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Journal

PROTECTING SECRETS ON THE NET

Inside

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CONTENTS

DEPARTMENTS

ON THE COVER

This month's cover is a graphic rendition of the complexity and density of information traveling throughout the Worldwide Web.

Cover Design by Lori Herzing.

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2002 by the New York State Bar Association.

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President's Message

LORRAINE POWER THARP

Tapping Our Talent

I have had a Gershwin composition playing – and replaying – in my mind over the past week. It is the one describing the two persons who seemingly have different vantage points on every aspect that they discuss.

> You say E-ther and I say I-ther.
>
> You say nE-ther and I say nI-ther.
>
> You like potay-to and I like po-tah-to.
>
> You like to-may-to and I like to-mah-to.

And so the situation goes, with the couple getting caught up in their divergent approaches and diminishing the magnetism that attracted them to each other. But, happily, the singer suggests that they bridge these divides and enjoy each other's strengths and common bonds.

> For we know we need each other so we
>
> Better call the calling off off,
>
> Let's call the whole thing off![1]

Thoughts of our Association turned on this tune. Specifically coming to mind was the diversity of experience and perspective that our members bring to our collective table. Out of that diversity, as we have seen so many times during debates in the House of Delegates, comes reasoned approaches strengthened by review of the various considerations. I contemplated the potential that we have, by pooling this array of skill, which can enable us to speak and act with power and passion for the profession. I was not alone in these musings.

Joining me in this theme were members of our Executive Committee, as we met in a three-day strategic planning retreat in my home base of Saratoga Springs, on means of tapping the tremendous talent found in our Association. We need to make our voice and advocacy stronger in legislative action, media and public communications, through collaboration, innovation and being in a position to seize every opportunity. In addition, we examined ways to build and promote an active involved membership reflective of today's profession, and to meet the needs of our members. Our discussions were intensive and lively. We heard from and engaged in dialogue with the chairs of relevant committees, and others versed in the issues at hand who aided us in making a candid assessment of our present efforts and in devising plans to do more, more effectively.

The Executive Committee was guided in the process by the skillful hand of past President Justin Vigdor. And we gained from the keynote remarks of Associate Judge Richard Wesley of the Court of Appeals and American Bar Association President A.P. Carlton, Jr., as we reviewed our common missions and our current initiatives. We also traced our roots, recalling the NYSBA's founding convention in Albany in 1878 and visiting City Court in Saratoga where a plaque commemorates the inaugural meeting of the ABA held there two years later. We heartily concurred with Judge Wesley's call for increased efforts to speak, with pride, about the extensive work of the profession on behalf of society. We need to explain what we stand for and that members of the profession go far beyond words to express these principles and values.

In each area – legislative advocacy, media communications and public information, membership development and involvement, and practical services for members – it was clear that changing conditions within the practice of law and with life in general necessitate fresh, more concerted and focused approaches. Those approaches need to be attuned to today's fast-paced, information-saturated society where the competition to be heard above the crowd is a daily challenge. We have taken important steps – among them, the extensive redevelopment of our Web site, online CLE programs, beginning the implementation of the report of our Special Committee on Legislative Advocacy approved by the House in January, and conducting research asking you to tell us your member needs and what you want your Association to be.

The retreat was designed to bring together, as a potent force, the substantive expertise of our sections and committees regarding how the legal process should function and problem-solving ability to force solutions for improvement; effectively explaining to lawmakers the practical need for action and the impact resulting from lack of attention; increasing awareness and understanding by bringing the Association's message to the media and public forums; making use of technology and involving members in these efforts. We examined and devised steps to strengthen our membership. We have created implementation groups to put these steps

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into action in coordination with our sections and committees.

The evolution of an Association proposal for change in the law and procedure is the result of a member who brings the matter to the attention of his or her section or committee. The idea becomes the subject of study, discussion by colleagues in the field of concentration who share their experiences and possible approaches, developing into a report with recommended actions that is then considered by the Association's Executive Committee and House of Delegates, who bring additional backgrounds and perspectives. Through cultivation, the problem that needed solving or the provision that needed improving has become a resource for the profession to advance the effectiveness of the law and legal process. Clearly, the collective thinking of our membership, based on the principles of the justice system and practical experience, is our most important asset.

In our retreat, the Executive Committee discussed the powerful force of our ideas and the need to ensure that we do all we can to leverage these measures to meet today's needs. It is at this point in their development when these proposals are the most vulnerable and need a multi-faceted and tailored communications strategy, taking our case to the key lawmakers, media and the public, painting the human face and human cost of inaction on the problem, building alliances with other organizations to advocate for this cause, and informing and involving members on the need to speak out on the issue. The specific plans being formulated out of our retreat will harness these elements to enable our voice to carry over the cacophony.

Our retreat discussions were not limited to legislative and communications actions. We also want to ensure that this is an Association of action and opportunity and an Association that represents, at every level – not just in numbers - the diverse fabric of the profession today, from Montauk to Massena and beyond. The Executive Committee agreed that we have more work to do in outreach and structure. We look forward in coming months to the recommendations being developed by our Special Committee on Association Governance and to the implementation work being undertaken by the Gender Equity Task Force established to pursue the recommendations of the Committee on Women in the Law. Plaudits also go to our Business Law Section for its development and pursuit of a diversity plan. Meanwhile, building on these measures and the retreat discussions, the Executive Committee is formulating concrete actions to reach out to traditionally underrepresented colleagues in our profession, and to engage, involve and advance members in our Association. These are vital steps in ensuring a vigorous and strong organization.

The reflection of diversity brings me back to the Gershwin brothers, whose music is classic and the source of discovery for generations of music lovers, and to that particular tune recycling in my mind. So let us stop, like the couple in the song, and take a fresh look at our responsibility for building our Association in membership, in active participation, and in proactive initiatives to advance the law and legal process. By so doing, we will learn and gain from the strength of our diverse experiences and our mutual dedication to justice.

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1. "Let's Call the Whole Thing Off," George and Ira Gershwin, from *Shall We Dance* (1937).

Protecting Trade Secrets From Disclosure on the Internet Requires Diligent Practice

BY VICTORIA A. CUNDIFF

The CIA has announced that its release of hundreds of intelligence reports on its Internet site for Gulf War veterans before adequately reviewing them for national security issues had done "serious damage to intelligence sources and methods." But it concluded that it was too late to do anything about it. "Many Gulf War veterans had already copied them [from the Web site], and a private Washington publishing house defied Pentagon and CIA officials and released the entire set of documents on its own Internet site."[1]

The Canadian government was embarrassed to discover that one of its military's top-secret electronic eavesdroppers had posted on his individual Web page the names, photos, and location of CF-18 pilots based in Italy before and during the war in Yugoslavia, along with details of his duties.[2] The Canadian Defense Department also made available on its own Web site a list of personnel working with its electronic espionage agency.[3] Analysts expect that the information has probably been downloaded by "every intelligence agency in the world."

Such disasters could happen to you. The Internet, at least in its public access areas, is no place for secrets. Some commentators estimate that as many as 150 million people can access the Internet worldwide. Scores of millions access it routinely in the United States alone. These viewers all can examine, download, copy, and broadly retransmit both publicly posted information and e-mail directed to them personally without the knowledge of the owner of the information.

To qualify for protection as a trade secret, information must be kept secret. A trade secret "derives independent economic value, actual or potential, from not being generally known to" others and "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[4] "Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret."[5] Clearly, then, there is an almost deadly tension between the Internet and trade secrets. The Internet can destroy trade secrets almost instantaneously by exposing them to millions of viewers. And, indeed, even if a secret is removed from online, a "cached" version of the text incorporating the secret may remain resident in search engines for months to come. It could remain on viewers' hard drives forever.

This article looks at practical tips on how to prevent release of secrets on the Internet, considers the legal consequences of disclosure on the Internet, and addresses what can be done if the worst happens.

Losing Secrets on the Internet

It is easy to understand why secrets can be destroyed on the Internet. Making a secret publicly available to potentially millions of viewers is inviting trouble. But how can secrets get on the Internet in the first place? Several ways:

- Companies actually post them deliberately, with no thought for, or understanding of, the consequences. Examples include Web sites listing the company's new sales contracts and strategic visions for the future or incorporating or revealing the company's proprietary software or new product plans. The CIA's hurried but unreviewed posting falls into this category.
- Companies post their secrets carelessly. Thus, for example, marketing personnel may post details about products under development without clearing the posting with the personnel actually developing the new products.
- Employees e-mail secrets to third parties for legitimate business purposes, but with inadequate precau-

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She thanks Jennifer Shmulewitz, an associate at the firm, for her research assistance. This article first appeared in the Winter 2000 issue of *Bright Ideas*, a publication of the Intellectual Property Law Section of the New York State Bar Association.

tions against retransmission. Third parties thereafter can freely (or accidentally) retransmit them to countless others, either via direct e-mail or via public posting accessible by wide segments of the public.

• Employees deliberately e-mail secrets to third parties to spirit them out of the company. E-mail is a far more efficient, and sometimes less detectable, way of removing secrets than carrying out boxes of documents in the dead of night. In a much-publicized California suit, Cadence Corporation alleged that this is precisely how its competitor, Avant!, gained a competitive advantage at Cadence's expense. Two recent convictions under the Federal Economic Espionage Act stemmed from e-mail transmissions or Internet offers to sell trade secrets.

Keep in mind that Web sites display not only words. To the initiated, they can also reveal the source code for the software generating the exciting graphics.

• Employees or others publicly post secrets for the express purpose of sabotaging the company owning them. Such activity has been alleged in suits brought by Raytheon, Ford Motor Company, and an affiliate of the Church of Scientology, among others.

• "Hackers" gain entrance to a company's internal computer system or intranet and access and copy stored secrets.

• Cyberspies develop other means to access trade secrets without detection.

Each of these potential threats to trade secrets presents different legal issues and requires different preventive measures.

Web Pages: Postings You Control

Many corporate Web sites are essentially extended corporate advertising, intended to provide consumers and the public with information about the company, its employees, products, and business plans. Companies need to insure that the information they provide on their Web sites does not include trade secrets.

Web sites typically are designed by or for companies. From both a practical and a legal standpoint (at least in the trade secrets context), therefore, the company has control over what appears on its Web page. The company should exercise this control with an eye to taking reasonable measures to protect trade secrets.

Keep in mind that it is not only potential customers who view Web sites. Actual competitors do, too.[6] Listing satisfied customers with whom the company has an ongoing relationship may strike an advertising agency as an important way of demonstrating the company's success. Indeed, it may be the best way. But that way will also almost certainly destroy the company's ability to argue in another context that those customer identities and those particular contracts are confidential. By posting them on the Web page, the company took *no,* let alone "reasonable," precautions to maintain secrecy.[7] Perhaps the central message – that the company has satisfied customers in many geographic and business sectors – could be powerfully conveyed in another way with less risk to corporate secrets.

Similarly, if a company wants to be able to argue that knowing which employees have particular capabilities or are members of a particular development team is confidential information to be protected from recruiters, the company should not post such details on its Web site.

Making sure that corporate personnel who are familiar with what secrets the company wishes to protect review Web postings *before* they are posted is a sound precaution. In many companies, it makes sense to consider review by representatives of several parts of the organization, because marketing, sales, and research and development groups may not all be equally attuned to protecting each other's secrets. This approach should reduce the risk of the "rush to post" syndrome that plagued the CIA. Similarly, in the case of franchises, requiring the franchiser to approve any Web pages franchisees wish to establish is also a practical safeguard.

Reviewing personnel should also be mindful that the secrets of others should not be displayed on the company Web page, either. While the company owning the Web site may not mind displaying its customer list, for example, the customers themselves may want to keep their source of supply secret. When in doubt, check before posting information others can claim to be confidential.

Web Site Development Considerations

Keep in mind that Web sites display not only words. To the initiated, they also can reveal the source code for the software generating the exciting graphics displayed on Web sites. This fact means that Web watchers may be in a position to duplicate those graphics for others, diluting their visual distinctiveness. How to prevent this risk? A legend reserving all rights in the software may help from a legal standpoint, as will a copyright notice. Depending on the nature and value of the software, such a warning may occupy an entire page and may require the viewer's affirmative assent before permitting further access. But such a warning may not fully protect the ideas underlying the software – the domain of trade

secrets – as opposed to the specific expression incorporated in the software – the copyright.

One practical way of protecting most of the software used in connection with a Web site is to write it in a manner that does not display the entire program. Many programs can be written so that all that appears in code visible on the Internet is a series of instructions to merge in files or other programs in response to some action by the user. These other programs, which actually create the graphics, are typically not visible on the Web site and are not downloadable. They are instead executed on the Web server itself and therefore never get into the hands of those who would copy them. This precaution is something Web site developers – and companies who commission them – should keep in mind.

Remember, too, that new software poses new challenges. Java7 software, for example, embeds executable program code into downloadable Web materials. While reverse-engineering such code is currently very difficult, making it a good choice for protecting proprietary programs, over time that may change. And over time, those using such software without clearly establishing that the viewer has assumed a duty of confidentiality may be found to have taken inadequate precautions to maintain secrecy. Thus new precautions may need to be taken to prevent future leaks.

Finally, to the extent third parties are involved in creating a Web page, the site owner should gain ownership of all appropriate software (a matter that will typically be the subject of negotiation, because the developer may wish to re-use certain core software to write or drive other software he or she writes in the future) and require all who participated in developing the page to sign appropriate confidentiality and transfer agreements. Although such agreements cannot protect as secrets information actually appearing without confidentiality controls on the Web page, they may protect both information and concepts underlying the display or pertaining to future plans. The site owner also should gain the developer's promise to keep confidential all business information the company may show the developer during the course of the engagement.

E-mail Transmissions You Can Safeguard

Many people use the Internet primarily as a form of fax machine to e-mail communications to specific recipients. Although some people (generally those not well-versed in the way the Internet works) fear that "beaming" transmissions exposes them to interception by the public, and thereby destroys their secrecy in the same way that some cellular telephone equipment does, there are in fact extremely important technical differences between the two transmissions. Cellular telephones are a form of radio. This means that, at least in the early analog form still used in many parts of the country, cellular signals can be readily intercepted by receivers operating on the same frequency as the transmitter. This is why so many people have had the experience of hearing tantalizing bits of information transmitted via cellular phone in the midst of a conventional phone call or television or radio program.

The Internet is different. While the wrong person can indeed receive an e-mail, in the first instance that fact stems not from e-mail technology but rather from human error in mistyping the e-mail address – a problem that can just as well arise with faxes or conventional mail. A legend advising that improperly directed or received e-mails should be destroyed *and deleted* may persuasively be argued to serve as a reasonable precaution to maintain the secrecy of such misdirected e-mail.

One can make the argument that even unencrypted Internet e-mail is generally more secure from interception than other forms of communication because of the way the Internet works. Information transmitted over the Internet, as opposed to e-mail sent by services such as America Online, CompuServe, or MCI Mail, is not transmitted as a constant stream of information.[8] Instead, it is broken into small "packets" of data, each of which typically reaches its final destination via a different path. Some packets may travel from New York to Washington via Bangkok, for example, while others may travel through Toronto. These packets are reassembled into a single message only at the end of their travels. The precise route traveled typically varies from message to message. This is part of why the time for e-mail transmission can vary so widely – different messages may travel by very different routes. (This complex routing was initially developed to prevent a communications breakdown if a primary communications node was destroyed in a military disaster.)

This transmission method means that in most cases it is unlikely that e-mail messages will be any more readily intercepted than other more familiar means of communication. Moreover, interception of e-mail being transmitted over the Internet is unlawful under the Electronic Communications Privacy Act. Interception of *stored* e-mail, however, appears to fall outside the scope of this Act, a fact suggesting the need to password protect highly sensitive e-mail so that once received it cannot be widely accessed.[9]

These facts, while offering substantial comfort, do not mean that use of the Internet to transmit trade secrets poses no risk. Companies desiring to use e-mail to transmit sensitive information internally would do well to construct an "intranet" with a secure firewall preventing against potential retransmission over the external Internet. This type of communication has been held

CONTINUED ON PAGE 12

CONTINUED FROM PAGE 10

by courts to maintain a reasonable expectation of privacy.[10]

The primary risk of transmitting confidential information over intranets or the Internet, however, lies not in the mechanics of transmission, but in the fact that once digitized information is transmitted via email, it can then more readily be retransmitted by the recipient to larger numbers of unauthorized people than is true with more conventional means of communication. A vendor can, with a few key strokes, e-mail the customer's pricing parameters to the customer's competitors. A scientist can e-mail the formula to others secretly working on a competing product. And the disgruntled colleague can e-mail the communication to discussion groups, which are discussed further below, that will then automatically transmit and retransmit and exchange the information with countless other discussion groups throughout the world.

Once digitized information is transmitted via e-mail, it can then more readily be retransmitted by the recipient to larger numbers of unauthorized people.

How can these threats be reduced? By using intra- and extranets to limit the universe of potential recipients of confidential information. By counseling employees and others to use caution in selecting what they transmit over the Internet (is it really necessary from a business standpoint?), in selecting intended recipients (do they truly need to know the information? have they executed a confidentiality agreement? have they been reliable in the past? have they been apprised that this particular information is confidential?), in accurately addressing e-mail, and in implementing protective measures such as password protection and encryption that both underscore the importance of the confidentiality obligation and make it more difficult to retransmit the message to third parties. And by conducting periodic tests to see if company-mandated safeguards are in fact being followed, or need to be strengthened.

The argument has been made that, with the increasing availability of reasonably priced and largely effective encryption software, failing to use it may evidence a failure to use what has become a reasonable measure to maintain secrecy.[11] One need not go so far as to embrace this conclusion, however, to understand that using such protective measures certainly send the clear message "this secret is not free to take or spread."[12]

Companies can take other practical measures to prevent excessive or inappropriate use of e-mail to transmit secrets. First, many communications need not be made over the Internet at all. If the intended recipients all work at a single organization, the information may be easily conveyed via a local network or "intranet."[13] Second, many companies do not give all employees Internet access for a variety of reasons, including security. If something needs to be e-mailed via the Internet, it must be given to a supervisor who reviews the need to transmit it.

Third, sophisticated monitoring software is becoming increasingly available to track what happens to particular documents, including whether they are forwarded to others, downloaded, copied, or e-mailed. Such software should be used in environments that have a high concern for security. Reports should be reviewed frequently regarding particularly sensitive information, and certainly in connection with the departure of employees who have had access to highly confidential documents. They may pinpoint trouble. In the highly publicized departure of José Ignacio Lopez from General Motors, for example, it was alleged that shortly before his departure he had transferred massive amounts of GM's secrets from the United States to Germany over GM's internal e-mail system and then accessed them with Volkswagen's computers. Appropriate electronic "tags" on the these documents might have alerted GM to the problem earlier – even a simple count of the mammoth number of megabits e-mailed from computers under Lopez's control would have done so. Even the records that did exist were central to GM's prosecution of the case.

Similarly, in connection with a key Borland employee's departure to Symantec, copies of the employee's email to Symantec in the days before his departure formed the basis for a criminal suit, later dismissed, alleging trade secret misappropriation.

Sophisticated monitoring techniques are not always essential. An e-mail misdirected from one co-conspirator to her boss rather than to her confederate expressing nervousness that what she was doing was wrong and "really like stealing" alerted IDEXX that its trade secrets were being e-mailed out of the company and led to conviction of the confederate under the Economic Espionage Act.[14]

E-mail Transmissions by Lawyers

At least one state bar, Iowa, initially concluded that the risk that e-mail will be intercepted is such that before lawyers can send "sensitive information" via e-mail, they must either obtain written consent and ac-

CONTINUED ON PAGE 14

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knowledgment of the potential risk of a confidentiality breach or encrypt, password protect, or otherwise protect the information transmitted.[15]

Iowa rethought that conclusion, however, and issued a new determination amending the earlier opinion. The new opinion, which is only available to Iowa Bar members having a password permitting them to access the opinion, apparently provides that these restrictions should apply only to "sensitive" material, rather than pure exchanges of information or legal communication with clients.[16] South Carolina has also reversed its earlier opinion[17] concluding that since its earlier opinion was released, "The use of e-mail has become commonplace, and there now exists a reasonable level of 'certainty' and expectation that such communications may be regarded as confidential, created by improvements in technology and changes in the law."

One of the nation's largest malpractice insurers, ALAS, has concluded that lawyers may ethically "communicate with or about clients on the Internet without encryption." This is so in part because interception of such messages would have to be intentional and, necessarily, unlawful.[18] A number of states have accepted the ALAS approach, stating that in most cases the transmission of confidential information by unencrypted electronic mail does not *per se* violate the confidentiality rules absent unusual circumstances.[19] The measures Iowa previously had imposed, however, may well be sensible to follow to limit the further transmission of trade secrets, for the reasons discussed below.

New York's approach is also good advice. It has warned that in circumstances where a lawyer is on notice for a specific reason that a particular e-mail transmission is at heightened risk of interception, or where the confidential information at issue is of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer must select a more secure means of communication than unencrypted Internet e-mail.

Repelling Extraordinary Measures to Intercept Secrets

As technology develops, so do methods to intercept, copy, "sniff," and "spoof" to gain unauthorized access to e-mail messages. Similar techniques exist for intercepting conventional telephone transmissions.

Although no e-mail system is "interception-proof," in most circumstances one following the procedures outlined above should find the actual risk to be small. The malpractice insurer ALAS has concluded, "To identify one of the relevant computers over which an e-mail message will pass and then locate, isolate, and capture a particular message would take a substantial investment in time and money – not to mention personnel who are both technically proficient and willing to violate the law."[20]

Discussion Groups: The Danger Zone

Another "lane" on the information superhighway is the discussion groups, started by various groups soliciting e-mails expressing comments on topics ranging from particular products or companies (snapple.com), to the occult (alt.magic), to current events (alt.abortion), to sports (rec.sports.boxing). This is one of the places where secrets can be put at greatest risk.

The automatic conclusion that if information has been posted on the Internet it is no longer a secret does not comport with settled trade secrets law.

If a secret gets into a discussion group, the trade secret owner has effectively lost control of it. Not only can every member of the discussion group at least theoretically access the secret for some period of time; even worse, many discussion groups automatically exchange postings with other groups. Thus a single posting of a secret can, in time, lead to its replication throughout the Internet. This fact – the total loss of control over information – is what gives most trade secret owners the greatest fear about the Internet. With good reason.

As a result, improper posting of secrets to the Internet has already led to litigation, and is likely to lead to more in the future. The initial round of such litigation often focuses on identifying the party making the unauthorized postings. Raytheon, in a much-publicized case, sought an injunction against further posting of Raytheon secrets by 21 unidentified Internet users who had posted confidential engineering information in chat rooms and bulletin boards.[21] One of the critical initial strategies was to subpoena the Internet Service Provider Yahoo! to divulge the identities of the posters. Yahoo! complied.[22] Several posters subsequently resigned as Raytheon employees; others entered corporate counseling. Raytheon then dropped the suit. The fate of the postings at issue has not been discussed in press accounts.

The next issue is obtaining relief. Typically, the trade secret owner would seek an injunction requiring the trade secret to be removed and further postings of se-

crets to be banned. Although such relief is entirely consistent with what is afforded in cases of trade secret misappropriation by conventional means, at least one recent case has concluded that, absent the misappropriator's breach of a contractual or fiduciary duty, an injunction against such a posting is an impermissible prior restraint on protected speech.[23]

The district court in *Lane* recognized that the posting constituted misappropriation of trade secrets and might even be criminally actionable. It nonetheless concluded that the Sixth Circuit's decision in *Procter & Gamble Co. v. Bankers Trust Co.*,[24] refusing, on First Amendment grounds, to enjoin the publication of information the parties had incorrectly stipulated in a lawsuit was "confidential," prohibited an injunction against disclosure of trade secrets. *Lane* is startling, because it appears to ignore the fact that free disclosure of a trade secret destroys the trade secret owner's property rights. The "speech" at issue is in fact what courts sometimes call "speech plus." It wrecks destruction of property.[25] Regardless of whether *Lane* remains good law or is adopted in other forums, the decision underscores the importance of keeping trade secrets away from Internet discussion groups.

