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ONEONONE

A publication of the General Practice Section
of the New York State Bar Association

A Message from the Chair

Recently I had the opportunity to comment in the press on our Section and the general practice of law. I think it's worth repeating. This is what I said:

The General Practice Section seeks to attract its members from all segments of the lawyer community. We address the practices of younger and older lawyers, male and female and all areas of practice.

What is a general practitioner today (GP)? The general practice of law, I have heard some people say, is for lawyers who are solo practitioners or members of small firms. That is not necessarily the case.

Most large firms channel their lawyers into areas of practice which include specialists such as labor, real estate, corporate, tax, bankruptcy, etc. Even these large firms (for this discussion, 300 or more lawyers, give or take) also have general practitioners. They have groups of litigators whether in small firms or large firms that handle matters which arise from various practice areas of the law. A good litigator can take on most kinds of cases in litigation, learn the facts, issues and the areas of the law necessary for successful outcome, and try it to conclusion. They can represent plaintiff or defendant with equal vigor.

Inside

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Even specialists need to have a basic understanding of other areas of law. Can you represent a workers' compensation claimant or defend the employers without recognizing a potential matrimonial, labor or tax issue? If a marriage is not valid in New York, is a foreign spouse entitled to benefits? Is the marriage valid and, if not, what is the status of children?

In a real world, most lawyers must be generalists to some degree, no matter how specialized their practice. We are all general practitioners to some degree. When the practice accepts clients who have legal problems of all kinds, we call that a general practice. Much like the medical doctors of old (before internists) who were general practitioners or family doctors, the general practice lawyer handles a large array of the client's problems.

The advantage for the client is obvious. They grow to trust the practitioner. "I have the best lawyer. He handles all my legal affairs." That is the general practitioner, and yes, he or she even still sometimes makes house calls. It is not unusual for the general practitioner to come to the home of an elderly client to execute a will, or complete the necessary papers to pursue a tort action for personal injuries. Let's hope that we never get to a day when lawyers do not take up the challenge of being fluent in many areas of the practice of law and can call themselves general practitioners.

That is how I see the general practitioner. While a lawyer should not accept a representation in a matter that she or he does not have the ability to handle, which cannot be readily or quickly learned, sometimes joining with another lawyer can solve the problem. Just as litigators in the big firms sometimes rely on the partner who knows the answer to an issue that may arise in the case involving the lawyer's specialty, the general practitioner also generally has access to other lawyers who lend the needed advice and can assist counsel.

The community benefits from the fact that there are attorneys willing to take on the challenge of being a family lawyer or a general practitioner. The General Practice Section exists to help them become better in what they do, and, hopefully, to provide a network of other lawyers who can share.

This is my last front page as Chair of the Section. It has been an honor to have been able to serve as your Chair. I look forward to working with Marty Kera, our next Chair, and the rest of our Executive Committee in this coming year.

Martin Minkowitz

Note: Martin S. Kera became Chair of the General Practice Section on June 1, 2010.

From the Editor

As we come to the end of another fiscal year, I want to take this opportunity to thank all those who have contributed to the General Practice Section's newsletter, *One on One*. Your participation and support has been beneficial to our readers and the General Practice Section membership.

The articles contained in our previous newsletters have been timely and a great resource to in-house counsel or private practitioners. We strive to publish articles about current issues and various areas of practice that will be useful in bringing forth information that will strengthen the efficiency of your practice and that are helpful in delivering information to your clients on a day-to-day basis.

Over the past year, we have published an array of articles, some as a series, on such issues as: *Who Is Entitled to Life Insurance Benefits and Top-Hat Benefits from an ERISA Plan Following a Divorce or a Marital Separation*?; *Insurance Implications of the Sub-Prime Lending Collapse*; *A Wholesale Review of the Vendors Endorsement: How It Works & the Priority of Coverage*; a three-part series on *Assisting the Consumer Debtor: Becoming Aware of Potential Affirmative Claims; Securing Legal Representation*: *Counsel Fee Decision Should Aid Worker's Compensation Claimants*; *Insurance Fraud (The Latent Crisis),* among others.

We are happy to report that with each issue, we receive requests from new contributors who want to share some information about their area of expertise with the rest of the General Practice membership.

As we move forward, the General Practice Section has an aggressive agenda to include new initiative from its working committees. We encourage our Section members to participate on committees and to share some of their knowledge within their area of practice and by contributing to an upcoming issue of *One on One*. Your contributions benefit the entire membership.

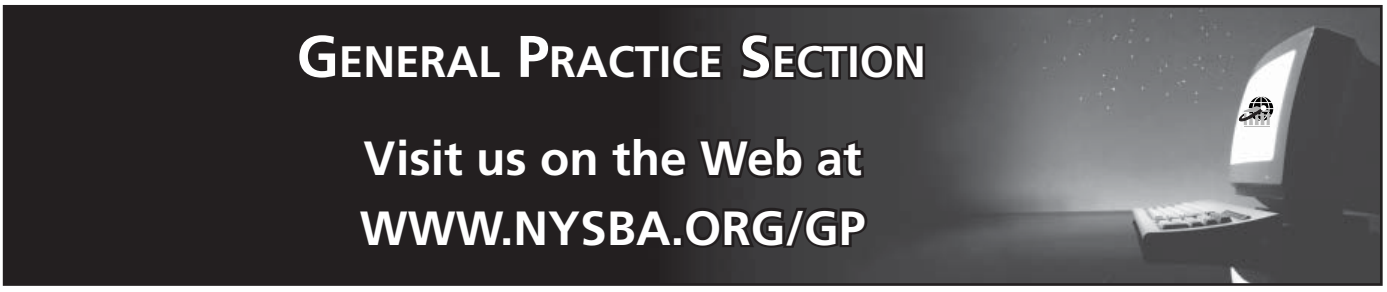
Articles should be submitted to my attention in a Word document at mcs@thebeaumontgroup.com. I can also be reached at 718-892-0228 and am available to answer any question you may have regarding submission of an article.

Your participation and support is a testament of your belief in the value and benefits that the Section has to offer.

Have a safe and healthy summer!

Sincerely,

Maria Sclafani
Editor



Assisting the Consumer Debtor, Part III: Improper Service

By Daniel Schlanger

I. Introduction

This article is the third and final installment in a series which has sought to provide the general practitioner with a basic orientation to representing consumers in collection actions. Part I focused on identifying potential counterclaims and third-party claims, particularly those arising under state and federal consumer protection statutes, such as the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., the Truth In Lending Act, 15 U.S.C. § 1601 et seq., and New York General Business Law § 349.[1] Part II (Winter 2009/2010) focused on potential defenses to consumer collection actions, including statute of limitations, standing, personal jurisdiction, evidentiary defenses, offsets and substantive non-liability.[2]

In this final installment, I expand on the subject of lack of personal jurisdiction mentioned previously, detailing the procedural and practical issues involved, and highlighting a variety of deficiencies and even fraudulent practices regarding service of process and submission of affidavits of service that can be successfully attacked by a general practitioner who knows what to look for. In some cases, these deficiencies are so significant and/or pernicious that they may also form the basis of counterclaims or third party claims.[3]

II. Basic Procedural Issues

The defense of lack of personal jurisdiction based upon failure to serve the debtor with process typically arises in one of two procedural postures: (A) post-default judgment and (B) pre-default judgment.

A. Post-Default: CPLR 5015(a)(4)

I regularly encounter potential clients who seek assistance of counsel only after a creditor has successfully attached the consumer's bank account or garnished the consumer's wages. The combined effect of losing access to bank funds, and having outstanding checks returned for insufficient funds (not to mention their own banking institutions levy-related fees and charges) can have grave, real-life consequences for even solidly middle-class or affluent families. This remains true despite the recent, marked improvements in the rules regarding bank attachments pursuant to New York's Exempt Income Protection Act of 2009 (EIPA).[4] In many instances, the consumer is not even aware that a lawsuit was filed and judgment obtained even after the bank attachment or garnishment has commenced, and desperately wants to know on what basis the creditor has been able to attach funds, garnish wages, etc.

Where the consumer was not properly served, the consumer is entitled to vacatur of the judgment as a matter of law pursuant to CPLR 5015(a)(4). Although there are other provisions of the CPLR—most notably § 5015(a)(1) and § 317—that provide for vacatur/relief from judgment based, in part, upon a showing of meritorious defense, a court need not reach the issue of whether the judgment debtor has meritorious defenses in granting a motion under § 5015(a)(4).

Rather, "a court must first resolve the nondiscretionary CPLR 5015(a)(4)'s lack of jurisdiction. If a court lacked jurisdiction to render the default judgment, the court *must* vacate the default *even if no* showing is made by a defendant of a reasonable excuse for the default or a meritorious defense. This vacatur mandate is imposed because the default judgment or order is deemed void for lack of personal jurisdiction over defendant, and thus any judgment or order entered is a nullity." *Cho v. Song*, 166 Misc. 2d 129 (1995) (emphasis in original) (citing *Cipriano by Cipriano v. Hank,* 197 A.D.2d 295 (1st Dept. 1994) and *Marazita v. Nelbach*, 91 A.D.2d 604 (2d Dept. 1982). *Ortiz v. Santiago*, 303 A.D. 2d 1, 523 (1st Dept. 2003) ("[H]ad service been improper… there would have been a lack of jurisdiction over them and hence no need of a showing of reasonable excuse and meritorious defense.") Indeed, the United States Supreme Court has held that to require a showing of meritorious defense prior to allowing a party who was not provided with service or notice runs afoul of the Due Process Clause under the Fourteenth Amendment. *Peralta v. Heights Medical Center, Inc.*, 108 S. Ct. 896 (1988).

Creditor's counsel routinely attempt to argue against vacatur under § 5015(a)(4) on grounds that any deficiencies in service did not "prejudice" the client who may have had at least actual notice. However, "actual notice alone will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service." *Saxon Mortg. Services, Inc. v. Bell*, 63 A.D.3d 1029 (2d Dept. 2009); *Foley Machinery Co. v. Amaco Const. Corp*. 126 A.D.2d 603 (2d Dept. 1987).

Nor is a motion under § 5015(a)(4) for lack of service subject to the time limitations of a motion for vacatur/relief from judgment pursuant to § 5015(a)(1) (state limits here) or § 317 (motion must be brought within one year after she obtained knowledge of the entry of judgment on and not more than five years from the date the judgment was entered).

The case law on the applicability of the creditor's defense of laches to a motion under § 5015(a)(4) is not entirely settled. In *Foley Machinery Co. v. Amaco Const. Corp*. 126 A.D.2d 603 (2d Dept. 1987), a defendant was improperly served at his place of employment. The Second Department stated "[n]or is the defendant['s] application barred by the doctrine of laches because personal jurisdiction was not obtained," but went on to state that "in any event, mere delay alone, without actual prejudice, does not constitute laches." *Id*.

In contrast, in *Allen v. Board of Assessors of Town of Mendon*, 57 A.D.2d 1036 (4th Dept. 1977), a tax grievance case, the court held that personal jurisdiction was subject to the doctrine of laches, stating that the appellant Town's delays in asserting the defense of lack of personal jurisdiction amounted "to laches and a waiver by the Town, and, therefore, the Town is now estopped from raising the jurisdiction defense based on lack of service, if indeed there was such." The facts of *Allen* appear particular to the tax assessment context in which a town provides imperfect or incomplete information regarding response procedures to a taxpayer grieving an assessment and then finds the court unsympathetic when it raises the taxpayer's failure to follow the correct procedures as a basis for a finding of no personal jurisdiction. Fittingly, the cases citing *Allen* are limited exclusively to the tax grievance context.

B. Pre-Default: CPLR 3211(a)(8)

Where the consumer was not properly served but obtains actual notice and responds to the summons and complaint timely, the consumer must either include the defense in a pre-Answer Motion to Dismiss pursuant to CPLR 3211(a)(8) or, if opting not to file such a motion, may include it in the Answer.

Critically, the latter option of raising the defense in the Answer requires that the consumer must move to dismiss on this basis within 60 days of filing the Answer pursuant to CPLR 3211(e). In other words, simply raising the defense of lack of personal jurisdiction is not sufficient to preserve it throughout the proceeding.[5] Moreover, serial Motions to Dismiss are sharply limited, as CPLR 3211(e) specifies a long list of defenses, including personal jurisdiction, that must be brought together as a basis for dismissal or not at all.

Although CPLR 3211(e) does provide that the court may "extend the time upon the ground of undue hardship,"[6] courts have been extremely unforgiving regarding the 60-day rule, interpreting the hardship exception quite narrowly. E.g., *Aretakis v. Tarantino*, 300 A.D.2d 160 (1st Dept. 2002). As a result, practitioners who miss this deadline may have significantly prejudiced their clients. Indeed, even where the consumer is *pro se*, courts have sometimes enforced waiver. Compare, e.g., *Bell v. Little*, 250 A.D.2d 485 (1st Dept. 1998) (enforcing waiver against pro se litigant) and *Dover Limited v. Assemi*, 2009 WL 2870645 (SDNY 2009) (same), with *Local 875 I.B.T. Pension Fund v. Pollock*, 992 F. Supp. 545, (EDNY 1998) (rejecting waiver of personal jurisdiction defense on grounds that [Defendant] is a foreign pro se defendant and leave to amend the answer would have been readily available) and *Lipman v. Salsberg*, 107 Misc. 2d 276 (New York Civ. Ct. 1980).

Moreover, even where asserted timely, personal jurisdiction is waived where the defendant interposes a counterclaim that is "unrelated" to Plaintiff's claims, i.e., that would not be subject to collateral estoppel were it to be asserted in a later lawsuit. *Textile Technology Exchange, Inc. v. Davis*, 81 N.Y.2d 56 (Ct. of Appeals 1993).

As a result of these limitations, the debtor's attorney must carefully map out how and when it plans to raise the personal jurisdiction defense and what other grounds for dismissal must be "piggy-backed" onto a Motion to Dismiss for lack of personal jurisdiction.[7]

III. Attacking Personal Jurisdiction Over Defendant in a Consumer Collection Action

A. "I Don't Live There"

The easiest lack of service cases are those in which the defendant can demonstrate through overwhelming documentary evidence that—at the time of service—he or she simply did not live at the address specified as the place where service was made in the process server's affidavit. Our office routinely attaches the following as exhibits in order to establish what one might call the "I Don't Live There" defense.

A. Apartment Lease

B. Cancelled Rent Checks

C. Rent Invoices

D. Mortgage or Property Records

E. Utility Bills

F. Cable Bills

G. Telephone Bills

H. Bank Documents

I. Tax Returns

J. Property Manager Affidavits

K. Pay Stubs Listing Home Address[8]

We also routinely use non-party affidavits from housemates, property managers and next door neighbors. Faced with sufficient documentary evidence, most courts will hold that there is no personal jurisdiction over defendant without ordering a traverse hearing in which the court hears testimony from the defendant, the process server, etc. See, e.g., *Discover Bank v. Miller*, Index No. 1085/02 (Supreme Court, Sullivan County) Sept. 22, 2008;[9] *Harvest Credit Management VII, LLC v. Constance M. Athas*, Index No. 75446/08, Feb. 19, 2010 (NY Civil Ct. 2010).[10] Avoiding a traverse hearing is desirable both in terms of avoiding additional time and expense on the part of the debtor and the debtor's attorney, and also because one avoids the risk of damaging admissions, poor impressions, and confusion of the issues that always arise when live testimony is taken. Indeed, some debt collectors will immediately offer to vacate judgment rather than attempt to oppose a well documented Motion to Dismiss for lack of personal jurisdiction and run up expenses with little prospect of success.

B. Annotated Affidavit of Service

In addition to the "I Don't Live There" defense, there are a variety of other grounds upon which one can attack service. In the remainder of this article, we examine a typical collection action affidavit of service to illustrate these other issues. (See Appendix A, sample "Affidavit of Service" on page 9).

1. Does the Affidavit list the correct plaintiff and correct defendant? Is the court and index number listed correctly? While courts are often lenient regarding mere "scrivener's errors" (e.g., *Chatham Green Management Corp. v. AAFE Management Company*, 2003 WL 22299083 (N.Y. City Civ. Ct. 2003), there are occasionally more significant problems. For example, it is not uncommon for a consumer to be sued on several accounts by the same debt buyer, resulting in multiple actions with similar captions, all handled by the same process server, leading to possible mis-service and/or misfiling. In addition to the correctness of the name, the practitioner should confirm that the process server alleges separate service of each defendant, even where the defendants are related and/or live together.

2. a. Is the process server duly licensed? Although there is no statewide licensure, some localities—most notably New York City—have local licensure requirements. Although NYC's registry is not yet available online, the practitioner can typically get verbal confirmation over the phone from the NYC Department of Consumer Affairs (NYDCA). Written confirmation that a process server is not licensed is obtainable by FOIA request made to the NYDCA.

   b. Does the process server have a history of misconduct? Complaint histories are available from the NYCDCA via FOIA request. Another useful resource is the Complaint itself in *Pfau v. Forster & Garbus*, 2009-8236, Sup. Ct. Erie County, 2009, which details specific misconduct (e.g., claims to have served multiple people in disparate locations at the same time) by numerous individual process servers.[11] Process servers have been sued in federal court for misconduct, making Pacer a useful resource as well.

   c. Is the name of the process server/affiant listed as in this opening line the same as the name under the signature block? In this particular affidavit, taken from a case handled by this author, the names are not the same. The affidavit of "Donald Wolfman" appears to be signed by "George Pressman."

3. Is the date of service listed a weekend? See CPLR 308 (Process may be served on any day of the week (including holidays) except Sunday.) *See* N.Y. Gen. Bus. Law § 11.[12]

4. Was this the consumer's address at the time service was alleged? In this particular case, the consumer had moved from Brooklyn to Florida many years prior and, in any event, the address listed was not one he had ever lived at. *Charles v. Palisades Collection, LLC*, Index No. 09-cv-0818 (M.D. Fla. 2009).[13]

5. Was service affixed to the door of the residence, or merely to a door in the public area of an apartment complex or other larger structure? Posting service in a lobby is only acceptable where entry past the lobby is restricted. *F.I. DuPont, Glore Forgan & Co. v. Chen*, 41 N.Y.2d 794, 396 N.Y.S.2d 343 (1977) (Because the process server was not permitted to go beyond the lobby area by the doorman, the court found that the bounds of Defendant's dwelling place extended to the building lobby where the process server's attempt to effectuate service upon Defendant was impeded).

6. Do any of the dates of previous attempts fall on a Sunday? See (3), above. More importantly, although it appears to be almost universal practice in collection cases to perform "nail and mail" service (i.e., affixation of the summons and complaint to the door, followed by a copy sent via regular mail) on the third attempt at

service at the residence, it would appear that an affidavit that fails to allege more is, prima facie, insufficient. Specifically, several appellate courts have ruled that where the affidavit of service does not allege any inquiry "about the defendant's whereabouts and place of employment," the process server has not met CPLR 308(4)'s due diligence requirement and the Complaint is properly dismissed for lack of personal jurisdiction on this basis *without a traverse hearing*. *McSorley v. Spear*, 50 A.D.3d 652 (2d Dept. 2008); *Schwarz v. Margie*, 62 A.D. 3d 780 (2d Dept. 2009) (holding that the trial court committed reversible error by ordering a traverse hearing where the plaintiff "failed to show the existence of even a factual question as to whether the process server exercised the due diligence necessary to be permitted to serve someone under CPLR 308(4)") (citations omitted).

7. Is the mailing address correct? Typically it will be listed on the affidavit of service as identical to the physical address. Even where the client resides at the physical address listed, occasionally the client will have a P.O. Box and no onsite postal delivery, allowing a successful challenge to service for failure to mail a copy of the summons and complaint to defendant.

8. a. In a case involving alleged service upon a person of suitable age and discretion: Does the person exist? In one case the author handled, the court dismissed after Defendant submitted documents showing that the person of suitable age and discretion had died years prior to the alleged service date. The description of the person receiving service can often be helpful in this regard, as it can sometimes avoid questions about whether the person allegedly accepting service merely gave a false name, and allow the debtor, residents of the property, the landlord, neighbors etc. to state in an affidavit that no one fitting that description lives at the residence.

   b. Is the person who allegedly accepted service truly of suitable age and discretion? See e.g., *Room Additions, Inc. v. Howard*, 124 Misc. 2d 19, 475 N.Y.S.2d 310 (N.Y. City Civ. Ct. 1984) (court vacated judgment and dismissed action as a nullity where eleven-year-old "accepted" service of summons and complaint); *50 Court Street Associates v. Mendelson and Mendelson*, 151 Misc. 2d 87, 572 N.Y.S.2d 997 (N.Y. City Civ. Ct. 1991) (listing relevant case law and explaining that "the principle that emerges from these cases is that a person will be considered to be of suitable age and discretion where the nature of his/her relationship with the person to be served makes it more likely than not that they will deliver process to the named party.").

   c. Was the process server at the "residence" at the time service was accepted on behalf of debtor? Note that Courts have held that a doorman only meets this requirement where access beyond the lobby was not permitted, such that the process server did not have the option of proceeding to the entrance of the debtor's actual apartment. See also *Pickman Brokerage v. Bevona*, 149 Misc. 2d 879, 568 N.Y.S.2d 287 (N.Y. Sup. 1991) (leaving of process with a janitor or office building maintenance employee in the lobby at 5 PM is insufficient as a matter of law for conferring jurisdiction pursuant to CPLR Sec. 308(2)); *Colonial National Bank v. Jacobs*, 188 Misc. 2d 87, 89 (NY Civil Ct. 2000) ("If a doorman is at the main entrance to a multi-unit building, however, he is not normally at a building resident's actual dwelling for purposes of service."). See supra, (4).

9. Military Service: The Federal and New York service member Civil Relief Acts "require that, prior to issuance of a default judgment, the plaintiff or petitioner must submit to the court affidavits establishing that any individual defendant or respondent is not in active military service." *Palisades Acquisition, LLC v. Ibrahim*, 12 Misc. 3d 340 (N.Y. Civil Ct. New York County 2006), citing 50 App. U.S.C.A. § 521, and N.Y. Military Law § 303(1) and § 306. Although this defect is not "jurisdictional" and thus does not render the judgment "void ab initio," numerous courts have refused to enter default judgments based on plaintiff's failure to submit a military affidavit holding that the court nonetheless has a duty to ensure compliance with the law. *Palisades Acquisition, LLC v. Ibrahim*, 12 Misc. 3d 340 (N.Y. Civil Ct. New York County 2006); *MBNA America Bank, N.A. v. Nelson*, 15 Misc. 3d 1148(A), 841 N.Y.S.2d 826, 2007 WL 1704618 (N.Y. City Civ. Ct. 2007); *3 Realty v. Booth*, 12 Misc. 3d 1184(A) (Suffolk, 2006); *Atrium Funding Corp. v. McRoberts*, 10 Misc. 3d 1077 (Suffolk 2006). But see *Department of Housing etc. v. West 129th Street Realty Corp.*, 9 Misc. 3d 61, 802 N.Y.S.2d 826 (1st Dept. 2005) (vacatur was improper where defendant made no "pretense of being on active military duty or being a military dependent at the time of his default").

10. Is the individual signing as a notary actually a notary with a valid license at the time of notarization? If not, the document submitted is unnotarized and therefore not an affidavit at all. The practitioner can search for this information at the New York Department of State's Division of Licensing Services, Licensee ID Search page: *http://appsext8.dos.state.ny.us/lcns_public/id_search_frm*.

IV. Conclusion

Because many collection firms employ sloppy or even unethical process servers, service-related challenges to personal jurisdiction can provide a powerful defense for the consumer debtor. This article has aimed to highlight a plethora of common deficiencies regarding service of process, and to sharpen the general practitioner's ability to recognize improprieties or, at least, fruitful avenues of inquiry, when examining a typical affidavit of service in a collection matter. In the most egregious cases, service-related deficiencies can even provide the basis for counter/third party claims.

