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by Susan L. Pollet

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Journal

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DEPARTMENTS

The *Journal* ((ISSN 1529-3769 (print), ISSN 1934-2020 (online)), official publication of the New York State Bar Association, One Elk Street, Albany, NY 12207, is issued nine times each year, as follows: January, February, March/April, May, June, July/August, September, October, November/December. Single copies $30. Library subscription rate is $200 annually. Periodical postage paid at Albany, NY and additional mailing offices. POSTMASTER: Send address changes per USPS edict to: One Elk Street, Albany, NY 12207.

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STEPHEN P. YOUNGER

Family Courts: Restoring Justice for All

In taking office as President last June, I emphasized the need to both shape the future of our legal profession and to restore public confidence in our government institutions. There may be no place where these two important objectives come together as clearly as our state's Family Court system.

Family Courts serve society's most fundamental building block – our families. They are called on to resolve pressing problems affecting the most vulnerable segment of our society – our children. From foster care to child abuse and neglect, every day our Family Courts make critical decisions that can have lasting effects on New York's children and their families.

Given the important influence that Family Courts have on the lives of our citizens, we must do all we can to ensure that members of the public have equal access to and receive fair treatment by our justice system. Too often, however, due to overcrowded dockets, too few judges, and long delays, Family Courts resemble hospital emergency rooms and our family law attorneys are forced to perform triage.

New York's Family Courts are in deep crisis. Consider these startling statistics:

- From 1991 to the present day, no new judges have been appointed to the Family Court bench in New York City. During this same period, filings in the New York City Family Court increased 23%, from 206,186 to 253,421 in 2009.
- In 2009, Family Court filings reached a record high of nearly 750,000 statewide, with filings related to family violence increasing 30% in the last two years alone.
- In the New York City Family Court, each year a typical judge handling child protective cases hears 2,100 cases – up from 1,600 cases in 2005.
- And, our Family Court Judges now have to hold more hearings in cases where new legal requirements have been imposed – such as in the child protective area.

Last July, we formed the Task Force on Family Courts to identify and address issues that need to be resolved for the improved operation of these courts. Co-chaired by the Honorable Rita Connerton (Supervising Family Court Judge for the 6th Judicial District) and Susan B. Lindenauer (Retired General Counsel of the Legal Aid Society), the Task Force is examining key issues affecting our Family Courts across the state.

The questions that the Task Force is exploring include:

1. What additional Family Court resources are needed and in what functional areas?
2. What improvements are required in case management and utilization of Family Court staff?
3. What new technologies can judges and attorneys use to enhance efficiency of the Family Courts?
4. And, what operational improvements are needed to better serve our state's families?

In addition to focusing on these important topics, members of the Task Force are meeting with court officials both from New York and from neighboring states to learn about the best practices that states are using to ensure efficient operation of Family Courts. To date, Task Force members have met with judicial officers in New Jersey and Connecticut, and follow-up meetings are being planned for the near future.

There is no question that our Family Courts provide an immeasurable service to the public. Last fall, I had the extraordinary opportunity, along with Task Force co-chair Susan Lindenauer, to participate in Bronx County Family Court proceedings at the Family Court Judge for a Day program sponsored by Legal Information for Families Today (LIFT). Susan and I worked side-by-side with a Family Court Judge and witnessed proceedings that strike at the heart of a family's stability, including custody, neglect, abuse, foster care, and family violence.

The Family Court Judge for a Day initiative is an excellent program that gives community leaders a bird's-eye view of the current state of New York's Family Courts. Such programs play an essential role in improving our Family Court system.

Under the leadership of Judge Rita Connerton and Susan Lindenauer, and with guidance from experts on the front lines of our Family Courts, our Task Force is tackling problems faced by this important branch of our court system. At the end of the process, we will have a road map that will chart a new course for addressing these challenging problems so we can have a Family Court system that fully protects our children and families when they most need it. ■

STEPHEN P. YOUNGER can be reached at syounger@nysba.org.

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New York State Public Health Legal Manual

A Guide for Judges, Attorneys and Public Health Professionals

It is not possible to predict the next public health emergency, but it is possible, and necessary, to prepare for one. State and local governments and public health professionals will respond more effectively and efficiently in the event of such emergency if they understand the lines of authority and the diverse roles that governments and individuals play, and the governing laws that affect their actions.

The New York State Public Health Legal Manual, a timely and important resource for dealing with public health disasters, clarifies these issues. It is the result of a collaboration between the New York State Unified Court System, the New York State Bar Association, the New York State Department of Health and the New York City Department of Health and Mental Hygiene.

The *Manual* covers the laws governing the control of the spread of communicable diseases and the laws concerning the abatement of nuisances that may cause public health emergencies, as well as the constitutional rights of those affected. The authors also include "commentary" sections to address gaps or constitutional discrepancies that may not be covered completely by the law. Recognizing that many of the Public Health Law provisions do not apply to the New York City, the *Manual* contains extensive review of relevant sections of New York City Health Code, the New York City Charter and the New York City Administrative Code provisions.

The *Manual* contains forewords by Chief Judge Jonathan Lippman and New York State Bar Association President Stephen P. Younger.

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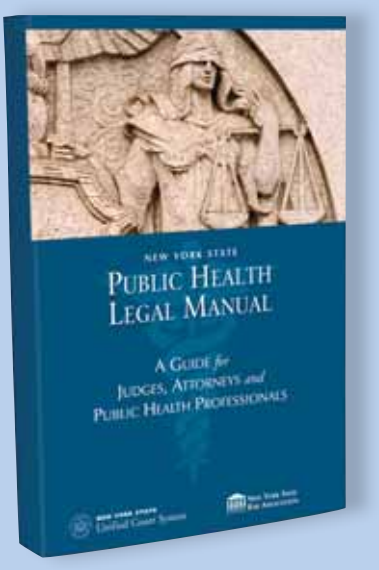

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†Seventh Annual International Estate Planning Institute
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(1:00 pm – 5:00 pm)
March 25 New York City

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March 28 New York City
March 29 Rochester
March 30 Albany; Westchester
April 1 Long Island

Hot Topics in Real Property Law (Video Replay)
March 31 Jamestown

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April 1 New York City

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April 5 Long Island
April 6 Syracuse
April 7 Albany; Buffalo
April 14 New York City; Westchester

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April 8 Albany; Long Island
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April 27 New York City

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April 29 Rochester
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June 10 Albany
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Ethics for Business and Transactional Lawyers
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Practical Skills: Basic Elder Law
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Susan L. Pollet (SPollet@courts.state.ny.us) is the Coordinator of the New York State Parent Education and Awareness Program for the Office of Court Administration, an initiative of former Chief Judge Judith S. Kaye and now Chief Judge Jonathan Lippman. The author is grateful to Alyssa M. Rodriguez and Coral Strother, Pace Law Student Interns, for their extensive research which formed the basis for this article and the chart included in this article.

The views expressed in this article belong to Susan L. Pollet and do not reflect the views of the New York State Unified Court System.