Obviously, anyone who has access to trade secrets should be counseled – but should not need to be – not to post any secrets to public discussion groups. What are the legal consequences if they do? First, consider the person who originally posts a secret to a discussion group. Assuming he or she had no authorization to do so, that person is liable for trade secret misappropriation and all the consequences thereof – including damages for the destruction of the secret. The unauthorized poster also may have criminal liability, under either the Economic Espionage Act[26] (making electronic transmission of trade secrets a crime) or other statutes.[27] Third parties acting in concert with the misappropriator may also be barred from using or retransmitting the secret.[28] But what of innocent third parties? Are they entitled to use with impunity a secret that has been posted on the Internet under the theory that it is secret no longer? Some courts have said yes.[29] In an early ruling in the case, Judge Whyte wrote in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*:[30]

> The court is troubled by the notion that any Internet user, including those using "anonymous remailers" to protect their identity, can destroy valuable intellectual property rights by posting them over the Internet, especially given the fact that there is little opportunity to screen postings before they are made. Nonetheless, one of the Internet's virtues, that it gives even the poorest individuals the power to publish to millions of readers, can also be a detriment to the value of intellectual property rights. The anonymous (or judgment proof) defendant can permanently destroy valuable trade secrets, leaving no one to hold liable for the misappropriation. Although a work posted to an Internet newsgroup remains accessible to the public for only a limited amount of time, once that trade secret has been released into the public domain there is no retrieving it.[31]

This automatic conclusion that if information has been posted on the Internet it is no longer a secret does not comport with settled trade secrets law, however. Unlike the patent field, where the existence of a single, though obscure, reference anywhere in the world can destroy novelty, and hence patentability, the test for trade secret status is whether the information is, in fact, generally *known*.

Does general availability on the Internet equate with being generally known? Not necessarily. If one blares a trade secret over the loudspeaker in Yankee Stadium off-season and no one hears it, is it still a trade secret? Perhaps. In reconsidering his earlier decision that its posting on the Internet necessarily destroys a secret, Judge Whyte stated:

> [T]he Court believes that its statement in its September 22, 1995 order that "posting works to the Internet makes them 'generally known' to the relevant people" is an overly broad generalization and needs to be revised. The question of when a posting causes the loss of trade secret status requires a review of the circumstances surrounding the posting and consideration of the interests of the trade secret owner, the policies favoring competition, and the interests, including first

> amendment rights, of *innocent* third parties who acquire information off the Internet. . . . [T]he general public is not the relevant population for determining if a claimed trade secret is generally known. The relevant inquiry is whether the documents for which trade secret protection is sought are "generally known" to the relevant people [namely, potential competitors].[32]

Likewise, in *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*,[33] the court held that the fact that a document describing plaintiff's trade secret was inadvertently filed unsealed and remained on file for several months did not necessarily preclude trade secret protection, but the court observed that the situation might be different if it also had been posted to the Internet.

Judge Whyte's rejection of a *per se* rule that unauthorized posting destroys a trade secret was embraced by the Santa Clara County California Superior Court in *DVD Copy Control Ass'ns Inc. v. McLaughlin*.[34] There, Judge Elfving granted a preliminary injunction ordering the removal of Internet postings revealing the DVD encryption code even though the postings were fairly widespread and some had been up for about three months. He concluded:

> The Court is not persuaded that trade secret status should be deemed destroyed at this stage merely by the postings of the trade secret to the Internet. . . . To hold otherwise would do nothing less than encourage misappropriators of trade secrets to post the fruits of their wrongdoings on the Internet as quickly as possible and as widely as possible thereby destroying a trade secret forever. Such a holding would not be prudent in this age of the Internet.

Judge Elfving went on to conclude that the trade secret owners had moved quickly to protect their rights and that injunctive relief was appropriate.

This approach certainly argues for working to delete misappropriated secrets from the Internet as quickly and thoroughly as possible, *including* from search engine services that may not update their information "caches" frequently.[35] It does not, however, entirely solve all the important practical issues. The CIA's experience suggests that if information is particularly interesting to the audience that gains access to it, downloading and retransmitting may begin almost immediately. The same appears to have been true in the DVD context as well, and, as a result, the DVD Copy Association is now going through the costly task of establishing new encryption codes. But a "look at the particular circumstances" approach does offer the prospect that an unauthorized posting need not necessarily lead to cataclysmic loss.[36]

Aside from the question of whether a trade secret, although for a time generally *available*, has in fact become generally *known*, another principle of the law of trade secrets may help a trade secret owner whose secret has been posted on the Internet. Under traditional legal principles a third party who acquires a misappropriated secret is not free to ignore evidence of misappropriation, whether that evidence arrives with the secret or subsequently.[37]

Thus, if a trade secret makes its way onto the Internet, a trade secret owner should consider how best to get the word out that the public is not free to use it. Any given situation may be extremely delicate – sending out postings to "ignore that valuable secret!" may not be a particularly effective way of stifling curiosity. Removing the secret from the principal places it has been posted (a browser can help identify sites) and replacing the original posting with a message to the effect that "the posting added to this site at 22:18 on January 14, 2000 by Y concerning X Corp. has been removed because it was posted without X Corp.'s permission and may contain information misappropriated from X Corp. Use or retransmission of the information contained in that posting constitutes misappropriation" may help.

Using the Internet to Acquire or Distribute Trade Secrets

Just as using the Internet to solicit copies of copyrighted software was held to constitute copyright infringement in *Sega Enterprises, Ltd. v. Maphia*,[38] using the Internet to solicit the retransmission or other delivery of trade secrets has been held to be "wrongful acquisition" of trade secrets under the Uniform Trade Secrets Act.[39]

Conclusion

The thoughtful owner of trade secrets will realize that those secrets do not belong on the Internet except in controlled form and will implement strong policies and practical measures updated as technology evolves to insure that secrets do not escape.

If secrets do make their way onto the Internet, even briefly, the trade secret owner will work to pull them off and limit the damage. Finally, to insure that its secrets are safe, the wise trade secret owner will take periodic cruises on the information superhighway looking for signs of misuse. A good browser should point the way to any trouble.

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1. *Gulf War Data on Internet Harmed U.S. Spy Efforts, Report Says*, N.Y. Times, Aug. 8, 1997, at A15.
2. *Military Secrets Posted on Web by CP*, Calgary Sun, Aug. 26, 1999.
3. *Canadian Intelligence Security Reviewed Amid Internet Spy Furor*, Globe & Mail, Aug. 27, 1999.
4. Uniform Trade Secrets Act § 1 (adopted in more than 43 states).
5. Restatement (First) of Torts, § 757 cmt. b (1939).

6. Indeed, a review of competitors' Web sites can be an excellent start in conducting competitive intelligence. It can also be useful ammunition in a trade secrets suit. *See*, *e.g.*, *New England Circuit Sales v. Randall*, No. 96-10840 EFH, 1996 U.S. Dist. LEXIS 9748 (D. Mass. June 4, 1996), where a key piece of evidence in support of the claim that an Internet marketer was violating his restrictive covenant by working for a new company was the new company's Web site description of its new direction once the employee assumed his new role.

   A company viewing its competitor's Web site should be aware, however, that this practice may not go undetected. Depending on the competitor's tracking software and use of "cookies," it may be possible for the competitor to learn who has visited its site, for how long, how often, and whether they return to the site. Analyzing this information may itself result in valuable competitive intelligence. Therefore, a company considering making a strategic acquisition, for example, might choose to have those investigating the target's Web site use Internet names that are not traceable to the potential acquiring party.

7. *Cf. DoubleClick v. Henderson*, No. 116914/97, 1997 N.Y. Misc. LEXIS 577 (N.Y. Sup. Ct. Nov. 3, 1997), where one defense offered to misusing Internet advertising rate information of their employer was defendants' claim that the employer had posted the same information on its Web site. The court rejected the defense, finding that in fact the employer had posted only generalities, not the specifics at issue. *Cf. EarthWeb v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999), *aff'd in part and remanded in part*, 205 F.3d 1322 (2d Cir. 2000), holding that certain online publishing strategies would not long be secret since they would be revealed by the Web site itself.

8. Information sent by those services remains intact in a mailbox at the service provider which could, in theory, be accessed by the service provider or those who improperly enter the service providers' files, as well as by the intended recipient. Such potential access, however, is not particularly likely. *See* South Carolina Bar Ethics Advisory Opinion 97-08 (June 1997) ("While there exists a potential for communications to be intercepted, albeit illegally, from a commercial network mailbox or an Internet 'router,' the Committee does not believe such a potential makes an expectation of privacy unreasonable").

9. *See Wesley College v. Pitts*, 974 F. Supp. 375 (D. Del. 1997), *aff'd*, 172 F.3d 861 (3d Cir. 1998) (holding that ECPA criminalizes only the interception of electronic communications contemporaneously with their transmission, not once they have been stored); *Payne v. Norwest Corp.*, 911 F. Supp. 1299, 1303 (D. Mont. 1995) (appropriation of a voicemail or similar stored electronic message does not constitute an "interception" under the statute); *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457 (5th Cir. 1996); *U.S. v. Turk*, 526 F.2d 654, 658 n.3 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976). *Cf. U.S. v. Smith*, 155 F.3d 1051 (9th Cir. 1998) (retrieval of stored voicemail does violate the act).

10. *U.S. v. Keystone Sanitation Co.*, 903 F. Supp. 803 (M.D. Pa. 1995).

11. *Cf. The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), *cert. denied sub nom. Eastern Transp. Co. v. N. Barge Co.*, 287 U.S. 662 (1932) (L. Hand, J.) (holding that "seaworthiness" is a term whose definition is not fixed but evolves along with technological advances, and concluding that while a seaworthy vessel of an earlier era would not have incorporated a radio, radios were available to vessels of 1928 and thus should have been used). But see the discussion below of various State Bar opinions concluding that failure to encrypt communications with clients is not unethical.

12. Note that, depending on the subject matter, encrypting messages may on occasion trigger the new Export Control provisions.

13. Security measures should be observed on internal "intranets" as well. The touchstone should always be, does the recipient have a business need to see the information? If so, password protection can help ensure that others who have no need to see the information do not see it as well.

14. *U.S. v. Martin*, 228 F.3d 1 (D. Me. 2000).

15. Iowa Supreme Court Board of Professional Ethics, Opinion 96-1, Aug. 29, 1996. To the same effect, see South Carolina Bar Advisory Opinion 94-27 (Jan. 1995).

16. Opinion 97-1, 9/17/97.

17. *See* South Carolina Bar Ethics Advisory Committee, Opinion 9708 (June 1997).

18. *See* W. Freivogel, *Communicating with or about Clients on the Internet*, ALAS Prevention J., Jan. 1996; *see also* W. Freivogel, *Internet Communications Part II, A Larger Perspective*, ALAS Prevention J., Jan. 1997.

19. *See*, *e.g.*, Alaska Bar Ass'n Ethics Comm. Op. 98-2 (Jan. 16, 1998) (1998 WL156443), State Bar of Arizona Advisory Ethics Opinion 97-04, 4/7/97, at http://www.azbar.org/EthicsOpinions; the District of Columbia. Ethics Comm. Op. 281 (Feb. 18, 1998), http://www.dcbar.org/pro-resources/opinions; Illinois State Bar Association Opinion 96-10, 5/16/97; Kentucky Bar Ass'n Ethics Comm. Advisory Op. E-403 (July 1998), http://www. uKy.edu/law/Kyethics; New York State Bar Ass'n Comm. on Profes-

sional Ethics Op. 709 (Sept. 16, 1998), http://www.nysba.org/opinions, N.D. State Bar Ass'n Ethics Comm. Op. 97-09 (Sept. 4, 1997) (unpublished); Vermont Bar Association Committee on Professional Responsibility, Opinion 97-5, 13, Law Man. Prof. Conduct 2/0. *See also* ABA Comm. on Ethics & Professional Responsibility Formal Opinion 99-143 (Mar. 10, 1999), www.abanet.org/cpr.; Major Nell, *E-mail and Confidential Information*, 1999-AUG Army Law. 45 (Aug. 1999).

20. Freivogel, *supra* note 18.
21. *Raytheon v. John Does 1-21*, No. MICV 99-00816F (Mass. Super. Ct., filed Feb. 11, 1999). *See Pro Med Co Mgmt. Co. v. John Does 1-50*, No. 806956 (Orange Co., Cal. Sup. Ct. 1999) (suit brought seeking identity of posters of allegedly defamatory messages which drove down value of plaintiff's stock).
22. Many major ISPs have stated their willingness to provide such identifying information in response to a subpoena, whether with or without notice to the poster. Their specific policies vary. Representative policies regarding how to assert claims of misappropriation of intellectual property may be located at www.lycos.com/lycosinc/legal.html; http://docs.yahoo.com/mfo; http://doc.altavista.com/legal/copyright.shtml.
23. *Ford Motor Co. v. Lane*, 52 U.S.P.Q. 1345 (E.D. Mich. 1999). *See Sheehan III v. King County*, No. C97-136 OWD (W.D. Wash. 1998), refusing to enjoin a consumer's posting of personal and Social Security information about employees of a credit reporting agency on the Internet on the same grounds.
24. 78 F.3d 219 (6th Cir. 1996).
25. *See Conley v. DSC Communications Corp.*, No. 05-98-01051-CV, 1999 WL89955 (Tex. App. Feb. 24, 1999) (rejecting First Amendment overbreadth challenge to trade secrets injunction since injunction was the only effective way to prevent destruction of the secrets).
26. 18 U.S.C. §§ 1831–1839.
27. *See*, *e.g.*, *U.S. v. Riggs*, 743 F. Supp. 556 (N.D. Ill. 1990) (imposing liability under the National Stolen Property Act, 18 U.S.C. § 2314, on two "hackers" who had allegedly stolen files from the telephone company and republished them on the Internet to tell the "hacker" community how to prevent the authorities from discovering their activities. The court held that the transmission "is the very vehicle of the crime itself."). *See also*, *e.g.*, Cal. Pen. Code § 499C and Cal. Pen. Code § 502 (criminalizing various computer crimes including illegally accessing or copying data).
28. *Cf. Underwater Storage, Inc. v. United States Rubber Co.*, 375 F.2d 950, 955 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 911 (1967) ("Once the secret is out, the rest of the world may well have a right to copy it at will; but this should not protect the misappropriator or his privies").
29. *See*, *e.g.*, *Religious Tech. Ctr. v. Lerma*, 897 F. Supp. 260, 265 (E.D. Va. 1995) ("Despite [plaintiff's extraordinary efforts to try to maintain' secrecy,] defendant . . . is not the only source of [the documents containing the secrets] on the Internet. Accordingly, for the purposes of this motion, it would seem that plaintiff cannot establish that [the documents] are not 'generally known.'"); *Religious Tech. Ctr. v. FactNet, Inc.*, 901 F. Supp. 1519 (D. Colo. 1995) (publication on the Internet destroys trade secrets).
30. 923 F. Supp. 123 (N.D. Cal. 1995).
31. *Id.* at 1256 (citations and footnote omitted).
32. *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.* (N.D. Cal. Jan. 6, 1997) (emphasis in original).
33. 174 F.3d 411 (4th Cir. 1999).
34. No. CV 786804 (Cal. Super. Ct., Santa Clara Co. Jan. 21, 2000). For the briefs filed in that action, see http://www.pzcommunications.com/decss/main.htm.
35. For a list of search engines and their caching policies, see http://www.searchenginewatch.com/features.htm.
36. One can foresee a situation in which, to avoid a crushing damages calculation, the initial poster will urge that little harm was actually done by the misdeed and thereby perhaps assume the burden of showing that in fact there was only limited access to the secret. Such a showing might not be binding, however, in subsequent litigation with third parties.
37. *See*, *e.g.*, Restatement of the Law of Unfair Competition, § 40 (1995).
38. 857 F. Supp. 679 (N.D. Cal. 1994), *modified*, 948 F. Supp. 923 (N.D. Cal. 1996).
39. *Religious Tech. Ctr. v. Ward* (N.D. Cal. Mar. 21, 1996) (granting temporary restraining order against further solicitation of trade secret materials or publication of secrets). *See U.S. v. Lange*, No. 99-CR-174 (E.D. Wisc. 1999) in which an individual who used the Internet to solicit potential buyers of his employer's trade secrets was convicted for violating the Economic Espionage Act.

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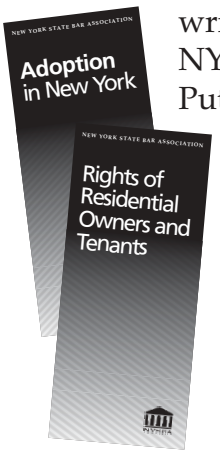

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Lawyers Taking Equity Interests In Internet Companies Must Be Alert to Special Ethical Risks

By Antonella T. Popoff

Even though the practice of attorney investment in or transacting with clients is not forbidden, nor is it a new practice, several risks are involved with the practice that could lead to disbarment. Similar risks arise when attorneys provide non-business consulting and wear multiple hats. With the increase of these practices due to the demands of Internet startups, it is essential that attorneys be educated to the risks and take the necessary precautions.

Equity and Fee Structures

There are essentially eight types of equity and fee structures that may be considered risky and may ultimately expose an attorney to potential liability or lead to disbarment:

• *Founding equity:* This position is usually reserved for company founders, but some attorneys have negotiated a share for business consultations performed in addition to regular legal work and fees. It usually results in more than 5% ownership of the company.

• *Investments made during venture capitalist funding rounds:* This usually results in 3–5% ownership of the company. Many venture capitalists would not invest under these circumstances because they would have to split their interest.

• *Equity and stock options for deemed or deferred billing for legal work or in exchange for legal fees:* The percentage depends on the amount of work and how early in the start-up the attorney is hired. The earlier, the higher the percentage, but usually it gets diluted to less than 1%.

• *Debentures:* Attorneys can invest in start-ups by purchasing debt instruments. This may be a more favorable arrangement for the attorney; but it may become more difficult for a start-up to acquire venture capital, since venture capitalists usually do not care to fund prior investors' returns.

• *Investments after an IPO:* This was the more common form of investment in the past. It is not as lucrative as the prior forms because company growth tends to slow down after that stage.

• *Hiring a management company to manage equity interests:* This is an attempt by some laws firm to protect themselves from conflict-of-interest lawsuits by not actively involving themselves in the management of the shares that they own (the out-of-sight out-of-mind theory). It is questionable, however, whether this theory is enough to protect attorneys given the fact that the attorneys are aware of their interests and the effect their consultations will have on their shares, regardless of who manages them.

• *Forming a separate entity for non-legal advice:* This approach assists the clients in separating the attorney's role in a transaction. Arguments have been made, however, that if the client is aware that the attorney is a licensed attorney, the attorney may still be held to different standards, due to the client's expectations.

• *Contingency fees and finder's fees:* Attorneys have often collected contingency fees for litigation and finder's fees for introducing financiers to companies that result in acquiring finance.

Multiple Hats Worn by Attorneys

Attorneys often perform non-legal tasks for a start-up and/or invest in a start-up in addition to providing legal counsel. Typically, attorneys may assume the following non-legal roles:

• *Co-founder:* The attorney also acts as one of the founders of the company, actively participating in business decisions, with rights to vote, to act on behalf of the company, etc.

• *Business financial consultant:* The advice goes beyond legal consultations, but does not reach the level of

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deal making (see below). The attorney may write the business, marketing or financial plans, make financial projections, etc.

• *Accountant:* The attorney keeps the books for the client and prepares taxes for the company and possibly for the directors/officers of the company as well.

• *Dealmaker:* The attorney is most likely well connected or represents financial institutions or venture capitalists and arranges deals between the start-up and these institutions, as well as among clients.

• *Venture capitalist/investor/shareholder/bondholder:* The attorney actively invests in the company – as a start-up, after it matures or after it makes an initial public offering – and becomes a shareholder or bondholder of the company.

• *Agent:* An attorney becomes an agent of a company when the company gives the attorney the right to act on its behalf and represent the company in transactions.

Changes in the Code of Professional Responsibility

Overall, there were four major changes in the Code of Professional Responsibility that attorneys should be aware of when talking with clients, taking a financial, business or personal interest in clients, or when providing non-legal advice as an attorney. A complete version of the Code can be found at the New York State Bar Association Web site (www.nysba.org) and a complete version with annotations can be found in the final volume of the Judiciary Law in *McKinney's Consolidated Laws of New York Annotated.*

• *Conflict of Interest (COI) and Lawyer's Own Interest DR 5-101 [§ 1200.20]:*[1] Clients can only consent to representation by an attorney with potential conflict-of-interest issues if there is full disclosure. The new standard is that a disinterested attorney is one who would reasonably believe that the representation would not be adversely affected by such interest ("new disinterested attorney standard").

• *Transactions between Clients and Lawyer DR 5-104 [§ 1200.23]:* The original provision only required client consent after full disclosure. The new one sets forth three standards: (1) the transaction and the terms have to be reasonable to the client and be easily understood by the client; (2) the attorney must advise the client in writing, after full disclosure, to seek the advice of independent counsel; and (3) client has to consent in writing after full disclosure.

• *COI; Simultaneous Representation DR 5-105 [§ 1200.24]:* Once again we see the new disinterested attorney standard. In addition, the full disclosure to the client must include the implications of the simultaneous representation and the advantages and risks involved.

• *Organization as Clients DR 5-109 [§ 1200.28]:* The attorney must inform constituents that he or she represents the organization and not the officers/directors as individuals. The full disclosure should include a cost benefit analysis and options for procedure, including resignation by lawyer.

No ethics rules bar the practice of taking equity interest in clients, nor is there a pro se rule that prohibits an attorney from owning stock in, or serving as an officer or a director of, the client company. However, the ABA is studying the practice due to a major concern that the practice clouds attorney judgment.

Other Laws Relating to Equity Acquisition

In addition to ethical considerations and regulations imposed by the federal and state agencies and organizations, securities are also governed by federal statutes and regulated by the Securities and Exchange Commission (SEC). Although the SEC regulations do not define an "independent attorney," it is likely that over time, particularly in light of all the recent corporate scandals, the SEC may scrutinize attorneys or firms that have a strong interest in transactions due to stock ownership, especially where there is failure to disclose material information. Attorneys should be aware of and keep the following regulations in mind when considering an equity arrangement with a client:

• *Disclosure in Securities Offerings:* Item 509 of Regulation S-K requires disclosure of "interests of named experts and counsel" that exceed $50,000.

• *SEC Rule 10b-5:* Stock ownership may assist plaintiffs in establishing scienter in securities cases against attorneys who own stock in their clients.

• *NASD Requirements:* Rule 2110-1(b)(3) of the Conduct Rules of the National Association of Securities Dealers prohibits the sale b a member firm of securities in a "hot offering" to any person acting in a fiduciary capacity to the managing underwriter, including attorneys and finders.

• *The Investment Company Act of 1940:* Section 6(b) exempts issues relating to investment vehicles for firms with more than 100 partners.

• *Insurance policies:* Typical lawyers' "Errors and Omissions" policies generally exclude wrongful acts where the insured is (1) a 5% or greater owner of a publicly traded company, (2) a 25% or greater owner of a non-publicly traded company, or (3) such company is controlled, operated or managed directly or indirectly by one or more insured. This exclusion should not apply to ownership, control, operation or management by insured of such entity if it was exclusively in a fiduciary capacity incident to the practice of law by the firm.

Questionable Practices

Various questionable practices could lead to disputes and lawsuits in the future, especially in down markets when companies are more likely to sue. Among the typical risks:

- Taking a founding interest in a company.
- Unequal distribution of equity in a law firm, or individual attorneys taking equity in their own name and not as the firm.
- Equity being used as a barter system to attract attorneys on deals.
- Dropping clients when the company matures or goes public because they become less profitable due to slower growth potential ("outplacing clients").
- Allocating and selling client shares may create corporate opportunity issues, selling and client relations issues, and attribution risk.
- Investing in a private placement and participating in the price negotiations between the client and independent, third-party investors.
- Dropping clients when the company matures or goes public because they become less profitable due to slower growth potential ("outplacing clients").
- Wearing multiple hats or acting as agent, and failing to separate legal from non-legal counseling.
- No representation of client in negotiations with their attorney (an attorney is required to make full disclosure of his or her own interest in writing and advise the client to seek disinterested counsel).
- Representing multiple parties (company's and founders' interests).
- An equity-owning attorney may have a conflict of interest when representing the company in litigation and/or may become a party to the litigation.
- Representing one party as a lawyer and the other party as a business consultant or agent.

Sound Practice Guidelines

To avoid questionable practices, attorneys and their forms would be well advised to follow these guidelines:

- Impose strict controls on all investments and follow insider trading rules; avoid direct investment by individual attorneys or decision making by individual attorneys.
- Do not permit trading of client stock.
- Limit size of client investment and percentage of ownership to $25,000 to $50,000 and 1% to 2% of a client's company.
- Take all or a bulk of the fees in cash; consider the tax consequences of taking stock for services.
- Do not take stock for future services without vesting provisions and the express right for client cancellation.
- Impose a voluntary lock-up of sale and avoid flipping of stock.
- Obtain valuations by independent third parties.
- Do not rely on Chinese walls or ethical screens; assume attribution.
- Provide a detailed, written disclosure of conflicts (do not use boilerplate disclosures) and obtain written client consent in accordance with ethical rules of conduct; regularly review services performed for client for conflicts; and, when necessary, get a revised consent from client.
- Disclose stock ownership to third parties when appropriate.
- Do not invest in or decline representation of client if you cannot fully and zealously represent client or if your independent professional judgment will be compromised.
- Determine whether an investment vehicle is appropriate which allows the firm's lawyers who qualify as accredited investors to participate in a blind pool of investment or whether new entities should be formed for each investment.
- Request that the board and/or shareholder authorization of issuance be formally made.
- Advise the client to seek independent counsel when negotiating shareholder and buy-sell agreements with the client, when negotiating or advising on registration rights for the stock owned by the attorney, or when the company wishes to issue new classes of stock that conflict with attorney ownership.
- Avoid voting on or taking sides in internal disputes, deadlocks or problems with management.