Endnotes

1. "Assisting the Consumer Debtor: Becoming Aware of Potential Affirmative Claims," Daniel A. Schlanger, Esq., NYSBA, *One on One* (Fall, 2009).
2. "Assisting the Consumer Debtor, Part II: Defenses to Consumer Credit Claims," Daniel A. Schlanger, Esq., NYSBA, *One on One* (Winter 2010).
3. Addressing unethical service practices, the Court of Appeals has recognized a "continuing and pervasive problem of unscrupulous service practices by licensed process servers," *Barr v. Department of Consumer Affairs of the City of New York*, 70 N.Y.2d 821, 822 (1987). The Court further stated that "[t]hese deceptive practices deprive defendants of their day in court and lead to fraudulent default judgments" and are "[o]ften associated with consumer debt collectors." *Id*. at 822-823. More recently, New York Attorney General's Office and the Chief Administrative Judge, the Hon. Ann Pfau, brought suit against no fewer than thirty-eight collection law firms regarding systemic bad service of process and the NYAG criminally prosecuted the head of American Legal Process. *See Pfau v. Forster & Garbus,* 2009-8236, Sup. Ct. Erie Co., 2009; *Erin Services Co., LLC v. Bohnet*, 26 Misc. 3d 1230(A) (Nassau Dist. Ct. 2010) (sanctioning collection firm $14,800 for service-related and other collection misconduct). See also "Process Server Pleads Guilty to Fraud," New York Law Journal, Jan. 20, 2010, Noeleen G. Walder. New York suffers from massive and widespread "sewer service" problems. *Justice Disserved* (MFY Legal Services, Consumer Rights Projects), June 2008, available at http://www.mfy.org/Justice_Disserved.pdf.
4. CPLR 5222. For more detailed information, see "New Protection Against the Garnishment of Exempt Funds," Kirsteen E. Keefe and Prof. Gina Calabrese, Esq., available online at http://www.empirejustice.org/issue-areas/consumer-community-development/fair-debt-collection/new-protection-against-the.html and http://www.empirejustice.org/assets/pdf/issue-areas/consumer-community-development/eipa-flow-chart.pdf.
5. The interaction between lack of service and the statute of limitations defense stemming from CPLR 306-b, and the resulting inadvisability of waiving jurisdictional defenses, is discussed in Part II of this three-part series.
6. *See also* CPLR 2004.
7. Of particular interest to the consumer practitioner is the lack of clarity regarding whether the defense of no standing is best conceptualized as one of "lack of capacity to sue" (§ 3211(a)(3)) and is thus waived if not raised timely or not included in Defendant's motion to dismiss for lack of personal jurisdiction, or whether the defense is "jurisdictional" (§ 3211(a)(2)) and thus entirely unwaivable even on appeal. See McKinney's, Practice Commentaries (Siegel), § 3211:13 citing, e.g., *Gilman v. Abagnale*, 235 A.D.2d 989 (3d Dept. 1997); and CPLR 3211(e) (limiting Defendant to one motion to dismiss based upon 3211(a)(3) through (6)). Regardless of this author's opinion that the latter view is correct, prudence dictates that standing thus be plead under both § 3211(a)(2) and (a)(3) alongside the practitioner's motion for dismissal for lack of personal jurisdiction pursuant to § 3211(a)(8).
8. Obviously, various documents on this list must be redacted prior to submission to the Court in order to protect client confidentiality.
9. Available at http://www.newyorkconsumerprotection.com/wp-content/themes/paperstreet/files/miller%20decision%20and%20order%20dated%209-22-08.pdf.
10. Available at http://www.newyorkconsumerprotection.com results/harvest-credit-management-vii-llc-v-constance-m-athas.
11. In *Pfau v. Forster & Garbus,* 2009-8236, Sup. Ct. Erie Co., 2009, the following individual process servers were singled out for gross misconduct: Raymond Bennett; Dunham Toby Tyler; Gene Gagliardi; Drefel Grimmett; Bill Matzel; John Hughes; Andrea D'Ambra; Greg Tereshko; Diana Lentz; Herb Katz; Bernard Holder; Adnan Omar; Annette Forte; Issam Omar; Dan Beck; Beth Eubank; Michelle Miller; Harry Marinelli; Michael Pszczola; and Courtney Goldstein.
12. Exceptions to the prohibition on Sunday are found in N.Y. Jud.Law § 5 (injunctive orders) and N.Y. Gen. Bus. Law § 13 (Persons who are known to be Saturday Sabbath observers may not properly be served on Saturday). Although GBL § 13, on its face, addresses criminal liability for Saturday service, courts have found that the statute implicitly voids service made intentionally on the Jewish Sabbath (including Friday after sundown) and other Jewish Holidays on which work is forbidden where the Plaintiff knows that the Defendant is a religiously observant Jew. *Hirsch v. Zvi*, 184 Misc. 2d 946 (Civil Ct. Kings Co. 2000); F*PTK, LLC v. Paradise Pillows, Inc*., 9 Misc. 3d 1125(A), 862 N.Y.S.2d 808 (N.Y. City Civ. Ct. 2005).
13. *See also Palisades v. Charles*, 85576-cv-2006 (N.Y. Civil Ct. Kings Co. 2009). The author represented Defendant in this action, which was dismissed with prejudice prior to initiation of the above referenced federal FDCPA suit.

Daniel Schlanger, Esq. is a partner at Schlanger & Schlanger, LLP in White Plains, New York and Manhattan, and practices primarily in the area of consumer law. He is a graduate of Harvard Law School and a former clerk of the Honorable R. Lanier Anderson, III of the U.S. Court of Appeals, Eleventh Circuit. He may be reached at daniel@schlangerlegal.com or 914-946-1981. Additional information regarding the topics addressed in this series can be found at the firm's consumer law website, www.newyorkconsumerprotection.com. Finally, the author wishes to acknowledge and thank associate Jeanne M. Christensen, Esq., for her significant research assistance on this article.

APPENDIX A

Affidavit of Service

CIVIL COURT OF THE CITY OF NEW YORK - COUNTY OF KINGS
District:
Part:

PALISADES COLLECTION, L.L.C.	PLAINTIFF(s)/ PETITIONER(s)	Attorney: PAP Att. File: C145631 Mortage:
- against -		Index: 085576/06
RAWLE CHARLES	DEFENDANT(s) / RESPONDENT(s)	S&C Filed: 06/26/2006

STATE OF NEW YORK: COUNTY OF NASSAU: ss:

DONALD L. WOLFMAN, BEING DULY SWORN DEPOSES AND SAYS DEPONENT IS NOT A PARTY TO THIS ACTION AND IS OVER THE AGE OF EIGHTEEN YEARS AND RESIDES IN THE STATE OF NEW YORK.

That on 08/03/2006 at 08:34 AM at 838 MONROE ST # 3, BROOKLYN, NY, 112214107 deponent served the within Summons and Verified Complaint on RAWLE CHARLES defendant therein named.

☒ AFFIXING TO DOOR, ETC. — By affixing 1 true copy(s) thereof to the door of said premises, the same being the defendant's dwelling place within the State of New York.

☒ PREVIOUS ATTEMPTS — Deponent had previously attempted to serve the above named defendant/respondent on the following: 7/31/06 AT 7:34 PM, 8/2/06 AT 12:22 PM

☒ MAILING — Deponent completed service under the last two sections by depositing 1 copy(s) of the above described papers in a post paid, properly addressed envelope in an official depository under the exclusive care and custody of the United States Post Office in the State of New York, on 08/09/2006 addressed to the defendant(s) served to the above address with the envelope bearing the legend "PERSONAL AND CONFIDENTIAL" and did not indicate on the outside thereof that the communication was from an attorney or concerned an action against the defendant(s).

DEPONENT DESCRIBES THE INDIVIDUAL AS FOLLOWS:

Sex:	Approx. Age:	Approx. Height:	Approx. Weight:	Color of Skin:	Color of Hair:

Other:

☒ Deponent asked the person whether the defendant and/or present occupant was presently in the military service of the United States Government or on active duty in the military service in State of New York or a dependant of anybody in the military and was told defendant and/or present occupant was not.

MALE NEIGHBOR, MR. HERLEY , 2F

2006 AUG 17 AM 10:58

Sworn to before me on: 8/9/06

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Notary Public, State of NEW YORK
No. 01GE6095827
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U.S. Supreme Court: FRCP 23 Trumps State Law Limits on Class Action Practice

By Robert T. Horst and Mark H. Rosenberg

This article is an interpretation of current law and is offered for informational purposes only. This material is not legal advice and should not be construed or used as a substitute for the advice of an attorney.

Robert T. Horst

The United States Supreme Court has held that Federal Rule of Civil Procedure 23 takes precedence over state statutes that place limits upon the class action mechanism. In Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., No. 08-1008, __S. Ct. __, 2010 WL 1222272 (U.S. Mar. 31, 2010), the Court considered a putative class action challenging an automobile insurer's purported failure to pay interest on overdue medical payment benefits, as required by New York statutory law. The United States District Court for the Eastern District of New York dismissed the lawsuit on the grounds that the putative class action was precluded by N.Y. Civ. Prac. Law § 901(b), which prohibits the use of a class action to recover "penalties." The trial court's decision was affirmed by the United States Court of Appeals for the Second Circuit.

In a 5-4 decision, the Supreme Court held that Federal Rule of Civil Procedure 23 superseded the limitations on class action procedure set forth in the New York statute. Writing on behalf of himself, Chief Justice Roberts, Justice Thomas, and Justice Sotomayor, Justice Scalia observed that under the Rules Enabling Act, 28 U.S.C. § 2072, the Supreme Court is authorized to enact federal procedural rules, so long as these rules do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Accordingly, Justice Scalia noted that under the Act, federal civil rules are valid and enforceable so long as they truly concern matters of procedure, rather than a litigant's substantive rights.

Justice Scalia concluded that Rule 23 was a procedural rule that did not affect a party's substantive rights, explaining that "a class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." Shady Grove, 2010 WL 1222272 at *8. Justice Scalia also observed that "like traditional joinder," the class action process "leaves the parties' legal rights and duties intact and the rules of decision unchanged." Id. Justice Scalia emphasized that the defendant insurer's "aggregate liability" for the conduct at issue "does not depend on whether the suit proceeds as a class action," as the potential class members are free to bring individual lawsuits regarding the alleged conduct. Justice Scalia also noted that the fact that "some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action" has "no bearing" on the litigants' "legal rights." Id. at *9. In conclusion, Justice Scalia noted that while "keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping," such a consequence was "the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure." Id. at *12.

Mark H. Rosenberg

In contrast, the dissenting opinion, written by Justice Ginsburg and joined by Justices Kennedy, Breyer, and Alito, found that, in light of the absence of any collision between Rule 23 and N.Y. Civ. Prac. Law § 901(b), there is no reason to undermine state legislation designed to protect a legitimate state interest limiting a legal remedy, just as a state-imposed statutory cap on damages would do so.

The Shady Grove opinion may hamper the ability of states to place statutory limits upon the class action mechanism. The expanded federal jurisdiction over putative class actions established by the Class Action Fairness Act will provide plaintiffs with opportunity to bypass these limits by bringing similar cases in federal court, consistent with Shady Grove. Ironically, the plaintiffs' bar that long-resisted expanded federal jurisdiction over class actions may now utilize this jurisdiction to pursue otherwise-barred class claims.

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The New N.Y. Rules of Professional Conduct

By Sarah Jo Hamilton and Lewis Tesser

Effective April 1, 2009, the New York Code of Professional Responsibility (the Code), which has governed attorney conduct for forty years in New York, was replaced by the New York Rules of Professional Conduct (the Rules). These new Rules were adopted by the Administrative Board of the Appellate Division (ABA) in December, 2008, after the New York State Bar Association forwarded a recommendation to adopt proposed Rules of Professional Conduct based on the ABA Model Rules. The format of the new Rules, as adopted, follows that of the Model Rules, and while some of its provisions are similar to the Model Rules, much of the content is identical to the former Code. However, there are differences in the new Rules. This article will set forth some of the major changes from the Code in the Rules.

The adoption of the new Rules comes somewhat late in the national ethics rules game. The ABA, aware of dissatisfaction with the Code of Professional Responsibility, which was inadequate in many respects and not logically organized, first adopted the Model Rules in 1983. Subsequently most other states in the country adopted a version of the Rules, and lately New York has been the lone hold-out for the Code. New York's adoption of the Rules means that New York lawyers now have a more coherent set of disciplinary rules and a national body of professional conduct law to which they can refer.

The first important change is in the organization of the Rules. Following the Model Rules format, the New York Rules are divided into eight sections essentially organized by function.

Section One	Rules 1.0 to 1.18	Client-Lawyer Relationship
Section Two	Rules 2.1 to 2.4	Attorney as Advisor
Section Three	Rules 3.1 to 3.9	Attorney as Litigator
Section Four	Rules 4.1 to 4.5	Attorney as Professional
Section Five	Rules 5.1 to 5.8	Attorney as Supervisor and Practitioner
Section Six	Rules 6.1 to 6.5	Pro Bono and Legal Services
Section Seven	Rules 7.1 to 7.5	Advertising, Recommendation, Solicitation
Section Eight	Rules 8.1 to 8.5	Misconduct, Reporting Misconduct, Bar Admission, Judicial Officers, Discipline

Most of the Rules are logically set forth in the most appropriate section. We do not attempt to comment on all the Rules in this article, but have selected major changes to discuss in the following sections.

"New York's adoption of the Rules means that New York lawyers now have a more coherent set of disciplinary rules and a national body of professional conduct law to which they can refer."

Definitions

Rule 1.0 contains terminology. Definitions contained in new Rule 1.0 greatly expand the number of definitions specifically set forth in the definition section of the Code. Some definitions are taken directly from substantive sections of the Code, while some are new and taken from the Model Rules. Some terms of particular interest are:

> 1.0(e) "Confirmed in writing," which means a writing from a person to a lawyer, or a lawyer to a person confirming that the person has given consent (see sections (i) and (ii) of Rule 1.0(e)). The definition of the term "confirmed in writing" also can include a statement on the record of a proceeding before a tribunal. The writing must be transmitted or obtained within a reasonable time after oral consent is given.
>
> 1.0(x) "Writing" includes handwritten, printed and photocopied material, photographs, audio or video recordings and e-mail. A "signed writing" includes electronic signatures.
>
> 1.0(k) "Knowingly," "known," "know" and "knows" mean actual knowledge, which may be inferred from circumstances.
>
> 1.0(q-s) "Reasonable," "reasonable belief," and "reasonably should know" relate to the conduct of a reasonably prudent and competent lawyer. These definitions establish the reasonable person standard for belief or knowledge.

1.0(d) The definition of "Confidential Information" is found in Rule 1.6.

Rule 1.6: Confidentiality of Information

The definition of confidential information, referred to in 1.0(d) is actually contained in the substantive Rule 1.6 dealing with confidentiality of information. Whereas in Disciplinary Rule (DR) 4-101 the Code drew a distinction between "confidences" and "secrets," Rule 1.6(a) makes no such distinction, stating that confidential information consists of information gained during, or relating to, the representation of a client, whatever the source and includes matters protected by attorney-client privilege, matters likely to be embarrassing or detrimental to the client or information that the client has requested be kept confidential.

Confidential information may not be knowingly revealed or used to the disadvantage of a client, or for the advantage of the lawyer or a third person unless the client gives informed consent. (Informed consent, defined in Rule 1.0(j) is the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.) Confidential information also may be disclosed if disclosure is impliedly authorized to advance the best interests of the client and is reasonable or customary. Other exceptions permitting disclosure of confidential information are similar to those in the Code, with some important differences.

First, the new Rule permits disclosure to prevent reasonably certain death or substantial bodily harm, and to permit attorneys to obtain legal advice about compliance with the Rules or other law. But, most important, Rule 3.3 dealing with Conduct Before a Tribunal authorizes disclosure of confidential information to prevent or rectify a fraud upon a tribunal.

Rule 3.3: Conduct Before a Tribunal

Under the Code sections dealing with conduct before a tribunal, DR 7-102(B), an attorney who received information clearly establishing that a client had perpetrated a fraud upon a tribunal was mandated to call upon the client to rectify the fraud. If the client refused, or was unable to do so, the attorney was mandated to reveal the fraud *unless the information was protected as a confidence or secret.* As expressed many times, by many authors, there are very few, if any, instances where client fraud upon a tribunal would not be protected as a confidence or secret. For the most part, the exception negated the rule.

Rule 3.3 represents a 180-degree swing. It provides that an attorney must take reasonable remedial measures to correct false evidence including, if necessary, disclosure to the tribunal. The obligation also extends to future, current and past criminal or fraudulent conduct. The exception for confidential information in the Code has been explicitly eliminated. While the Rule applies to material evidence, materiality has been held to extend to matters related solely to credibility. See *Matter of Friedman,* 196 A.D. 2d 280 (1st Dep't 1994).

Rule 1.5: Fees and Division of Fees

The fee provisions contained in Rule 1.5 are similar to the rules regarding fees in the Code. However, Rule 1.5 is more expansive, and includes other rules and case law. For example, the court rule regarding written letters of engagement (22 NYCRR § 1215) has been incorporated by reference into the Rules so that failure to comply with the court rule could be the basis of discipline. Further, the Rule 1.5 specifically prohibits excessive expenses, mandates that in contingent fee cases clients be notified of expenses for which they will be responsible, codifies the prohibition against non-refundable retainers (*Matter of Cooperman*, 83 N.Y.2d 465, 611 N.Y.S. 2d 465 (1994)), and notably, requires that clients be informed *in writing* of the amount of the fee each attorney will receive in cases referred to other attorneys.

Rule 1.14: Clients with Diminished Capacity

This new and welcome rule provides authority for attorneys who are confronted with clients with diminished capacity to obtain the help they need to keep the client from harm. It authorizes the attorney to maintain, as far as reasonably possible, a conventional relationship with the client. However, the lawyer may take reasonably necessary protective action, including consulting with others who may help the client, and may, in the appropriate case, seek the appointment of a guardian or conservator. The rule specifies that the attorney may reveal confidential information, but only to the extent necessary to protect the client's interests. It is still unclear whether failure to take protective measures under this rule would subject an attorney to discipline, as the language of the section is permissive.

Rule 1.18: Duties to Prospective Clients

There is no Code equivalent to the new Rule 1.18. The rule defines a prospective client as one who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter, and places the prospective client in the same position relative to conflicts of interest as a former client. A lawyer may not represent a client adverse to a prospective client in the

same or substantially related matter without written consent from both the affected and prospective client.

However, in the case of a prospective client, the imputation of disqualification to the attorney's firm can be overcome under certain circumstances. The lawyer must have taken reasonable measures to avoid exposure to more information than was necessary to determine whether to represent the prospective client. Additionally, the firm must promptly and appropriately screen the disqualified lawyer from the matter, must not apportion any part of the fees to the disqualified attorney and must promptly provide written notice of the representation to the prospective client.

Of special note are the exceptions to the prospective client status. A person who unilaterally communicates information to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship does not come under the prospective client protective umbrella. Neither does the person who seeks a consultation in order to disqualify the attorney from handling a materially adverse representation on the same or a substantially related matter. Thus, the cocktail party guest who starts relaying confidential information to an attorney attending the social gathering is not protected, and neither is the person seeking to disqualify an attorney from representing his or her spouse in a matrimonial matter.

Rule 4.4(b): Inadvertently Produced Material

For too long New York has suffered from contradictions and confusion in legal authority regarding inadvertently transmitted documents. Ethics opinions and case law suggested contradictory obligations, from stating that examining inadvertently sent material was unethical, to permitting full examination and use of the material. Now, Rule 4.4 makes an attorney's obligations clear. He or she must notify the sender. There is no disciplinary violation in examining, or indeed using, in the absence of an order prohibiting use, the inadvertently sent material. The rule does not, however, attempt to establish what use, if any, may be made of such material, and leaves those decisions to the courts.

Conclusion

This article sets forth some significant differences between the Code and the new Rules. There are many additional differences, all of which New York attorneys should become familiar.

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Injured in the Course of Employment—Not Necessarily Work-Related

By Martin Minkowitz

The law provides the claimant with a number of presumptions to assist in establishing a claim before the Workers' Compensation Board ("Board"). There are five listed presumptions in § 21 WCL. The first of these "that the claim comes within the provision of this chapter," has been interpreted by the Courts to include that an accident which occurs in the course of the employment is presumed to also arise out of the employment. This is very significant since an injury to be compensable must arise out of and also be in the course of the employment. Whether an injury arose out of and in the course of the employment is a question of fact for the Board to decide. All questions of fact are for the Board, and rarely will be disturbed on appeal to the Appellate Division 3rd Department, or further to the Court of Appeals. The finding of the Board will be sustained if there is "any nexus," however slight, between the employment and the injury.[1] The Board's decision must be based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] All presumptions are rebuttable.

As noted above, not only when the Board makes a finding of fact is it rarely disturbed by the Court, but it is presumed and most often found that when an injury occurred in the course of the employment it also arose out of the employment.

In a recent case it was conceded that the injury happened in the course of the employment. The issue was whether the injury arose out of the employment. In that case a woman who was an assistant store manager had her car stolen while at work. A week later she saw her car in the store parking lot with someone in it. She confronted the person in her car and while in a scuffle with the driver, a store employee came to the assistance of the driver, getting in the car and driving off leaving the woman injured from the assault. She filed a claim for workers' compensation benefits and with the employer admitting that the assault occurred in the course of the employment the Board found, employing the presumption, which as a matter of fact, the injury arose out of and in the course of the employment.

On appeal to the Court the decision was reversed. The Court concluded that the statutory presumption had been rebutted by substantial evidence. In rejecting the Board's findings of facts, it found the fact to be that the assault on the claimant was the result of a purely personal animosity with the driver of her stolen vehicle. Since the assailant was not a co-worker and not connected to her employment it was not work related. It therefore did not arise out of the employment although it undisputedly was in the course of the employment.[3]

Findings of fact by the Trier of the case are generally not changed because it is that tribunal that has seen and heard the evidence. The Trier of the facts has seen the witnesses that testify and observed their demeanor. Has observed the presentation of evidence and the cross examination of witnesses. This is not available to an appellate court. While they may permit oral argument before them, they have not been present for the introduction of the evidence, which established the facts upon which the decision will be made.

As a personal observation, it would seem that the facts as presented gave the Board sufficient basis, even if slender, for its findings that this injury occurred out of and in the course of the employment; and that it was not merely an arbitrary or capricious finding by the Board. The Court should not interfere with the Board's finding of fact unless "all the evidence and reasonable inferences therefrom allow no other reasonable conclusion" except that the injury did not arise out of and in the course of the employment.[4]

Endnotes

1. *See* Baker v. Hudson Val. Nursing Home, 233 A.D.2d 608 (1996), Perez v. Victory Motors Inn, 2 A.D.3d 963 (2003).
2. Russo v. HRT, Inc. of Orange Co., 246 A.D.2d 933 (1998); Con E; v. NLRB, 305 U.S. 197 (1938).
3. Wadsworth v. K-Mart *et al.*, __ A.D.3d __ (2010).
4. Villapol v. American Landmark Mgt., 271 A.D.2d 882 (2000); Post v. Tenn. Prods & Chem Corp., 19 A.D. 2d 484 (1965), affd., 14 N.Y.2d 796 (1964).

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Revoking a Waiver and Consent Is Not As Easy As You Think

By Gary E. Bashian and Michael Candela

Gary E. Bashian

American author Alfred A. Montapert once said that "nobody ever did, or ever will, escape the consequences of his choices."[1] That statement holds true in the field of trusts and estates, in particular when it comes to the execution of a waiver and consent in a probate proceeding. As this article will show, a party to a probate proceeding must exercise care in signing such a document, as it carries with it powerful consequences that cannot be easily undone.

Probate Process: Overview

In its simplest terms, the probate of a will is the process whereby the Surrogate's Court approves the will of a decedent and accepts the document as the decedent's instructions as to how his or her probate estate assets are to be distributed. In order for the court's decision to be binding on all parties, the court must have jurisdiction over all the "necessary parties" to enforce the judgment against each party.[2] The necessary parties to a probate proceeding are described in Surrogate's Court Procedure Act ("SCPA") § 1403. They include those individuals and entities named as beneficiaries in the will and all individuals who would inherit in intestacy if there were no will.[3] Personal jurisdiction over these necessary parties is obtained by their submission to the jurisdiction of the court or by the due issuance and service of process upon them.[4]

By executing a Waiver of Issuance and Service of Process and Consent to Probate, a necessary party submits to the jurisdiction of the court and agrees to the probate of the decedent's will. If a necessary party chooses to sign a waiver and consent, the party must sign the document in the presence of a notary public and return it to the nominated fiduciary for filing with the Surrogate's Court. Execution and filing of the waiver and consent with the Surrogate's Court confirms the jurisdiction of the court over the necessary party.[5]

If a necessary party chooses not to sign the waiver, then the nominated fiduciary's attorney will prepare a Citation and have it signed by the Chief Clerk of the Surrogate's Court.[6] The Citation is then served in accordance with the applicable service rules upon all necessary parties named within it who have not previously submitted to the jurisdiction of the Surrogate's Court.[7] The petitioner will then file proof of service of the Citation with the Surrogate's Court to confirm that the court has obtained jurisdiction over all the necessary parties.[8] Upon receipt of the Citation, the cited parties have the option of either appearing or not appearing in court. By choosing not to appear, they waive their right to challenge the probate of the decedent's will.

Michael Candela

Once all necessary parties have been cited and served with a Citation or signed a waiver and consent that has been filed with the Surrogate's Court, the proofs of jurisdiction over all necessary parties are complete.

Procedure for Revoking a Waiver and Consent

A party seeking to revoke a waiver and consent must make a direct application to the Surrogate by way of an order to show cause[9] or by motion[10] made on notice to all other parties.[11] The burden of proof lies on the party attempting to revoke a waiver.[12] The standard of proof is clear and convincing evidence,[13] which is a difficult standard to meet.

Standards for Withdrawing a Waiver and Consent

Generally, courts do not take lightly to the withdrawal of waivers and consents as "such actions disrupt the orderly process of administration and create a continuous aura of uncertainty."[14] A waiver and consent is binding upon the party who has executed it and can be withdrawn only under certain circumstances.