Breaking Up Is Hard[er] to Do

Same-Sex Divorce

By Susan L. Pollet

"Gay divorce, it turns out, is as painful as the straight kind, and a lot more complicated."
Jgoti Thottam

"What is straight? A line can be straight, or a street, but the human heart, oh, no, it's curved like a road through mountains." Tennessee Williams, *A Streetcar Named Desire,* 1947

Background

Some commentators maintain that marriage in our country, as in most societies throughout the world, is the "single most significant communal ceremony of belonging. It marks not just a joining of two people, but a joining of families and an occasion for tribal celebration and solidarity."[1] Many legal commentators make the case for strengthening marriage in the 21st century by emphasizing the "emotional, financial, and social benefits flowing to children and communities from marriage."[2] Others point out the decline of traditional marriage in contemporary society.[3] One commentator analyzed the economic double-edged sword with respect to same-sex couples who marry, and the disadvantages related to divorce, taxation and public assistance for certain individuals and couples.[4]

Whatever view of marriage one maintains, currently same-sex couples can be validly married in only a few jurisdictions – Massachusetts, Connecticut, Iowa, New Hampshire, Vermont and Washington, D.C.[5] One state has legalized civil unions, another four states have legalized domestic partnerships and, in addition to the five states which have successfully legalized same-sex marriage, three more states recognize out-of-state same-sex marriages (including New York).[6]

To complicate matters, in 1996, Congress passed the Defense of Marriage Act (DOMA), "defining 'marriage' as used in the United States Code to mean only a legal union between a man and a woman and 'spouse' to mean a husband or wife of the opposite sex. DOMA also explicitly permits each state to refuse to recognize same-sex marriages solemnized in other states."[7] Forty states have now enacted "mini-DOMA" statutes, and 24 of those states have codified this policy in their constitutions.[8]

Gay male and lesbian couples typically raise children in three contexts. The first is where one of the partners is already the biological parent of a child. The second is where the same-sex couple agrees to have a child and plan that one of them will be the biological parent, and that, after birth, they will raise the child together. The third is where a same-sex couple seeks to adopt or become the foster parents of a child who is not biologically related to either of them.[9]

Approximately 250,000 children are being raised by same-sex couples in the United States, but the rights of these parents "vary widely among states," in that only about half allow second-parent adoptions by the unmarried partner of an existing legal parent and a handful of state courts have ruled these adoptions not permissible under state laws.[10] Yet another estimate is that at least 270,000 children are being raised by same-sex couples; this number does not include single lesbian, gay, bisexual or transgender parents. It seems likely that same-sex parents are underreported in the Census.[11] (Another cited statistic is that between one million and nine million kids are raised in families with at least one gay parent.[12]) Same-sex couples are raising children via single-parent adoptions in all states except Florida.[13]

In today's world there is the "potential for a child to have up to five 'parents' – the egg donor (the genetic mother), the sperm donor (the genetic father), the surrogate mother who hosts the pregnancy, and two 'social' or 'psychological' parents whom the child knows as 'mother' and 'father.'"[14] The recent movie *The Kids Are All Right*, concerns two children conceived by artificial insemination. There are two lesbian mothers, whom the children refer to as the "Momses," each having carried one of the children, using the same sperm donor for both. That is a relatively uncomplicated example of the modern family. Competing claims of same-sex parents, and claims involving donor parents, can become extremely complex, however; this article will discuss claims of same-sex parents, only.

Same-sex couples are discovering that getting divorced can be far more complicated than getting married.

What happens when same-sex couples seek to divorce? If they remain in the few states where same-sex couples can marry, then court matters should proceed as they would in cases involving heterosexual couples. However, if they move out of those states, they may very well be caught in a situation where they are unable to dissolve their legal bond. This is because of the limited recognition of these marriages, the residency requirements in the divorce statutes and the Supreme Court's "interpretation of the Full Faith and Credit Clause as extending only to those divorce decrees made with subject matter jurisdiction predicated on at least one party to the divorce being domiciled in the state."[15]

Psychological Literature

First we will discuss some of the psychological literature as to the parenting of same-sex couples and how the children are faring in such households.

Very few studies involve same-sex relationships, marriage and divorce – as might be expected. There is one study, a three-year follow-up of same-sex couples who had civil unions in Vermont during the first year of that legislation (before Vermont adopted same-sex marriage).[16] Interestingly, civil union couples did not differ "on any measure" from same-sex couples who were not in civil unions.[17] The study did find, however, that "same-sex couples not in civil unions were more likely to have ended their relationships than same-sex civil union or heterosexual married couples. Compared with heterosexual married participants, both types of same-sex couples reported greater relationship quality, compatibility, and intimacy and lower levels of conflict."[18]

With regard to the parenting ability of same-sex couples, according to an article in an American Psychological Association (APA) publication, sexual orientation is not related to "parental effectiveness":[19]

> Research indicates that lesbian mothers do not differ from heterosexual mothers on measures such as mental health, self-concept or behavior toward children. Children of same-sex parents do not differ from children of heterosexual parents on measures of personality or morality; nor do the groups differ in gender role/identity, developmental difficulties, sexual orientation, peer relationships or attitudes toward parents. Lesbian couples may actually be better than heterosexual couples in some ways, as research shows that lesbian couples are more knowledgeable about parenting skills. In sum, research indicates that there are few negative effects of being raised by same-sex parents.[20]

The governing body of the APA voted unanimously in favor of the following statement: "Research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that children of lesbian and gay parents are as likely as those of heterosexual parents to flourish (APA, 2004)."[21] In addition, "the American Bar Association, the American Academy of Pediatrics, the American Psychiatric Association, and other mainstream professional groups have issued similar statements."[22]

Research results suggest that parental sexual orientation is less important than the quality of family relationships, such as the quality of daily interaction and the strength of the relationships children have with their same-sex parents.[23]

In a 25-year study recently reported in the *Journal of Pediatrics*, the findings suggested that "children raised in lesbian households were psychologically well-adjusted and had fewer behavioral problems than their peers."[24] (Some groups, however, have questioned the legitimacy of these findings because the study was funded by gay advocacy groups.[25])

There is little empirical research on same-sex divorce and more research is needed on the dynamics of same-sex relationships and how they end.[26] It has been mentioned that psychologists could play an important role in shaping legal status by studying the "challenges that same-sex parents and their children face as they deal with post-break up relationships."[27] Further research is needed "regarding the potential strengths of children raised by same-sex parents, such as a greater appreciation of diversity and a willingness to challenge stereotypes."[28] In addition, more research is needed regarding "[t]he well-being and adjustment of children who do and do not have contact with a noncustodial parent after the breakup of the parental relationship" as the current research involves heterosexual families.[29] The argument has been made that "bias against gays and lesbians has been shown to have detrimental effects when it comes to the legal system (e.g., Anderson, 2004), so it is important for us to understand how homophobia and heterosexism might influence decision-making in same-sex divorce cases."[30]

Legal Issues Arising Out of Same-Sex Divorce or Separation

Next we will analyze some of the legal issues involved in same-sex divorce, including the difficulty in getting a divorce, custody and visitation/access questions and adoption by same-sex couples.

Inability to Get a Divorce

The lesbian couple (Julie and Hillary Goodridge), who led the legal fight for Massachusetts to become the first state to legalize same-sex marriages in 2004, filed for divorce in that state five years later.[31] The irony of that occurrence has not been lost on the media. Clearly, the next same-sex

challenge is divorce, and all eyes are on Massachusetts to see how same-sex marriage and divorce will evolve. In 2008 it was reported that 10,000 gay and lesbian couples married after Massachusetts made same-sex marriage legal. Apparently dozens of such couples have divorced since then, although no records are kept.[32] According to "the most recent data from the National Center for Vital Statistics, Massachusetts retains the national title as the lowest divorce rate state, and the MA divorce rate is about where the US divorce rate was in 1940, prior to the Japanese bombing of Pearl Harbor that triggered the US entrance into World War Two."[33] (A UCLA study of same-sex couples "in states that offer civil unions or legal domestic partnerships showed that these couples broke their legal bonds at about the same rate as straight couples: 2 percent per year."[34])

One expert in Connecticut has noted that the biggest issue with same-sex divorce is financial in that judges and attorneys have a "steep" learning curve to understand how federal nonrecognition (DOMA) impacts same-sex couples and can complicate state court orders.[35] More time is needed to fully assess how the courts in states that allow same-sex divorce will be deciding issues related to divorce, custody, visitation, access and adoption.

Massachusetts is an equitable-distribution state, and since a major factor in determining the distribution of assets is the duration of the marriage, arguments are being made in court by gay spouses that they would have been married longer if it had been allowed.[36]

Researchers have noted that "[a]round the country, same-sex couples are discovering that getting divorced can be far more complicated than getting married," and sometimes these problems "stem from living in a state with different laws from the state where the marriage took place."[37] Because of DOMA, which bans federal recognition of same-sex marriage, gay couples may not be entitled to the same tax-free division of assets as their heterosexual counterparts as far as the federal taxes are concerned, even in states that recognize same-sex marriage.[38] While most states have passed statutes or constitutional amendments defining marriage as being between a man and a woman, the courts are making the ultimate ruling on whether that means that married same-sex couples should not be allowed to divorce.[39]

For gay couples living in a state that does not recognize same-sex marriage or does not allow same-sex divorce, it may not be worth getting married because you "may not be able to get divorced, you couldn't remarry, your status would always be in question, and you wouldn't get the benefits of marriage anyway."[40]

States that don't allow gay marriage "have been struggling with whether to grant divorces for marriages performed in states that do."[41] The two issues which come up are that each state has laws that require a minimum

duration of residency to obtain a divorce in that state, and that "in many 'non-recognition' states granting a divorce is seen as a form of 'recognition' of the legal relationship."[42] For example, courts in Rhode Island and judges in Oklahoma and Texas have refused to grant divorces, while courts in New Jersey and New York have allowed them.[43] The California Supreme Court ruled that same-sex marriages that took place in 2008 before voters approved a ban will remain valid and recognized, such that "all of the rules of marriage apply, including divorce."[44] A full summary of out-of-state recognition of same-sex divorces is in the chart included in this article.