Possible Causes of Actions

Disgruntled clients have a wide range of causes of action against an attorney. Among them are:

- Negligence
- Breach of Contract
- Breach of Fiduciary Duties
- Breach of Implied Covenant of Good Faith and Fair Dealing
- Negligent Misrepresentation
- Fraud and Deceit
- Legal Malpractice
- Imposition of Constructive Trust
- Quantum Meruit
- Interference with Prospective Business Interest or Relations
- Conspiracy to Interfere with Contract
- Conspiracy to Interfere with Prospective Business Interest
- Conspiracy to Defraud
- Negligent Infliction of Emotional Distress
- Intentional Infliction of Emotional Distress
- Accounting
- Restitution
- Rescission
- Conversion

Possible Defenses

An attorney has fewer options for defenses, the elements of which are often more difficult to prove. Defenses to the possible causes of action above include:

- Failure to State a Cause of Action
- Statute of Limitations
- Laches
- Estoppel
- Unclean hands
- Waiver
- Ratification
- Comparative Negligence
- Failure to Mitigate Damages
- Supervening Causes
- Sham
- Contributory Negligence

Related Case Law

Entertainment issues: *Croce v. Kurnit*, 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984). The widow of singer/songwriter Jim Croce brought action for unconscionability and breach of fiduciary duty against Jim Croce's producer, publisher, manager and the attorney who drafted the recording, publishing and management contracts Croce signed. The attorney, Philip Kurnit, was merely introduced as "the attorney" and Croce was not aware of Kurnit's interest as a principal in the transactions. Kurnit failed to advise the Croces to seek independent counsel.

Joel v. Weber, Sup. Ct., N.Y. Co., Mex No. 20702/89 (Lehner, J.) and *Joel v. Grubman*. Billy Joel sued his former brother-in-law and manager, Frank Weber, and the law firm of Grubman, Indursky, Schindler & Goldstein. The complaint against Grubman was for breach of fiduciary duty, legal malpractice, fraud and breach of contract, and the complaint alleged that Grubman allowed Weber to dictate the terms and induce kickbacks with regard to Joel's interest so as to keep Weber happy so that he would advise Joel to use Grubman as a firm.

Disclosure of COI and informed consent of client: *Rhodes v. Buechel*, N.Y.L.J., Mar. 18, 1998, p. 28 (Sup. Ct., N.Y. Co.), *aff'd*, 258 A.D.2d 274, 685 N.Y.S.2d 65 (1st Dep't 1999). Lawyer failed to advise client to seek the advice of independent legal counsel, to disclose potential conflicts identified by the courts, to set forth in the fee agreement what legal responsibilities he would undertake and to advise client of right to terminate the engagement at any time.

People v. Gomberg, 38 N.Y.2d 307, 379 N.Y.S.2d 769 (1975); *In re MacKinnon*, 223 A.D.2d 807, 637 N.Y.S.2d 321 (3d Dep't 1996). An attorney made a loan to a client without recommending that the client seek independent counsel or other disinterested advice. The case was dismissed, however, because there appeared to be no client-attorney relationship.

Schlanger v. Flaton, 218 A.D.2d 597, 631 N.Y.S.2d 293 (1st Dep't 1995), *appeal denied without opinion*, 87 N.Y.2d 812, 644 N.Y.S.2d 145 (1996). The attorney breached fiduciary obligations by failing to disclose the legal implications of assuming one half share in a corporation with the client, by never advising the client to procure independent legal counsel, by preparing all necessary documents to consummate transactions, by acting as attorney for himself, client and corporation, and by arranging all details to his own advantage.

Representing multiple parties: *In re Slavin*, 208 A.D.2d 86, 622 N.Y.S.2d 747 (1st Dep't 1995). The attorney represented a client when his judgment was affected by his own financial and business interest, engaged in improper business transaction with the client, and represented a client with a conflicting interest (buyer and seller, and he represented REIT and partner at the same time).

In re Viggiano, 211 A.D.2d 1, 625 N.Y.S.2d 581 (2d Dep't 1995). The attorney improperly allowed his professional judgment on behalf of his client to become impaired by his own financial, business and personal interest.

Welton Becket Assocs. v. LLJV Development Corp., 193 A.D.2d 477, 597 N.Y.S.2d 398 (1st Dep't), *later proceeding*, 193 A.D.2d 478, 598 N.Y.S.2d 711 (1st Dep't), *later proceeding*, 1993 N.Y. App. Div. LEXIS 8866, *and appeal dismissed*, 82 N.Y.2d 889 (1993). The law firm should not be disqualified where firm obtained disputed client's "clearly informed" consent to its simultaneous representation of that client and respondents in two unrelated matters by different attorneys working out of different offices in different cities.

Fischer v. Deitsch, 198 A.D.2d 327, 605 N.Y.S.2d 703 (2d Dep't 1993); related proceeding *Schusterman v. Fischer*, 198 A.D.2d 343, 605 N.Y.S.2d 871 (2d Dep't), *motion granted in part, motion denied in part*, 198 A.D.2d 344, 605 N.Y.S.2d 872 (2d Dep't), *later proceeding*, 198 A.D.2d 345, 605 N.Y.S.2d 873 (2d Dep't 1993); and related proceeding *Deitsch v. Fischer*, 198 A.D.2d 322, 605 N.Y.S.2d 873 (2d Dep't), *motion granted in part, denied in part, later proceeding*, 198 A.D.2d 323, 605 N.Y.S.2d 875 (2d Dep't), *motion granted in part, denied in part, later proceeding*, 198 A.D.2d 324, 605 N.Y.S.2d 876 (2d Dep't), *motion granted in part, denied in part, later proceeding*, 198 A.D.2d 325, 605 N.Y.S.2d 877 (2d Dep't), *motion granted in part, denied in part*, 198 A.D.2d 326, 605 N.Y.S.2d 878 (2d Dep't 1993). Representation of multiple parties is proper where lawyer can adequately present the interests of each party and each party consents to representation after full disclosure.

In re Holsberger, 223 A.D.2d 920, 637 N.Y.S.2d 322 (3d Dep't), *motion granted*, 228 A.D.2d 971, 644 N.Y.S.2d 836 (3d Dep't), *separate opinion*, 230 A.D.2d 940, 646 N.Y.S.2d 216 (3d Dep't 1996). The attorney engaged in conflict of interest by representing clients in negotiating and preparing documents for a loan from other clients he

had represented in other financial transactions at about the same time.

Wearing multiple hats: *Chang v. Chang*, 190 A.D.2d 311, 597 N.Y.S.2d 692 (1st Dep't 1993). The action was reversed and remanded for a new hearing where the attorney represented all parties and a close corporation/family enterprise, and for his own culpability in allegedly fraudulent acts.

In re Tems, 238 A.D.2d 65, 666 N.Y.S.2d 732 (2d Dep't 1997). The attorney represented purchaser while acting as the seller's real estate broker.

In re Grossfield, 150 A.D.2d 139, 545 N.Y.S.2d 718 (1st Dep't 1989). The attorney loaned money to clients and collected money owed to them in payment of such loans while he had conflicting interest which he filed to disclose; he represented a client regarding two security agreements which secured separate loans made by the attorney and client to two other clients; and the attorney simultaneously represented lender and borrowers in such transactions.

Disqualification or withdrawal because attorney became party to lawsuit: *Skidmore v. Warburg Dillon Read*, 99 Civ. 10525 (NRB) (S.D.N.Y. May 11, 2001). An application to disqualify counsel for conflict of interest may be brought by any party, including party opponent who was never represented by counsel alleged to have conflict because the ultimate concern is integrity of trial process.

Lake v. M.P.C. Trucking Inc., 279 A.D.2d 813, 718 N.Y.S.2d 903 (3d Dep't 2001). Court granted attorney's motion to withdraw where attorney's loyalty was challenged and irreconcilable differences as to course of litigation arose.

Cummin v. Cummin, 264 A.D.2d 637, 695 N.Y.S.2d 346 (1st Dep't 1999). Reversal of court order disqualifying plaintiff's counsel where conflict of interest arose from a single consultation with defendant, six years prior to cause of action, where no notes or documentation of consultation exist, the attorney has no recollection of the consultation, and the attorney is screened from the representation of plaintiff.

Hitzig v. Borough-Tel Service, Inc., 108 A.D.2d 677, 485 N.Y.S.2d 541 (1st Dep't 1985). The law firm representing the company and the officers disqualified from representing the company against a part owner who was removed as an officer and employee by a majority vote of the directors, one of whom was a member of the law firm and a party defender and witness in action.

Sources for Ethics Questions and Issues

The New York State Bar Association Web site contains various ethics opinions (http://www.nysba.org). Among items of particular interest are the complete text of:

- Opinion 639 – Multiple representation, different interest;
- Opinion 674 – COI; multiple representation of corporation and corporate officer, corporate officer perjury, duty to withdraw;
- Opinion 687 – COI; dual practice as lawyer and insurance agent;
- Opinion 711 – COI; dual practice as lawyer and insurance agent;
- Opinion 712 – COI; financial interest;
- Opinion 731 – COI; referral of real estate clients to attorney-owned abstract company; employees of lawyer;
- Opinion 738 – COI; referral of clients to abstract company owned by attorney's spouse.

The Association of the Bar of the City of New York (ABCNY) publishes "Frequently Asked Questions" on ethics and includes copies of its opinions from 1986 through 2000 (http://www.abcny.org/ethicshome.htm). The ABCNY also has an ethics hotline at (212) 382-6624 for attorneys faced with ethical issues in their practices. Of particular interest are:

- Formal Opinion No. 2000-03 – The acceptance of securities in a client company in exchange for legal services to be performed;
- Formal Opinion No. 1999-01 – Lawyer's ability to represent a trade association as well as clients with interests adverse to individual members of the association;
- Formal Opinion No. 1999-07 – Joint Representation, duty of loyalty, client confidences and secrets;
- Formal Opinion No. 1995-01 – Attorney fees, billing, credit cards and other financing;
- Formal Opinion No. 1994-06 – In-house attorney; fees to third parties; multiple roles;
- Formal Opinion No. 1994-01 – In-house attorney; discrimination claims against former employer; confidences and secrets;
- Formal Opinion No. 1991-01 – Disclosure of potential conflict of interest to existing client;
- Formal Opinion No. 1990-01 – Attorney who is an active shareholder and provides legal services for different constituents (relates to coops);
- Formal Opinion No. 1988-05 – Co-op COIs.

The New York County Lawyers Association Web site contains its ethics opinions. Newer opinions can be found in full text and older ones in summary form (http://www.nycla.org).

The Standing Committee on Ethics and Professional Responsibility of the American Bar Association (ABA) also published a valuable opinion on July 7, 2000, For-

CONTINUED ON PAGE 34

Suits Against Public Entities For Injury or Wrongful Death Pose Varying Procedural Hurdles

By Michael G. Bersani

Bringing personal injury and wrongful death claims against New York public entities – the state, its public corporations, public authorities, agencies, departments, etc. – can seem like walking a minefield. Lurking just beneath the surface are myriad malpractice bombs waiting for the uninitiated to tread and detonate.

The procedures for bringing claims against the state and against its sundry political subdivisions are similar, yet different, thus causing confusion, which in turn can lead to mistakes by novices and even experienced attorneys.

First, know your opponent. Is the potential defendant a "public corporation," a "public authority," some other type of public entity, or is it a mere agency or department of the state?

Generally, if the wrongdoer is a "public corporation" (*e.g.*, towns, cities, counties, villages, fire districts, industrial development agencies, N.Y. City Health and Hospitals Corp.) you must sue in Supreme or County Court.[1] "Public corporations" include all "municipal corporations" (town, city, county, village, school district, etc.),[2] district corporations (*e.g.*, fire districts, water districts), and public benefit corporations (*e.g.*, industrial development agencies, N.Y. City Health and Hospitals Corp.).[3] Public corporations are creatures of statute, and their enabling statutes, charters and local laws almost invariably require adherence to the Notice of Claim procedures in General Municipal Law § 50-e for actions brought for personal injuries or wrongful death.[4] Section 50-e was enacted in 1945 to establish a uniform system for instituting tort claims against public corporations to replace the numerous provisions that had developed under local laws.[5]

"Public authorities" are another type of New York public entity. Most of their enabling statutes provide that, among other things, those seeking damages from them for personal injury or wrongful death must adhere to the Notice of Claim provisions of General Municipal Law § 50-e.[6] Generally, actions against public authorities must be brought in Supreme or County Court,[7] though in some cases exclusive jurisdiction is conferred in the Court of Claims, in which case the procedural provisions of the Court of Claims Act apply.[8] Public authorities differ from public corporations in one significant way: their enabling statutes often contain additional procedural requirements, beyond those set forth in General Municipal Law § 50-e, for bringing actions for personal injury or wrongful death.[9] Therefore, in suing a public authority, you must pay careful attention to its enabling statute, which can be found in the Public Authorities Law. This will tell you where, how and when you must sue.

Generally, if the wrongdoer is a mere agency or department of the State of New York (*e.g.*, the New York State Police, SUNY, the Department of Transportation, the state correctional facilities) or a state official acting in official capacity, you must sue the State of New York in the Court of Claims, and the Court of Claims Act applies.[10]

Most New York "public entities" are either public corporations, public authorities, or mere agencies or departments of the state with no independent identity for lawsuit purposes, *i.e.*, the state itself. There are, however, some specially constructed public entities that do not fall into these categories, such as the City University of New York,[11] whose enabling statute requires that, among other things, wrongful death and tort claims against it be brought in the Court of Claims.[12]

If the defendant is a public entity, and you are unfamiliar with the procedures for suing it, you must con-

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duct thorough research regarding the entity. A good place to start is case law. Research tort lawsuits involving the same entity to identify the forum in which the entity was sued. Next, conduct a statutory search regarding the entity in question to see whether it is set up as a public corporation, a public authority, some other independent body, or whether it is a mere agency or department of the state. Read the enabling statutes carefully to discern how, where and when you must sue.

Whether suing a public corporation, a public authority, some other independent public entity, or the state itself, attention must be paid to: (1) time limitations; (2) how, where and when you must move for leave to serve a late Notice of Claim (against public corporations and public authorities) or for leave to file and serve a late Claim (against the state); (3) the required contents of the various pleadings (the Notice of Claim, Complaint, Notice of Intention to File a Claim, and the Claim); (4) upon whom to serve these pleadings; (5) how to file and serve these pleadings; (6) pre-suit hearings; and (7) requirements regarding prior written notice of defects. Each issue is discussed below.

The one-year-and-90-day statute of limitations of the General Municipal Law trumps the sometimes-shorter statutes of limitations set forth in Article 2 of the CPLR.

TIME LIMITATIONS

Against a Public Corporation

The Notice of Claim Serving a Notice of Claim is a condition precedent to the commencement of an action against a public corporation. The defendant must be served with a Notice of Claim within 90 days of the date of the accrual of the claim (the incident complained of) or, in wrongful death actions, from the date of the appointment of a representative of the decedent's estate.[13]

CAREFUL! In an action for conscious pain and suffering on behalf of the decedent's estate, the 90-day period is measured from, at the latest, the date of death, and probably from the accident date,[14] but never from the date of the appointment of the representative of the decedent's estate.[15]

CAREFUL! The 90-day Notice of Claim requirement is not, strictly speaking, a "time limitation," but rather a jurisdictional condition precedent to the lawsuit, and therefore, the time for serving the Notice of Claim is not tolled by the tolling provisions of CPLR Article 2 (such as a claimant's legal disability pursuant to CPLR 208 or the recommencement-within-six-months provision of CPLR 205).[16]

Service of a Notice of Claim upon an officer or employee of a public corporation is not a condition precedent to the commencement of an action or special proceeding against such person unless the corporation has a statutory obligation to indemnify such person.[17] Be safe! When in doubt, serve the Notice of Claim upon the public corporation.

The Summons and Complaint At the earliest, the Summons and Complaint can be filed 30 days after the Notice of Claim was served or, if the public corporation has noticed a 50-h hearing, after the 50-h hearing takes place.[18] The outside time limit (*i.e.*, the statute of limitations) for filing the Summons and Complaint is one year and 90 days from the accrual date (not three years as with ordinary negligence cases), except for wrongful death claims, in which case it is two years from the date of death.[19]

CAREFUL! A conscious pain and suffering claim on behalf of the decedent does not benefit from the two-year period; the Notice of Claim must be served within 90 days of the incident complained of.[20]

CAREFUL! Personal injury actions against a sheriff or a coroner have a one-year statute of limitations.[21]

The one-year-and-90-day statute of limitations of the General Municipal Law trumps the sometimes-shorter statutes of limitations set forth in Article 2 of the CPLR (*e.g.*, one year for intentional torts).[22] For example, in a suit against a public corporation based on intentional tort, the statute of limitations is one year and 90 days, not one year.

CAREFUL! Although it is possible to sue a public corporation for an intentional tort (such as defamation) even after the shorter (one-year) CPLR Article 2 statute of limitations has expired, the shorter (CPLR Article 2) statute of limitations will apply to claims against any individual defendants (*e.g.*, officers or employees of the public corporation). Thus, if you sue a public corporation and its officers or employees for an intentional tort after the one-year statute of limitations of Article 2 of the CPLR has expired, but before the one-year-90-day statute of limitations of the General Municipal Law has expired, the officers and employees may escape liability on statute of limitations grounds. At the same time, the public corporation may escape liability if its officers or employees were acting outside the scope of their duties in committing the intentional tort. Result: Your case is dismissed. Lesson: Always sue the public corporation

and its officers or employees for such torts before the shorter CPLR Article 2 statute of limitations expires.

Although the CPLR Article 2 tolling provisions do not extend the time to serve a Notice of Claim, they do extend the time to file the Summons and Complaint (and simultaneously, the time to bring a motion to serve a late Notice of Claim and then to serve the late Notice of Claim against a public corporation).[23]

Public Authorities And Other Independent Public Entities

The enabling statutes of other public entities, and most notably many of New York's "public authorities," set forth different or additional "conditions precedent" for commencing an action as well as shorter statutes of limitations.[24] This can be a trap to the unwary!

The attorney who prefers to learn from others' mistakes should take heed of *Ramirez v. New York City School Construction Authority*,[25] where the unfortunate plaintiff, or more precisely her attorney, had sued the case within the one year and 90 days provided by the General Municipal Law, but not within the one-year statute of limitations set forth in the Public Authorities Law for suing the New York City School Construction Authority. In dismissing the claim on statute of limitations grounds, the court held that "having chosen to pursue a claim against defendant, a public authority, plaintiff is charged with knowledge of the statutory provisions dealing with the commencement of actions against such a body."[26] Lesson: Carefully research the public entity you are suing, checking both case law and statutory law to be certain where, how and when you must sue.

Against the State

As stated above, if the public entity does not have "public corporation" or "public authority" status, it is generally deemed a mere agency or department of the State of New York, in which case you must sue the state in the Court of Claims.

Here, too, the claimant must act within 90 days of the accrual date, or in wrongful death claims, from the date of the appointment of the representative of the estate.[27] Here, however, the claimant has the option of either serving a "Notice of Intention to File a Claim" (also known simply as a "Notice of Intention") or filing and serving the "Claim" itself within that time period.

If the "Claim" is filed and served within 90 days, then the claimant never serves a Notice of Intention; the Claim commences the action and the state must now answer. If the claimant chooses to serve a Notice of Intention rather than file and serve the Claim itself within the first 90 days, then the Claim itself must be *filed and served* within one year of the accrual date for intentional tort claims,[28] within two years of the accrual date for claims based on negligence,[29] and within two years of death for wrongful death claims.[30]

As noted above, in wrongful death actions the 90-day period for serving a Notice of Intention (or alternatively, filing and serving the Claim itself) is measured from the date of the appointment of a representative of the decedent's estate rather than from the date of death.[31]

CAREFUL! In an action for conscious pain and suffering, the 90-day period is measured from the ordinary accrual date for the tort, not from the date of the appointment of the representative of the decedent's estate.[32]

If the state does not object to the claimant's failure to adhere to the above 90-day time limitations, either by motion to dismiss the Claim before service of the Answer, or by affirmative defense in the Answer itself, then the defendant has waived the defense.[33]

CAREFUL! The time periods for serving the Notice of Intention and for filing and serving the Claim are not, strictly speaking, "time limitations," but rather jurisdictional conditions precedent to the lawsuit, and therefore, these time periods are *not* tolled by CPLR Article 2 tolling provisions.[34]

Although the CPLR Article 2 tolling provisions cannot be applied to extend the time for serving the Notice of Intention or filing and serving the Claim, the Court of Claims Act provides one toll of its own: "If the claimant shall be under legal disability, the Claim may be presented within two years after such disability is removed."[35]

LATE CLAIM OR LATE NOTICE OF CLAIM

As can be seen from the above, whether the public entity you are suing is a public corporation or the state itself, the first 90 days following the incident, or following the appointment of a legal representative in the case of wrongful death, are crucial. If the defendant is a public corporation, a Notice of Claim must be served, and if the defendant is the state, either a Notice of Intention must be served or, alternatively, the Claim itself must filed and served.

Yet even if these crucial 90 days have transpired, the claimant is not without hope. If the defendant is a public corporation, the claimant can move for leave to serve a late Notice of Claim. If the defendant is the state, the claimant can move for permission to serve a late Notice of Intention or to file and serve a late Claim.

Against a Public Corporation

How In the community where this author practices, a motion for leave to serve a late Notice of Claim is often brought simply by purchasing an index number and an RJI (request for judicial intervention) and then serving the motion by regular mail. Some courts, however, have held that such motions must be brought upon a special

proceeding, with personal service.[36] One commentator cautions that, without starting a special proceeding, jurisdiction over the defendant is not obtained.[37]

In any event, you must attach the proposed Notice of Claim to your motion for leave to serve a late Claim.[38] In your affidavits and other proof in support of the motion, try to show the factors set forth in General Municipal Law § 50-e(5):

1. The public corporation or its attorney or its insurance carrier knew of the essential facts constituting the Claim within 90 days of the incident, or acquired such knowledge within a "reasonable time thereafter." (This includes actual as well as constructive notice.[39])

2. The claimant was an infant, or mentally or physically incapacitated, or died before the time for service of the Notice of Claim.

3. The failure to timely serve a Notice of Claim was attributable to the claimant's justifiable reliance upon settlement representations.

4. The claimant or his or her attorney made an "excusable error" concerning the identity of the public corporation.

5. The delay did not "substantially prejudice" the public corporation in maintaining a defense on the merits.

6. Other factors, at the court's discretion.

Case law has added one more factor: whether the claimant has demonstrated a "reasonable excuse for the failure to serve a timely notice of claim."[40] Unfortunately for plaintiffs and their lawyers, neither a plaintiff's ignorance of the 90-day Notice of Claim requirement nor "law office failure" constitutes a "reasonable excuse" for failure to timely serve the Notice of Claim.[41]

Neither a plaintiff's ignorance of the 90-day Notice of Claim requirement nor "law office failure" constitutes a "reasonable excuse" for failure to timely serve the Notice of Claim.

"Ordinarily courts should not delve into the merits of an action in determining an application for leave to file a late Notice of Claim."[42] Although the claimant need not definitively demonstrate that the Claim is meritorious, the claimant must at least show that sufficient facts exist to establish that the Claim is reasonable.[43] Why risk it? Demonstrate the merits of your case as best you can.