Courts have established different tests for withdrawal of a waiver and consent before issuance of a probate decree or after issuance of a probate decree, making the latter more difficult to achieve as it requires the vacatur of the probate decree in addition to the withdrawal of the waiver.[15] In both situations, the party seeking to set aside a waiver must show that the waiver was obtained by *fraud* or *overreaching*, was the product of *misrepresentation* or *misconduct*, or that *newly*

discovered evidence, *clerical error* or *other sufficient cause* justifies revocation.[16] If a probate decree has not yet been entered in the proceeding, then such a showing may be sufficient as long as there is no prejudice to the opposing party.[17] In contrast, where a party seeks to set aside a waiver after the entry of a probate decree, the party must also demonstrate a substantial basis for contesting the will and a reasonable probability of success through competent evidence that would have probably altered the outcome of the original probate proceeding.[18]

Grounds for Revocation Denied

When reviewing the facts of a case to see if a party has provided clear and convincing evidence of fraud or other sufficient causes as set forth in the case law, the courts will not only look at the evidence regarding the underlying case but will also scrutinize the educational level and general experience of the individual seeking to revoke a waiver, particularly in cases where the petitioner claims not to have understood the significance of a waiver and consent. In *In re Estate of Titus*,[19] the petitioner sought to revoke a waiver and consent that she had submitted on the grounds that she signed the document without understanding its significance. The court denied her petition, noting that she was a certified public accountant with a master's degree in business administration. Similarly, in the case of *In re Martin's Estate*,[20] the court denied the petitioner's application to revoke a waiver, stating that "[t]he petitioner was a woman of mature years, education and culture."[21] This was also the result in *In re Coccia*,[22] where a court denied a party's attempt to withdraw his previously submitted waiver and consent by finding his "allegations that he did not appreciate or understand the significance of a waiver and consent" to be "unsubstantiated and conclusory."[23]

Courts have also denied applications to vacate waivers based on the issue of notice. In the *Titus*[24] case, the court pointed out that the petitioner was provided a copy of the decedent's will and therefore was deemed to have understood what she was signing.[25] Similarly, in *In re Helmers' Estate*,[26] the court denied the petitioner's application to revoke a waiver and consent, stating that the petitioner possessed a copy of the decedent's will and was "fully aware of the effect of such waiver."[27] Also, in the case *In re Durchin*,[28] the petitioner's application was denied since she received "both actual and statutory notice" of objections filed and did not take any formal action until after a decree admitting the will to probate was entered.

As *Durchin* demonstrates, if a necessary party executes and files a waiver and consent with the Surrogate's Court and then seeks to have it revoked, it is best if they attempt to revoke the waiver sooner rather than later, preferably before entry of a probate decree. In *In re Miller*,[29] the petitioner waited nine (9) months before filing an application to revoke his waiver and consent, and the application was denied. This can be contrasted with the holding in *Estate of Bochicchio*,[30] where the court allowed the withdrawal of a waiver when it was requested a few days after the waiver and consent was filed with the court.[31]

Even though neither the nominated fiduciary nor his or her attorney is under an obligation to advise the necessary party of the nature and effect of the waiver and consent,[32] necessary parties are deemed to have read and understood the contents and consequences of signing a waiver and consent. This can best be illustrated in *In re Anderson's Will*,[33] where the court deemed a necessary party "chargeable with knowledge of the contents and the legal effect of such waiver [and consent] whether or not he availed himself of the advice of counsel at the time of the execution thereof."[34]

Therefore, to ensure that an individual makes the correct choice in choosing whether or not to sign a waiver and consent, an individual should consult with an attorney upon receipt of such a document. Of course, consultation with an attorney can itself be grounds for a court to deny an application to withdraw a waiver and consent, as the court will most likely find that the individual understood the consequences of his or her actions.[35]

Circumstances Where Withdrawal is Allowed

There are situations where the courts will allow a necessary party to withdraw a waiver and consent.

Courts will sometimes allow the withdrawal of a waiver and consent where evidence is brought to the court's attention that may alter the outcome of the probate proceeding.[36] In *Estate of Culley*,[37] for example, the decedent's distributees raised factual issues surrounding the decedent's testamentary capacity when he executed the codicil submitted for probate. They alleged, among other things, that at the time they signed their waivers and consents, they were unaware the decedent had been residing in a nursing home operated by a religious group that was named as a substantial legatee in the codicil. The court also noted that the distributees had no attorney when they executed the waivers and that the nominated fiduciary incorrectly advised one of them that her waiver could be withdrawn at any time. Similarly, in the *Estate of Galas*,[38] the Court allowed the petitioners to withdraw waivers and consents upon a showing that the proponent of the will, also the drafting attorney, misled them into signing the waivers. Also, in the *Estate of Carini*,[39] evidence that came to light after the necessary party signed the waiver and consent was grounds for withdrawal of the waiver and consent.

Courts have also permitted the withdrawal of a waiver and consent in the interest of justice and in situations where a withdrawal would not prejudice any of the parties or where a will contest was inevitable because other objections to probate had already been filed. In these circumstances, the court will grant the withdrawal of a previously submitted and fully executed waiver and consent.[40]

The courts have also shown that in addition to allowing withdrawal based on the merits of the underlying case, they will honor an agreement made between the nominated executor and the party seeking to withdraw the waiver and consent, as was done in both the *Estate of Scienze*[41] and *Estate of John Sanchez*.[42] Similarly, if the parties enter into a stipulation of settlement, courts will honor the settlement as well.[43]

Conclusion

As the foregoing illustrates, the execution of a waiver and consent is extremely important and should not be taken lightly, as it may not be able to be withdrawn once submitted. Necessary parties asked to sign such a document should consult with independent counsel.

Endnotes

1. Alfred A. Montapert, Inspirational Quotes on Success, Aug. 2009.
2. *See In re Putignano*, 82 Misc. 2d 389 (Sur. Kings Co. 1975).
3. *See* N.Y. Surrogate's Court Procedure Act § 1403 (SPCA). Other persons who are necessary parties under § 1403 include the nominated executor; any person designated in the will as beneficiary, executor, trustee or guardian, whose rights or interests are adversely affected by a codicil or other subsequent instrument offered for probate; any person designated as beneficiary, executor, trustee or guardian in any other will of the decedent filed in the surrogate's court of the county in which the propounded will is filed whose rights or interests are adversely affected by the propounded will; any person whose rights or interests are adversely affected by the exercise of a power of appointment if the propounded will expressly refers to an instrument which created the power of appointment and purports to exercise the power of appointment; the testator in any case where the petition alleges that the testator is believed to be dead; the state tax commission in the case of a non-domiciliary testator; the fiduciary of a necessary party who has died or, if none has been appointed, his distributees, nominated fiduciaries or named legatees or devisees under any will filed in the court.
4. *See* SCPA § 203.
5. SCPA §§ 203, 401.
6. *See* SCPA §§ 203, 306(1)(b).
7. *See* SCPA §§ 212, 307.
8. *See* SCPA § 203.
9. *See In re Miller's Will*, 162 Misc. 563 (Sur. Ct. New York Co. 1937); *In re Sturges' Will*, 24 Misc.2d 14 (Sur. Ct. New York Co. 1960); *Estate of Thomas A. Knutson, Jr.*, 7/7/95 N.Y.L.J. 36 (col. 1); *Estate of Elizabeth V. Clare*, 4/1/99 N.Y.L.J. 35 (col. 2); *Estate of Robert Frankel*, 12/27/2000 N.Y.L.J. 28 (col. 5).
10. *See In re Bursch's Will*, 285 A.D. 1072 (2d Dep't 1955), *In re Orlowski*, 281 A.D.2d 422 (2d Dept., 2001).
11. *See In re Martin's Estate*, 14 Misc.2d 266 (Sur. Ct. New York Co. 1944).
12. *See In re Anderson's Will*, 22 Misc.2d 662, 663 (Sur. Ct. Suffolk Co. 1960).
13. *See id.*
14. *See Estate of Stern*, 7/20/94 N.Y.L.J. 26 (col. 3).
15. *See In re Frutiger*, 29 N.Y.2d 143 (1971).
16. *See id.*; *In re Estate of Titus*, 39 A.D.3d 1203 (4th Dep't 2007); *In re Hinderson*, 4 Misc.2d 559 (Sur. Ct. New York Co. 1956); *In re Westberg*, 254 A.D. 320 (1st Dep't 1938).
17. *See Estate of Culley*, 2/14/96 N.Y.L.J. 37 (col. 3).
18. *See In re American Comm. For Weizmann Inst. Of Science v. Dunn*, 10 N.Y.3d 82 (2008), *Estate of Elson*, 94 Misc.2d 983 (Sur. Ct. New York Co. 1978).
19. 39 A.D.3d 1203 (4th Dep't 2007).
20. In re *Martin's Estate*, 14 Misc.2d 266.
21. *Id.* at 267.
22. 59 A.D.3d 716 (2d Dep't 2009).
23. *Id.*
24. 39 A.D.3d 1203 (4th Dep't 2007).
25. *See id.*
26. 64 N.Y.S.2d 724 (Sur. Ct. Westchester Co. 1946).
27. *Id.* at 725.
28. 217 A.D.2d 582 (2d Dep't 1995).
29. *In re Miller*, 220 A.D.2d 591 (2d Dep't 1995).
30. 6/26/2003 N.Y.L.J. 24 (col. 2).
31. *See id.*
32. *See Anderson's Will*, 22 Misc. 2d 662, 663; *see also In re Bissell*, 58 Misc.2d 246 (Sur. Ct. Erie Co. 1968).
33. 22 Misc. 2d 662, 663 (Sur. Ct. Suffolk Co. 1960).
34. *See Anderson's Will*, 22 Misc. 2d at 663 *citing In re Stone's Estate*, 272 N.Y. 121 (1936); *In re Habermehl's Will*, 19 Misc.2d 1087 (Sur. Ct. Erie Co. 1959); *In re White's Will*, 16 Misc.2d 22 (Sur. Ct. Cattaraugus Co. 1959); *In re Pearson's Will*, 19 Misc. 2d 833 (Sur. Ct. Westchester Co. 1959); *In re Freundlich's Estate*, 58 N.Y.S.2d 679 (Sur. Ct. New York Co. 1946).
35. *See Bissell*, 58 Misc.2d 246.
36. *See In re American Comm. For Weizmann Inst. Of Science v. Dunn*, 10 N.Y.3d 82 (2008); *Estate of Elson*, 94 Misc.2d 983 (Sur. Ct. New York Co. 1978).
37. 2/14/96 N.Y.L.J. 31 (col. 3).
38. 2/4/2000 N.Y.L.J. 37 (col. 4).
39. 7/23/96 N.Y.L.J. 23 (col. 6).
40. *See In re Carrion*, 1/25/89 N.Y.L.J., 26 (col. 3); *Estate of Hertz*, 12/4/92 N.Y.L.J. 25, (col.2); *Estate of Engelberg*, 10/1/91 N.Y.L.J. 25, (col. 6); *Matters of Stupel*, 1/3/96 N.Y.L.J. 28, (col. 6).
41. 12/6/2006 N.Y.L.J. 30 (col. 2).
42. 7/16/2001 N.Y.L.J. 24 (col. 3).
43. *See Estate of Salvesen*, 11/27/2002 N.Y.L.J. 21 (col. 3).

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Mixed-Motive Causation Under the Americans with Disabilities Act

By Daniel B. Moar and Stacey L. Budzinski

The Supreme Court's recent decision in *Gross v. FBL Financial Servs., Inc.*[1] casts significant doubt on the applicability of the existing mixed-motives causation test to discrimination claims brought under the Americans with Disabilities Act ("ADA"). This article examines the law on mixed-motive discrimination claims brought under the ADA and whether the burden-shifting "motivating factor" test remains applicable after *Gross*.

I. Background

Mixed-motives cases are those cases where employment decisions, such as hiring and firing, are based on both legitimate and discriminatory reasons.[2] For example, if an employer considered both an employee's sex and poor work performance record in making a termination decision, a case brought challenging that decision would be a mixed-motives case.

A. *Price Waterhouse v. Hopkins*

The Supreme Court recognized mixed-motives cases and developed a specific causation standard for them in Title VII cases in *Price Waterhouse v. Hopkins*.[3] The Supreme Court developed the mixed-motives framework because Title VII prohibits an employer from making employment decisions "because of" an employee's race, color, religion, sex, or national origin,[4] but the statute does not define how a plaintiff proves a decision was made "because of" discrimination. In *Price Waterhouse*, the employer argued that the "because of" standard requires that an employee prove that the discriminatory factor was given "decisive consideration" in the employment decision.[5] The employee, however, argued that the "because of" standard merely required that the discriminatory factor play "any part" in the employment decision.[6]

The *Price Waterhouse* Court's response was to develop a burden-shifting standard that initially requires a Title VII plaintiff to prove that discrimination played a "motivating factor" in an employment decision, but then once such a showing is made, allows an employer to defeat all liability by proving by a preponderance of the evidence that it would have made the same decision even had it not considered the discriminatory factor.[7] Thus, the "motivating factor" test requires a two-step causation inquiry. First, the employee must show that discrimination was a motivating factor in an employment decision. Second, if the employee makes such a showing, the burden then shifts to the employer to show that it would have made the decision anyway based on legitimate factors.

B. The Civil Rights Act of 1991

Following *Price Waterhouse*, Congress passed the Civil Rights Act of 1991[8] to reverse part of that decision and other Supreme Court decisions.[9] The summary and purpose of the committee reports on the Civil Rights Act of 1991 (the "Act") tell us that the Act was intended to respond to recent Supreme Court decisions by "restoring civil rights protections that had been dramatically limited by [its] decisions and to strengthen existing protections and remedies available under the federal civil rights law to provide more effective deterrence and adequate compensation for victims of discrimination."[10]

The Act was Congress's second attempt to address the Court's alleged curtailment of civil rights. The first attempt, the Civil Rights Act of 1990, was passed by Congress, but met the President's veto. The veto by President George H. W. Bush represented his view that the Act would fail to eliminate discrimination in the workplace and create inducements for quotas. Congress failed to garner the votes necessary to override the veto, and in 1991 Congress and the President reached a compromise to pass the 1991 Civil Rights Act.

Section 107(a) of the Act partially reverses *Price Waterhouse* by allowing a plaintiff to prevail even if non-discriminatory motivations exist and the employer can show that it would have taken the same action in spite of the discriminatory purpose.[11] However, the Act also limits a plaintiff's remedies in mixed-motive cases where the employer can show that the same action would have been taken even in the absence of the improper motivating factor. In those instances, the court may only grant declaratory relief, an injunction, and attorney's fees and costs directly attributable to these claims; it cannot grant damages, enter an order requiring admission, reinstatement, hiring, promotion, or require back wages to be paid.[12]

The legislative history found in the introduction to a House Committee report states that "…other laws modeled after Title VII [including the ADA and ADEA] should be interpreted in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII."[13] Similarly, the House

Committee report states "…mixed motive cases involving disability under the ADA should be interpreted in a manner consistent with the prohibition against all intentional discrimination in Section 5 of this Act."[14] However, introductions to committee reports are not binding law and were not incorporated into the final statute.

Price Waterhouse was handed down just one week prior to Congress beginning negotiations over the proper statutory provisions of the ADA. The *Price Waterhouse* decision was a fractured plurality opinion with no clear holding. Thus, when Congress amended Title VII to explicitly state a motivating factor standard, it did so to ensure that there could be no doubt that it was codifying that aspect of the *Price Waterhouse* plurality decision supporting a motivating factor standard. Congress did not, however, make the same explicit endorsement of the motivating factor standard in the ADA. Despite the language in the committee reports relating to the Act, the ADA makes no reference to the motivating factor standard that the Act's legislative history asserts should be read into the statute.

If the Congress had wanted to endorse a motivating factor standard for the ADA, it could have easily added a conforming amendment to follow the amendment to Title VII. For example, Congress added Section 17 of the Act to address the statute of limitations and right to sue under both the ADEA and Title VII. To address "lingering confusion" between the two statutes, Congress specifically added a conforming amendment to the ADEA that eliminates the dual limitation scheme for filing charges and initiating litigation and replaces it with a single two-year charge-filing requirement.[15] Congress understood its ability to expressly make changes to other laws in the Act; however, it made no similar amendment to the ADA. The exclusion of a conforming amendment should be construed as a cautionary sign against simply reading Title VII language into other non-discrimination laws.[16]

Given that the ADA was passed in the midst of debates over the proper amendment to the Civil Rights Act, Congress was aware of the strengths and weaknesses of Title VII and likely knew of the challenges that needed to be addressed in light of recent Court decisions, including *Price Waterhouse*. With this in mind, Congress expressly addressed disparate impact by incorporating a specific provision into the ADA.[17] However, Congress did not address the burden under mixed-motive cases by incorporating a provision into the ADA or adding a conforming amendment as it did with the ADEA. It is strange that Congress would have remained silent on its choice of causation standard for the ADA, merely assuming that a motivating factor standard would apply while explicitly pursuing disparate-impact provisions in both the Act and the ADA.

C. ADA Mixed-Motives Cases After *Price Waterhouse*

Most of the circuit courts subsequently issued decisions applying the *Price Waterhouse* motivating factor test to mixed-motives cases brought under the ADA.[18] The ADA makes it illegal to discriminate "on the basis of disability,"[19] a similar standard to Title VII's prohibition on discrimination "because of" race, color, religion, sex, or national origin.[20] Therefore, the circuit courts frequently examine the statutes together.

Several circuit courts concluded that the mixed motives standards of Title VII apply to the ADA because the ADA expressly provides that the remedies available under Title VII are available in ADA actions.[21] Title VII provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[22] Under the ADA, "[t]he remedies, procedures, and rights set forth in [Title VII] shall be the remedies, procedures, and rights…provide[d] to any persons alleging discrimination on the basis of disability in violation of [the ADA]."[23] Therefore, the courts reasoned, the ADA incorporates the motivating factor standard of Title VII for mixed-motives cases.[24]

An additional reason the circuit courts provided for applying a motivating factor standard to ADA claims was to comply with the purpose of the ADA.[25] The ADA states that its purpose includes providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[26] The courts reasoned that applying a motivating factor standard complies with this purpose. For example, in rejecting the employer's argument that it could face liability only if its employment decision were made "solely" because of disability discrimination, the Eleventh Circuit stated:

> [A] standard that imposes liability only when an employee's disability is the sole basis for the decision necessarily tolerates discrimination against individuals with disabilities so long as the employer's decision was based—if ever so slightly—on at least one other factor. A liability standard that tolerates decisions that would not have been made in the absence of discrimination, but were nonetheless influenced by at least one other factor, does little to "eliminate" discrimination; instead it indulges it.[27]

Several circuit courts have concluded that the legislative history of the Civil Rights Act of 1991 mandates

that the motivating factor test apply to ADA mixed-motives claims. In *Parker v. Columbia Pictures Indus.*,[28] for example, the Second Circuit noted that in the Civil Rights Act of 1991, Congress had defined the meaning of "because of" as a motivating factor standard. The Second Circuit recognized that the Civil Rights Act amendment did not explicitly apply to the ADA, but it concluded that there was no evidence that Congress intended the "because of" standard to have a different meaning in Title VII and ADA cases. Instead, the Second Circuit concluded that the use of substantially identical language in Title VII and ADA "indicates that the expansion of Title VII to cover mixed-motive cases should apply to the ADA as well."[29] Other courts similarly noted that Congress did not specifically amend the ADA in the Civil Rights Act to provide for a motivating factor standard, but dismissed this as immaterial in light of the legislative history of the Civil Rights Act. For example, in *Foster v. Arthur Andersen, LLP,*[30] the court wrote:

> [The Civil Rights Act of 1991] § 107(a) states only that it is amending Title VII; it makes no reference to the ADA, an omission that seems significant in light of the fact that other provisions of the Act expressly do so when provisions of more than one civil rights statute are to be amended.
>
> On the other hand, the legislative history of the Civil Rights Act suggests that Congress wanted the causation standard under the ADA to be the same as under Title VII.[31]

While the majority of the circuit courts addressing the issue concluded that the motivating factor standard applies to ADA mixed-motives cases, many of the circuit courts departed from *Price Waterhouse* by holding that even under the motivating factor standard a plaintiff must prove but-for causation. A "but-for" causation standard is a "hypothetical construct" in which the court asks whether the employment decision would have occurred anyway if the discriminatory factor had not been considered.[32] For example, if the employer would have fired the individual based on poor performance alone, then the employer's consideration of the employee's disability was not the "but-for" cause of the termination. In *Price Waterhouse*, the plurality expressly rejected the argument that "because of" required a "but-for" causation standard.[33]

Many of the circuit courts, however, have held that a mixed-motives ADA plaintiff must show "but-for" causation.[34] The circuit court decisions following *Price Waterhouse's* rationale in providing for a motivating factor standard, but then equating the motivating factor standard with but-for causation may simply reflect confusion over the meaning of the *Price Waterhouse* decision. If so, such confusion was anticipated by Justice Kennedy. Dissenting in *Price Waterhouse*, Justice Kennedy suggested that "the plurality decision may sow confusion."[35] Justice Kennedy argued that "[m]uch of the plurality's rhetoric is spent denouncing a 'but-for' standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard."[36]

In contrast to the majority of the circuit courts, which applied the motivating factor standard to ADA mixed-motives claims, the Sixth Circuit issued decisions pre-dating *Gross* that reject applying the motivating factor standard in ADA cases. In *Layman v. Alloway Stamping & Mach. Co.*,[37] the Sixth Circuit rejected the application of the motivating factor standard to ADA mixed-motives cases. The Sixth Circuit's rationale in rejecting the motivating factor standard for ADA mixed-motives claims has some similarity to the Supreme Court's rationale in *Gross* in rejecting the motivating factor standard in ADEA claims.

First, the Sixth Circuit rejected the argument that the Civil Rights Act of 1991 amended the meaning of "because of" in ADA cases to provide for a motivating factor standard. The Sixth Circuit concluded that the motivating factor standard applied in Title VII cases because "Congress modified the statute expressly to adopt that standard," but that Congress did not make the same amendment to the ADA.[38] Similarly, the *Gross* decision indicates that "[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII."[39]

Second, the Sixth Circuit rejected the argument that the "because of" language alone, which appears in both Title VII and the ADEA, requires a motivating factor standard. The Sixth Circuit concluded that "[t]he modification of Title VII to adopt the 'motivating factor' standard suggests that the 'because of' language is not alone sufficient to trigger 'mixed motives' review."[40] The Supreme Court similarly concluded in *Gross* that the "because of" standard of Title VII alone does not mandate a motivating factor standard, but that rather such a standard is mandated by "Congress' careful tailoring of the 'motivating factor' claim in Title VII."[41]

II. *Gross v. FBL*

On June 18, 2009, a sharply divided Supreme Court issued its decision in *Gross v. FBL Financial Servs., Inc.* The 5-4 decision established that plaintiffs bringing disparate-treatment claims under the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action.[42] Following that showing, the burden

of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.

This case arose after FBL Financial Group ("FBL") transferred its employee Jack Gross, who was 54 years old, from his position as claims administration director to claims project coordinator. FBL also transferred many of Gross' duties to another employee, who was then in her forties, once reported to Gross, and had been assigned to the newly created position of claims administrative manager. Although Gross and the other employee received the same compensation, Gross considered his new position and the reallocation of duties to be a demotion because his co-worker assumed the functional equivalent of his former position, and his new position was ill-defined and lacked a job description or specifically assigned duties.[43]

The Court, in a majority opinion authored by Justice Thomas, stated, "[B]ecause Title VII is materially different with respect to the relevant burden of persuasion, this Court's interpretation of the ADEA is not governed by Title VII decisions such as *Price Waterhouse* and *Desert Palace, Inc. v. Costa* [44]…. This Court has never applied Title VII's burden-shifting framework to ADEA claims and declines to do so now."[45] Moreover, the Court explained that the ADEA's text does not authorize an alleged mixed-motives age discrimination claim. The Court stated, "[U]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor…Congress neglected to add such a provision when it amended Title VII [through the Civil Rights Act of 1991]."[46] The ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act.[47] To establish a disparate-treatment claim under this plain language, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision.

The Court also rejected the application of *Price Waterhouse*, explaining that it is not clear whether the Court would have adopted such a reasoning if it were to visit the issue today in the first instance.[48] In rejecting the application of *Price Waterhouse*, the Court explained that its decision was motivated in part by the difficulty faced by jurors when applying the burden-shifting framework. Justice Thomas opined that even if "*Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims."[49]

Justice Stevens, dissenting, castigated the majority for its "utter disregard of our precedent and Congress' intent" by resurrecting a "but-for" standard long since rejected by both the Court and Congress. Justice Stevens asserted that "the most natural reading" of "because of...age" is to prohibit actions motivated in whole or in part by age, and that the dictionary definitions cited by Justice Thomas simply do not support the majority's conclusion. Justice Stevens further explained that it is not the job of the Court to reject as "unworkable" a mixed-motive framework drawn up by Congress, albeit under a slightly different statute.[50] Justice Stevens concluded that mixed-motive claims are viable under the ADEA and, based on the Court's decision in *Desert Palace*, do not depend on any distinction between direct and circumstantial evidence.