Why is same-sex divorce important for same-sex couples? "[H]aving access to the structure of laws determines how you pull apart one of the most financially intertwined relationships and also gives you a neutral arbiter, a judge, to help navigate"; from a psychological standpoint it "helps to create a ritual of separation, a ritual for disengagement."[45] One psychologist opined that preventing same-sex couples from marrying in states but allowing them to divorce is "an incredibly negative destabilizing message" that "somehow you don't have equal rights," creating the inadvertent message that "[w]e'll help you to separate; we just won't help you to get together."[46]

Since there are so many legal intricacies with same-sex marriage and divorce, the problem is "that in cases where the partners disagree over 'parentage, money or property,' one person may be able to 'take advantage of the situation' and use the legal confusion to deprive the other person of rights they would have if the partners were not the same sex."[47] From a practical standpoint, while the state a same-sex couple lives in may not recognize the marriage, either spouse may relocate to a state that does recognize the marriage, and then some marital obligations (like joint liability debt) could attach, and it would be bigamous to marry someone else.[48] This legal limbo is unacceptable to many.[49]

Some experts have recommended the following steps: (1) same-sex couples should sign prenuptial agreements or domestic-partner agreements to outline how assets should be divided in a split even if it cannot be enforced; (2) the non-biological parent should adopt the children or move to a state where that parent can; (3) all legal unions should be dissolved through the legal system whenever possible; and (4) same-sex couples should work with tax specialists on dividing assets, dealing with retirement assets, and working through the tax implications of alimony.[50] Co-parenting agreements which recognize the "parental roles, affections, and responsibilities that develop between the child and the nonbiological" parent can be utilized.[51] One commentator noted that the National Center for Lesbian Rights "recognizes that the co-parenting agreements may not be an enforceable legal document but may be useful to the nonbiological parent in establishing a parent-child relationship if that is disputed in the future."[52] An excellent discussion of various legal considerations when advising same-sex couples is contained in an article titled "Considerations, Pitfalls, and Opportunities That Arise When Advising Same-Sex Couples," by Raymond Prather.[53]

Custody and Access

When married heterosexuals who have children divorce, the parents are "automatically presumed to be the legal parents of their children" and absent a "termination due to unfitness, they retain their rights upon divorce."[54] With gay, lesbian, bisexual, and transgendered (GLBT) parents, the "rights are less clear."[55] Only the biological parent of the child in the gay relationship is "presumed to be the legal parent," and the nonbiological parent typically "has to overcome the presumption in favor of the biological parent."[56] In states where gay marriage and civil unions are illegal, "the rights of non-legal parents are tenuous at best and depend on the willingness of judges to find *de facto* parenthood."[57]

According to the literature,

> state custody and visitation determinations concerning homosexual, biological parents typically fall into three categories of rules: (1) per se, in which homosexuality in and of itself is considered harmful to the child; (2) burden shifting, which places the burden on the homosexual parent to show that there is no adverse impact; and (3) nexus, which creates a presumption that custody or visitation for the homosexual parent is proper, rebuttable by evidence of harm stemming from the parent's homosexual relationships.[58]

One commentator stated that "an increasing number of courts have recognized the custodial and visitation rights of gay and lesbian *de facto* parents, noting that family relationships do not always mimic biological ones," and the increasing recognition of same-sex marriage and civil unions "support this trend."[59] Another noted that when a noncustodial parent is homosexual, "states are divided as to how much weight should be accorded to this factor in determining the visitation suitable to the best interest of the child" and that while most states do not consider the parent's homosexuality, "a few still consider homosexuality in and of itself to be harmful to the child."[60]

An interesting psychological issue which impacts legal proceedings arises in the context of assessing the custodial preferences of children of gay and lesbian parents in custody cases. This litigation generally arises in two ways: the first situation is "either prior to or upon divorce, one parent discloses his or her same sex orientation to the other parent."[61] In the second, "a parent discloses same sex orientation after the divorce and initial custody determination have been made," and the parent who lost custody tries to challenge the award upon discovery that the custodial parent is gay or lesbian.[62] One commentator argues that in cases where children

expressed a preference not to live with the gay or lesbian parent, the bases of their preferences "seem too entangled with their emotional reaction to their parent's disclosure of a same sex orientation and accompanying lifestyle, rather than on the parent's care-giving abilities."[63]

Apparently, there is a dearth of literature about a child's perception of a gay or lesbian parent's homosexuality. However, according to one commentator,

> the existing literature on child development and gay and lesbian parenting does indicate a general pattern of responses to a parent's disclosure of a lesbian or gay orientation. Although many children and adolescents initially experience negative emotions stemming from internalized homophobia upon disclosure, many emerge supportive of, well adjusted to, and comfortable with their parent's same sex orientation once they process their feelings and concerns. A child's perception of her gay or lesbian parent will likely evolve with age, development, and sophistication, as well as with the child's developing relationship with the parent.[64]

The commentator suggests that courts must be informed about the responses children have in these situations, and that the court should either delay the timing of ascertaining the children's preferences until the children have had time to process it or should not take the children's preferences into consideration when making its ultimate decision if delay is not an option.[65]

At the current time, all 50 states "have rejected a gender-based presumption in child custody and visitation disputes in favor of a gender-neutral, best-interest-of-the-child analysis," which leaves broad discretion with the judges.[66] A commentator noted that "[h]istorically, many courts have determined that homosexuality and parenting are irreconcilable, which results in the gay parent losing custody."[67]

Some of the "popular" arguments that courts have used include "concern for social stigma, gender role or sexual orientation confusion, and improper socialization of the children involved."[68]Another commentator asserts that "[a] judicial ruling that gives custody to a heterosexual parent over a lesbian or gay parent solely on the grounds of sexual orientation ignores the purpose of the best interests of the child standard,"[69] arguing that "[c]ourts applying the best interests standard should focus on the child's general necessities and not on the parent's identity as lesbian, gay, or heterosexual. Further, judges should disregard their own personal morals, prejudices, or political beliefs."[70] It should be noted that trends indicate that courts are focusing more on the welfare of the child and placing less emphasis on sexual orientation, but there is still concern about this issue in many states.[71]

According to one expert, some family court judges do not appreciate intervention from civil rights organizations in the context of custody cases as they do not want it to be a political issue but rather a discussion about what is in the child's best interests.[72]

Gay men have faced a stereotype that they are "hypersexual, self-absorbed, untrustworthy in their intimate relationships, and unwilling or unable to commit to a long-term intimate relationship."[73] One commentator noted that because gay fathers of heterosexual marriages "came out" in the context of divorce litigation, it reinforced this negative gay identity.[74] However, now that there is a new generation of gay fathers who began parenting while in an openly gay relationship, and who have been involved in securing legal recognition for their families through same-sex marriage, civil union and second-parent adoptions, it is argued that the gay identity will change and the society will be able to accept the possibility of "fatherhood within a committed gay relationship."[75]

Using mediation would allow gay couples to maintain control of their dispute rather than subject themselves to the biases of the legal system.

