequence of the different objectives is that the fiduciary may require the advice of counsel to make discretionary decisions which affect the interest of the beneficiaries.

The Attorney-Client Privilege

As a general rule, all relevant information should be disclosed and admitted at trial. Our privilege statutes provide exclusionary rules to protect communications which were intended to be confidential and made within the context of certain relationships.

CPLR 4503 provides a statutory exception to the general principle by creating the attorney-client privilege which provides that an attorney shall not disclose, **or be allowed to disclose**, any confidential communication made by a client. The privilege exists for the protection of the client only as to those communications intended to be confidential. A client includes any person or corporation or trust company.

Lawyers do their jobs best when the client discloses all the facts. It is usually the embarrassing or harmful facts that a client will hide if he or she thinks that the information will be disclosed. The existence of the privilege enables the client to reveal to the lawyer the relevant information without fear of disclosure and the lawyer is able to provide advice without concern that one day he or she will have to testify against the client.

The attorney-client privilege in New York is absolute with two exceptions; (1) the will exception[3] and (2) the prevention of crime exception. The will exception requires an attorney or his or her employee to disclose information as to the preparation, execution or revocation of any will or other relevant instrument provided it does not disgrace the decedent's memory. Underlying the will exception is the assumption that the testator-client intended the communication to be revealed at a later date. Thus, the character of the communication is not considered to be confidential in nature.

The second exception applies to a situation where the client reveals his or her intent to commit a crime or fraudulent act.[4] Where it appears that the client intends to commit a fraud, then the lawyer may have a duty to disclose the communication, or may not provide the client with advice that will enable him or her to act in such manner.[5]

The Attorney-Work Product Rule

The attorney-work product rule protects from disclosure the lawyer's strategy, including mental impressions, legal opinions, theories and conclusions. Like the privilege, this rule enables the lawyer to develop a case by considering all its angles, regardless of whether a particular theory may hurt his or her client.

Ethical Rules

A lawyer is a fiduciary to his or her client because the relationship is founded on trust. Once retained, a lawyer, like an executor or trustee, owes the client a duty of undivided loyalty and is obligated to preserve client confidences and secrets and any information obtained from third persons about the client.

Duty to Preserve Client Confidences

Ethical consideration 4-1 provides

> The proper functioning of the legal system requires the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ [a] lawyer. A client must be free to discuss anything with his or her lawyer and a lawyer must be equally free to obtain information beyond that volunteered by the client. A lawyer should be fully informed of all the facts of the matter being handled in order for the client to obtain the full advantage of our legal system.

This duty continues after discharge.

The duty to protect confidences is broader than the privilege. Ethical rule 4-4, provides "this ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

Duty to Exercise Independent Professional Judgment

A lawyer must exercise independent professional judgment on behalf of a client.[6] Ethical Consideration 5-21 provides that the lawyer must disregard the desires of other persons which might impair the lawyer's free judgment. And, ethical consideration 5-22 cautions us as follows: "if a lawyer is compensated from a source other than the client, the lawyer may feel a sense of responsibility to someone other than the client." In our practice this rule is important to consider because one ground for applying the fiduciary exception to the attorney-client privilege is that the beneficiaries ultimately pay for the services of the fiduciary's lawyer. Thus, the courts reason that the beneficiaries are entitled to receive the lawyer's advice. However, such a result is in direct conflict with this ethical rule.

Duty to Zealously Represent a Client

Ethical Consideration 7-1 provides that a lawyer should represent a client zealously within the bounds of the law. The rule distinguishes between the lawyer acting as an advocate and acting as an advisor. An advocate deals with past conduct and in such a situation a lawyer's duty is to resolve issues in favor of the client regardless of his professional opinion as to the outcome. The rule excludes frivolous conduct. As an adviser, the lawyer gives a professional opinion as to what he or she believes to be the likely outcome of a matter. You may continue representation even though the client elects not to take your advice.

Origin of Fiduciary Exception in New York

Good Cause Test Established

Garner Wolfinbarger[7]

The fiduciary exception to the attorney-client privilege originated in a federal case, *Garner Wolfinbarger*. *Garner* involved a shareholder derivative action in which it was alleged that the corporate officers fraudulently induced the shareholders to pay an excessive price for stock. During discovery, the plaintiff sought to question the corporation's lawyer about communications he had with the corporate officers concerning the issuance of the stock. The attorney asserted the privilege. The court held that "good cause" existed to pierce the attorney-client privilege.

Hoopes v. Carota[8]

In *Hoopes v. Carota*, the plaintiffs were beneficiaries of a trust that held stock in a corporation. The defendant, Carota, was both a trustee and chief executive officer. The trust was the controlling shareholder. Carota had allegedly voted for substantial raises and entered into a self-dealing long term contract. The beneficiaries sought to remove him. During his deposition, Carota asserted the attorney-client privilege as a bar to disclosure of certain information he gave his lawyer. Carota was directed to answer. The Court of Appeals identified two possible grounds for allowing disclosure, as follows: (1) by finding that no privilege exists because the attorney represents the fiduciary and beneficiaries, or (2) by finding that despite the existence of the privilege, it may be set aside for good cause shown. The court went on to find good cause without providing an explanation for its application.

Other Cases Applying the Good Cause Test

- *In re Nelson;*[9]
- *Wynard v Beiny;*[10]
- *In re Community Service Society;*[11] Good cause exists where public policy favors waiver and where the documents were highly relevant to the issue and may be

the only evidence available to the beneficiary to establish her claim.

Factors Relevant to Determining Good Cause

- Identity of interests among parties regarding disclosure;
- Relevancy of information sought; and
- Meritorious claim.

Inception of Litigation Test Established

In re Baker[12]

In re Baker, concerned allegations of self-dealing by a fiduciary. The beneficiaries of an estate sought to compel production of a legal memorandum prepared for the fiduciaries, which was resisted on the ground of the attorney-client privilege. The court, held that a fiduciary has an obligation to disclose the advice of counsel with respect to matters affecting the administration of the estate until such point as litigation is contemplated.

