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NEW YORK STATE BAR ASSOCIATION

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by Bran Noonan

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EUGENE C. GERHART
(1912 – 2007)
Editor-in-Chief, 1961–1998

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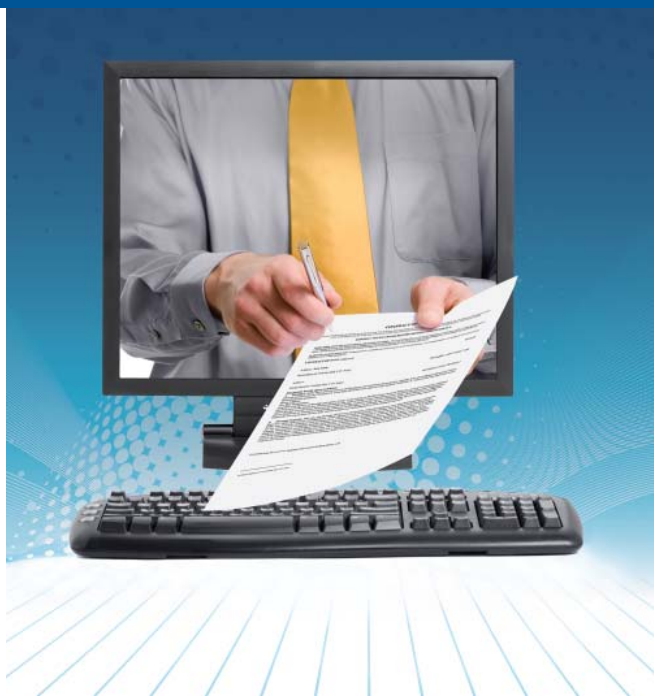

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MICHAEL E. GETNICK

Social Media: The Good, the Bad and the Ugly

For law firms promoting their practices and attorneys selling their skills, social media sites like LinkedIn, Facebook and Twitter can be essential tools. In fact, our Lawyers in Transition Committee recently sponsored a free Webinar on the benefits of social networking in the down economy.[1] The "good": In a time where we are all concerned about the bottom line, social media can be an attractive marketing tool due to its relatively low cost. Social media can open many doors for your practice, but there can also be the opposite result.

A judge shared with me a story of one attorney in a case before her who claimed her inability to appear in court was due to a death in the family. The attorney's Facebook page told another story. Rather than meeting her professional obligations, the attorney had spent the week drinking and partying, and then shared her escapades online. This extreme example of social media exposing misconduct certainly falls into the "bad" category. But there are other, more subtle, ways to get in trouble online.

Although the law in this area is new, it is rapidly growing. I have heard that persons posting allegedly defamatory statements on Twitter about topics ranging from apartments to clothing are finding themselves named defendants in libel suits. Status updates on Facebook and Twitter are supposedly intended to be real-time reports on what you are thinking, feeling and doing. However, publishing a negative statement without first contemplating the consequences could get you into serious trouble. Even with something as modern as social media, the old adage remains true: Think before you speak. When in doubt, don't say anything. Remember that anything you post should be considered permanent and searchable; it can be copied, pasted and e-mailed to a wide audience.

Attorneys using social media also can run afoul of the Rules of Professional Conduct. Anecdotally, I have heard of instances where attorneys were communicating with their clients through Facebook, and these posts were ultimately read by opposing counsel. Rule 1.6 provides that "[a] lawyer shall not knowingly reveal confidential information" without the client's informed consent. There is no expectation of privacy on Facebook, and attorney-client communications on networking sites such as Facebook certainly are at risk for revealing privileged or confidential information.

Other Rules come to mind. Per Rule 3.3, a lawyer appearing before a tribunal cannot "engage in undignified or discourteous conduct" or conduct "intended to disrupt the tribunal." So, avoid tweeting in court, and be careful that your communications do not disparage the judge or opposing counsel. Rule 3.6 covers trial publicity and provides that lawyers shall not make an extrajudicial statement that will be disseminated by means of public communication – which arguably includes blogs, Twitter, Facebook and the like – that could materially prejudice an adjudicative proceeding in the matter. In addition, the rules related to advertising and testimonials also come into play. While LinkedIn is a credible, professional networking site and a great way to increase your client base, to be safe, I suggest testimonials posted on your profile by your clients should follow Rule 7.1 – including the requirement of posting a disclaimer. I am certain that the use of social media implicates other Rules, but I do not have the space to note them all in this column.

It's worth noting that a client's use of social media can also pose problems. I recommend counseling clients against discussing their cases with friends and relatives through social media. If your clients are active on social media, it may be a good idea to read what they are posting. Electronic postings are increasingly becoming evidence in divorce and child custody matters.[2] In one case, a mother's posting that she was single and had no children was used against her to indicate her lack of honesty.[3] Lawyers also are using social networking sites as evidence in personal injury actions. In one scenario, a client litigating a personal injury action, wherein he claimed that injuries prevented him from having an active social life, posted information on Facebook indicating that he hosted parties and attended weekend outings at summer cabins.[4] At the very least that's "ugly."

Finally, those in law school and not yet admitted to the bar should be espe-

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cially careful about what items they post – and also what their friends post about them. Pictures, video and even words can all come back to haunt you during your character and fitness evaluation. And, the content remains out there, waiting for would-be employers to discover. Recent graduates are having enough difficulty in the current job market. Be careful that your social media activity does not create a black cloud over your record of achievements.

Cautions aside, it is no surprise that more and more attorneys and law firms are using social media, which provide an easy and efficient way for us to stay connected to each other and to cutting-edge information. The State Bar has more than 20 blogs written by a diverse group – from solo practitioners to a struggling law school graduate to experts in various fields of law. A wealth of information is available to you at www.nysba.org/blogs. You can follow us on Twitter at www.twitter.com/nysba, where we often post our press releases and other news items. We also have a growing following on LinkedIn. Join our group of nearly 1,000 individuals at www.nysba.org/LinkedIn, where you will find discussions, news and job postings.

Social media can be a wonderful marketing tool for attorneys who take the time to learn how to use it effectively. Like any other form of communication, social media can have pitfalls, especially for lawyers. The wise practitioner will learn to balance privacy and confidentiality if seeking to maintain a robust professional presence online. ■

1. This and the other valuable Lawyers in Transition programs are free to download at www.nysba.org/lawyersintransition.

2. *See* http://lawprofessors.typepad.com/family_law/2009/06/facebook-divorce.html (last visited Aug. 31, 2009).

3. *See* Belinda Luscombe, *Facebook and Divorce: Airing the Dirty Laundry*, Time, June 22, 2009 *available at* http://www.time.com/time/magazine/article/0,9171,1904147,00.html (last visited Aug. 31, 2009).

4. *See* http://www.cbc.ca/canada/newfoundland-labrador/story/2009/05/11/facebook-lawsuit-cp-511.html (last visited Aug. 31, 2009).

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Tentative Schedule of Fall Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

No Fault – What You Need to Know in New York
October 14 Long Island

Public Utility Law
October 16 Albany

Medical Malpractice
October 16 Syracuse
November 4 Long Island
November 6 Buffalo
November 18 Rochester
November 19 Albany; New York City

Practical Skills: Intro to Estate Planning
October 19 New York City
October 20 Albany; Buffalo; Long Island; Rochester; Syracuse; Westchester

Update – 2009 (live program)
October 23 Syracuse
October 30 New York City

Practicing Matrimonial and Family Law in Chaotic Economic Times
(9:00 am – 12:45 pm)
October 23 Buffalo
November 6 Long Island
November 20 Syracuse
December 4 Albany
December 11 New York City

Limited Liability Companies
(9:00 am – 1:00 pm)
October 27 Westchester
December 1 New York City
December 2 Albany
December 4 Buffalo

Using PowerPoint at Trial
November 4 New York City

Representing Licensed Professionals
(9:00 am – 1:00 pm)
November 5 New York City
November 12 Albany
November 19 Syracuse
December 3 Long Island

Handling Tough Issues in a Plaintiff's Personal Injury Case
November 5 Rochester
November 13 Buffalo; New York City
November 20 Albany; Long Island

New York Appellate Practice
November 5 Long Island
November 13 Westchester
December 3 New York City

Henry Miller – The Trial
November 6 Albany

Protecting Your Practice – Risk Management for the Solo and Small Firm
(1:00 pm – 5:00 pm)
November 9 Albany
November 16 Long Island
November 18 Buffalo; New York City

Practical Skills: Purchases and Sales of Homes
November 10 Albany; Buffalo; Long Island; New York City; Rochester; Syracuse; Westchester

Securities Arbitration
November 12 New York City

Ethics and Professionalism
(9:00 am – 12:35 pm)
November 12 New York City
November 13 Albany; Syracuse
November 17 Long Island
November 20 Westchester
December 1 Buffalo
December 8 Rochester

†Update – 2009 (video replays)
November 13 Albany; Rochester
November 18 Binghamton
November 19 Ithaca; Long Island; Saratoga
November 20 Canton; Utica; Watertown
December 2 Buffalo; Suffern
December 3 Plattsburgh
December 4 Jamestown; Poughkeepsie
December 10 Corning; Westchester
December 11 Loch Sheldrake

Foreclosure and Other Receiverships
(half-day program)
November 13 New York City (1:00 pm – 3:45 pm)
November 20 Rochester (9:00 am – 11:45 am)

† Does not qualify as a basic level course and, therefore, cannot be used by newly admitted attorneys for New York MCLE credit.

The Contested Accounting Proceeding in Surrogate's Court: The Law and Techniques You Should Know

November 17	Buffalo
November 20	Westchester
December 1	Syracuse
December 3	Albany
December 8	Long Island
December 10	New York City
December 11	Rochester

Practical Skills: Civil Practice – The Trial

November 18	Albany; Buffalo; Long Island; New York City; Syracuse; Westchester

†Corporate Counsel Institute
(two-day program)
November 19–20 New York City

†Seventh Annual Sophisticated Trusts and Estates Institute
(two-day program)
November 19–20 New York City

Construction Site Accidents

November 20	Buffalo
December 4	Albany; Long Island
December 11	New York City; Syracuse

Finding the Bottom Line – Rights of People With Disabilities in New York State

December 1	Rochester
December 4	New York City
December 9	Albany

Hot Topics in Elder Law

December 2	Albany; New York City
December 4	Rochester
December 9	Westchester
December 10	Long Island

Advanced Real Estate Practice
December 14 New York City

†Estate Planning (video replay)
January 22 Jamestown

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The Modernized, Streamlined Contract

Electronic Contracts and Signatures – *Redux*

By Bran Noonan

Bran Noonan (noonab@mcblaw.com) is a senior associate at Martin Clearwater & Bell LLP. He earned his law degree from New York Law School and his undergraduate degree from the University of Arizona.

As with everything else in the digital age, the hallowed handwritten and signed document is being reduced to relic status. Today, transacting electronically has become the norm rather than the exception. Nearly any type of contract can be drafted and executed electronically. Scores of legal documents, such as tax forms and trademark applications, are completed, signed, and submitted electronically. Checks are gradually becoming a thing of the past as more and more institutions accept automatic account withdrawal programs. Even parking tickets, once known for their illegibility, are no longer handwritten.

The electronic medium, at a minimum, expedites and modernizes commercial and business transactions, allowing parties to enter into them instantly and effortlessly. Consider a magazine publishing company that, for example, must enter into work-for-hire agreements with freelance writers on a monthly basis. The electronic medium allows each party to negotiate terms and execute the agreement from the comfort of their own offices. Neither side has to expend time or money meeting in person or waiting for documents to arrive by mail. And by simplifying and streamlining the editing and review process, the electronic medium improves the quality of a document and by extension the transaction itself.

Since the emergence of the Internet, the New York State Bar Association *Journal* has published two noteworthy articles on the subject of electronic transactions.[1] In June 1996, the *Journal* published "Information Age in Law: New Frontiers in Property and Contract."[2] The author warned that the rapidly expanding digital world would present new legal challenges as electronic transactions began to replace those executed on paper. As a result, the author urged legislatures and courts to reexamine and adapt the law to the broadening electronic form. Consumers and businesses would need laws to instill confidence in the integrity and validity of the electronic medium. Four years later, in 2000, the *Journal* published "Wide Use of Electronic Signatures Awaits Market Decisions About Their Risks and Benefits," which explored the potential effects of the then newly passed federal electronic signatures legislation on transactions.[3] This article addresses how the law has responded and progressed since those articles, focusing specifically on the validity and construction of e-contracts.

For all intents and purposes, electronic contracts are equal to their handwritten paper brethren. Current federal and New York State statutes and common law purportedly permit parties to execute a wide range of contracts and transactions electronically and to utilize electronic signatures to indicate mutual and valid consent. At the end of the day, courts primarily concentrate on whether or not an e-contract is properly constructed, rather than on the validity of the medium itself. The design of an e-contract raises unique issues, such as the effect of hyperlinks in contracts, which are absent from paper contracts. Interestingly, courts look to traditional contract law principles, such as sufficient notice of terms, to resolve design and construction concerns.

The Federal E-Sign Law

Congress adopted the Electronic Signatures in Global and National Commerce Act, commonly referred to as "E-Sign," on June 30, 2000. Section 7001, title 15 of the U.S. Code states in pertinent part that

> with respect to any transaction in or affecting interstate or foreign commerce: 1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and 2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.[4]

A transaction under E-Sign consists of "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons."[5] Section 7003 does, however, exclude certain transactions from its coverage, namely, those traditionally governed by state law, such as insurance polices, rental agreements, and Uniform Commercial Code (UCC) transactions.

Federal courts have never addressed the constitutionality of E-Sign. While the act covers "any transaction in or affecting interstate or foreign commerce,"[6] it does not explicitly indicate which types of intrastate transactions are "in" or will "affect" interstate commerce and come under the purview of the act. Since its adoption, one state court has raised doubts about the legitimacy of the act. In *People v. McFarlan*,[7] a New York state trial court questioned whether or not Congress, in its attempt to give E-Sign the broadest scope constitutionally possible, would find the statute under judicial scrutiny in light of the U.S. Supreme Court's decisions in *United States v. Lopez*[8] and *United States v. Morrision*,[9] where the Court sought to limit, if not roll back, Congress's power under the Commerce Clause. In *Lopez*, the Court held that the Gun-Free School Zones Act exceeded the scope of Congress's authority under the Commerce Clause because the subject matter of the act did not have a substantial economic effect on interstate commerce even when viewed in the aggregate. In *Morrison*, the Court invalidated the Violence Against Women Act for similar reasons. Declining to resolve the constitutional question, the *McFarlan* court, instead, merely contemplated how far Congress could actually step beyond the limits of the Commerce Clause in an effort to provide a better, uniform nationwide rule. At any rate, the U.S. Supreme Court's 2005 decision in *Gonzales v. Raich*[10] may have rendered this issue moot. There, appearing to distance itself from *Lopez* and *Morrison*, the Court upheld the validity of the Controlled Substance Act under the Commerce Clause insofar as it prohibited the intrastate manufacture and possession of marijuana.

The trial court in *McFarlan* also suggested that the U.S. Supreme Court's decision in *Printz v. United States*[11] raised a second constitutional problem with E-Sign. In *Printz*, the Court held unconstitutional provisions in the Brady Handgun Violence Prevention Act that required states to conduct background checks before allowing gun purchases. According to the Court, the federal government is prohibited from commandeering state processes or bodies to achieve federal purposes. In *McFarlan*, the state court considered E-Sign's applicability to a second police printout of computer-generated photos of the defendant. According to the court, E-Sign "expressly preempts state law" with respect to all records kept by state or local agencies.[12] While E-Sign presumably would not cover the police record, however, because it did not arise out of a commercial transaction,[13] the court argued, somewhat cryptically, that a rule imposed upon a state that regulates only those records used in commerce "is in the real world a rule imposing the [statute] on such state's records for all purposes."[14] The court dismissed the idea that a state statute regulating non-transactional government records might coexist with E-Sign, concluding that a federal rule that regulates all state records "may well constitute a violation of the rule against commandeering the activities of a state to achieve a federal purpose."[15] Putting aside whether the analysis flows logically, this conclusion is a rather expansive interpretation of *Printz*. Accepting the validity of an e-record is unlikely the type of hijacked processes the U.S. Supreme Court envisioned in *Printz*. Nevertheless, no published case has ever cited *McFarlan* or questioned the constitutionality of E-Sign. The implication is, at the very least, that the act has been widely accepted. A constitutional challenge would in fact be surprising because the functional benefit of the statute presumably outweighs any constitutional violation.

Despite *McFarlan*'s red flags, federal courts have utilized E-Sign on a handful of occasions, limiting their discussion to stating that E-Sign had settled the question of whether or not electronic agreements and signatures were valid and enforceable. For example, in the 2003 action *Medical Self Care, Inc. v. National Broadcasting Co.*,

the Southern District of New York addressed whether an e-mail should be considered a writing for the purpose of enforcing a "written consent" clause in a contract.[16] The court invoked E-Sign, holding that "the decision not to consider an e-mail a writing is arguably foreclosed by 15 U.S.C. section 7001."[17] The next year in *On Line Power Technologies, Inc. v. Square D Co.*,[18] the Southern District of New York examined whether e-mails created a valid purchase agreement. The plaintiff allegedly entered into agreements with the defendant over multiple e-mails, which stated only the price, order number, and name of the sender. The court held that since "federal statutes governing electronic signatures recognize the validity and enforceability of electronic signatures," the parties "did enter into valid new agreements."[19] Finally, a year later, *Campbell v. General Dynamics*[20] concerned an employer that sent its employees a mass e-mail requiring them to pursue arbitration of an American with Disabilities Act grievance. In determining the validity of the arbitration e-mail agreement under the Federal Arbitration Act, the First Circuit held that E-Sign "prohibits any interpretation of the FAA's 'written provision' requirement that would preclude giving legal effect to an agreement solely on the basis that it was in electronic form."[21] Notwithstanding the lack of commentary, the case law, including that from other circuits, summarily confirms that E-Sign furnishes electronic agreements with the same authority as their paper counterparts.[22]

Interestingly, a narrow area of contention focuses on whether or not one party is obligated to accept electronic agreements under E-Sign, especially where the other party insists on it. The issue arises out of two provisions in 15 U.S.C. § 7001. On the one hand, § 7001(a) mandates that an electronic record may not be denied legal effect. Yet, on the other hand, § 7001(b)(2) states that persons are not statutorily required "to agree to use or accept electronic records or electronic signatures," presumably overriding the foregoing section. The sections lead to contrary interpretations: an electronic record will be automatically either denied legal effect if one party refuses to accept it or given legal effect if one party decides to use it.

Only two courts have actually addressed this issue, both favoring subsection (b)(2) over the preceding subsection. In *Prudential Insurance Co. v. Prusky*,[23] a 2005 action arising out of the Eastern District of Pennsylvania, the defendant cross-claimed, alleging that the plaintiff violated E-Sign for refusing to accept his electronic requests to transfer monies to other investment funds. Shortly after, a New York state trial court addressed the issue in *DWP Pain Free Medical PC v. Progressive Northeastern Insurance*.[24] In that case, the defendant argued that the plaintiff's no-fault action was premature because the medical provider submitted claim forms electronically without permission. The plaintiff replied that E-Sign required the defendant to accept the forms because E-Sign gave them the same

validity and effect as the handwritten form. Without explanation, both courts held that subsection (b)(2) permitted the parties to reject the electronic transmissions. Under that approach, subsection (a) apparently would govern when parties explicitly agree to use electronic means but, absent an agreement, neither party would be obligated to transact electronically. The result potentially burdens parties who intend to use electronic means by requiring them to obtain the other party's consent. This could lead to inequitable outcomes for individuals unsophisticated in the law. For instance, a consumer accustomed to transacting electronically might not expect this statutory limitation and might be left empty-handed for failing to confirm whether a business accepts electronic transactions, which is what happened to the individual investor in *Prusky*.[25]

The New York State ESRA Law

In 1999, the New York State Legislature passed the Electronic Signatures and Records Act (ESRA).[26] Section 304 states in pertinent part: "An electronic signature may be used by a person in lieu of a signature affixed by hand," and it shall have "the same validity and effect as the use of a signature affixed by hand." Section 305 adds that an "electronic record shall have the same force and effect as those records not produced by electronic means." The Legislature enacted ESRA to ensure that "persons who voluntarily elect to use electronic signatures or electronic records can do so with confidence that they carry the same force and effect as nonelectronic signatures and records."[27] Similar to E-Sign, the statute does not, however, explicitly obligate "any entity or person to use an electronic record or an electronic signature."[28]

As with the constitutionality of E-Sign, *People v. McFarlan* is again the lone court to create a potential controversy – this time, the issue of preemption. E-Sign expressly preempts contrary state law except for a narrow field. Specifically, a state electronic record and signature statute survives if (1) the state enacts the Uniform Electronic Transactions Act (UETA) as approved and adopted for enactment by the National Conference of Commissioners on Uniform State Laws; or (2) if the state enacts a law that is (a) consistent with §§ 7001 and 7002 of E-Sign, (b) technologically neutral, and (c) if enacted after E-Sign, makes specific reference to E-Sign.

In deciding the defendant's motion to exclude the prosecution's second printout of computer-generated photos of the defendant, the *McFarlan* court affirmed that "ESRA is not the same as, a clone of, or even similar to UETA,"[29] failing the first preemption exception under E-Sign. Then, presumably with respect to E-Sign's second preemption exception, the court resolved that the scope of E-Sign "purports to preempt ESRA in accordance with [its] own terms." The basis for this conclusion is left unexplained. No glaring inconsistencies between the two statutes exist, and the state statute is technology neutral. Actually, ESRA preceded E-Sign, and, therefore, does not refer back to the federal law. Regardless, in the end, the trial court evaded the issue altogether and actually rendered it moot, concluding that under either ESRA or E-Sign the result would be the same. While no other court has ever addressed this issue, the chance that a court will invalidate ESRA on preemption grounds appears remote.