Jurisdictions with same-sex marriages "would benefit from the creation of mediation programs to administer child custody arrangements upon same-sex divorce,"[76] in part because they address the specific needs of these families, would ease the "stress of changing current standards of child custody," and would avoid burdening "an already backlogged family court system."[77] One commentator observed that using mediation to resolve custody and visitation conflicts would allow "gay couples [to] maintain control of their dispute rather than subject themselves to the biases of the legal system."[78] Other reasons are that mediation encourages privacy, preserves the dignity of gay parents, and empowers gay and lesbian couples.[79] The most "pressing concerns" for the use of mediation are the questions of consent and enforceability.[80]

Another issue, which is outside the scope of this article, is cases where there is domestic violence, which may impact upon custody and visitation cases. One commentator maintained that incidents of violence occur as frequently with same-sex couples as with heterosexual couples.[81] Same-gender victims often have the additional stress of severe isolation and the fear that the abuser will "out them" in a hostile manner.[82] More research needs to be done regarding domestic violence issues, and divorce professionals need to have special training to work with these couples.[83]

Adoption

Adoption was "unknown at common law and therefore in the United States it required statutory authorization. The first adoption statute was not enacted until 1851,

in Massachusetts."[84] "The question in the twenty-first century is not whether to recognize legal parentage in the absence of biology but when to do so."[85]

A new family form developed starting in the late 1970s, which was when "lesbians and gay men [began] giving birth to and adopting children [in] the context of same-gender relationships, using advances in reproductive technology and changes in adoption options to accomplish these aims (Pies, 1989)."[86] This has been referred to in the lesbian, gay, and bisexual community as the "gay-by boom."[87]

Because of the growing need for adoptive homes and the growing numbers of same-sex parent families who want to adopt, there has been a "dramatic decrease in anti-gay discrimination on the part of adoption agencies and courts."[88] With respect to individual adoptions, every state permits unmarried individuals to adopt; however, Florida, by statute, "categorically" prohibits lesbians and gay individuals from becoming adoptive parents.[89] In general, the best interests of the child is the standard used for approving a same-sex adoption, but, as one commentator notes, judicial reaction can range from "supportive acceptance to overt hostility."[90] (In New York, administrative regulations "prohibit the denial of an adoption solely on the basis of the applicant's marital status or sexual orientation."[91])

In addition to individual adoptions, there are second-parent adoptions and joint adoptions. Second-parent adoptions allow a same-sex partner to adopt her or his partner's biological or adoptive child without terminating the first legal parent's rights; joint adoptions permit both partners to simultaneously adopt a child.[92]

A challenge faced by children of lesbian and gay families is that of equal legal access to the parents who raised them, because the biological parent is the only legal parent, even if the same-gender partner is the primary care giver from birth onward.[93] There is research demonstrating that children form strong bonds with the non-biological, non-adoptive parent, and thus, it is argued, a continued relationship is in the best interests of children.[94] However, depending on the state statute, many states do not allow for second-parent adoption.[95]

One of the first "second-parent" adoptions was in Alaska, and it was actually a third-parent adoption, in which the judge granted an adoption to the mother's partner without terminating the parental rights of the child's biological father.[96]

A number of scholars have made the argument that adoptions by same-sex couples are entitled to "exacting full faith and credit as a matter of constitutional law and, therefore, must be respected and enforced by other states even if they violate the public policy of the second state."[97] (One commentator has added that other types of parentage adjudications, including those "made in the context of otherwise modifiable orders like child custody and support orders," are likewise entitled to full faith and credit.[98])

In a 2002 policy statement, the American Academy of Pediatrics asserted, in part, that "[c]hildren who are born to or adopted by one member of a same-sex couple deserve the security of two legally recognized parents."[99] With respect to lesbians, one commentator raises the poignant question: Why should a mother have to adopt her own child?[100]

Second-parent adoptions give children of same-sex parents legal security. They become entitled to financial benefits, including inheritance rights, wrongful death and other tort damages, Social Security benefits, child support and health insurance coverage.[101] In addition, second-parent adoptions protect the rights of the same-sex parent who is the nonbiological parent in that the relationship will be legally recognized if the couple separates or if the biological or original adoptive parent dies, becomes incapacitated or is incarcerated.[102]

States that recognize same-sex marriage, or provide for comprehensive domestic partnerships or civil unions, allow couples to use the stepparent adoption procedures that married couples may use.[103] Domestic partner and civil union adoptions have the same effect as a second-parent adoption, "but they are often faster and less expensive than second parent adoptions."[104]

In those states where second-parent adoptions are not recognized, it is recommended that same-sex couples prepare backup documentation to help ensure that the parent-child relationship will be legally recognized because the question of whether other states must recognize adoptions by same-sex couples is still unsettled.[105] These documents would include a shared or co-parenting agreement and a nomination of guardian and powers of attorney.[106]

Narrative Summary

Included in this article, starting on page 19, is a chart showing current legislation in all 50 states with regard to these legal issues. This information is constantly changing, so periodically check the information on the Lambda Legal website, the Human Rights Campaign website and other like websites.[107] The chart indicates, as noted earlier, that only five states have legalized same-sex marriage plus the District of Columbia. Only one has legalized civil unions and another four have legalized domestic partnerships. In addition to the five states that permit same-sex marriage, three more recognize out-of-state same-sex marriages. With respect to adoption, only one state, Florida, does not permit a single LGBT person to adopt. Second-parent adoption has been recognized in 28 states, and joint adoption has been recognized in 16 states.

Conclusion

Because of the state and federal legal patchwork of laws with regard to same-sex couples marrying, adopting children, and then divorcing, legal advice by lawyers knowledgeable and up-to-date in the field is essential. The current research indicates that the emotional and personal issues in gay divorce are similar to straight divorce; however, the legal and tax issues make same-sex divorce that much more complicated. Some believe that mediation is a better route for divorcing same-sex couples rather than going to court; others opine that this must be considered on a case-by-case basis.

Same-sex couples have become more numerous and visible, and there appears to be a trend toward integrating these families into the current framework of family law protections. The lack of uniformity on the state and federal levels makes this area of the law a great challenge, one which will not be resolved quickly or easily. ■

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Chart of Current Legislation Regarding Same-Sex Couples

The chart, starting on the right, summarizes current legislation, as of May 2010, in all 50 states regarding same-sex couples. Specifically, it addresses: (1) whether the state has same sex marriage, (2) whether the state has civil unions, (3) whether the state has domestic partnerships, (4) whether the state recognizes out of state marriages, (5) whether a single Lesbian, Gay, Bisexual, or Transvestite (LGBT) person can adopt on his or her own, (6) whether the state recognizes second parent adoption,† (7) whether the state recognizes joint adoption.††

Out of 50 states, five have successfully legalized same sex marriage (not including the District of Columbia).*

Only one state has legalized civil unions.* *

Another four states have legalized domestic partnerships.***

In addition to the five states that have same-sex marriage, three more recognize out-of-state same-sex marriages.****

Only Florida does not allow a single LGBT person to adopt. Second parent adoption has been recognized in 28 states, either statutorily or through successful petitioning in the courts.‡

Joint adoption has been recognized in 16 states, either statutorily or through successful petitioning in the courts.‡‡

†Second Parent Adoption is defined by the National Center for Lesbian Rights as follows: "Second parent adoption (also called co-parent adoption) is a legal procedure that allows a same sex partner to adopt her or his partner's biological or adoptive child without terminating the first legal parent's rights." National Center for Lesbian Rights, Adoption by LGBT Parents, www.nclrights.org (2010).

††Joint Adoption allows both partners to simultaneously adopt a child. National Center for Lesbian Rights, Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law, www.nclrights.org (2010).