Other Cases Applying the "Inception of Litigation Test"

- *In re Herman*;[13]
- *In re Monfort*;[14] The Court held that the point at which the privilege is activated is when litigation between the fiduciary and beneficiary commences or becomes imminent.
- *In re Iskyan*;[15] Internal memorandum prepared by counsel for the trustees, eleven days before litigation was anticipated, was not privileged.
- *In re Smith*;[16] Directed disclosure where attorney's services were paid from estate assets.
- *In re Fox*;[17] Held that records of an original fiduciary are the property of the estate and must be turned over to a successor fiduciary.
- *In re Levine*;[18] Denied disclosure for period following contemplation of litigation.
- *In re Friedman*.[19]

In the inception of litigation cases, it appears that the courts treat the lawyer's representation of the fiduciary before litigation is contemplated as general representation, and after litigation is contemplated the representation converts to personal representation. However, in practice there is no such line of demarcation with which to identify the point at which the representation changes. Nor does the fiduciary's duty to the beneficiaries cease just because litigation is in the air. A fiduciary's job is to make discretionary decisions. Clearly, then, one of the fiduciary's goals during the administration of an estate is to avoid a finding of liability resulting from the exercise of such discretion.

Proposed Solutions

Given the prevalence of the fiduciary exception, how can lawyers reconcile the ethical rules, evidentiary rules and the fiduciary's obligation to the beneficiaries?

Acting in an advisory role, the lawyer should discuss with the fiduciary his or her obligation to act in good faith and in fairness to the beneficiaries and suggest to the fiduciary that he or she provide the beneficiaries with information about the estate. Such advice satisfies the ethical rule which requires that the lawyer zealously represent his or her client, the fiduciary, not the beneficiaries. Once litigation is imminent, then the lawyer should treat the fiduciary's communications differently.

1. Retain separate counsel

Where it is clear that a conflict exists, consider advising the fiduciary to retain separate counsel and to use his or her own funds to pay for the services. Avoid sharing opinions of private counsel with the lawyer retained to handle estate or trust matters.

2. Delineate the lawyer's role vis a vis the beneficiaries

Prior to the commencement of litigation:

Where it appears from the outset that the fiduciary may have a conflict, consider sending a letter to the beneficiaries stating that you have been retained by the fiduciary to protect his or her interests and identify the information the fiduciary will disseminate to them during the course of administering the estate. Advise the beneficiaries to contact the fiduciary, not the lawyer, for such information.

After a conflict arises, or litigation is imminent:

Establish a line of demarcation by a memo to the file setting forth what action precipitated the likelihood of litigation and state that all future advice to the fiduciary is considered privileged. Consider notifying the beneficiaries of the change in circumstances.

3. Protect confidential communications by the following:

- Consider who is present when a communication is made. Be careful, do not include any person who is not necessary to address the issue at hand.
- Consider whether notes should be made of every conversation or meeting.
- Control the content of documents to ensure that your client is protected. Always ask whether the writing could hurt your client.
- Label documents to identify those that are intended to be confidential and privileged.

4. Maintain separate files

Maintain separate files, an administration file and litigation file. Label the litigation file "confidential, privileged, attorney-work product."

5. Where attorney learns that client/fiduciary intends to breach fiduciary duty

Request that the fiduciary refrain from such conduct. Consider withdrawing from the case or notifying the court of the fiduciary's action.

6. Response to disclosure demands

Never volunteer documents, always insist upon a subpoena from the beneficiary. Where a demand for disclosure is made, move to quash. In the motion, demonstrate to the court that the fiduciary has made full disclosure to the beneficiaries of estate matters and that he or she seeks only to protect confidential communications. In addition, seek an *in camera* review by the court of the information sought to be disclosed.

Proposed New York State Bar Association Solution

The Trusts and Estates Section of the New York State Bar Association has sponsored a bill which rectifies the fiduciary exception to the attorney-client privilege. The proposed bill has two components: (1) it establishes that the fiduciary is the client, not the beneficiaries of the estate, and (2) confirms that the privilege applies to confidential communications made by a fiduciary to his or her lawyer.

Existing Protections

The law already provides adequate protection to the beneficiaries without eroding the privilege. Where a fiduciary seeks to justify challenged conduct as having been made upon the advice of counsel, and then shields the communication, the court may find that the fiduciary has waived the privilege as to such advice. The rationale is that the fiduciary may not affirmatively assert the advice as a sword then utilize the privilege as a shield. Moreover, where a fiduciary declines to disclose relevant attorney-client communications and asserts the privilege, then the trier of fact may draw the strongest inference against the fiduciary which the opposing evidence in the record permits. Thus, the consequence of not revealing an attorney's advice may be more severe than to maintain the confidence.

Summary

In an accounting or removal proceeding, it is the lawyer's job to defend the fiduciary against allegations of misconduct. Most lawyers would agree that not every action taken by fiduciary requires protection from disclosure. The best advice to the fiduciary may be for him or her to disclose confidential communications. Remember, impressions always count. It is the lawyer's job to protect the fiduciary and to demonstrate that he or she has acted prudently and impartially. The fiduciary should not appear to be hiding information from the beneficiaries and the Court. The court's opinion of the fiduciary may be enhanced by demonstrating that he or she kept the beneficiaries appraised throughout the administration of the estate. Ultimately, the Surrogate may be receptive to an argument that information sought to be protected from disclosure is only that information which was clearly intended to be confidential.

Endnotes

1. *See In re Iannone*, 104 Misc. 2d 5 (Sur. Ct., Monroe Co.); *In re Brush,* 46 Misc. 2d 277 (Sur. Ct., New York Co.); *In re Lubin*, 143 Misc. 2d 121 (Sur. Ct., Bronx Co.).
2. *See In re Schrauth*, 249 A.D. 847 (2d Dep't 1937); *In re Scanlon*, 2 Misc. 2d 65 (Sur. Ct., Kings Co.).
3. CPLR 4503 (b).
4. Ethical Consideration 4-7; Disciplinary rule 4-101 (3).
5. *In re King*, N.Y.L.J., 9/25/97, at 33, col 6 (Sur. Ct., Westchester Co.).
6. Canon 5.
7. 430 F.2d 1093 (5th Cir. 1970).
8. 74 N.Y.2d 716 (1989).
9. N.Y.L.J. 1/9/90, at 30, col 6 (Sur. Ct., Westchester Co.), *aff'd* 176 A.D.2d 882 (2d Dep't 1991).
10. N.Y.L.J. 7/5/94, at 32, col 4 (Sur. Ct., New York Co.).
11. N.Y.L.J., 11/14/97, at 26, col 2 (Sur. Ct., New York Co.).
12. 139 Misc. 2d 573 (Sur. Ct., Nassau Co. 1988).
13. N.Y.L.J. 8/21/91, at 26, col 3 (Sur. Ct., Nassau Co.).
14. N.Y.L.J., 9/29/93, at 25, col 2 (Sur. Ct., Nassau Co.).
15. N.Y.L.J., 11/14/94, at 31, col 1 (Sur. Ct., Nassau Co.).
16. N.Y.L.J., 11/20/97, at 32, col 2 (Sur. Ct., Suffolk Co.).
17. N.Y.L.J., 6/27/97, at 30, col 6 (Sur. Ct., Nassau Co.).
18. N.Y.L.J., 7/28/98, at 24, col 6 (Sur. Ct., Nassau Co.).
19. N.Y.L.J., 5/11/99, at 37, col 3 (Sur. Ct. Nassau Co.).