With respect to the substance of the statute, ESRA has received even less attention than E-Sign. While the statute authorizes the use of electronic signatures, records, and contracts,[30] New York state courts have limited their review to the validity of electronic records, as opposed to contracts. In April 2002, *McFarlan* became the first published case to raise ESRA, accepting the validity of computer-generated photos of the defendant under the state and federal technology statutes. Just weeks afterward, in *D'Arrigo v. Alitalia*,[31] a New York civil court decided whether or not an airline passenger's electronically filed lost luggage complaint constituted a "writing" under the Warsaw Convention, which required complaints to be in writing. The civil court cited a variety of legal and non-legal sources, including ESRA, to hold that the computer-generated complaint constituted a "writing."

The only other cases to utilize ESRA have done so in connection with electronic traffic tickets. Decided in 2005, *People v. Rose* involved a defendant who moved to dismiss her DWI charge on the ground that the computer-generated ticket was invalid.[32] The Rochester city court acknowledged that ESRA was designed primarily for "commercial and public record applications rather than law enforcement use," but that "the decision to substitute e-tickets for the often illegible multiple copy Uniform Traffic Tickets was an appropriate and logical extension within the purview of ESRA."[33]

The city court, however, objected to the e-ticket system insofar as it functioned in a manner that violated the verification requirement under the Criminal Procedure Law. Officers would input information into the computer system and then print the e-ticket. Yet the software was designed so that the officer "signed" the e-ticket before actually entering any information on the ticket. That would be akin to parties signing a blank paper before filling in the terms of agreement. Verification, as with consent, needed to follow the input of information. The court, nevertheless, found that the officer's signed deposition revived his ill-timed electronic verification.

A few years later, a Rensselaer County justice court faced with the same verification issue took an alternative approach. In *People v. Patanian*, the justice court agreed with the defendant that the state could not cure a defective e-ticket with deposition testimony.[34] The court, instead, held that the officer's actions verified the electronic document. Since the officer himself printed

and served the ticket bearing his electronic signature, "the need for a prompt or additional button formally affirming the uniform traffic ticket seems redundant in nature."[35] The court pointed out that "[n]o language under [ESRA] exists specific to any timing of the signature."[36] The central caveat, therefore, became the design rather than the validity of the electronic form.

New York State and Federal Common Law

In the event that E-Sign or ESRA are declared unconstitutional, repealed, ignored, or inapplicable for any reason, New York state and federal courts will likely continue to permit the use of electronic contracts and signatures, as long as the contracts are properly constructed. Since the case law on electronic contracts is sparse, jurisdictions have yet to develop their own comprehensive precedent on the subject. Federal and state courts look, instead, to the small group of cases that have emerged in jurisdictions nationwide for guidance.[37]

Most of the litigation has focused on Web site agreements, where a few federal and state courts have expressly held that such agreements constitute a valid writing which parties may execute and accept electronically. See, for example, *Caspi v. Microsoft Network, L.L.C.*[38] Before joining the Microsoft Network, a prospective member was prompted to enter a subscriber agreement with click-boxes providing the options: "I Agree" and "I Don't Agree." Registration could only proceed after the subscriber had an opportunity to view the screen and click the "I Agree" box. The New Jersey state appellate court held that between an electronic and printed contract "there is no significant distinction."[39] Another example is *In re RealNetworks, Inc.*,[40] where the Northern District of Illinois examined whether the arbitration clause in a Web site license agreement constituted a writing as required under the federal and state arbitration acts. The district court applied a literal interpretation of the term "writing," concluding that the definition of "writing" did not exclude electronic agreements.

Other courts have, however, bypassed the question of the medium's validity altogether, focusing instead on the construction of the Web site agreement. For instance, in *Moore v. Microsoft Corp.*,[41] the plaintiff had to scroll through the terms of the license and then click the "I Agree" icon before he could download the software. Paying no attention to the validity of the electronic medium, the New York state appellate court focused on whether or not the plaintiff received adequate notice of the terms and sufficiently consented. Similarly, in *Barnett v. Network Solutions*,[42] the plaintiff entered into an electronic contract with the defendant to register domain names. The Texas state appellate court focused on whether the plaintiff had notice of the forum selection clause, upholding the contract because it clearly presented the clause and required the plaintiff to scroll past it prior to consenting.

A controversial e-contract design issue has been the effect of hyperlinks in Web site license agreements. In *Pollstar v. Gigmania*,[43] an Internet browser could download concert information from the plaintiff's Web site pursuant to the conditions of a license agreement that the user accessed by clicking a hyperlink. The catch was that users could consent and proceed without ever linking to view the agreement, which is commonly referred to as a Browse-wrap agreement. In deciding the defendant's motion to dismiss, the Eastern District of California held that while the license agreement was buried in the Web site, potentially impairing the parties' mutual consent, the agreement was not invalid as a matter of law. Two years after *Pollstar*, the Second Circuit explicitly rejected the browse-wrap design altogether in *Specht v. Netscape Communications Corp.* because it failed to provide adequate notice.[44] In all these actions, from *Moore* to *Specht*, the construction of the e-agreement was under attack, not the electronic medium itself, which is to say that the courts all tacitly approved of it.

The catch was that users could consent and proceed without ever linking to view the agreement, which is commonly referred to as a Browse-wrap agreement.

Courts have not indicated any special reasons, such as the rise of e-commerce, to give Web site agreements an exclusive right to the electronic form, finding other electronic transactions governed by the statute of frauds equally valid. A 2004 New York state case of first impression was *Rosenfeld v. Zerneck*, where the trial court addressed whether parties may enter a real estate contract by e-mail. In deciding if the typed signature at the bottom of defendant's e-mail satisfied the writing requirement under New York State's statute of frauds, the court held that the defendant's "act of typing his name at the bottom of the e-mail manifested his intention to authenticate [the] transmission."[45] In 2008, the New York Appellate Division, First Department applied *Rosenfeld* to an e-mailed employment agreement. In *Stevens v. Publics*, the appellate court held that the "e-mails from plaintiff constituted a signed writing within the meaning of the statute of frauds."[46] In the federal forum, the Seventh Circuit considered whether the defendant's e-mailed purchase orders, which contained only the sender's name in the e-mails, satisfied the UCC statute of fraud's signature

requirement. Judge Posner, writing for the court, claimed that "neither the common law nor the UCC requires a *hand-written* signature," concluding that the sender's name on the e-mails met the signature requirement.[47] With these actions, the issue was not so much whether the electronic medium is a valid means for executing employment or real estate agreements, but whether a statute restricts the use of the medium.

Construction of an E-Contract

While E-Sign and ESRA allow electronic contracts to serve as legitimate substitutes for many paper contracts, they provide limited guidance for practitioners attempting to properly construct an electronic contract. Practitioners should, therefore, consult the small body of electronic common law to determine the safest way to design and build an e-contract.

The case law highlights a number of general architectural guideposts. At the very least, properly constructed e-contracts should contain sufficient notice of all terms, adequate methods of consent, the ability to save and print the agreement, and a readable format.[48] For instance, in *Feldman v. Google*, the federal district court held that an e-contract seven paragraphs in length was "not so long as to render scrolling down to view all the terms inconvenient or impossible." With that in mind, parties should likely refrain from using hyperlinks since they potentially obstruct a party's notice of the terms. Next, electronic consent may be accomplished by requiring a user to click an "I agree" icon, for example, before allowing software to be installed.[49] The print and save requirement does not necessarily mean an electronic agreement must provide a "print" or "save" icon; the ability to cut and paste the agreement into a word processing program will suffice.[50] Finally, with respect to readability, while no single standard exists, common sense should guide design decisions. In *Feldman*, for example, the court approved contractual terms in 12-point font and not all capitalized.[51]

The case law has identified two key methods to deliver an e-contract: (1) by e-mail or (2) by accessing a contract on a Web site, as in a Web site license agreement.[52] Today, other methods certainly exist. A number of software programs, such as Adobe Acrobat and Omniforms, allow individuals to convert word-processed and hard-copy documents to digital forms that parties can digitally fill in, save, and e-mail as attachments.

Finally, while not addressed in any of the e-contract cases, an offeror should also construct a non-UCC e-contract that adheres to the mirror-image rule.[53] In New York, the mirror-image rule states that an offeree's response operates as an acceptance only if it is to the exact terms of the offer.[54] An offeror should, therefore, create an electronic contract where the prospective offeree cannot delete or insert material language. Otherwise, if the offeree materially modifies and returns the contract, it would likely fail for lack of mutuality.

Conclusion

While the electronic medium is seemingly equal to the handwritten paper form, new transactional legal challenges will certainly arise as the digital age progresses. Already increasingly common methods of e-communication will likely pose significant legal tests. Before long, the law will have to assess the validity of transactions executed via text messaging, instant messaging, Twitter, and Facebook. Do these electronic avenues differ significantly from e-mail correspondence? Will their informal nature preclude them from being a valid and enforceable alternative? Will courts begin to individually examine the types of electronic communication thruways employed? The answers are all arguably no. Courts have never scrutinized handwritten paper contracts over the type of paper used, whether it was a napkin or personal check, but rather over whether the parties satisfied the formal formation requirements, such as providing fair notice of terms and evidencing mutual consent. As long as the electronic alternatives allow for valid formation, courts should uphold them too. ■

1. A third article, *Of Keystrokes and Ballpoints*, 80 N.Y. St. B.J. 46 (Jul./Aug. 2008), by William Maker, Jr., touched on the narrow issue of whether an electronic writing satisfies the statute of frauds writing requirement.
2. Raymond T. Nimmer, N.Y. St. B.J. (May/June 1996), p. 28.
3. Bill Zoellick, N.Y. St. B.J. (Nov./Dec. 2000), p. 10.
4. Under § 7006(4), an electronic record "means a contract or other record created, generated, sent, communicated, received, or stored by electronic means."
5. 15 U.S.C. § 7006(13).
6. 15 U.S.C. § 7001.
7. 191 Misc. 2d 531, 744 N.Y.S.2d 287 (N.Y. Sup. Ct. 2002).
8. 514 U.S. 549 (1995).
9. 529 U.S. 598 (2000).
10. 545 U.S. 1 (2005).
11. 521 U.S. 898 (1997).
12. *McFarlan*, 191 Misc. 2d at 538. The court's source for this proposition is unclear since it incorrectly cites to a federal criminal statute. No provision in E-Sign appears to preempt state law with respect to agency records.
13. 15 U.S.C. § 7006.
14. *McFarlan*, 191 Misc. 2d at 539.
15. *Id.*
16. No. 01CIV4191, 2003 WL 1622181 *1 (S.D.N.Y. 2003).
17. *Id.* at *3.
18. No. 03 CIV 4860 (CM), 2004 WL 1171405 *1 (S.D.N.Y. 2004).
19. *Id.*
20. 407 F.3d 546 (1st Cir. 2005).
21. *Id.* at 556. The court added that, pursuant to E-Sign, an e-mail agreement to arbitrate is also likely enforceable under the Americans with Disabilities Act.
22. *See also Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002) (E-Sign settled the issue that the arbitration provision of the online agreement was a writing); *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289 (7th Cir. 2002) (had E-Sign taken effect before the contract had been completed, it would uphold the legal

effect of the e-mails under the UCC statute of frauds); *MacDermid v. Discover Fin. Servs.*, 488 F.3d 721 (6th Cir. 2007) (online credit card application deemed valid under E-Sign).

23. 413 F. Supp. 2d 489 (E.D. Pa. 2005).

24. 14 Misc. 3d 800, 831 N.Y.S.2d 849 (Dist. Ct., Suffolk Co. 2006).

25. 413 F. Supp. 2d 489.

26. *See* N.Y. State Technology Law § 301 ("State Tech. Law").

27. 9 N.Y.C.R.R. § 540.1(a).

28. State Tech. Law § 309.

29. *McFarlan*, 191 Misc. 2d at 538.

30. State Tech. Law § 302: An electronic record "shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human capabilities."

31. 192 Misc. 2d 188, 745 N.Y.S.2d 816 (N.Y. Civ. Ct. 2002).

32. 11 Misc. 3d 200, 805 N.Y.S.2d 506 (N.Y. City Ct. 2005).

33. *Id*.

34. 20 Misc. 3d 298, 857 N.Y.S.2d 482 (N.Y. Just. Ct. 2008).

35. *Id*.

36. *Id*.

37. While the cases discussed in this section were decided between the late 1990s and early 2000s, courts continue to cite them today as guiding precedent. *See, e.g.*, *Mortgage Plus, Inc. v. DocMagic, Inc.*, 2004 WL 23331918 (D. Kan. 2004); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa 2007); *Jesmer v. Retail Magic, Inc.*, 55 A.D.3d 171 (2d Dep't 2008).

38. 323 N.J. Super. 118, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

39. *Id*. at 119.

40. No. 00 C 1366, 2000 WL 631341 *1 (N.D. Ill. May 8, 2000).

41. 293 A.D.2d 587, 741 N.Y.S.2d 91 (2d Dep't 2002).

42. 38 S.W.3d 200 (Tex. App. 2001).

43. 170 F. Supp. 2d 974 (E.D. Cal. 2000).

44. *See Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002) (the court found that a browse-wrap license agreement was invalid for failure to provide sufficient notice of the terms).

45. 4 Misc. 3d 193, 776 N.Y.S.2d 458 (N.Y. Sup. Ct. 2004). *But see Vista Developers Corp. v. VFP Realty LLC*, 17 Misc. 3d 914, 847 N.Y.S2d 416 (Sup. Ct., Queens Co. 2007) (holding that signed e-mail does not satisfy statute of frauds in a real estate transaction).

46. 50 A.D.3d 253, 854 N.Y.S.2d 590 (1st Dep't 2008). *See also Al-Bawaba.Com, Inc. v. Nstein Technologies Corp.*, 19 Misc. 3d 1125(A), 862 N.Y.S.2d 812 (Sup. Ct., Kings Co. 2008) (applying *Rosenfeld* to e-mail license agreement).

47. *Hasbro*, 314 F.3d 289.

48. *See Caspi v. Microsoft Network, L.L.C.*, 323 N.J. Super. 118, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); *Barnett v. Network Solutions*, 38 S.W.3d 200 (Tex. App. 2001); *In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341 *1 (N.D. Ill. May 8, 2000).

49. *Moore v. Microsoft Corp.*, 293 A.D.2d 587, 741 N.Y.S.2d 91 (2d Dep't 2002).

50. *In re RealNetworks, Inc.*, 2000 WL 631341 *1.

51. *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1010 (D.D.C. 2002); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa 2007).

52. *See Barnett*, 38 S.W.3d 200; *Specht*, 306 F.3d 17; *Caspi*, 732 A.2d 528; *Moore*, 293 A.D.2d 587; *Rosenfeld v. Zerneck*, 4 Misc. 3d 193, 776 N.Y.S.2d 458 (N.Y. Sup. Ct. 2004); *Cloud Corp.*, 314 F.3d 289.

53. The UCC abandoned the mirror-image rule for the rule of good faith which does not invalidate an offer if the offeree modifies the terms in good faith.

54. *See Sinram-Marnis Oil Co., Inc. v. City of N.Y.*, 139 A.D.2d 360, 532 N.Y.S.2d 94 (1st Dep't 1988).

BURDEN OF PROOF

BY DAVID PAUL HOROWITZ

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"Buried, But Not Dead"

As the leaves fall this October, and a sudden cold snap reminds us that winter is just around the corner, one's thoughts invariably turn to that uniquely American holiday, Halloween. For me, the iconic, Norman Rockwell-inspired childhood memories of dunking for apples and binging for weeks on the fruits of trick-or-treating plotted and carried out with the precision of the landings at Normandy, are overshadowed by the memory of my life's greatest humiliation.

As a child, while my friends were reading comic books or the Hardy Boys, I was thumbing through the CPLR. As my friends decorated their rooms as firehouses or forts from the western frontier, my room was set up as a miniature courtroom. And while my friends wanted to grow up to be John Glenn or Roger Maris, I wanted to grow up and be, well, David Siegel. Alas, that was not to be.

My childhood dreams were shattered on Halloween, 1965. Determined to win the prize for best costume, and thereby earn the everlasting respect and admiration of my classmates, I designed a costume so clever, so sophisticated, and so terrifying that winning the prize was a foregone conclusion. That too was not to be. Instead of achieving what I now realize would have been fleeting fame, I thereafter endured daily taunts until my family finally moved out of the neighborhood.

The source of my humiliation? I went to my school Halloween party dressed as CPLR 3404. And you know what? Not one person got it. Not my classmates; not my teacher, Mrs. Wildman; not the principal. Following my grand entrance, as the assemblage's stunned silence quickly turned to raucous jeering, feeling a bit like Carrie at the prom, I burst into tears and fled the gymnasium. On the way out, Mrs. Wildman stopped me: "David, what were you thinking?"

This is what I stammered in reply.

CPLR 3404

CPLR 3404 provides for the automatic dismissal, for failure to prosecute, of a case that has been "marked off," or struck from the trial calendar, or has gone unanswered at a clerk's calendar call, and has not been restored to the trial calendar within one year.

In New York a case is "marked off" or struck from the calendar when one or more of the parties is unable to proceed to trial on the date set by the court for trial and the court will not allow the trial date to be adjourned. When this happens, CPLR 3404 is triggered, and the one-year period to restore the case to the trial calendar begins to run. If the court elects to adjourn the trial date, the action remains on the trial calendar, to be called to trial at a later date, and CPLR 3404 has no application.

A clerk's calendar call is a device utilized in some counties whereby notice is given that certain actions, when there has been no activity noted for a case for a set period of time and which the court suspects may have been abandoned, are placed on a calendar to be called at a specified date and time. At the time set forth in the notice, the case is called by the clerk, and if the action has, in fact, been abandoned, and no one answers the call of the calendar, the case is dismissed pursuant to CPLR 3404, and the one-year period to restore the case to the trial calendar begins to run. If the calendar call is answered, CPLR 3404 does not come into play, and the court generally sets the case down for either a pre-trial conference or a trial date.

Whether "marked off," struck from the calendar, or unanswered at a clerk's calendar call, the case is taken off the court's trial calendar and placed in a state of suspended animation, from which it is either revived by restoring the case to the trial calendar within one year of being taken off the calendar or dismissed.

The restoration of an action within one year of its being taken off the trial calendar in one of the ways set forth above, is a simple task. In some counties, the plaintiff simply notifies the clerk of the trial court, either in writing or by advising the clerk of the part that the case is being restored. Other counties require a stipulation, and, where a stipulation is not agreed to, a motion may be required. In any event, all that is required is notification by the plaintiff that the case is ready to be restored. A motion to restore an action within the one-year period may be opposed, and the motion denied, where the parties stipulated, or the order striking the action specified actions to be taken by the plaintiff prior to restoration that were not done at the time the motion is made.

A dismissal pursuant to CPLR 3404, in contrast with a dismissal for lack of prosecution pursuant to CPLR 3216, requires no motion or other action by a party, and requires no order from a judge. All that is required is a ministerial act by the clerk to make the appropriate entry dismissing the case after the one-year time period has run. CPLR 3404 specifies that a dismissal pursuant to the rule is without costs. Some courts have made the point that a CPLR 3404 dismissal is never ministerial since it creates a presumption of abandonment that may be negated by proof of litigation in progress, yet this seems to be a distinction without a difference. Thus, an action dismissed after one year pursuant to CPLR 3404 is, in fact, dismissed, even if it may be possible to overcome the presumption of abandonment that led to the dismissal.

Once an action is dismissed pursuant to CPLR 3404, a motion to vacate the dismissal, pursuant to CPLR 5015, and restore the action must be made. In seeking vacatur of the dismissal and restoration to the calendar, the moving papers must demonstrate a meritorious cause of action, a reasonable excuse for the delay, a lack of prejudice, and the lack of intent to abandon the action. Because the dismissal is one for neglect to prosecute, an order denying a motion to restore an action deemed abandoned should comply with the recently enacted amendment to CPLR 205(a), which requires a recitation of the specific conduct constituting the neglect.

CPLR 3404 is one of several calendar control devices contained in the CPLR and in the Uniform Rules for Trial Courts permitting the dismissal of actions. Other calendar control devices include CPLR 3216, which provides for the dismissal of actions for lack of prosecution prior to the time a note of issue is filed, and § 202.27 of the Uniform Rules of Trial Courts,[1] which authorizes a trial court to dismiss a case or take other action if a party fails to appear at a scheduled calendar call or conference.[2] Alternatively, the court may elect to grant an adjournment, although many judges feel constrained by the deadlines imposed by the court system for the trial of actions (referred to as "standards and goals") or the court may vacate the note of issue and restore the case to pre-note status, pursuant to § 202.21(e) of the Uniform Rules.

The practice of trial courts "marking off" or striking cases from the calendar has expanded beyond the limited purpose for which the statute was originally intended, and is now frequently utilized, to make a court's calendar compliant with "standards and goals." This expansion of the use of the statute, implemented in varying ways and with divergent means of restoration, has sown confusion as this and other aspects of calendar practice vary, often significantly, from one county to another. Recent Appellate Division cases take the position that CPLR 3404 has been overused and, in accordance with the original intent of the section, it should be used sparingly, and only in cases in which a note of issue has been filed.[3]

Conclusion

Once my sobbing subsided to the occasional shuddering sigh, Mrs. Wildman said: "What on earth does any of that have to do with Halloween?" I looked at her incredulously. "Don't you get it? Your case is no longer alive, but it's not dead either, you can still bring it back to life! It's perfect for Halloween." Shooting me the same look she had when I asked why I couldn't sing with the others after being designated a "listener" at auditions for the chorus, Mrs. Wildman told me to go on home, get a good night's sleep, and not to worry about the other kids.