III. Lower Courts React to *Gross v. FBL*

The Supreme Court's decision in *Gross* is a lesson in both statutory interpretation and drafting. In light of the Court's decision, lower courts are taking a much closer look at the relationship between statutes, noting the need to "be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[51] As a result of *Gross,* many district and circuit courts interpreting similarly phrased statutes, such as the Family Medical Leave Act ("FMLA"), the Jury System Improvement Act, and even the ADA, have begun to question whether the reasoning in *Gross* applies and alters the standard by which discriminatory conduct is evaluated. Additionally, some courts have questioned whether the reasoning in *Gross* should also be applied to statutes that do not utilize the precise "because of" standard found in the ADEA.[52]

According to the Fifth Circuit's recent decision in *Crouch v. JC Penney Corp., Inc.,* "[T]he Supreme Court's recent opinion in *Gross v. FBL Financial Services, Inc.*, raises the question of whether the mixed-motive framework is available to plaintiffs alleging discrimination outside of the Title VII framework."[53] However, in its decision the court refrains from deciding the applicability of *Gross* and states, "[W]e need not reach this question, however, because Crouch cannot meet either standard [*Price Waterhouse* or *McDonnell Douglas*]." *Id.*

In *Crouch*, the plaintiff sued under both the FMLA and the ADA. In the analysis, the court cites *Gross* when deciding whether the plaintiff's claim of mixed-motive retaliation is proper under the FMLA. After rejecting the plaintiff's claim for lack of evidence, the court explains that "FMLA and ADA claims rise and fall together, because they employ the same burden-shifting framework" thus signaling the possibility that if the courts apply *Gross* in the FMLA mixed-motive retaliation cases, the same standard and analysis will also govern ADA claims.[54]

In *Williams v. District of Columbia*,[55] the district court applied *Gross* to the Jury System Improvement

Act and explained that, unlike Title VII, the Jury System Improvement Act does not allow a plaintiff to establish discrimination by showing that [jury service] was simply a motivating factor.[56] Despite recognizing that the plaintiff's jury service was likely a factor in the employer's decision, the court found for the defendant because the plaintiff could produce no evidence that the jury service was the "but-for cause" of the decision.[57]

The Seventh Circuit, in *Serwatka v. Rockwell Automation, Inc.*,[58] is the first court thus far to apply *Gross* in a mixed-motive case brought under the ADA.[59] In *Serwatka* the jury found that the plaintiff was perceived by her employer to be disabled, but would have been terminated regardless of her perceived disability. On appeal, the Seventh Circuit vacated the district court's decision and held that because there is no provision in the governing version of the ADA akin to Title VII's mixed-motive provision, an ADA plaintiff must show that his or her employer would not have fired him or her but for his or her actual or perceived disability—mere proof of mixed motives will not suffice.[60] The court explained that "like the ADEA, the ADA renders employers liable for decisions made 'because of' a person's disability, and *Gross* construes 'because of' to require a showing of but-for causation."[61]

The Seventh Circuit relied on the importance of implicit statutory language to place employers on notice of the proper basis for decision-making and applicable remedies. The court discussed the failure of Congress to add a provision to the ADA akin to Title VII's mixed-motive provision and noted that section 12117(a) of the ADA makes available to plaintiffs the same "powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 for Title VII plaintiffs…[however] the motivating factor amendment to Title VII is not a power, remedy, or procedure, it is, instead, a substantive standard of liability."[62] Thus, the Seventh Circuit held that mixed-motive claims were not proper under the ADA because Congress's failure to amend the ADA suggests that it had decided not to authorize mixed-motive claims under the ADA. The court refused to broadly construe a statute to provide causes of action and remedies not recognized by Congress.[63]

The decision by the Seventh Circuit logically construes both the Supreme Court's decision in *Gross* as well as Congress's intent when drafting the ADA. However, regardless of how the issue is ultimately resolved, there will likely be significant confusion in instructing juries in mixed-motives cases where there is evidence of discrimination under multiple statutes. For example, as a result of *Gross*, in mixed-motives cases where there is discrimination under both Title VII and the ADEA, Title VII's prohibition on making employment decisions "because of" race will warrant a motivating factor instruction. However, the ADEA's prohibition on making employment decisions "because of" age will not warrant such an instruction in the same case. As noted by Justice Stevens' dissent in *Gross*, this "will further complicate every case in which a plaintiff raises both ADEA and Title VII claims."[64]

Any confusion may be short-lived, however, as Congress will be holding hearings on the *Gross* decision and may "clarify the law's intent" through further legislation.[65]

Endnotes

1. 129 S. Ct. 2343 (2009).
2. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) ("In mixed-motives cases….there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.") (O'Connor, J., concurring); Lex K. Larson, *Employment Discrimination* § 8.09 (2d ed. 2009) ("[T]he term 'mixed motive' case describes the situation in which the plaintiff has provided sufficient evidence for a jury to find that there was a discriminatory motivation for the employer's actions and the employer seeks to prove that the action was motivated by nondiscriminatory as well as discriminatory reasons.").
3. 490 U.S. 228 (plurality opinion).
4. 42 U.S.C. § 2000e-2(a)(1), (2).
5. 490 U.S. at 237.
6. *Id.*
7. *Id.* at 258.
8. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in relevant part at 42 U.S.C. § 2000e-2(m)).
9. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) ("Two years after *Price Waterhouse*, Congress passed the 1991 Act 'in large part [as] a response to a series of decisions of this Court interpreting the Civil Rights Act of 1866 and 1964.'"); *Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000) (Alito, J.) ("Congress responded to Price Waterhouse with Section 107(a) of the 1991 Act, which amended Title VII.").
10. H.R. Rep. No. 102-40, pt 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697. In addition, Justice John Paul Stevens wrote that "[t]he Civil Rights Act of 1991 is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964. Section 3(4) expressly identifies as one of the Act's purposes 'to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.'" *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 250-51 (1994).
11. *See* 42 U.S.C. 2000e-2(m).
12. *See* 42 U.S.C. § 2000e-5(g)(2)(B).
13. H.R. Rep. No. 102-40, pt 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.
14. *Id.*
15. *Id.* at 734.
16. *Gross*, 129 S. Ct. at 2349 ("When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'").
17. *See* 42 U.S.C. §§ 12122(b)(3)-(7), 12113(a).
18. *See, e.g., Katz v. City Metal Co., Inc.*, 87 F.3d 26 (1st Cir. 1996); *Olson v. State of New York*, 315 Fed. Appx. 361 (2d Cir. 2009);

Parker v. Columbia Pictures Indus., 204 F.3d 326 (2d Cir. 2000); *Buchsbaum v. University Physicians Plan*, 55 Fed. Appx. 40 (3d Cir. 2002); *Walton v. Mental Health Assoc. of Se. Pa.*, 168 F.3d 661 (3d Cir. 1999); *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999); *Pinkerton v. Spellings*, 529 F.3d 513 (5th Cir. 2008); *Newberry v. East Tex. State Univ.*, 161 F.3d 276 (5th Cir. 1998); *Buchanan v. City of San Antonio*, 85 F.3d 196 (5th Cir. 1996); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300 (8th Cir. 1995); *Head v. Glacier NW., Inc.*, 413 F.3d 1053 (9th Cir. 2005); *Bell v. Kaiser Found. Hosp.*, 122 Fed. Appx. 880 (9th Cir. 2004); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996). Both the Sixth and Tenth Circuits, however, have issued decisions rejecting the possibility of a motivating factor standard in ADA mixed-motives cases and, instead, requiring plaintiffs to show that the adverse employment decision was made "solely by reason of" disability discrimination. *See Macy v. Hopkins County Sch. Bd. of Educ.*, 484 F.3d 357, 363-64 (6th Cir. 2007); *Fitzgerald v. Corrections Corp. of Am.*, 403 F.3d 1134, 1144 (10th Cir. 2005); *see also Despears v. Milwaukee County*, 63 F.3d 635, 636 (7th Cir. 1995) (stating a "sole cause" standard for an ADA claim), *overruled on other grounds as stated in Barrett v. Pearson*, 2009 U.S. App. LEXIS 23556, at *4, 2009 WL 3416658, at *1 (10th Cir. Oct. 26, 2009). The *Macy* decision expresses doubt as to the propriety of the "solely by reason of" standard, but indicates that it is bound to follow prior reported Sixth Circuit panel decisions. 484 F.3d at 364 n.2. The propriety of the standard is doubtful, given the Supreme Court's determination that "because of" does not mean "solely because of." *Price Waterhouse*, 490 U.S. at 242; *see also Head*, 413 F.3d at 1065 ("[W]e conclude that 'solely' is not the appropriate causal standard under any of the ADA's liability provisions."); *McNely*, 99 F.3d at 1074 ("[W]e believe that importing the restrictive term 'solely' from the Rehabilitation Act into the ADA cannot be reconciled with the stated purpose of the ADA.").

19. 42 U.S.C. § 12112(a). The ADA formerly had "because of" language parallel to Title VII, but in the ADA Amendments Act of 2008, Congress replaced the "because of" language with "on the basis of." *See* Pub.L. 110-325, § 5(a)(1).
20. 42 U.S.C. § 2000e-2(a)(1).
21. *Baird*, 192 F.3d at 470; *Buchanan*, 85 F.3d at 200 ("The remedies provided under the ADA are the same as those provided by Title VII.").
22. 42 U.S.C. § 2000e-2(m).
23. 42 U.S.C. § 12133.
24. *Baird*, 192 F.3d at 470; *Buchanan*, 85 F.3d at 200.
25. *Parker*, 204 F.3d at 337 ("Congress intended the statute…to cover situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action. Such a reading is consistent with the broad purpose of the ADA."); *McNely*, 99 F.3d 1068; *see also Walton*, 168 F.3d at 666 ("[I]n the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose—to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner of proof under on statute should inform the standards under the others as well.").
26. 42 U.S.C. 12101(b)(1).
27. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1074 (11th Cir. 1996).
28. 204 F.3d 326 (2d Cir).
29. *Id.* at 337. The Second Circuit took an arguably inconsistent position with respect to Age Discrimination in Employment Act (ADEA) claims. In *DeMarco v. Holy Cross High Sch.*, the Second Circuit rejected an argument that the motivating factor standard applied in ADEA cases because the Civil Rights Act of 1991 did not specifically amend the ADEA. 4 F.3d 166, 172 (2d Cir. 1993) ("We see no basis for concluding that the new Title VII standard applies to the ADEA, since Congress could have amended the ADEA along with Title VII, but did not."). Given that the Civil Rights Act also did not explicitly amend the ADA to provide for a motivating factor standard, the Second Circuit case law is difficult to square.
30. 1997 U.S. Dist. LEXIS 20754, 1997 WL 802106 (N.D. Ill. Dec. 29, 1997).
31. 1997 U.S. Dist. LEXIS 20754, at *20, 1997 WL 802106, at *6 (N.D. Ill. Dec. 29, 1997), *aff'd,* 168 F.3d 1029 (7th Cir. 1999).
32. *Price Waterhouse*, 490 U.S. at 240 ("But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.").
33. *Id.* ("To construe the words 'because of' as colloquial shorthand for 'but-for causation,'…is to misunderstand them.").
34. *See*, *e.g.*, *Pinkerton v. Spellings*, 529 F.3d 513, 519 (5th Cir. 2008) ("The proper causation standard under the ADA is a 'motivating factor' test…discrimination need not be the sole reason for the adverse employment decision, [but[must actually play a role in the employer's decision making process and have a determinative influence on the outcome."); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033-34 (7th Cir. 1999) ("To be a motivating factor, then, the forbidden criterion must be a significant reason for the employer's action. It must make such a difference in the outcome of events that it can fairly be characterized as the catalyst which prompted the employer to take the adverse employment action, and a factor without which the employer would not have acted."); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1076-77 (11th Cir. 1996) ("we hold that the ADA imposes liability whenever the prohibited motivation makes the difference in the employer's decision, i.e., when it is a 'but-for' cause…. In everyday usage, 'because of' conveys the idea of a factor that made a difference in the outcome. The ADA imposes a 'but-for' liability standard."). In contrast, a recent Second Circuit decision, issued shortly before *Gross*, gave a significantly broader interpretation of the requirements of showing a motivating factor. *See Olson v. State of New York*, 315 Fed. Appx. 361, 363 (2d Cir. 2009) ("We have consistently held that a plaintiff in an employment discrimination case need not prove that discrimination was the sole motivating factor, the primary motivating factor, or the real motivating factor in the adverse employment action; she need only prove that discrimination was a motivating factor.").
35. *Price Waterhouse*, 490 U.S. at 283.
36. *Id.* at 281.
37. 98 Fed. Appx. 369 (6th Cir. 2004).
38. *Id.* at 376 n.3.
39. *Gross*, 129 S. Ct. at 2349.
40. 98 Fed. Appx. at 376 n.3.
41. 129 S. Ct. at 2352 n.5.
42. *Id.* at 2351.
43. *Id.* at 2347.
44. 539 U.S. 90, 94-95 (2003).
45. 129 S. Ct. at 2349.
46. *Id.*
47. *Id.* at 2350 (*citing Hazen Paper Co. v. Biggins*, 507 U. S. 604, 610 (1993)).
48. *Id.* at 2352.
49. *Id.* at 2352. *But see Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977) (reevaluating precedent that was subject to criticism and continuing controversy and confusion).
50. *Id.* at 2353.

51. *See Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1153 (2008).

52. *Brown v. J. KAZ, Inc.*, 581 F.3d 175, 182 (3d Cir. 2009).

53. 2009 U.S. App. Lexis 14362, at *7; 2009 WL 1885875, at *2 (5th Cir. July 1, 2009).

54. 2009 U.S.App. Lexis 14362, at *7; 2009 WL 1885875, at *3; *see also Rasic v. City of Northlake*, 2009 U.S. Dist. Lexis 88651, at *56-57; 2009 WL 3150428, at *17-18 (N.D. Ill. Sept. 25, 2009) (The district court refused to apply the Supreme Court's decision in *Gross* to the plaintiff's FMLA claims because of the Seventh Circuit precedent that predates *Gross*. However, the court also noted that there is a serious question as to whether the mixed-motive theory of FMLA retaliation survives the Supreme Court's recent decision in *Gross v. FBL Fin. Servs., Inc.*, which it called on the Seventh Circuit to address.).

55. 644 F. Supp. 2d 103 (D. D.C. 2009).

56. *Id.* at 109.

57. *Id.*

58. 2010 U.S.App. Lexis 948; 2010 WL 137343 (7th Cir. Jan 15, 2010).

59. In *Doe v. Deer Mountain Day Camp, Inc.*, the district court for the Southern District of NewYork declined to apply *Gross* to a mixed-motives case under the ADA. 2010 U.S. Dist. LEXIS 3265, at *39-*40, 2010 WL 181373, at *8 (S.D.N.Y. Jan. 13, 2010). The court recognized that the Supreme Court's *Gross* decision might mandate a higher standard of causation, but because *Gross* did not expressly apply to the ADA, the district court continued to apply Second Circuit precedent as set forth in *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000). The district court nonetheless concluded that even if the higher "but-for" standard set forth in *Gross* applied, the plaintiff met that standard. 2010 U.S. Dist. LEXIS 3265, at *40 n.40, 2010 WL 181373, at *8 n.40.

60. 2010 U.S.App. Lexis 948, at * 14; 2010 WL 137343, at *4.

61. *Id.*

62. *Id.*

63. *Id.* (*citing McNutt v. Bd. Of Trustees of U. of Ill.*, 141 F.3d 706 (7th Cir. 1998) (refusing to allow a mixed-motive claim under Title VII because the omission of retaliation claims from 42 U.S.C. § 2000e-2(m) limits the relief that courts can grant).

64. 129 S. Ct. at 2357. When he served on the Third Circuit, Justice Alito expressed a similar concern about judges facing "the challenge of trying to make lay jurors understand that 'because of' means one thing as applied to the first claim and another thing as applied to the other claims." *Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 220 (3d Cir. 2000) (Alito, J.).

65. *See* United States House of Representatives Committee on Education & Labor Press Release, "Congress to Hold Hearings on Supreme Court's 'Gross' Ruling Regarding Age Discrimination, Says Chairman Miller," June 30, 2009, *available at* http://edlabor.house.gov/newsroom/2009/06/congress-to-hold-hearing-on-su.shtml; *see also* United States Senator Patrick Leahy Press Release, "Bicameral Legislation Will Protect Older Workers from Discrimination, Restore Civil Rights," October 6, 2009, *available at* http://leahy.senate.gov/press/200910/100609c.html (discussing the proposed "Protecting Older Workers Against Discrimination Act," which would reverse *Gross v. FBL Financial Servs., Inc.*).

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Electronic Surveillance and Home Care: A Reasonable Expectation of Privacy?

By Edo Banach and James Newfield

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James Newfield

In our unpredictable life as an in-house and outside counsel for the Visiting Nurse Service of New York, we can always predict one semi-regular question. One would expect this question to involve a health care or elder law issue. Instead, it involves video cameras in the home, and is usually a variation on the following scenario: "Nurse A went into patient B's home and noticed a digital surveillance, or web camera, in the home. Is this legal?" The short answer, which always surprises the person asking the question, is "yes." It is legal for an individual to purchase and install a camera in one's own home. So-called "nanny cams," or "granny cams,"[1] are pervasive and generally legal.

We assume that most of the readers of this article will be elder law or health care practitioners. While we usually deal with Medicaid and estate planning and related issues, this article serves as a reminder that rapidly advancing technology requires us to remain vigilant and knowledgeable about certain aspects of criminal, surveillance and privacy law as well. This article is meant to benefit both attorneys counseling consumers and attorneys representing providers and employees by reviewing relevant privacy and wiretapping laws and case law to clarify the circumstances under which it is legal to install a camera in one's own home, and the extent to which individuals entering a home care patient's home may have an expectation of privacy.

I. Privacy Law

What we now call privacy law has developed from various strands of constitutional law, common law,[2] case law and statutory law. A little law school refresher course will help provide a foundation before we consider the legality of in-home electronic surveillance in New York State.

A. Federal Law

In 1890, Louis D. Brandeis published the first concise treatment of the Right to Privacy.[3] Almost forty years later, in a case involving wiretapping of telephones, the then-Supreme Court Justice Brandeis articulated the concept of the "right to be let alone" in his famous dissent in *Olmstead v. U.S.*[4] It took another thirty or so years before the Supreme Court adopted Brandeis' position.[5] The Supreme Court and lower courts have come to accept the idea that the right to privacy is present in the Fourth Amendment and the "penumbra" of a number of other amendments.[6] Federal law now explicitly provides that one has right of privacy for contents of telephone conversations, telegraph messages, or electronic data by wire.[7]

"[R]apidly advancing technology requires us to remain vigilant and knowledgeable about certain aspects of criminal, surveillance and privacy law…"

B. A Reasonable Expectation of Privacy—Federal

In *Katz v. United States*, the Supreme Court announced that Fourth Amendment protection only applies when a person possesses a subjective expectation of privacy that society is willing to recognize as reasonable.[8] A "reasonable expectation of privacy" is a highly contextual term that depends on time, place, and person. What can reasonably be expected to be private in one setting may not be in another. For example, Courts have held that while a "hospital room is more akin to one's home than one's…office…a patient admitted for long-term care may enjoy a greater expectation of privacy than one rushed to an emergency room and released that same day."[9]

C. A Reasonable Expectation of Privacy—New York

New York courts have adopted and articulated the objective and subjective components of the *Katz* test:

> A legitimate expectation of privacy exists where defendant has manifested an expectation of privacy that society recognizes as reasonable….Thus, the test has two components. The first is a subjective component—did defendant exhibit an expectation of privacy in the place or item searched, that is,

> did he seek to preserve something as private.… The second component is objective—does society generally recognize defendant's expectation of privacy as reasonable, that is, is his expectation of privacy justifiable under the circumstances?[10]

New York courts have also recognized an employee has a legitimate expectation of privacy in certain areas of his or her workplace, "though not all areas of a person's business office or workplace are encompassed within the ambit of an objective zone of privacy."[11] Again, the scope of the right can vary depending on circumstances. As the Court observed in *O'Connor*, "An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees."[12]

> Therefore a person's legitimate expectation of privacy in a work area will vary depending on an evaluation of the "surrounding circumstances" including the function of the workplace and the person's efforts to protect his area from intrusion. A receptionist in a hospital emergency room waiting area could not reasonably expect that his or her desk top would not be perused by those who seek to avail themselves of the hospital's services but could legitimately expect that the drawers of that desk would not be invaded. On the other hand, a doctor would not even expect that his or her private office could be entered without his or her permission.[13]

II. State Statutory Law

A. Eavesdropping

In New York, the penal law defines eavesdropping as unlawfully engaging in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication. Eavesdropping is considered a class E felony.[14] In New York the consent of *either* the sender or receiver would take the communication largely outside of the eavesdropping law.[15] Also, eavesdropping applies only to sound recording; it does not apply to video-only recording.

B. Unlawfully Maintaining a Video Recording Device[16]

A separate, less restrictive statute governs use of video-only recording devices in New York. A person is guilty of unlawfully installing or maintaining a video recording device (a violation) when:

> being the owner or manager of any premises, he knowingly permits or allows such a device to be installed or maintained in or upon such premises, for purpose of surreptitiously recording a visual image of the interior of any fitting room, restroom, toilet, bathroom, washroom, shower, or any other room assigned to guests or patrons in a motel, hotel or inn.

However, the law explicitly carves out private dwellings from its reach.[17]

C. Unlawful Surveillance

Responding to that loophole, and a case in which a landlord surreptitiously taped a tenant in her own bathroom, in 2003 the New York State legislature passed "Stephanie's Law," which bans "Unlawful Surveillance," generally involving non-consensual imaging of a person's private parts, or private activities (dressing, undressing, toileting) without legitimate purpose or for non-legitimate purpose (for amusement, entertainment, profit or to degrade).[18]

In other words, unlawful surveillance involves either recording images in a room where an individual would have a reasonable expectation of privacy (i.e., a bedroom or bathroom) or a recording of images in any setting where the person doing the recording has the intention of abusing or degrading the recordee or where the recording is made for a sexual purpose.

D. New York State Law Summary

Typically, "nanny-cams" or "granny-cams" are video-only, are set-up to monitor staff and are not positioned in restrooms or to image staff dressing/undressing.[19] Such "typical" use in a patient's home generally would not run afoul of New York privacy law, though little has been written in this area, particularly in contrast to nursing home surveillance.

III. Cameras in Nursing Homes

Over the past several years, the use and legality of cameras—hidden or visible—in nursing homes has received much attention.[20] A few states have even gone so far as to legislate that nursing home residents or their families may install audio or video surveillance equipment in their rooms[21] and to provide guidelines for facilities seeking to install their own surveillance cameras.[22] While there is no similar law or guidance in New York State, the Attorney General has utilized hidden video-only cameras to monitor patient care at nursing homes.[23]

IV. Cameras in the Home

In many ways, an analysis of home-based surveillance is very different from an analysis of hospital- or nursing home-based surveillance. In the home, it is almost always the patient or family who installs the camera. To the extent family does so improperly in violation of the patient's right to privacy, this is between patient and family. We, on the other hand, are asked to consider and protect privacy rights of our staff when in the home. Generally, New York holds individuals have a reasonable expectation of privacy in their own home, and not in the homes of others. Nonetheless, Stephanie's Law indicates appreciation of privacy right to private areas and activities (toileting, dressing) outside of the home as well. In the home care context, a court of first impression is likely to consider the privacy rights of the individual visiting a person's home, including whether or not that person would have a reasonable expectation of privacy in the part of the home where a camera was installed. While all visitors may have an expectation of privacy in a bathroom, it may be the case that a live-in home health aide would have a greater expectation of privacy in his or her own bedroom than an aide or nurse who comes to visit the patient for a few hours a day.

Home health aides, nurses, and others visiting a patient in the patient's home need to be aware, and should be counseled at orientation, that cameras may be present in patient homes. Also, providers should know that nothing in either law or regulation would allow an agency to deny care or discharge a patient due to video surveillance of non-private areas. If an employee is uncomfortable providing services to a patient's home where a camera is present, it would be a good practice for a provider to allow that employee to care for other patients.

V. Conclusion

Electronic surveillance is becoming more accessible and common, and as video cameras become more pervasive it will be more and more difficult for individual to claim that he or she has a reasonable expectation of privacy in most places. We counsel employees to assume that there may be a camera in any home they enter. That said, providers and health care employees do not give up their rights when they enter a patient's home, either as a live-in home health aide or to provide services for a certain amount of time per day or per week. Because a home care patient's home is the workplace for various home health aides, nurses and other practitioners, those practitioners must not be exposed to unlawful surveillance or subject to surveillance in a place where they have a reasonable expectation of privacy, such as a bedroom or bathroom. As technology improves, becomes cheaper and more prevalent, states will continue to revise laws and courts will continue to apply (and sometimes create) laws to assure that individuals retain some modicum of privacy. As health care and elder-law practitioners on the front lines of some of these issues, it is important that we continue to monitor this area of the law and counsel our clients accordingly.

Endnotes

1. Kelly Greene, *Support Grows for Cameras in Care Facilities*, WALL ST. J., Mar. 7, 2002, at B1, *available at* 2002 WL-WSJ 3388000 (referring to "granny cams").
2. Law of Trespass to Chattels. Restatement (Second) of Torts §§ 217 *et seq*. This common law tort has been invoked in modern-day information technology cases. *See, e.g.*, *School of Visual Arts v. Kuprewicz*, 771 N.Y.S.2d 804 (N.Y. Sup. 2003).
3. Warren and Brandeis, *The Right to Privacy*, 4 Harvard L.R. 193 (1890).
4. 277 U.S. 438, 478 (1928).
5. *Katz v. United States*, 389 U.S. 347 (1967).
6. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Douglas, J.).
7. 18 U.S.C. § 2510.
8. *Supr*a note 5.
9. *State v. Stott*, 794 A.2d 120, 127 (N.J. 2002).
10. *People v. Van Houten*, 177 Misc. 2d 94, 97 (N.Y. County Ct. 1998).
11. *People v. Holland,* 155 Misc. 2d 964, 967 (N.Y. City Crim. Ct. 1992). *See O'Connor v. Ortega,* 480 U.S. 709 (1987) (staff member of public hospital had legitimate expectation of privacy in his private office*).*
12. *O'Connor v. Ortega*, *supra* note 10, at 717.
13. *People v. Holland*, *supra* note 10, at 967.
14. N.Y. Penal §§ 250.00, 250.05.
15. *Id.*
16. N.Y. Gen. Bus. § 395-b(2)(a).
17. *Id.* at § 3(a)(iv).
18. N.Y. Penal § 250.45.
19. Video imaging by family of patient's bedroom to monitor staff, even without patient knowledge or consent, and even if this recorded patient private parts, probably is permissible, as staff monitoring likely would be deemed a legitimate purpose.
20. *See, e.g.,* Eric M. Carlson, *Videotaping to Protect Nursing Facility Residents: A Legal Analysis*, 2 Am. Med. Dir. Ass'n, at 41-44 (2001).
21. *See, e.g.,* http://www.nmaging.state.nm.us/Granny_Cameras.html.
22. *See, e.g.*, http://www.vdh.state.va.us/OLC/Laws/documents/NursingHomes/Electronic%20Monitoring.pdf and 24 N.M. Code § 26 (Patient Care Monitoring Act).
23. *See* http://www.ag.ny.gov/media_center/2008/oct/oct21a_08.html.