*Connecticut, Iowa, Massachusetts, New Hampshire, Vermont

**New Jersey

***California, Nevada, Oregon, Washington

****Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Vermont

‡Alabama, Alaska, Arkansas,California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, Wisconsin

‡‡ California, Colorado, Connecticut, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, Washington, Wisconsin

State	Marriage	Civil Union	Domestic P'ship	Reciprocal Beneficiaries	Statute	Out of State Recognition		Gay/Lesbian Adoption*	Second Parent Adoption**	Joint Adoption***
Alabama	No	No	No		Code of Ala. § 30-1-19	No	Code of Ala. § 30-1-19	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Alaska	No	No	No	Yes (limited domestic p'ship benefits to state employees)	Alaska Stat. § 25.05.013	No	Alaska Stat. § 25.05.013	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Arizona	No	No	No		A.R.S. § 25-101	No	A.R.S. § 25-112	Yes	not specifically addressed by statute	not specifically addressed by statute
Arkansas	No	No	No		A.C.A. § 9-11-208	No	A.C.A. § 9-11-208	Yes	Yes	No
California	No	No	Yes?		Cal. Fam. Code § 297 (court case pending re: constitutionality of denial of same sex marriage)	Yes	Cal. Fam. Code § 308	Yes	Yes	Yes
Colorado	No	No	No	Yes	C.R.S. 14-2-104	No	C.R.S. 14-2-104	Yes	Yes	Yes
Connecticut	Yes	No	No		Conn. Gen. Stat. § 1-1m	Yes	Conn. Gen. Stat. § 46b-28a	Yes	Yes	Yes
Delaware	No	No	No		13 Del. C. § 101	No	13 Del. C. § 101	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Florida	No	No	No		Fla. Stat. § 741.212	No	Fla. Stat. § 741.212	No	No	No
Georgia	No	No	No		O.C.G.A. § 19-3-3.1	No	O.C.G.A. § 19-3-3.1	Yes	not specifically addressed by statute	not specifically addressed by statute
Hawaii	No	No	No	Yes	HRS § 572-1	No	HRS § 572-3	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Idaho	No	No	No		Idaho Code § 32-209	No	Idaho Code § 32-209	Yes	not specifically addressed by statute	not specifically addressed by statute
Illinois	No	No	No	Yes (limited domestic p'ship benefits)	750 ILCS 5/213.1	No	750 ILCS 5/213 also 750 ILCS 5/216	Yes	same sex couples have successfully petitioned	Yes
Indiana	No	No	No		Burns Ind. Code Ann. § 31-11-1-1	No	Burns Ind. Code Ann. § 31-11-1-1	Yes	not specifically addressed by statute	Yes
Iowa	Yes	No	No		Iowa Code § 595.2	Yes	no statutory language	Yes	same sex couples have successfully petitioned	Yes
Kansas	No	No	No		K.S.A. § 23-101	No	K.S.A. § 23-115	Yes	not specifically addressed by statute	not specifically addressed by statute
Kentucky	No	No	No		KRS § 402.005	No	KRS § 402.045	Yes	not specifically addressed by statute	not specifically addressed by statute
Louisiana	No	No	No		La. C.C. Art. 86/ La. C.C. Art. 89	No	La. C.C. Art. 3520	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Maine	No	No	No	Yes (limited domestic p'ship benefits to state employees)	19-A M.R.S. § 701	No	19-A M.R.S. § 701	Yes	not specifically addressed by statute	Yes
Maryland	No	No	No		Md. Family Law Code Ann. § 2-201	perhaps	no statutory language	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Massachusetts	Yes	No	No		440 Mass. 309; 798 N.E.2d 941; 2003 Mass. LEXIS 814	Yes	no statutory language	Yes	Yes	Yes
Michigan	No	No	No		MCL § 551.272	No	MCL § 551.272	Yes	not specifically addressed by statute	No
Minnesota	No	No	No		Minn. Stat. § 517.01	No	Minn. Stat. § 517.03	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Mississippi	No	No	No		Miss. Code Ann. § 93-1-1	No	Miss. Code Ann. § 93-1-1	Yes	No	No
Missouri	No	No	No		§ 451.022 R.S.Mo.	No	§ 451.022 R.S.Mo.	Yes	not specifically addressed by statute	not specifically addressed by statute
Montana	No	No	No	Yes (limited domestic p'ship benefits to state employees)	Mont. Code Anno., § 40-1-401	No	Mont. Code Anno., § 40-1-103	Yes	not specifically addressed by statute	not specifically addressed by statute

Current Legislation Regarding Same-Sex Couples (continued)

Nebraska	No	No	No		Ne. Const. Art. I, § 29	No	R.R.S. Neb. § 42-341	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Nevada	No	No	Yes		Nev. Rev. Stat. Ann. § 122A.040	no statutory language	no statutory language	Yes	same sex couples have successfully petitioned	same sex couples have successfully petitioned to adopt in some jurisdictions
New Hampshire	Yes	No	No		RSA 457:1-a / RSA 457:46	Yes	RSA 457:3 / RSA 457:45	Yes	Yes	same sex couples have successfully petitioned to adopt in some jurisdictions
New Jersey	No	Yes	No		N.J. Stat. § 37:1-28	Yes (for civil unions)	N.J. Stat. § 37:1-34	Yes	Yes	Yes
New Mexico	No	No	No	Yes (limited domestic p'ship benefits to state employees)	N.M. Stat. Ann. § 28-1-7	Yes	N.M. Stat. Ann. § 40-1-4	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
New York	No	No	No		no statutory language	Yes	case law	Yes	Yes	Yes
North Carolina	No	No	No		N.C. Gen. Stat. § 51-1.2	No	N.C. Gen. Stat. § 51-1.2	Yes	Yes	No
North Dakota	No	No	No		N.D. Cent. Code, § 14-03-01	No	N.D. Cent. Code, § 14-03-08	Yes	not specifically addressed by statute	not specifically addressed by statute
Ohio	No	No	No		ORC Ann. 3101.01	No	ORC Ann. 3101.01	Yes	not specifically addressed by statute	not specifically addressed by statute
Oklahoma	No	No	No		43 Okl. St. § 3	No	43 Okl. St. § 3.1	Yes	not specifically addressed by statute	not specifically addressed by statute
Oregon	No	No	Yes		ORS § 106.310	no statutory language	no statutory language	Yes	same sex couples have successfully petitioned	Yes
Pennsylvania	No	No	No		23 Pa.C.S. § 1102	No	23 Pa.C.S. § 1704	Yes	Yes	not specifically addressed by statute
Rhode Island	No	No	No	Yes (limited domestic p'ship benefits to state employees)	R.I. Gen. Laws §§ 28-5-5, 28-5-7, 28-5-5 and 28-5-7	no statutory language	no statutory language	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
South Carolina	No	No	No		S.C. Code Ann. § 20-1-10 / S.C. Code Ann. § 20-1-15	No	no statutory language	Yes	not specifically addressed by statute	not specifically addressed by statute
South Dakota	No	No	No		S.D. Codified Laws § 25-1-1	No	S.D. Codified Laws § 25-1-38	Yes	not specifically addressed by statute	not specifically addressed by statute
Tennessee	No	No	No		Tenn. Code Ann. § 36-3-113	No	Tenn. Code Ann. § 36-3-113	Yes	not specifically addressed by statute	not specifically addressed by statute
Texas	No	No	No		Tex. Const. Art. I, § 32 / Tex. Fam. Code § 6.204	No	Tex. Fam. Code § 6.204	Yes	same sex couples have successfully petitioned	not specifically addressed by statute
Utah	No	No	No		Utah Const. Art. I, § 29 / Utah Code Ann. § 30-1-4.1	No	no statutory language	Yes	No	No
Vermont	Yes	No	No		15 V.S.A. § 8	Yes	15 V.S.A. § 8	Yes	Yes	Yes
Virginia	No	No	No		Va. Code Ann. § 20-45.2 / Va. Code Ann. § 20-45.3	No	Va. Code Ann. § 20-45.2 / Va. Code Ann. § 20-45.3	Yes	not specifically addressed by statute	not specifically addressed by statute
Washington	No	No	Yes		Rev. Code Wash. (ARCW) § 26.04.010 / Rev. Code Wash. (ARCW) § 26.04.020 / Rev. Code Wash. (ARCW) § 26.60.030	No	Rev. Code Wash. (ARCW) § 26.04.020	Yes	same sex couples have successfully petitioned	Yes
West Virginia	No	No	No		W. Va. Code § 48-2-603	No	W. Va. Code § 48-2-603	Yes	not specifically addressed by statute	not specifically addressed by statute
Wisconsin	No	No	No	Yes (limited domestic p'ship benefits to state employees)	Wis. Const. Art. XIII, § 13 / Wis. Stat. § 765.01 / Wis. Stat. § 770.05 (D.P)	No	Wis. Stat. § 765.04 / Wis. Stat. § 765.30	Yes	Yes	Yes
Wyoming	No	No	No		Wyo. Stat. § 20-1-101	No	no statutory language	Yes	not specifically addressed by statute	not specifically addressed by statute

Information valid as of 5/18/10. Information obtained from Lambda Legal http://www.lambdalegal.org/, Human Rights Campaign http://www.hrc.org/, Individual State Statutes, and Independent Research by Law Students

BY DAVID PAUL HOROWITZ

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Average Just Isn't Good Enough (Anymore)

Introduction

Garrison Keillor begins every episode of "The News From Lake Wobegon" with the reminder that in that mythic Minnesota town, "all the women are strong, all the men are good looking, and all the children are above average." This introduction echoes every modern parent's description of their own child; in today's society average simply isn't good enough.