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Who Ever Said There's No Humor in the Practice of Law?

By Andy Brick

For my first job as an attorney, I had the unique experience of serving as the administrator for a parking violations bureau on Long Island. Twice a month we would hold trials before a hearing officer. Prior to trial, we would conference the case in an attempt to achieve a plea bargain. People would explain their side and we would make a determination to dismiss, offer a reduced fine, or take the matter to trial. One of my first management decisions was to require all staff to keep a record of the wackiest excuses people used to try to get out of their ticket. Below are some of my favorites. Needless to say, each resulted in a quick conviction!

- I parked in the fire zone but I was just returning movies, not renting any.
- I am allowed to park in that handicapped space, I was in a coma.
- I didn't know it was a handicapped space because I'm colorblind and didn't realize the sign was blue.
- I'm allowed to park in a fire zone, I'm a volunteer fireman.
- Under the law it wasn't parked, it was standing because I left the motor running and my children were in the car.
- I had to park in the fire zone because all the handicapped spaces were taken.
- I only parked there so I could complain to the store manager about the lack of parking.
- I was not parked, I was changing a tire and your officer must not have seen me.
- Technically, I was handicapped by the lack of parking spaces.
- The line at the drive-thru was too long.
- I was in the fire zone because I thought there was a fire.
- I just ran in for a second to buy more beer.
- I had to park in front of the hydrant because my driveway was being resealed.
- I didn't see the hydrant because it was on the passenger side.

And my personal favorite:

- Our car could not have been parked at the beach on that date because my husband and I were in Europe and our teenage son isn't old enough to drive.

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Ethics Matters: Ethical Obligations of Attorneys Handling Escrow Funds

By Mark S. Ochs

Introduction

There often is confusion and a lack of awareness of the role and responsibility of an attorney who has received money from a client or third party. This article addresses the handling of escrow funds by attorneys.

I. Attorney Escrow Accounts

An attorney who receives funds on behalf of a client or third party is a fiduciary and, as such, must safeguard those funds in accordance with the Code of Professional Responsibility[1] and the Judiciary Law. Any funds belonging to another person, received in the course of the attorney's practice of law, are to be maintained in a special account. This account is to be kept separate from any business or personal accounts of the attorney and separate from any accounts the attorney may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity.[2]

A. Location of Account

The escrow account must be in a New York bank which agrees to provide reports pursuant to the Dishonored Check Rule.[3] Records for the account must be located or available at the attorney's principal New York office. The account may be maintained in a bank outside of New York only if that bank complies with the Dishonored Check Rule and the attorney has obtained prior detailed ***written*** approval from the person to whom the funds belong.[4]

B. Title of Account

The account is to be in the name of the attorney or law firm and must contain the title "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account." Checks and deposit slips must also bear that designation.[5] The account title may include other descriptive language as long as it does not conflict with the required language. For example, an attorney may add "Real Estate Account" or "Closing Account" below the title. If the escrow account is an IOLA account, which most are, an additional designation is required.[6]

C. Funds of Attorney

Other than an amount sufficient to maintain the account, no funds belonging to the attorney may be kept in the escrow account.[7] Unearned attorney's fees deposited into an escrow account are to be withdrawn promptly when earned.[8] Where an attorney's fee is deposited in escrow and a dispute thereafter arises, the disputed portion may not be withdrawn until the dispute is resolved.[9]

D. Earned Fees

Earned fees should not be deposited in an escrow account. They are the property of the attorney and their deposit constitutes commingling of personal funds with those belonging to clients.[10]

E. Personal Use of Escrow Account

Escrow accounts are not to be used to pay personal debts nor are they to be used to shelter an attorney's funds from judgment creditors or tax liens.[11] Funds due an attorney should be disbursed from the account by check payable to the attorney. They should not be withdrawn by issuing checks to third parties in satisfaction of personal obligations or business expenses unrelated to the particular matter.[12]

F. Payments from Escrow Account

Payments from the account may only be made to a named payee by check or with the prior written approval of the party entitled to the proceeds, by bank or wire transfer. Checks should not be made payable to cash and cash withdrawals or transactions using an ATM card are not permitted.[13]

G. Signatories

Only an attorney admitted in New York may be a signatory on an escrow account. Paralegals, office managers or other non-attorneys may not sign escrow account checks.[14]

H. Deposits

An attorney may not make disbursements against a deposit until the funds have been collected. Funds from

an earlier transaction may not be used as a float to cover uncollected funds.[15] The use of post-dated checks is a practice fraught with danger.

I. Overdrafts

Escrow accounts may not carry overdraft privileges and the account may not be associated or linked with any other account for the purpose of covering a shortage.

J. All Funds Must Be Deposited

All funds received or held by an attorney on behalf of others must be deposited in an escrow account. Cash may not be kept in an attorney's safe, even if segregated somehow from funds of other clients.[16]

K. Missing Clients

Where money is payable to a client who cannot be located, the attorney should apply for an order directing payment of his or her fees and disbursements, with the balance to be delivered to the Lawyers' Fund for Client Protection for safeguarding and disbursement.[17]

L. Dissolution of Law Firm

The former partners or members of a dissolved law firm must arrange for one of them or a successor firm to maintain the bookkeeping records required under DR 9-102(D).[18]

M. Deceased Attorneys

When an attorney who is the sole signatory on an escrow account dies, neither the estate representative nor the attorney for the estate may issue checks from the deceased attorney's escrow account. In such a situation, an application needs to be made to Supreme Court for an order designating a successor signatory.[19]

II. Interest On Lawyer Accounts (IOLA)

An IOLA account is an unsegregated, interest bearing escrow account.[20] Funds which an attorney will deposit in an escrow account should be deposited into an IOLA escrow account when, in the judgment of the attorney, they are not expected to generate sufficient interest to justify the expense of administering a segregated account.