Some of the "factors" tend to interact like falling dominos. For example, if the public corporation had "actual [or constructive] knowledge of the essential facts constituting this claim within 90 days or a reasonable time thereafter" (factor #1) this usually eliminates any "prejudice to the municipal defendant in maintaining a defense on the merits" (factor #5). These two factors are accorded great weight.[44] If you can satisfy factor #1, this should in turn show that the delay did not "substantially prejudice" the defendant (factor #5) (since the defendant will have had a timely opportunity to investigate the claim), and thus, even without satisfying the other factors, your motion will probably be granted. If you cannot satisfy factor #1, then you will usually be unable to satisfy #5, and your motion will usually be denied.[45]

When A motion for leave to serve a late Notice of Claim cannot be granted if, at the time the motion was served, the time limit for filing the Summons and Complaint (*i.e.*, the one-year-90-day, or two-year in wrongful death actions, statute of limitations, plus any available tolls) had expired.[46] As we have already seen, although the CPLR Article 2 tolling provisions do not extend the time to serve the Notice of Claim, they do extend the time to file the Summons and Complaint, and simultaneously, the time to bring a motion for leave to serve a late Notice of Claim against a public corporation.[47] The statute of limitations is tolled from the time the plaintiff commences the proceeding to obtain leave to file a late Notice of Claim until the order granting that relief goes into effect.[48]

The careful practitioner will not wait until the 11th hour to move for leave to serve a late Notice of Claim. Instead, the attorney will do so as soon as possible, because lengthy delays are more likely to cause "prejudice" to the defendant, less likely to be justified by a "reasonable excuse," and therefore more likely to result in denial of the motion.[49]

Against the State

How The motion for leave to file a late Claim must be filed in the Court of Claims and served upon the attorney general.[50] Case law has held that service by regular mail will do; the formal service requirements of Court of Claims Act § 11(a) (regarding service of the Claim and Notice of Intention to File a Claim) do not apply here.[51] You must attach the proposed Claim to your motion.[52]

The factors considered by the Court of Claims in deciding whether to grant a motion for leave to file a late Claim (or late Notice of Intention to File a Claim), enumerated in Court of Claims Act § 10(6),[53] are substantially the same as those enumerated in General Municipal Law § 50-e(5), listed above, except that, in addition, the Court considers whether the Claim "appears to be meritorious" and whether the claimant "has any other

CONTINUED ON PAGE 30

Suits Against New York Public Entities

	Time limits	Contents	Whom to serve	How to file/serve
Notice of Claim against **public corporation**	90 days from accrual date, or, in wrongful death actions, from the appointment of the administrator (unless leave to serve late notice granted).[1]	Name and address of claimants, and attorney; nature of the claim; time, place and manner in which the claim arose; items of damage or injury sustained, and, only if suing a city with a population of more than one million, the amount of damages claimed.[2]	See CPLR 311 for those "designated by law" for service at various municipal corporations, or serve the public corporation's attorney if said attorney is regularly engaged in representing the corporation.[3]	Serve personally or by registered or certified mail.[4]
Summons & Complaint against **public corporation**	1 year and 90 days from accrual date, or, in wrongful death claims, 2 years from death (unless tolls apply).[5]	Everything a Complaint ordinarily contains, including amount of damages claimed, but also allege that plaintiff has complied with all the conditions precedent set forth in General Municipal Law, that 30 days or more have elapsed since the Notice of Claim was served upon the public corporation, and that the "adjustment or payment" thereof has been neglected or refused.[6]	Same as above.[7]	File in the county where the public corporation resides, or in New York City, in the county where the claim arose, or, if it arose outside the city, in the county of New York.[8] Serve by personal service pursuant to CPLR 311 or 312-a.
Motion for leave to serve Late Notice of Claim against **public corporation**	Time limit coincides with statute of limitations (see above) plus all available CPLR Article 2 tolls.[9]	Attach proposed claim and show the following "factors": reasonable excuse for failing to serve a timely Notice of Claim; defendant aware of facts of claim within 90 days or within reasonable time; infant, incapacitated or deceased claimant; claimant relied on settlement representations; "excusable error" concerning the identity of the public corporation; no substantial prejudice to defendant; and any other equitable factors.[10]	Same as above.	Although service is frequently accomplished by regular mail, some courts hold plaintiff must bring special proceeding and effect personal service.[11]
Notice of Intention to file a Claim against **state**	Must serve this, or alternatively file and serve the Claim itself, 90 days from accrual date, or, in wrongful death actions, from the date an administrator is appointed (unless leave to serve late notice of intention is granted).[12]	Substantially same as for "Claim" (see below), except need not state items of damages or sum claimed.[13]	Attorney General.[14]	Serve either personally or by certified mail, return receipt requested.[15]

	Time limits	Contents	Whom to serve	How to file/serve
Claim against **state**	Must file and serve either within the 90 days indicated above, or, if a Notice of Intention was served instead, Claim must be filed and served 1 year from accrual date for intentional torts, 1 year from accrual date for negligence claims and 2 years from death for wrongful death claims (unless leave to file late claim is granted).[16]	Substantially everything listed above regarding a Notice of Claim against a public corporation, but in addition must set forth "the total sum claimed.[17]	Attorney General.[18]	File 2 copies with Ct. of Claims and serve upon A.G. in same manner as above, then file proof of service within 10 days of filing.[19]
Motion for leave to file late Claim against **state**	Coincides with underlying statute of limitations (e.g., 3 years for negligence claim) plus all available CPLR Article 2 tolls.[20]	Attach the proposed claim and show "factors," which are substantially the same as those listed above regarding motion for leave to serve late claim against public corporation, but also whether claim "appears to be meritorious" as well as whether the claimant "has any other available remedy" (*e.g.*, worker's compensation).[21]	Attorney General.[22]	Serve by regular mail.[23]
Notice of Claim, Complaint, Motion for Late Notice, *etc.*, against **public authorities** and other **independent public entities**	Check enabling statutes, which often defer in large part to the General Municipal Law, but often contain additional conditions precedent and shorter statutes of limitations.	Check enabling statutes, which often defer in large part to the General Municipal Law.	Check enabling statute, which often defer in large part to the General Municipal Law. Otherwise, follow CPLR 311.	Check enabling statutes, which often defer in large part to the General Municipal Law.

1. Gen. Mun. Law § 50-e(1)(a).
2. Gen. Mun. Law § 50-e(2).
3. Gen. Mun. Law § 50-e(3)(a).
4. *Id.*
5. Gen. Mun. Law § 50-i(1).
6. *Id.*
7. Gen. Mun. Law § 50-e(3)(a).
8. CPLR 504.
9. Gen. Mun. Law § 50-e(5).
10. *Id.*
11. *Lewin v. County of Suffolk,* 239 A.D.2d 345, 657 N.Y.S.2d 734 (2d Dep't 1997); *see* Siegel's Practice Review, No. 71, p. 4. (May 1998).
12. Ct. Cl. Act § 10(2), (3), (3-b).
13. Ct. Cl. Act § 11(b).
14. Ct. Cl. Act § 11(a).
15. *Id.*
16. Ct. Cl. Act § 10(2), (3), (3-b).
17. Ct. Cl. Act § 11(b).
18. Ct. Cl. Act § 11(a).
19. Ct. Cl. Act § 11(a); 22 N.Y.C.R.R. §§ 206.5(a), 206.5-b.
20. Ct. Cl. Act § 10(6).
21. *Id.*
22. *Id.*
23. *Sciarabba v. State of N.Y.*, 152 A.D.2d 229, 549 N.Y.S.2d 224 (3d Dep't 1989).

CONTINUED FROM PAGE 27

available remedy" (*e.g.*, workers' compensation).[54] Therefore, in a motion for leave to file a late Claim against the state, an affidavit of merit from a party with personal knowledge of the events making out a *prima facie* showing of the Claim should always be submitted with the motion papers.

Although the court must consider the six factors enumerated in Court of Claims Act § 10(6), those factors are not exhaustive and no one factor is controlling.[55] Of all the factors considered by the court, the most important is that the defendant has actual or constructive notice of the facts of the Claim within the 90-day period or shortly thereafter.[56] If it is shown that the state had prompt notice of the accident and an opportunity to investigate, this dispels any cloud of "prejudice" from the claimant's delay. (Again, note the domino-like interplay among these "factors.") Under such circumstances, the motion is usually granted, even if the claimant has failed to show a reasonable excuse for the delay.[57]

One court, reading the Court of Claims Act perhaps too literally, found that the statute does not permit motions to serve a late Notice of Intention to File a Claim, but only to file and serve a late Claim.[58] Thus, if more than 90 days have transpired since the accrual date (or date of the appointment of a representative of the estate in a wrongful death action), and neither the Notice of Intention nor the Claim has been filed or served, it is better to move to file and serve a late Claim rather than a late Notice of Intention, or at least to ask for alternative relief.

When Leave to file and serve a late Claim can be granted, at the court's discretion, as long as the underlying CPLR Article 2 statute of limitations had not expired at the time the motion was brought.[59] Example: Your client informs you of his potential negligence claim against the state at almost the three-year anniversary of the accident. If you move for leave to file a late Claim on that same day, the Court has discretion to grant it.

The Court of Claims Act adopts the tolling provisions of CPLR Article 2 in calculating the time to move for leave to file a late Claim.[60]

If a Notice of Intention was timely served (*i.e.*, within 90 days), and the time for filing and serving the Claim then expires (*e.g.*, in a negligence action, two years), but the time to move for leave to file and serve a late Claim (*e.g.*, in a negligence action, three years) has not yet expired, a claimant has two options: move for leave to file a late Claim or move for permission to treat the Notice of Intention as a Claim.[61] The better practice is to move for alternative relief.

The careful practitioner will not wait until the 11th hour to move for leave to file and serve a late Claim. Instead, the attorney will do so as soon as possible, because lengthy delays are more likely to cause prejudice to the defendant, less likely to be justified by a "reasonable excuse," and therefore more likely to result in a denial of the motion.[62]

CONTENTS OF THE PLEADINGS

Against a Public Corporation

Notice of Claim Pursuant to General Municipal Law § 50-e(2) the Notice of Claim against a public corporation must contain:

1. The name and post office address of each claimant, and of his or her attorney.
2. The nature of the Claim.
3. The time, place and manner in which the Claim arose.
4. Only if suing a city with a population of more than one million, the amount of damages claimed.[63]

Be careful to clearly and specifically allege the above. If you fail to describe the site, time of the accident or nature of the Claim with enough specificity so that the public corporation can properly investigate the Claim, your Notice of Claim may be deemed defective and your case dismissed.[64]

The claimant must verify the Notice of Claim.[65]

Complaint The Complaint must contain everything a Complaint ordinarily contains, but should also allege that the plaintiff has complied with all the conditions precedent set forth in General Municipal Law § 50-e and that 30 days or more have elapsed since the Notice of Claim was served upon the public corporation, and that the "adjustment or payment" thereof has been neglected or refused.[66] You should also state the amount of damages claimed.

The Complaint should not allege punitive damages against the public corporation, because none are allowable.[67]

Against a Public Authority And Other Independent Public Entities

The enabling statutes of many public authorities and certain other independent public entities set forth their own rules regarding content, but often defer to the General Municipal Law. Check the enabling statutes carefully.

Against the State

The Claim The Claim must state the time and place where the claim arose, the nature of the claim and the items of damage or injuries sustained and the total sum sought.[68]

Do not name any state employees whom you are suing individually. When the state employee or official is sued individually, *i.e.*, for acts committed outside the

scope of employment or on other theories of personal liability, such claims must be brought in Supreme or County Court, because the Court of Claims has no ancillary jurisdiction over such defendants.[69] This is so even where the state may be liable for the same acts under a *respondeat superior* theory.[70] Thus, to pursue the state as well as its employees or officers individually, a claimant must pursue parallel actions in the Court of Claims (against the state) and Supreme or County Court (against the individuals).

As in claims against public corporations, you cannot claim punitive damages against the State of New York.[71]

Notice of Intention to File a Claim The contents of the Notice of Intention are the same as for the Claim itself, except that you need not (but can if you wish) state "the items of damage or injuries and the sum claimed."[72] The Notice of Intention must describe, with sufficient specificity, the site and time of the incident as well as the nature of the claim "to enable the State to investigate the claim and promptly ascertain the existence and extent of its liability."[73]

Both the Claim and the Notice of Intention must be verified.[74]

WHOM TO SERVE

Against a Public Corporation

The Notice of Claim and the Summons and Complaint must be "served upon the public corporation against which the Claim is made." (The latter but not the former must be filed first.) Specifically, service must be "upon the person designated by law to receive service at the corporation or to its attorney if said attorney is regularly engaged in representing the corporation."[75] CPLR 311 sets forth those "designated by law" for service at various municipal corporations, the most relevant of which are listed here:

> 2. upon the city of New York, to the corporation counsel or to any person designated to receive process in a writing filed in the office of the clerk of New York county;
>
> 3. upon any other city, to the mayor, comptroller, treasurer, counsel or clerk; or, if the city lacks such officers, to an officer performing a corresponding function under another name;
>
> 4. upon a county, to the chair or clerk of the board of supervisors, clerk, attorney or treasurer;
>
> 5. upon a town, to the supervisor or the clerk;
>
> 6. upon a village, to the mayor, clerk, or any trustee.
>
> 7. upon a school district, to a school officer, as defined in the education law; and
>
> 8. upon a park, sewage or other district, to the clerk, any trustee or any member of the board.

Against a Public Authority And Other Independent Public Entities

The enabling statutes of many public authorities and certain other independent public entities set forth their own rules regarding service, but often defer to the General Municipal Law.[76] Check the enabling statutes carefully on how and whom to serve.

Against the State

The Notice of Intention to File a Claim and the Claim (only the later must be filed with the Court of Claims first) must be served upon the state attorney general.[77]

As stated above, the Court of Claims has exclusive jurisdiction over claims for personal injury and wrongful death against some public entities. Three of these are the Thruway Authority, the City University of New York, and the New York State Power Authority. The Court of Claims Act requires that, if the defendant is among these three, said defendant must be served as well as the attorney general.[78]

HOW TO FILE AND SERVE

Against a Public Corporation

The Notice of Claim must be delivered personally or by registered or certified mail upon the public corporation.[79]

Do not "file" the Notice of Claim; merely serve it upon the public corporation. Be careful, however. Improper service can be fatal. Defects in the manner of service are waived, however, if (1) the public corporation demands a 50-h hearing or (2) the public corporation actually received the Notice of Claim within the 90 days and fails to return the Notice of Claim to plaintiff within 30 days of its receipt with a statement specifying the defect.[80] The plaintiff then has 10 days to serve a new notice, which in turn cures the defect.[81]

The Summons and Complaint must be filed in the county where the public corporation resides or, in New York City, in the county where the Claim arose or, if it arose outside the city, in the county of New York[82] in the same manner as a Summons and Complaint against any private defendant, and then personally served pursuant to CPLR 311 or by mail with acknowledgment pursuant to CPLR 312-a.

Against the State

In an action against the state, the "Notice of Intention to File a Claim" or "Claim" can be served either personally or by certified mail, return receipt requested.[83] The Notice of Intention need not be "filed," but merely served, while the Claim itself must be filed in the Court of Claims and served upon the attorney general.[84]

CAREFUL! Service by certified mail, return receipt requested, is not deemed completed until the attorney

general *receives* the Notice of Intention or Claim.[85] So, if your time is short, go with personal service.

The Claim can be filed personally by delivering two copies of the Claim to the Court of Claims clerk's office, or by sending them to the clerk's office by regular mail, together with the filing fee. In either case, proof of service must be filed within 10 days of filing.[86] Filing by fax is permitted, but be careful to follow the rules at 22 N.Y.C.R.R. § 206.5-a.

If the state does not object to the manner or timeliness of service of the Claim or Notice of Claim, either by motion to dismiss the Claim prior to service of the first responsive pleading or by affirmative defense in the responsive pleading itself, then the defendant has waived such defense.[87]

PRE-SUIT HEARINGS

Against a Public Corporation

In suits against certain public corporations (cities, counties, towns, villages, fire districts, ambulance districts, school districts), the defendant is given the opportunity to take a 50-h hearing of the claimant after the Notice of Claim is served but before suit is commenced.[88] The 50-h hearing is not really a "hearing" (no judge is present), but rather a deposition. The public corporation has the right to demand such a hearing "relative to the occurrence and extent of the injuries or damage for which the Claim is made."[89]

The public corporation may notice the 50-h hearing at any time before being served with the Summons and Complaint, and the Summons and Complaint cannot be filed until 30 days after service of the Notice of Claim. If, 30 days after serving the Notice of Claim, claimant's attorney has received no 50-h notice, he or she may file and serve the Summons and Complaint.[90]

The public corporation must notice the 50-h hearing within 90 days of service of the Notice of Claim.[91] If the public corporation notices the hearing in a timely manner, but the 50-h hearing does not take place within 90 days of service of the 50-h notice, the plaintiff may commence the action by filing and serving the Summons and Complaint, but only if the plaintiff did not fail to appear at the examination, request adjournments, or otherwise cause the delay beyond the 90-day period.[92]

Unlike the rules for an ordinary deposition, the public corporation can notice the 50-h hearing to take place anywhere it wants. If, however, it notices a place outside the municipality against which the Claim is made, "the claimant may demand, within ten days of such service, that the examination be held at a location within such municipality."[93]

By taking a 50-h hearing, the public corporation does not waive its right to also take a deposition of the plaintiff pursuant to the CPLR after suit is filed.[94] In essence, then, the public corporation gets two "depositions" of the plaintiff: the 50-h hearing before suit and the CPLR deposition after suit is filed.

Against the State

If the claimant serves a Notice of Intention against the state, the state has the right to demand an examination of the claimant pursuant to Court of Claims Act § 17-a, which again is really nothing more than a deposition. If the claimant is served with such a demand, the claimant cannot file and serve the Claim until after the § 17-a hearing. The examination must take place within 90 days of service of the demand, or else the claimant may file and serve the Claim notwithstanding the hearing demand, unless the delay was the claimant's fault.[95]

By taking a § 17-a hearing, the state waives its right to a subsequent deposition.[96] This no doubt explains why § 17-a hearings are not demanded with the same frequency as 50-h hearings.

PRIOR WRITTEN NOTICE OF DEFECT

In some instances, in order to bring a Claim against a public entity, you must show that the public entity had prior written notice of the defect that allegedly caused the injury.

Against a Public Corporation

Where a municipality (*e.g.*, cities, towns, villages, counties) is the defendant, and injury is alleged to have been caused by a dangerous condition (including an accumulation of snow or ice) in a street, highway, bridge, culvert, sidewalk or crosswalk, you may be required to show that the defendant had "prior written notice" of the dangerous condition.[97] This is only so if the municipal charter or local law so provides[98] (but they almost always do).

In New York City, the Big Apple Pothole Corp. roams the city mapping such defects and keeps careful records of its written notices to the city. Everywhere else, the prior written notice rule is often the death knell for the plaintiff's case. There are several exceptions to the prior written notice rule, so check case law carefully before giving up on your claim for lack of prior written notice.

Against the State

There is no requirement of "prior written notice" of a defect when bringing a Claim against the state.

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1. CPLR 504.
2. General Municipal Law § 120-w ("Gen. Mun. Law"); General Construction Law § 66(1)–(2) ("Gen. Constr. Law").
3. Gen. Constr. Law § 66(3)–(4).
4. *See, e.g.,* CPLR 9801 (villages); County Law § 52 (counties).

5. *Viruet v. City of N.Y.*, 97 N.Y.2d 171, 738 N.Y.S.2d 2 (2001).
6. *See, e.g.*, Public Authorities Law § 1212 (New York City Transit Authority), § 1276 (Metropolitan Transportation Authority) ("Pub. Auth. Law"); *see Michael v. Yonkers Parking Auth.*, 172 Misc. 2d 304, 658 N.Y.S.2d 194 (Sup. Ct., Westchester Co. 1997).
7. CPLR 505(a).
8. *See, e.g.*, Pub. Auth. Law § 361-b (jurisdiction conferred upon the court of claims for tort actions against the Thruway Authority); Pub. Auth. Law § 2622 (conferring "exclusive jurisdiction . . . upon the court of claims to hear and determine any claim of any person brought hereafter against the authority to recover damages for injuries to property or for personal injury arising out of the operation by the [NY State Olympic Regional Development] Authority of any participating Olympic facility owned by the state or of the Gore mountain ski center"); *see also Plath v. N.Y.S. Olympic Reg'l Dev. Auth.*, 190 Misc. 2d 198, 738 N.Y.S.2d 507 (Ct. Cl. 2002) (discussion of Pub. Auth. Law § 2622).
9. *See, e.g.*, Pub. Auth. Law § 1276 (requiring that plaintiff plead that 30 days have elapsed since making a demand upon the Metropolitan Transportation Authority and setting a one-year statute of limitations for all torts, except wrongful death); *Fleming v. Long Island R.R.*, 130 A.D.2d 59, 518 N.Y.S.2d 144 (2d Dep't 1987) (discussing said 30-day demand requirement).
10. Court of Claims Act § 8 ("Ct. Cl. Act"); *Morell v. Balasubramanian*, 70 N.Y.2d 297, 520 N.Y.S.2d 530 (1987); *Glendora v. Cohen*, 215 A.D.2d 529, 627 N.Y.S.2d 947 (2d Dep't 1995); *see Sinhogar v. Parry*, 53 N.Y.2d 424, 442 N.Y.S.2d 438 (1981); *Paige v. State*, 269 N.Y. 352, 199 N.E. 617 (1936).
11. *Brooks v. Bd. of Higher Educ.*, 113 Misc. 2d 494, 449 N.Y.S.2d 425 (Sup. Ct., N.Y. Co. 1982) (CUNY is a "distinct, independent, quasi-governmental entity . . . controlled by the State").
12. Education Law § 6224.
13. Gen. Mun. Law § 50-e(1)(a); *Gibbons v. City of Troy*, 91 A.D.2d 707, 457 N.Y.S.2d 950 (3d Dep't 1982).
14. *Mack v. City of N.Y.*, 265 A.D.2d 308, 696 N.Y.S.2d 206 (2d Dep't 1999).
15. *Yoo v. N.Y.C. Health & Hosps. Corp.*, 239 A.D.2d 267, 657 N.Y.S.2d 189 (1st Dep't 1997); *Forero v. Town of Tuxedo*, 51 A.D.2d 443, 382 N.Y.S.2d 328 (2d Dep't 1976).
16. *Glamm v. City of Amsterdam*, 67 A.D.2d 1056, 413 N.Y.S.2d 512 (3d Dep't 1979), *aff'd*, 49 N.Y.2d 714, 425 N.Y.S.2d 804 (1980); *see Noel v. Shahbaz*, 274 A.D.2d 381, 711 N.Y.S.2d 752 (2d Dep't 2000).
17. Gen. Mun. Law § 50-e(1).
18. *Id.*
19. Gen. Mun. Law § 50-i(1).
20. *Rodriguez v. City of N.Y.*, 169 A.D.2d 532, 564 N.Y.S.2d 384 (1st Dep't 1991).
21. CPLR 215(1); *Eidman v. County of Monroe*, 177 A.D.2d 996, 578 N.Y.S.2d 17 (4th Dep't 1991).
22. *Ruggiero v. Phillips*, 292 A.D.2d 41, 739 N.Y.S.2d 797 (4th Dep't 2002).
23. Gen. Mun. Law § 50-e(5); *Noel v. Shahbaz*, 274 A.D.2d 381, 711 N.Y.S.2d 752 (2d Dep't 2000); *see Cohen v. Pearl River Union Free Sch. Dist.*, 51 N.Y.2d 256, 434 N.Y.S.2d 138 (1980); *Fierro v. City of N.Y.*, 271 A.D.2d 608, 609, 706 N.Y.S.2d 451 (2d Dep't 2000).
24. *See, e.g.*, Pub. Auth. Law § 1276 (requiring that plaintiff plead that 30 days have elapsed since making a demand upon the Metropolitan Transportation Authority and setting a one-year statute of limitations for all torts, except wrongful death); *Fleming v. Long Island R.R.*, 130 A.D.2d 59, 518 N.Y.S.2d 144 (2d Dep't 1987) (discussing said 30-day demand requirement), *aff'd*, 72 N.Y.2d 998, 534 N.Y.S.2d 371 (1988).
25. 229 A.D.2d 313, 644 N.Y.S.2d 741 (1st Dep't 1996).
26. *Id.* at 314.
27. Ct. Cl. Act § 10.
28. Ct. Cl. Act § 10(3-b).
29. Ct. Cl. Act § 10(3).
30. Ct. Cl. Act § 10(2).
31. *Id.*
32. *Pelnick v. State*, 171 A.D.2d 734, 567 N.Y.S.2d 290 (2d Dep't 1991); *see Howard v. State*, 175 A.D.2d 634, 572 N.Y.S.2d 569 (4th Dep't 1991).
33. Ct. Cl. Act § 11(c).
34. *Pelnick,* 171 A.D.2d 734.
35. Ct. Cl. Act § 10(5); *see Bowles v. State*, 208 A.D.2d 440, 617 N.Y.S.2d 712 (1st Dep't 1994).
36. *Lewin v. County of Suffolk*, 239 A.D.2d 345, 657 N.Y.S.2d 734 (2d Dep't 1997).
37. *See* Siegel's Practice Review, no. 71, p. 4.
38. Gen. Mun. Law § 50-e(7).
39. *Kliment v. City of Syracuse*, __ A.D.2d __, 741 N.Y.S.2d 819 (4th Dep't 2002).
40. *Clark v. City of N.Y.*, 292 A.D.2d 605, 739 N.Y.S.2d 624 (2d Dep't 2002).
41. *James v. City of N.Y.*, 242 A.D.2d 630, 662 N.Y.S.2d 542 (2d Dep't 1997); *see Ragin v. City of N.Y.*, 222 A.D.2d 678, 636 N.Y.S.2d 83 (2d Dep't 1995); *Weber v. County of Suffolk,* 208 A.D.2d 527, 528, 616 N.Y.S.2d 807 (2d Dep't 1994); *see also Deegan v. City of N.Y.*, 227 A.D.2d 620, 643 N.Y.S.2d 596 (2d Dep't 1996); *Lamper v. City of N.Y.*, 215 A.D.2d 484, 485, 626 N.Y.S.2d 253 (2d Dep't 1995).
42. *Katz v. Town of Bedford*, 192 A.D.2d 707, 597 N.Y.S.2d 140 (2d Dep't 1993).
43. *Ali by Ali v. Bunny Realty Corp.*, 253 A.D.2d 356, 676 N.Y.S.2d 166 (1st Dep't 1998).
44. *James*, 242 A.D.2d 630; *see Beary v. City of Rye*, 44 N.Y.2d 398, 412, 406 N.Y.S.2d 9 (1978); *Wertenberger v. Village of Briarcliff Manor*, 175 A.D.2d 922, 923, 573 N.Y.S.2d 757 (2d Dep't 1991); *see also Pollicino v. N.Y.C. Transit Auth.*, 225 A.D.2d 750, 751, 640 N.Y.S.2d 168 (2d Dep't 1996).
45. *Resto v. City of N.Y.*, 240 A.D.2d 499, 658 N.Y.S.2d 416 (2d Dep't 1997); *Lawrence v. County of Sullivan*, 233 A.D.2d 609, 649 N.Y.S.2d 244 (3d Dep't 1996).
46. *Lopez v. Brentwood Union Free Sch. Dist.*, 149 A.D.2d 474, 539 N.Y.S.2d 969 (2d Dep't 1989).
47. Gen. Mun. Law § 50-e(5); *Noel v. Shahbaz*, 274 A.D.2d 381, 711 N.Y.S.2d 752 (2d Dep't 2000); *see Cohen v. Pearl River Union Free Sch. Dist.*, 51 N.Y.2d 256, 434 N.Y.S.2d 138 (1980); *Fierro v. City of N.Y.*, 271 A.D.2d 608, 609, 706 N.Y.S.2d 451 (2d Dep't 2000); *McSherry v. Hawthorne Sch.*, 246 A.D.2d 517, 667 N.Y.S.2d 765 (2d Dep't), *appeal denied*, 91 N.Y.2d 812, 672 N.Y.S.2d 848 (1998).
48. *Giblin v. Nassau County Med. Ctr.*, 61 N.Y.2d 67, 471 N.Y.S.2d 563 (1984).
49. *See Ahferom v. Dormitory Auth.*, 282 A.D.2d 343, 723 N.Y.S.2d 367 (1st Dep't 2001) (leave to serve late notice of claim granted where delay was "short"); *Ayala v. City of N.Y.*, 189 A.D.2d 632, 592 N.Y.S.2d 352 (1st Dep't 1993); *see also Diallo v. City of N.Y.*, 249 A.D.2d 390, 670 N.Y.S.2d 793 (2d Dep't 1998) (leave denied where delay was "lengthy"); *Shapiro v. Town of Clarkstown*, 238 A.D.2d 498, 656 N.Y.S.2d 682 (2d Dep't 1997).
50. Ct. Cl. Act § 10(6).