The concept of average has traditionally had a better reception at law, playing a role in computing damages (average wages for a given profession) and providing guidance in medical malpractice cases (average survival time for a given malady) and in accident cases where an operator's reaction time is at issue (average reaction time). It is this final category that is the subject of this and next issue's columns, brought to the fore in the recent First Department decision in *Dibble v. New York City Transit Authority*.[1]

Liability for Breach of Train Operator's Duty of Care

As recently as 2006 the Court of Appeals affirmed a jury verdict for a concededly intoxicated plaintiff[2] who was struck by a train while walking along a catwalk adjoining the train tracks between two stations.[3] In *Soto v. New York City Transit Authority*, the Court framed the issues before it:

> The question presented by this appeal is whether plaintiff's reckless behavior was of such a nature as to constitute the sole legal cause of his injuries, vitiating the duty of care of a train operator. We conclude under the circumstances of this case that it was not, and that the evidence was sufficient to support the verdict. We further conclude that plaintiff's estimate of his own running speed at the time of the accident was admissible and sufficient to lay a proper foundation for plaintiff's accident reconstruction expert to use in forming his opinion.[4]

One issue in *Soto* was the plaintiff's expert's use of testimony by the plaintiff that he was running away from the train at a speed of seven or eight miles per hour in calculating whether or not the train operator had sufficient time to stop the train without hitting the plaintiff.[5] The Court of Appeals then explained plaintiff's expert's calculations:

> Plaintiff's expert then used that estimate in making his calculations. Computing the train's stopping distance assuming the train operator perceived the boys on the catwalk from 151.5 feet away – the distance allegedly illuminated by the train's headlights – and factoring in reaction time, the expert determined that the train could have stopped 51 feet before it reached plaintiff if he had been running eight miles per hour and 37 feet before it reached plaintiff if he had been running seven miles per hour.[6]

The Court explained the legal basis for the defendant's liability and affirmed the jury's finding:

> We have held that a train operator may be found negligent if he or she sees a person on the tracks "from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person" (citations omitted). The train operator's duty certainly is not vitiated because plaintiff was voluntarily walking or running along the tracks or because of any reckless conduct on plaintiff's part.
>
> Thus, it was not irrational for the jury to find NYCTA negligent. There is a reasonable view of the evidence that the train operator failed to see the teenagers from a distance from which he should have seen them, and that he failed to employ emergency braking measures. The jury's determination that the operator could have avoided this accident is an affirmed finding of fact with support in the record and is beyond our further review. Plaintiff's conduct did not constitute such an unforeseeable or superseding event as to break the causal connection between his injury and defendant's negligence.[7]

The Court of Appeals cited two of its prior decisions, *Coleman v. New York City Transit Authority*[8] and *Noseworthy v. City of New York*,[9] where the liability of train operators was affirmed. Readers will no doubt recognize *Noseworthy* as the Court of Appeals decision estab-

lishing a reduced burden of proof in certain wrongful death actions.

The *Soto* court also affirmed the expert's use of the plaintiff's own estimate of his running speed:

> Additionally, the jury was entitled to credit the testimony of plaintiff's expert who used the estimated running speed in making his calculations. The expert did not express an opinion as to how fast plaintiff was running, but used plaintiff's own estimate to determine where the train could have come to rest if plaintiff was running at the speeds he asserted. As a result, it was not "pure speculation and conjecture," but admissible and reliable evidence from which the jury properly concluded that the train could have stopped before striking plaintiff.[10]

The Evidence in *Dibble*

In *Dibble*, the plaintiff was injured when he was struck by a train while on the track bed at the Union Square Station. Two experts testified for the plaintiff, the first an engineer and the second a retired train operator. The engineer testified, *inter alia*, regarding average reaction times for train operators. The jury returned a verdict for the plaintiff, and the First Department reversed:

> The issue before this Court, therefore, is whether such a unit of time-distance measurement may be the sole basis for establishing what amounts to a standard of care in these types of cases. We find that a reaction time that is seconds or fractions of a second longer than the purported average cannot, as a matter of law, constitute the difference between reasonable and unreasonable conduct, or proof of negligence.[11]

The train operator was deposed, but died before trial, and his deposition transcript was read into evidence and is the only meaningful fact testimony discussed in the opinion.[12] Relevant portions of his testimony were:

> [T]hat, on the night in question, as he was coming into the Union Square station, he saw a dark object at the beginning of the station. He stated, "It looked like garbage. . . . Maybe some material left by some of the track workers." It was dark in color and just looked like a "mass" or a "lump." The object was to the left of the rails, almost under the platform, about a foot and a half above the road bed. He testified that he was about three car lengths away at that point, and that he slowed up. He did not stop the train, and did not want to slow up too much. Then, when he was one car length away, he "saw the debris move," and he put the train into emergency.
>
> * * *
>
> When asked if there was a reason he did not stop the train when he first saw the debris, he responded that, if he stopped whenever he saw debris on the tracks, he would have to stop the train every five minutes. He estimated that the time that elapsed between when he first saw the "mass" and when he stopped the train was about four seconds. He was not sure how far the train traveled after he stopped it. He could not tell if he had run over the object, but knew that he had stopped at a point past where he had first seen the debris.
>
> After the train stopped, Moore called the control center to have the power turned off. He saw the plaintiff lying partially on the left running rail between the first and second cars. When asked if plaintiff was in the same location as he had been in before the train hit him, Moore responded that he definitely was not, that he was about a car length further into the station than when Moore had first observed the object he described variously as a mass, a lump or debris.[13]

Plaintiff's engineering expert utilized a one-second average reaction time for the train operator in calculated stopping distances, which were based upon the train operator first seeing an object on the tracks when the train was three car lengths away. Acknowledging that the train operator mistakenly testified that the length of each car as 75 feet when, in fact, each car was 60 feet in length, he provided calculations based upon the shorter car length. Within these parameters, whether the train was traveling at 20 or 24 mph, he calculated that the operator could have stopped the train without striking the plaintiff.

He conceded that the train operator did not comprehend that there was a person on the tracks until the train was one car length away and further conceded that at that distance the train operator could not have stopped the train without hitting the plaintiff. He acknowledged that he had never operated a train and that he relied heavily on measurements that were only estimates.

The plaintiff's engineering expert then opined that at a speed of 20 mph, the operator could have stopped the train without striking the plaintiff even if the operator's reaction time was four seconds, and that, at the higher speed of 24 miles per hour, the operator could have stopped the train without striking the plaintiff even if the operator's reaction time was two seconds.

The defendant called two experts, an engineer and a train operator instructor. The defendant's engineer disagreed with the plaintiff's average one-second reaction time for a train operator:

> [Defendant's Expert Engineer] explained that reaction time involved three phases during which (1) an object is perceived and identified, (2) an analysis is conducted as to what should be done about it, and (3) the decision is acted upon. He opined that, in this case, [the train operator's] analysis could have been slowed by the fact that the plaintiff was wearing dark clothing on a dark subway roadbed. [Defendant's Expert Engineer] also testified that reaction time not only varies from individual to individual but that it

can vary for any one individual at different times.[14]

The Issue of Fact in *Dibble*

The First Department acknowledged that the "Court of Appeals has held that a train operator may be found negligent if he or she sees a person on the tracks 'from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person,'"[15] and "[i]f there is a question of fact and 'it would not be utterly irrational for a jury to reach the result it has determined upon . . . the court may not conclude that the verdict is as a matter of law not supported by the evidence.'"[16]

The First Department identified the question of fact as whether the train operator "could have avoided hitting the plaintiff."