If a particular deposit is expected to earn less than $150 in interest while in the attorney's control, the money should be placed in an IOLA account.[21] Where the attorney determines that sufficient interest will be earned to justify a segregated escrow account for the benefit of the particular client, all interest earned on that account is the property of the client.[22]

While an attorney may not be held liable for monetary damages or be made the subject of a disciplinary proceeding based upon a good faith decision to deposit funds into an IOLA account, the failure to maintain such an account has been held to constitute misconduct.[23]

The obligation rests with the attorney to ensure that the IOLA fund is notified that the account has been established.[24]

- **Non-Interest Bearing Escrow Accounts**

There is no such thing as a non-interest bearing escrow account. Funds must either be deposited into an interest bearing escrow account with the interest credited to a specific client or an IOLA account. Even short-term special funding accounts established for mortgage transactions on behalf of financial institutions fall within these rules.

III. Alternatives to Escrow Accounts

In a situation where it would be appropriate for an attorney to establish a non-IOLA interest bearing account on behalf of a client, questions exist as to whether it is permissible for the attorney to place funds in a certificate of deposit, money market or brokerage account even with the written consent of the client or parties involved.

Specific language permitting deposit into an account other than an "identifiable bank account" was rejected when DR 9-102 was enacted.[25] Significant problems may arise when an attorney becomes more concerned with obtaining a higher rate of return than with safeguarding funds entrusted to him or her.

IV. Required Bookkeeping Records

Records of all financial transactions must be accurate and are to be made at or near the time of the events recorded.[26] These record keeping requirements apply to all accounts associated with the attorney's practice, not just escrow accounts. For a period of seven years attorneys must maintain the following documentation:

- A record of all deposits and withdrawals identifying the date, source and description of each deposit, and date, payee and purpose of each withdrawal or disbursement;
- A record for escrow accounts, showing the source of all funds deposited, the names of all persons for whom the funds are held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;[27]

- All checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips;
- Other non-banking documents relating to the attorney's representation of a client must also be retained. They are detailed in DR 9-102(D).

Attorneys are further required to maintain a running balance of trust account activity and complete periodic reconciliations.[28]

All attorneys who are signatories on an escrow account are responsible for the activity in that account. Where an attorney in a law firm converts client funds, the failure to oversee or review the firm's books and bookkeeping practices exposes the otherwise innocent partner to discipline.[29] Lack of venal intent is not a defense to a charge of conversion. Intent only comes into play where the conversion charge is coupled with a charge under DR 1-102(A)(4), which requires a showing of intent to defraud, deceive or misrepresent.[30]

V. Dishonored Check Reporting Rule

The Dishonored Check Reporting Rule[31] provides that a bank must issue a report whenever a check from an attorney's escrow account is returned for insufficient funds.

A. Compliance with Rule

Escrow accounts may only be maintained in a bank which agrees to provide reports pursuant to the Dishonored Check Reporting Rule. All New York attorneys are deemed to have consented to the rule and the obligation rests with the attorney to make certain that the account is in compliance.

B. Report of Dishonored Check

A report is required from the depository bank whenever a properly payable instrument is presented against an escrow account which contains insufficient available funds, and the bank dishonors the instrument. This is not an overdraft rule. The check must in fact be dishonored.

C. Processing of Report

A dishonored check report is mailed to the Lawyers' Fund for Client Protection within five banking days after the date of presentment. The Lawyers' Fund holds the report for ten business days to enable the bank to withdraw the report. The report may only be withdrawn if it was issued by inadvertence or mistake. The curing of an insufficiency by the deposit of funds is not a basis for withdrawing a report. After ten business days, the Lawyers' Fund forwards the report to the appropriate grievance committee for investigation.

Conclusion

The safeguarding of escrow funds is one of the most important obligations an attorney has. The proper handling of these funds and attention to record keeping requirements makes sound business sense and will help the practitioner avoid ethical problems that may arise.

A future article will deal with investigations relating to an attorney's escrow account by grievance committees, the audit process and the consequences of escrow irregularities. Non-escrow attorney accounts with escrow ramifications will also be discussed.

Endnotes

1. Disciplinary Rules of the Code of Professional Responsibility, promulgated as joint rules of the Appellate Division of the Supreme Court and set forth in Part 1200 of Title 22 of N.Y. Comp. Codes, R. and Regs. (N.Y.C.R.R.).
2. DR 9-102(B).
3. 22 N.Y.C.R.R. 1300 [Dishonored Check Reporting Rules for Attorney Special, Trust and Escrow Accounts].
4. DR 9-102(B)(1); 9-102(H); *In re Weisman*, 139 A.D.2d 249, 531 N.Y.S.2d 255 (1st Dep't, 1988).
5. DR 9-102(B)(2); *In re Holsberger*, 223 A.D.2d 920, 637 N.Y.S.2d 322 (3d Dep't, 1996); *In re Gambino*, 205 A.D.2d 212, 619 N.Y.S.2d 305 (2d Dep't, 1994).
6. *See*, IOLA ACCOUNTS, *infra.*
7. DR 9-102(B)(3).
8. *In re Orseck*, ___ A.D.2d ___, 692 N.Y.S.2d 766 (3d Dep't, 1999); *In re Elefterakis*, 238 A.D.2d 7, 667 N.Y.S.2d 55 (2d Dep't, 1997).
9. NYSBA ethics opinion #570.
10. *In re Gambino*, 205 A.D.2d 212, 619 N.Y.S.2d 305 (2d Dep't, 1994).
11. DR 9-102(A); 9-102(B)(4); *In re Betancourt*, 232 A.D.2d 9, 661 N.Y.S.2d 208 (1st Dep't, 1977); *In re Connolly*, 225 A.D.2d 241, 650 N.Y.S.2d 275 (2d Dep't, 1996).
12. *In re Eckelman*, 189 A.D.2d 263, 596 N.Y.S.2d 443 (2d Dep't, 1993).
13. DR 9-102(E); *In re Tinubu*, 255 A.D.2d 4, 688 N.Y.S.2d 611 (2d Dep't, 1999); *In re Bishop*, 235 A.D.2d 53, 663 N.Y.S.2d 241 (2d Dep't, 1997); *In re Amisano,* 225 A.D.2d 179, 649 N.Y.S.2d 601 (4th Dep't, 1996); *In re Ocasio*, 223 A.D.2d 339, 646 N.Y.S.2d 327 (1st Dep't, 1996); *In re Raphael*, 216 A.D.2d 788, 628 N.Y.S.2d 846 (3d Dep't, 1995); *In re Satta*, 211 A.D.2d 65, 626 N.Y.S.2d 100 (1st Dep't, 1995).
14. DR 9-102(E); *In re McMahon*, 251 A.D.2d 808, 674 N.Y.S.2d 474 (3d Dep't, 1998); *In re Takvorian*, 240 A.D.2d 95, 670 N.Y.S.2d 211 (2d Dep't, 1998); *cf.* New York State Bar Association Ethics Opinion #693.
15. *In re Elefterakis*, 238 A.D.2d 7, 667 N.Y.S.2d 55 (2d Dep't, 1997); *In re Joyce*, 236 A.D.2d 116, 665 N.Y.S.2d 430 (2d Dep't, 1997).
16. *In re Sullivan*, 253 A.D.2d 999, 678 N.Y.S.2d 169 (3d Dep't, 1998); *In re Collins*, 193 A.D.2d 22, 602 N.Y.S.2d 553 (2d Dep't, 1993).
17. DR 9-102(F).
18. DR 9-102(H).
19. DR 9-102(G).
20. Judiciary Law § 497.
21. 21 N.Y.C.R.R. 7000.l0.