Well, perhaps this Halloween you will remember my childhood nightmare and toss trick-or-treaters a couple of extra pieces of candy. Whether or not you do, if your action is marked off, or struck from the trial calendar, or goes unanswered at a clerk's calendar call, remember Scout on the way home from her school pageant in her squash costume, feeling lost and scared in the woods, and that, like Boo Radley, CPLR 3404 is there to save you. ■

1. 22 N.Y.C.R.R. § 202.27.

2. *See Basetti v. Nour*, 287 A.D.2d 126, 128, 731 N.Y.S.2d 35, 37 (2d Dep't 2001). *See also Uddaraju v. City of N.Y.*, 1 A.D.3d 140, 766 N.Y.S.2d 207 (1st Dep't 2003); *Lopez v. Imperial Delivery Serv., Inc.*, 282 A.D.2d 190, 725 N.Y.S.2d 57 (2d Dep't 2001).

3. *See Basetti*, 287 A.D.2d at 128; *Lopez*, 282 A.D.2d 190.

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Why Arbitrate? The Benefits and Savings

By Edna Sussman

Choice – the opportunity to tailor procedures to business goals and priorities – is the fundamental advantage of arbitration over litigation.[1]

Much has been written in recent years about whether arbitration has become so much like litigation that arbitration's most commonly cited benefits – saving time and money – no longer pertain. One author, writing in a recent issue of the New York State Bar Association *Journal*, suggested that the cost of the arbitrators' fees makes litigation the less expensive alternative for resolving commercial disputes.[2] Response to this and other criticisms requires a review of the many benefits of arbitration, a look at the empirical data on the speed and cost of arbitration, and a summary of the mechanisms available to the parties and their counsel to control costs and increase efficiency.[3]

Why Arbitrate?

Benefits

The many benefits of arbitration have led to the extensive use of arbitration as the process of choice for dispute resolution in commercial disputes. These include:

Faster and Cheaper – As is discussed at greater length below, arbitration is the *parties'* process. The parties can craft and implement a streamlined procedure that can significantly reduce costs and provide for a much speedier resolution than can be found in court.

Flexible Process – As arbitration is a creature of contract, the parties can design the process to accommodate their respective needs. Hearings may be set at the parties' convenience and the less formal and less adversarial setting minimizes the stress on what are often continuing business relationships.

Subject Matter Expertise – Arbitration permits the parties to choose adjudicators with the expertise necessary to decide complex issues that often require such industry-specific expertise.

Finality – Judicial review of awards is restricted to very limited issues. The finality of awards is particularly important in business transactions. In many instances, with the cost of capital and the paralysis that indecision can bring to businesses, the most important consideration in a commercial dispute is that it be quickly and definitively decided.

Confidentiality – Arbitral hearings, as opposed to court trials, are generally private, and confidentiality can be agreed to by the parties. Most arbitral institutions have specific rules regarding the confidentiality of proceedings and awards. This is an important feature for many cor-

porations, particularly when dealing with disputes over intellectual property and trade secrets.

International Arena

Certain additional features of arbitration in the international context are of particular importance:

Cross-Border Expertise – Arbitration permits the parties to choose adjudicators with the necessary expertise to decide the dispute. Such special expertise can include an understanding of more than one legal tradition – such as common law, civil law or sharia law – an understanding and ability to harmonize cross-border cultural differences and fluency in more than one language.

Neutrality – In the international context, arbitration provides a neutral forum for dispute resolution and enables the parties to select decision makers of neutral nationalities who are detached from the parties or their respective home state governments and courts, in a setting in which bias is avoided and the rule of law is observed.

Enforceability – In the international context, a critical feature is the existence and effective operation of the New York Convention to which over 140 nations are parties. The Convention enables the enforceability of international arbitration agreements and awards across borders. It significantly limits the grounds for refusal to enforce an arbitration agreement or award, making it possible to enforce an award even in a jurisdiction that might otherwise find ways to favor its domestic party. In contrast, judgments of national courts are much more difficult and often impossible to enforce abroad.

Thus, even apart from the lower cost and greater speed, many parties choose arbitration for dispute resolution for one or more of these other benefits.

Is Arbitration Really Faster?

The availability of a process that is quicker than a court proceeding has long been a principal reason for the selection of arbitration for dispute resolution in business transactions. The statistics support the long-held belief that arbitration is a mechanism for achieving speedier dispute resolution. The American Arbitration Association (AAA) reports that for its business-to-business cases in which awards were rendered in 2008, the median length of time from the filing of the demand to the award was 238 days or 7.9 months.[4] The AAA's international arm, the International Centre for Dispute Resolution (ICDR), reports that for its cases in which awards were rendered in 2008, the median length of time from the filing of the demand to the award was exactly 365 days or 12 months.[5] The International Institute for Conflict Prevention and Resolution (CPR) reports that for its domestic and international cases combined in which an award was rendered in 2008, the median length of time from the filing of the demand to the award was 347 days or 11.5 months.[6]

By contrast, as reported for 2008, the median length of time for civil cases resolved through trial in the U.S. District Court for the Southern District of New York was 30.7 months for jury cases and 27.0 months for non-jury cases, a number in line with most other federal district courts.[7] The median length of time from filing in lower court to disposition in the Second Circuit for cases that were appealed was 43.1 months.[8] The Bureau of Justice Statistics reports that for state court contract cases in the 75 largest U.S. counties, the average length of time from case filing to trial in jury cases was 25.3 months and for bench trials 18.4 months.[9]

Thus as compared with both U.S. federal and state court systems, arbitration affords a significant time saving for the vast majority of cases. Indeed the average case appears to reach resolution three to five times faster in arbitration. And it must be noted that many international court systems are considerably slower than those in the United States.

Counsel expenses and fees are the most significant cost of litigation. Inevitably, a longer process requires the expenditure of additional lawyer time as it creates opportunities for additional discovery and motion practice. The abbreviated schedule in most arbitrations usually results in significant cost savings.

Is Arbitration Really Cheaper?

The reduced cost available in arbitration has historically been viewed as a principal reason to favor arbitration over litigation. It is true that access to the courts is essentially free while arbitration has some costs associated with it – *i.e.*, the cost of the administering institution if one is selected and the cost of the arbitrator(s) – but these must be viewed in light of the total cost of the proceeding, including counsel fees and the other costs of preparing a case. While there appear to be no definitive statistical studies comparing the costs of arbitration with litigation in commercial cases, through informal comparisons and anecdotal evidence arbitration appears to be generally cheaper.[10] Certainly it is a process that can be streamlined by the parties.

Only a small part of the total cost of arbitration goes for the fees and expenses of the arbitrators and the tribunal, the "additional" cost of arbitration. The International Chamber of Commerce reported that 82% of the costs incurred were what the parties spent to present their case, including lawyer fees and expenses, expenses related to witnesses and expert evidence, and other case preparation costs.[11] Thus, arbitrator and institutional charges were only 18% of the cost of the arbitration. And it should be noted that the costs for case preparation and presentation are much more easily controlled in arbitration than in litigation.

In litigation one is subject to the Federal Rules of Civil Procedure or parallel state court rules that allow for

broad discovery, including both document discovery and depositions. Typically, discovery is a very costly part of trial preparation, and it can be burdensome to the parties as well. Document discovery is generally more limited in arbitration; depositions are either dispensed with altogether or are severely limited in number. Extensive motion practice is commonplace in court but is much less common and, in fact, usually discouraged in arbitration.

Court cases require more counsel time for preparation and trial than is the case with arbitration. For example, trial-related matters not pertinent to arbitration include evidentiary issues, voir dire and jury charges instructions, and proposed findings of fact and law. Appeals from trial court decisions are commonly filed, a process generally unavailable and, in any case, very unusual in arbitration.[12] All of these additional costs must be factored into any consideration of the costs of arbitration. This suggests that arbitration can be, and generally is, much less expensive even with a paid adjudicator.

What Can Parties Do to Make Arbitration Faster and Cheaper?

While a good arbitrator will manage the arbitration to expedite the proceeding and minimize costs, the parties and their counsel can have a determinative role and in all cases they play a significant part in establishing the timing and costs for the matter. Arbitrators can "jaw-bone," set schedules, emphasize efficiency and cost saving, and work with the parties to streamline the process, but they are required to follow the terms of the arbitration agreement. If, for example, the arbitration agreement establishes extensive litigation-like protocols, the arbitrator must follow them. If the parties jointly seek to extend or complicate the arbitration, they may obstruct the arbitrator's ability to achieve efficiency goals.

There are many steps counsel and parties can take to assure time and cost savings; much is in their hands. Efficiency and cost are not always the parties' principal goals in arbitration, however. But if speed and cost saving are objectives sought by the parties, attention should be devoted to carefully addressing the many choices available, including the following:

Contract Provisions – Counsel are increasingly coming to recognize the importance of tailoring the dispute resolution clause to the specific needs of the situation and are no longer simply inserting the "standard clause" at midnight. In order to assure a speedy and less costly arbitration process, counsel can consider contractually limiting document discovery, barring or limiting depositions, providing for fast-track procedures (such as limiting the length of time from appointment of the arbitrators to hearing and from the hearing to award), providing for "baseball arbitration," limiting the matter to one arbitrator at least for smaller disputes, excluding judicial review where that is permissible, and taking care to draft an arbitration clause that will not provide grounds for a court challenge as to its application. The selection of appropriate governing rules can make all the difference and can set up the time limits and other procedures desired. In selecting the arbitral institutional rules that will govern, they should be reviewed to make an informed choice. Unless the parties want a lengthy proceeding, counsel should not provide for the application of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Of course it takes two to tango, and this contractual approach to limiting dispute resolution timing and costs only works if agreed to by all parties.[13]

If the parties jointly seek to extend or complicate the arbitration, they may obstruct the arbitrator's ability to achieve efficiency goals.

Choice of Institution – Examine the rules of the provider institution selected, if the matter will not be *ad hoc*, in deciding which is most suitable. The rules of the institutions vary. Some have rules that promote more expeditious and less costly resolution.

Choice of Counsel – Retain counsel who understand the interest in efficiency and cost savings and who are experienced in arbitration. Selecting counsel who are accustomed to litigation and see all cases as best tried with a "leave no stone unturned" attitude can lead to the conversion of the arbitration into a litigation-like process, especially if all parties subscribe to that view.

Choice of Arbitrator(s) – Select an arbitrator who (1) is experienced in case management and has the ability to conduct the pre-hearing procedures efficiently; (2) is available to deal promptly with pre-hearing issues, hear the case in the near term, and deliver awards without undue delay after the hearing; and (3) has the ability to move hearings along.

Choices on Discovery – Do not seek extensive document discovery; eliminate depositions altogether or limit them to one or two per party. If one party opposes broad discovery, it is much easier for the arbitrator to set tight limitations, as he or she is not faced with "the parties' process" and right to choose. Provide that a single arbitrator be authorized to rule on discovery issues.

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Choices on Pre-Hearing Issues – Don't make motions other than those as to such threshold issues as the jurisdiction of the tribunal or the statute of limitations. Work cooperatively with opposing counsel to minimize the matters that must be brought to the arbitrator for resolution.

Choices on Scheduling – Pick as early a date for the hearing as is realistic and consistent with the level of preparation the case merits based on client goals – and stick to it. Rescheduling a hearing can often cause a lengthy delay as it can be difficult to find dates on which all participants are available.

Choices for the Hearing – The conduct of the hearing can be expedited by (1) presenting direct testimony by affidavit; (2) limiting the time available for the hearing and, if appropriate, using the "chess clock method" to assure equal time; (3) using telephone and video conferencing technology; (4) choosing a hearing location that minimizes expenses to the parties; (5) conferencing or "hot tubbing" the experts; (6) using a single expert to advise the arbitrators rather than having the parties offer competing experts; and (7) limiting post-hearing submissions.

What Else Is Being Done to Make Arbitration Faster and Cheaper?

Current criticisms of arbitration – that it is neither speedy nor cost-effective – largely stem from two issues: the submission to arbitration of sophisticated business cases of significant monetary value and the advent of globalization with the resulting increase in complex cross-border disputes. Counsel and parties have in recent years chosen to handle some of these matters in a manner that has led to their falling within time frames and cost structures more akin to litigation than arbitration. These cases have led some to question the efficacy of arbitration.

The arbitral institutions have been responsive to the criticism and are devoting significant attention to fostering speedier and cheaper arbitration proceedings by promulgating rules, guidelines and protocols[14] intended to help parties select a more efficient process, and to provide a concrete, rule-based protocol for the arbitrator to resist burdensome party requests. Educational programs for arbitrators now often emphasize the ways in which the arbitrator can facilitate an efficient hearing. To meet the criticism head on, the College of Commercial Arbitrators is holding a national summit in October 2009 for all constituencies to come together to discuss and vote on a series of concrete, practical protocols.

In short, the institutions and the arbitrators are stepping up to the challenge of preserving the time- and cost-saving advantages of arbitration. However, it takes parallel motivation and action by parties and counsel to achieve the goal.

Conclusion

Any system of dispute resolution, whether arbitration or litigation, will have its outliers, the cases that run amok, and it is easy to point to those to support a negative view. However, any realistic analysis must look to the functioning of the overall system and the unique ability the parties have to craft a process that meets their needs. If cost and time savings are important to the parties, arbitration provides a mechanism for achieving those goals. Litigation may have many other virtues but it simply does not offer the parties the opportunity to tailor the process to meet those objectives. ■

1. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation,"* 7 De Paul Bus. & Comm. L.J. 3 (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1372291.

2. Ronald J. Offenkrantz, *Arbitrating Commercial Issues: Do You Really Know the Out-of Pocket Costs?* N.Y. St. B.J. (Jul./Aug. 2009), p. 30.

3. This article focuses on commercial disputes. Consumer and employment arbitration which has been controversial in recent years and has been the subject of numerous studies and articles is beyond its scope.

4. E-mail from American Arbitration Association on file with author.

5. E-mail from the International Centre for Dispute Resolution on file with author.

6. E-mail from the International Institute for Conflict Prevention and Resolution on file with author.

7. *Judicial Business of the United States Courts 2008* Table C-10, *available at* http://www.uscourts.gov/judbus2008/contents.cfm.

8. *Id.* at Table B-4A.

9. *Civil Justice Survey of State Courts, Bureau of Justice Statistics 2005, available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf.

10. Susan Zuckerman, *Comparing Cost in Arbitration and Litigation*, 62 Disp. Res. J. 42 (2007). An anecdotal study in which three construction litigators and arbitrators concluded that litigation was 27% more expensive than arbitration even assuming that several depositions were taken in the arbitration and excluding the costs of appeals in a court proceeding.

11. International Chamber of Commerce Commission on Arbitration, *Techniques for Controlling Time and Costs for Arbitration*, *available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf.

12. *See, e.g.*, *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Some institutions provide for an appellate process with a panel of arbitrators but parties have not commonly availed themselves of this option. For example, CPR established rules for an appellate process with a panel of three arbitrators in 1999, but the process has never been used by any party.

13. For a discussion of the many issues a careful drafter should consider in drafting the dispute resolution clause, see Stipanowich, *supra* note 1; John Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins*, 58 Disp. Resol. J. 28 (2003).

14. *See, e.g.*, AAA *Commercial Arbitration Rules. Expedited Procedures*; ICDR *Guidelines for Information Exchanges in International Arbitration*; JAMS *Streamlined Arbitration Rules and Procedures*; CPR *Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration; ICC Commission on Arbitration*, *supra* note 11; IBA *Rules on the Taking of Evidence in International Commercial Arbitration*.

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Exoneration Clauses – Not All They're Cracked Up to Be

Intent is a paramount concern in construing the provisions of a will or trust, but public policy considerations often play an important role. While these concerns generally coincide, when matters of public policy conflict with a dispositive plan, public policy considerations will be decisive of the outcome.

Public policy concerns most often come into play when issues of fiduciary duty and liability are before the court. Testamentary clauses that purport to exonerate a fiduciary from responsibility for failing to exercise prudence and reasonable care have been found invalid as contrary to public policy. While, historically, exoneration clauses have been a matter requiring judicial intervention, with the passage of § 11-1.7 of the N.Y. Estates, Powers & Trusts Law (EPTL) in 1966 testamentary attempts to immunize a fiduciary from liability have been eliminated by legislative fiat. Nevertheless, because EPTL 11-1.7 is limited by its terms to testamentary documents, judicial oversight in this area continues, and has become most apparent in recent years, in the context of *inter vivos* instruments.

This article examines the competing interests involved in the construction of a will or trust, provides a general background on exoneration clauses, and advocates for the amendment of EPTL 11-1.7 to limit the enforceability of exoneration clauses in *inter vivos* trust instruments and powers of attorney.

Principles of Construction and the Role of Public Policy

New York law authorizes an individual having testamentary capacity to dispose of property "in any manner and for any . . . purpose," provided that the disposition does not offend public policy.[1] Consistent with that principle, intent generally trumps all other concerns in construing testamentary instruments.[2] Courts are charged with effectuating that purpose by implementing each testator's testamentary scheme, determining the decedent's intentions from the plain language of the entire will, and construing the words memorialized therein in accordance with their ordinary meanings.[3]

Once ascertained, the testator's intent typically controls.[4] Although the testator's voice has been silenced by death, courts are duty-bound to effectuate his or her expressed testamentary wishes, regardless of any conflicts among clamoring litigants.[5] Neither the courts nor the beneficiaries of an estate have the power to substitute their own wants and desires for those of the decedent[6] – that is, unless the testator's intent violates public policy.[7]

A legacy is violative of public policy when it contravenes a constitutional provision, statutory prohibition, or "the social judgment . . . implemented by the statute."[8] When a testator's intent offends public policy, a court will circumvent it and substitute its discretion for that of the decedent.[9]

Examples of testamentary provisions that violate the law or public policy abound.[10] In *In re Walker*, the petitioners commenced a construction proceeding, seeking to obtain two adoption decrees they claimed the decedent, their adoptive father, specifically bequeathed to them in his will.[11] The petitioners sought the decrees because the documents purportedly identified their biological mothers.[12]

The Surrogate's Court, New York County, denied the petitioners' application and dismissed the petition, reasoning that public policy required the confidentiality of adoption records.[13] In affirming the surrogate's decision, the Appellate Division, First Department and the Court of Appeals relied upon the same policy-based rationale.[14] As the Court of Appeals explained, the decedent's bequest was "contrary to public policy because consummation of the transfer [was] sought for the purpose of discovering information which [was] against the public policy . . . to disclose without good cause."[15] The confidentiality was necessary to ensure the assimilation of the adopted child into the adoptive family and the privacy of the biological parents, among other concerns.[16]

Another case often cited for this proposition is *In re Haight*,[17] in which the decedent's will conditioned his son's right to enjoy the income of a testamentary trust on the son's divorce or separation from his wife. Although the Surrogate's Court, Orange County,

issued a decree effectuating that provision, the Appellate Division, Second Department, found it to be void as against public policy.[18] The Appellate Division reasoned that "conditions annexed to a gift, the *tendency* of which is to induce the husband and wife to live separate, or *to be divorced*, are, upon grounds of public policy and public morals, void."[19]

In re Pace[20] is of equal import. In *Pace*, the decedent's will directed the trustees of a testamentary trust to raze the buildings located on real property held in trust.[21] Noting that the buildings were in "good physical condition," the trustee commenced a construction proceeding and the Surrogate's Court, Cayuga County, found that the subject provision was void as against public policy.[22] The court explained that the decedent's intent should not be effectuated because razing the buildings would be "waste[ful]."[23] As the court further opined, "the intention of the maker of a will should not be carried out when the results would be absurd, abhorrent or a waste of the assets of an estate."[24] Accordingly, the court refused to enforce the disputed provision.[25]

In sum, while a testator's expressed intent generally guides the construction of a will, adherence to that intent is not universal. Courts can look beyond testamentary intent and substitute their discretion for that of a testator when the testator's intent violates the law or public policy of the state.