Conclusion (For Now)

Next issue's column will delve into the First Department's analysis of the law as applied to the evidence at trial and the plaintiff's expert's use of an average reaction time in calculating the train operator's ability to bring the train to a stop without striking the plaintiff. ■

1. 76 A.D.3d 272 (1st Dep't 2010).
2. The Second Department, in a 3-2 decision, affirmed the jury verdict.
3. *Soto v. N.Y. City Transit Auth.*, 6 N.Y.3d 487 (2006).
4. *Id.* at 489.
5. *Id.* at 490.
6. *Id.*
7. *Id.* at 493.
8. 37 N.Y.2d 137 (1975).
9. 298 N.Y. 76, 79 (1948).
10. *Soto*, 6 N.Y.3d at 494.
11. *Dibble*, 76 A.D.3d at 273.
12. The only other testimony by a fact witness referenced by the First Department was testimony by the conductor that the train "might" have been traveling at 25 mph.
13. *Dibble*, 76 A.D.3d at 274.
14. *Id.* at 276.
15. *Id.* at 277 (citation omitted).
16. *Id.* at 276 (citation omitted).

Statute of Limitations: An Immoral Defense?

By Henry G. Miller

"I will never plead the statute of limitations when based on the mere efflux of time, for if my client is conscious he owes the debt and has no other defense than the legal bar, he shall never make me a partner in his knavery."[1] David Hoffman, 1784-1854.[2]

The Statute of Limitations. An immoral defense? You don't think so. Here's a case:

Father Walter O'Malley consults with Joe Onorato, an able and honorable lawyer. Patrick McSweet is suing Father O'Malley and the Diocese for sexually abusing him between the ages of 10 and 15, when he was an altar boy.

O'Malley explains, "The Diocese wanted me to go to its lawyer. I did and he told me not to worry – the time to sue has run and it's an easy win. But I want you to know, Joe, the claim is true, every word of it. I did abuse that boy. It's been on my conscience all these years. He was not the only one I abused and I've been trying to atone for it these many years. My memory is as vivid as ever. Patrick and I are the only witnesses to this sin, this crime, and obviously we both remember it like it was yesterday. There is nothing stale about this claim. There are no lost documents or anything like that, like that other lawyer kept asking about. That's why I came to you, Joe. You'll know the right thing to do. That other lawyer explained if we plead the . . . statute of limitations, I think he called it, we'll win and that'll end the case. But, of course, it would be a gigantic injustice. What should we do?"

Indeed, what should Joseph Onorato, an honorable lawyer, do?

Can it be that there are times when pleading the statute of limitations is an immoral act? We have been told over and over that the reason for the statute is to prohibit stale claims. This is necessary, as has been famously argued, when "evidence has been lost, memories have faded, and witnesses have disappeared."[3] But suppose none of that is true? Suppose there is absolutely no prejudice? Suppose the perpetrator's memory of the abuse is as clear as the day it happened? What should the defense lawyer do?

History

There was a time when statutes of limitations were rare.[4] They existed in Roman times but mostly in property cases. In personal actions, the time to sue was literally perpetu-

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al.[5] Personal actions were not limited until 424 A.D. and even then only by long periods, like 30 years.[6] In England, as early as 1236, some statutes prohibited real property actions if occurring after certain periods.[7] By 1540, fixed time periods were enacted for certain actions, but by modern standards, the date of repose was sometimes as laughably distant as 300 years.[8] The Limitation Act of 1623 marks the beginning of the modern era with its strong interest in protecting defendants from stale claims.[9]

The Modern Era

Statutes of limitations are now common. They are justified as being needed so that defendants can wipe the slate clean of ancient obligations.

Early judicial hostility towards statutes of limitations resulted in exceptions, which were a reaction to the rigidity of arbitrarily fixed time periods.[10] But that hostility did not last overly long. As early as 1868 the well-known hostility of the courts of an earlier day no longer existed.[11]

It may be wondered whether that early hostility has given rise to something quite different, perhaps an attitude favoring limitations based on the belief that the fewer lawsuits the better, even if occasional hardship results. The 2007 Supreme Court holding in *Ledbetter v. Goodyear* would seem to support that view.[12] There, a majority actually barred a woman from suing because the statute of limitations had run before she could have discovered she was the victim of unlawful sexual discrimination.[13] (She was given lower raises than men with similar jobs and similar qualifications.) This decision was so shocking that even our divided Congress, which seems to get together on very little, managed to pass legislation to undo that injustice.

Here in New York, the Court of Appeals decided *Heslin v. County of Greene*[14] in February 2010. In *Heslin*, a three year old was beaten to death by her mother's boyfriend. The mother and the boyfriend are in prison and will not share in any lawsuit. The sole potential beneficiaries are two infant siblings of the decedent. The Court held that the wrongful death claim survives based on an earlier decision stating that if the sole distributee is an infant and the infant dies without a will, the statute of limitations will toll until a guardian is appointed or the infant comes of age.[15] However, the personal injury claim was not given the benefit of the toll since claims of an injury go to the estate, not to the distributees. The dissent found that to be an insignificant technical point.[16]

Too Strict?

These cases raise a larger point. Are statutes of limitations being written and interpreted too strictly, often denying fair, meritorious claims the chance of even being heard? Have there been too many draconian applications of the statute as some have suggested?[17]

The law has sometimes found ways to soften the harshness of strict time limits. Actions in equity were historically controlled by the judicially imposed doctrine of laches which went to the discretion of the judge and where the defendant had to show prejudice to defeat the tardy plaintiff.[18] But with the ending of the distinction between law and equity, that area of judicial independence has been reduced.[19]

Legislatures created tolling exemptions for certain disabilities. A 1773 statute had a saving clause for minors, mentally incompetent persons, imprisoned persons and those outside the jurisdiction.[20] As Judge Cardozo once emphasized, there is a need to preserve the rights of a blameless yet tardy plaintiff who is not a fraudulent suitor.[21] And there have always been exceptions for certain felonies like murder, arson and forgery. Indeed, seven states presently do not have statutes of limitations for felonies.[22] On the subject of tolling statutes of limitations, I strongly recommend a splendid article by the Hon. Mark C. Dillon of the Appellate Division, Second Department, which discusses the tolling on account of war.[23]

The Winners

Some, of course, have benefited from a strict application of these statutes. Unsurprisingly, those defending medical malpractice cases support and often rely on statutes

of limitations. In New York, the medical malpractice statute was reduced to two and a half years from the usual three-year negligence statute as part of a heavily lobbied "reform."[24] Physicians and hospitals understandably worry about potentially limitless statutes. They believe they have a right to be free of stale claims. Nonetheless, sometimes even they acknowledge time should be extended for injuries that are "inherently unknowable," of which the plaintiff is "blamelessly ignorant."[25]

> A debt which is time-barred is still a debt. It's just the remedy that is gone.

Municipalities have long benefited from a strict application of 90-day notices of claim, where a claimant must show good cause for a claim to survive a late notice. Those sued frequently are always hoping for a shorter statute. One understands why frequently sued corporations, such as tobacco companies, want and seek shorter statutes of limitations. It's in their self interest.

Even some accused of crimes benefit from a strict application of these statutes. Pending cases of sexual assault have been closed because the statute expired, even when there was DNA evidence identifying the perpetrator.[26] Since 2000, Manhattan prosecutors have closed over 690 sexual assault cases, despite solid leads and occasional identification of the perpetrators through DNA evidence, because of the expiration of the statute of limitations.[27] Some states, including New York, have passed or will soon be passing legislation extending the statute of limitations or even removing it for sexual offenses in which DNA evidence is found at the crime scene.[28]

Is There a Better Way?

Statutes of limitations are arbitrary, serving as artificial constraints on a party's time to sue or society's time to prosecute. Who can say that a six-year limitation for a contract dispute is the only correct time limit? Would not seven years or five years serve the same purpose?

In some ways, the doctrine of laches is more beguiling. There, prejudice is determinative. Let the defendant show that memories have faded, documents have been lost or witnesses are no longer available. Then, there is prejudice. Perhaps it could be argued that statutes of limitations should be applied only if the defendant can show prejudice. That, of course, would be a difficult rule to apply. It would burden our courts with almost endless litigation and many satellite controversies. Yet, there is a ring of fairness to it that does not always exist with arbitrary time limitations striking down claims that just might be meritorious.