22. *In re Summer*, 238 A.D.2d 86, 667 N.Y.S.2d 150 (4th Dep't, 1997); *In re Mattone*, 195 A.D.2d 91, 606 N.Y.S.2d 322 (2d Dep't, 1994); *In re Stella*, 193 A.D.2d 235, 602 N.Y.S.2d 636 (2d Dep't, 1993).
23. *In re Raymond*, 210 A.D.2d 694, 620 N.Y.S.2d 165 (3d Dep't, 1994).
24. Judiciary Law § 497(6)(a).
25. *See*, Gross, Marjorie E., *Amendments to the New York Code of Professional Responsibility*, 1990.
26. DR 9-102(D).
27. *In re Siddiqi*, 231 A.D.2d 150, 658 N.Y.S.2d 668 (2d Dep't, 1997).
28. *In re Warkow*, 242 A.D.2d 102, 673 N.Y.S.2d 437 (2d Dep't, 1998); *In re Capobianco*, 219 A.D.2d 179, 639 N.Y.S.2d 242 (4th Dep't, 1996).
29. *In re Ponzini*, 259 A.D.2d 142, 694 N.Y.S.2d 127 (2d Dep't, 1999); *In re Maroney*, 259 A.D.2d 206, 694 N.Y.S.2d 431 (2d Dep't, 1999); *In re Spencer*, 259 A.D.2d 218, 694 N.Y.S.2d 426 (2d Dep't, 1999); *In re Falanga*, 180 A.D.2d 83, 583 N.Y.S.2d 472 (2d Dep't, 1992); *In re Sykes*, 150 A.D.2d 126, 546 N.Y.S.2d 376 (2d Dep't, 1989); *In re Dahowski*, 103 A.D.2d 354, 479 N.Y.S.2d 755 (2d Dep't, 1984).
30. *In re Russakoff*, 79 N.Y.2d 520, 524, 583 N.Y.S.2d 949 (1992); *See also*, *In re Altomerianos*, 160 A.D.2d 96, 559 N.Y.S.2d 712 (1st Dep't, 1990); *In re Semple*, 225 A.D.2d 238, 650 N.Y.S.2d 146 (1st Dep't, 1996); *In re Baumgarten*, 197 A.D.2d 309, 613 N.Y.S.2d 361 (1st Dep't, 1994).
31. 22 N.Y.C.R.R. 1300.

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Eight Steps to Better Time Management for Lawyers

By Eva Wisnik

An inherent part of practicing law is working in a reactive work environment. Being client-focused means that you are always responding to others' demands, including those of senior attorneys, partners and clients. Time management is an essential tool that will enable you to respond to these demands fully and appropriately, yet maintain some sense of control. My goal in this article is to share specific tools and strategies that will help you to manage your time effectively.

By employing proven time management techniques, you will be more focused and productive because you will be "on top" of your assignments instead of feeling buried under them. By learning to plan, prioritize, organize and delegate your daily actions more efficiently, you will enjoy greater job confidence and, therefore, be perceived as competent. The following strategies may seem obvious, but they will work only if you commit to daily planning, focus on your priorities and take daily action steps to most efficiently use your most limited resource—**time**.

1. Start your day with an action plan. Invest 15 minutes to plan each day. To begin, identify the key goals for the day. Plan how you can achieve these goals by breaking them down into manageable action steps. Make sure these goals are realistic. Be honest with yourself and do not confuse your daily action plan with a wish list.

In designing your action plan for the day:

- Identify the three goals you would like to accomplish that will, by the end of the day, make you feel that your time was well invested.
- Estimate the time it will take to complete the action steps (keep in mind that on a productive day you can plan on accomplishing 4-5 hours of concentrative work).
- Add in time for delays, obstacles and interruptions (this is where the other 6-8 hours are spent).
- Identify those available resources that can help you achieve your goals. Planning will allow you to identify and utilize existing resources such as the library, established precedents or brief banks, and word-processing. These resources will enable you to use your time and smarts to do the aspect of the legal work where you add the greatest value. For example, before diving into a memo, you may want to speak to the librarian about locating specific precedents or call an associate who has worked on similar cases. Taking the time to think through how you can most efficiently use your available resources will save you time that can then be invested in improving your final work product. Remember, when you plan ahead and line up the resources you need, you will not have to stand by the copy machine for 35 minutes when your secretary has left for the day.

2. Prioritize your action steps. Apply the 80/20 rule and identify the steps that will generate the greatest results. In most areas of your life, you will find that 80% of your results come from 20% of your actions. Therefore, by identifying and focusing on the actions that will produce the greatest results, you will be most productive. For example, if doing a first draft of a client memo is the most important item on your daily action plan, identify possible resources and complete the outline for the memo before returning routine phone calls. By focusing throughout the day on the assignments that deserve the greatest priority, you will leave the office feeling that you used your time and resources most effectively. The rule that the most efficient and productive attorneys use is to do the items that they have identified as "most important" first. Productivity increases when you save tedious tasks, as well as projects with later deadlines, until after you have completed at least one of your three most important goals for the day. In addition, it helps to confront challenging projects immediately; they lose their intimidating face once you tackle them. For example, if you need to speak with a partner who has a reputation for being difficult about an assignment you are working on, talk to him or her the first chance you get. Otherwise, you will be distracted by NOT taking this action and you will barely be able to focus on your other projects.