Exoneration Clauses: Meaning and Early Application

Estate and trust fiduciaries owe a duty of undivided, absolute loyalty to the beneficiaries whose interests they protect.[26] This "inflexible" duty of fidelity is akin to the highest standards of honor, not just honesty alone.[27] It obligates fiduciaries to administer the estate or trust for the benefit of the beneficiaries, without regard to self-interests.[28] The legal responsibilities arising from that fiduciary status cannot generally be divested by agreement or otherwise.[29]

Notwithstanding that duty, however, testators and grantors have attempted to insulate their fiduciaries from liability for breaching their obligations.[30] These attempts come in the form of exoneration clauses, which purport to exculpate fiduciaries for breaching the duty of undivided loyalty and failing to account.[31] Yet, these clauses are not universally enforceable, despite the intentions of testators, grantors and principals.[32]

More than a century ago, in *Crabb v. Young*, the Court of Appeals first addressed the issue of whether exoneration clauses are enforceable.[33] In *Crabb*, the decedent's will exempted the trustees of a testamentary trust established pursuant thereto from liability for "any loss or damage . . . except [that which occurred due to] their own willful default, misconduct or neglect."[34] When the trust suffered investment losses, the beneficiaries sought to be

reimbursed by the trustee.[35] Although both the trial court and intermediate appellate court ruled that the trustee had an obligation to replace the amount lost, the Court of Appeals reversed, relying on the exoneration clause contained in the will.[36] In doing so, the Court explained that the decedent "had an absolute right to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done."[37] Since there was no evidence of willful default, misconduct or negligence on the trustee's part, the exoneration clause governed and required that the fiduciary be excused from liability for the losses.[38]

Subject to the requirement that fiduciaries act honestly and in good faith, the rule in *Crabb* prevailed for more than five decades, until the Legislature enacted N.Y. Decedent Estate Law § 125 (DEL) in 1936.[39] Section 125 of the DEL proscribed the enforcement of exoneration clauses that purported to excuse estate and testamentary trust fiduciaries from liability for failing to exercise reasonable care.[40] This was necessitated by the "increasing practice of testamentary draftsmen and corporate fiduciaries in vesting in . . . fiduciaries almost unlimited powers, with a minimum of obligations."[41] As the legislative history reflects, this practice was "a serious potential menace not only to the rights of a surviving spouse but of . . . all persons interested in estates."[42] The same policy-based reasons governed when the Legislature passed the successor to DEL § 125, EPTL 11-1.7, 30 years later.[43]

Whittling Away the Power to Exonerate Fiduciaries

Under EPTL 11-1.7, a testator is prohibited from exculpating the executor or testamentary trustee nominated in a will from liability for failing to "exercise reasonable care, diligence and prudence."[44] Will provisions that purport to do so are void as against public policy and have no effect.[45] Indeed, as Surrogate Radigan explained in *In re Stralem*, "'the attempted exoneration of the fiduciary [of an estate or testamentary trust] for any loss, unless occasioned by "willful neglect or misconduct" is a nugatory provision amounting to nothing more than a waste of good white paper.'"[46]

Countless cases bear this point out.[47] Surrogate Holzman's decision in *In re Lubin*[48] provides a helpful analysis of the statute as it relates to executors and testamentary trustees. In *Lubin*, the decedent's will provided that the executor of his estate would be relieved from liability "for any loss or injury to the property . . . except . . . as may result from fraud, misconduct or gross negligence."[49] Describing it as a "toothless tiger," the surrogate refused to enforce the exoneration clause because it violated public policy.[50]

Another noteworthy case is *In re Allister*, in which the decedent's will authorized her testamentary trustee to invest the trust principal "irrespective of whether the same may be authorized by the laws of [this] State . . . as investments for fiduciaries and without the duty to diversify and without any restrictions placed upon fiduciaries by any present or future applicable law."[51] Notwithstanding the testator's intent, however, the Surrogate's Court, Nassau County, found that the exoneration provision contravened EPTL 11-1.7,[52] reasoning that the provision "would elevate the fiduciary above the law" if effectuated.[53]

Although EPTL 11-1.7 undeniably applies to testamentary instruments, the statute is silent with respect to *inter vivos* trust instruments and powers of attorney.[54] That silence has left courts to reach their own, sometimes divergent, views on the issue and necessitates the amendments discussed below.

The Statutory Silence

As noted above, EPTL 11-1.7 is devoid of any mention of *inter vivos* trust instruments and powers of attorney.[55] In the absence of statutory guidance, courts have exercised their discretion – and reached conflicting conclusions – as to the enforceability of exoneration clauses in such instruments.

Initially, the Appellate Divisions for the First and Second Departments enforced exoneration clauses in *inter vivos* trust instruments,[56] relying upon the strong preference for respecting a grantor's expressed intent, rather than imposing judicial discretion on the trust.[57] The courts also emphasized that the exoneration clauses were limited – they did not completely absolve the fiduciaries from accountability to the trust beneficiaries.[58]

More recently, courts have come to contrary conclusions, holding that exoneration clauses in *inter vivos* trust instruments are not enforceable, despite the statutory silence in EPTL 11-1.7.[59] For example, in *In re Shore*, the Surrogate's Court, New York County, invalidated an exoneration clause that purported to insulate the attorney-trustee from the duty to account.[60] Accountability is the cornerstone of all fiduciary relations, said the court; the exoneration clause in question violated public policy since it left the trust beneficiary with no one to protect his interests.[61] The court explained that the "public policy against exonerating testamentary fiduciaries from any and all accountability is equally applicable [to] inter vivos trusts."[62] Accordingly, the court rejected the attorney-trustee's defense that the exoneration clause excused her from the duty to account.[63]

Similarly, in *In re Francis*, the only reported decision to address the enforceability of such clauses in powers of attorney, the Surrogate's Court, Westchester County, rejected the agent's reliance on an exculpatory provision that authorized him to engage in self-dealing and absolved him of the duty to account.[64] As Surrogate Anthony A. Scarpino, Jr. explained, the agent's conduct was governed by the "standard of 'utmost good faith and undivided loyalty toward the principal, [as well as] the highest principles of morality, fidelity, loyalty and fair dealing."[65] Insofar as the exoneration clause purported to excuse the agent from that standard, it ran "afoul of New York's public policy" and could not be enforced.[66]

Since executors, trustees, and agents acting pursuant to powers of attorney are held to the same standard of absolute, undivided loyalty to the beneficiaries whom they serve, public policy necessitates that they be treated similarly, especially in the context of exoneration clauses. Therefore, EPTL 11-1.7 should be amended to effectuate that purpose by filling the statutory void with respect to *inter vivos* trust instruments and powers of attorney, regardless of the grantor's or principal's expressed intentions. Indeed, doing so will ensure that the state's public policy concerns regarding reasonable fiduciary conduct are served and that the courts address this issue uniformly.

Conclusion

The language of testamentary and non-testamentary instruments, while generally accorded great deference by the courts, has historically yielded to public policy concerns – ensuring that a fiduciary acts in accordance with the highest principles of morality, fidelity, loyalty and fair dealing. Though traditionally invoked in the area of estates, these principles should apply equally in the context of every instrument from which a fiduciary relationship arises. Hence, there is no logical basis for excluding *inter vivos* trusts and powers of attorney from the scope of exceptions that have been applied to exoneration clauses. Indeed, giving *inter vivos* trustees and attorneys-in-fact unfettered discretion to act unreasonably, without accountability, contravenes the very nature of their fiduciary status. Section 11-1.7 should, therefore, be amended to ensure the interests of *inter vivos* trust beneficiaries and principals are protected by proscribing the enforcement of broad exoneration clauses, which purport to relieve fiduciaries from the duty to exercise reasonable care, diligence and prudence. ■

1. *In re Walker*, 64 N.Y.2d 354, 357–60, 486 N.Y.S.2d 899 (1985).

2. *Sankel v. Spector*, 8 Misc. 3d 670, 679–80, 799 N.Y.S.2d 356 (Sup. Ct., N.Y. Co. 2005); *see In re Fabbri*, 2 N.Y.2d 236, 239–40, 159 N.Y.S.2d 184 (1957).

3. *Walker*, 64 N.Y.2d at 358–60.

4. *Id.* at 358.

5. 11 Warren's Heaton on Surrogate's Court Prac. § 187.01(4)(a) (7th ed. 2007).

6. *Id.*

7. *In re Godrey's Will*, 36 N.Y.S.2d 414, 415 (Sur. Ct., Richmond Co. 1941).

8. *Walker*, 64 N.Y.2d at 358–60.

9. Warren's Heaton, *supra* note 5, at §187.01(4)(e).

10. *In re Liberman*, 279 N.Y. 458, 464–66, 18 N.E.2d 658 (1939) (holding a condition in restraint of marriage to be void as against public policy); *Kalish v. Kalish*, 166 N.Y. 368, 372–73, 59 N.E. 917 (1901) (opining that the testamentary provisions, which violated the rule against perpetuities, contravened the public policy of this state); *Levenson v. Levenson*, 229 A.D. 402, 403–406, 242 N.Y.S. 165 (2d Dep't 1930) (stating that the decedent's attempt to convey an interest in a joint tenancy was invalid); *In re McHugh*, 226 A.D. 153, 154, 234 N.Y.S. 541 (4th Dep't 1929) (invalidating a bequest of wrongful death action proceedings, which did not provide for the statutory beneficiaries); *Hacker v. Hacker*, 153 A.D. 270, 271–77, 138 N.Y.S. 194 (2d Dep't 1912) (finding a testamentary provision containing an unlawful restraint on the power of alienation to be invalid).

11. *Walker*, 64 N.Y.2d at 358–60.

12. *Id.*

13. *In re Walker*, 99 A.D.2d 448, 448–49, 471 N.Y.S.2d 243 (1st Dep't 1984), *aff'd*, 64 N.Y.2d 354, 358–60, 486 N.Y.S.2d 899 (1985).

14. *Id.*

15. *Walker*, 64 N.Y.2d at 360.

16. *Id.* at 360–61.

17. 51 A.D. 310, 311–12, 64 N.Y.S. 1029 (2d Dep't 1900).

18. *Id.* at 313–16.

19. *Id.*

20. 93 Misc. 2d 969, 400 N.Y.S.2d 488 (Sur. Ct., Cayuga Co. 1977).

21. *Id.* at 970–75.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. 41 N.Y. Jur. 2d Decedents' Estates § 1450 (2009); Ian W. MacLean, *Exculpatory Clauses in* Inter Vivos *Trusts: What Remains of a Trustee's Duty of Undivided Loyalty?*, 37 NYSBA Trusts & Estates L. Section Newsl. 5, 5 (Fall 2004).

27. *In re Wallens*, 9 N.Y.3d 117, 122–23, 847 N.Y.S.2d 156 (2007) (discussing the duty of trustees).

28. *Id.*

29. *Id.*

30. MacLean, *supra* note 26, at 5.

31. Robert Whitman, *Exoneration Clauses in Wills and Trust Instruments*, 4 Hofstra Prop. L.J. 123, 124–25 (1992).

32. *Cf. In re Stralem*, 181 Misc. 2d 715, 720, 695 N.Y.S.2d 274 (Sur. Ct., Nassau Co. 1999) (discussing the enforcement of exoneration clauses in testamentary instruments).

33. 92 N.Y. 56, 65–67 (1883).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *In re Clark's Will*, 257 N.Y. 132, 138, 177 N.E. 397 (1931); *In re Balfe's Will*, 245 A.D. 22, 24–25, 280 N.Y.S. 128 (2d Dep't 1935); Margaret Valentine Turano, Commentaries: EPTL § 11-1.7 (2008).

40. *In re Stralem*, 181 Misc. 2d 715, 719–20, 695 N.Y.S.2d 274 (Sur. Ct., Nassau Co. 1999).

41. *Id.*

42. *Id.*

43. *Id.*

44. EPTL 11-1.7(a)(1).

45. EPTL 11-1.7(a)–(b).

46. *In re Stralem*, 181 Misc. 2d at 720 (citations omitted).

47. *See, e.g.*, *In re Allister*, 144 Misc. 2d 994, 998, 545 N.Y.S.2d 483 (Sur. Ct., Nassau Co. 1989); *In re Lang*, 60 Misc. 2d 232, 234–35, 302 N.Y.S.2d 954 (Sur. Ct., Erie Co. 1969).

48. 143 Misc. 2d 121, 539 N.Y.S.2d 695 (Sur. Ct., Bronx Co. 1989).

49. *Id.* at 122.

50. *Id.*

51. *Allister*, 144 Misc. 2d at 997–98.

52. *Id.*

53. *Id.*

54. *In re Shore*, 19 Misc. 3d 663, 665–67, 854 N.Y.S.2d 293 (Sur. Ct., N.Y. Co. 2008); *In re Francis*, 19 Misc. 3d 536, 541–43, 853 N.Y.S.2d 245 (Sur. Ct., Westchester Co. 2008).

55. Coincidentally, the Legislature recently amended the N.Y. General Obligations Law (GOL) to ensure greater accountability among agents acting pursuant to powers of attorney. GOL §§ 5-1505, 5-1509, 5-1510. Among other things, the amended GOL sections specify that agents owe fiduciary duties to their principals, provide for the appointment of monitors with respect to the agents, and authorize the commencement of special proceedings to remove agents. *Id.* The new provisions are consistent with the amendments to EPTL 11-1.7 proposed herein in that they provide for greater accountability among agents.

56. *Carey v. Cunningham*, 191 A.D.2d 336, 336, 595 N.Y.S.2d 185 (1st Dep't 1993); *Bauer v. Bauernschmidt*, 187 A.D.2d 477, 478–79, 589 N.Y.S.2d 582 (2d Dep't 1992); *see also Kolentus v. AVCO Corp.*, 798 F.2d 949, 966 (7th Cir. 1986) (applying New York law).

57. *Bauer*, 187 A.D.2d at 478–79.

58. *Carey*, 191 A.D.2d at 336.

59. *In re Amaducci*, N.Y.L.J., Jan. 12, 1998, p. 32, col. 3 (Sur. Ct., Westchester Co.).

60. *Shore*, 19 Misc. 3d at 665–67.

61. *Id.*

62. *Id.*

63. *Id.*

64. *In re Francis*, 19 Misc. 3d 536, 541–42, 853 N.Y.S.2d 245 (Sur. Ct., Westchester Co. 2008).

65. *Id.*

66. *Id.*

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Is the Cure Worse Than the Disease?

The Direct-to-Consumer Advertising Exception

Tort reform can take many forms and affect many parts of common law. These reforms are generally considered by, and passed by, state legislatures. Recently, some state legislatures have considered changing the duties a prescription drug manufacturer owes to the ultimate consumer. The prescription drug manufacturer has two duties: (1) to make a safe product that is free from defects and (2) to warn the ultimate consumer of any foreseeable risks.[1] This warning can come from many sources, including the drug label, brochures, and advertisements.

This article will examine one proposed change to the duty of manufacturers of prescription drugs to adequately warn the ultimate consumer. Under the proposed change, a manufacturer of prescription drugs who engages in direct-to-consumer advertising of those drugs, can no longer satisfy its duty to warn by warning a learned intermediary – *e.g.*, by providing the prescribing physician with adequate warnings, which the doctor then conveys to patients.

This reform has been considered in a few states,[2] and it is likely that more states will consider it as well. Proponents claim this reform will benefit consumers in two ways.[3] First, they say, it will lower drug prices because the manufacturer will spend less on advertising. Second, it will provide patients with better warnings since manufacturers will have to warn consumers directly. I will argue, however, that this reform will not benefit consumers but rather will harm consumers in numerous ways.

Duty to Warn

Product manufacturers have a duty to warn consumers about all reasonably foreseeable risks associated with their products. To establish a prima facie case, a plaintiff must prove that knowledge of the warning would have changed the plaintiff's behavior[4]; and, in most cases, courts apply the presumption that the warning would have changed the plaintiff's conduct.[5] Many courts have held, however, that this presumption should not apply in unavoidably dangerous products like prescription drugs.[6]

A manufacturer has a duty to warn of all risks that a reasonable person would want to know about, and the warning must convey the scope and seriousness of the danger.[7] The Restatement (Third) of Torts provides that the manufacturer of a prescription drug or medical device violates this duty to warn if the manufacturer does not provide reasonable warnings of foreseeable risks to the health-care provider – or the patient if the manufacturer should know that health-care providers are not in a position to reduce the risks of harm in accordance with the instructions or warnings.[8]

Some courts have held that a plaintiff must establish that (1) the prescribing physician would not have prescribed the drug if there was an adequate warning and (2) the injury would not have occurred had the drug not been administered.[9] The manufacturer can escape liability if it can show that the prescriber knew of the risk, considered the risk, and decided the benefits of the drug outweighed the risk of the disease that the medication was used to treat.[10]

Who Must Warn Whom?

Courts have recognized that warnings can be provided on the container in which the products are supplied or by a label or other device if feasible.[11] Many courts have recognized that manufacturers and distributors of certain products may have no effective way to convey warnings to the ultimate consumer.[12] In *Persons*, the court held that the manufacturer of skis did not violate a duty to warn against the use of a particular type of ski boot. The court felt the warning the defendant gave to the sporting goods store was enough to satisfy its duty to warn because the store acted as a reliable third party that should have conveyed the information to the ultimate user. The *Persons* court held that a warning would have no benefit for consumers if the consumers do not have the technical expertise or knowledge to understand the warning.[13] Warning the ski shop was enough to satisfy the defendant's duty to warn the consumer because the consumer necessarily relies on the knowledge and technical expertise of the ski shop.[14]

A manufacturer does not always have an effective or feasible way to convey a product's warning to the ultimate consumer. In general, courts have held that a manufacturer in this situa-

tion does not have a duty to warn the ultimate consumer; rather, the warning must be conveyed to an intermediary who will relay this warning to the ultimate consumer. Take, for example, a manufacturer and supplier of bulk products. In *Hoffman v. Houghton Chemical Corp.*, the court adopted what is known as the "bulk supplier doctrine," which can be an affirmative defense in products liability/duty to warn cases.[15] Bulk suppliers and manufacturers should be able to rely on the intermediary's own obligation to provide safety measures and warnings for the ultimate users. The bulk supplier must supply adequate warnings to the intermediary and ensure that reliance on the intermediary is reasonable. The supplier is permitted to discharge its duty to warn in a practical and responsible way that equitably balances the realities of its business with the need for consumer safety.[16]

The bulk supplier doctrine should be extended to prescription drug manufacturers. Prescription drug manufacturers sell large amounts of their product and the product is the same regardless of the buyer. While the manufacturer is not absolved of its duty to convey adequate warnings, it is allowed to rely on an intermediary to make a risk/benefit analysis and recommend to the ultimate consumer which drug should be taken. It is likely that an ordinary consumer would not have the expertise or knowledge to be able to comprehend the drug manufacturer's warning. Since the typical user has insufficient knowledge and expertise to benefit from the warning, the manufacturer should be able to rely on warning a learned intermediary to satisfy its duty to warn.

The Learned Intermediary Doctrine

Many people argue that the most effective way a manufacturer can warn the consumer is through the consumer's doctor. The idea of limiting a drug manufacturer's duty to warn to the doctor, rather than the general public, began with *Stottlemire v. Cawood*.[17] Federal courts first held, in *Sterling Drug, Inc. v. Cornish*, that if the doctor is properly warned of the possibility of a side effect in some patients, and is advised of the symptoms normally accompanying the side effect, there is an excellent chance that injury to the patient can be avoided.[18] An overwhelming number of jurisdictions have adopted this learned intermediary doctrine.[19]

The learned intermediary doctrine is an exception to the rule that the manufacturer must take all reasonable steps to provide warnings directly to a product's ultimate user.[20] Learned intermediaries, such as doctors and nurse practitioners, stand between the manufacturers and the product user and make the decisions as to what medicines the user should take. Thus, the manufacturer's duty to inform consumers runs through the physicians, not directly to the consumer.[21] The intermediary makes an individualized decision, weighing the potential harms and benefits, based on the intermediary's knowledge and experience of both the patient and the product.[22] Prescription drugs are likely to be complex and their effects on users can be varied.[23] Because only a medical professional can take into account the propensities of the drug, as well as the individual characteristics of the user, the manufacturer is required to warn only the prescribing physician.[24] The prescribing physician is then obligated to inform the patient of the benefits and risks of the drug, and how those benefits and risks compare to different treatment or no treatment.[25]

Exceptions in Prescription Drugs

The learned intermediary doctrine is an affirmative defense, which the defendant has the burden to prove; however, if an exception is applied, the burden shifts to the plaintiff.[26] Courts have held there are a few exceptions to the doctrine where the manufacturer must warn the ultimate consumer. Some of these exceptions include: mass immunization programs,[27] birth control pills,[28] and direct-to-consumer advertising.[29]

In 1997, the F.D.A. relaxed its restrictions on direct-to-consumer advertising of prescription drugs. Since then, the amount of money the pharmaceutical industry spends on advertising has risen to billions of dollars annually. This has prompted some states to recognize an exception to the learned intermediary doctrine for direct-to-consumer advertising situations.

While drug manufacturers formerly advertised to patients only through their prescribing physician, they now directly advertise products to consumers on the radio, television, the Internet, billboards, on public transportation, and in magazines.[30] Some courts have held that mass marketers of prescription drugs should not be insulated from their duty to warn consumers directly when they seek to influence a patient's choice of drugs through marketing.[31] In *Perez v. Wyeth Laboratories*, for example, the court held that the learned intermediary doctrine does not apply to direct-to-consumer situations because consumers are active participants in their health care decisions, invalidating the concept that it is the doctor, not the patient, who decides whether a drug or device should be used.[32]

Due to these changes in prescription drug marketing (as noted in *Perez*[33]), the Supreme Court of West Virginia became the first state court to reject the learned intermediary doctrine wholesale in *State ex rel. Johnson & Johnson Corp. v. Karl*.[34] The court in *Karl* held that manufacturers of prescription drugs are subject to the same duty to warn consumers about the risks of their products as other manufacturers.[35] The changing environment has also affected the way courts define a manufacturer's duty to warn. For example, in *Holley v. Burroughs Wellcome Co.*,[36] the court extended the scope of what constitutes an intermediary to include other medical personnel that may be in a position to reduce or avoid risk of harm. This has been adopted by the Restatement (Third) of Torts: Products Liability.[37] There is no general rule for deciding whether

a manufacturer has a duty to warn an intermediary or the ultimate user, but certain factors should be considered in making the determination of whom the manufacturer has a duty to warn.[38] These include the gravity of the risks posed by the product, the likelihood the intermediary will convey the warning to the ultimate user, and the feasibility and effectiveness of warning the ultimate user directly.[39]

Rejecting the Doctrine in Direct-to-Consumer Advertising

The justifications for the learned intermediary doctrine were best summed up by the New Jersey Supreme Court: "(1) reluctance to undermine the doctor-patient relationship; (2) absence in the era of 'doctor knows best' of need for the patient's informed consent; (3) inability of drug manufacturer to communicate with patients; and (4) complexity of the subject."[40] Advertising prescription drugs directly to the consumer undermines only two of the four justifications; however, manufacturers engaging in direct-to-consumer advertisement generally can escape liability by warning an intermediary.