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Liability for Criminal Acts of Third Parties

By Glenn A. Monk and Julie C. Hellberg

I. Introduction

A premises owner is under an affirmative duty to safeguard persons lawfully on his or her property from foreseeable harm. As with any premises liability case, the landlord's duty regarding criminal conduct by a third party is proscribed by whether the conduct was foreseeable. Foreseeability in this context turns on the circumstances of whether a criminal element had previously infiltrated the premises or whether the owner would otherwise be on notice that a likely criminal act would occur on the premises. Thus, any analysis of liability for criminal acts of third persons should commence by investigating whether and what type of criminal conduct had previously occurred on the premises.

In cases where a plaintiff can indeed demonstrate that he or she was injured by reason of the criminal conduct of a third person, and that the criminal conduct was foreseeable, a premises owner has a duty to take "minimal security precautions." Where the premises owner fails to install minimal security devices or installs them negligently in the face of the foreseeable risk of harm, he or she can be held liable to the plaintiff for his or her injuries. A defendant landlord can generally satisfy the "minimal security measures" standard by demonstrating that there were working locks and an intercom at the entrance to the building.

II. Duty

The threshold question in any negligence action is whether the defendant owes a legally recognized duty of care to the plaintiff. *Hamilton v. Beretta USA Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 7 (2001); *Moss v. New York Telephone Co.*, 600 N.Y.S.2d 759, 760 (2d Dep't 1993); *Iannelli v. Powers*, 114 A.D.2d 157, 498 N.Y.S.2d 377, 380 (2d Dep't 1986). Although "a possessor of land…is not an insurer of the visitor's safety," *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519, 429 N.Y.S.2d 606, 613 (1980), he or she is under an affirmative duty to maintain the property in reasonably safe condition for those who use it. *Id.; Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564 (1976). It is now well established that this duty includes the obligation to take minimal precautions to protect members of the public from the reasonably foreseeable criminal acts of third persons. *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 684 N.Y.S.2d 139 (1998); *Miller v. State of New York*, 62 N.Y.2d 506, 513, 478 N.Y.S.2d 829 (1984); *Nallan, supra; Kush v. City of Buffalo*, 59 N.Y.2d 26, 33, 462 N.Y.S.2d 831, 835 (1983). However, the existence of the duty to take such precautions is circumscribed by whether the crime which caused plaintiff's injuries was reasonably foreseeable to the landowner, and whether the landowner had the ability to control the conduct of the third party. "The risk reasonably to be perceived defines the duty to be obeyed" and delimits the duty's scope. *Palsgraf v. Long Is. R.R. Co.*, 248 N.Y. 339 at 344, 162 N. E. 99 (1928).

In order to establish the existence of the premises owner's duty to take minimal protective measures, one must show that the owner "either knows or had reason to know from past experience 'that there is a likelihood of conduct on the part of third-persons… which is likely to endanger the safety of the visitor.'"[1] *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 519, 429 N.Y.S.2d at 613 (quoting Restatement Torts 2d, S 344, Comment F); *M.D. v. Pasadena Realty Co.*, 300 A.D.2d 235, 753 N.Y.S.2d 457 (1st Dep't 2002). "Lacking such notice, there is no duty on the part of the landowner to provide protective measures, as foreseeability of harm is the measure of a landowner's duty of care." *Adiutori v. Rabovsky Academy of Dance*, 149 A.D.2d 637, 540 N.Y.S.2d 457 (2d Dep't 1989). Where there is little evidence of criminal activity in the building, there are insufficient facts to base a finding of foreseeability. *M.D. v. Pasadena Realty Co., supra* (quoting *Iannelli v. Powers, supra*); *Camacho v. Edelman*, 176 A.D.2d 453, 574 N.Y.S.2d 356 (1st Dep't 1991).

Stated differently, a landowner has no duty protect visitors from the criminal acts of third parties unless it is shown that the landowner either knows or has reason to know that there is a likelihood of conduct dangerous to the safety of the visitor. Absent such notice, a criminal act perpetrated by a third person is considered an intervening or superseding cause of injury that absolves a defendant landowner from liability. *Kush, supra; Perry v. Rochester Lime Co.*, 219 N.Y. 60, 113 N.E. 529 (1916); *Waters v. New York City Housing Authority*, 116 A.D.2d 384, 501 N.Y.S.2d 385 (2d Dep't 1986). Absent a cognizable duty of care, no liability can be imposed on a premises owner as a matter of law. *Johnson v. Jamaica Hosp.*, 62 N.Y.2d 523, 528, 478 N.Y.S.2d 838, 467 N.E.2d 502 (1984). The determination of a duty on the part of the defendant is for the Court to decide. *Bodaness v. Staten Island Aid, Inc.*, 170 A.D.2d 637, 567 N.Y.S.2d 63 (2d Dep't 1991); *Moss*, *supra*. Thus, where a defendant can make a showing that the intentional act by a third party was not reasonably foreseeable—i.e., that he or she had no notice of criminality connected to the property through historical data or otherwise—a motion for summary judgment may be granted.

(a) Foreseeable Risk

(i) Ambient Crime

"Ambient neighborhood crime alone is insufficient to establish foreseeability." *Novikova v. Greenbriar Owner's Corp.*, 258 A.D.2d 149, 153, 694 N.Y.S.2d 445, 448 (2d Dep't 1999). "It is only insofar as the ambient crime has demonstrably infiltrated a landowner's premises or insofar as the landowner is otherwise on notice of a serious risk of such infiltration that its duty to provide protection against the acts of criminal intruders may be said to arise." *Todorovich v. Columbia University*, 245 A.D.2d 45, 46, 665 N.Y.S.2d 77, 78 (1st Dep't 1997). Although the past criminal activity need not be of exactly the same type or in the exact location, "the court should consider the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question." *Mulvihill v. Wegmans Food Markets, Inc.*, 266 A.D.2d 851, 698 N.Y.S.2d 130, 131 (4th Dep't 1999); *Maheshwari v. City of New York*, 2 N.Y.3d 288, 294, 778 N.Y.S.2d 442, 446 (2004); *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 614 N.E.2d 723, 598 N.Y.S.2d 160 (1993).

However, it is not invariable that notice of a risk of third-party criminality must be based on precedent incidents at the premises. Where there are other grounds to infer that the owner was or should have been aware of a real risk that the alleged crime upon its property would occur, the law does not forbid an inference of notice and consequently arising duty. *Nash v. Port Authority of New York and New Jersey*, 51 A.D.3d 337, 856 N.Y.S.2d 583, 588 (1st Dep't, April 29, 2008). The relevant requirement in premises liability actions is ultimately notice, not history. 51 A.D.3d 337, 856 N.Y.S.2d at 589.

Cases Holding That the Risk of Harm Was Not Foreseeable

In *Maheshwari v. City of New York*, plaintiff was attacked in the parking lot after a large outdoor concert. The Court of Appeals held that the attack was not foreseeable because the "types of crimes committed at past Lollapalooza concerts are of a lesser degree than a criminal assault, and would not lead defendants to predict that such an attack would occur or could be prevented." 2 N.Y.3d 288, 294, 778 N.Y.S.2d 442, 446. Moreover, it found that a "random criminal attack… is not a predictable result of the gathering of a large group of people." *Id.*

In *Novikova v. Greenbriar Owner's Corp.*, plaintiff's decedent, a visitor to a tenant in defendant's condominium, was shot and killed during a robbery in the entry hall of the building. Plaintiff's attempt to establish that the criminal conduct was foreseeable, thus requiring the landlord to provide minimum security measures, was rejected by the Court. It found that

> of the 21 reported crimes relied upon by the plaintiffs, only three are reported as having occurred at or in front of the subject premises—two apartment burglaries and one theft of a car. None of these three crimes are similar to the crime at issue. Indeed, the burglaries do not even necessarily implicate street crime or a criminal intruder as these crimes might have been committed by a fellow tenant, a guest or a service provider. Of the remaining reported crimes, the vast majority concern the theft or vandalism to cars, or burglaries…and none concerned an ambush-style robbery as occurred here.

Id. at 153. In addition, the Court found that the reported crimes were not close in proximity to the subject area, and did not occur at the same time of day as in the instant case (2:30 a.m.). Accordingly, as the subject criminal act was not reasonably foreseeable, defendant owed no duty to protect plaintiff's decedent, and the Court granted summary judgment to the defendant.

In *Todorovich v. Columbia University*, plaintiffs were attacked and robbed in the vestibule of their building while they were attempting to open the door on their return from vacation. In response to an attack on another tenant whose house keys were taken in the robbery on the public sidewalk in the neighborhood, defendant landlord had previously changed the locks of the vestibule door while the plaintiffs were away. Plaintiffs claimed that Columbia breached its duty of care by changing the locks and failing to provide them with new keys. 245 A.D.2d 45, 665 N.Y.S.2d 77.

However, plaintiffs failed to provide a record of any prior incidents in which the ambient crime in the neighborhood had infiltrated the building, or that defendant Columbia had any notice of any criminal activity. The facts on which to base a finding of foreseeability necessary to a determination that defendants owed a duty to provide minimal protection were therefore insufficient. Thus, the Court held that defendant landlord owed no duty to the plaintiffs in the first instance, and granted summary judgment to Columbia. 245 A.D.2d at 47, 665 N.Y.S.2d 77.

In *Mulvihill v. Wegmans Food Markets, Inc.*, plaintiff was attacked in the parking lot of the grocery store at 2:00 a.m. by a group of young males. The court found that the incidents that occurred in the parking lot and the store during the three years before plaintiff's assault "were so dissimilar in nature from the violent attack upon plaintiff [ ] as to be insufficient, as a matter of law, to raise a triable factual issue as to foreseeability."

266 A.D.2d 851, 698 N.Y.S.2d 130, 131 (4th Dep't 1999) (interior citations omitted).

In *Williams v. Citibank, N.A.*, the Court found that the bank could not be held liable for the attack on a customer using the ATM machine inside its vestibule as plaintiff could not show any history of crimes in the vestibule. It specifically rejected plaintiff's theory that ATM machines attract criminal activity, and thus extra precautions should have been taken. Even if Citibank had a duty to plaintiff, however, it had fully complied with Administrative Code of the City of New York § 10-160 with respect to the security requirements at an ATM. It had equipped the entry doors with a locking device that permitted ingress only by use of an ATM card; the lock was working properly; there was adequate lighting and at least one exterior wall of untinted glass to provide an unobstructed view of the ATMs; video surveillance cameras, fully operational, were in place, as well as a free telephone service that automatically connects the caller to a customer-service person. 247 A.D.2d 49, 677 N.Y.S.2d 318 (1st Dep't 1998).

Cases Holding That the Need for Security Was Foreseeable or at Least That the Facts Adduced Raised a Question of Fact for Trial

In *Miller v. State of New York*, plaintiff satisfied the required threshold showing by offering evidence that with respect to her own dormitory

> there had been reports to campus security of men being present in the women's bathroom. Claimant herself had complained twice to the Assistant Quad Manager of her dormitory area about nonresidents loitering in the dormitory lounges and hallways when they were not accompanied by resident students.

62 N.Y.2d 506, 509 478 N.Y.S.2d 829. Furthermore, all of the dormitory doors were equipped with locks which the State, as a matter of policy, did not lock. As this Court noted, "the act complained of under the landlord theory of liability was the failure to lock the outer doors of the dormitory," and the duty which was breached was the "duty to take the rather minimal security measure of keeping the dormitory doors locked." *Id.* at 513, 514.

In *Jacqueline S. v. City of New York*, plaintiff, a 14-year-old resident of a New York City housing project, was abducted in the lobby of her building and taken to a room on the roof and raped. Plaintiff produced evidence that other violent criminal activity including rape and robbery had occurred in the complex, and indeed in her building. Although the police could not recall whether the criminal activity had occurred in plaintiff's building, the Court of Appeals held that the evidence produced by plaintiff was sufficient to raise a triable issue of fact as to whether the crime had been foreseeable, thus requiring the Housing Authority to have taken security measures. 81 N.Y.2d 288, 614 N.E.2d 723, 598 N.Y.S.2d 160.

In *Nieswand v. Cornell University*, plaintiff's decedent was shot in her dormitory room by the rejected boyfriend of her roommate. It was never determined how the intruder gained entrance to the dormitory, and the University's security department had no records of any problem with the assailant. Moreover, no murder or attempted murder had ever occurred on campus prior to the tragedy. Nonetheless, on plaintiff's showing that in the three years prior to the shooting, Cornell experienced four rapes, eight robberies, and 51 total assaults, as well as over 3,200 other burglaries and larcenies, the District Court denied Cornell's motion for summary judgment. It held that a genuine issue of fact existed as to whether the murder had been foreseeable given the criminal activity on campus, thereby giving rise to Cornell's duty to provide security. 692 F. Supp. 1464, at 1468-69 (N.D.N.Y. 1988).

In *Nash v. Port Authority of New York and New Jersey*, plaintiff sued for injury occasioned by the 1993 bombing in the parking garage of the World Trade Center. Plaintiff produced documentary evidence that as early as 1983, the Port Authority had received several reports warning of possible bomb attacks on the building, and reports and interoffice memoranda regarding "target-hardening" security measures that should be taken, including in the under-building garage. "Tellingly, not one of the consultants who reviewed the security of the subgrade public parking facilities found that existing security measures were adequate or that defendant might, as an alternative to implementing the recommended precautions, prudently adopt a wait-and-see attitude." 51 A.D.3d 337, 856 N.Y.S.2d at 589. Upholding the trial court order denying defendants' motion to set aside the jury verdict, the First Department held that the documentary evidence in the case permitted the inference that defendant was on notice that a devastating car-bombing in the subgrade garage of its complex was a very real possibility, and thus defendants had a duty to take the appropriate security measures under the circumstances. *Id.*

(ii) Vicarious Liability and Foreseeability

An employer is not liable under the doctrine of respondeat superior for torts committed by an employee for purely personal reasons unrelated to the furtherance of the employer's business. *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933, 693 N.Y.S.2d 67 (1999); *Sandra M. v. St. Luke's Roosevelt Medical Center*, 33 A.D.3d 875, 823 N.Y.S.2d 463 (2d Dep't 2006). For the most part, employer liability will turn on the above doctrine, and the question of safeguarding the premises

from foreseeable acts of third persons does not arise. For example, a bar owner could be held vicariously liable for the acts of his bouncer whose rough removal of a patron injures the patron because the bouncer was acting in furtherance of the employer's business. Where the violent act of an employee is not foreseeable, the employer/premises owner cannot be held liable to the plaintiff for injuries caused by the employee. Employers can also be held liable for criminal activity of an employee under the theories of negligent hiring or negligent supervision.

In *Sandra M., supra*, plaintiff was raped by a nurse caretaker employed by St. Luke's Roosevelt. The Second Department held that the hospital is not responsible for knowing or foreseeing what an employer could not be expected to know of [the criminal tendencies of] its employees, and thus St. Luke's could not be held liable under this premises liability theory.[2]

The same holds true for independent contractors retained by the business/property owner. For example, in *Kirkman v. Astoria Gen. Hosp.*, the plaintiff was raped by a security guard, employed by a subcontractor security company, who was on duty at a hospital where the plaintiff had been visiting a patient. The court determined that the hospital could not be held liable, as a possessor of realty, for a breach of the duty to protect the visitor from the reasonably foreseeable criminal acts of third persons, since there was "no evidence in the record that [the hospital] had any knowledge of, or contact with, the employee that would have made the employee's criminal act foreseeable to the hospital." *Kirkman v. Astoria Gen. Hosp.*, 204 A.D.2d 401, 402, 611 N.Y.S.2d 615 (2d Dep't 1994).

It is also worth noting that insurance policies often contain exclusions for intentional torts, such as assault and battery. Thus, it has been held that insurers have no duty to defend and indemnify an employer for an employee's intentional acts, criminal or not. *Penn-America Group, Inc. v. Zoobar, Inc.*, 305 A.D.2d 1116, 759 N.Y.S.2d 825 (4th Dep't 2003) (holding that due to the assault and battery exclusion, insurer had no duty to defend and indemnify bar owner for the bar bouncer's assault); *but see Anastasis v. American Safety Indem. Co.*, 12 A.D.3d 628, 786 N.Y.S.2d 88 (2d Dep't 2004) (held that where bouncer stepped on patron's leg unintentionally the act did ***not*** fall within insurance policy's exclusion for assault and battery, and the insurer had a duty to defend and indemnify).

Moreover, public policy interdicts enforcement of an indemnity agreement where the agreement purports to indemnify a party for the intentional infliction of harm. *Austro v Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 496 N.Y.S.2d 410 (1985). Thus, an agreement to indemnify may not provide indemnity against future criminal or illegal acts by employees.

b. Assumption of Duty

In the absence of a legal obligation to protect tenants from criminal conduct by third parties, a landlord can nevertheless be held liable under the theory of "assumed duty" where he or she voluntarily provides security but fails to do so carefully and omits to do what an ordinary prudent person would do in accomplishing the task. *Wolf v. City of N.Y.*, 39 N.Y.2d 568, 384 N.Y.S.2d 758 (1976). Merely assuming a duty to provide some form of security, however, does not create automatic liability. Rather, an assumed duty arises where the failure to exercise due care *increases* the risk of harm to the plaintiff or where the harm suffered was due to plaintiff's reasonable *reliance* on the voluntary undertaking and that he or she tailored his or her own conduct accordingly. *Nallan v. Helmsley-Spear, Inc.,* 50 N.Y.2d at 522, 429 N.Y.S.2d 606.

In *Nallan, supra*, plaintiff was shot while in lobby of defendants' building at time when a lobby attendant employed by defendants was away from his desk. The Court of Appeals stated [in *dicta*, after ordering a second trial due to an inconsistent jury verdict] that at the second trial plaintiff could support a theory of "assumed duty" upon a showing that plaintiff was familiar with the building's after-hours procedures and expected that an attendant would be present, and that he was therefore lulled into a false sense of security and neglected to take the precautions he might otherwise have taken upon entering the building. 50 N.Y.2d at 522-23, 429 N.Y.S.2d 606.

In *Jacobs v. Helmsley-Spear, Inc.*, plaintiff was robbed at gunpoint while walking to the garage of her apartment. The electronic garage door, which the landlord had voluntarily undertaken to install, was broken at the time of the incident. Plaintiff testified that she would have entered the garage to safety "but for the fact that the locking mechanism was inoperable." Thus, the Court held that because the landlord "installed a security system which by its very nature would induce tenants to use that entrance to the garage as readily as the entrance within the building" plaintiff was "lulled into a false sense of security," thereby demonstrating reasonable reliance. *Jacobs v. Helmsley-Spear*, 121 Misc.2d 910, 469 N.Y.S.2d 555 (N.Y. Civ. Ct. 1983) (citing *Nallan, supra*).

III. Breach of Duty

Once a duty on the part of the premises owner has been established, plaintiff must show that defendants breached their duty by failing to maintain "minimal security measures." *Miller v. State of New York*, 62 N.Y.2d at 513, 478 N.Y.S.2d 829. Minimal security measures might be as slight as a working lock on an entry door, or might require further security such as an intercom, cameras, locking the elevator, etc.

What safety precautions may reasonably be required of landowner, who holds his land open to the public, to make his premises safe for the public is almost always question of fact for jury; in assessing reasonableness of landowner's conduct, a jury may take into account such variables as seriousness of risk of harm and cost of various safety measures. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 519, 429 N.Y.S.2d at 613; the law does not require that a landlord must provide state of the art or perfect security, but "only reasonable security measures." *James v. Jamie Towers Housing Co.*, 99 N.Y.2d 639, 760 N.Y.S.2d 718 (2003); *Tarter v. Schildkraut*, 151 A.D.2d 414, 415, 542 N.Y.S.2d 626 (1st Dep't 1989); *Iannelli v. Powers*, 114 A.D.2d 157, 498 N.Y.S.2d 377. Generally, the threshold requirement of minimal security measures is one functional lock and a functional intercom system.

In *Tarter v. Schildkraut, supra*, the inner vestibule door had a functioning lock, which plaintiff was entering when she was shot, and a working intercom system. The First Department reversed the jury's verdict, holding that under the circumstances, the one locked door was sufficient to discharge defendant's duty to the plaintiff. 151 A.D.2d at 415, 542 N.Y.S.2d 626.

In *Novikova v. Greenbriar Owner's Corp., supra*, the court held that by providing an inner door lock, an intercom, surveillance camera, and evening doorman the landlord "satisfied their duty to provide minimal precautions against the foreseeable criminal acts of third parties." Moreover, the failure to provide a doorman 24 hours per day did not raise a triable issue of fact that defendant breached the duty of care. 258 A.D.2d at 152-53, 694 N.Y.S.2d 445.

If a security guard is provided, it is not a breach of duty where the guard is not present at his post one-hundred percent of the time. In *James v. Jamie Towers Housing Co.,* the Court of Appeals held that defendant landlord discharged its duty to take minimal security precautions by providing locking doors, an intercom service and 24-hour security, *notwithstanding the fact that the security guard was not at his post at the time of the attack*. 99 N.Y.2d at 642, 760 N.Y.S.2d 718, 720.

In *Iannelli v. Powers*, *supra*, where the decedent was killed by an assailant who gained access to the locked building when another tenant opened the door, the Court reversed the jury verdict that defendants had breached their duty to provide greater security than a locked entrance. Specifically, the Court held that even assuming that the defendants had a duty to adopt security measures in the first place, the plaintiff failed to "adduce testimony *from a qualified expert* in the field of building security…regarding the deficiencies in security, if any,…and what additional safety measures, if any, could reasonably have been undertaken…." 114 A.D.2d at 163, 498 N.Y.S.2d 377.

IV. Proximate Cause

As with all negligence claims, it is plaintiff's burden to show that defendants' conduct in allegedly failing in their obligation to take reasonable precautionary measures to make premises safe for visiting public was a substantial causative factor in sequence of events that led to plaintiff's injuries. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 519, 429 N.Y.S.2d at 613.

"In premises security cases...the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. *Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, **plaintiff can recover only if the assailant was an intruder***." *Burgos v. Aqueduct Realty*, 92 N.Y.2d 544, 550-551, 684 N.Y.S.2d 139 (1998) (emphasis added). A plaintiff's own conduct of responding to a knock or a ring by opening a locked apartment door that contains a peephole without first looking through the peephole to ascertain who is on the other side constitutes intervening and superseding causation that breaks the causal chain and severs the landlord's liability. This is true even where a plaintiff can demonstrate that the landlord's security measures were not reasonable. *S.M.R.K., Inc. v. 25 West 43rd Street Co.*, 250 A.D.2d 487, 673 N.Y.S.2d 119 (1st Dep't 1998); *Benitez v. Paxton Realty Corp.*, 223 A.D.2d 431, 637 N.Y.S.2d 11 (1st Dep't 1996).

In *Elie v. Kraus*, plaintiff lived in a garden apartment complex where the individual tenant's own apartment doors were the main line of defense against intruders. The Court held that the fact that plaintiff buzzed open his door without first checking who was at the door, after dark, despite the fact that he had a peephole in his front door, to be an intervening cause of the attack, thus severing the landlord of liability. 218 A.D.2d 629, 631 N.Y.S.2d 16 (1st Dep't 1995).

But see *Mason v. U.E.S.S. Leasing Corp.*, 96 N.Y.2d 875, 730 N.Y.S.2d 770 (2001). The Court of Appeals upheld lower court decisions, finding that plaintiff's action of opening the door to her attacker without looking through the peephole thinking that it was her boyfriend was not an intervening cause of the attack as a matter of law. The Court reasoned that the complex's security could be found negligent under the circumstances in allowing entrance to the attacker, despite the fact that he "had…been involved in several criminal acts in the complex, including robbery, attempted rape and the beating of a security guard; that he had been arrested on the premises; and that defendants kept an arrest photo of him." 96 N.Y.2d at 878. Note that in this case, plaintiff's own door was not the primary security measure.

a. Stalking Cases

Similar to the cases where a plaintiff cannot provide sufficient proof that the assailant was an intruder to the building, and not a tenant or visitor, the evidence of a stalking relationship between the victim and the assailant has been held to be an intervening cause of injury, and severs the landlord's liability. For example, in *Rivera v. New York City Housing Auth.*, the defendant's failure to repair the front door lock was "undermined by the clear evidence that this attack was motivated by a preconceived criminal conspiracy to murder plaintiff's stepbrother who lived with her…[and thus] it was most unlikely that any reasonable security measures would have deterred the criminal participants." 239 A.D.2d 114, 115, 657 N.Y.S.2d 32, 33 (1st Dep't 1997).

In *Tarter v. Schildkraut, supra*, in addition to finding that the defendants did not breach their duty because they provided reasonable security, the Court reversed a jury verdict, holding that "the conclusion is inescapable that plaintiff's ex-lover was intent on harming plaintiff. He had stalked her for that purpose. Given the motivation for the assault, his acts were truly extraordinary and unforeseeable and served to breach the causal connection between any negligence on the part of defendants and the plaintiff's injuries." 151 A.D.2d at 416, 542 N.Y.S.2d 626.