3. Delegate responsibilities. Learning to delegate effectively is a challenge. You should never confuse delegating with dumping! Even if you work in a small firm where there are fewer resources, you must begin to distinguish between the actions you need to take and those that are best delegated. Here are two rules to apply in making this determination:

A. Will mastering this task enhance your professional development? Will you be adding to your learning curve by completing this task? When you begin practicing, there are some tasks you want to know how to do so that you never feel disabled. For example,

learning how to use the fax machine or making minor edits to a client document on the computer.

B. Is my doing this task at my billable rate in the best interest of the client? For example, if your billing rate is $80 per hour should you be inputting a document into the computer or would the client prefer for a secretary, temp or wordprocessor to do it at a much lower rate per hour?

Possible tasks to delegate include:

- Confirming appointments/meetings
- Entering billable hours into system
- Scheduling meetings
- Correspondence
- Faxing
- Organizing documents
- Travel arrangements
- Creating files
- Filing
- Research
- Photocopying
- Pulling cases
- Updating your rolodex
- Preparing Fed Ex airbills

Think of your secretary, paralegals and other associates as resources. By taking the time to identify and delegate certain tasks, you can then spend time on those parts of the project to which you add the greatest value. However, you must be willing to invest time in explaining what you want. And you must be prepared to trust your co-workers. The following tips can guide you towards successful delegation:

- Fully explain what it is you want the end product to look like (i.e., how should the document be laid out, where do you want the page breaks, etc.).
- Let your co-workers have full responsibility for delivering the end product that you have outlined, but provide them with possible resources, such as precedents or samples of similar work.
- Point out possible obstacles and challenges.
- Give both critical feedback and praise for well accomplished tasks.
- **Trust them!**

By learning to delegate effectively, you will be able to devote more of your own time to accomplish those action steps that require both your expertise and your time.

4. Create systems that will support your work. Ideally, when a partner comes into your office and asks for his client's file, you immediately want to locate it to show how easily you can retrieve information. If you establish uniform procedures for organizing each case or deal, you will be able to locate any file at a moment's notice. To stay on top of all the paper that flows into your office, you may want to:

- Start a new legal pad for each new assignment, which includes:
  - — Basic client information – client charge number, phone numbers, fax numbers, names of parties involved in the matter, etc.
  - — Deadlines
  - — Research data
  - — Outlines and drafts of memos
  - — Project Action Plan
- Create a Redweld file folder for each new case, which includes a labeled file folder for documents such as:
  - Distribution lists
  - Original documents
  - Research
  - Drafts
  - Faxes
  - Pleadings

At the end of each day, invest five minutes in placing all loose papers into the appropriate files. By creating these organizing systems from the start, your office and desk will look cleaner and neater and you will feel more in control. In addition, attorneys who work with you will have increased confidence in you and your work.

5. Learn to control interruptions. In all legal environments, interruptions are a normal part of the day. Your phone will ring, e-mail will beep, and visitors will stop by unexpectedly. Too often, by constantly responding to interference, we *allow* ourselves to get interrupted. The problem is that it usually takes longer to recover from the interruption and refocus on the project, than

it takes to deal with the actual interruption. However, there are moments when you have a choice. For example, when you come into the office early to draft a memo, do not allow yourself to be distracted by a ringing phone. Remember, the caller doesn't know that you're in yet, so let your voice-mail retrieve the call. In order to better control interruptions:

- Always add in extra time for interruptions when planning your day.
- Change your voice-mail daily.
- Return non-urgent phone calls in "batches" after important projects are completed.
- Answer e-mails a maximum of 6 times a day—twice in the morning, before and after lunch and twice in the afternoon—as opposed to each time a new one arrives.
- Visit colleagues, as opposed to having them visiting you, so you can control the length of the visit.
- If you are in the middle of an important project, ask if you can get back to the caller as soon as you are finished, instead of stopping and then hoping to get back into the project.

You have more control over your time than you sometimes may believe. Deciding when you want to be interrupted is a vital key to time management. You will not be able to eliminate interruptions, but you can better control them.

6. Block out time. Lawyers who are most effective at time management block out time during the day to accomplish their most important projects. For example, after completing all routine tasks, such as answering e-mails and returning phone calls, they ask their assistants to tell callers that they are "in a meeting." They don't necessarily clarify that it is a meeting with themselves. These attorneys then do concentrative work, such as research or drafting for 1–2 hours. By being able to block out 2–4 hours daily to complete the important projects, they are able to accomplish significant pieces of client work before 5 p.m.

7. Learn to communicate and ask questions—now. Poor communication can be the biggest time waster, as the following true story illustrates. A junior associate was once assigned a time-consuming project. For five straight days she locked herself in the library to do research. She produced an extremely impressive product. Unfortunately, she did not receive any credit for her work. As it happened, the client no longer needed the firm's help. Because the associate did not keep in touch with her supervising attorney, she failed to learn of this change. In addition, she also lost precious time that could have been used to complete other client work. To avoid such a scenario, you should:

- Ask questions to clarify assignments.
- Ask for possible resources.
- Ask for deadlines.
- Keep those you work with well informed of your progress.
- Address possible obstacles directly and ask for help.

Learning how to communicate effectively with other attorneys, clients, and staff is critical to successful time management and a successful career. If you take responsibility for staying in touch with supervisors and colleagues, you will get the information you need to prioritize your time most efficiently.

8. Work as a team with your secretarial assistant. Your assistant is one of your most valuable resources. He or she has the ability to help you achieve your goals. You can maximize your secretary's capabilities by facing projects as a team. To support this essential relationship:

- Make sure your secretary has a copy of your daily calendar so he or she always knows where you are.
- Update your secretary on all of your current projects and any projects you will be working on in the future.
- Communicate your weekly schedule and plan ahead with your secretary.
- Clarify what needs to get done and when.
- Help your secretary to prioritize the most urgent tasks on a daily basis.
- Acknowledge your secretary's contributions regularly.
- Know your secretary's talents. Use them and praise them.

Your secretary can be your most valuable tool for managing your time.