Advertising directly to the consumer does undermine the doctor-patient relationship and create a need for the patient's informed consent; the patient becomes a more active participant in the relationship by initiating the conversation with the doctor about the course of treatment. The doctor may be more willing to prescribe the drug that the consumer has chosen, because he or she knows the patient wants that treatment. Therefore, the patient should have all of the information in order to make an informed decision.

Proponents of the exception to the learned intermediary doctrine can argue that since manufacturers are able to communicate with consumers through the advertisement, the manufacturer will be able to communicate the warning to the patient. The mere fact that the warning can be communicated to the consumer, however, does not mean the typical consumer will understand the warning.[41] Risks connected to prescription drugs are likely to be very complex, most often too complex for the ordinary consumer to understand. If the ordinary consumer does not have the technical knowledge or expertise to understand the warning, then the warning is not of benefit to the ultimate user.[42] It is difficult to imagine that including a warning of all reasonably foreseeable risks in a commercial or in a pamphlet will be an effective way to warn the ultimate consumer. The typical language in a warning is too scientific for an ordinary consumer to understand. The manufacturer also runs the risk of desensitizing the user. As manufacturers add line after line to warnings, it is easy to lose sight of the label's communicative value as a whole.[43] Attempts to warn of every possible risk can lead to voluminous and yet impenetrable labels – too long-winded to read and too technical to understand.[44] A doctor or other learned intermediary would be able to choose what warnings are necessary and what warnings are frivolous concerning a particular patient.

Because there is not an effective or feasible way for prescription drugs to convey adequate warnings to the ultimate user in a beneficial way, most states have not adopted an exception to the learned intermediary doctrine for direct-to-consumer advertising. The exception was formerly widespread, but since *Perez* was decided no court (besides New Jersey) has applied the direct-to-consumer exception to the learned intermediary doctrine.[45] Courts deciding whether to apply the direct-to-consumer exception have all elected to apply the learned intermediary doctrine, with no exception.[46]

Which States Apply the Learned Intermediary Doctrine?

Defendants in cases regarding prescription drugs or medical devices can apply the learned intermediary doctrine. In the prescription drug context, every state other than West Virginia, Rhode Island, and Vermont applies some form of the doctrine (courts and the legislatures of Rhode Island and Vermont have not yet considered the learned intermediary doctrine).[47] In the medical devices context, 39 states apply the learned intermediary doctrine; 10 states have not had the opportunity to decide whether to extend the learned intermediary doctrine to devices.[48] Only West Virginia has rejected applying the doctrine.[49]

A doctor or other learned intermediary would be able to choose what warnings are necessary and what warnings are frivolous concerning a particular patient.

Tort Reform Abolishing the Learned Intermediary Doctrine

New York has, however, begun considering replacing the learned intermediary doctrine with a duty to warn the ultimate user when direct-to-consumer advertising is used.[50] Other states have considered a similar reform[51] and more will likely consider it as well.

The drafters of the New York bill recognize that direct-to-consumer advertising can have adverse effects on the public due to misinformation. In a poll cited by the bill drafters, 43% of individuals polled believed only completely safe drugs could be advertised and 21% thought only extremely effective drugs could be advertised.[52]

Advertising makes the patient a more active part of the doctor-patient

calculation, and the bill's drafters claim the patient who demands an advertised drug receives that drug 73% of the time (although the drafters do not cite where they got this statistic). They also say that allowing a prescription drug manufacturer the benefit of the learned intermediary doctrine would allow the manufacturer to hide behind the physician whose role it has usurped.[53] They are worried that drug manufacturers will increase drug costs to pay for increased advertising costs, although one could argue that drug manufacturers will have to increase drug costs to pay for increased civil liability costs.

The most common criticism of creating an exception to the learned intermediary doctrine is that it takes the most knowledgeable person out of the equation. The consumer would receive all of the information about a product and make the decision whether to use it in the absence of the doctor. Proponents of reform claim that the doctor will continue to warn patients but that consumers will be able to supplement the doctor's warning with the one from the manufacturer. Assuming an adequate warning reaches and is read by a patient (let alone understood by him or her), one likely result would be confusion, fear, and the unreasonable rejection of an appropriate medical treatment. The consumer may focus on the risks of the product and discount the very narrow probability that harm will actually occur. Thus, the warning should be provided to the learned intermediary; only he or she has the knowledge and expertise to make the correct risk/benefit analysis for each individual patient.

Professor Alberto Bernabe of John Marshall Law School argues, however, that eliminating the learned intermediary doctrine in direct-to-consumer advertising will not take the doctor out of the equation.[54] Doctors have a duty to warn their patients of the risks of the medicine they prescribe, independent of the duty they have under the learned intermediary doctrine, notes Professor Bernabe. Manufacturers would not stop providing warnings to doctors, and doctors would not stop conveying warnings to patients.[55] But not every patient will need to be warned about every risk, and a consumer reading a warning containing every foreseeable risk may be unreasonably deterred from using the drug. Bernabe's argument ignores the possibility that patients will place too much emphasis on the risks enumerated in the manufacturer's warnings and too little on the benefits the doctor conveys to the patient.

Proponents of reform claim that manufacturers should be able to clearly communicate a more comprehensive warning. They reason that if the manufacturer can convey an advertisement to the consumer it should be able to convey a warning to the same consumer. The flaw is that advertisements are much easier to understand than scientific warnings. A warning is not effective simply because it is communicated. If the consumer does not understand a warning, then he or she has not benefited from the warning.[56] Therefore it is likely that requiring manufacturers to convey their warnings directly to the consumer will result in the consumer having less understanding of the risks of a prescription drug than when the warning is conveyed by the doctor, who has received it from the manufacturer.

The Exception Should Be Rejected

Increased liability would drive up the cost of health care and deter the development and production of helpful medicines. Proponents of the exception to the learned intermediary doctrine claim that it is the cost of advertising that drives up the cost of medicine.[57] However, costs included in civil litigation are likely to be much higher than a company's advertising costs. Eliminating the learned intermediary doctrine will eliminate a defense for the manufacturer. Manufacturers could expect not only more lawsuits but also more adverse judgments.

Drug manufacturers would likely be forced to raise drug costs more with a direct-to-consumer exception in place.

The cost of providing a full and comprehensible warning to the patient and the cost of increased lawsuits and adverse judgments must be added to the cost of manufacturing the drug to understand the increased costs caused by the reform. Thus, drug manufacturers would likely be forced to raise drug costs more with a direct-to-consumer exception in place. Proponents of the exception are attempting to fix a problem, but in reality they are increasing the problem exponentially.

Another issue is that an exception to the learned intermediary doctrine will encourage forum shopping. Plaintiffs will always try to bring suit in a jurisdiction that has an exception for direct-to-consumer advertising. Many prescription drug products liability suits turn into class-action suits, and jurisdictions having the exception will be more attractive to these litigants. One example is the Vioxx litigation in 2004, where a law firm sent out letters to get all potential clients to bring their lawsuits against Vioxx in New Jersey because of the state's lenient products liability laws.[58]

Finally, patients should get information about prescription drugs from their doctors, because they may be more likely to follow warnings that their physicians provide rather than warnings a company provides.

Conclusion

The learned intermediary doctrine is an important concept in products

liability law, especially when prescription drugs are being considered. Ever since the FDA eased its regulations on prescription drug advertising in 1997, there has been an evolution in the way drug manufacturers do business – specifically concerning advertising. This increase in drug advertisements has created many new issues, one of which is whether the drug manufacturer should still be able to satisfy its duty to warn the consumer by providing the physician with an adequate warning.

Some argue that advertising directly to the consumer undermines many of the justifications for the learned intermediary doctrine and that it is not fair for the manufacturers to spend money on advertisements and pass the costs onto the consumer in the form of higher prices. However, the most important justification for keeping the learned intermediary doctrine in place is that it is not feasible that manufacturers can provide effective warnings that are comprehensible to the average user. If the user does not understand the complex warnings, then the warning is not beneficial and serves no purpose. An exception to the learned intermediary doctrine for situations in which the manufacturer advertises directly to the consumer would take the most knowledgeable person out of the equation. The multitude of warnings, which are not applicable to everybody, will likely confuse and scare the average user, perhaps deterring that person from taking a potentially useful medicine. And, the price of drugs will likely rise to cover the costs of increased litigation.

Advertising prescription drugs directly to the consumer does change many parts of the relationship between the manufacturer, doctor and patient. However, the changes do not justify an exception to the learned intermediary doctrine. The exception to the learned intermediary doctrine does little more than hurt the patients it purports to protect. Therefore state legislatures should reject any measures to reform the learned intermediary doctrine to create a direct-to-consumer exception. ■

1. Restatement (Second) of Torts § 388.
2. For example, New Jersey in 1999, West Virginia in 2007, California in 2008, New York in 2009.
3. *See, e.g.*, N.Y. State Assembly, Bill No. A05201, *available at* http://assembly.state.ny.us/leg/?bn=A05201.
4. *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 677 N.Y.S.2d 764 (1998).
5. *Tingey v. Radionics*, 193 Fed. Appx. 747 (10th Cir. 2006); Restatement (Second) of Torts § 402A, cmts. j, k.
6. *See, e.g.*, *Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806, 813 (5th Cir. 1992); Restatement (Third) Products Liability § 6(d).
7. *Madsen v. Am. Home Prods. Corp.*, 477 F. Supp. 2d 1025, 1035 (E.D. Mo. 2007).
8. Restatement (Third) Products Liability § 6(d).
9. *Thomas*, 949 F.2d at 814; *Motus v. Pfizer Inc.*, 358 F.3d 659, 661 (9th Cir. 2004).
10. *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1021 (10th Cir. 2001).
11. Restatement (Second) of Torts, § 388, cmt. n.
12. *Persons v. Salomon N. Am., Inc.*, 265 Cal. Rptr. 773, 777, 217 Cal. App. 3d 168 (1990).
13. *Id*. at 778.
14. *Id*. at 779.
15. 751 N.E.2d 848, 434 Mass. 624 (2001).
16. *Id*. at 857.
17. 213 F. Supp. 897, 899 (D.D.C. 1963).
18. *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966).
19. *Pumphrey v. Bard*, 906 F. Supp. 334, 338 (N.D. W.V. 1995).
20. *Vitanza v. Upjohn Co.*, 778 A.2d 829, 836, 257 Conn. 365 (2001).
21. David G. Owen, Products Liability Law 630 (West, Thomson Reuters 3d ed. 2008).
22. *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974).
23. *Id*.
24. *Id*.
25. Owen, *Supra* note 21, at 631.
26. *Ebel v. Eli Lilly & Co.*, 536 F. Supp. 2d 767, 782 (S.D. Tex. 2008), *aff'd*, 321 Fed. Appx. 350 (5th Cir. 2009).
27. *See Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 131 (9th Cir. 1968).
28. *See MacDonald v. Ortho Pharmaceutical Corp.*, 475 N.E.2d 65, 394 Mass. 131 (1985).
29. *Perez v. Wyeth Labs.*, 734 A.2d 1245, 161 N.J. 1 (1999).
30. *Id* at 1247.
31. *Id*.
32. *Id*. at 1260 (quoting Susan A. Casey, Comment, *Laying an Old Doctrine to Rest: Challenging the Wisdom of the Learned Intermediary Doctrine*, 19 Wm. Mitchell L. Rev. 931, 956 (1993)).
33. *Id*. at 1247
34. 647 S.E.2d 899, 220 W. Va. 463 (2007).
35. *Id*. at 914.
36. 330 S.E.2d 228, 74 N.C. App. 736 (1985), *aff'd*, 348 S.E.2d 772, 318 N.C. 352 (1986).
37. Restatement (Third) Products Liability § 2(c), cmt. i.
38. *Id*.
39. *Id*.
40. *Perez v. Wyeth Labs.*, 734 A.2d 1245, 1255, 161 N.J. 1 (1999).
41. *Persons v. Salomon N. Am., Inc.*, 265 Cal. Rptr. 773, 777, 217 Cal. App. 3d 168 (1990).
42. *Id*.
43. *Hood v. Ryobi*, 181 F.3d 608, 611 (4th Cir. 1999).
44. *Id*.
45. *See, e.g.*, *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 547 n.30 (E.D. Pa. 2006), *judgment vacated*, 129 S. Ct. 1578 (2009); *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 812 n.19 (N.D. Ohio 2004), *aff'd*, 447 F.3d 861 (6th Cir. 2006); *Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1376 (S.D. Fla. 2007).
46. *Beale*, 492 F. Supp. 2d at 1376.
47. *See* Drug and Device Law, *Headcount II: The Learned Intermediary Rule and Medical Devices*, *available at* http://druganddevicelaw.blogspot.com/2008/07/headcount-ii-learned-intermediary-rule.html.
48. *See id*.
49. *See State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 220 W. Va. 463 (2007).
50. N.Y. State Assembly, Bill No. A05201, *available at* http://assembly.state.ny.us/leg/?bn=A05201.
51. For example, New Jersey in 1999, West Virginia in 2007, California in 2008.
52. N.Y. State Assembly, Bill No. A05201, *available at* http://assembly.state.ny.us/leg/?bn=A05201.
53. *Id*.
54. Torts, *Comment on a Bill That Would Eliminate the Learned Intermediary Doctrine*, *available at* http://bernabetorts.blogspot.com/2009/05/comment-on-bill-that-would-eliminate.html.
55. *Id*.
56. *Persons v. Salomon N. Am., Inc.*, 265 Cal. Rptr. 773, 777, 217 Cal. App. 3d 168 (1990).
57. N.Y. State Assembly, Bill No. A05201, *available at* http://assembly.state.ny.us/leg/?bn=A05201.
58. Letter, *Re: Vioxx Litigation*, *available at* http://druganddevicelaw.net/Vioxx%20forumshopping%20letter.pdf.

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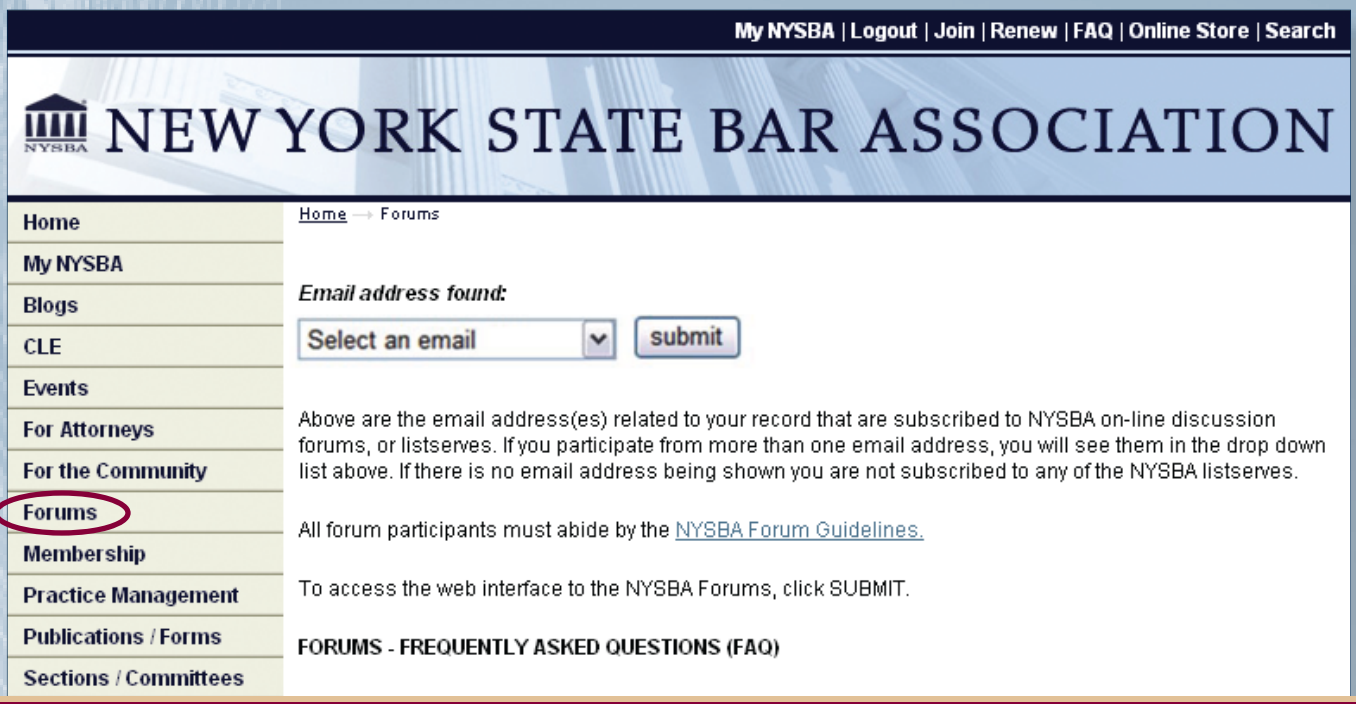

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On July 19, 2009, a tsunami swept over the consumer credit market, washing many potential claims out of arbitration and into the courthouse. On that day the National Arbitration Forum (NAF), under pressure from the Minnesota State Attorney General, announced that it was withdrawing from the field of consumer credit arbitration, effective July 24. It will, however, continue to administer credit matters filed before July 24, 2009. On July 27, 2009, the American Arbitration Association (AAA) announced a self-imposed moratorium applicable to any new consumer credit cases brought by a creditor. The impact will be felt for years to come.

In the short term decisions will need to be made quickly about how best to resolve the literally thousands of potential disputes already contracted to proceed before the NAF and AAA. A parallel concern should be the development of strategies about how best to draft consumer agreements to account for the forthcoming shift from private justice to the courthouse.

In this article we will examine just a few of the many likely scenarios, with an eye toward preparing clients and attorneys alike for the resolution of a class of disputes that will no longer be candidates for resolution by arbitration.

What This Is All About

For years consumer groups have objected to the practice of many credit card companies and telecom providers of imposing, by way of adhesion, mandatory arbitration on customers. These groups believe that mandatory arbitration is "lawless," rigged, and designed to deny consumers an assortment of essential rights – jury trials, class action status, discovery, to name a few – all to the benefit of the credit card and telecom companies. In large measure, the focus of their discontent has been NAF, which became the largest provider in the United States of consumer arbitration services as a result of its claims of absolute neutrality. These consumer groups point to an assortment of NAF actions that, they say, suggests (at the very least) an appearance of partiality:

- NAF solicits credit card companies, and others, urging them to designate NAF as the forum for arbitration;
- NAF unilaterally creates the rules for the administration of arbitration;
- NAF charges the credit card companies, and others, fees for processing claims against consumers; and
- NAF pays the arbitrators it assigns to resolve a dispute.

NAF has therefore been the target of numerous private lawsuits seeking to establish the existence of a direct connection between NAF and the companies NAF serves and, worse yet, the attorneys representing these institutions before NAF arbitrators. None of these efforts has yielded conclusive proof of partiality and wrongdoing by NAF.

In September 2007, the Washington D.C.–based Public Citizen released a report titled "*The Arbitration Trap: How Credit Card Companies Ensnare Consumers*."[1] Relying on disclosures by NAF mandated by California law, the report claimed to have identified a pattern of behavior by NAF arbitrators, evidencing rubber-stamping of the demands of credit card companies. NAF refuted the claim, pointing out that in the vast majority of the cases in question the debtor had defaulted, leaving the arbitrator no choice but to recognize the claims. NAF maintained that identical results would have been achieved had the forum been the courthouse.

In the spring of 2008, the San Francisco City Attorney brought an action against NAF and two of its clients in the Superior Court in San Francisco,[2] claiming violations of numerous California consumer laws such as the California Fair Debt Collection Practice Act,[3] as well as claims for unfair and deceptive marketing practices. The relief sought was a permanent injunction, substantial fines and costs. For the most part, the factual statements in the complaint track those laid out in the Public Citizen report, described above. One of the client-defendants has settled, agreeing in effect not to use NAF for arbitration within California without the consent and supervision of the city attorney. NAF and the remaining client defendant have continued to fight the claims.

Meanwhile the Minnesota State Attorney General opened an investigation into the activities of NAF and a group of companies that NAF works with closely in providing arbitration services to clients of NAF. The attorney general had jurisdiction because all the targets were entities formed under Minnesota law and had their principal places of business offices at the same address in Minneapolis. On July 10, 2009, an action was commenced in the district court in Hennepin County

seeking relief similar to that being sought by the San Francisco City Attorney. Many of the recited factual allegations also track the Public Citizen report. But, in addition, the attorney general claimed to have uncovered a web of connections suggesting that NAF was anything but impartial because it is partially owned by a group of attorneys who regularly represent the credit card claimants in proceedings before NAF arbitrators. Within a week NAF, while not admitting any wrongdoing, entered into a stipulation of settlement and agreed to withdraw from the consumer credit arbitration business, nationwide, effective July 24. There is no doubt this agreement will result in a flood of new cases appearing in courthouses around the country. According to the complaint[4] filed by the attorney general, in 2006 NAF processed 214,000 consumer debt collection arbitration claims across the United States.

While all of this was going on, bills have been introduced into the U.S. House of Representatives[5] and the Senate[6] designed to curb mandatory arbitration. While the details differ, both bills would render any predispute mandatory arbitration clause *unenforceable*, no matter when entered into, if found in a contract involving a consumer, employment or franchise transaction. The Senate version also includes any dispute arising under the U.S. Constitution, any state constitution or any federal or state law involving discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the federal government or any state government. Neither bill defines precisely what is meant by a consumer agreement giving rise to questions about the viability of the Financial Industry Regulatory Authority (FINRA) programs. Both of these bills are, at the time of this writing, still in committee.

Thus, even if the pending bills don't become law, at least in matters involving credit cards and other forms of consumer credit previously addressed by NAF and AAA, mandatory arbitration is, for the foreseeable future, dead in the water.