51. *Sciarabba v. State of N.Y.*, 152 A.D.2d 229, 549 N.Y.S.2d 224 (3d Dep't 1989).
52. Ct. Cl. Act § 10(6).
53. Ct. Cl. Act § 10(6) states the following:

> The court shall consider, among other factors, whether the delay in filing the claim was excusable; whether the state had notice of the essential facts constituting the claim; whether the state had an opportunity to investigate the circumstances underlying the claim; whether the claim appears to be meritorious; whether the failure to file or serve upon the attorney general a timely claim or to serve upon the attorney general a notice of intention resulted in substantial prejudice to the state; and whether the claimant has any other available remedy.

54. *Id.*
55. *See Ledet v. State*, 207 A.D.2d 965, 616 N.Y.S.2d 831 (4th Dep't 1994).
56. *See Lockwood v. State*, 267 A.D.2d 832, 699 N.Y.S.2d 817 (3d Dep't 1999); *Gavigan v. State*, 176 A.D.2d 1117, 1119, 575 N.Y.S.2d 217 (3d Dep't 1991).
57. *Id.*
58. *See De Hart v. State*, 92 Misc. 2d 631, 401 N.Y.S.2d 417 (Ct. Cl. 1977).
59. Ct. Cl. Act § 10(6); *see Doe v. State*, 221 A.D.2d 218, 634 N.Y.S.2d 57 (1st Dep't 1995); *Howard v. State*, 175 A.D.2d 634, 572 N.Y.S.2d 569 (4th Dep't 1991); *see also Dreger v. N.Y.S. Thruway Auth.*, 81 N.Y.2d 721, 593 N.Y.S.2d 758 (1992).
60. Ct. Cl. Act § 10(8)(b).
61. Ct. Cl. Act § 10(8)(a).
62. *See Maurantonio v. State*, 266 A.D.2d 290, 698 N.Y.S.2d 281 (2d Dep't 1999) (leave to file and serve late Claim denied where claimant failed to provide a legally acceptable excuse for her eight-month delay in filing a claim against the defendant, and defendant was prejudiced by delay).
63. Gen. Mun. Law § 50-e(2); *Nickerson v. County of Jefferson*, 199 A.D.2d 1070, 608 N.Y.S.2d 906 (4th Dep't 1993).
64. *Caselli v. City of N.Y.*, 105 A.D.2d 251, 483 N.Y.S.2d 401 (2d Dep't 1984); *Evers v. City of N.Y.*, 90 A.D.2d 786, 455 N.Y.S.2d 646 (2d Dep't 1982).
65. Gen. Mun. Law § 50-e(2).
66. Gen. Mun. Law § 50-i(1).
67. *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1982); *Fernandez v. Suffolk County Water Auth.*, 276 A.D.2d 466, 714 N.Y.S.2d 91 (2d Dep't 2000).
68. Ct. Cl. Act § 11(b).
69. *LAL Leasing Corp. v. Williams*, 150 A.D.2d 643, 541 N.Y.S.2d 517 (2d Dep't 1989).
70. *Id.*
71. *Harvey v. State*, 281 A.D.2d 846, 722 N.Y.S.2d 605 (3d Dep't 2001); *see Sharapata v. Town of Islip*, 56 N.Y.2d 332, 452 N.Y.S.2d 347 (1982).
72. Ct. Cl. Act § 11(b).
73. *Riefler v. State*, 228 A.D.2d 1000, 645 N.Y.S.2d 556 (3d Dep't 1996).
74. Ct. Cl. Act § 11(b).
75. Gen. Mun. Law § 50-e(3)(a).
76. *See, e.g., Viruet v. City of N.Y.*, 97 N.Y.2d 171, 738 N.Y.S.2d 2 (2001) (concluding that the notice of claim service provisions of Gen. Mun. Law § 50-e(3)(a) are incorporated into the New York City Health & Hospitals Corp. (HHC) Act).
77. Ct. Cl. Act § 11(a).
78. *Id.*
79. Gen. Mun. Law § 50-e(3)(a).
80. Gen. Mun. Law § 50-e(3)(c).
81. Gen. Mun. Law § 50-e(3)(d).
82. CPLR 504.
83. Ct. Cl. Act § 11(a).
84. *Id.*
85. *Id.*
86. 22 N.Y.C.R.R. § 206.5(a)–(b).
87. Ct. Cl. Act § 11(c).
88. Gen. Mun. Law § 50-h.
89. *Id.*
90. Gen. Mun. Law §§ 50-h(5), 50-i.
91. Gen. Mun. Law § 50-h(2).
92. Gen. Mun. Law § 50-h(5); *Donohue v. County of Erie*, 226 A.D.2d 1083, 641 N.Y.S.2d 772 (4th Dep't 1996).
93. Gen. Mun. Law § 50-h(2).
94. Gen. Mun. Law § 50-h(1).
95. Ct. Cl. Act § 17-a(5).
96. Ct. Cl. Act § 17.
97. *Caramanica v. City of New Rochelle*, 268 A.D.2d 496, 497, 702 N.Y.S.2d 351 (2d Dep't 2000).
98. *Id.*; *see* Gen. Mun. Law § 50-g (cities); Village Law §§ 4-402, 6-602; Town Law § 65-a; CPLR 9804.

EQUITY INTERESTS IN STARTUPS
CONTINUED FROM PAGE 23

mal Opinion No. 00-418 – Acquiring Ownership in a Client in Connection with Performing Legal Services; which address various ethical issues: avoiding interest adverse to client; fairness of purchase price and terms; impact of attorney investment on control of client; and the exercise of independent professional judgment.

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1. All references in brackets [ ] are to the Disciplinary Rules of the Code of Professional Responsibility promulgated as joint rules of the Appellate Division of the Supreme Court and set forth in Part 1200 of Title 22 of N.Y. Codes, R. & Regs.

If the Jury Hears That a Defendant Is Covered by Liability Insurance, A Mistrial Is Not a Certainty

BY JOANNE B. HAELEN

The principle, and its practical implications, are well known: it is improper to disclose to a jury that a defendant in a negligence action carries liability insurance, and a mistrial may result if the jury is told. But after this general statement is made, the reviewing court may engage in very specific inquiries based on law that has taken almost a century to evolve.

This article explores the origin, legal underpinnings and manner in which this principle of nondisclosure has been applied over the years, all in an effort to answer the perplexing question of "how much is too much" when it comes to revealing that a defendant is insured.

Prejudice Is the Key

The touchstone for a mistrial is prejudice, and the principle of nondisclosure was founded on the belief that the jury would be corrupted if it learned that the defendant was insured against loss. As stated by the Court of Appeals in the seminal case of *Loughton v. Brassil*,[1] "it might make it much easier to find an adverse verdict if the jury understood that an insurance company would be compelled to pay the verdict."[2] Although this theory had its critics,[3] the criticism did not prevent the idea from taking hold. In 1911, the Court of Appeals decided *Simpson v. Foundation Co*.[4] The following language from that opinion has been embedded in New York jurisprudence ever since:

> Evidence that the defendant in an action for negligence was insured in a casualty company, or that the defense was conducted by an insurance company, is incompetent and so dangerous as to require a reversal even when the court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it could not have influenced the verdict.[5]

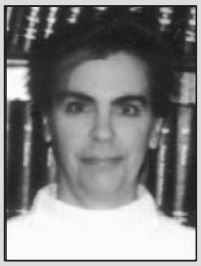
Nevertheless, and though it may seem anathema to the clear direction contained in the foregoing quotation, the first step in analyzing mistrial motions based upon disclosure of insurance coverage is to recognize that *Simpson* does *not* stand for the proposition that any and all mentions of insurance generate the type of prejudice that justifies a mistrial. Rather, and as succinctly stated in *Oltarsh v. Aetna Ins. Co.*,[6] *Simpson* condemns such disclosure "only when the fact of its existence is irrelevant to the issues and where such reference is, in all likelihood, made for the purpose of improperly influencing the jury."[7] As a result, the threshold question in an analysis of a mistrial application is whether the disclosure regarding insurance was the by-product of a relevant inquiry into a bona fide issue, or was completely irrelevant to any legitimate issue in the case.

Balancing Test if Information Is Relevant

If the existence of insurance coverage is relevant,[8] *Simpson* does not apply. The reason for the distinction between relevant and irrelevant disclosure is simple. The exclusion of relevant (and otherwise competent) evidence abridges a litigant's right to submit proof in support of a claim or defense, or to fully cross-examine adverse witnesses. On the other hand, the exclusion of irrelevant proof does not impinge upon such rights.

The courts apply a balancing test in cases where disclosure of insurance was relevant. Hearkening back to *Simpson*, they recognize that prejudice can be occasioned by the disclosure, but also recognize that this factor must be weighed against the offering party's fundamental right to present proof and to confront adverse proof. It is only when the prejudice occasioned by the disclosure is found to be so pervasive that it impinges on the right to a fair trial that a court will conclude that the relevant evidence containing the disclosure should have been abridged or excluded completely.

While it is impossible to pinpoint the precise nature and quality of relevant proof necessary to tip the balance in favor of a mistrial, it is clear that the nature and



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effect of the proof must be quite substantial, towards the extreme end of the spectrum. The Court of Appeals has said that incidental prejudice is not enough.[9] Cases where the disclosure was no more than a brief mention and was limited to establishing a material issue in the case (such as the defendant's ownership or control of property) fall into this latter category.[10] The same is true of cases where the mention also was brief and was made for the limited purpose of impeaching a witness, either by showing inconsistent statements[11] or by establishing bias or interest.[12]

Disclosure of insurance can also be relevant and allowable if a party "opens the door." One of the more interesting cases in this vein is *Honsberger v. Wilmot*,[13] a negligence action arising out of a motor vehicle accident. During cross-examination of a defendant, counsel elicited that he did not have a driver's license. The driver's counsel responded by bringing out the fact that the license had been taken away because the driver was not insured. In affirming the trial court's denial of a mistrial, the Third Department found that the cross-examiner had opened the door and, thus, was in no position to complain that the driver developed the reason for not having a license. Again, the reference to insurance (or lack thereof) was brief.

Insurance coverage can legitimately be interjected into a negligence action. However, cases where insurance is legitimately relevant to a substantial issue in the case are in the minority.

This is not to say, however, that a mistrial or a re-trial in the interests of justice is *never* justified when insurance coverage is disclosed solely in the pursuit of a relevant inquiry. As noted above, these situations are generally at the extreme end of the spectrum, and are usually characterized by protracted references in connection with collateral issues. The case of *Lynch v. Ford*[14] is a good example. The Lynch vehicle, which was operated by plaintiff wife, was struck twice from behind while traveling on the Saw Mill River Parkway.

The plaintiffs claimed that their car was struck by a car owned and operated by the Fords, defendants whose vehicle had been struck in the rear by a car owned and operated by the defendants Gray. The Fords' car was propelled forward and struck the Lynch vehicle for a second time. The Fords claimed that Mrs. Lynch had made a sudden stop, causing the three cars to come together; the Grays asserted that their car never collided with either of the other two vehicles.[15]

In the context of this factual dispute, co-plaintiff husband – who was a claims examiner for an insurance company – was allowed to testify about two MV-104 accident reports he had prepared for his wife to sign. The two reports differed in that the first noted that three cars had been involved in the accident, those of Lynch, Ford and Gray, while the second mentioned only two, those of Lynch and Ford.

Evidently, plaintiff husband had learned, after the accident, that the Ford vehicle was uninsured, and he prepared the second report in connection with making a claim under the uninsured motorist endorsement of his own insurance policy. At trial, the defendants inquired into the discrepancy between the two reports in order to impeach plaintiff husband's credibility, *i.e.*, to show that he was willing to conceal the existence of the Gray vehicle, which was insured, in order to recover on his uninsured motorist endorsement. The Appellate Division majority found this to be prejudicial and ordered a new trial.

Notably, the court balanced the generally inadmissible nature of insurance information against the proper use of the inconsistent reports to impeach the husband's credibility. It reversed because the trial court had allowed an "extended and broad ranging cross examination" which it found had "stressed the highly prejudicial collateral issue of insurance coverage to the jury and . . . informed the jury that the defendants Gray were insured. . . . [T]his was a close case and it is impossible to say that the prejudicial effect . . . did not influence the jury's verdict."[16]

As the foregoing discussion illustrates, the presence of insurance coverage *can* legitimately be interjected into a negligence action. However, cases where insurance is legitimately relevant to a substantial issue in the case are in the minority. Most mistrial applications occur when (a) the disclosure of insurance coverage is *irrelevant* to any legitimate issue in the case, or (b) some of the disclosures were legitimately relevant and others were not. These are the cases that fall squarely under *Simpson*.

Moving Away From a Strict *Simpson* Rule

On its face, the *Simpson* rule is stark and uncompromising, and initially it was strictly applied. If the fact of insurance was disclosed during trial and it had no bearing on any relevant issue in the case, prejudice was almost always presumed, and the declaration of a mistrial or a reversal of the verdict followed as a matter of course.[17]

By the 1940s and 1950s, however, a different trend seemed to be developing. Whether brought on by the enactment of legislation making liability insurance mandatory for certain vehicles and drivers, or by other

concerns, appellate courts became somewhat more circumspect. The irrelevant interjection of insurance coverage was still strongly condemned, but courts seemed more inclined to disregard it if they were satisfied the verdict had not been affected. The precise words used were analyzed, and distinctions were drawn, between disclosures that tended to show that a defendant actually carried insurance, and those that amounted to no more than a general reference to insurance or an insurance company.[18]

Distinctions were also made between passing comments and protracted discussions, and there was a focus on *who* made the disclosure (whether it came from counsel or from a witness), as well as *how* it occurred (whether it was interjected unexpectedly by the witness or deliberately by counsel).[19] Finally, a more vigorous investigation was launched into the strength of the proof supporting the verdict. If it was found to be a "close case," prejudicial influence and, hence, a mistrial were more likely.

By the 1960s, it was becoming apparent that the premise underlying the principle, namely, that the defendant would be prejudiced if the jury were advised that the defendant was insured against loss, was eroding. In 1964, the Court of Appeals pronounced, "it is the rare individual who today does not know that 'defendants in negligence cases are insured and that an insurance company and its lawyer are defending.'"[20] The advent of compulsory automobile liability insurance, along with the public recognition of the realities that insurance played in motor vehicle negligence litigation coincided with, and perhaps fueled, a further shift in the way courts analyzed mistrial motions based upon an irrelevant interjection of insurance coverage.

By the early 1970s, the shift was well under way. The dissenting opinions in the cases of *Doyle v. Dapolito*[21] and *O'Connell v. Consolo*[22] are representative of this newer thinking.

In *Doyle*,[23] the references to insurance coverage were brought out by plaintiff's counsel during his cross-examination of a defense witness, Justus S. Allen. Allen, a stenographer, had been called to testify about prior inconsistent statements made by one of plaintiff's witnesses. In an effort to impeach Allen's credibility, plaintiff's counsel asked him who paid for his services. Allen responded that (a) he had been hired by Allstate Insurance Company; (b) Allstate was the insurance carrier for one of the defendants; and (c) he was hired to accompany a Mr. Ganforti to interview witnesses in connection with the subject accident. After this, the following cross-examination occurred:

> Q. Who was Mr. Ganforti, Mr. Allen?
>
> A. He represented the Allstate Company. Investigator.
>
> Q. He was an investigator for Allstate?
>
> A. For the Allstate Company, yes, sir.
>
> Q. And was employed by a company that had a financial interest in the answers to these questions? Isn't that correct?
>
> A. I would assume so, yes, sir.[24]

The majority found the above-quoted testimony sufficient, under the facts of the case, to warrant reversal and a new trial. In its analysis, a distinction was drawn between questions concerning Allen's employment and those concerning Ganforti, who was not called as a witness. With regard to Allen, the majority recognized that questions concerning his employment had a direct bearing on his credibility, and thus could be a proper subject of cross-examination, even though they incidentally "brought forth responses which indicated the defendant was insured."[25] While the majority seemed uncomfortable with the name of the insurance carrier being elicited in connection with impeaching Allen, what tipped the scale in favor of reversal was its reiteration in connection with questions asked about Ganforti's employment. These questions were found irrelevant to any legitimate inquiry and, because they resulted in eliciting three additional references to the carrier by name and there were "close" questions on "vital issues of fact,"[26] the majority found the testimony prejudicial, warranting a new trial.

The dissent agreed that the line of questioning was improper, but it found no indication of prejudice and thus no reversible error. The dissenters stated that "[w]e have passed far beyond the time when the mere mention of insurance before the jury creates prejudicial error. . . . This large carrier . . . may well have had policyholders on the jury, or at least some who thought highly of it[ ] . . . [and] might, in fact, have benefited the defendant . . . this may be why the verdict was moderate in amount."[27]

The Appellate Division opinion and dissent in *O'Connell v. Consolo*[28] also reflects this growing change. There, the majority affirmed the trial court's grant of a mistrial based upon a single reference by a witness to Allstate Insurance Company. During plaintiff's re-cross-examination of a defense witness, counsel asked whether anyone had contacted him to find out how the accident happened. The witness responded, "I think someone of the Allstate Insurance Company called up, but –."[29] At this point, the testimony was terminated and the court instructed the jury to disregard the remark. The majority emphasized that the reference involved "more than the mention of insurance coverage, for a specific insurer was named."[30] It also noted, "It is not possible to determine on this record the effect which

the reference to Allstate, a company widely-advertised through mass media, had upon the jury and, in fact, there is some evidence which suggests that the reference influenced the amount of plaintiff's verdict."[31] The majority concluded that a new trial "would best achieve the interests of justice."[32]

However, here too, as in *Doyle,* there was a vigorous dissent:

> In our opinion, this reference to "Allstate Insurance" was not prejudicial. . . . The reference was voluntary and unresponsive . . . counsel was surprised by the reference . . . shown by his quick reaction and termination of all further questioning . . . the witness . . . was being queried as to possible inconsistencies in statements. . . . This was proper cross-examination. Furthermore . . . there was no way to tell whether the company referred to insured the plaintiff or one of the defendants. . . . It is unrealistic in these days of compulsory automobile insurance to expect a jury to completely block all idea of insurance from its mind. The important thing is to make sure it is not prejudiced by intentional and protracted reference to it.[33]

Prejudice No Longer Presumed

Present-day analysis is more in line with that applied by the dissenters in the foregoing cases. Appellate courts no longer presume prejudice. Rather, the perspective is that even if it is irrelevant to issues in the case, interjection of insurance coverage is presumptively *not* prejudicial. Accordingly, it is not cause for a mistrial unless it clearly appears that its interjection was deliberate, done for the calculated purpose of gaining a litigation advantage or improperly influencing the jury – *and* the verdict was affected as a result. In this regard, the current approach seems to be more in line with that used in connection with mistrial applications based upon *relevant* disclosures; incidental prejudice is not enough to tip the scale. Something more is required – something so egregious as to strike at the core of a fair trial.

In this spirit, courts have held that isolated, unintentionally elicited testimony from a witness that he or she gave a statement to, or was employed by, or did work for, an "insurance company" is insufficient,[34] and this approach does not change should the specific name of the insurance carrier be disclosed in the process.[35] Even a direct statement that the defendant is insured against loss, if isolated and deemed not likely to influence the verdict, has been held insufficient to justify a mistrial. Notable in this regard is *Rush v. Sears, Roebuck & Co*.[36] On cross-examination of the defendant's employee, counsel for the third-party defendant asked, "[I]f Sears loses this case, they stand to lose a lot of money, don't they?"[37] The witness responded, "We are insured."[38] In affirming the trial court's denial of a mistrial, the Third Department observed that the ruling was proper because the record supported the trial court's opinion that the witness's answer had been inadvertently volunteered, and other proof clearly had established defendant's liability.[39]

This is not to say, however, that the line never can be crossed. That point is well illustrated in *Butigan v. Port Authority of N.Y. & N.J.*[40] The case arose out of plaintiff's fall from a ladder while working for his employer, third-party defendant Computercool, on a renovation project. At issue were inflammatory remarks by plaintiff's counsel. During summation counsel argued:

> It's about money. It's all about money. Why give him a ladder? Because it's cheaper. Did you see Mr. Savas's [the owner of Computercool] face when I said, what about scaffolds? He said you have to rent scaffolds. . . . Let a couple guys fall down. When you accumulate how much it would cost to lease the scaffolds over the years, it's a lot cheaper to, you know, pay the insurance, do what you have to do, than to pay for the scaffolds.[41]

The law has evolved well beyond the point where there is a presumption of prejudice attendant solely to the mention of insurance coverage.

Further, despite the fact that there was no testimony during the trial about insurance, counsel argued on summation that Computercool was negligent because it had insurance and suggested that "the already deep pocketed 'major corporations' in the 'cold and callous . . . construction industry' would be unaffected by a large award."[42]

The trial court denied mistrial motions and gave curative instructions, and the jury returned a verdict for the plaintiffs. The First Department reversed. It noted that plaintiffs might be correct in asserting that most jurors are aware that construction companies tend to carry insurance for personal injuries, but found that their counsel had used the corporations' insurance coverage as evidence of negligence in order to inflame anti-corporate feelings. The appellate court also found that counsel had urged an award that was larger than justified by arguing, without any supporting evidence, that the companies operated under the theory that it was cheaper to buy insurance than to rent scaffolds. The court thus concluded that the curative instructions given by the court were insufficient to remedy the inherent prejudice of counsel's statements.[43]

Conclusion

There has been a blurring of the analytical distinction between relevant and irrelevant insurance disclosure. The courts seem to have adopted a single standard in assessing motions for a mistrial based on the disclosure that defendants were insured, looking to how and why the disclosure was made, and the effect it had on the jury's determination. Is *Simpson* dead? The answer is partly yes, and partly no.