By mastering the skills outlined in this article, you will be perceived as the competent professional that you are. As a result, those you report to will trust you and your work.

Eva Wisnik, President of Wisnik Career Strategies, Inc., has trained over 2,000 attorneys in CLE-approved Time Management Skills. She is the former Director of Recruitment and Training at Schulte Roth & Zabel and Cadwalader, Wickersham & Taft.

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Getting Started with Electronic Mail: An On-line Primer

By Stephen P. Gallagher

In recent months there has been a dramatic change in attitudes of lawyers toward the Internet as being a viable option to improve productivity, communications, and customer service, even though there is still very little understanding of how anyone will find the real cost/benefit ratio and return on investment. The Internet today is estimated to connect more than 15 million computers, and, according to Find/SVP, a New York City technology-research firm, 37.8 million adults in the United States already have access to the Internet. There is increasing evidence that law firms can no longer afford to ignore the Internet, but before you dive in it's a good idea to try to take a look at the big picture.

The decision to create a Web site is a complex issue, and one we will not attempt to address at this time. Since it is hard for me to imagine how any lawyer in private practice will be able to survive in the years ahead without a computer, a telephone, a fax machine, and an e-mail address that will enable current clients and potential clients to find you 24 hours a day, 365 days a year, let's begin by establishing a single e-mail account for one individual in your firm. This article is intended to provide readers with a practical starting point for going on line.

Step I—Getting Connected

Before we can discuss how you should establish an e-mail account, you must have the computer hardware and software that would enable you to get connected. According to recent surveys, more than 40 percent of firms with 20 or more attorneys are still using PCs on networks running under DOS operating systems, while the majority of sole practitioners who use the Microsoft standard have already moved to Windows-based PCs. As larger firms struggle with the costs associated with upgrading their networks, sole practitioners and smaller firms are going on line in record numbers. If you are in a large firm setting, you might want to consider purchasing one laptop computer to begin to encourage your staff to use e-mail, and to explore how to access the Internet.

Talk to Other Users

The best way to get started in finding a good e-mail service provider is by talking to colleagues and friends. If you are just beginning to use the computer, you should be particularly concerned about the company's customer support. The most common way to get an e-mail account on the Internet is from a local Internet Service Provider (ISP). Another excellent resource is your community library. Find out who provides Internet connectivity for the local library. This is usually a good referral because your community librarian has, in all likelihood, done a great deal of research into finding the most cost-effective Internet service connection. If you travel away from your office on a regular basis, you may need either toll-free or local-call access to the Internet from anywhere in the country. This generally can be purchased through any of a number of national ISPs.

If you have Internet access through another source but want to establish your own account, an excellent resource to help you find ISPs in your area is a Web site known as "The List," which can be found at: <http://www.thelist.com>. Your local librarian should be able to show you how to find this site on the Web; if you are a member of NYSBA, call the Law Office Economics and Management Resource Center at 1-800-699-LOEM, and we will conduct this search for you. This is a very good way to find out what ISPs service your area.

Look at the Large Commercial Services

There are a number of very popular commercial online services—such as CompuServe, Prodigy and America Online (AOL). These proprietary online services provide software, services and content, plus each also provides subscribers with Internet connectivity through their computer networks. There has been a great deal in the news media recently about changes taking place in the commercial online services business, so again, check with colleagues familiar with these services before signing-up. Typically, these vendors offer a carefully structured, user-friendly online environment, so their e-mail services can be a good way to get started.

Step II—Reach Out and Touch Someone

Once you have set-up an e-mail account you need to notify clients and other lawyers of your availability online. It can prove to be frustrating at first, because as with everything else you have to do on a daily basis, you now must check for e-mail regularly. Through the efforts of the NYSBA Electronic Communications Task Force, the state bar association is expanding its use of e-mail to better service its members. Three NYSBA sections (Health Law, Trusts and Estates Law, and the General Practice Section) have contacted their members to solicit e-mail addresses, and these efforts will expand in the coming months.

One Message Leads to Many

One way of attracting traffic to your e-mail account is through the use of electronic mailing lists, which enable individuals to participate in discussions via e-mail. A Listserv© (listproc, majordomo, listserver) is a program that maintains one or more of these mailing lists (i.e., a list server). The listserv automatically distributes an e-mail message from one member of a list to all other members on that list. Listservs maintain thousands of lists in the form of digests, electronic journals, discussion groups and the like.

When you subscribe to a list, your name and e-mail address are automatically added to the list. You will receive a standard letter of welcome (via e-mail) telling you about the list. From that time on, you will receive all mail (postings) sent to the list by its members. You may follow the discussions or join in on them. If you respond, you can send your response to the list (in which case, all members of the list will receive it), or to an individual on the list. You can sign off (unsubscribe) from a list at any time.

Incentive to Log On

The mailing list is a very convenient tool that will give you added incentive to log on to your computer at least once a day. There are literally hundreds of mailing lists devoted to law and legal concerns, and a good place to begin to find law-related mailing lists is a Web site developed by Lyonette Louis-Jacques, lecturer in law and international law librarian at the University of Chicago School of Law. Lyonette maintains a database of all such mailing lists at http://www.lib.uchicago.edu/~llo/lawlists/info.html. Each listing includes the name of the list, a brief description, and subscription information. Lyonette's database is an excellent place to start.

If you currently have an e-mail address and you want to try out a mailing list, you might want to begin by subscribing to the liibulletin-ny mailing list, which analyzes the more significant decisions of the New York Court of Appeals. The Cornell Legal Information Institute (LII) maintains this current-awareness service, which includes decisions since 1992. Written by student editors in their second and third years of law school, the liibulletin-ny is available by electronic mail (via free subscription).

Subscribe to the liibulletin-ny, by sending an e-mail message to: listserv@lii.law.cornell.edu. Anyone with an Internet accessible e-mail address can become a subscriber. The message needs to read: subscribe liibulletin-ny [followed by subscriber's name—all on one line]. Subscribers will receive an e-mail bulletin containing summary and analysis of important decisions of the New York Court of Appeals within days after they have been handed down and placed on the Internet by the LII, along with instructions on how to access those decisions in full text or retrieve them by e-mail. The liibulletin-ny mailing list will begin to show you the power of this new technology, and you will begin to better understand how access to the Internet is changing the practice of law.

Once you are comfortable with using e-mail to communicate with clients and friends, the next logical step is to talk about what you must do to find information that is accessible through the World Wide Web.