What the Practitioner Needs to Consider

Attorneys representing parties with existing contracts providing for mandatory arbitration need to immediately review these agreements to decide how best to counsel their clients. Practitioners currently considering including such a clause in a consumer contract, employment contract or agreement involving a franchise, need to carefully consider the advisability of doing so given the actions of NAF and the AAA, as well as the possibility that Congress may pass the Arbitration Fairness Act at some point in the relatively near future. Particular attention needs to be given to agreements involving employment, discussed below.

Consumer Credit

First, there are literally tens of millions of contracts for credit cards and other forms of consumer credit requiring mandatory arbitration. If you represent a potential claimant, the first question would be whether the clause requires arbitration before either the NAF or the AAA. If the answer is yes, the client is going to have to look someplace else if arbitration is still desired, and it may not be easy to substitute another provider. Unless the clause gives the client the exclusive right to select an alternate provider, a provision that at present is probably not unconscionable,[7] consent by each respondent will be required. Moreover, there aren't many other providers of arbitration administration equipped to handle these claims, especially if the volume is substantial.

Similarly, if you represent clients who receive notice of the commencement of an arbitration proceeding, you need to immediately determine if the matter involves consumer credit *and* the provider is either the NAF or the AAA. If the answer to both questions is yes, NAF is now obligated to refuse to accept the matter, and the AAA simply will refuse. Still, the claimant may attempt to initiate arbitration before another provider, in which case careful thought has to be given to whether your client's consent is required. If it is, your client may be in good position to bargain for favorable settlement. If an immediate settlement isn't possible, thought should be given to the appropriateness of a court proceeding to stay the arbitration.

Claimant may attempt to initiate arbitration before another provider, in which case careful thought has to be given to whether your client's consent is required.

The inquiry should not stop at consumer credit. The stipulation that the NAF has agreed to covers "Consumer Arbitration," defined as "any arbitration involving a dispute between a business entity and a private individual which relates to goods, services, or property of any kind allegedly provided by any business entity to the individual, or payment for such goods, services, or property. The term includes any claim by a third party debt buyer against a private individual."[8]

Employment, a Special Situation

Both bills before the Congress would bar enforcement of a mandatory arbitration clause in *any* employment agreement, without concern for the relative bargaining positions of the parties or when an agreement was entered into. This may prove problematic for lawyers representing high-earning individuals.

Studies have shown that high earners prefer arbitration because they believe that they are more likely to prevail in an arbitration than before a jury.[9] Those individuals are almost always represented by counsel when negotiating an employment contract, so there is almost never a question about sophistication and/or equality in bargaining power. But the bills under consideration fail to recognize this reality, with the result that this class of individuals is lumped together with all other employees and is denied the right to negotiate a pre-dispute mandatory arbitration provision. If you represent a high earner in a contract negotiation, you need to explain this to the client and explore with him or her other alternatives for dispute resolution. And you need to point out that an existing clause mandating arbitration may also be unenforceable.

Conclusion

The ability to insist on pre-dispute mandatory arbitration is likely to be limited with the result that both counsel and clients need to review existing agreements involving consumer, employment and/or franchise transactions with an eye toward finding other ways to resolve disputes. Whether this wave of change will improve access to justice is something that only time will tell. For the moment, counsel's job is to be aware of the new limitations and keep clients advised of the rapidly changing nature of the landscape. ■

1. *Available at* www.citizen.org/publications/release.cfm?ID=7545.

2. Case no. cgc-08-473569 *available at* www.webaccess.sftc.org.

3. Cal. Civ. Code §§ 1788 *et seq*.

4. District Court, 4th Judicial District, County of Hennepin, Minnesota, Civ. 27-09-18550, par. 3.

5. H.R. 1020, 111th Congress (2009), *available at* Thomas.Loc.gov.

6. S. 931, 111th Congress (2009), *available at* Thomas.Loc.gov.

7. *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 538 N.Y.S.2d 513 (1989); *1210 Colvin Ave., Inc. v. Tops Markets*, 30 A.D.3d 995, 816 N.Y.S.2d 639 (4th Dep't 2006).

8. Consent Judgment, Court File No. 27-CV-09-18550, District Court,4th Judicial District, Hennepin County, Minn., pp. 1–2; see press release re settlement, the Office of Attorney General Lori Swanson, *available at* www.ag.state.mn.us.

9. Stewart J. Schwab & Randell S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Executives Bargain For?*, 63 Wash & Lee L. Rev. 231, 238 (2006).

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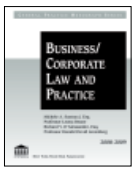

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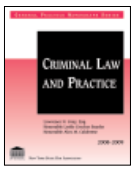

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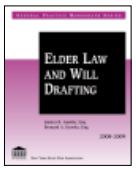

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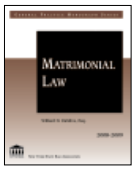

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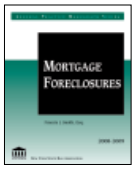

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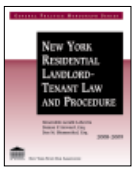

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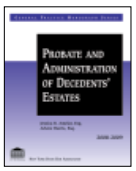

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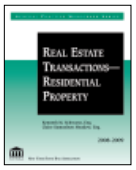

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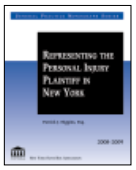

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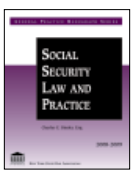

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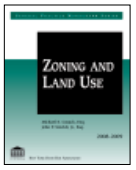

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BY ROBERT LANE AND BRUCE A. OLSON

Winning at Trial With a Dynamic PowerPoint Presentation

A lot is at stake – power, money, reputation, future plans, justice. You need to win this case. Your presentation materials surely will play an important role in helping the judge and jury experience the sights, sounds, and details of the case . . . *or not*. The choice is up to you, says one tech-savvy attorney. It all depends upon whether you are willing to push PowerPoint[1] beyond its normal boundaries to maximize its interactive and persuasive potential.

This Wasn't Part of the Plan

On a crisp winter's day, Bruce climbed the courthouse stairs and walked toward his assigned courtroom, a ritual he had repeated many times before throughout his career as a trial lawyer. Soon a jury would hear opening statements. Bruce was well prepared, as usual, to walk them through a carefully arranged PowerPoint presentation – a typical series of linear slides summarizing the case. Everything seemed in order and under control. That's when a surprise hit.

Bruce: "We'd picked a jury in the morning, and opening statements started after lunch. I'd made it partway through my opening when I realized I was starting to lose the jury – they were dozing off. Opening after lunch is always difficult. To wake them up, I really needed to move up the most important slides from the end where I'd initially placed them for a strong finish. I also needed to drop a number of slides on the fly to shorten the presentation. Given the way I'd structured my PowerPoint show, though, I was stuck. All I could do was talk loudly and click rapidly through the slides to get to the end so I could re-engage the jury's interest.

Figure 1

"While I was generally a fan of PowerPoint, it clearly had its limitations in court, or so I'd been led to believe. As a result, I always exercised caution when using it at trial. The software's linear design worked well for sequential, predictable messages such as opening and closing arguments, but I hadn't learned a way to use it to address unpredictable events like sleeping jurors. Situations like that don't fit into convenient little predictable boxes. They are messy and random – and most aspects of litigation are like that. How could PowerPoint possibly address such complexity?"

Hey, It's Not Like That on TV!

"Another factor caused me to further worry about PowerPoint's appropriateness to litigation, a phenomenon I refer to as the '*CSI* effect.' Movies and television shows like *CSI* condition us to expect visual clues on a regular basis to help fill in information gaps.

Robert Lane (rlane@aspirecommunications.com) is a U.S.-based presentation consultant specializing in visually interactive communication theory and is the author of *Relational Presentation, a Visually Interactive Approach*. His Web site, www.aspirecommunications.com, features free demonstration video clips, tutorials, guides, and other resources that further explain the concepts discussed in this article.

Bruce A. Olson (bolson@onlawtec.com) is President of ONLAW Trial Technologies, LLC, a consulting firm offering trial technology, eDiscovery, and computer forensic services. A trial attorney and nationally recognized legal technologist, Olson received the prestigious "TechnoLawyer of the Year 2002" Award, from TechnoLawyer, and was Chair of ABA TECHSHOW 2004, Vice Chair of ABA TECHSHOW 2003, and served on the TECHSHOW Board of Directors from 2000–2004.

Suddenly we are taken back in time to see a gunshot, hear a victim's scream, get a zoomed-in view of a blood speck on a carpet, or a thousand other timely bits of information needed to solve the mystery of how the crime was committed. Those clues allow us to mentally piece together what really happened.

"Granted, such television dramas have little relationship to real life, but that doesn't seem to matter with many jurors these days. They almost expect trial lawyers to act like *CSI* characters, pulling up just the right pictures, video clips, and sounds, at the right moments, to support their points. Words alone are not enough. A subconscious thought demands: 'Show it to me like they do on TV so I can decide if he really did it or not.' There is a huge difference between rebutting an argument with a statement like 'That's impossible,' compared to 'That's impossible . . . *and let me show you why*.' The latter response taps into a *CSI expectation* of seeing evidence when it's most relevant.

"A lawyer who can't satisfy this media-enhanced expectation to at least some degree risks losing jurors' interest and concentration. Just having that information gathering dust somewhere in a long slide show is not enough, either. Details must be available at a moment's notice, regardless of context, to provide jurors with what could turn out to be a pivotal *clue*. In that instant of relevant display, they realize, 'Ah! Now that makes sense.'

"Again, in the past I would have thought, 'PowerPoint for more than openings or closings? Are you kidding?' I have a different perspective today."

Adding Navigation Elements to Your PowerPoint-based Evidence

The Need for Flexibility

The change of perspective came while experimenting with PowerPoint's built-in interactivity tools. By combining shapes, pictures, and hyperlinks, Bruce created what are known as *navigation styles* – simple hyperlinking strategies that allow random movement within, and between, slide shows. Before long, and using nothing more than standard PowerPoint software, he could approach jurors with a highly flexible, interlinked collection of about 200 slides. Any topic was displayable within seconds, in any order. Plus, content could be reviewed at a later time, or skipped altogether.

Figure 2

Figure 3

Bruce: "It felt a little strange at first. Interactive delivery is quite different from plowing through a fixed sequence of slides. You need to know your content well and get in the habit of asking yourself, 'Do I have a slide that can help me make this point or answer that question?' I had to give up the robotic dependency on PowerPoint to spoon-feed me the next topic every time. The next topic was whatever *I wanted it to be*. It was a liberating. My presentation style gradually began taking on a more conversational, spontaneous feel – which was fun.

"Here's an example of how the process works, something you can do with your presentation materials, as well. Let's say hypothetically I am representing a client in an automobile accident injury case. Certain kinds of pictures might be very helpful, right?

"I probably will want pictures of the vehicles involved: close-ups, full-views, various angles, inside and outside perspectives. I need pictures of the accident scene: skid marks, damage to plants or signs, security camera captures, if available, and so forth. Pictures of the environment might be helpful: shadows, the sun angle, anything that might be distracting to motorists at that intersection.

"Eventually, I end up with quite a few images. Certainly I could throw them all into a long, linear slide show like everyone else, but there's a better strategy. I want to have instant, individual control over which of these pictures are shown, at the right time. That's how I, and you, will simulate that *CSI* effect mentioned earlier."

A Look at Showcase Navigation

"One of the simplest, yet effective, navigation styles I might choose for this kind of content is a back-and-forth process Robert calls 'Showcase navigation.' Here's how it works. We'll use the same three categories of pictures mentioned above and turn them into an interactive PowerPoint presentation as shown in Figure 4 (next page).

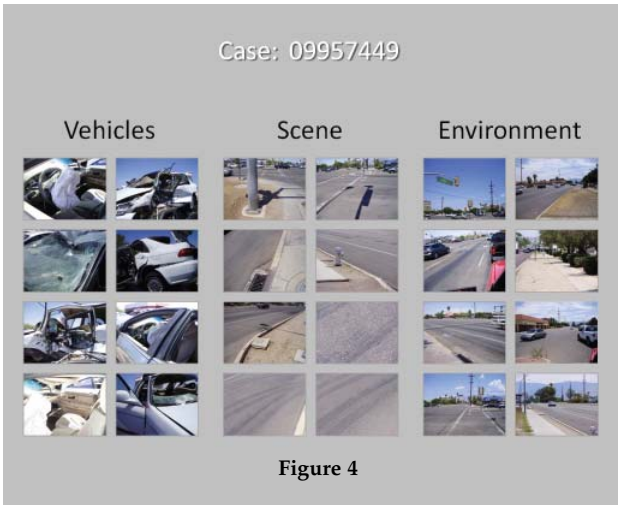


Figure 4

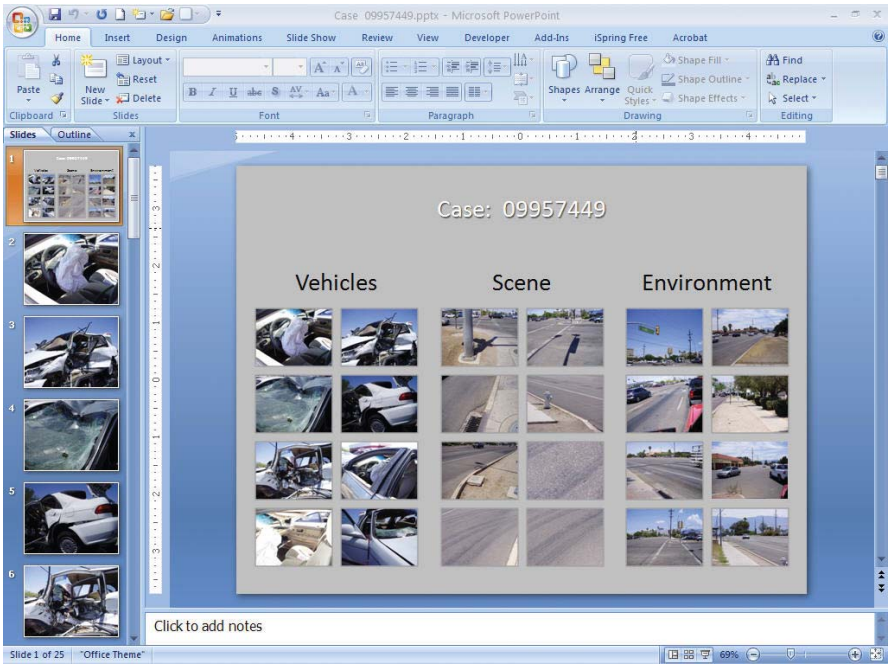


Figure 5

"Assume we have 8 pictures per category – 24 in all. That means our PowerPoint presentation must have a total of 25 slides. We need one slide for each picture, and then one additional special slide at the beginning of the show called a *switchboard*. That first slide (Figure 5) contains small thumbnail representations of the full-sized pictures appearing on the show's remaining 24 slides. The thumbnails, not surprisingly, link directly to their respective picture slides, allowing the speaker to quickly find and display any full-sized picture (Figure 6). (Note that in evidentiary situations where showing the switchboard's thumbnails might be inappropriate, you can use PowerPoint's screen blackout feature to temporarily hide the display while making a selection.)

"Of course, once a particular picture is displayed that's not the end of the story. The speaker must be able to immediately return to the switchboard slide for additional choices. So, the trick of how Showcase navigation works is to also link all the full-sized pictures back to slide 1. That action completes the loop. While performing, a presenter first clicks a thumbnail to display its picture content full-screen and then clicks that picture to again access the switchboard. The process can be repeated over and over again with as many pictures as desired.

"Notice, too, that the thumbnails in Figure 4 are arranged on the slide in groups, according to their focus. If a vehicle picture is needed, for example, the speaker can completely ignore the other two categories while searching. Such grouping strategies improve the efficiency of interactive presentation methods, reducing time spent moving between topics."

Building Showcase Navigation

Try converting some of your own content into Showcase navigation. To do so, follow the steps below. For more detailed instructions, there are free Showcase navigation tutorials for both PowerPoint 2003 and PowerPoint 2007.[2]

Step 1: Make the (or open the existing) presentation.

Step 2: If you are using an existing show, simply add a blank slide at the beginning to be the switchboard. If

Figure 6

building a new show, add a slide for each content topic and one additional slide for the switchboard. Note that a showcase presentation is a traditional linear slide show in all respects – except for the extra slide at the beginning and the internal hyperlinks that allow random slide selection.

Step 3: If your show contains pictures on its content slides, as in the example above, place a copy of each picture on slide 1 and downsize all the pictures to be small images (thumbnails: Figure 7). Arrange the thumbnails on the slide as desired, ideally in organized patterns.

Step 4: Hyperlink each thumbnail to its respective slide. Do so by right-clicking a thumbnail and choosing "Hyperlink" from the menu

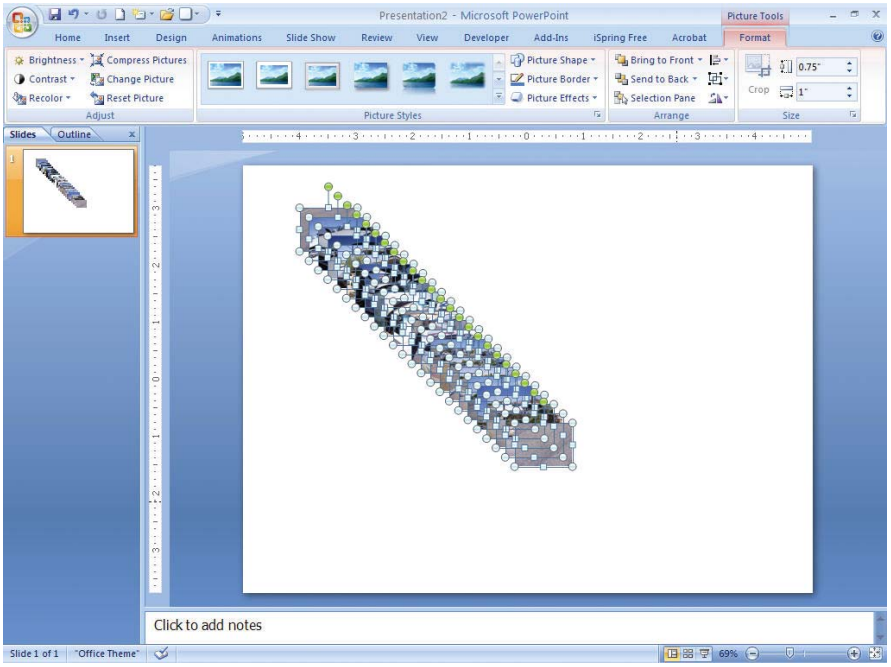


Figure 7

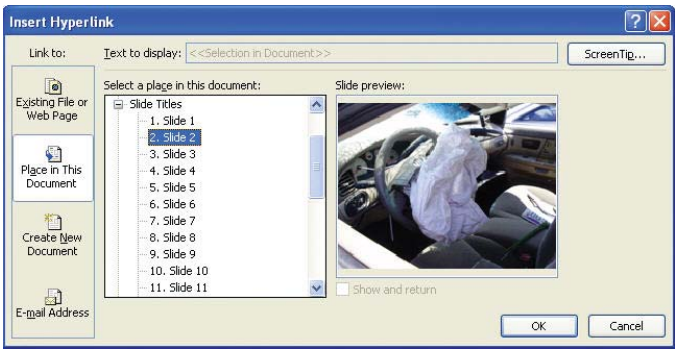


Figure 8

that appears. Then on the "Insert Hyperlink" dialog box, click the "Place in this document" tab (Figure 8). Click the appropriate slide number and then click "OK" at the bottom of the dialog box. Repeat this process with the remaining thumbnails.

Step 5: Once the switchboard hyperlinks are in place, complete the return hyperlinks. Activate each slide in turn, right click its content picture, and hyperlink the picture to slide 1. When finished, all the content slides should link back to slide 1.

Step 6: Test the hyperlinks to make sure they work properly. Note that hyperlinks are active only while in slide show mode. So, start the slide show at slide 1. Then click a thumbnail and verify that the proper slide comes into view. Click that slide's content to return to the switchboard. Systematically check all links. You should be able to go back and forth with ease. If any links do not perform as expected, end the slide show and edit the links accordingly.

That's all it takes to add interactivity to your evidentiary displays. Various other navigation styles are possible as well.

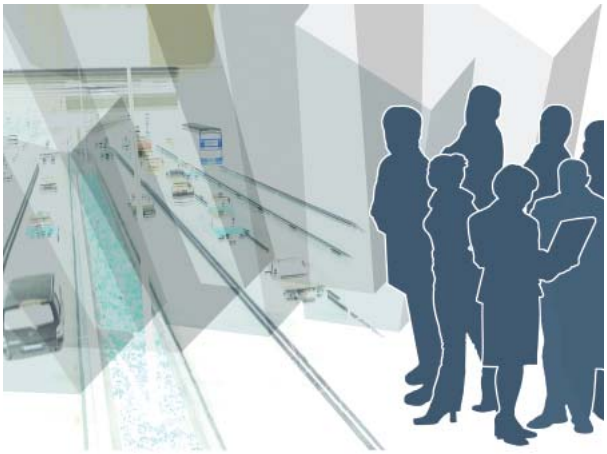
Best Practices

Adding hyperlinks to a PowerPoint slide show is a relatively simple process, but there's more to interactivity in the courtroom than just that. It's vitally important that you also change your entire way of thinking about presentations. Rather than preparing slide shows to be lectures progressing down a line, think of them as collections of individual facts, answers to questions, and spontaneous points of interest.