The *Simpson* principle is based upon two premises: first, that a fair trial can be defeated by the interjection of irrelevant issues; and, second, that the mention of liability insurance is so corrupting as to defeat a fair trial. The first remains an important and viable part of our jurisprudence – in fact, it is one of the underlying bases for the exercise of the mistrial power itself. The second is probably outmoded. To be sure, the interjection of insurance coverage, as with any irrelevant issue, can be done in such a manner as to defeat a fair trial. However, the law has evolved well beyond the point where there is a presumption of prejudice attendant solely to the mention of insurance coverage. Ironically, it seems to have taken almost 90 years of applying *Simpson* to realize that there was some truth to what Justice Gaynor said way back in 1908:

> [T]he notion that our jurymen are so lawless or weak or corrupt that if they find out that a defendant is insured against damages for accidents they will render a verdict against him, when they would not have done so if that fact had been kept from them, is so false and so unjust to them that it should not be dignified by discussion. [sic] It must be humiliating to jurymen to learn that such a low estimate of their intelligence and alertness is entertained anywhere, let alone by judges who review their verdicts on appeal.[44]

It's hard to argue with that.

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1. 187 N.Y. 128 (1907).
2. *Id*. at 135.
3. *Rinklin v. Acker*, 125 A.D. 244, 249, 109 N.Y.S. 125 (2d Dep't 1908) (Gaynor, J., concurring).
4. 201 N.Y. 479 (1911).
5. *Id*. at 490.
6. 15 N.Y.2d 111, 256 N.Y.S.2d 577 (1965).
7. *Id*. at 118.
8. What is and is not relevant is something upon which reasonable minds can, and have, disagreed (*see Estes v. Big Flats*, 41 A.D.2d 681, 340 N.Y.S.2d 950 (3d Dep't 1973)).
9. *Leotta v. Plessinger*, 8 N.Y.2d 449, 462, 209 N.Y.S.2d 304 (1960).
10. *Id*. at 461–62; *Flieg v. Levy*, 148 A.D. 781, 133 N.Y.S. 249 (2d Dep't 1912), *aff'd*, 208 N.Y. 564 (1913); *McGovern v. Oliver*, 177 A.D. 167, 63 N.Y.S. 275 (1st Dep't 1917); *Martyn v. Braun*, 270 A.D. 768, 59 N.Y.S.2d 388 (2d Dep't 1946); *but see Constable v. Matie*, 199 A.D.2d 1004, 603 N.Y.S.2d 133 (4th Dep't 1993).
11. *Galuska v. Arbaiza*, 106 A.D.2d 543, 545, 482 N.Y.S.2d 846 (2d Dep't 1984).
12. *Di Tommaso v. Syracuse Univ.*, 218 N.Y. 640 (1916), *aff'g* 172 A.D. 34, 158 N.Y.S. 175 (4th Dep't); *Wood v. N.Y.S. Elec. & Gas Corp.*, 257 A.D. 172, 12 N.Y.S.2d 947 (3d Dep't), *aff'd*, 281 N.Y. 797 (1939).
13. 276 A.D. 884, 93 N.Y.S.2d 762 (3d Dep't 1949).
14. 60 A.D.2d 880, 401 N.Y.S.2d 281 (2d Dep't 1978).
15. *Id*. at 880.
16. *Id*. at 881 (citations omitted).
17. *Rodzborski v. American Sugar Refining Co.*, 210 N.Y. 262 (1914); *Akin v. Lee*, 206 N.Y. 20 (1912); *O'Brien v. Hencken & Willenbrook Co.*, 172 A.D. 142, 158 N.Y.S. 200 (1st Dep't 1916); *Donnelly v. Younglove Lumber Co.*, 140 A.D. 846, 125 N.Y.S. 689 (3d Dep't 1910).
18. *Weisgerber v. Ancona*, 259 A.D. 815, 20 N.Y.S.2d 649 (1st Dep't), *aff'd*, 284 N.Y. 665 (1940).
19. *See Havern v. Hoffmann*, 252 A.D. 486, 299 N.Y.S. 530 (1st Dep't 1937).
20. *Oltarsh v. Aetna Ins. Co.*, 15 N.Y.2d 111, 118, 256 N.Y.S.2d 577 (1965).
21. 20 A.D.2d 318, 247 N.Y.S.2d 340 (4th Dep't 1964).
22. 32 A.D.2d 820, 302 N.Y.S.2d 319 (2d Dep't 1969).
23. 20 A.D.2d 318.
24. *Id*. at 321.
25. *Id*.
26. *Id*. at 322.
27. *Id*. (Williams, P.J., dissenting).
28. 32 A.D.2d 820, 302 N.Y.S.2d 319 (2d Dep't 1969).
29. *Id*. at 821.
30. *Id*. at 820.
31. *Id*.
32. *Id*.
33. *Id*. at 821 (Munder and Martuscello, JJ., dissenting) (citations omitted).
34. *Sperduti v. Mezger*, 283 A.D.2d 1018, 724 N.Y.S.2d 250 (4th Dep't 2001); *Staltare v. D&B Distribs*., 281 A.D.2d 469, 470, 721 N.Y.S.2d 772 (2d Dep't 2001); *Burlingame v. G&G Auto Repair*, 229 A.D.2d 511, 512, 646 N.Y.S.2d 32 (2d Dep't 1996); *Allen v. Harrington*, 156 A.D.2d 854, 855, 550 N.Y.S.2d 79 (3d Dep't 1989), *leave denied*, 75 N.Y.2d 708, 554 N.Y.S.2d 833 (1990); *Div-Com, Inc. v. F.J. Zeronda, Inc.*, 136 A.D.2d 844, 523 N.Y.S.2d 687 (3d Dep't 1988); *Manchester v. Bankhead Corp.*, 125 A.D.2d 740, 509 N.Y.S.2d 434 (3d Dep't 1986).
35. *Kowalski v. Loblaws*, 61 A.D.2d 340, 343, 402 N.Y.S.2d 681 (4th Dep't 1978); *see Siegfried v. Siegfried*, 123 A.D.2d 621, 507 N.Y.S.2d 20 (2d Dep't 1986).
36. 92 A.D.2d 1072, 1073, 461 N.Y.S.2d 559 (3d Dep't 1983).
37. *Id*. at 1073.
38. *Id*.
39. *Id*.
40. 293 A.D.2d 251, 740 N.Y.S.2d 305 (1st Dep't 2002).
41. *Id*. at slip opinion, p. 1.
42. *Id*.
43. *Id*.
44. *Rinklin v. Acker*, 125 A.D. 244, 249, 109 N.Y.S. 125 (1908) (Gaynor, J., concurring).

Gradual Changes Have Silently Transformed the Adjudication Of Workers' Compensation Claims

By Barbara Baum Levine and James M. McCarthy

For nearly 20 years, a nationwide effort has been under way to change Workers' Compensation statutory schemes. Generally, these changes have been driven by economic arguments that compensation benefits are out of control, rife with claimant fraud, overly expensive for employers and cause businesses to relocate to other jurisdictions.

Such changes have achieved little in the way of broad attention largely because they are focused within each of the 50 states where regulation of insurance carriers remains a primary function of state legislatures.

In states where legislative revision has been implemented (*e.g.*, California, Texas, Minnesota), the result has significantly and substantially altered the Workers' Compensation bargain[1] between labor and industry, generally to the benefit of the employer and detriment of the injured worker.

The experience in New York State, while different from that in other jurisdictions, portends to produce similar results albeit without legislative participation.

During a recent speech, Allan Dershowitz characterized the reform agenda:

> They [the reformers] will take as much as they can get from you and from the average consumer, and they are trying to frame this as a consumer-oriented campaign directed at the conflict that exists between trial lawyers and their clients. That's the image they want to create: that you are hurting your clients – you are hurting the consumers – that they are there to forge an alliance between the corporation, the consumer, and the workers against greedy trial lawyers.[2]

In New York State, efforts to reform the Workers' Compensation system have commenced without legislation substantially revising the existing statutory scheme. Instead, a systemic transformation of the administration and adjudication of claims has occurred. This transformation avoids the state's constitutional[3] enfranchisement of the Workers' Compensation bargain while, at the same time, repositioning the system toward the ends identified by Professor Dershowitz.

The Workers' Compensation Bargain

Often lost in the rhetoric of reform of Workers' Compensation laws are the reasons the statutes came into existence. "At the turn of the century, industrial accidents were claiming about 35,000 lives a year, and inflicting close to 2,000,000 injuries."[4] The common law remedy for the industrial worker required a personal injury lawsuit which, in the face of such huge numbers, clogged the civil courts, with the result that neither capital nor labor was satisfied with the rules developed to accommodate these claims.[5] Three rules, in particular, operated to nullify or disallow a claim: fellow servant, assumption of risk and contributory negligence. Even where states legislated employer liability to modify the rules, the results were an increase in legal exceptions to the legislative acts. The ultimate outcome was that such laws were wildly non-uniform and full of unpardonable differences and distinctions:

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> [They] did not have the courage of [their] cruelty, nor the strength to be humane. . . . [They] siphoned millions of dollars into the hands of lawyers, court systems, Administrators, insurers, claims adjusters. Companies spent and spent, yet did not buy industrial harmony – and not enough of the dollars flowed to the injured workmen.[6]

By 1910, New York State enacted legislation to reform tort laws in the industrial sector providing benefits to injured workers. Despite the context of deaths and injuries to workers, the Court of Appeals declared the law unconstitutional as a deprivation of property without due process of law.[7]

The case was decided March 24, 1911, and the next day 146 women died in the Triangle Shirtwaist factory fire. In response, the New York State Legislature proposed and enacted, following a referendum, an amendment to the New York State Constitution.[8]

By 1914, the legislature had enacted a statutory scheme for Workers' Compensation. This rare change enabled New York State to provide a rational method for addressing the needs of injured workers beyond the strictures of tort remedy. Since that time, the New York Workers' Compensation Board (WCB) has been the arbiter of claims and has become the repository of accumulated knowledge, experience, and law in the field.

The New York Experience

From its inception, the WCB has been a unique agency. It is and has been substantially self-funded by way of an assessment scheme upon carriers authorized to underwrite Workers' Compensation insurance in New York.[9] In effect, the WCB has some insulation from the contentious budget process in New York State, and although it is nominally part of the state Department of Labor, it functions independently under a 13-member commission appointed by the governor.

As guardian and moderator of the constitutional bargain, the agency stood as a paradigm of independence, largely insulated from the political process, appearing to insure its legislative purposes and instill public confidence in its activities. This historic watershed of tort reform continues to underscore the vision of New York's courts in reviewing the agency's determinations.[10]

Characteristically, for most of the years of its existence, the WCB has conducted itself as a benign moderator of the rights of injured workers, their entitlement to benefits and/or the determination of carrier liability under the Workers' Compensation Law. By statute (WCL § 21), the agency is bound to administer the rights and claims of injured workers with the assumption that every claim filed with the agency is valid unless rebutted by substantial evidence. Over these many years, the WCB has created a body of "common law" within the agency and has had New York courts refine and develop decisional law furthering the legislative purposes. Both the intra-agency "common law" and decisional law were largely the product of two major forces: first, the moderation of disputes and contests between the claimant and employer/insurance carrier bars; and second, legislative enactments. These two forces combined to forge a substantial expansion of benefit coverage to large groups of injured workers (*e.g.*, asbestos claims, repetitive injury claims, independent contractors). The jurisprudence defining the statutory scheme matured under the aegis of the agency, which, in turn, circumscribed its adjudicatory function to administering claims and making determinations based upon its established common law, court decisions and legislative enactments.

In 1994, with the election of a new governor and new party control in Albany, the agency was spotlighted to be reviewed and reformed.

Consistent with this role as "moderator," the statute (WCL § 150) continues to define WCB hearing officers as "referees," even though the WCB by its rule-making authority changed the designation to "administrative law judge" (ALJ). On July 31, 1990, the ALJs were included under Civil Service Law, subject to appointment from approved lists following written examination. While referees previously were political appointees, the subsequent Civil Service Law denomination was a reform sought by unions and reformer legislation ostensibly to insulate the agency from political influence and increase gubernatorial control over its management and mission.

Transformation of the Process

In 1994, with the election of a new governor and new party control in Albany, the agency was spotlighted to be reviewed and reformed. In 1996, the Omnibus Workers' Compensation Reform Act (the "Act") amended the statutory scheme. Among other provisions, it sought to limit the common law exposure of employers for injuries to their employees and to restrict the remedy of third-party actions by non-employer defendants (*viz.*, the *Dole v. Dow Chemical Co.*[11] impleader). In this way, a reform of tort actions was accomplished by limiting the types of injuries within the WCL that could be the subject of third-party pleadings.[12] The Act, thereby, removed other employers and carriers from the pool of

available resources for injured workers. In effect, tort reform was achieved by amending the WCL, which amendment had little or no direct effect upon the Workers' Compensation bargain.

The veto potential in the legislature as well as the need to garner the support of labor, including those representing state workers, suggested alternatives to direct reform of the WCL. The executive branch elected to introduce a program of management and administrative reform, including the extensive use of computer programs and imaging of files for use at hearings by the ALJs and other participants in the adjudication of claims.

Without formal studies, the agency's leadership pronounced that, among other reasons, hearing delays were due 19% to the claims process, 21% to the review process, and 26.5% to the hearing process.[13] These critiques were largely the product of opinions of the WCB's own employees. The balance of opinion, 33.5%, was not reported.

At the same time, the WCB formally introduced "Organization Process and Technology in Customer Service" (OPTICS) devoted to the speedier resolution of claims for injured workers and employers as "demanded of us by our customers."[14] Although intrinsically benign as a comprehensive information system to manage the volume of claims more efficiently and effectively, OPTICS has enabled the WCB to shape and direct the conduct and activities of other participants in the system.

Transformation of the Judicial Process

Armed with increased authority over the selection of administrative law judges, together with OPTICS, the agency's leadership had the means, motive and opportunity to substitute reforms with a less independent judiciary in the post-1994 years. For example, practitioners report that they have seen ALJ "score sheets" measuring the number of cases heard by an ALJ and the relationship of actions at hearings to established management goals (*e.g.*, number of closed cases). "The electronic case folder will enable the Board to *evaluate the performance* of judges based on the duration of various types of claims and assess a variety of actions and decisions which contributed to the duration of Claims."[15]

The WCB has recruited ALJs from a number of state agencies, including the Department of Motor Vehicles. The new ALJs, recruited to a formerly claimant-friendly agency, served in agencies with a decidedly less friendly outlook. Moreover, they arrive with many years of service to preserve, and are thus more Civil-Service sensitive. In this way, the WCB has a revamped body of hearing officers more responsive to management control and, ironically, less independent than the previous politically appointed referees. Performance, retention and assignment are now an agency function.

Transformation of the Hearing and Claims Process

Nor has the thrust of management's platform to shape the adjudication of claims been limited to the hearing process. Practitioners report an increase in oral and written communications from WCB claims staff advising that a requested action will not be taken unless the staff member has been persuaded. Practitioners further report being advised that a claim would not be processed upon the medical report submitted by a party.

In another instance, an ALJ directed closure on a claim, citing the absence of a medical report indicating permanency of the injuries, while the core issue involved a totally different dispute: the suspension of benefits based upon a carrier report. The WCB staff communicated that the case would not be restored to the calendar although such report was already noted to be in the electronic case folder (ECF). Some carrier practitioners report conciliation decisions assessing penalties where the carrier-client is not even the proper carrier for the claim.

The "customer-service" model has also impinged more directly upon the adjudicatory process. By way of introducing a "no hearing" conciliation procedure, "customers" are informed of findings of fact (and, by definition, law) about their cases through an "Administrative Decision." Although the "customer" has a right to object to these decisions, the written decisions themselves are complex and encumbered with legal language. Worse, even though the "customer" may have received all the benefits to which he or she was entitled, the claimant remains ignorant of other rights available under the Workers' Compensation statutory scheme (*e.g.*, the right to reopen a claim for future benefits).

At hearings, "customers" are advised by ALJs (in management's pursuit of diminishing the inventory of claims) that the claim is subject to "No Further Action" (NFA) by the WCB until such time as some defined event occurs. Although such determinations are appropriate in a number of cases, NFA ignores the dynamics of the claims process and, more particularly, the medical and indemnity needs of claimants where, for example, medical treatment protocols are developing or where the rate of compensation has been set by the ALJ, based upon a single Independent Medical Exam (IME) from the carrier's medical consultant. Practitioners are advised by ALJs that the agency assures "re-opening as necessary in thirty days." This advice is not borne out by the experience of practitioners in the field and the board has not defined the standards by which "as necessary" will be determined.

In introducing medical deposition testimony in lieu of in-court appearances by the health-care providers of injured workers and carrier IMEs, the agency has declared that depositions would be scheduled whenever possible in cases where claimants are represented by legal counsel, but that claimants not represented by legal counsel would have all of their medical testimony take place before an administrative law judge.[16] Here again, the customer-service model creates dissonance between the represented and unrepresented in its absolutist drive to perfect a vendor-customer relationship. Such distinction invokes a serious due process question. It should be clear that the WCB, in its deposition rules, proposes depositions in lieu of live expert (generally, medical) testimony for use in ALJ decision making only for claimants represented by legal counsel. Contrasted with the purpose of depositions in the CPLR, which generally are limited to pre-trial matters, the WCB intends to reduce ALJs' opportunity to evaluate the credibility of witnesses and offer their "customers" expediency rather than direct judicial observation of witnesses.

The transition to the customer-service model reflects a distinct change in agency behavior from its historical position.

The WCB has proceeded to issue proposed regulations concerning the conduct of depositions despite opposition by both the claimant's and employer/carrier's bars. The rationale against deposition testimony has been simply and clearly set forth:

> All reasonable efforts should be undertaken to ensure that trial testimony is taken before the Law Judge. Depositions should only be directed where special circumstances warrant and then only where telephonic testimony is unavailable. Depositions under the WCL are actually trial testimony, and as such, trial testimony should be taken whenever possible in the presence of the Law Judge. Nothing can be more important to Law Judges in deciding issues of credibility and in weighing medical evidence than to hear and participate in trial testimony. The parties to the proceeding should not be deprived of trial testimony unless good cause exists.
>
> Counsel for the parties have a fiduciary obligation to their clients, and the Board should not intrude into this relationship by ordering a deposition where both parties want testimony to be taken in the presence of a Law Judge. Awards under the WCL can continue for a claimant's lifetime and over such time can total hundreds of thousands of dollars. This significant amount of potential benefits for claimants should be determined, whenever possible, by actual trial testimony before a Law Judge.[17]

Again, without the benefit of more responsible information or data, the agency has further opined that "securing timely medical testimony is frequently cited as the number one reason the Hearing process takes so long in New York."[18] It also declared that the practice of "live" testimony was "not required under the Workers' Compensation Law."[19] This is a distinction without foundation. WCL § 121 provides only that the WCB "may cause depositions of witnesses residing within or without the state." The determination to effect deposition testimony reverses many years of practice and enhances the weight of IME credibility for a single examination against that of the medical providers for injured workers, who may have treated the injured workers over several years. Moreover, the customer-service model shifts the adjudication burden in such instances to board policy, thereby increasing the agency's authority in the adjudicatory process. Along with its conciliation procedure, the WCB has enhanced its control over the rights of injured workers.

The transition to the customer-service model reflects a distinct change in agency behavior from its historical position to one now advancing itself as the primary protector, moderator, and custodian of rights and benefits for injured workers. By focusing on this goal, the WCB has conjugated the adjudicatory process to increased administrative and management control. This transformation diminishes the primacy of claimant (vs. customer) rights and converts the prosecution and/or assertion of rights into a vendor-customer relationship. Ironically, this paternalistic approach tends to contravene the philosophy of accepted conservative principles of government.

Transformation of the Appeal Process

The agency has also expanded and enlarged its Office of Appeals (formerly the Review Bureau) to respond to a much over-burdened procedure. In deft public relations terminology, the WCB defined its Office of Appeals (OOA) as "an independent body" to "recommend that [an ALJ] decision will be affirmed when it is grounded in the law and when the reasoning behind the decision is set forth."[20] Thus, the "independent" OOA appears not authorized to reverse a WCLJ decision even where the law is not correctly set forth, as long as some law has been referenced. The 2000 Annual Report of the WCB notes that the scope of authority of the OOA was reduced by transferring Full Board review matters (the second appellate step) to the WCB's Office of General Counsel.[21]

In the past few years, however, decisions rendered by Board Panels (three-member panels of Commissioners –

the first appellate step) appear to reflect a conscious selection of issues for review. Included among these are whether an injured worker has voluntarily retired from the labor market; has a compensable claim as a result of travel to or from the employment location; suffered a cardiac or CVA injury as a result of work activities. Again, practitioners report a perceptible reversal by Board Panels in these areas previously held to be compensable under agency "common law." For example, in the "travel to/from" claims, Board Panels have cited to a 1976 Court of Appeals decision, *Husted v. Seneca Steel Services Inc.*,[22] to reverse its "common law" body of decisions involving safe egress and ingress to the employment location. Some of these *sua sponte* reversals have not been ignored by the Appellate Division, Third Department. In one case, the court admonished the Workers' Compensation Board, holding "in the absence of substantial record evidence to support the Board's central determination that claimant was not injured 'in close proximity to her worksite' . . . the Board's determination cannot be sustained and the matter must be remitted for further development of the record."[23]

Nor has the Third Department been constrained in its admonitions to the WCB to follow both its own precedents, procedures and the WCL case law, as well as the agency's legislative purposes. Some recent curative instructions from the Third Department noted:

> [T]he Board cited no other evidentiary support for its determination. . . . As we have previously observed, while the Board is free to selectively credit or reject portions of expert medical testimony, it may not totally reject uncontroverted medical testimony in favor of its own opinion.[24]

> In the absence of a decision permitting intelligent review, we will not speculate on the basis for the Board's decision but, rather, remit the matter for further findings.[25]

> [W]e conclude that the Board's finding that decedent's death was wholly unrelated to his compensable [injury] lacks record support. . . . [W]e conclude that the Board's determination is arbitrary, capricious and unsupported by substantial evidence in the record.[26]

This last Third Department decision reversed the ALJ's disallowance of the claim and the Board Panel's affirmance of that decision. As noted above, the OOA provided the panel with grounds for disallowance even where the decisional law was crystal clear. Thus, notwithstanding prevailing precedents, the agency appears prepared to effect jurisprudential change by ignoring precedent, even evidence, to transform the appellate process.

The strong remonstrances from the Third Department raise a question about the role of the state attorney general's statutory obligation to represent the WCB in such matters. One wonders about the defense of the WCB's interests in reforming its jurisprudence, where such defense violates established precedents. At a minimum, the WCB seems anxious to bring about such change, while the Third Department is ever more adamant in reminding the agency of its legal constraints and legislative purposes.

It should also be noted that there is no legislative requirement that any of the Board Panel commissioners be attorneys. At present, the 13-member commission has four attorneys, not including the chairman of the WCB. Thus, many panel decisions citing the WCB common law and court cases, are often rendered by non-attorneys.

Perhaps largely due to its benign history, evidence of the WCB's transformation of the adjudicatory process remains for the most part unprovable. Practitioners offer multitudes of anecdotal information. Unfortunately, the WCB is itself not a proud historian of its own past. A reading of its 1999 and 2000 annual reports reveals little concerning this aspect of its mission. Instead, those reports proclaim its accomplishments in reducing the inventory of claims and data on its accomplishments in "servicing customers" – number of hearings conducted, reduction of rates, etc.[27]

In its annual reports, the WCB provides information on the accomplishments of two of its efforts: the Office of Advocate for Business (OAB) and the Office for Advocate for Injured Workers (OAIW). The OAB boasted of its assistance to individual business owners, saving them "hundreds of thousands of dollars," speeches to "26 chambers and associations" and participation in "3 trade shows for small business."[28] In contrast, the OAIW reported "3,580 public contact service hours with organizations throughout New York State."[29] The OAIW reported no specific information on contacts with or speeches before worker organizations or bar groups representing workers. It would appear that customer service to one cohort of customers is more aggressive than to another. This type of directed effort tends to reflect upon the true reality of the drum beats to which the agency marches.

This perception of the agency's reform mission was set forth by Governor Pataki: "We created a task force to take an in-depth look at the system to determine how we could cut the costs to businesses and stop the exodus of private sector employers."[30]

If the purpose of the reformed WCB was to make changes encouraged by business and political interests, and without legislative approval, it must be said to be succeeding. Thus, given its kinder and gentler history, as well as bar groups unorganized and unprepared to respond to a change in adjudication, the agency has been free to redefine the mission and shape its outcome.

Other Responses to the Transformation

In 1998, a committee of the New York State Bar Association (NYSBA) issued a report[31] severely critical of the agency's conduct, especially its attitudes toward attorneys practicing in the field and its handling of the rights of injured workers. At least one other recent appellate decision suggests that the courts will not support the WCB's attempts to place more weight on its concern with disposing of cases than in dealing with claimants fairly or in accordance with the law. In *Zatz v. Moscovici*,[32] the court observed that "in light of the undisputed facts presented here, the Board's decision to deny claimant the remedy of a workers' compensation claim was contrary to established caselaw, illogical, unduly harsh and, in fact, antithetical to the economic and humanitarian objectives of the Workers' Compensation Law."

Neither claimants nor employers are customers. They are parties to a claim of injury for which wage and medical benefits may be contested.