Stephen P. Gallagher is director of the NYSBA Law Office Economics and Managment Department, and is liaison to the NYSBA Electronic Communications Task Force.

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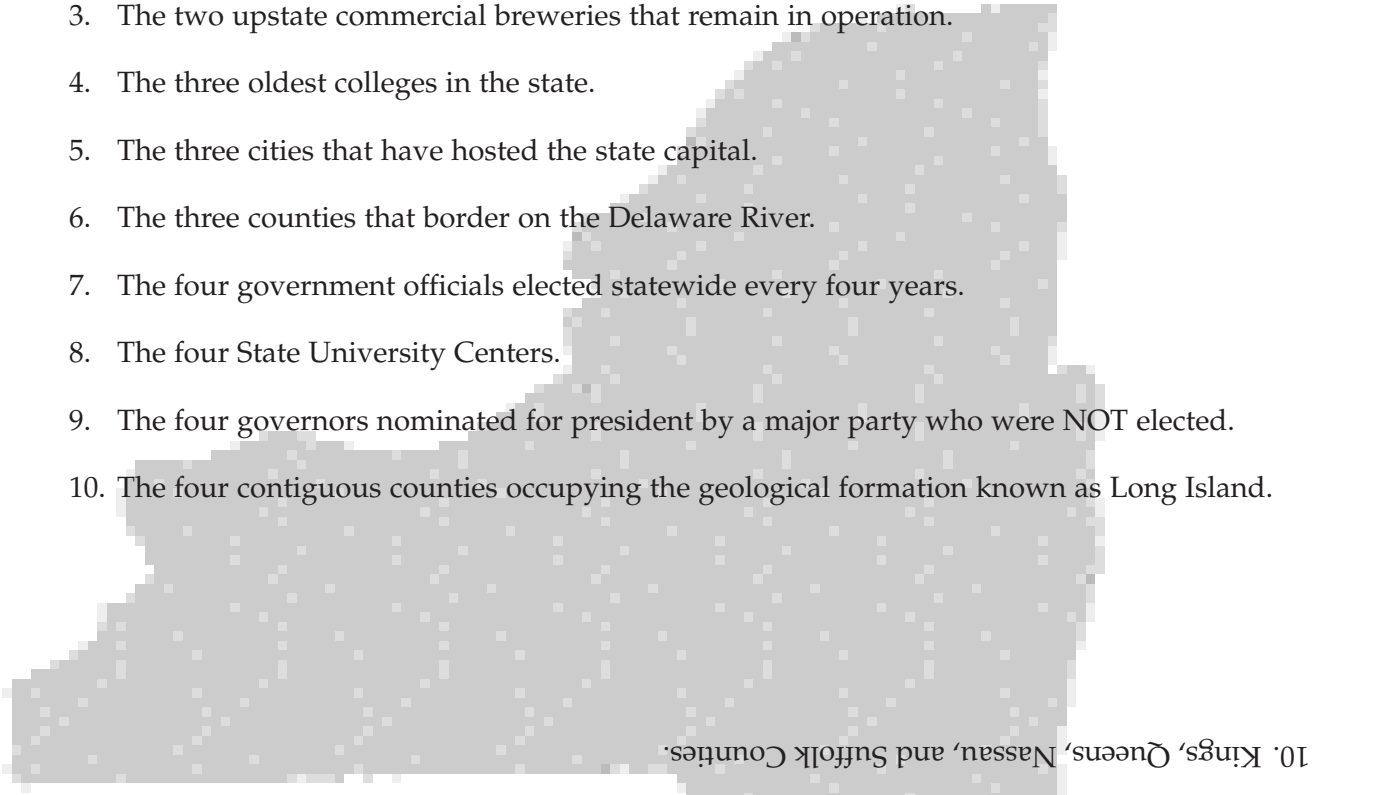
Empire State Name Game

Name

1. The only President who also served as New York State Attorney General.
2. The two upstate automobile manufacturers that closed during the Depression.
3. The two upstate commercial breweries that remain in operation.
4. The three oldest colleges in the state.
5. The three cities that have hosted the state capital.
6. The three counties that border on the Delaware River.
7. The four government officials elected statewide every four years.
8. The four State University Centers.
9. The four governors nominated for president by a major party who were NOT elected.
10. The four contiguous counties occupying the geological formation known as Long Island.



Answers

1. Martin Van Buren
2. Franklin (Syracuse) and Pierce-Arrow (Buffalo).
3. Genesee (Rochester) and F.X. Matt (Utica).
4. Columbia, Union, and Hamilton, in that order.
5. Kingston, New York, and Albany, in that order.
6. Orange, Sullivan, and Delaware.
7. Governor, Lieutenant Governor, Comptroller, and Attorney General.
8. Stony Brook, Albany, Buffalo, and Binghamton.
9. Dewitt Clinton, Samuel Tilden, Al Smith, and Tom Dewey.
10. Kings, Queens, Nassau, and Suffolk Counties.

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Estate Planning and Will Drafting in New York

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Estate planning involves much more than drafting wills. As the introductory chapter of *Estate Planning and Will Drafting in New York* notes, good estate planning requires the technical skills of a tax lawyer; a strong understanding of business, real property and decedent's estate law; and the human touch of a sensitive advisor. This book is designed to provide an overview of the complex rules and considerations involved in the various aspects of estate planning in New York State.

Written by practitioners who specialize in the field, *Estate Planning and Will Drafting in New York* is a comprehensive text that will benefit those who are just entering this growing area. Experienced practitioners may also benefit from the practical guidance offered by their colleagues by using this book as a text of first reference for areas with which they may not be as familiar.

Annual updates will make *Estate Planning and Will Drafting in New York* an invaluable reference for many years to come.

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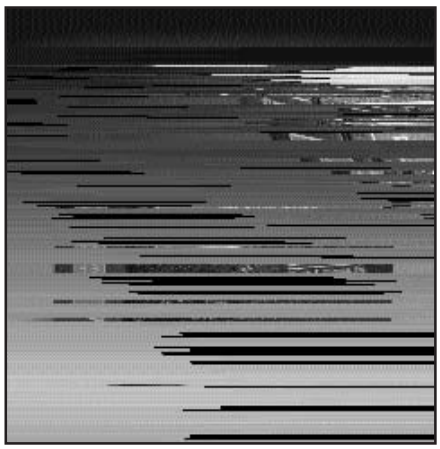

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