Consider that if you have 200 slides available, you might use only three on any given day. That's OK. Or you might access 10 or 50. Be flexible and smart. Display relevant material – *and only that material*. Think of those slides as a visual vocabulary that can be *spoken* as needed, nuggets to be mined for maximum impact. You might as well become an expert at giving jurors the timely visual clues they want, because the *CSI* effect probably won't disappear anytime soon. ■

1. Applies to PowerPoint 2007, PowerPoint 2003.
2. *At* http://www.aspirecommunications.com/FreeTutorials.html.

BY STEVEN C. BENNETT



Do Ask; Do Tell: Keyword Search Terms

Electronic documents are increasingly reviewed for possible production using keyword searching, a process whereby computers seek out certain words and phrases, parts of words or words in proximity to other words in a document collection.[1] For litigators, cogent keyword search strategy generally requires discussions with the client to determine what terms are most likely to retrieve relevant information.[2] Similarly, client consultation may be required to help identify search terms that can, in turn, help identify portions of the document collection that may contain privileged or otherwise confidential information. Keyword searching also may require some testing of the search protocol against results; again, that may involve lawyer discussions with the client's information technology personnel and perhaps discussions with an e-discovery service vendor. In sum, the e-discovery search strategy could reflect a great deal of attorney work and communications in close consultation with the client and search professionals.

This type of information, regarding the details of attorney strategies, and (often) reflecting communications between attorney and client (or professionals working with the client) typically would be considered subject to privilege claims in litigation. Yet, new federal rules for electronic discovery and the developing case law suggest that such information must be shared with adversaries in litigation. This article surveys how the law has emerged and suggests some of the practical implications for the conduct of e-discovery.

The New Federal Rules

An amended version of the Federal Rules of Civil Procedure (FRCP) came into effect in December 2006. These new Rules specifically aim to resolve some of the most important issues related to e-discovery. Rule 26(f)(3), in particular, requires parties to discuss, at the outset of a case, "the subjects on which discovery may be needed."[3] The *Manual for Complex Litigation* suggests that one part of that discussion should include an exchange regarding "key words to be used in identifying responsive materials."[4] The Advisory Committee Notes to the new Rules, moreover, emphasize that early discussion of the discovery process "may avoid later difficulties or ease their resolution."[5] A recent "Cooperation Proclamation" by the highly respected Sedona Conference notes that the amended discovery rules embody a mandate for counsel to act cooperatively. The Proclamation gives the example of "jointly developing automated search and retrieval methodologies to cull relevant information"[6] as a means to this end.

Cases Applying the Rules

Courts have increasingly begun to suggest that "[p]arties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols (including as to keywords, concepts, and other types of search parameters)."[7] The recent opinion of Magistrate Judge Andrew J. Peck of the Southern District of New York, in the case of *William A. Gross Construction Assocs., Inc. v. American Manufacturers Mutual Insurance Co.*,[8] began with this admonition: "This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in

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The views expressed are solely those of the author and should not be attributed to the author's firm or its clients.

designing search terms or 'keywords' to be used to produce e-mails or other electronically stored information."[9]

The producing party in the dispute before Judge Peck proposed a narrow set of search terms. The requesting party proposed "thousands of additional search terms."[10] Judge Peck concluded that neither party had adequately discussed appropriate search terms with the non-party who wrote most of the e-mails at issue. Thus, as Judge Peck noted, much judicial time and client money were spent cleaning up a mess that could have been discussed – and avoided.

Moreover, courts have expressly disapproved the "don't tell" approach to formulating search terms. In *Lapin v. Goldman, Sachs & Co.*,[11] the parties spent months fighting over search terms. The plaintiff claimed that the defendant's search term list was inadequate but refused to offer an alternative list. The court expressly rejected that approach:

> I direct Plaintiff to serve his own list of search terms, and then the attorneys and their computer experts must promptly hold a meeting with at least four hours of discussion about proposals for search terms. Among other things, they should discuss (a) the estimated cost of the search and (b) the cost of a possible follow-up search with a supplemental list of search terms.[12]

The discovery dispute in *S.E.C. v. Collins & Aikman Corp.*[13] arose in the context of a large securities fraud case. The defendant posed six requests for documents to the Securities and Exchange Commission; the SEC objected. The defendant proposed that the parties "establish a search term protocol that would balance identification and disclosure of relevant documents against a strain on agency resources."[14] The SEC refused that overture, instead choosing its own means and methods in searching for responsive documents (which it did not reveal to the defendant). Ultimately, it produced no responsive documents. Judge Scheindlin called the SEC refusal to negotiate a workable search protocol "patently unreasonable," citing the requirements of FRCP Rule 26(f) that parties confer to create a "discovery plan."[15] Judge Scheindlin went on to remark on the unnecessary costs, burdens and delays that resulted from failure to engage in cooperative discovery practices.

Effects on Privilege Protection

The foregoing Rules, citations, and cases make clear that, under the new regime, parties (at least in federal litigation) must talk to each other about the details of how they plan to conduct a keyword search for electronically stored information. In theory, such discussions could constitute waiver of attorney-client privilege, and/or work product protection, regarding the details of how counsel (in collaboration with their client and consulting professionals) formulated search terms, and how they refined (or omitted) terms from their list.[16] Indeed, to the extent that counsel affirmatively assert that they have performed a reasonable search for information (or supervised such a search by others), they might, in theory, be required to provide all the details regarding such efforts.[17] The result could be a catch-22, where counsel are "damned if they do" (reveal confidential information about searching) and "damned if they don't" (cooperate with adversaries regarding search).

Although this potential conflict has not yet been clearly articulated in recent opinions on the subject of search, in practice the reluctance of counsel in cases (perhaps even in the cases cited above) to reveal the details of their search efforts may, at least in part, reflect concern for privilege waiver issues.[18] Indeed, under the waiver rules in some jurisdictions, once privilege is waived on a portion of a given topic, the entire "subject matter" is open for inquiry without any ability to claim the protections of privilege.[19] These potentially dire consequences, however, almost certainly were not intended by the framers of the new Rules. Moreover, several legal theories may be available to help reduce or eliminate the potential conflict.

One broad theory, derived from cases where a court orders a party to reveal privileged information, is labeled the "compelled disclosure" doctrine.[20] In the context of routine conferences between counsel in civil cases (where no court order directly compels revelation of particular information), the doctrine might be difficult to apply. A court might (in theory) be invited to *order* parties to reveal the details of their search strategies, such that the discussions would be considered "compelled," but this seems an awkward (and probably inconsistent) procedure.

New Rule 502 of the Federal Rules of Evidence (FRE) (adopted in 2008), however, may offer more effective relief. Rule 502(b) generally provides that disclosure does not operate as a waiver of privilege where the disclosure is "inadvertent," the party disclosing has taken "reasonable steps" to protect privilege, and the disclosing party takes reasonable steps, after the disclosure, to "rectify the error." That provision may offer little protection, however, because in most cases, discussion of search strategies would

Much judicial time and client money were spent cleaning up a mess that could have been discussed — and avoided.

not be inadvertent, and the disclosing party probably would take no steps in response to the disclosure.

FRE Rule 502(a) contains a potentially more helpful provision on the scope of privilege waivers. The Rule states that a waiver "extends to an undisclosed communication" (*i.e.*, to the broader subject matter on which a waiver has occurred) only if the waiver is "intentional," the "disclosed and undisclosed communications or information concern the same subject matter," and both disclosed and undisclosed information "ought in fairness to be considered together." The "fairness" point might be the savior for parties who discuss some portion of their search methodologies but leave out the strategic reasons why their clients may prefer one approach over another. Arguably, the waiver of privilege (if there is any waiver) concerns only *what* the parties did, not *why* they did it.

The real salvation is Rule 502(e), which generally recognizes that parties may make "agreement[s] on the effect of disclosure" of information, and that such agreements may be "incorporated into a court order." (If incorporated into an order of the court, such agreements also provide protection from claims of privilege waiver by parties in other proceedings.) Thus, for example, parties may enter into agreements to the effect that their discussions of search methodologies will not operate as a general waiver of privilege concerning advice the attorneys may have given their clients about the discovery process (or the merits of the litigation). Such agreements, moreover, may be embodied in court orders, perhaps as part of the initial Rule 16 conference with the court.[21]

Practice Tips

In light of the concerns outlined above, counsel may wish to take some or all of the following precautions:

- Carefully distinguish between information that may be part of the normal "give and take" of discovery negotiations with opposing counsel and material that clearly reflects attorney advice and strategy. Legal memoranda or communications with clients on legal obligations in discovery, for example, should be labeled privileged and treated as such by all involved in a litigation team.
- Discuss the concept of an agreement with opposing parties regarding non-waiver of privilege as part of discovery negotiations. Consider also developing a specific understanding as to the scope of information to be exchanged as part of discovery negotiations. If the opposing parties refuse, make that subject an agenda item for early discussion with the court.
- In the event of motion practice or hearings on discovery disputes, avoid the use of counsel as witnesses on the substance of what discovery steps may have been taken. An attorney's testimony, in most instances, will reflect a mixture of events observed, plus communications with clients and consultants, plus attorney opinion and strategy. Once the attorney begins to testify, the barriers between these categories may crumble.

Finally, because these kinds of "privilege versus full disclosure" problems may arise again and again for certain "perpetual litigants," a thorough review of a client's information management processes will often prove helpful.[22] Creation of a "data map," for example, often will permit greater ease of searching by identifying where information is stored and who is responsible for it; establishment of standard protocols for searching may permit more effective and efficient negotiations with adversaries in the event of litigation.[23] With such preparation, moreover, counsel in discovery negotiations need only describe the reasonable discovery steps available, based on the client's prior efforts. Counsel need not describe the perhaps hours or days of legal advice and communications that ultimately led to the client's system. Appropriate preparations, moreover, can provide a strategic advantage in litigation. Thus, armed with complete information about data systems capabilities, and with a reasonable capacity for response to the demands of litigation, a party is in the best position to negotiate with adversaries and/or seek necessary relief from a court. ■

1. *See* Steven C. Bennett, *E-Discovery by Keyword Search*, 15 Prac. Litigator 7 (2004). There is, today, no such thing as a "perfect" search methodology for every case. *See* Jason Krause, *In Search of the Perfect Search*, A.B.A. J., Apr. 2009, *available at* www.abajournal.com/magazine.

2. One resource that can help with client discussions of discovery issues is available from the Sedona Conference. *See Jumpstart Outline: Questions to Ask Your Client And Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences and Requests for Production*, May 2008, *available at* www.thesedonaconference.org.

3. Fed. R. Civ. P. 26(f)(3).

4. Federal Judicial Center, Manual for Complex Litigation, § 40.25(2) (4th ed. 2004).

5. Fed. R. Civ. P. 26(f), Advisory Committee Notes (2006).

6. *See* www.thesedonaconference.org/content/tsc_cooperation_proclamation.

7. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008) (Grimm, M.J.) (referencing Sedona Conference best practices for search and information retrieval, and holding that effective search is required to preserve privileges).

8. 256 F.R.D. 134 (S.D.N.Y. 2009) (Peck, M.J.).

9. *Id.* at 134.

10. *Id.*

11. No. 04 Civ. 2236, 2009 WL 222788 (S.D.N.Y. Jan. 23, 2009) (Eaton, M.J.).

12. *Id.* at *2.

13. 256 F.R.D. 403 (S.D.N.Y. 2009) (Scheindlin, J.).

14. *Id.* at 414.

15. *Id.*

16. *See In re Intel Corp. Microprocessor Antitrust Litig.*, Civil Action No. 05-441-JJF, 2008 WL 2310288 at *16 (D. Del. June 4, 2008) (Farnan, J.) (waiver occurred regarding preservation issues when a party, through its attorneys, agreed to produce "detailed written description[s] of the preservation issues affecting [every] Intel Custodian, including the nature, scope and duration of any preservation issue(s)"). *See generally* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2016.2 (2nd ed. 1994 & Supp. 2009) (summarizing waiver issues).

17. *Victor Stanley, Inc.*, 250 F.R.D. at 256 (finding waiver, due to inadequacy of search for privileged information, where "[d]efendants are regrettably vague in their description of the seventy keywords used . . . , how they were developed, how the search was conducted, and what quality controls were employed to assess their reliability and accuracy"). This issue also arises where counsel attempt to use

privilege as a sword *and* shield, or when counsel affirmatively inject issues into litigation. *See CP Kelco U.S. Inc. v. Pharmacia Corp.*, 213 F.R.D. 176, 179 (D. Del. 2003) ("Having chosen to use the information offensively, any privilege Pharmacia might have claimed to defend the information from disclosure is, and remains, waived."); *Herrick Co., Inc. v. Vetta Sports, Inc.*, No. 94 Civ. 0905 (RRP) 1998 WL 637468 at *2 (S.D.N.Y. Sept. 17, 1998) (law firm that designated law professor as expert on legal ethics waived the attorney-client privilege protection not only for the communications between the law firm and the professor on which the professor relied, but also for other privileged communications relevant to his impeachment).

18. For similar reasons, counsel in some cases have refused to produce "litigation hold" notices. *See Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007) (privilege necessary to encourage businesses to comply with hold obligations); *Capitano v. Ford Motor Co.*, 15 Misc. 3d 561, 831 N.Y.S.2d 687 (Sup. Ct., Chautauqua Co. 2007) (although relevant, hold notice found to be privileged); *but see Major Tours v. Colorel*, Civ. No. 05-3091, 2009 WL 2413631 (D.N.J. Aug. 4, 2009) (hold notice not privileged where spoliation alleged).

19. *FMT Corp. Inc. v. Nissei ASB Co.*, No. 1:90-cv-786-CTET, 1992 WL 240688, 24 U.S.P.Q.2d 1073, 1075 (N.D. Ga. June 10, 1992) ("[Defendant] must produce to [plaintiff] not only the opinions upon which [defendant] has chosen to rely, but also all other attorney communications on the same subject matter and all documents relied upon or considered by counsel at the time and in conjunction with rendering that opinion."); *SEB, S.A. v. Montgomery Ward & Co., Inc.*, 412 F. Supp. 2d 336, 349 nn.19 & 20 (S.D.N.Y. 2006) (patent infringer could not rely on two opinions and then fail to disclose a third on privilege grounds when all addressed the same subject matter).

20. *See, e.g., Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc'y*, 406 F.3d 867, 877 n.5 (7th Cir. 2005) (no waiver where magistrate judge ordered production); *In re 50-Off Stores, Inc.*, 213 B.R. 646, 656 (Bankr. W.D. Tex. 1997) (compelled disclosure in bankruptcy proceeding did not waive privilege).

21. *See* Fed. R. Civ. P. 16(b) (requiring scheduling conference early in the course of litigation, which results in "scheduling order"). Courts are specifically authorized, under the terms of the Rules, to "include any agreements the parties reach for asserting claims of privilege," as part of the Rule 16 process. *See* Fed. R. Civ. P. 16(b)(3)(B)(iv).

22. *See* Joshua Horn & Beth L. Domenick, *Lessons Learned From 'Creative Pipe,'* Corp. Couns., Aug. 12, 2008, *available at* www.law.com (suggesting "creation and institution of a document retention policy," "creation of a standard form litigation hold," development of a "protocol to identify and segregate" privileged documents, and creation of a system to "employ the 'utmost care' in selecting a search and information retrieval methodology").

23. "The implementation of an efficient system of records management before litigation may also be relevant" in determining whether a party took reasonable precautions against inadvertent production. FRE 502(b), Advisory Committee Notes (2008).

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have read your column for the last two years. I must confess that I do not have a clear understanding of the difference between ethics and professionalism. Where does civility fit into the picture? Thank you in advance.

Sincerely,
Confused

Dear Confused:

On April 1, 2009, the Lawyer's Code of Professional Responsibility was replaced with the New York Rules of Professional Conduct. The new Rules of Professional Conduct are based on the American Bar Association's Model Rules. The new rules can be found in 22 N.Y.C.R.R. Part 1200, and they are the embodiment of ethics in New York. Violation of these rules can result in punishment, the severest being disbarment.

Professionalism, on the other hand, is aspirational in nature. It refers to recommended conduct that will make us better attorneys. Civility is part of professionalism.

The New York State Bar Association's Committee on Attorney Professionalism offers the following definition of Attorney Professionalism:

> Attorney Professionalism is dedication to service to clients and commitment to promoting respect of the legal system in pursuit of justice and the public good, characterized by ethical conduct, competence, good judgment, integrity and civility.

The Committee goes on to tell us that service to clients is the foundation of professionalism. However, this relationship is just one aspect of our role in the legal system. Our dealings with fellow attorneys, judges, clerks, partners, associate attorneys, government agencies and legislators must promote respect for the law and the processes of the legal system.

The Committee goes on to say:

> In our work to serve our clients while promoting respect for the legal system, we do so in the pursuit of justice and the public good. In the strictly legal sense, justice can mean the "proper administration of laws . . . to render every man his due." (Black's Law Dictionary). But most would agree that justice necessarily implies more than the "rightness" or "wrongness" of a given act, or strict compliance with the black letter of the law. In the larger sense, pursuing justice connotes pursuing a morally "good" end. Attorneys must look beyond the short-term results and consider the consequences of their actions and advice. To conduct oneself in this way will benefit the public at large – and to do the public good – must include dedication to providing *pro bono* services for the needy.

The Committee offers guidance as to how we can exhibit professionalism.

> By *exemplary ethical conduct:* aspiring to fulfill the spirit, not just the requirements of the Code of Professional Responsibility [now the Rules];
>
> By remaining *competent:* taking advantage of continuing legal education; keeping abreast of the latest developments in our areas of expertise; mentoring younger attorneys;
>
> By showing *good judgment:* providing good client service by formulating discerning opinions and advice based upon knowledge and experience;
>
> By acting with *integrity:* exhibiting soundness of character, fidelity and honesty;
>
> By demonstrating *civility:* behaving with courtesy and respect.

Now that brings us to civility, which, as noted, is part of professionalism. The Standards of Civility are contained in 22 N.Y.C.R.R. Part 1200, Appendix A. These Standards set forth the lawyer's responsibility to be civil to other lawyers, litigants, witnesses, the court and court personnel. They also articulate the responsibility of judges to be civil to lawyers, parties and witnesses and the duties of court personnel to the court, lawyers and litigants. This response cannot delve into these Standards in detail. However, they should be read and followed, and in short they can be summarized by the old adage – treat others as you wish to be treated.

The view here is that satisfaction and enjoyment from the practice of law are available to all of us, and the keys are simple: Obey the Rules of Professional Conduct; and act professionally and with civility.

The Forum, by
George J. Nashak Jr.
Queens County, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I have been practicing law for 20 years. I am admitted to practice in

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

New York, two other states, several United States Federal District Courts, and the United States Supreme Court. I started my career as a federal prosecutor and later worked for two other state governmental agencies. I now work in a private firm and have several cases pending before governmental agencies. I am not on the management committee, but recently I heard rumblings about cutbacks and even the possible dissolution of my firm because of the effects of the current economy. I have a family to support, and naturally I'm concerned.

I am thinking about applying for a job with the government and would like to know if any problems might arise regarding pending cases on which I am presently working. Can you give me some guidance? Is there anything that my prospective governmental employers and I should be aware of before I interview?

Signed,
In Need of Job Security

Continued from Page 64

will avoid the computer-age pitfalls of incomplete edits.[5] Having another person look over a document will provide that attentive editing.

• Use spell-check and grammar programs. Word-processing programs feature functions that find misspelled words and grammatical errors and suggest corrections. These functions aren't entirely reliable or accurate. But they'll catch mistakes even the best writers will miss. Another word-processing tool is the "find" button. Writers should look up words they commonly misspell.[6] Spelling errors often result from faulty information in kinesthetic memory: Writers who usually misspell a word might do so again.[7]

• Rely on Flesch-Kinkaid. The Flesch Reading Ease test scores documents between 0 and 100. The higher the score, the more readable the document. A score of 60 means that 13- to 15-year-olds will have no problem with the text. The Flesch-Kinkaid Grade Level Formula translates the 0-100 score into an American grade level. A score of "nine" means that a ninth grader will understand the text.[8]

Microsoft Word allows writers to grade their documents by choosing "Spelling and Grammar" and then turning on the "Options" setting to "Show Readability Statistics." In WordPerfect, writers can choose "Grammatik" from the "Tools" option. When the "Grammatik" window opens, choose "Options," "Analysis," and then "Readability." WordPerfect examines passive voice, sentence complexity, and vocabulary complexity.

• Read the document backward. Reading from the last sentence to the first or from the bottom of the page to the top can check for surface errors without getting bogged down on subject matter.[9]

• Proofread each line with a ruler. By placing a ruler under a line of text, readers can keep their eyes from moving ahead to the next word group. Experienced readers tend not to read letter-by-letter or even word-by-word. Proofreading with a ruler slows down reading to assure correctness.[10]

• Redline. Redlining lets writers and their editors see changes between drafts.

Being edited requires modesty, patience, and the willingness to accept criticism.

In Word, click "Track Changes." The changes will show up on the document. New words become red and underlined. Deleted words have a dotted line drawn to the right-hand margin, where the deleted word appears. Each person who reviews the document is assigned a different color of font. Each time someone makes a change, the change appears in the respective font, and a legend appears at the top of the screen. This keeps the document clear for multiple reviewers. A line appears on the left-hand margin to indicate changes. Writers who want to accept all the changes will choose "Accept all changes" from the toolbar's "Changes" icon. Writers who don't want to accept all the changes at once can choose "Accept and Move to Next."

WordPerfect's redlining options are available under "File," "Document," and "Review." WordPerfect allows for comparisons between two documents. "Compare Only" produces a "Compare Summary" of additions and deletions. "Compare and Review" reviews both entire documents to note and make additional changes.