V. Risk Transfer Considerations

a. Security Contracts—Indemnity

A contracting security company owes no duty of care to a non-contracting third party arising out of its contractual obligation or the performance thereof unless: it increases the risk; plaintiff reasonably relies on the performance of the contract; or where the contractor entirely replaces the landowner's duties to maintain the premises safely. *Church v. Callanan Indus.*, 99 N.Y.2d 104, 752 N.Y.S.2d 254, 782 N.E.2d 50 (2002); *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138–139, 746 N.Y.S.2d 120, 773 N.E.2d 485 (2002); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 611 N.Y.S.2d 817, 634 N.E.2d 189 (1994); *Timmins v. Tishman Const. Corp.*, 9 A.D.3d 62, 777 N.Y.S.2d 458 (1st Dep't 2004).

However, keep in mind that the owner or possessor of land can contractually transfer the risk to its security contractor through indemnification provisions. *McFall v. Compagnie Maritime Belge S.A.*, 304 N.Y. 314, 327–28 (1952). Such a determination must be made after review of the security contract indemnity clause.

b. Out-of-Possession Landlord

An out-of-possession property owner is not liable for injuries that occur on the property unless the owner has retained control over the premises or is contractually obligated to perform maintenance and repairs. *Hepburn v. Getty Petroleum Corp.*, 258 A.D.2d 504, 684 N.Y.S.2d 624 (2d Dep't 1999) (out-of-possession landlord not liable for shooting during robbery of gas station). The ability of the landowner to transfer his or her duty to a tenant is set forth in the lease provisions where general contract principles of indemnity will apply. The reservation of a right to enter the premises for purposes of inspection and repair constitutes sufficient retention of control to impose liability for injuries caused by a dangerous condition *only* where the condition violates a specific statutory provision and there is a significant structural or design defect. *Id.* A landlord retains control over the premises where he or she is involved in the daily operations of the business in possession (for example, where landlord is principal shareholder of the corporation that owns the building and also owns and operates the business leasing the premises). *See also Ahmad v. Getty Petroleum Corp.*, 217 A.D.2d 600, 629 N.Y.S.2d 779 (2d Dep't 1995); *Decorato v. Cozzoli Bros., LLC*, 841 N.Y.S.2d 825, 825, 16 Misc.3d 1108(A), 1108(A) (Sup. Ct., Kings Co. 2007) (grocery store shooting).

VI. Affirmative Defenses

a. CPLR 1411—Contributory Negligence

The doctrine of contributory negligence serves to diminish the amount of damages otherwise recoverable by the plaintiff where plaintiff's own conduct contributes to the cause of the injury. Contributory negligence is an affirmative defense that must be pleaded and proved by the party asserting the defense. CPLR 1412. Apportioning liability among plaintiff and defendant is usually a question to be resolved by a jury.

In order for premises owner to avail himself or herself of the doctrine of contributory negligence, the plaintiff's own conduct must be a cause in fact of his or her own injury. *Arbegast v. Board of Educ. of South New Berlin Central School*, 65 N.Y.2d 161, 168, 490 N.Y.S.2d 751 (1985). As a practical matter, the circumstances that might arise where plaintiff could be held contributorily liable are few and delicate to argue at trial, as they raise the ire of the jury if perceived as blaming or attacking the victim. However, a plaintiff could be assessed contributory negligence if, for example, he or she left open or unlocked the apartment window giving entrance on the fire escape.

b. CPLR Article 16—Joint and Several Liability

The limitations on liability imposed by Article 16 apply only to liability for non-economic loss, i.e., pain and suffering. Liability for economic losses remains joint and several in all instances. CPLR Article 16 does not apply to actions requiring proof of intent. Where there are multiple tortfeasors and only one has acted intentionally, apportionment for noneconomic loss *may* be apportioned against him or her, even if the criminal perpetrator is not a party to the action. The plaintiff

can avoid the application of apportionment to the non-party perpetrator if he or she can show he or she failed, using all due diligence, to obtain jurisdiction. However, often the non-party perpetrator, having been successfully prosecuted, can be served at a correctional facility, making it difficult for the plaintiff to gain this exception. Note that the intentional tortfeasor may not benefit from Article 16, nor may multiple intentional tortfeasors apportion liability among themselves.

In *Chianese v. Meier*, 98 N.Y.2d 270, 746 N.Y.S.2d 657 (2002), the Court of Appeals sustained an apportionment of liability among defendant building owner, defendant managing agent and the non-party assailant, who had acted intentionally. The Court held that the exception in CPLR 1602(5) applies to prevent defendants who are found to have committed an intentional act from invoking the benefits of Article 16. The Court noted, however, that in the multiple party situation presented in *Chianese*, plaintiff's claims against the named defendants did not require a showing of intent, and the non-party tortfeasor's intentional conduct did not bring this pure negligence action within the scope of the exception in CPLR 1602(5). *See* PJI 2:275; *see also Roseboro v. NewYork City Transit Authority*, 286 A.D.2d 222, 729 N.Y.S.2d 472 (1st Dep't 2001); *Concepcion v. New York City Health and Hospitals Corp.*, 284 A.D.2d 37, 729 N.Y.S.2d 478 (1st Dep't 2001); *Siler v. 146 Montague Associates*, 228 A.D.2d 33, 652 N.Y.S.2d 315 (2d Dep't 1997) (landlord could seek apportionment of liability of assailant, plumber, who was non-party but was party over whom jurisdiction could have been obtained). *See also Cardenas v. Alexander Wolfe & Co.*, 303 A.D.2d 313, 758 N.Y.S.2d 15 (1st Dep't 2003).

While it is clear that plaintiff must plead and prove an exception to Article 16, there is a division of authority as to whether a defendant must plead and prove the Article 16 defense. The Second Department holds that where plaintiff sues multiple defendants, Article 16 applies *unless* plaintiff establishes an exception and, therefore, defendants are not required to assert Article 16 as an affirmative defense. *Marsala v. Weinraub*, 208 A.D.2d 689, 617 N.Y.S.2d 809 (2d Dep't 1994). Moreover, as defendants do not carry the burden of proof, they may not be required to supply a bill of particulars regarding the identity of possible additional tortfeasors. The First Department holds that an Article 16 defense must be pleaded only if it would likely surprise plaintiff or apportionment injects new factual issue into case. *Maria E. v. 599 West Associates*, 188 Misc.2d 119, 726 N.Y.S.2d 237 (Sup. Ct., Bronx Co. 2001). On the other hand, the Fourth Department holds that defendants, as parties seeking to limit their liability under CPLR 1603, have the burden of proof and must, therefore, plead Article 16 as an affirmative defense (see CPLR 3018(b)), *and* provide a bill of particulars as to that defense, *Ryan v. Beavers*, 170 A.D.2d 1045, 566 N.Y.S.2d 112 (4th Dep't 1991).

VII. Conclusion

The successful defense of a premises owner or possessor against a claim arising from the criminal conduct of a third party depends in the first instance on thorough investigation of the facts and circumstances surrounding the occurrence. Where the evidence demonstrates that there is no previous criminal history on the property or that the landlord is not otherwise on notice of the likelihood that criminal activity would occur there, the landlord owes no duty to the plaintiff as a matter of law, and a motion for summary judgment should be pursued. Where a landowner is found to owe a duty to the plaintiff, the investigation will reveal whether the landlord provided "minimal security measures." Although a court can find that the security provided was sufficient as a matter of law, the determination is more often left for the jury to decide. If motion practice is not available or successful in insulating the landowner from liability, additional strategies and considerations are available. Because of the innate sympathy that a jury might have for the victim of a crime, establishing comparative liability of the plaintiff is a delicate exercise requiring care not to appear to be attacking the victim. The ability to apportion fault to the often judgment-proof criminal perpetrator is another means to reduce the defendant landowner's potential for joint liability and exposure for non-economic damages.

Endnotes

1. Note that a landlord is under a duty to exercise reasonable care to discover that such acts are being done or are likely to be done. *Nallan, supra*. Thus, ignorance of a pervasive criminal element in his or her property would provide no protection from liability if the exercise of reasonable care would have disclosed criminal activity to him or her.
2. Note that the Court also held that the hospital was not liable for negligent hiring as it had no knowledge of any violent background of the employee of which it would have had a duty to investigate.

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Comparing New State and Federal Laws Designed to Protect Residential Tenants Against Immediate Eviction from Foreclosed Properties

By Dan M. Blumenthal

Shortly after my article on the federal Protecting Tenants at Foreclosure Act,[1] (the "Federal Act") appeared in the Fall 2009 edition of the NYSBA *N.Y. Real Property Law Journal*,[2] Governor Paterson signed a similar law, codified as Real Property Actions and Proceedings Law ("RPAPL") § 1305, effective January 14, 2010 (the "NYS Act") mandating similar notice and also granting protections for tenants in foreclosed residential properties.[3]

The relief afforded by the Federal Act shall be ineffective if "any State or local law [ ] provides longer time periods or other additional protections for tenants."[4] With this in mind, how does the NYS Act modify or clarify the duties of a foreclosure purchaser and rights of occupants of foreclosed properties?

The Federal Act protects any "bona fide" tenant, that term being defined to include anyone in possession pursuant to "an arm's-length transaction" for "fair market rent" or rent "reduced or subsidized due to a Federal, State, or local subsidy," but not "the mortgagor or the child, spouse, or parent of the mortgagor."[5] The NYS Act definition of "Tenant" is broad enough to include anyone other than the former owner, provided they are paying "not substantially less than fair market rent."[6] While the Federal Act applies to any occupancy agreement, the NYS Act is confined to agreements made with the foreclosed mortgagor.[7] We routinely encounter occupants with written or oral agreements with a party who has either been given authority from the owner facing foreclosure or is running a scam by renting out an abandoned house.[8] The occupant under a third party agreement, whether valid or fraudulent, would appear not to be entitled to protection under the NYS Act.

In what appears to be the only reported case in the state arguing for protection under the Federal Act,[9] the Suffolk County District Court correctly found that the Federal Act applies "to only those tenancies arising from dwellings or residential real property in which a federally related mortgage was foreclosed" and denied the motion by determining that the underlying mortgage was not "federally related" as required under the Federal Act.[10] The term "federally related mortgage loan" is defined in 12 U.S.C. § 2602(1) (directly referenced in the Federal Act[11]) to include a broad range of mortgages insured or made by a Federal entity,[12] intended for sale to "the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation,"[13] or in the definition most vulnerable to the Suffolk District Court's constitutional argument, made by any entity "who makes or invests in residential real estate loans aggregating more than $1,000,000 per year" other than a State agency.[14] The subsequent enactment of a New York State law applicable to all residential foreclosures in the State renders this analysis unnecessary.

"[H]ow does the NYS Act [RPAPL § 1305] modify or clarify the duties of a foreclosure purchaser and rights of occupants of foreclosed properties?"

The Federal Act applies to "any dwelling or residential real property," provided there is a federal regulatory nexus.[15] The NYS Act provides a more concise definition of "residential real property," confining the protection of the NYS Act to structures that "may be used, in whole or in part, as the home or residence of one or more persons."[16] Use of the permissive "may" suggests that illegal space is not included in scope of the NYS Act. An argument could be made that the alternate term "dwelling" in the Federal Act broadens the federal protections beyond the NYS Act to include any *de facto* dwelling. The protections of the NYS Act would seem to extend to multiple units within a dwelling, other than those covered by rent control or stabilization;[17] unlike the Federal Act, which is silent on multi-unit residences, the NYS Act expressly recognizes multi-unit residencies.[18] One interesting twist under the NYS Act that can be anticipated will be the mortgagor making a last minute lease to a family which, if rent is "not substantially less than the fair market rent," will need to be honored by the purchasers.[19]

Both acts place the notice obligations on the "successor in interest" to the foreclosed former borrower/owners.[20] The Federal Act is confined to an otherwise undefined "immediate successor in interest pursuant to foreclosure,"[21] leaving questions about subsequent grantees (for instance, the servicer for an FHA insured

loan takes title and then deeds to the Secretary of Housing as part of the claim). Under the NYS Act, "successor" is defined as "any person or entity who or which acquires title in a residential real property as a result of a judgment of foreclosure and sale, or other disposition during the pendency of the foreclosure proceeding, or at any time thereafter but prior to the expiration of the time period as provided for in subdivision two of this section."[22] This would seem to place the notice requirements on any entity acquiring a property with a foreclosure or a deed in lieu of (a pending) foreclosure granted within (the greater of) any remaining lease term or 90 days from the date of the grant by which the borrowers lost title.

The Federal Act, while mandating a notice, is vague as to timing or delivery. The NYS Act provides far greater guidance, providing that the notice must be in writing[23] and indicating delivery by mail[24] with the 90-day period counted from the date of the mailing.[25] The NYS Act would also appear to be applicable where a purchaser acquires the property in an arm's-length transaction and the property is occupied.[26]

While the Federal Act is silent on the rent obligations of eligible occupants, the NYS Act provides that the rights granted by the Act shall not abrogate any right to evict as an instance of foreclosure or for non-payment.[27] It is an open question whether an innocent, documented payment to the former owner would be a defense to a non-payment proceeding under this provision. Caution should be observed in taking rents *after* any period provided for by the NYS Act, as there can be no assurance that such payment would not be construed as establishing a statutory tenancy. The rent obligation under the NYS Act is that amount "in effect at the time of entry of the judgment of foreclosure and sale, or if no such judgment was entered, upon the terms and conditions as were in effect at the time of transfer of ownership of such property."[28] We are left to our own devices to determine the rent due for a tenancy commencing after entry of judgment, if such a tenancy has any validity.[29]

The NYS Act limits the ability of a foreclosure purchaser to terminate a lease on 90-day notice and gain possession for personal use to a single dwelling unit.[30] Every notice under the NYS Act must contain the name and address of the new owner.[31] Further, anyone taking subsequent title while an occupancy right under the NYS Act is in place must notify the occupants of the transfer with its name and address.[32]

The rights given to a tenant under the new NYS Act are in addition to any rights of such a party by reason of not being named in the underlying foreclosure,[33] such as unavailability of a writ of assistance in the foreclosure action based on due process issues.[34] An open issue is the validity and obligation of a foreclosure purchaser to honor any lease with a term greater than three (3) years, as such a lease would be deemed a conveyance[35] and otherwise unenforceable against a subsequent good-faith purchaser,[36] a definition which includes a mortgagee who properly records.[37]

Foreclosure purchasers will, as a general rule, want to send the notice required under these Acts as quickly as possible. Of interest to purchasers other than the foreclosure plaintiff (who often take title on the same day as the auction) is that a foreclosure sale bid (with deposit) makes the bidder the legal equivalent of a contract vendee and "the execution of a contract for the purchase of real estate and the making of a partial payment gives the contract vendee equitable title to the property."[38] This may be sufficient status to warrant issuance of notice.

Whatever your position on the utility and appropriateness of these Acts, the New York State legislature is to be commended for taking the important step lacking in the Federal Act of defining terms and introducing some equitable balance to the law.

Endnotes

1. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111–22, § 701–04, 123 Stat. 1632.
2. *See* Dan M. Blumenthal, *The New Federal "Protecting Tenants at Foreclosure Act*," 37 N.Y. Real Prop. L.J. 4 (2009).
3. N.Y. Real Prop. Acts. Law ("RPAPL") § 1305 (McKinney 2009).
4. Protecting Tenants at Foreclosure Act § 702, 42 U.S.C.A. § 1437f(o)(7)(F) (2009).
5. Protecting Tenants at Foreclosure Act § 702(b), 12 U.S.C.A. § 5220, note.
6. *See* RPAPL § 1305(2)(a) (McKinney 2006) ("fair market rent" shall mean rent for a unit of residential real property of similar size, location and condition).
7. *See* RPAPL § 1305 (1)(c).
8. Among the variations on this scam are con artists posing as landlords accepting rental deposits, as well as bolder criminals who actually show up monthly to collect rents. Invariably, these opportunistic thieves disappear before eviction proceedings are heard. *See* Karen Aho, *Renters: Beware of new twists on an old scam*, MSN.com Real Estate, http://realestate.msn.com/article.aspx?cp-documentid=20482759 (last visited Feb. 4, 2010).
9. *See Collado v. Boklar*i, 892 N.Y.S.2d 731, 2009 N.Y. Slip Op. 29447.
10. 892 N.Y.S.2d at 733.
11. Protecting Tenants at Foreclosure Act, § 702(c).
12. 12 U.S.C. § 2602(1)(B)(i), (ii).
13. 12 U.S.C. § 2602(1)(B)(iii).
14. 12 U.S.C. § 2602(1)(B)(iv).
15. Protecting Tenants at Foreclosure Act, § 702(a).
16. RPAPL § 1305(1)(a).
17. Such tenants are exempt from eviction based solely on foreclosure. *See Pisani v. Cominger*, 36 A.D.2d 593, 593, 318 N.Y.S.2d 913, 913 (1st Dep't 1971).

18. RPAPL § 1305(1)(c).
19. RPAPL § 1305(2).
20. *See* RPAPL § 1305(3); Protecting Tenants at Foreclosure Act, § 701 (codified at 12 U.S.C. § 5220, note).
21. Protecting Tenants at Foreclosure Act, § 702(a).
22. RPAPL § 1305(1)(b).
23. *See* RPAPL § 1305(3).
24. *See* RPAPL § 1305(2), (3).
25. *See* RPAPL § 1305(2)(a).
26. *See* RPAPL § 1305(2).
27. *See* RPAPL § 1305(4).
28. RPAPL § 1305(3).
29. *See Green Point Sav. Bank v. Barbagallo*, 247 A.D.2d 442, 443, 668 N.Y.S.2d 678, 679 (2d Dep't 1998) ("[U]pon entry of the judgment of foreclosure and sale [ ], the mortgagors no longer had any title through which they could convey a leasehold interest.") (citation omitted).
30. *See* RPAPL § 1305(2).
31. *See* RPAPL § 1305(3)(b).
32. *See* RPAPL § 1305(3).
33. *See* RPAPL § 1305(5)(a).
34. *See Nationwide Associates, Inc. v. Brunne*, 216 A.D.2d 547, 547, 629 N.Y.S.2d 769, 769 (2d Dep't 1995).
35. *See* Real. Prop. §§ 290–291, 291-c (McKinney 2009).
36. *See Hi-rise Laundry Equip. Corp. v. Matrix Prop., Inc.*, 96 A.D.2d 930, 930, 466 N.Y.S.2d 375, 376 (2d Dep't 1983).
37. *See* N.Y. Real. Prop. Law § 291.
38. *Carnavalla v. Ferraro*, 281 A.D.2d 443, 443, 722 N.Y.S.2d 47, 48 (2d Dep't 2001).

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In the Area of Eyewitness Identification Expert Testimony, *LeGrand* Should Be Revisited

By Paul Shechtman

Earlier this term, the New York Court of Appeals considered the companion cases of *People v. Abney* and *People v. Allen*, which involved the admissibility of expert testimony on the reliability of eyewitness identifications.[1] In reversing Abney's conviction and affirming Allen's, the Court applied the rule it established in 2007 in *People v. LeGrand*: "Where [a] case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witnesses's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert, and (4) on a topic beyond the ken of the average juror."[2] The Court's new decisions, however, expose the weakness of the *LeGrand* rule.

A.

Abney was indicted for the robbery of a 13-year-old girl, who was on her way home from school. At trial, the girl was the prosecution's principal witness. She identified Abney as the robber, emphasizing his "puppy dog eyes" and "pinkish-purplish lips." (She had previously selected him from a lineup held 20 days after the incident, which led to his arrest.) In his defense, Abney presented an alibi: his girlfriend and a teacher testified that at the time of the robbery, he was picking up the girlfriend's daughter at her pre-school. The alibi defense, however, proved suspect. The girlfriend testified that she had gone to the school the day after the robbery to obtain a photocopy of the prior day's sign-out sheet (which showed that the defendant had picked up her daughter), and the teacher confirmed that account. Their testimony enabled the prosecutor to argue that the girlfriend was seeking the log to establish an alibi for a crime with which Abney had not yet been charged.

The defense also sought to call an expert on eyewitness identification to "educate the jurors on many counterintuitive findings that bear directly on the reliability of the identification evidence in [the case]." The trial judge excluded the expert testimony, Abney was convicted, and a divided panel of the First Department upheld the conviction. The majority concluded that the defendant's "false alibi" witnesses corroborated the eyewitness testimony, and therefore that the trial court had not abused its discretion under *LeGrand*.

The facts in *Allen* were these: On March 10, 2004, two masked men barged into a barbershop in Queens. One of the men wielded a knife, and his mask let the top portion of his face exposed. The robbers made off with $30. As they fled the store, a customer apparently recognized the knife-wielding robber as Gregory Allen from his "body type" and voice.

At trial, the customer and a barber testified that Allen was the knife-wielding robber. Both had selected him from a court-ordered lineup held four months after the incident. That lineup followed an aborted attempt the day after the crime; it failed because Allen refused to cooperate: he pulled his shirt over his head, crawled into a fetal position, and refused to hold up a number unless all the men in the lineup wore masks.

As in *Abney,* the defense sought to rebut the People's proof by calling an expert on eyewitness identification. The trial judge excluded the testimony, Abney was convicted, and the Second Department affirmed the conviction.

B.

Writing for a unanimous Court of Appeals, Judge Susan Read concluded that under *LeGrand*, the trial court had abused its discretion in *Abney* when it refused to allow the defense expert to testify to principles related to witness confidence (which are generally accepted within the relevant scientific community) and when it refused to conduct a *Frye* hearing to determine if other aspects of the proposed testimony (the effect of event stress, exposure time, weapon focus and cross-racial identification) were scientifically accepted.[3] Nor was the error harmless. While Abney's "muddled alibi" was "unhelpful to his cause," it was not "overwhelmingly inculpatory," and he may not "have pursued an alibi defense in the first place if [his expert] had [been permitted to] testif[y]."

The result in *Allen* was different because the prosecution had elicited sufficient corroborative evidence. In Judge Read's words: "Critically, [the customer] independently identified defendant as the knife-wielding robber who searched him and stood nearby throughout the course of the robbery. And defendant was not a stranger to…[the customer]."

C.

Abney and *Allen* are faithful to *LeGrand* but raise several issues.

First, can the testimony of a second eyewitness supply the corroborative proof that *LeGrand* requires before a judge can exclude expert testimony? *LeGrand* itself suggests that the answer is "no." There, the defendant was charged with the stabbing murder of a livery cab driver. At trial, the People's proof consisted of the testimony of three eyewitnesses, each of whom identified the defendant as the perpetrator. For the Court, the case was

one that turned "solely on the accuracy of the witnesses' identification…there was no corroborating evidence connecting defendant to the crime." On that basis, the Court concluded that "the testimony of defendant's expert would have benefited the jury in evaluating the accuracy of the eyewitnesses' identifications." The Court's use of the plural confirms that it was well aware that more than one eyewitness had testified.

Allen, however, suggests a caveat. There, the fact that the customer-witness had "independently identified [the] defendant" was deemed "critical[]," but the Court quickly added that the defendant "was not a stranger" to the customer. Apparently, this means that the eyewitness testimony of a non-stranger—a person who is less susceptible to suggestive identification procedures—can corroborate the eyewitness testimony of a stranger for purposes of *LeGrand*. Notably, however, Allen was partially masked, and the expert was prepared to testify to "unconscious transference"—the notion that an "innocent person seen in some context can be mistakenly identified as having been seen at the crime." That is to say, the expert would have testified that the non-stranger's testimony was itself suspect.

Second, should the *LeGrand* rule apply if there is strong, but contested, corroborative proof? Consider this hypothetical: D is on trial for the robbery of V, and the prosecution's proof consists of V's eyewitness testimony and a fingerprint expert's testimony that D's print was found on V's purse. D claims that the fingerprint evidence was planted, and he seeks to call an expert on eyewitness identifications to cast doubt on V's testimony. If the judge excludes the expert's testimony, is it an abuse of discretion?

The hypothetical recalls the United States Supreme Court's 2006 decision in *Holmes v. South Carolina*.[4] There, the Court struck down a South Carolina evidence rule that prohibited a defendant from introducing proof of third-party guilt—i.e., evidence that another person had committed the crime—if the prosecution had introduced forensic evidence which, *if believed*, strongly supported a guilty verdict. Writing for the Court, Justice Samuel Alito found the rule "irrational": "Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third party guilt has only a weak logical connection to the central issues in the case." Presumably, the same principle should apply where expert testimony on eyewitness identification is at issue: Just because other evidence, if credited, would corroborate the eyewitness' testimony, it does not follow that the expert's testimony would not help the jury in assessing the defendant's guilt.

Third, can proof elicited in the defendant's case be used to corroborate the eyewitness' testimony? Consider a variant of *Abney*: The prosecution's case consists only of the testimony of A, an eyewitness. In his defense, D calls W, an alibi witness, who is discredited on cross-examination; indeed, W admits that D solicited him to provide a false alibi. Is W's testimony corroborative proof under *LeGrand*? *Abney* seems to suggest "no" ("it is possible [D] would not have pursued an alibi defense in the first place if [the expert] had testified"), but that answer seems problematic. At a retrial, the prosecution could call W in its case-in-chief, in which event the trial court would not abuse its discretion if it excluded the expert. If that is so, then it makes little sense to order a retrial in such circumstances.

Finally, there is the question of harmless error. In *Abney,* Judge Read found that the error was not harmless, suggesting that a *LeGrand* error can be harmless in certain cases. But can it? One can imagine cases in which the eyewitness viewed the perpetrator for an extended period or in which there were a large number of eyewitnesses (presumably more than the three in *LeGrand*), where the exclusion of the expert could be deemed inconsequential. But to recognize the existence of such cases is to acknowledge that not all eyewitness identification cases are alike—an acknowledgement that is at odds with the *LeGrand* rule.