Although much contained in the NYSBA report was anecdotal information from practitioners, it was sufficiently credible and convincing to support the committee's recommendation for further investigation. The effect of the new changes on the adjudication of the rights of injured workers may inspire the legislature to intervene should those effects alter workers' rights and/or employer/carrier liability.

The changes introduced by the WCB seem to reflect ignorance of its historic mission as well as the idea that those changes may abridge constitutionally protected rights of injured workers. It is a contradiction in terms to assume that the adjudication of the rights of parties can be resolved by an all-powerful state agency. Experience, legal and practical, dictates that those rights will, sooner or later, succumb to the agency's bureaucratic stasis. Who guards the guardian?

Whether claimants or customers, the issue of rights remains predominant. The 1999 and 2000 annual reports issued by the WCB, as well as its interim publications, reveal little concern for the benefits to injured workers or for their rights. Instead, the reports laud the benefits of lowering costs or premiums to employers and give statistical data on the reduction of claim inventories, appeal inventories, etc. The WCB has yet to demonstrate the efficacy of its programs on the legal and equitable aspects of the claims of injured workers. Speed, efficiency, WCLJ performance, and lower premiums are proclaimed as being in the interest of the consumer/customer/claimant, without explanation. Carriers and carrier attorneys who stand in the place of the employer are mere "stakeholders," for whom the adjudication process is reduced to the WCB's reform interests – no matter what legal issues they present in interest. Lawyers for claimants, or "stakeholders," are thrust into an even more ineffective position in asserting the rights of injured workers.

Only by analogy is service to customers in a bargained-for contract equivalent to that in an injury claim. The terms of the "contract" in Workers' Compensation is the WCL, and its root in the New York State Constitution. Customers generally are not exercising a personal right, one defined by a contract. The injured worker, on the other hand, seeks to exercise a claim to benefits for a personal injury as enfranchised by a statutory scheme. Although it may suit businesses to participate as customers, the injured worker may be in need of life-sustaining medical assistance and income for his or her family to avoid public welfare. The analogy between claimant/injured worker and customer simply fails to acknowledge the essence of a claim and the stakes of the situation. "Customer service" merely provides a useful euphemism for the WCB to reform the agency without legislative changes.

Conclusions

The gravamen of the bargain among injured workers, employers, and the state, *viz*. workers' compensation, remains unchanged. The *right* to benefits continues as the irreducible consideration of the statutory scheme. Reform of workers' compensation ought to focus on the enhancement of benefits to which an injured worker is entitled; on increased effectiveness of work-place safety programs, on increased enforcement against employer fraud in failing to obtain coverage, and cash payments of wages.

Neither claimants nor employers are customers. They are parties to a claim of injury for which wage and medical benefits may be contested. The state – through the WCB – stands in the place of courts of general jurisdiction to insure a fair and equitable resolution to the injured worker's claim. Reform that affects the adjudicatory function in the pursuit of agency policies, which reform lauds its effect in lowering premiums, is not serving the rights of injured workers. It is, at best, self-serving.

The WCB is recording its new behavior through its publications, press releases, and annual reports. As that recorded history grows, observers will have a better record by which to assess the effect of that transformation upon the future of the rights of injured workers in

New York State. Anthony Lewis, the *New York Times* Op-Ed columnist, observed upon his retirement: "[C]ertainty is the enemy of decency and humanity in people who are sure they are right. . . . And when governments short-cut the law, it's extremely dangerous."[33]

1. Randy Rabinowitz, *Give Workers the Benefit of the Bargain*, Workers First Watch (Workplace Injury Litig. Group).
2. Allan Dershowitz, Keynote Address to the New York State Trial Lawyers Law Day Dinner, *published in Bill of Particulars* New York State Trial Lawyers Inst. Summer 2001.
3. N.Y. Const. art. I, § 18.
4. Lawrence M. Friedman, A History of American Law 482 (Simon & Schuster 1985).
5. *Id.* at 484.
6. *Id.*
7. *Ives v. So. Buffalo Railroad Co.*, 201 N.Y. 271 (1911).
8. *See* Edward I. Pitts & Ronald Weiss, New York Workers' Compensation Handbook § 1.03 (Lexis Publishing 2001).
9. *Id.* § 10.01(1), (2).
10. The N.Y. Worker's Compensation Law (WCL) is remedial in character and it is to be construed broadly and liberally to accomplish its economic and humanitarian objectives. *Holcomb v. Daily News*, 45 N.Y.2d 602, 412 N.Y.S.2d 118 (1978). In light of its beneficial and remedial character, the WCL should be construed liberally in favor of the employee. *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 369 N.Y.S.2d 637 (1975). The WCL was encacted for socioeconomic remediation purposes as a means of protecting workers and their dependents from want in case of injury on the job. *Johannesen v. N.Y.C. Dep't of Hous. Preservation & Dev.*, 84 N.Y.2d 129, 615 N.Y.S.2d 336 (1994).
11. 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972).
12. The Act revised WCL § 11 to require grave injury as a threshold to a *Dole* impleader. The courts have been strictly interpreting the list of threshold injuries as set forth in WCL § 21.
13. Focal Points (New York State Workers' Compensation Board) Jan. 1999, at 1.
14. *Id.* at 3.
15. *The Seven Principles of Effective Hearings*, Focal Points (New York State Workers' Compensation Board), Apr. 1999, at 3 (emphasis added).
16. *Id.*
17. New York Self-Insurers Association, Administrative Reform Proposals, Dec. 20, 1999, at 3.
18. *See The Seven Principles of Effective Hearings*, *supra* note 15, at 3.
19. *Id.*
20. *See id.* at 2.
21. New York State Workers' Compensation Board, *2000 Annual Report*, at 2.
22. 50 A.D.2d 76, 375 N.Y.S.2d 911 (3d Dep't 1975). In *Spector v. N.Y. City Bd. of Educ.*, 292 A.D.2d 741, 742, 739 N.Y.S.2d 758 (3d Dep't 2002), the Third Department reversed a WCB Panel decision which had affirmed a previous WCLJ decision; the Board Panel found that the "WCLJ acted within his discretion"; the Court found that the "Board failed to engage in its fact-finding role" by relying upon what the Board "erroneously viewed as the WCLJ's exercise of discretion."
23. *Moore v. Ogden Allied*, 284 A.D.2d 624, 626, 726 N.Y.S.2d 752 (3d Dep't 2001) (egress/ingress claim).
24. *Knouse v. Millshoe*, 260 A.D.2d 948, 950, 689 N.Y.S.2d 266 (3d Dep't 1999) (voluntary withdrawal claim).
25. *Loftus v. N.Y. News*, 279 A.D.2d 657, 659, 719 N.Y.S.2d 314 (3d Dep't 2001) (stroke claim).
26. *Imbriani v. Berkar Knitting Mills*, 277 A.D.2d 727, 731, 716 N.Y.S.2d 149 (3d Dep't 2000) (death claim arising from compensable occupational disease).
27. New York State Workers' Compensation Board, *2000 Annual Report*, Introductory Letters by Gov. G. Pataki and WCB Chair R. Snashall.
28. *Id.* at 18.
29. *Id.* at 19.
30. *Then and Now: A Message from Governor George E. Pataki*, On Board (New York State Workers' Compensation Board), Vol. 2, No. 1, at 1 (Apr. 1999).
31. New York State Bar Ass'n, *Report of the Special Committee on Administrative Adjudication*, Oct. 12, 1999.
32. 258 A.D.2d 850, 850, 686 N.Y.S.2d 167 (3d Dep't 1999).
33. *Conversations/The Long View, 50 Years of Covering War, Looking for Peace and Honoring Law*, N.Y. Times, Dec. 16, 2001, § 4, at 9.

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Provisions of New York Laws Are Likely to Diminish Impact Of High Court Disability Decisions

By Richard J. Reibstein and Rachael A. Akohonae

The U.S. Supreme Court has issued four decisions this year involving the Americans with Disabilities Act (ADA), and each one has been characterized as either a great victory for employers or a major setback for employees.[1]

One of those cases dealt only with unionized employers;[2] another dealt solely with government employees.[3] But for the vast number of private employers in New York including those who are not unionized, the other two Supreme Court decisions – the ones that have received the most attention in the media – should have little or no effect on the day-to-day affairs at work and only minor significance in court. The reason is that these two decisions, one involving a Toyota manufacturing plant and the other a Chevron refinery, turned on specific language in the ADA that does not appear in either the New York State or New York City Human Rights Laws – the state and local laws governing disability discrimination in New York State.

Defining "Disability"

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[4] an autoworker complained that her employer, Toyota, would not accommodate her carpal tunnel syndrome. After changing her job duties once, Toyota refused to change them a second time to eliminate all tasks that required her to lift up her arms. She sued Toyota under the ADA and the Family and Medical Leave Act (FMLA). The threshold question before the Court was whether her carpal tunnel syndrome was a protected "disability" under the ADA. That law defines "disability" with respect to an individual as "a physical or mental impairment that substantially limits one or more major life activities of such individual."[5]

The Supreme Court held that the autoworker was not necessarily protected under the ADA. Justice Sandra Day O'Connor said the lower court erred in disregarding evidence that the worker was able to carry out personal and household chores.[6] The Supreme Court sent the case back to the lower court with the instruction that, in deciding whether the employee's carpal tunnel syndrome "substantially limits a major life activity" under the ADA, the court must also consider whether the employee can perform basic everyday tasks that are "of central importance to daily life," such as brushing her own teeth, bathing herself, fixing breakfast, doing laundry, or performing other types of basic household chores.[7]

Notably, the definitions of "disability" under New York state and local laws differ substantially from the ADA. Under the New York State Human Rights Law, the term "disability" is very broadly defined. It covers "a physical, mental or medical impairment . . . which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques."[8] The New York City Human Rights Law is virtually identical and is just as broad.[9] Neither of those laws requires that the impairment "limit a major life activity," as does the ADA. Thus, carpal tunnel syndrome and many other physical, mental, or medical impairments may be protected disabilities under the New York State and City Human Rights Laws even though such impairments may not limit the employee's performance of everyday tasks that are "of central importance to daily life."[10]

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An example of this key disparity between the federal ADA's definition of "disability" and the broader New York definition of "disability" was noted in *Cole v. Uni-Marts, Inc.*, a case decided by a federal district court in New York.[11] In *Cole*, the court found that sinusitis was not a protected disability under the federal ADA but was protected under the New York State Human Rights Law.[12]

Effect in New York This key difference between the federal and New York definitions of "disability" is one of several reasons why employers in New York should not change the way they handle the accommodation of employees who have a physical or mental condition.

For example, if an employee who has carpal tunnel syndrome, like the employee in the Supreme Court case, walks into the human resources office at work (whether in New York or any other state) and says that his wrists have been aching and he cannot do his work that day, the human resources manager will likely do the same things he or she has done for years. First, the manager will probably ask if the employee's pain has anything to do with his job. Next, the manager may give him a workers' comp form to fill out, and maybe an FMLA form to complete if it appears that the employee will be missing time from work.[13] At this point, whether the employee is protected by the ADA or by state or federal law is of little consequence to an employer.

After being treated by a physician, the employee may ask for some type of job accommodation, such as a change in job duties or work environment, as did the employee in the *Toyota* case. Technically, this is where the disability discrimination laws kick in, because an employer has a duty under federal, state, and local laws to make reasonable accommodations for an employee with a protected "disability."[14] At this point, a human resources manager is highly unlikely to ask the employee whether he can brush his teeth, bathe himself, or make his own bed before deciding whether the company will grant the requested accommodation. Rather, the manager typically will either accept the employee's accommodation request, if it is reasonable, or offer a different accommodation that may be more reasonable or less of a burden on the company.[15]

Why should a human resources manager accept an employee's request for a workplace accommodation or offer an alternative accommodation without first determining if the worker's condition is protected under the ADA or a state or local law?

First, as noted above under New York law, as well as under the disability discrimination laws in many other states, an employee may be protected *even if* he or she is not substantially limited in a major life activity and can perform all types of manual tasks at home.[16]

Second, even though a medical condition might not be protected under the federal ADA or a state or local law, it may be protected under other federal laws, such as the federal FMLA, which affords eligible employees up to 12 weeks per year of medical leave for many illnesses and conditions that are not covered by the ADA.[17]

Third, many companies offer more rights to disabled employees than the laws require, especially to employees who have proven themselves to be valuable. Further, most human resources managers have little interest in picking legal battles with employees who are afflicted with a serious illness, disease, or medical condition. Nor do many human resources managers wish to ask employees such personal questions as whether they can brush their teeth, bathe themselves, or make their own bed, before deciding whether their companies are required by federal law to accommodate an employee's physical or mental condition.

For these reasons, the *Toyota* case is unlikely to alter the day-to-day employee relations of most employers, especially in states such as New York with state disability discrimination laws that are more protective than the ADA.

Courtroom Effect of the *Toyota* Decision

Most disability discrimination cases brought in court under the ADA are also brought under state and/or local laws prohibiting employment discrimination. In states such as New York where the laws are more protective to employees than the ADA, the Supreme Court's decision will have less effect than many practitioners may have anticipated.

Take for example a case like *Toyota* where there is an issue regarding whether an employee's medical condition substantially limits a major life activity. If the New York employee chooses to file a lawsuit against her employer for disability discrimination or failure to accommodate her condition, her lawyer may simply forgo the federal ADA claim and proceed in state court under a more protective state or local law that does not require that a major life activity be limited. The New York State and New York City Human Rights Laws, as well as other state laws with broader protection than the ADA, allow employees to commence civil actions in state court or to use the administrative adjudication process.[18] Further, unlike the $300,000 cap on punitive and compensatory damages under the ADA,[19] many states, such as New York, have no limits on such damages.[20]

For these reasons, the courtroom benefit of the Supreme Court's *Toyota* decision may be more limited than expected for those employers in states such as New York. Instead of filing suit in federal court, employees in

such states may commence their lawsuits in state court. In those instances, plaintiffs will more easily be able to demonstrate that they are protected by the broader and more protective state or local law; indeed, the plaintiff's protected status may not even be seriously challenged by the employer. For employers who are sued in state rather than federal court, *Toyota* will be of little or no value.

The "Direct Threat" Defense

In *Chevron U.S.A. Inc. v. Echazabal*,[21] the Supreme Court addressed the language in the federal ADA that provides employers with a special defense: the so-called "direct threat." This defense explicitly allows an employer to refuse to hire an individual whose employment poses a "significant risk to the health or safety of others that cannot be eliminated by a reasonable accommodation."[22]

Nothing in the New York State and New York City Human Rights Laws refers to any threats or risks to the health or safety of others.

The issue in *Chevron* was whether this "direct threat" language in the ADA means a direct threat to co-workers only or also a direct threat to the employee himself. In *Chevron*, the plaintiff worked as an independent contractor at Chevron's refinery. He had a liver condition that was exacerbated by his continued exposure to toxins. He applied for a job at Chevron directly, and after Chevron refused to hire him because of his condition, he sued Chevron for violation of the Americans with Disabilities Act.[23] Agreeing with Chevron, the Supreme Court held that the direct threat defense under federal law includes threats to the employee *himself*.[24]

Open question in New York New York law has no "direct threat" defense. Nothing in the New York State and New York City Human Rights Laws refers to any threats or risks to the health or safety of others. So, is such a defense available in New York?

Like the ADA, New York State and local laws require an employer to make a reasonable accommodation to the known impairments of an employee.[25] But, an employer in New York need not provide any such accommodations that "impose an undue hardship on the [employer's] business."[26] The New York State Human Rights Law also limits its employment discrimination provisions to disabilities that, upon the provision of a reasonable accommodation, "do not prevent the [employee] from performing in a reasonable manner the activities involved in the job or occupation sought or held."[27] A similar "defense" exists under the New York City Human Rights Law: in any case where the need for a reasonable accommodation is placed in issue, it shall be an affirmative defense that the employee could not, with a reasonable accommodation, "satisfy the essential requisites of the job."[28]

It is an open question whether these types of defenses under state and local law permit an employer to lawfully refuse to hire an employee who poses a direct threat to himself. On the one hand, an employer may argue that any employee who poses a direct threat to himself cannot perform in a reasonable manner the requirements of the job. On the other hand, an employee may contend that as long as he or she can physically perform the essential functions of the position without harming other workers or creating an unacceptable risk of damage to the employer's property, the law does not protect an employer who refuses to employ the individual. Essentially, these are the same sort of arguments advanced by the parties in the *Chevron* case. However, because New York and most other state and local laws do not include a "direct threat" defense, the outcome of such state court litigation is uncertain at best. Indeed, it is probable that the courts in some states or localities may reach inconsistent results with the courts in other jurisdictions.

Workplace Considerations After *Chevron*

There is another danger in reading too much into the *Chevron* decision: it does not give *carte blanche* to employers to fire workers who are a danger to themselves or other workers. Chevron, like other employers, was looking for a hard-and-fast rule on why it could lawfully refuse to hire a worker whose employment posed a threat to his own safety. The Supreme Court did not give employers what they wanted – an easy rule to follow. Instead, the Supreme Court said that employers must make an "individualized medical assessment" of the employee's ability to safely perform the essential functions of the job.[29]

According to the Court, this assessment must be based on a reasonable medical judgment that uses the most current medical knowledge and best available objective evidence, including imminence of the risk and severity of the anticipated harm.[30] Nothing about this "individualized medical assessment" rule is easy for employers; in fact, it is the rule favored by many employee groups. It can be a burdensome, expensive and time-consuming drill for employers. Although large companies such as Chevron may be able to afford to conduct "individualized medical assessments," most employers have little interest in investing the time and money to do so.

In sum, the practical effect of the Supreme Court's *Chevron* decision will be vastly different than what the media has suggested. Although no protection may be available under the ADA to an employee who poses a direct threat to his or her own safety, he or she might be protected under some state or local disability discrimination laws. Further, even if an employer is willing to undertake an individualized medical assessment that passes muster under the ADA, the results of litigation dealing with such an assessment is anything but certain.

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1. *See* Linda Greenhouse, *Justices Narrow Breadth of Law on Disabilities*, N.Y. Times, Jan. 9, 2002, at A1; Edward Walsh, *High Court Narrows Disability Act's Scope*, Wash. Post, Jan. 9, 2002, at A01; Linda Greenhouse, *Employers in 9–0 Ruling by Justices, Extended Willing Streak in Disabilities Act Cases*, N.Y. Times, June 11, 2002, at A24; Robert S. Greenberger, *Supreme Court Puts More Curbs on Reach of U.S. Disabilities Act*, Wall St. J., June 18, 2002, at A2; Charles Lane, *Supreme Court Limits Disabilities Act on Safety Issue*, Wash. Post, June 11, 2002, at A07; David G. Savage, *Disabled's Right to Jobs Narrowed*, L.A. Times, June 11, 2002, at A10; Robert S. Greenberger, *Supreme Court Sets Tighter Standards for Employees with Disability Claims*, Wall St. J., Jan. 9, 2002, at B4.
2. *U.S. Airways, Inc. v. Barnett*, 112 S. Ct. 1516 (2002).
3. *Barnes v. Gorman*, 112 S. Ct. 2097 (2002).
4. 534 U.S. 184, 122 S. Ct. 681 (2002).
5. 42 U.S.C. § 12102(2)(A), (B), (C). The definition of disability also includes an individual who has "a record of such an impairment" and one "being regarded as having such an impairment."
6. *Toyota Motor Mfg.*, 122 S. Ct. at 693.
7. *Id*. at 691, 693.
8. N.Y. Executive Law § 292(21)(a) ("Exec. Law"). Like the ADA, the definition also covers employees with "a record of such an impairment" and "a condition regarded by others as such an impairment." Exec. Law § 292(21)(b), (c).
9. N.Y.C. Admin. Code § 8-102(16).
10. *Toyota Motor Mfg.*, 122 S. Ct. at 691, 693.
11. 88 F. Supp. 2d 67 (W.D.N.Y. 2000).
12. *Id*. at 73, 74.
13. Under the regulations governing the FMLA, employers must give employees written notice detailing the specific expectations and obligations of the employee. *See* 29 C.F.R. §§ 825.208(a), 825.301(b). The U.S. Department of Labor provides an optional use form "Employer Response to Employee Request for Family or Medical Leave."
14. *See* 42 U.S.C. § 12112(b)(5)(A) (reasonable accommodation required to known physical or mental limitations of an otherwise qualified individual with a disability unless the accommodation would impose an "undue hardship" on the employer's business operations); Exec. Law § 296(3)(a), (b) (similar); N.Y.C. Admin. Code § 8-107(15)(a), (b) (similar but no reference to "undue hardship").
15. *See* EEOC Enforcement Guidance: Workers Compensation and the ADA; No. 915.002 (9/3/96); *Gronne v. Apple Bank for Sav.*, 2001 U.S. App. LEXIS 533, at *6 (2d. Cir. 2001).
16. For example, in New Jersey, see New Jersey Law Against Discrimination, N.J. Stat. 10:5-5(q).
17. While New York does not have a law requiring employers to offer family or medical leave, other states in which such employers operate may have state family or medical leave acts.
18. *See*, *e.g.*, Exec. Law § 297(1), (9); N.Y.C. Admin. Code §§ 8-109, 8-502. *See also* N.J. Stat. 10:5-13.
19. 42 U.S.C. § 1981a(b)(3).
20. The New York City Human Rights Law also has no such limits. *See* N.Y.C. Admin. Code § 8-502(a). The New York *State* Human Rights Law does not allow punitive damages (punitive damages only available in housing cases, see Exec. Law § 297(9); *Thoreson v. Penthouse Int'l*, 80 N.Y.2d 490, 591 N.Y.S.2d 978 (1992)), but has no cap on compensatory damages. While the New York *State* Human Rights Law does not provide for attorneys' fees, attorneys' fees are available to prevailing employees covered by the New York *City* Human Rights Law. N.Y.C. Admin. Code § 8-502(f).
21. 122 S. Ct. 2045 (2002).
22. 42 U.S.C. § 12111(3).
23. *Chevron*, 122 S. Ct. 2045.
24. *Id*.
25. Exec. Law § 292(21-e); N.Y.C. Admin. Code § 8-107(15)(a).
26. Exec. Law §§ 292(21-e), 296(3)(a). *See* N.Y.C. Admin. Code § 8-107(18).
27. Exec. Law § 292(21).
28. N.Y.C. Admin. Code § 8-107(15)(b).
29. *Chevron U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045, 2053 (2002).
30. *Id*.

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POINT OF VIEW

Flexing Your Media Muscle: A Guide to Working Out With the Media

BY LISA M. FANTINO

Media coverage is an essential element of law firm marketing. The more you speak, the larger the number of people that will hear you. You cannot grow a practice in the 21st century without media exposure.

The days of "no comment" and "off the record" are long gone. Nearly everything that happens inside the courthouse is newsworthy outside the courthouse, but the art is in knowing whether it is going to play out in a community newsletter or on the nightly network news.

"You know if it rains, that's not news because it happens frequently. It's news because it's new," says David Bookstaver, director of communications for the New York State Office of Court Administration. "You have to ask yourself what is the new angle and what is the public interest?" Bookstaver is a former photojournalist for both The Associated Press and *The New York Post*, but he readily admits there is no exact science to determining what may interest the gatekeepers of public information.

To learn more about how the media think requires becoming an active radio listener and television viewer, as well as reading the newspaper with an eye toward assessing why stories are covered on any particular day. Analyze why the five main headline stories were placed in that order and then, individually, which parts of them were covered and which were omitted. Is the story "sexy" – does it involve a celebrity or public official, is it a crime of passion, is there a gory crime scene, is there a scandal involved? If not, then see if it reaches a high number of people because anything that affects the community at large is newsworthy. Realize, too, that each media outlet has its own mission and you will be better able to determine whether the liberal or conservative outlet will be more inclined to cover your case.

Approaching the Media

Reaching the decision maker is the biggest challenge. Reporters are hungry for stories, but corporate downsizing and consolidation have cut resources at newspapers and broadcast stations. As a result, fewer reporters are searching for news, and many wait for the news to come to them.

Lawyers can learn the names of reporters, editors and producers by perusing the daily newspaper, listening to the credits aired hourly on the radio and watching the credit scroll at the end of a television news broadcast. These are the people who decide what gets covered.

Bookstaver, who spent seven years as the media coordinator for the cameras in the court program in New York, says he has rarely seen a lawyer visit the pressroom of any courthouse. Reporters gather there frequently during the downtime of a trial, while waiting for assignments and callbacks and looking for news. Attorneys should realize they have a captive audience within walking distance of the courtroom.

"Attorneys stand up in front of judges, they stand up in front of juries, they become the most skilled actors, presenters and orators, and to say that they feel awkward, or uncomfortable, or ill at ease going into a pressroom and getting to know people and bringing them a cup of coffee, I think that's feeble. I give lawyers more credit," says Bookstaver. "I think they should go into the pressroom. It's not cheap. It's saying, 'Look, I'm going to get to know people who can help me.'"