Redline corrections on a computer make the paper appear cleaner. They're also easy to read: The editors' comments appear next to the original text. On the other hand, redlining can be more time consuming for an editor who re-writes much of the document.[11]

• Proofread on a hard copy. A hard copy is easier to read than a computer screen. It's also easier to edit on a hard copy. The downside to editing on hard copy is that it can take a long time. Writers end up going over the document twice — once on paper, once on the computer — for every set of edits. For this reason, writers and editors who go through many drafts prefer to redline. Even if they redline, however, writers and editors should proofread the final draft on a hard copy.

• Note corrections. It's easy to miss handmade corrections on a hard copy. Mark edits — those made and those not understood — with highlighters or tick marks.

• Read aloud. Writers should read the document aloud to themselves or to someone who's proofreading on a hard copy. This allows listeners to verify the accuracy of each word they hear rather than absorb the ideas of the piece.[12]

• Citations. Writers should copy and paste citations into Westlaw, LEXIS, or other program to verify them, the pinpoint citations, and all quotations. Everything must be right: word for word, number for number, comma for comma. Writers should also make sure that cross-references between citations are correct, that short-form citations continue to be accurate, and that each "*supra*," "*infra*," and "*Id.*" is valid. Writers should then verify cross-references. Editing produces changes. Footnotes and endnotes don't end up where they started.

Correcting Proof

Lawyers edit and proofread the work of others. Editors should write corrections in the margin, close to the original. Editors should draw a line

through an entire word that has two or more changes. New material should be rewritten in the margin.[13] Editors should use standard proofreader's marks to suggest changes (see sidebar, Proofreader's Marks, on this page).

To subject themselves to the editing whim of others, writers must lose their egos. Some writers ask others to examine their work just to get positive feedback. But the point of being edited is to get suggestions. Being edited requires modesty, patience, and the willingness to accept criticism.

One fiction writer[14] compared being edited to the stages of death. Denial ("There's no way I am making these ridiculous changes!"). Anger ("Who does the editor think she is, tearing up my work like that?"). Bargaining ("If I cut the tearing-at-the-heartstrings conclusion, may I keep the reference to social morals in the intro?"). Depression ("This writing is terrible. I have to start from scratch."). Acceptance ("I deleted the flowery conclusion and the exaggerated intro. You were right from the start.").

Editors are helpful because they can be objective. They're not attached to the writing. Regardless who if anyone pays them, their only real client is — or should be — the reader. The benefit to having an editor is having someone with fresh eyes look at the text.

All writers, with or without editors, must leave enough time between drafts to re-see their text. Starting the writing process early and leaving time to edit and proofread are required.

Editing requires a healthy mind-set. Criticism that's less than constructive is counter-productive. The writer will become frustrated and unmotivated to take an editor's advice. Also ineffective are over-commenting in fear that mistakes will go unchecked[15] and adopting an authoritarian editing stance.[16] Editees must trust their editors. The editor must establish that trust. Condescending, degrading, or over-commenting will hinder an effective editee-editor relationship. So will changing the text so radically that the work becomes the editor's, not the editee's.

PROOFREADER'S MARKS

Operational Marks		*Style of Type*
Delete or or /	Take it out	Set in italic type ital
Delete and close up	Close up	Set in roman type Rom
Delete space, close up	Close up	Set in boldface type bf
Replace	Petitioner Respondent seeks legal fees	Set in lightface type lf
Insert ^	legal The system	Set in lowercase lc
Insert and close up		Set in capital letters caps
Insert space	insertspace	Caps and lowercase c + lc
Equalize space eq#		Set in small capitals sc
Insert lead ld in	Space between the lines	Wrong fonts (Wrong SIZE or *type*) wf
Take out lead rm ld		Insert here or make superscript
Insert line space # >		Insert here or make subscript
Delete line space		Full justify
Letterspace ls		***Punctuation Marks***
Start a new line		Insert comma
Begin new paragraph		Insert apostrophe
No paragraph no ¶		Insert quotation marks " " or ' '
Run in- Run on Run in		Insert period
Indent type one em from left or right		Insert question marks
No indention flush		Insert exclamation point
Move right	Too far to the left	Insert semicolon ; or ;/
Move left	Too far to the right	Insert colon : or ⁝ or :/
Center cen or][		Insert hyphen = or ⌵ or /H/
Move up		Insert em dash
Move down		Insert en dash
Flush left fl		Insert parentheses ( ) or (/)
Flush right fr		Virgule (slash, backslash) slash /
Align vertically		Insert brackets [ ]
Transpose tr or	Change order the	
Spell out sp	Set 2 as two	
Abbreviate or use symbol	Set twenty as 20	
Let it stand stet or	Ignore correction	
Instruction	explain	

How much and what kind of editing depends on the editee's needs. If the editee is a student or someone looking to learn from the writing experience, the editor should explain and teach. If the editee is a professional who requires feedback on a document that needs to go to a court or client quickly, the editor should focus on the court's or client's needs. In that case, the goal is not to teach or be taught but to create a flawless document. Even so, the editee should learn from the edits. Only by learning will the writer improve.[17]

Editors should adhere to these suggestions:

- Select issues on which to comment. Comments should concentrate on a hierarchy of concerns: content, idea development, organization, and, finally, surface errors.
- Note general comments at the end of the document and identify tasks for the next draft. The comments should add substance to the comments in the margins.
- Make comments specific and easy to read. Generic comments are unhelpful.
- Direct comments about the writing, not the writer.
- Offer some praise if at all warranted.[18]

No one way to edit is perfect — or perfect for everyone. Whether the editor is self-editing or an editor is editing a writer, all approach editing differently.

One approach is to edit in stages.[19] This technique requires the editor to isolate a particular mistake and edit the document only for that mistake, ignoring other errors. Editors using this technique will go through a document first to check for section numbering, then headings, and then citations. Finally, they'll read the text in a combined proofreading and editing effort, ignoring the items checked earlier. Some believe that this technique wastes time. It requires many read-throughs. If a mistake is spotted, it makes sense to correct it immediately.

> There's no such thing as good writing. There's only good re-*seeing*.

Another way to edit is to start with micro-revisions — the corrections dealing with smaller details like spelling, grammar, and sentence structure — and then step back to study the bigger picture. Proponents of this method believe that once small changes are made, the clutter is gone and a writer can look at the document, cobweb-free, to dwell on content, structure, and other large-scale issues.

Some editors take the opposite approach. They make macro-revisions first and then consider technical issues. These editors believe it wastes time to focus on the small stuff when the section with those errors might be changed or even cut out later.

A useful way to offer feedback to student writers is to use evaluation sheets. Evaluation sheets are separate from the written document. They're labeled with numbered sections that match sections of the text where corrections are made. This allows editors to provide consistent feedback and detailed explanations.[20]

Conclusion

People expect correctness. To err is human, but readers don't forgive mistakes in others' writing.[21] Mistakes make readers draw negative inferences about the writer's skills — inferences legal writers can ill afford.[22] To write well is to edit and proofread: to see things large and small from the reader's perspective.

As Justice Louis Brandeis said, "There is no such thing as good writing. There is only good rewriting."[23] Let's update that: "There's only good re-*seeing*." That's because revision is just that: Re-*vision*. ■

1. Tom Goldstein & Jethro K. Lieberman, The Lawyer's Guide to Writing Well 108 (2d ed. 2002).

2. Gerald Lebovits, The Legal Writer, *Sentences and Paragraphs: A Revisionist Philosophy*, 77 N.Y. St. B.J. 64, 64 (Jan. 2005).

3. *Id.* at 60.

4. Veda R. Charrow et al., Clear and Effective Legal Writing 227 (4th ed. 2007).

5. John J. Paschetto, *Beyond Redlines and Spell-Check: Proofreading Tips from the Dark Ages*, The Prac. Law. 15, 17 (Feb. 2008), *available at* http://files.aliaba.org/thumbs/datastorage/lacidoirep/articles/TPL0802-Paschetto_thumb.pdf (last visited Sept. 1, 2009).

6. Suzanne E. Rowe, The Legal Writer, *Perfect Proofing: 10 Steps Towards Error-Free Documents*, 67 Or. St. B. Bull. 33, 33 (Dec. 2006).

7. Virginia Tech, *Proofreading*, http://www.ucc.vt.edu/stdysk/proofing.html (last visited Sept. 1, 2009).

8. The Legal Writer always subjects his columns to Flesch-Kinkaid. The Legal Writer edits and proofreads his columns until a 15-year-old can understand them.

9. Charrow, *supra* note 4, at 236.

10. *Id.*

11. Leslie Rose, *E-Commenting: Pros and Cons*. 22 Second Draft (Bull. of Legal Writing Instit.) 1, 1 (Fall 2007).

12. Kimberly Hausbeck, *The Sound and Flurry of Words*, 22 Second Draft (Bull. of Legal Writing Instit.) 8, 8 (Fall 2007) (recommending ReadPlease.com for writers to hear their texts read aloud).

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16. Kristen Davis, *Building Credibility in the Margins: An Ethos-Based Perspective for Commenting on Student Papers*, 12 Leg. Writing 1, 85 (2006).

17. *See* Frank Gulino, *Providing Effective Feedback to Legal Writing Students: Practicing What We Preach*, 22 Second Draft (Bull. of Legal Writing Instit.) 5, 5 (Fall 2007) (discussing ways to give student writers effective feedback).

18. These suggestions come from Susan M. Taylor, Legal Writing Symposium, *Students as (Re)visionaries: Or, Revision, Revision, Revision*, 21 Touro L. Rev. 265, 294–95 (2005) (discussing what editors should focus on when giving feedback).

19. Paschetto, *supra* note 5, at 16.

20. Jan M. Baker, *A = Analysis: Labeling Written Comments to Correspond with Grade Evaluation Sheets*, 22 Second Draft (Bull. of Legal Writing Instit.) 4, 4 (Fall 2007).

21. Charrow, *supra* note 4, at 235.

22. *See* David E. Sorkin, *The Proof is in the Proofreading*, 81 Ill. St. B.J. 323, 323 (June 1993) (noting repercussions for lawyers who carelessly proofread and edit).

23. Richard K. Neumann Jr., Legal Reasoning and Legal Writing: Structure, Strategy, and Style 61 (4th ed. 2001) (quoted in Brooke J. Bowman, *Learning the Art of Rewriting and Editing — A Perspective*, 15 Perspectives: Teaching Legal Research & Writing 54, 54 (Fall 2006) *available at*: http://papers.ssrn.com/abstract=1124031 (last visited Sept. 1, 2009)).

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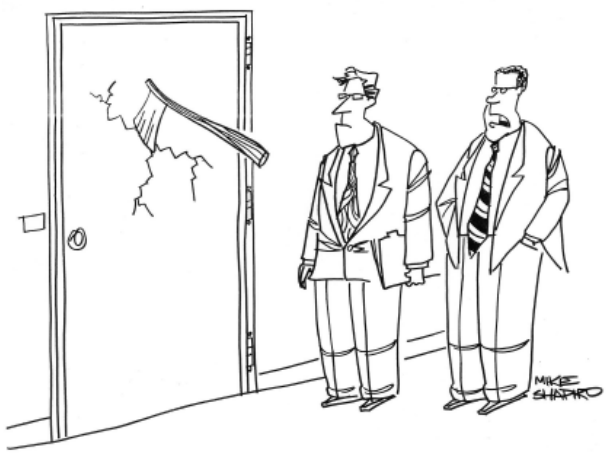

"I think we've alienated our clients."

LANGUAGE TIPS

BY GERTRUDE BLOCK

"A word is not crystal, transparent and unchanging; it is the skin of a living thought and may vary greatly in color and content according to the circumstance and the time in which it is used."

– Justice Oliver Wendell Holmes, Jr.

Question: I was taught that the verb *lend* was correct and that *loan* was a noun. But I see *loan* used as a verb by people who ought to know better, in sentences like "Loan me ten dollars." What has happened to the grammatical rule?

Answer: That grammatical rule has been canceled by usage, although the (conservative) Usage Panel of language experts who were interviewed for the 1985 edition of *The American Heritage Dictionary* preferred to maintain the distinction between the noun "loan" and the verb "lend." Although they acknowledge that "*loan* has long been established as a verb, especially in business usage," they add that many phrases require *lend*, such as "lend an ear," "money-lender," and "distance lends enchantment." (You may feel, as I do, that those phrases have a musty, antique sound – as if they came from a Shakespearean play.)

But, in language, usage always eventually trumps "rules" Once a large majority of educated people ignore a grammatical rule, it falls by the wayside, except, perhaps, in the language of meticulous users who are determined to retain it in their own speech. Take, for example, the rule that the pronoun *I* must be used as the subject, and the objective case (*me*) must be used when it is the object of a verb or a preposition, So it is disconcerting to purists when prestigious individuals break that rule.

For example, President George W. Bush remarked after a visit with Prime Minister Tony Blair, "Mr. Blair hosted Laura and I at a delightful luncheon." And more recently, President Obama commented, "I'll leave it to others to determine whether me and my team had anything to do with [the current economy]." In those statements, Mr. Bush and Mr. Obama joined the majority of teenagers and other common mortals who say, "Me and my friends went to the mall today."

Adverbs, too, have become an endangered species. Adjectives are rapidly replacing them. Take the adjective *good*, which is on its way to eliminating *well* in some constructions. In answer to the formulaic greeting, "How are you?" (In this part of the South, that has become "How-r yuh doon?") The typical but incorrect answer to that question is "*Good*," not "*Well*." Traffic signs warn drivers to "Drive *slow*" not "*slowly*." "Buy low and sell high" may be good advice, but it is bad grammar. And Senator Charles E. Schumer, who must know better, ignored the adverb *quickly* when he said, "You can see that many things should have been done better and quicker."

Almost everyone ignores the distinction between the subjective pronoun *who* and the objective pronoun *whom*. Conservative grammarians would insist on "The person *who* was appointed as Treasury Secretary," but "The person *whom* the President appointed as Treasury Secretary" Today, *whom* is almost forgotten.

Do you think that *different than* is equivalent to *different from*? If so, you are in the majority of Americans, but you are wrong according to conservative grammarians, who say that only *different from* is correct. (Britons say *different to*.) For exactness (and to be correct) you *bring* something to where a person is, but *take* it somewhere else. ("Bring me the newspaper, or take it to my house.") In addition, you walk *into* a room from outside, but *in* a room if you are already inside.

Although *as* and *as if* are still grammatically correct, the incorrect preposition *like* has virtually eliminated both, If you have said, "I remember it like it was yesterday," you are ungrammatical, but a PBS reporter joined numerous others when he said, "Just like a noise can be distracting, so can a blinking light." *Time* columnist Justin Fox, who probably knows better, wrote, "This election has been a major turning point, just like 1980's was." And this university's football coach (who does not) announced, "Like last year, the defensive ends will be a major threat."

It is your choice whether you prefer to follow the majority in breaking old grammatical rules or persist in following them, but invariably the next generation will follow the crowd, and the rules will fall by the wayside. George Campbell, an 18th-century grammarian, set forth a remarkably modern definition of good usage when he wrote in his *Philosophy of Rhetoric* that "language is purely a species of fashion," and defined the following criteria for correctness: "Good usage is that which is reputable, national (that is 'wide'), and [in] current use."

My answer to the reader's question strays far from its borders. The short answer is, as you have by now discovered, that *loan* is fully acceptable as both a verb and a noun, but if you choose to use *lend* as the verb form of *loan*, you will also be eminently correct – and will probably identify yourself as "of a certain age," when grammar was still taught in schools.

Readers of this column should also prepare themselves for a possible merging in the meaning of the following pairs; but note that at present *none* of these pairs are synonyms. The pairs that are currently sometimes incorrectly believed to be synonymous are "reticent" and "reluctant"; "discreet" and discrete"; "authoritative" and "authoritarian"; "observation" and "observance"; and "meritorious" and "meretricious." ■

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BY GERALD LEBOVITS

~~Prove~~ Proof It With ~~Revision~~ Re-vision — Part II

The September 2009 Legal Writer column analyzed how writers can learn to re-see their documents on the macro-level. The column continues.

Micro-Revisions

Editors revising on the micro-level look at sentence structure, word choice, grammar, punctuation, and spelling.

Sentence Structure

Editing must render writing intelligible. Proper sentence structure focuses on reader expectations. Readers approach given sentences with preconceived notions of what they expect to see. Sentences not meeting these expectations will be ignored or misunderstood.[1]

Sentences should move from simple to complex information and from old to new information to let readers transition from one idea to the next.

Sentence length is also important. Long sentences mean that readers are less likely to grasp and retain writing. Keep sentences 25 words or less, with one thought. Add a period every two or, at most, three lines of text to keep sentences short.[2] Too many short sentences sound angry and impatient, however. Mix short with long sentences to avoid monotony.

Subjects should be featured at the beginning of most sentences. Failing to feature the subject causes confusion and incoherence. Simple sentences have a subject and a predicate to indicate what the subject did. *Example:* "I enjoy legal writing." At the core of every subject is a noun (person, place, thing, and concept) or pronoun. In the example, the noun is "I." A verb is the core of every predicate. In the example, the verb is "enjoy." The predicate conveys a thought about the subject. Simple sentences emphasize and clarify.

Not every sentence need be simple. Variety makes sentences interesting.[3] Some sentences should be compound, complex, or compound-complex. A compound sentence contains two independent clauses, or two simple sentences, joined by a coordinator. Coordinators: "and," "but," "for," "not," "so." *Example:* "I enjoy writing, but I hate research."

A complex sentence has an independent clause joined by one or more dependent clauses. Complex sentences always use a subordinator like "after," "although," "because," "since," or "when" or a relative pronoun like "that," "who," or "which." When a complex sentence begins with a subordinator, a comma is required at the end of the dependent clause. *Example:* "Although the lawyer edited his brief, he kept the metadiscourse." No comma is required when the independent clause begins the sentence with subordinators in the middle. *Example:* "The lawyer is editing his brief because it is due tomorrow morning."

A compound-complex sentence has at least two independent clauses and one or more dependent clauses. *Example:* "When the litigator won the case, the defendant jumped for joy, and the audience applauded."

Word Choice

Lawyers must choose words that reflect what they want to convey.

Word choice relates to a reader's set of expectations: the "given-new concept."[4] This concept describes the relationship between what the reader already knows (the "given" information) and new information the writer is introducing. Readers assume relationships with the information they're given. Using the wrong word violates expectations.

Misused words defy a reader's given expectations. The result is a failure to relay the intended message. Commonly misused words include "affect" and "effect" and "then" and "than."

One word-choice problem is the use of multi-syllabic, foreign, and SAT words. Writers should strive for simplicity. It's better to be understood than to drive readers to a dictionary. It's better to make readers feel smart than stupid.

A word-choice problem unique to legal writing is legalese. "Legalese" is made up of words that appear legal but carry no meaning. *Examples:* "aforementioned," "hereinafter," and "theretofore." Legalese, the opposite of plain English, annoys and gives a false sense of precision.

Grammar, Punctuation, and Spelling

Here are 10 tips to make documents error-free, at least on the surface.

• Get an editor. Have fresh eyes read the document. Writers don't see their own mistakes, especially after they've scoured a document for hours. They see what they meant, not what they wrote. Only attentive editing

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‡ To take advantage of this offer, you must use the Offer Code provided to open your qualifying new Bank of America personal checking account by 11/30/2009. Bank of America may terminate the offer before this date. This offer is available only to new customers who open a new primary personal checking account. To qualify for this offer, an opening deposit of $250 must be made. The new checking account must be open for at least 30 days, during which the customer must make a minimum of one transaction with the newly assigned debit card. The new customer will receive the incentive upon verification of qualification in the incentive programs. We will deposit the $50 incentive directly into your new checking account within 90 days of its opening; if unable to do so, a check will be issued. The new customer is not eligible for this offer if they were a signer on a Bank of America checking account that was closed within the last three months. All accounts are subject to our normal approval process. The minimum deposit required to open a new personal checking account and receive this offer is subject to the normal opening deposit requirements of the specific account being opened that appear in our Personal Schedule of Fees. For example, the opening deposit for a Bank of America MyAccess Checking® account is $25. Limit one offer per household. Offer does not apply to Bank of America associates, current checking customers or student checking accounts. To the extent required by law, Bank of America will report the value of the offer to the IRS. Any applicable taxes are the responsibility of the account holder. Reproduction, purchase, sale, transfer or trade of this offer is prohibited. For Tiered Interest personal checking accounts, the APY is as follows: less than $10,000, 0.05%; $10,000-$99,999, 0.25%; $100,000 and over, 0.40%. APYs are accurate as of 8/27/2009. The APY may change after the account is opened. Fees may reduce earnings. Bon.5.09

☆ Keep the Change® requires a checking account, debit card and savings account. Upon enrollment in Keep the Change, we will round your MasterCard® or Visa® debit card purchases to the nearest dollar and transfer the difference from your checking account to your Bank of America savings account. We will match your Keep the Change savings at 100% for the first three months and, for NYSBA customers, 10% thereafter. The maximum total match is $250 per year. Matching funds are paid annually after the anniversary of enrollment on accounts that remain open and enrolled. We will only match Keep the Change transfers on up to five checking accounts per depositor (including joint depositors) or up to five checking accounts per household, whichever is less. Eligible savings accounts include, but are not limited to, Regular Savings (or Market Rate Savings in WA and ID) that requires a minimum opening balance of $25 ($1 in WA and ID) and pays a variable Annual Percentage Yield (APY) that was 0.10% as of 8/27/2009. Money Market savings accounts are also eligible. Fees may reduce earnings. The promotional matching funds will be reported to the IRS on form 1099. Patent Pending. KTC.5.09

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Periodicals

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