D.

The *LeGrand* rule poses so many nettlesome questions because of its very structure. Nowhere else in New York evidence law does the admissibility of expert testimony depend upon the strength of a party's case. Typically, a judge asks only these questions: Is the proposed expert testimony relevant to a contested issue? Is the subject matter beyond the ken of lay jurors? Is the proffered witness a qualified expert? And if the expert intends to offer "novel scientific testimony," does it meet the *Frye* general acceptance standard? Or, to paraphrase Wigmore, on this subject would this jury receive appreciable help from this witness? Helpfulness, and not the extent of corroborative proof, should govern the admissibility of expert testimony on eyewitness identifications.

In sum, *Abney* and *Allen* apply *LeGrand* faithfully, but the Court of Appeals should revisit the *LeGrand* rule.

Endnotes

1. 13 N.Y.3d 251 (2009).
2. *People v. LeGrand*, 8 N.Y.3d 449 (2007).
3. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
4. 547 U.S. 319 (2006).

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A Right to Publicity in Your Mug Shot? Maybe if You Are Lindsay Lohan

By Britt Simpson

Lindsay Lohan has a bone to pick with the American Beverage Institute (ABI). ABI used Lohan's highly publicized 2007 mug shot in a full-page spread in *USA Today* to display a message against proposed legislation what would install breathalyzer ignition locks (ignition locks) in many cars in the U.S.[1] If Lindsay Lohan decided to bring suit against ABI for its use of her picture without her permission, she would most likely argue that it violated her state publicity rights.[2] This article will discuss the likelihood of Lohan's success for a claim against ABI and ABI's likelihood of success in raising a First Amendment defense.

I. Background

A. The Parties Involved

ABI is a restaurant trade association that, along with representing many of the nation's restaurants and having a close relationship with alcohol distributers, serves as the self proclaimed "voice of the hospitality industry on adult beverage issues."[3] ABI's message is clear: there is such a thing as responsible adult drinking and driving.[4] ABI sponsors many studies that purport to support this message and uses these studies against "overzealous activists" to show the truth about responsible adult drinking.[5] ABI wants its message to ring loud and clear with both the public and policy makers in order to fight against proposed legislation in many states that would put ignition locks in most cars on the road.[6]

Lindsay Lohan is a Hollywood actress who currently receives more media attention for her personal life than for her acting career.[7] Lohan has been in and out of rehabilitation several times in the last couple of years due to arrests for drunk driving and possession of drugs.[8] Lohan's famous mug shot from her 2007 arrest for drunk driving and drug possession is widely available on the Internet.[9]

B. The *USA Today* Spread

In the Friday May 2, 2008 edition of *USA Today*, ABI took out a full-page spread to display a message very near to its heart: ignition locks are a bad idea for the general, responsible, drinking and driving American public, and should only be used in cases of repeat drunk driving offenders.[10] Specifically, the message read: "Ignition interlocks: A good idea for," followed by a picture of Lindsay Lohan's 2007 mug shot, "but a bad idea for us," followed by a picture of a couple drinking champagne at their wedding, a group of friends out for drinks, and a group of businessmen out for dinner.[11] Needless to say, Lohan was not happy about the use of her mug shot to exemplify what a subject of "good idea" looks like.[12] Lohan's attorney released a statement purporting that Lohan in fact supports the use of ignition locks and is not happy about ABI's use of her image in its campaign against the proposed system.[13] If Lohan decides to sue in her home state of New York,[14] she would probably base her claim on New York State Civil Rights Law § 50 (§ 50) and § 51 (§ 51).[15]

II. New York State's Right to Publicity

A. New York's General Standard

Many states have a common law right to publicity that if violated gives rise to a tort cause of action.[16] In New York, the right of publicity does not exist at common law, but is codified in Article Five of the Civil Rights Law § 50 and § 51. Section 50 provides that "[a] person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor."[17] Section 51 provides for a cause of action for an injunction or damages if the right to publicity is violated.[18] The statute is "semi penal in nature and [is] to be construed strictly."[19]

In ABI's *USA Today* spread, most of the factors for a § 50 violation are easily established. ABI is an organization that used a picture without the subject's consent. The first issue is: how exactly did ABI use the picture? More specifically, did ABI use the picture "for advertisement purposes"? Although the statute does not define what it means by advertisement or trade,[20] the Court of Appeals of New York has noted that these are "separate and distinct statutory concepts and violations" and has defined "for advertising purposes" liberally.[21] The Court defined "for advertising purposes" as: use of a name, portrait or picture "in a publication which, taken in its entirety, was distributed for use on, or as part of, an advertisement or solicitation for patronage of a particular product or service."[22]

In *Beverley v. Choices Women's Medical Center*, the defendant, a for-profit medical facility, used the plaintiff's picture, name, and title in a calendar that the defendant printed and distributed.[23] The issue the court decided was whether the defendant's use of the plaintiff's name, picture and title was "for advertising purposes."[24] The court found that the calendar was an advertisement for three reasons: (1) the placement of the defendant's name and information on every page; (2) the calendar had been widely disseminated; and (3) the calendar made "glowing characterizations and endorsements concerning the

services [defendant] provides."[25] Further, the court found that the defendant's use of the plaintiff's name, title, and picture was not merely incidental to the advertisement but in full-fledged furtherance of the advertisement.[26] The court stressed that because the plaintiff was a doctor and the advertisement was for medical services, the use clearly furthered the purpose of the advertisement.[27]

B. Was ABI's Use "for Advertising Purposes?"

Under the *Beverley* precedent, could it be said that ABI's *USA Today* spread was an advertisement? If the answer is "yes" then was ABI's use of Lohan's picture in furtherance of this advertisement and not merely incidental to it?

It is true that ABI's message has been characterized as an advertisement.[28] However, it warrants taking a closer look under the standard set forth in *Beverley*. ABI is a trade association made up of restaurants determined to protect an adult's ability to responsibly enjoy "adult beverages" outside of the home, namely while dining at a restaurant.[29] In furtherance of this objective, ABI has publicized different messages: there is such a thing as responsible drinking and driving;[30] use of extreme measures like ignition locks should be limited to repeat drunk driving offenders;[31] and mandatory ignition locks are comparable to prohibition.[32] In displaying these messages, in particular the message in *USA Today*, did ABI "advertise" as defined by § 50 and § 51?

It seems that the answer to the question is "yes." The purpose of ABI's message was to voice its concern over the new proposition of installing ignition locks in all cars on the road.[33] ABI's managing director, Sarah Longwell, stated that the association supports such a system in cases of repeat drunk drivers, like Lohan, but not average, responsible drinkers and drivers.[34] When it displayed a message in furtherance of its express mission in a widely disseminated publication, ABI seemed to be advertising in much the same way as the hospital in *Beverley*. One key difference is that, unlike the defendant in *Beverley*, ABI had not placed its name anywhere on its message.[35] However, this is unlikely a distinguishing factor because ABI is not in the business of selling a service like the hospital in *Beverley* and, therefore, ABI does not need to display where its services can be purchased. ABI is in the business of selling a message to the public and policy makers in hopes of fighting proposed legislation.[36]

The next issue is whether ABI's use of Lohan's image was merely incidental to its advertisement or was it in furtherance of promoting its message. Again, under the *Beverley* standard, it seems that the use of Lohan's image was in furtherance of ABI's advertisement. In *Beverley*, the defendant's use was found to further its advertisement because the plaintiff was a doctor and the defendant was selling doctors' services.[37] Here, it seems that ABI also used the image in furtherance of its advertisement. The very purpose of the spread was to point out that there are certain people who should be required to have ignition locks, those who repeatedly and irresponsibly drink and drive, like Lohan.[38] In fact, the ABI specifically chose to use the image of Lohan to make "an example that people understand, of what a repeat offender looks like."[39] The choice to use a celebrity was not merely incidental to the advertisement, but its main attraction.[40] The very purpose was to call attention to Lohan and her problems with drinking and driving and distinguish her from the ordinary public.[41] A court would probably find that ABI used Lohan's image in violation of § 50 and § 51.

III. Freedom of Speech

Although it seems that ABI violated § 50 and would be liable under § 51, there is one major exception for a defendant otherwise in violation of the statute: freedom of speech as protected by the First Amendment.[42] Courts have interpreted the First Amendment to protect against liability under § 51 for certain § 50 violations.[43] Most important in this case would be the "newsworthiness exception" which courts have applied to "news stories and articles of consumer interest" as well as "reports of political happenings and social trends."[44]

A. Matters of Public Interest

The court in *Beverley* addressed the nature and extent of the newsworthiness exception, specifically as applied to news and matters of pubic interest.[45] After the court found that the defendant's use was in violation of § 50 and the defendant was liable under § 51, the court assessed whether the theme of the calendar, namely the history of the Women's Movement, could be considered an area of sufficient public interest and therefore exempt the defendant from liability.[46] The court noted that liability under the statute for the defendant's use of the plaintiff's picture to disseminate matters of public interest or news conflicted directly with the First Amendment.[47] The court explained that the First Amendment trumped § 50 and § 51 when the speech is truly newsworthy or a matter of pubic interest.[48] However, the exception would not apply if the use of the picture "has no real relationship to the article" or "is an advertisement in disguise."[49] The court explained that this exception typically applied to a media enterprise's use of a picture in "periodical[s] or newspaper articles or documentary films concerning newsworthy events."[50]

Applying this rule, the *Beverley* court found that the defendant medical facility was not a media enterprise and the theme of the calendar did not save the use of the plaintiff's picture from violating § 50 and § 51 liability.[51] The use of this theme did not save the calendar from being an advertisement, no matter how "commendable the educational and informational value" was.[52] The court explained its holding by noting that the Women's Movement was no longer a "current news item" and a defendant could not simply claim an exemption from § 50 and § 51 by "wrapping its advertising message in the cloak of public interest."[53]

B. Political Speech

The court in *Davis v. Duryea* discussed the nature of the political speech or political happenings exception.[54] In *Davis*, the defendant was a candidate in the race for Governor and the plaintiff was a former Attica inmate who had been pardoned by the incumbent Governor.[55] The Supreme Court of New York held that the defendant's use of the plaintiff's image in his political campaign was not a violation of the plaintiff's publicity rights, as the use was a matter of public interest and political speech.[56] The defendant used the plaintiff's image to highlight and promote his election promise to make "prisons more secure and toughen policies on pardons and paroles."[57] The court held that § 50 and § 51 did not apply because information that "enable[s] our citizens to best exercise their electoral franchise, and thereby facilitate the election of leaders" is protected under the freedom of speech guarantee of the First Amendment.[58] Although the court said that this use was protected as a matter of sufficient public interest because "[t]he incident became a relevant central issue in a vigorously contested campaign for the election of a Governor," it also implied that matters debated in the electoral process are sufficiently political and should be protected under the First Amendment.[59]

C. The Defense

If Lohan sued ABI, the latter might argue that matters concerning ignition locks and responsible drinking and driving are matters of public interest or political happenings. On ABI's Web site there is an advertisement that compares ignition locks to Prohibition.[60] Furthermore, ABI has a link to the Interlock Facts Web site, which describes the development of the ignition lock system as a "neo-prohibitionist movement."[61] It has been reported that the Interlock Facts Web site is a "special project" of ABI's and it therefore seems likely that ABI would characterize the proposed system in a similar way.[62] According to ABI, the phrase "neo-prohibitionist movement" is a matter of public interest, because the proposed laws would "reduce the per capita consumption of adult beverages" and make it impossible for Americans to drink, even responsibly, outside of the home unless they are not driving, thereby changing the way that many Americans live their daily lives.[63] Furthermore, advocating against a "neo-prohibitionist movement" is inherently political, as it triggers discussion about the 18th Amendment, which established Prohibition, and the 21st Amendment, which repealed it.[64]

If ABI invoked this characterization in order to fall into the public interest and dissemination of news exemption, as did the defendant in *Beverley*, a court may see through this characterization, as did the *Beverley* court.[65] Both the Prohibition era and the Women's Movement may facially look like matters of public interest, as both are historical periods that helped shape our country into what it is today.[66] However, similar to the defendant in *Beverley*, ABI did not use the image of Lohan to illustrate an article about the era or in a documentary about the era. Furthermore, the Prohibition era, like the Women's Movement, is not a matter of "current" news as required for the dissemination of news or public interest exception.[67]

However, if ABI invoked this characterization in order to fall into the political speech exception, it may have more luck. Although characterizing the proposed legislation as a "neo-prohibitionist movement" may be an exaggeration of the effect of the system, ABI is responding directly to proposed legislation and trying to influence the public and policy makers not to pass any such legislation.[68] As this issue is relevant to the public and is an issue currently, or recently, before state legislatures,[69] a court under the standard set forth in *Davis* may find that ABI's advertisement was sufficiently political in nature. The advertisement is related to the political process in trying to influence the public in opposing proposed legislation.[70] The passage of laws seems to be as much a part of the political process as an election for a state Governor.

On the other hand, a court may not find that the use of Lohan's image was really part of protected political speech. It could be argued that ABI's use of Lohan's image in its advertisement is not really political speech at all, as the image itself really was not central to the debate about mandatory ignition locks.[71] The use could be characterized as merely an exploitation of Lohan and her personal troubles, used for shock value.[72] This use seems to be different than the use in *Davis*, where the plaintiff's image and story were actually the topic of a hotly debated issue surrounding executive pardons.[73]

IV. Conclusion

Although Lohan has not yet brought the matter to court, if she decides to bring a claim against ABI for violating her state publicity rights, a court's ruling on the matter will be highly important for other celebrities and pubic figures. If a court allows ABI's use under the newsworthiness exception, this may open the door for use of other celebrity images in promoting all types of interests that the celebrities themselves do not endorse. Sarah Longwell has even stated ABI's interest and intent to use other celebrities in this campaign.[74] However, the precedent could be limited to the specific facts of the case and the seemingly political aspect of the speech in response to actual proposed legislation in states across the country.

Endnotes

1. According to interlockfacts.com, New York State has considered legislation that would put ignition locks in every car on the road. *See* Interlock Facts Web site, http://interlockfacts.com/legislation.cfm (last visited April 12, 2010).
2. The idea for this paper was inspired by a short article written by Professor Marc Edelman. Marc Edelman, *Sports and the Law: Fate of Athletes' and Entertainers' Publicity Rights May Lie With LiLo*, Above the Law, http://abovethelaw.com/2008/05/sports_and_

the_law_athletes_an.php (last visited February 2, 2010) (no longer live).

3. ABI Web site, About Us, http://www.abionline.org/aboutUs.cfm (last visited April 12, 2010).
4. *Id.*
5. *Id.*
6. *Id.*
7. *See generally* Koran Miller, *Lindsay Lohan: Samantha Ronson break-up is like 'Mean Girls,'* N.Y. DAILY NEWS, *available at*: http://www.nydailynews.com/gossip/2009/04/08/2009-04-08_lindsay_lohan_on_samantha_ronson_breakup_this_is_like_mean_girls.html (last visited April 12, 2010).
8. Dui.com, http://www.dui.com/dui-library/celebrities/lindsay-lohan (last visited April 12, 2010).
9. *See* The Smoking Gun, http://www.thesmokinggun.com/mugshots/lohanmug1.html (last visited April 12, 2010); Hollywood Gossip, http://www.thehollywoodgossip.com/gallery/lindsay-lohan-mug-shot/ (last visited April 12, 2010); Absolute Celebrities, http://www.absolutecelebrities.com/mugshot/lindsay_lohan.html (last visited April 12, 2010).
10. Gil Kaufman, *Lindsay Lohan's Lawyer Blasts* USA Today *Over Use of Star's Image in Drunk-Driving Ad*, MTV.com (2008), http://www.mtv.com/news/articles/1586769/20090502/lohan_lindsay.jhtml (last visited April 12, 2010).
11. *Id.*; USA Today spread *available at* http://3.bp.blogspot.com/__XCWUd8FFjQ/SBsgVMCJjyI/AAAAAAAADPs/iuoKTqQs0cs/s1600-h/Lohan.jpg (last visited April 12, 2010).
12. *See* Kaufman, *supra* note 10.
13. *Id.*
14. Edelman, *supra* note 2.
15. N.Y. CIV. RIGHTS § 50 (McKinney 2009); N.Y. CIV. RIGHTS § 51 (McKinney 2009).
16. Eleanor Grossman, 62A Am. Jur. 2d Publicity § 3 (2008).
17. N.Y. CIV. RIGHTS § 50 (McKinney 2009).
18. N.Y. CIV. RIGHTS § 51 (McKinney 2009).
19. *Vogel v. Hearst Corp.*, 116 N.Y.S. 2d 905, 906 (App. Div. 1952).
20. *Stephano v. News Group Publications*, 474 N.E.2d 580, 584 (N.Y. 1984).
21. *Beverley v. Choices Women's Medical Center, Inc.*, 587 N.E.2d 275, 278 (N.Y. 1991) (citations omitted). As New York courts define "for advertising purposes" claims more liberally than "for purposes of trade claims," Lohan would be more likely to succeed if she brought a claim based on the former. *See Gautier v. Pro-Football, Inc.*, 106 N.Y.S.2d 553, 556 (App. Div. 1951). For this reason, this article will focus on Lohan's possible "for advertising purposes" claim.
22. *Beverley*, 587 N.E.2d at 278.
23. *Id.* at 276–277.
24. *Id.* at 277.
25. *Id.* at 278.
26. *Id.*
27. *Id.*
28. Kaufman, *supra* note 10.
29. ABI Web site, About Us, *supra* note 3.
30. USA Today spread, *supra* note 11.
31. *Id.*
32. ABI Web site, Home, http://www.abionline.org/index.cfm (last visited April 12, 2010).
33. *See id.*
34. Kaufman, *supra* note 10.
35. *Id.*
36. *See* ABI Web site, Home, *supra* note 32.
37. *Beverley*, 587 N.E.2d at 278.
38. *See* Kaufman, *supra* note 10.
39. *Id.*
40. Edelman, *supra* note 2.
41. *Id.*
42. U.S. CONST. amend. I.
43. *Beverley*, 587 N.E.2d at 278.
44. *Stephano*, 474 N.E.2d at 585.
45. *Beverley*, 587 N.E.2d at 278–279. Courts switch back and forth between the phrases "consumer interest" and "public interest." It appears that courts use the terms interchangeably. *See Stephano*, 474 N.E.2d at 584–585.
46. *Beverley*, 587 N.E.2d at 278–279.
47. *Id.* at 278.
48. *See id.* at 278–279.
49. *Id.* at 279.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *See Davis v. Duryea*, 417 N.Y.S.2d 624 (App. Div. 1979).
55. *Id.* at 626.
56. *See id.*
57. *Id.*
58. *Id.* at 627.
59. *See id.* at 628.
60. *See* ABI Web site, Home, *supra* note 32.
61. Interlock Facts Web site, *supra* note 1.
62. ABC News Web site, *Lohan Mugshot Launches Drink-Driving Ad*, http://www.abc.net.au/news/stories/2008/05/03/2234374.htm (last visited April 12, 2010).
63. ABI Web site, Home, *supra* note 32.
64. U.S. CONST. amend. XVIII, § 1; U.S. CONST. amend. XXI, § 1.
65. *Beverley*, 587 N.E.2d at 278–279.
66. *See generally* U-S-History.com, http://www.u-s-history.com/pages/h1054.html (last visited April 12, 2010).
67. *Beverley*, 587 N.E.2d at 278 – 279.
68. ABI Web site, About Us, *supra* note 3.
69. *See* Interlock Facts Web site, *supra* note 1.
70. *Id.*
71. Edelman, *supra* note 2.
72. *Id.*
73. *Davis*, 417 N.Y.S.2d at 628.
74. Kaufman, *supra* note 10.

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Ethics Opinion 836

Committee on Professional Ethics of the New York State Bar Association (1/12/09)

Topic: Dual representation of Guardian and incapacitated person in a proceeding to terminate the guardianship.

Digest: Lawyer who previously represented incapacitated Client in connection with the appointment of a Guardian for Client may later undertake dual representation of both Client and Guardian in a proceeding to terminate the guardianship, provided (a) Lawyer reasonably believes that Lawyer will be able to competently and diligently represent both clients, and (b) Lawyer obtains informed consent from each client, confirmed in writing.

Rules: 1.0(e); 1.0(j); 1.7; 1.14

Comments: Comment 28 to Rule 1.7

Question

[1.] May Lawyer, who previously represented an incapacitated Client in connection with the appointment of a Guardian for Client, later represent both Client and Guardian in a proceeding to terminate the Guardianship?

Opinion

[2.] Lawyer represented an incapacitated Client in connection with the appointment of a Guardian for Client. At that time, Guardian (one of Client's adult children) was appointed with Client's consent. Some time later, Client, Guardian, and Client's other adult children all agreed that the guardianship should be terminated. The reasons for terminating the guardianship are twofold: (1) Client has been living independently and no longer needs a Guardian, and (2) Guardian is planning to move across the country.

[3.] Client and Guardian have asked Lawyer to represent them both in a proceeding to discharge the Guardian. We will assume that the court wishes both Client and Guardian to be represented and approves of this dual representation.

[4.] There is always the possibility that a conflict of interest will arise between a guardian and the incapacitated person who is or will be the subject of the guardianship. While such conflicts might be more likely to arise at the inception of guardianship proceedings, they might also occur in connection with the termination of the guardianship. For example, it might be that the guardian seeks to escape the responsibilities of the guardianship even though the incapacitated person would be better served by continuing it. Here, the fact that the Guardian wishes to terminate the guardianship in anticipation of moving across country raises this possibility.

[5.] The proposed dual representation of Guardian and Client in a proceeding to terminate the guardianship must be analyzed under Rule 1.7 of the New York Rules of Professional Conduct, which took effect on April 1, 2009. Rule 1.7 provides:

RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent

and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[6.] The proposed dual representation will involve Lawyer in representing differing interests because a person who has been found to be incapacitated in the past presumably needs a guardian until proven otherwise, while the Guardian here wishes to be relieved of his guardianship responsibilities. The differing interests create a conflict under Rule 1.7(a)(1). Therefore, the conflict must be analyzed under Rule 1.7(b)(1)-(3) to determine whether it is consentable (*i.e.*, waivable).

[7.] It appears at present that the parties are aligned in interest and agree that the guardianship should be terminated, so any serious clash of interests between Client and Guardian is merely a future possibility. Therefore, unless other factors or circumstances of which we are unaware suggest a different conclusion, we think Lawyer may reasonably believe that he will be able to provide competent and diligent representation to both parties (Client and Guardian) in this matter. In particular, the belief appears reasonable because this representation does not occur in an adversarial setting and the whole matter will be under the supervision of the court.

[8.] If Lawyer, based on an appropriate investigation, reasonably believes that he can provide competent and diligent representation to both clients, then Rule 1.7(b)(1) does not prohibit the dual representation. Moreover, because the proposed dual representation is not prohibited by law and will not involve the lawyer in asserting a claim by either client against the other, neither Rule 1.7(b)(2) nor Rule 1.7(b)(3) prohibits the dual representation. Provided Lawyer meets the standards set forth in Rule 1.7(b)(1)-(3), the conflict is consentable.[1]

[9.] Consentability alone, however, is not enough. When a conflict is consentable, Rule 1.7(b)(4) requires that Lawyer actually obtain informed consent, confirmed in writing, from each of the clients. Rule 1.0(e) defines "confirmed in writing," and we assume Lawyer will confirm any consent in writing in accordance with that definition. Rule 1.0(j) defines the crucial term "informed consent" as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

[10.] Accordingly, Lawyer must fully inform each party of the possible risks of the dual representation. One such risk is that material disagreements may later arise between the two clients that will preclude Lawyer from reasonably believing that he can continue to provide competent and diligent representation to each of them. In that case, Lawyer would no longer be able to represent both clients, and both clients would have to engage new lawyers unless one client (who would now be a former client) gives informed consent, confirmed in writing, for the lawyer to continue representing the other client.

[11.] When obtaining informed consent from Client, Lawyer must take special care because Client is presently deemed to be incapacitated and under guardianship. However, three sources – Rule 1.14 our Rules of Professional Conduct[2], our prior opinion in N.Y. State 746[3], and New York's Mental Hygiene Law[4]—all support the conclusion that Client may consent to this dual representation despite Client's present legal designation of incapacity. Of course, Lawyer must carefully assess

Client's capacity to understand the conflict and to make a reasoned decision whether to consent to the representation despite the conflict. This careful assessment is necessary because if Client's capacity to make reasoned decisions is so diminished that she cannot give informed consent to the dual representation, then Lawyer cannot satisfy the informed consent requirement of Rule 1.7(b)(4). If a lawyer cannot satisfy the informed consent requirement of Rule 1.7(b)(4), then the lawyer cannot undertake the dual representation.

[12.] In seeking Client's informed consent to the dual representation, Lawyer must take Client's capacity into account and provide Client with information and explanations suitable to Client's understanding. Again, since the discharge of the Guardian will take place only if the court determines it is appropriate, any concerns we might have about the feasibility of obtaining informed consent from the incapacitated Client are substantially mitigated.

Conclusion

[13.] Lawyer who previously represented an incapacitated Client in connection with a the appointment of a Guardian for Client may later undertake dual representation of both Client and Guardian seeking termination of the guardianship, provided Lawyer reasonably believes that Lawyer will be able to competently and diligently represent both clients and Lawyer obtains informed consent from each client, confirmed in writing.