The Lawyer's Code of Professional Responsibility makes it clear that a lawyer should not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item;[1] but buying a reporter a cup of coffee or a doughnut is not likely to fall afoul of that rubric. The objective is to foster a friendly, professional relationship with the media, developing contacts you can trust, while being accessible yourself.

Timing information about your story involves knowing not only which phase of litigation may pique the media's interest but also the time of day to make it available. A print reporter's deadline is several hours ahead of when a reader may see the newspaper, whereas the deadline may be minutes away for radio and television reporters. You cannot offer a story to a newspaper reporter late in the evening and expect to make the late night or early morning news, but you can do that for broadcast reporters. In addition, understanding the constraints of each phase of litigation, both legal and in the interest of the media, allows for better placement of your story. Filing a complaint is similar to a prosecutor issuing an indictment, and sets the stage for media interest in talking to a lawyer or a client. This is an opportunity to initiate media contact without the constraints of disciplinary or court rules; you can merely state what is in the newly created court record without expanding in detail, and possibly tainting the administration of due process.

Your client should also be consulted. "You shouldn't be sending out press releases unless the client has agreed that this is a matter that you can seek press attention on," says Randolph Scott McLaughlin, a civil rights attorney and Pace Law School profes-

CONTINUED ON PAGE 54

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CONTINUED FROM PAGE 52

sor. "It's a fine line that you walk, but essentially the client has a right to privacy. However, once you enter a public forum, the privacy rights are limited because the papers are in a public courthouse and the reporters can pick them up themselves. So, if the case is going to get attention anyway, it's better for you to help shape public opinion than to let a reporter do it."

McLaughlin suggests seeing the big picture. Trying to pitch a case merely on the basis of getting the largest monetary reward for your client is not the way to win column inches or air time. McLaughlin notes, "I think that a lawyer owes a duty, not a legal duty here, not an ethical duty, but certainly a duty in a vague and amorphous sense to educate the people, and the media is a great tool for that."

Some attorneys believe the best way to create interest is through a well-drafted press release, but the sheer number of releases that come through a newsroom each day makes it impossible for producers and reporters to sift through them and discover what may be usable. As Juliet Papa, who has reported on the court system for more than 20 years at WINS-AM in New York and WCBS-TV, notes, "We would rather have the person say it on tape. I want a lawyer telling me that on tape, or at least I would like to ask them about it. If they want to limit themselves to the statement, especially if it doesn't say anything, then we won't even use it."

Bookstaver says you have to think inventively. What may appear to be a dry story on handling domestic violence or drug cases may be more sellable if you can pack it with emotion, such as those displayed at drug court graduations. "Sadly, TV people cannot get cameras in the courtroom, so I'm a little handicapped there when I do the pitching. But if I tell them they can do a drug court story and we can get them into the drug court graduation, which is a very emotional ceremony, then they will have highly charged video and see how effectively the court operates," says Bookstaver.

"You almost have to pre-produce the package with pictures and images that set the stage, so the reporters can pitch the story to their boss," he says. "If you pitch a talking head to a TV reporter or something that has no pictures, you're going to lose. Not because the story might not be good but because it's not a TV story."

Papa suggests that if the lawyer, whether a prosecutor or defense attorney, can supply surveillance footage, videotaped confessions, photographs or even do the interview at the scene of the crime, you can satisfy the needs of the television reporters. "I think lawyers generally try to get media coverage in their best interest," says Papa. "They just want the press because they have a story to tell, or in a federal civil rights suit they want the victims to come forth and talk about what happened to them, so it is usually in the attorney's best interest to have the press there."

Yet presenting those visual aids to the media may pose ethical issues for attorneys and have them facing contempt charges. The local rules for the Southern and Eastern Districts of the U.S. District Court in New York expressly prohibit any statements or release of non-public information that may involve a substantial likelihood that their public dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice. This includes statements on the existence or contents of any confession, the performance of any examinations or tests, or the accused's refusal or failure to submit to any examination or test.[2] In fact, it is comments on such evidence that have caused attorneys to face suspension of their licenses, as well as probation.[3]

What You Should and Shouldn't Say

Although attorneys do not check their free speech rights at the courthouse door, they are held to a higher standard under the First Amendment. Because lawyers have special access to information through discovery and client communications, the U.S. Supreme Court has held that attorneys who represent clients in pending cases may be regulated under a less demanding standard ("substantaial likelihood of material prejudice") than that established for regulation of the press ("clear and present danger").[4] The Court held that lawyers' extrajudicial statements may pose a threat to the fairness of a pending proceeding, in that such statements are likely to be received as especially authoritative; thus, the First Amendment does not require a state to demonstrate a clear and present danger of actual prejudice or an imminent threat to a fair trial before any discipline may be imposed on a lawyer who initiates a pretrial press conference.[5] Yet, whatever limitations are placed on an attorney by a court may be no greater than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial.[6]

Today's defense attorneys, however, often feel compelled to speak to the media because of pretrial publicity against their clients. "The media can make a villain or a victim of the person you are representing and you can never control what the media is going to do, so you must act in a way where you serve your client's interests and respond appropriately," says noted criminal defense attorney Mel Sachs. "Nowadays you must respond, and the reason you must respond is that so many cases become news whether it's on the front page or the lead story on television. Prosecutorial offices in criminal cases are letting the public know about indictments, and since that has become *de rigueur* for the other side, public opinion begins forming very quickly."

The question then becomes who responds and how to respond. Lawyers are often inaccessible, whether for ethical, scheduling, or comfort zone reasons, and feel compelled to hire a publicist. Reporters, on the other hand, want the story directly from the source and not a middleman. It is best if you,

CONTINUED ON PAGE 57

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Language Tips

By Gertrude Block

Question: Please comment on the statement recently made on television by an official of the State Department: "I take the blame. It was a mistake made by my office which I take all responsibility."

Answer: This is a case of the missing preposition *for*. The malady of preposition-deletion has infected writers and speakers who were perhaps taught English by teachers who considered it incorrect to end a sentence with a preposition. Their "rule" created a dilemma for writers and speakers. Should they sound stiff and formal by putting the preposition *for* in the middle of his sentence, or add it at the end of the sentence where it was incorrect? Faced with that choice, many omitted the preposition altogether.

The following comments were made by reporters who ought to know better:

- These insurance rates are even cheaper than competing companies. (Omission of *the rates of* create an impossible comparison, in which "rates" are compared to "companies."
- I take full blame. It was a mistake made by my office which I take all responsibility. (Omission of *for*)
- Give me an idea of what you're confronted. (Missing *with*)
- The interstate was closed 45 minutes. (Missing *for*)
- It was difficult to determine which direction the whales were swimming. (Missing *in*)
- We've had a chance to review the declaration that was agreed this AM. (Missing *on*)

These omissions not only defy grammar, they wreak havoc with English syntax. How does one "agree" a declaration? "Swim" a direction? Perhaps English teachers should learn to parse sentences before teaching English grammar to impressionable children.

On the other hand, while deleting necessary words, the same persons are also adding unnecessary words. In the following sentences one *that* would have been enough and one *then* is one too many: (Emphasis has been added.)

- The Court ruled *that* because quantity, price, and conditions were stated, *that* there was a valid offer.
- It has been argued *that* because some students panic in a single examination *that* several tests should be given.
- The court held *that* because the lease violated a statute section *that* the lease was invalid.
- If the seller is the owner of the gas station, *then* the owner is liable to him for conversion.

In recent years numerous adverbs have been needlessly attached to verbs and adjectives. Why is *back* attached to the verb *returned* in a statement like, "When you have read this, please return it back to me." Why is *back* attached to *hear* in a statement like, "Let me hear back from you"? People attach adverbs to adjectives, thus weakening the adjectives to which they have been attached: *perfectly honest* makes *honest* suspect; *well-renowned* makes merely *renowned* not good enough; and *overly verbose* seems to approve of verbosity.

In talks to legal professionals, I demonstrate our tendency to redundancy by asking them to shorten the following statements:

- Display of your entrance permit is mandatory at all times. (Display your permit.)
- To my mind it is a not-unjustifiable assumption. (I think)
- The remittance of sums paid by customers purchasing articles in or of this establishment is hereby guaranteed in the event that such articles, or one or more thereof, shall be hereafter deemed unsatisfactory to or by the said customers. (Satisfaction guaranteed.)
- "What I do is to orchestrate a series of people who put in inputs that eventually come out as a draft speech which I personally submit to the Secretary-General." (This was the answer a reporter received when he asked about the duties of the newly created position of deputy in the United Nations.)

One recalls Benjamin Franklin's *Poor Richard's* comment: "Here comes the orator with his flood of words and his drop of reason."

From the Mailbag

Some e-mails have arrived about the item in the July/August "Language Tips," discussing the decision of *Lloyd's List* (a distinguished British insurance and shipping newspaper read by many U.S. admiralty lawyers) to refer to ships in the neuter gender, abandoning the historic tradition of referring to them as female. Attorney William H. Hagendorn of the New York firm of Burlingham Underwood, who sent me the item, thought it might interest my readers. He was right.

Attorney Lorne Goldstein, wrote, "I have just finished reading your piece. . . . I loved it. If the topic of emotional response to linguistics interests you, I suggest that you turn your attention to the French used in Quebec."

Another reader suggested that the emotional response by feminists to the masculine gender "he" was similar to the response of persons who love ships. And University of Florida mechanical engineering professor Santiago Tavares, a native of Brazil, commented that emotional response to gender-reference is characteristic only of English speakers. He wrote that the Brazilian navy refers to ships as masculine; the propeller is feminine in the Portuguese navy and air force, but the word for "airplane" is masculine. Only English speakers, he added, get emotional about gender.

This emotional response has resulted from our loss of grammatical gender, which is still retained in other Indo-European languages. (For example the German word for "young woman" is neuter, *das Fraulein*, and the word for "human being" is masculine, *der Mensch*.) Old English nouns also had grammatical gender. For example, the word for "wife" was masculine, *wifmann*. But during the Middle Ages (1100–1500) English dropped gender designations, leaving all nouns, except those referring to sex, without gender. So those persons who

LANGUAGE TIPS
CONTINUED FROM PAGE 56

deplore the "sexist he" do not notice that most nouns ending in *or* and *er* are masculine in gender. Even those nouns with previously feminine endings (*actress, songstress, poetess*) have largely disappeared, in favor of the "masculine" form. Even the legal title *executrix* is giving way to *executor* in many courts.

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POINT OF VIEW
CONTINUED FROM PAGE 54

as the attorney, speak directly to the media on behalf of the client. You should have your clients direct all media inquiries to your office and, more importantly, never let your clients speak to the media outside your presence.

"You cannot control what the media is going to do. Those in the media have their own idea of what they're looking for and it certainly isn't fair and balanced reporting," notes Sachs, who is quick to echo other attorneys upset because their quotes were taken out of context. Sachs explains that an attorney should retain as much control over an interview as possible, often setting the parameters for what reporters may and may not ask.

Papa says she can work around such limitations and will agree, provided they are not so restrictive that there is no point to the interview. "Sometimes when they don't want to talk about specific evidence or guilt or innocence you can get a sense of the person and their emotions and that's helpful for a news story," she says. "You can judge what their feelings are if they're sitting in jail, or how this ordeal has been for them and their family, regardless of whether they're guilty or not, you can get a sense of the person involved."

Yet, in allowing your clients to speak to the media, you must carefully monitor what they are saying, because anything they say may be used against them as a prior statement if it is inconsistent with other testimony. You can best prepare your clients by preparing yourself to speak in simple sentences without revealing too much information that may be harmful.

"The media is like a beast that has to be fed, and you have to make sure that they only get the meal that you want to give them," says McLaughlin. He agrees with Sachs in that you do not need to answer questions directly but should focus on the big picture and talk about how the outcome of the case may affect the population at large. "You never have to answer a reporter's questions the way you must answer an appellate judge's questions – directly," Sachs advises. "When the media is asking the questions, you give the answers that you want because what's ultimately used in the nightly news is what you say. That way you can't put yourself in a position where you're answering something that's going to harm your case."

What to Expect

You can never expect that a reporter who questions you for an hour will use a substantial portion of your quotes for the average television story, which runs three minutes, or the average radio story, which runs 35 to 45 seconds.

"The media can be your greatest friend or your greatest enemy and it's important to cultivate relationships with those in the media you feel you can trust," says Sachs. He notes that reporters, just like lawyers, have reputations, and suggests learning the reputations of journalists to discover those who can be trusted. "Find a responsible journalist and take the time to explain things, and you will find that this is beneficial in many ways. A lot of journalists do not understand the law and will unintentionally say things without meaning to distort and misrepresent, but that's the way it ultimately comes out. If you take the time to act as a teacher as well as an advocate, you can educate the reporter and the public together. You must be able to explain what you were doing in court or what has already happened in order to get the story memorialized your way in an article or broadcast."

Conclusion

Attorneys need to realize the power in the media and recognize that they hold just as much power in advocating for their clients through the public forum. By keeping it short and simple and avoiding comments on a client's guilt or innocence, evidence not yet admitted in discovery and the character or competency of witnesses, you can steer clear of the potholes that may lead to contempt charges. Finally, respond to media queries in a thoughtful manner rather than react in a highly charged, emotional way, and the needs of both sides will be served.

1. The Lawyer's Code of Professional Responsibility, as adopted by the New York State Bar Association, effective January 1, 1970, as amended June 30, 1999, DR 2-101 [§ 1200.6] (J).
2. U.S. Dist. Ct. Rules S.D.N.Y. & E.D.N.Y., Criminal Rule 23.1 (a), (d).
3. *U.S. v. Cutler*, 58 F.3d 825 (2d Cir. 1995) (defendant held in contempt for speaking repeatedly and heatedly to the media on the merits of the government's case against his client).
4. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).
5. *Id.*
6. *U.S. v. Salameh*, 992 F.2d 445 (2d Cir. 1993).

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PS Form 3526, October 1999 (Reverse)

Judges use highlighting metadiscourse not only to add space. Judges highlight as a rhetorical device to show that they are informed – and that raises ethical concerns. A Westlaw check of May 31, 2002, discloses 31 times that New York State judges have congratulated themselves in the Official Reports for conducting "a through review of the record"; 60 times for conducting "exhaustive research"; 131 times for conducting "a close reading" of the papers, cases, or statutes; 23 times for conducting "thorough reading" of them; and a notable 1,285 times for conducting "a careful reading" of them. Seventy-seven times in the Official Reports have judges told their readers that they engaged in "careful deliberation," 90 times that they conducted a "complete review," and 46 times that "it is necessary to understand" a line of argument or factual issue.

Do judges highlight to assure skeptical readers that they spend their time deciding cases rather than playing golf? Or do judges highlight out of habit? Either way, metadiscoursive verbiage telling a reader that a judge is honest, smart, deliberate, detail-oriented, impartial, articulate, or empathetic has a negative effect. The words "sound hollow, contrived, and overly defensive," and at best "readers may find them offputting."[5]

Instead of explaining how closely they analyzed the facts, advocates and judges should analyze the facts closely – and prove it by written analysis, not by false expressions of candor. Instead of explaining how exhaustively they researched the law, advocates and judges should, if appropriate, discuss the research exhaustively. Instead of explaining how carefully they considered the issues, advocates and judges should consider the issues carefully. Instead of explaining how articulate they are, advocates and judges should write well.

Speaking to the reader directly is immodest, patronizing, theatrical, and insincere. Worse, doing so tells critical legal readers – the best lawyers, in other words – that perhaps the advocate or judge did not read the papers closely or research the matter exhaustively. An advocate's naked metadiscourse masks fair argument. A judge's naked metadiscourse masks deliberation and empathy.

Legal writers should not use the royal "we" or "us." For trial judges, doing so is inaccurate because a trial judge is singular. For attorneys, doing so is pompous. Appellate majority opinions written by one judge (as opposed to *per curiam* or memorandum opinions) may use "we" or "us." Appellate concurrences and dissents, even when joined by others, should use "I," not "we" or "us." Appellate concurring and dissenting judges should not use "I" at every turn. Immature and self-absorbed writers, whether practitioners or judges, write that way. But an "I" is better than circumlocutions that avoid it, such as "the present writer" and "the author." On the other hand, many "I" statements are metadiscoursive. It is obvious that many statements are opinion. The instant "Legal Writer" would strike the "I believe that" in "I believe that valid contracts require consideration."

As the ABA committee advised, "Avoid trite and hackneyed phrases such as 'well-settled' and 'constrained to hold.'"[6] The phrase "well settled" is especially hackneyed. A Westlaw check of May 31, 2002, disclosed exactly 10,000 times that New York courts have used it in officially published opinions. The same Westlaw check disclosed an astonishing 6,830 times that New York courts, in officially published opinions, have been metadiscoursively "constrained" to decide a case in a particular way. Judges who admit to being "constrained" shift responsibility from themselves. They are really saying, "I'm about to render an unjust, idiotic decision. Blame the legislature or other judges. Don't blame me."

Chief Justice David J. Dixon of the Missouri Court of Appeals, Kansas City District, explained what goes through judges' minds when they use phrases like "well settled," "no citation of authority is necessary," and "we need not dwell on the contention of counsel"[7]:

"I am about to apply *stare decisis* and although the result in this case may seem absurd, it is unnecessary to give any reason."

"I have an appointment at the Rotary Club to speak on the 'Integrity of Judicial Opinions' and my law clerk has been so busy getting my wife's anniversary present, he has not had time to find any analogous authority."

"The lawyer has skewered you and you need to get off the hook."

But Chief Justice Dixon also noted that using these expressions will not cause much trouble: "You can rest assured that if you utilize these expressions, your opinions will look like most opinions. Never mind the carping of law professors and their stooges on the Law Review."[8]

Needless to say – and accordingly even more needless to write – it goes without saying that when all is said and done, it is well settled that metadiscourse is verbose, unpersuasive, and often unethical. And on this point it is the present author's opinion that we should detain the reader no longer.

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1. Cathy Glaser et al., The Lawyer's Craft: An Introduction to Legal Analysis, Writing, Research and Advocacy 196 (2002).
2. Irving Younger, Persuasive Writing 32–33 (1990).
3. Gertrude Block, Effective Legal Writing 74 (4th ed. 1992). Note that Professor Block's excellent text is now in its fifth (1999) edition.
4. American Bar Association, Section on Judicial Administration, Committee Report, *Internal Operating Procedures of Appellate Courts* 37 (1961). This report was written mostly by Ninth Circuit Judge (and previously Washington Chief Justice) Frederick G. Hamley.
5. Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing 137, 151 (2002).
6. *Internal Operating Procedures of Appellate Courts*, *supra* note 4, at 37.
7. *See Lexicon for Appellate Judges*, N.Y.U. Appellate Judges Seminar (1973), *reprinted in* Robert A. Leflar, Appellate Judicial Opinions 193, 193–95 (1974).
8. *Id.* at 195.

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THE LEGAL WRITER

Writers on Writing: Metadiscourse

BY GERALD LEBOVITS

This is to inform you that from our point of view, we would venture to suggest in the final analysis something that goes without saying: Metadiscourse is cliché-driven discourse about discourse. Legal writers should get to the point without preambles and running starts. Metadiscourse takes up space and adds nothing. Metadiscoursive writers talk to their readers by explaining the writers' thinking and writing. Metadiscourse is throat clearing.

The adage "First say what you will say, then say it, then say you've said it" works only if you are subtle. Contrary to popular advice, do not say that you are about to say something. That pedantic and condescending way of speaking and writing frustrates even children.

In their new book on legal writing, a team of New York Law School professors offers good advice on metadiscourse to cut clutter and edit editorializing: "Let the thought itself carry its own interest or importance: if the point is truly interesting or important, let the reader find it so by how you express it."[1]

Delete the following metadiscourse: "Another aspect of the case that ought to be considered is that . . . ."; "As a matter of fact . . . ."; "As far as the court is concerned . . . ."; "Bear in mind that . . . ."; "Consideration should be given to the possibility of [or *that*] . . . ."; "For all intents and purposes . . . ."; "From our point of view . . . ."; "I would venture to suggest that . . . ."; "If I may be permitted to add . . . ."; "In connection with . . . ."; "In dissent I propose to argue that. . . ."; "In our opinion . . . ."; "In the final analysis . . . ."; "It appears to be the case that . . . ."; "It can be said with certainty that . . . ."; "It goes with saying that . . . ."; "It has come to our attention that . . . ."; "It is clear that . . . ."; "It is conceivable that . . . ."

"It is hornbook law that . . . ."; "It is important [or *helpful* or *interesting*] to remember that . . . ."; "It is important to state at the outset that . . . ."; "It is logical to believe that . . . ."; "It is significant that . . . ."; "It is submitted that . . . ."; "It is the court's conclusion that . . . ."; "It is true that . . . ."; "It should be emphasized that . . . ."; "It should [or *must*] be noted that . . . ."; "It should not be forgotten that . . . ."; "It stands to reason that . . . ."; "It would seem that . . . ."; "Let me say that . . . ."; "Needless to say . . . ."; "On balance . . . ."; "One feature of which one should be aware . . . ."; "Petitioner is aware that . . . ."; "Please be advised that . . . ."; "Speaking with all deference . . . ."

"Suffice it to say . . . ."; "That is to say . . . ."; "The court recognizes that . . . ."; "The court suggests that . . . ."; "The fact of the matter is that . . . ."; "The fact is that . . . ."; "The first thing this court will write about is . . . ."; "The point I am trying to make is that . . . ."; "The next issue defendant will deal with is . . . ." (*becomes:* "The next issue is [or *Second*,] . . . ."); "The third section of this brief concerns . . . ."; "There is no doubt but that . . . ."; "This court finds that . . . ." (use rarely, and only to show a sharp break between the litigants' contentions and the court's findings); "This is a case that . . . ."; "This is to inform you that. . . ."; "To get to the point . . . ."; "To me . . . ."; "We believe that . . . ."; "We happen to believe that . . . ."; "What I mean to say is that . . . ."; "When all is said and done . . . ."

Suffer not sing-song metadiscourse: "The contract is invalid. Why is the contract invalid? The contract is invalid because it violates public policy. How does the contract violate public policy? The contract violates public policy because it promotes illegal gambling. How does the contract promote illegal gambling? . . . ." Sing-song metadiscourse is common from religious pulpits. The technique fails with legal readers.

Metadiscourse is unsubtle and therefore unpersuasive. As Professor (and for a time New York County Judge) Younger explained, legal writing should be "modest and quiet, confident that its merit lies partly in the art by which the author has concealed his art . . . . [L]egal writing should be like a triple-dry martini – colorless but powerful."[2] Stated another way, "in legal writing, unlike much other writing, your personalities should remain in the background. Creativity and discursiveness, which perhaps earned you kudos as undergraduates, should give way to clarity and logical analysis."[3] Thus, eliminate overwrought metadiscourse: "The record is devoid of even a mere scintilla of evidence that . . . ."; "Opposing counsel has offered a series of bald assertions."

Legal writers should get to the point without preambles and running starts.

Metadiscourse also hides. Many judges, not merely many practitioners, use overstated metadiscourse to conceal. Judicial metadiscourse was condemned 40 years ago in an American Bar Association committee report:

> Avoid expressions such as "a cursory examination is sufficient" or "this point need not detain us long." The losing lawyer will feel the examination has been too cursory and that the court should have detained itself a little longer. The phrase "no citation of authority is needed" is redundant. If the citation of authority is not needed the informed reader will know it. But where this expression is used many will suspect that a citation was really needed but could not be found.[4]

CONTINUED ON PAGE 61

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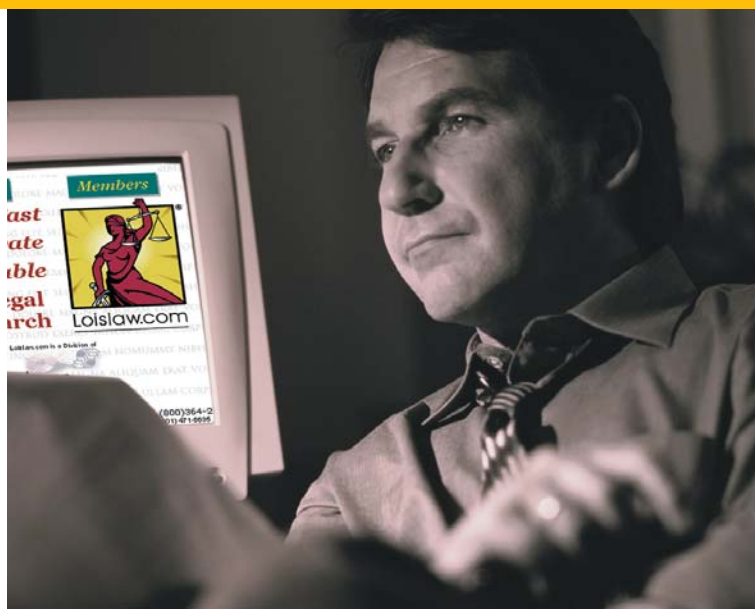

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