Endnotes

1. Comment 28 to Rule 1.7 recognizes that "[w]hether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation if their interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them."
2. Rule 1.14 ("Client with Diminished Capacity") deals with representing a person with diminished capacity and directs that "the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client."
3. In N.Y. State 746 (2001) (which was based on provisions of the New York Lawyer's Code of Professional Responsibility then in effect), we said "there is generally no bar to representing a client whose decision making capacity is impaired, but who is capable of making decisions and participating in the representation. Insofar as the client is making reasoned decisions concerning those matters that are for the client to decide and these decisions appear to be in the client's best interests, there would ordinarily be no need for the lawyer even to consider withdrawing from the representation or seeking the appointment of a guardian who would substitute his or her judgment for that of the client." This is consistent with recognizing an incapacitated client's ability to consent to the dual representation.
4. The Mental Hygiene Law mandates that an incapacitated person should be afforded the greatest amount of independence and self-determination possible, and states that an incapacitated person retains all of the powers and rights except those which are specifically granted to the guardian. N.Y. Mental Hyg. Law § 81.20 and 81.29.

(34-09)

Ethics Opinion 837

Committee on Professional Ethics of the New York State Bar Association (3/16/10)

Topic:	Confronting false evidence and false testimony.
Digest:	Rule 3.3 of the New York Rules of Professional Conduct requires an attorney to disclose client confidential information to a tribunal if disclosure is necessary to remedy false evidence or testimony. The exception in former DR 7-102(B)(1) exempting disclosure of information protected as a client "confidence or secret" no longer exists.
Rules and Code:	Rule 1.0(k); Rule 1.6; Rule 1.16; Rule 3.3; DR 4-101; DR 7-102
Comments:	Comment 3 to Rule 1.6, Comments 7, 8, 10 & 11 to Rule 3.3

Question

1. Inquiring counsel's client gave sworn testimony at an arbitration proceeding concerning a document. The document was admitted into evidence based upon the testimony. Counsel's client also testified concerning the client's actions in preparing the document and submitting the document to the client's employer.

2. In a later conversation between client and counsel, the client informed counsel that the document was forged. Counsel thereby came to know that the document and some of the client's testimony concerning the document were false.

3. Inquiring counsel raises the following questions:

   (1) Is counsel required to inform the tribunal that the document in question is a forgery and that some of the testimony relating to the document is false?

   (2) If not, what other steps would constitute reasonable remedial measures? In particular, would it suffice for counsel to inform the tribunal and opposing counsel that the evidence and any testimony relating to it are being withdrawn, and that he intends to proceed based on all other evidence properly before the tribunal?

   (3) Is counsel required to withdraw from representation of the client? If so, would withdrawal constitute a reasonable and sufficient remedial measure?

Opinion

4. The New York Rules of Professional Conduct (the "Rules") were formally adopted by the Appellate Divisions and took effect on April 1, 2009. The Rules replaced the New York Code of Professional Responsibility (the "Code"). The Rules are now codified at 22 NYCRR Part 1200 (as was the Code previously). Comments to the Rules also took effect on April 1, 2009 but have been adopted only by the New York State Bar Association, not by the courts.

The Old Code and the New Rules

5. In the former New York Code of Professional Responsibility, DR 7-102(B) provided (with emphasis added):

> A lawyer who receives information clearly establishing that:
>
> (1) the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a confidence or secret*.

The New Rules

6. Rule 3.3 ("Conduct Before a Tribunal") now covers the same ground that was previously covered by DR 7-102. Rule 3.3(a)(3) provides, in relevant part:

> If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(b) provides, in relevant part:

> A lawyer who represents a client before a tribunal and who knows that a person…is engaging or has

> engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Rule 3.3(c) provides:

> The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.[1]

Analysis of the Changes

7. In Roy Simon, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part II)*, N.Y. Prof. Resp. Report, March 2009, Professor Simon characterized Rule 3.3 as:

> perhaps the most radical break with the existing Code. Under DR 7-102(B)(1) of the current Code of Professional Responsibility, if a lawyer learns ("receives information clearly establishing") after the fact that a client has lied to a tribunal, then the lawyer "shall reveal the fraud" to the tribunal, "except when the information is protected as a confidence or secret"—which it nearly always will be, because disclosing that a client has committed perjury is embarrassing and detrimental to the client. Thus, the exception swallows the rule, and confidentiality trumps candor to the court in the current Code. In contrast, Rule 3.3(a) provides that if a lawyer or the lawyer's client has offered evidence to a tribunal and the lawyer later learns ("comes to know") that the evidence is false, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) makes crystal clear that the disclosure duty applies "even if" the information that the lawyer discloses is protected by the confidentiality rule (Rule 1.6). This is a major change from DR 7-102(B)(1)….

8. As noted in Comment [11] to Rule 3.3:

> A disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. *See*, Rule 1.2(d).

9. By its terms, DR 7-102(B)(1) came into play only if (1) the attorney "receive[d] information clearly establishing that" (2) a "fraud" had been perpetrated upon a person or tribunal.

10. Thus, the benchmark for invoking counsel's responsibility has shifted from DR 7-102(B)'s receipt of information clearly establishing fraud on a tribunal to Rule 3.3(a)'s standard of "actual knowledge of the fact in question." Rule 1.0(k) defines "knowingly," "known," "know," or "knows" with the proviso that "[a] person's knowledge may be inferred from circumstances." That definition is consistent with Rule 3.3, Comment [8], which observes:

> The prohibition against offering or using false evidence applies only if the lawyer knows that the evidence was false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. *See*, Rule 1.0(k) for the definition of "knowledge." Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

11. Another difference between the old Code and the new Rules is that DR 7-102(B)(1) required a "fraud" to have been perpetrated. Rule 3.3(b) likewise applies only in the case of "criminal or fraudulent" conduct, but Rule 3.3(a)(3) requires a lawyer to remedy false evidence even if it was innocently offered.[2]

12. Remedial measures are limited, however, by CPLR §4503(a)(1), the legislatively enacted attorney-client privilege. The attorney-client privilege takes precedence over the Rules because the Rules are court rules rather than statutory enactments. However, CPLR §4503's limit on remedial measures extends only to the introduction of protected information into evidence. As explained in Comment [3] to Rule 1.6:

> The principle of client-lawyer confidentiality is given effect in three re-

lated bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order.

See Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality: The New Iowa Rules of Professional Conduct*, 55 Drake L. Rev. 347, 381-384 (Winter 2007) (contrasting exceptions to Iowa's confidentiality rule with exceptions to Iowa's attorney-client privilege and asserting that such exceptions "are not exceptions to the attorney-client privilege"); Gregory C. Sisk, *Rule 1.6: Confidentiality of Information*, 16 Ia. Prac., Lawyer and Judicial Ethics § 5:6(d)(4)(E) (2009 ed.).

13. As elaborated by Professor Sisk, *Rule 3.3: Candor Toward the Tribunal*, 16 Ia. Prac., Lawyer and Judicial Ethics § 7:3(e)(3) (2009 ed.):

> Unless an exception to confidentiality under the rules (such as the Rule 3.3 duty to disclose false evidence) is directly co-extensive with an exception to the attorney-client privilege, the lawyer is authorized or required to share information only in the manner and to the extent necessary to prevent or correct the harm or achieve the designed purpose, but not to testify or give evidence against the client. When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney-client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary forms, namely sharing the information with the appropriate person or authorities. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.[3]

See also, Michael H. Berger and Katie A. Reilly, *The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges*, 38-JAN Colo. Law. 35, 38 (January 2009) (concluding that privileged communications are subject to the permissive disclosure provisions of Rule 1.6).

14. In the criminal, as opposed to civil, sphere, Rule 3.3's mandate to disclose client confidential information may be limited or prohibited by the Fifth Amendment (self-incrimination) and/or the Sixth Amendment (ineffective assistance of counsel) to the United States Constitution. *See* Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 Geo. J. Legal Ethics 133 (Winter 2008). As explained in Comment [7] to New York Rule 3.3:

> The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.

15. Some decisions construing Rule 3.3's predecessor (DR 7-102) did not find such constitutional limitations, but those decisions addressed "future perjury" situations. *See*, *e.g., People v. Andrades*, 4 N.Y.3d 355 (2005) (defendant was not deprived of his rights to effective assistance of counsel and to a fair suppression hearing when his attorney advised the court, prior to defendant's testimony at a *Huntley* hearing, that counsel wished to present the client's testimony in narrative form, or else withdraw from the case, pursuant to the mandates of DR 7-102(A)(4)—(8)); *People v. DePallo*, 96 N.Y.2d 437 (2001) (defendant was not deprived of his right to effective assistance of counsel when his attorney disclosed to the court that defendant intended to commit perjury); *People v. Darrett*, 2 A.D.3d 16 (1st Dep't 2003) (defendant's counsel improperly revealed more than necessary to the court to convey what proved to be an inaccurate belief that the defendant would commit perjury); *Nix v. Whiteside*, 475 U.S. 157 (1986) (right to effective assistance of counsel was not violated by attorney who refused to cooperate in presenting perjured testimony). Situations involving past rather than future perjury will of necessity await further judicial development.

Duration of the Duty to Take Remedial Measures

16. The New York State Bar Association recommended that New York Rule 3.3(c) track ABA Model Rule 3.3(c), and thus include the proviso that "[t]he duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.…" The State Bar's proposal also included a Comment [13] to Rule 3.3, which explained that proposed Rule 3.3(c) "establishes a practical time limit on the mandatory obligation to rectify false evidence or false statements of law and fact. The conclusion of the proceeding is a reasonably definite point for the termination of the mandatory obligation." *See* Proposed Rules of Professional Conduct, pp. 132-138 (Feb. 1, 2008). But the State Bar's proposal was not embodied in New York Rule 3.3(c) as adopted by the Appellate Divisions. Therefore, the duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. *Cf.*, N.Y. County 706, n. 1 (1995) (noting that under ABA Rule 3.3(b) the duty to take remedial measures would end at the close of the proceeding). This Committee has noted that the endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. *See* N.Y. State 831, n.4 (2009).

Application to the Facts on This Inquiry

17. Rule 3.3(a)(3) does not apply unless the false evidence or testimony that has been offered is also "material." While inquiring counsel has not specifically addressed the question of materiality, for purposes of this opinion we assume that the testimony and the documentary evidence at issue were "material." *See, e.g.*, N.Y. County 732 (2004) at p.5 (discussion of the materiality requirement under DR 4-101(C) that permitted withdrawal of a lawyer's opinion if based on "materially inaccurate" information). Were this not the case, inquiring counsel would be under no obligation to take any remedial action, and would instead be bound by the usual obligation to safeguard confidential information imposed by Rule 1.6.

18. Here, whether inquiring counsel's conversation with his client constituted a communication covered by the attorney-client privilege presents an issue of law beyond the Committee's purview. *See, e.g.*, N.Y. State 674 (1994) (noting that whether disclosure is "required by law or court order" is a question beyond the Committee's jurisdiction). However, inquiring counsel has stipulated that he now "knows" that his client has offered material evidence and testimony which was false. Rule 3.3(a)(3) therefore requires inquiring counsel to "take reasonable remedial measures," whether or not the client's conduct was "criminal or fraudulent" (the standard for invoking 3.3(b)).

19. Disclosure of the falsity, however, is required only "if necessary." Moreover, because counsel's knowledge constitutes confidential information under Rule 1.6, and does not fall within any of the exceptions contained in Rule 1.6(b), if disclosure is not "necessary" under Rule 3.3, it would also not be permitted under Rule 1.6. Therefore, if there are any reasonable remedial measures short of disclosure, that course must be taken.

20. In the situation addressed in this opinion, inquiring counsel has suggested an intermediate means of proceeding—he would inform the tribunal that the specific item of evidence and the related testimony are being withdrawn, but he would not expressly make any statement regarding the truth or falsity of the withdrawn items. The Committee approves of this suggestion. This would be the same sort of disclosure typically made when an attorney announces an intent to permit a criminal defendant client to testify in narrative form. It may lead the court or opposing counsel to draw an inference adverse to the lawyer's client, but would not involve counsel's actual disclosure of the falsity. *See People v. Andrades*, 4 N.Y.3d 355 (2005) (counsel advised the court that he planned to present defendant's testimony in narrative form, and counsel's disclosure was open to inference that defendant planned to perjure himself, but counsel's action was proper because it was a passive refusal to lend aid to perjury rather than an unequivocal announcement of counsel's client's perjurious intentions); *Benedict v. Henderson*, 721 F.Supp. 1560, 1563 (N.D.N.Y. 1989) (affirming counsel's use of the narrative form of testimony "without intrusion of direct questions," because counsel thereby met his "obligation…not to assist in any way presenting false evidence").

21. Inquiring counsel should be aware that before acting unilaterally, he should bring the issue of false evidence to the client's attention, and

seek the client's cooperation in taking remedial action. Comment [10] to New York Rule 3.3 provides:

> The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunals is reasonably necessary to remedy the situation.…

Counsel's actions are thus mandated by Rule 3.3(a)(3) (after client consultation) and are not subject to the client's veto.

22. Counsel remains under the continuing obligation of CPLR § 4503(a) to refrain from offering attorney-client privileged evidence adverse to the client, and in fact is under a continuing obligation to invoke the attorney client-privilege if called to testify or otherwise produce evidence adverse to the client. In addition, counsel should be cognizant of the restriction on *ex parte* communications noted in Rule 3.5(a)(2), and in related Comment [2] to New York Rule 3.5.

23. Since counsel is able to proceed without violating these Rules, withdrawal from representation pursuant to Rule 1.16(b) (1) is not required. Indeed, since it would not undo the effect of the false evidence, withdrawal would be insufficient to qualify as a "reasonable remedial measure" under Rule 3.3(a).

Conclusion

24. Rule 3.3 requires an attorney to take reasonable remedial measures even if doing so would entail the disclosure to a tribunal of client confidential information otherwise protected by Rule 1.6. However, if reasonable remedial measures less harmful to the client than disclosure are available, then disclosure to the tribunal is not "necessary" to remedy the falsehood and the attorney must use measures short of disclosure.

Endnotes

1. Rule 1.6 ("Confidentiality of Information") governs a lawyer's obligation to safeguard "confidential information." "Confidential information" under the Rules includes what were formerly referred to under the Code as confidences and secrets. *Compare* former DR 4-101(A) of the Code, with Rule 1.6(a).
2. To the extent that this Committee's prior opinions in N.Y. State 674 (1994), N.Y. State 681 (1996), and N.Y. State 797 (2006) premised their results upon the inability of the Committee to ascertain whether a "fraud" had occurred or was occurring, or upon the existence of an "exception" which relieved an attorney of the obligation to disclose a fraud on a tribunal if the fraud was discovered by the attorney via a client confidence or secret, those results would today require re-analysis in light of the existing Rules.
3. The attorney-client privilege itself would not cover material which falls under the crime-fraud exception to the attorney-client privilege. Because the crime-fraud exception has typically been applied in situations involving documentary discovery which are quite different from the scenarios contemplated by Rule 3.3, and because the crime-fraud exception has been interpreted to apply only to situations in which the client communication was itself in furtherance of the crime or fraud (*see, e.g., United States v. Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) ("[A] party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof."); *Linde v. Arab Bank, PLC*, 608 F.Supp.2d 351, 357 (E.D.N.Y. 2009) (quoting *U.S. v. Richard Roe, Inc.* for the proposition that the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud), the precise nature of the interplay between Rule 3.3, the attorney-client privilege, and the crime-fraud exception to that privilege remains to be explored in future court decisions and ethics opinions.

(41-09, 46-09)

Ethics Opinion 838

Committee on Professional Ethics of the New York State Bar Association
(3/10/10)

Topic Whether a rule-making or rate-making proceeding before an administrative agency or one of its officials should be considered as being before a "tribunal" for purposes of the Rules; and whether ex parte communications in such a proceeding are prohibited.

Digest: Whether a rule-making or rate-making proceeding before an administrative agency or one of its officials should be considered a proceeding before a "tribunal" for purposes of the Rules is a question of fact. Principles that would apply to the determination include (a) whether individual parties will be affected by the decision; (b) whether the parties have the opportunity to present evidence and cross-examine other providers; and (c) whether the ultimate determination will be made by a person in a policy-making role or instead by an independent trier of fact such as an administrative law judge. Even if the proceeding is before a "tribunal," Rule 3.5 does not apply unless the proceeding is an "adversary proceeding" and the agency does not have its own rules or regulations authorizing ex parte communications in connection with such proceedings.

Rules: 1.0(l), 1.0(w), 1.7, 1.16, 3.3, 3.4, 3.5, 3.7, 3.9, 4.1-4.4, 8.3, 8.4

Question

1. When would a proceeding before a New York State administrative agency, such as the Public Service Commission, be considered a proceeding before a "tribunal" for purposes of the New York Rules of Professional Conduct? Is the relevant criterion what the Agency is doing (i.e., adjudication versus rulemaking) or how it is acting (i.e., using an adjudicative process)?

2. If an Agency rule-making or rate-making proceeding qualifies as being before a "tribunal," does Rule 3.5 always prohibit a lawyer from communicating ex parte as to the merits of the matter with a judge or other official of the tribunal?

Discussion

What is a tribunal?

3. Many of the rules in the New York Rules of Professional Conduct (the "Rules"), as effective April 1, 2009, prescribe lawyer conduct when acting before a tribunal. *See, e.g.,* Rule 1.7(b)(3) (conflicts in proceedings before a tribunal), Rule 1.16(c)(13) & (d) (withdrawal in matters pending before a tribunal), Rule 3.3 (candor to a tribunal), Rule 3.4 (fairness to opposing parties and counsel in appearances before a tribunal), Rule 3.5 (impartiality of tribunals), Rule 3.7 (lawyer as witness in matter before a tribunal), and Rule 8.3 (reporting misconduct to a tribunal).

4. The New York Code of Professional Responsibility, which was effective prior to the adoption of the Rules, defined "tribunal" as including "all courts, arbitrators and other adjudicatory bodies." See Definition 6. The ABA Model Rules of Professional Conduct did not define the term "tribunal" until 2001, when the ABA adopted a definition of "tribunal" that included not only courts but also binding arbitration, legislative bodies, administrative agencies or other bodies "acting in an adjudicative capacity." The definition of "tribunal" in the New York Rules adopts the definition in the ABA Model Rules. Specifically, New York's definition of "tribunal, which appears in Rule 1.0(w), reads as follows:

> "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

5. Under this definition, acting in an adjudicative manner is not enough to bring agency proceedings within the definition of a tribunal. An administrative agency qualifies as a "tribunal" only when a neutral official, after presentation of evidence or legal argument by a "party or parties," will render a judgment that directly affects the party's interests in a particular matter. The definition of "matter," which is found in

Rule 1.0(l), includes an "administrative proceeding … involving a specific party or parties."[1]

6. In many administrative agencies, a rule-making proceeding is not a matter before a "tribunal" within the meaning of the Rules because rule-making does not involve a specific party or parties. Rather, rule-making applies generally to all covered persons. In some cases, the agency's procedures may include elements that are also found in an adjudicative proceeding. For example, the proceeding might involve the taking of testimony in formal hearings. However, we believe it is not the taking of testimony or a formal hearing that characterizes a tribunal, but rather the rendering of a legal judgment on the law and the evidence that directly affects the interests of one or more parties to the matter.

7. There is evidence in Rule 3.9, entitled "Advocate in Non-Adjudicative Matters," that the drafters of the Rules did not consider rule-making to be an "adjudicative" procedure.[2] Comments [1] and [1A] to that rule state (with emphasis added):

   > [1] In representation before bodies such as legislatures, municipal councils and executive and administrative agencies acting in a *rule-making* or policy-making capacity, lawyers present facts, formulate issues and advance argument regarding the matters under consideration. *The legislative body or administrative agency is entitled to know that the lawyer is appearing in a representative capacity.* Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. Representation in such matters is governed by Rule 4.1 through 4.4 and 8.4.
   >
   > [1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

8. Comment [1] to Rule 3.9 indicates that, when a lawyer is representing a client before an administrative agency acting in a rule-making capacity, the representation is governed by Rules 4.1 through 4.4 and 8.4.

9. Comment [1A] makes clear that, when a lawyer is acting before a tribunal, disclosure of the client's name is imperative. However, when a lawyer is representing a client in a rule-making proceeding, the lawyer need disclose only that he or she is acting in a representative capacity —the lawyer need not disclose the name of the client. The clear implication of this difference—a lawyer must disclose a client's name when representing a client before a tribunal but not when representing a client in a rule-making proceeding—is that the drafters of the Rules did not consider rule-making to be a proceeding before a "tribunal."

10. Rate-making proceedings may be difficult to classify. They may sometimes be adjudicatory in nature and sometimes not. Rate-making proceedings often affect individual parties, and often involve an administrative law judge who will take evidence and make a recommendation to the agency. However, the determination of rates is often a political or quasi-legislative process, which is based on policy considerations as well as evidence of costs. Such quasi-legislative and policy considerations may implicate the rights of participants to petition the government within the meaning of the First Amendment. ("Congress shall make no law…abridging…the right of the people…to petition the Government for a redress of grievances."). See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (same philosophy that underlies the Petition Clause governs the approach of citizens or groups of citizens to administrative agencies, and the right to petition extends to all departments of the government). Not surprisingly, therefore, Comment [1] to Rule 3.9 indicates that agencies acting in a policy-making capacity are acting in a non-adjudicative capacity.

11. In sum, a government agency may sometimes act in an adjudicative capacity, and thus qualify as a "tribunal," and at other times act in an non-adjudicative capacity, and thus not qualify as a "tribunal." Ultimately, whether the fact-finder in a rule-making or rate-making proceeding should be deemed to be a "tribunal" for purpose of the Rules is a question of fact that is beyond the jurisdiction of this Committee. The Agency's own characterization, or the characterization under the State Administrative Procedure Act, is not necessarily dispositive.

12. To generalize, we believe the determination of whether a particular proceeding is adjudica-

tory will involve one or more of the following factors:

(a) Whether specific parties will be affected by the decision;

(b) Whether the parties have the opportunity to present evidence and cross examine other providers or evidence; and

(c) Whether the ultimate determination will be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

Application of Rule 3.5

13. Rule 3.5, entitled "Maintaining and Preserving the Impartiality of Tribunals and Jurors," is designed to preserve the impartiality of tribunals by prohibiting improper influence through (i) gifts, loans and political contributions, or (ii) ex parte communications. Impartiality is not defined in the Rules, but rather in the Code of Judicial Conduct, where its meaning is given as the "absence of bias or prejudice" for or against "particular parties," and "maintaining an open mind in considering issues." New York Code of Judicial Conduct § 100.0(R).

14. Even if it is determined that a particular rule-making or rate-making proceeding is before a "tribunal" because the proceeding involves a neutral official who, after presentation of evidence or legal argument by a party or parties, will render a judgment, on the facts and the law that directly affects one or more parties' interests in a particular matter, Rule 3.5 would not necessarily apply.

15. New York Rule 3.5(a)(2), regarding communications on the merits of a matter, has no direct counterpart in the ABA Model Rules of Professional Conduct. Rather, Rule 3.5(a)(2) is derived from DR 7-110(B) of the former New York Code of Professional Responsibility. Both DR 7-110(B) and Rule 3.5(a)(2) apply only "in an adversary proceeding." Thus Rule 3.5 would only apply if the particular rule-making or rate-making proceeding were deemed to be an "adversarial proceeding."

16. Moreover, even if the rule-making or rate-making proceeding were deemed to be an "adversarial proceeding," an Agency could still determine on its own that Rule 3.5 should not apply. *See, e.g.*, Rule 3.5(a)(2)(iv), which states:

> A lawyer shall not…in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except…*as otherwise authorized by law*…." [Emphasis added.]

Conclusion

17. Whether a rule-making or rate-making proceeding by an administrative agency or one of its officials should be considered a proceeding before a "tribunal" for purposes of the New York Rules of Professional Conduct is a question of fact. Principles that would apply to the determination include (a) whether individual parties will be affected by the decision; (b) whether the parties have the opportunity to present evidence and cross-examine other providers; and (c) whether the ultimate determination will be made by a person in a policy-making role or instead by an independent trier of fact, such as an administrative law judge.

    Even if the proceeding is determined to be one before a "tribunal," Rule 3.5's restrictions on communicating with the tribunal would apply only if (i) the proceeding is determined to be an "adversary proceeding," and (ii) the agency has not adopted its own rules or regulations authorizing ex parte communications in connection with such proceedings.

Endnotes

1. Because the definition of "matter" in the Rules requires a specific party or parties, we do not give dispositive weight to the decision of the New York Court of Appeals in *Allied Chemical v. Niagara Mohawk*, 72 N.Y.2d 271 (1988). In that case, the Appellate Division found that certain Public Service Commission rulemaking proceedings that involved notice and comment and other "adjudicative-type procedural safeguards" were "quasi-judicial." Since the PSC's rulemaking proceeding had given Allied Chemical a full and fair opportunity to contest the same issue that would be determined in the second proceeding, the Court of Appeals held that the doctrine of collateral estoppel would prevent Allied from litigating the issue before a court. The finding that the PSC proceeding was "quasi-judicial" for purposes of collateral estoppel, however, is not dispositive of whether that type of PSC proceeding satisfies the definition of "tribunal" under the Rules.

2. We also note that the State Administrative Procedure Act ("SAPA") provides certain rules with respect to rule-making (SAPA Article 2) and adjudicatory proceedings (SAPA Article 3). In that regard, SAPA § 102(2)(ii) defines a "rule" as including "prescription for the future of rates," although certain rules regarding subscriber rates contained in an application to the Public Service Commission are not included. Similarly, SAPA § 102(3) defines an "adjudicatory proceeding" as an activity "which is not a rule making proceeding…in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing."

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