A Passionate Issue

Nowhere is this dispute more intensely emotional than in sexual abuse claims of children, incidents of which can take place at school, camp or church. Recently, Professor Lawrence Lessig of Harvard Law School, director of its Center of Ethics, labeled New York as having "one of the nation's most restrictive statutes of limitations for child sexual abuse, requiring victims to sue within five years of turning eighteen, whether or not they have recognized the psychological harm caused to them by their abuse."[29]

A bill was introduced in New York to give victims another five years to seek compensation, plus a one-year window for victims blocked by the old limitations.[30] This legislation has passed the Assembly three times, but the state Senate has refused to consider it.[31] According to Professor Lessig, there has been heavy lobbying against this bill by the New York Catholic Conference,[32] claiming that top-dollar lobbyists have been engaged to kill the bill.[33] He reports that one bishop threatened to close schools and parishes in districts where legislators vote for the bill.[34] Professor Lessig found this at variance with the mission of the Church where political engagement should be shaped by a focus on the dignity of every human being, particularly the weak and the vulnerable.[35] It is obvious that blocking this reform most injures those who are weak and vulnerable.

Recently, the Vatican doubled its own statute of limitations to defrock a priest to 20 years from the victim's 18th birthday.[36] But, significantly, the Vatican did not urge an end to the statute of limitations for victims of sexual abuse. Nor did it urge that victims be given more time to bring their claims.

But we need not restrict this discussion to the highly charged sexual abuse cases. Consider a moral debt.

Your Client Owes the Money

Johnny C., the creditor, lends his good friend, Billy D., the debtor, $100,000 so he can start a business. Billy D. says, "I'll pay you back as soon as I can" and writes a promissory note for the debt. The statute is six years. Seven years later, Billy D. hasn't paid. Then Johnny C. and Billy D. have a falling out. Johnny C. desperately needs the money and says, "I want my money." Billy D.'s business is thriving. He has the money, but he's angry at Johnny C. and refuses to pay. Johnny C. sues. Billy D. comes to you to defend him. He says, "I owe him the money. I remember it like it was yesterday. Here's a copy of the note I signed. I understand we can beat this claim by pleading the statute. Hah! Hah! Plead it. Whoever said life is fair? Plead that statute and we'll have the last laugh and a good drink together."

What should you do, Counselor? All documents are preserved. Memories are intact. All witnesses are available. What is the justification for Johnny D. and his law-

yer asserting the statute of limitations against this just debt?

Would the assertion of the statute of limitations in that case be an immoral act?

Speaking of statutes of limitations and statutes of fraud, one commentator noted that "there are good reasons for these rules but it will be clear they can sometimes be used to defeat claims which are both substantively just and otherwise relatively provable."[37]

Indeed, a debt which is time-barred is still a debt. It's just the remedy that is gone. Some courts have held that a new promise to repay an old debt removes the obstacle of an expired statute of limitations.[38] Obviously, some courts are looking for a moral way out.

Many years ago it was written that the "fact that a debt is barred by the statute of limitations in no way releases the debtor from his moral obligations to pay it."[39]

So what should a lawyer do?

The Lawyer's Role

Counsel for defendants must confront the issue of whether to assert the defense. The conscientious lawyer, of course, wants to assert every defense legitimately available. In most cases, justification can be found to assert the statute: memories are less clear, a crucial document cannot be found, a witness is no longer available. Lawyers are usually adroit at finding a fact that saves them from having to face up to difficult moral dilemmas.

The problem lies in the hard case when no excuse exists and the defendant concedes the truth of the claim, e.g., the abuse by Father O'Malley or the debt of Billy D. (In our classroom hypotheticals we try not to give the students any escape from these ethically difficult decisions.)

Explain the Law?

Must the lawyer advise the client of the law, even when the lawyer believes pleading the defense would be immoral?

> The stated goal of the statute of limitations is to promote reliance, efficiency and finality in legal proceedings as well as to economize judicial resources. To be clear, the statute of limitations is not to insure the equitable paying back of loans. Thus, advising the client about the possibility of asserting the statute as a defense, violates neither the law nor its spirit (although it might violate moral notions of fairness and justice).[40]

Few disagree that the client has a right to know. It is not the role of a lawyer to play the Supreme Judge and decide whether even to tell the client about an iron-clad defense because counsel thinks the defense is immoral. (In addition, lawyers who do that had better alert their malpractice insurance carrier because the day may come when the irate client who lost the case will learn that a perfect defense not only was not pled but it was not even discussed.[41])

No, lawyers sworn to represent clients vigorously cannot place their judgment over their clients' by failing to inform them of their rights. That way leads to chaos. Lawyers must advise the clients of the defense.

Refuse and Withdraw?

The client has been informed and wants to plead the defense. "Sure I abused the boy. Sure I took the money. But I'm entitled to the benefit of the law of limitations. They knew what they were doing in Albany when they passed that law." (Really!)

What do you do now, Counselor? The defense sickens you. The child was abused. The money is owed. You can't stomach it. Should you refuse and withdraw?

Of course you should. Professor Robert P. Lawry, of Case Western Reserve School of Law, is clear: Lawyers who refuse are part of the best moral tradition.[42] Professor Jack L. Sammons, Jr., of Mercer Law School concurs: A lawyer may certainly refuse to represent a client when the client is asking for a statute of frauds defense to a just claim.[43]

> Lawyers must advise clients of the defense, but should withdraw when they find the defense morally offensive and the client wants it asserted.

No one has to take a case. But once a lawyer takes a case and the client insists on a course the attorney can't morally abide, that lawyer must withdraw.[44] Hopefully, the client will consent to the withdrawal, but if not, a delicately worded motion to withdraw is in order. Most judges, when sensing such an impasse between client and attorney, will permit the withdrawal.

The Hard Case: Represent and Refuse?

You represent the culprit who wants the air-tight legal defense even though the case is morally indefensible. You haven't withdrawn or can't for whatever reason. Can you decide on your own not to plead the defense?

Surprisingly, some scholars say "yes," including David Hoffman, the so-called Father of American Legal Ethics, quoted above in the introduction to this article, who says he would never be a partner in the knavery of pleading the unjust defense.[45] William H. Simon, Professor of Law at Columbia University, argues that a lawyer ought to have discretion regarding whether to plead the statute of frauds for a client who clearly owes a moral debt.[46]

However, that approach runs against the traditional concept of a lawyer's duty to vigorously represent a client, including using any defense legitimately available. The weight of authority is against Hoffman and Simon.

Professor Lawry challenges Simon:

> Regarding the point at hand, he seems to argue that lawyers should have the right to decide whether or not to plead the statute of frauds without informing the client. The client's informed consent, not to mention his moral autonomy, would thereby be vitiated. This would turn our present system upside down. . . . I completely disagree. I think Simon ignores what it means to "represent" someone in the "adversary system."[47]

Lawry goes further:

> [T]o suggest (lawyers) can take these cases and not plead a good affirmative defense without their client's consent is to grant fearful power to lawyers and would turn the profession of lawyering on its head. There is an obligation on the part of the lawyer to try to have the client do the morally right thing. However, if the client wants to stand on his legal rights, how can we allow the lawyer to deprive his own client of such rights without due process of law? Would we say it is permissible for a Judge to decide the case without process or without justification other than his belief that the defense's position was sounder than plaintiff's? Of course not. . . . Why should the lawyer be the one to adjudicate those rights rather than the system which is set up to do so?[48]

And finally, Professor Daniel Markovits of Yale Law School:

> Thus, it is one of the banalities of legal ethics that a lawyer must assert technical defenses to defeat morally valid claims – claims that a client has a moral obligation to honor.[49]

It bears repeating, the dilemmas described here rarely happen in actual practice. "The lapse of time is apt to introduce all manner of morally significant variables that my client will probably understand better than I do. If my client is a decent person and has discussed his thought about the question fully, I will probably not feel obliged in conscience to gainsay him."[50]

If the client wants the defense, it must be pled.

A Greater Concern

When starting this article, my greatest concern was for the lawyer who had a defense to an obviously just claim. My emphasis was misplaced. The answers are there. Lawyers must advise clients of the defense, but should withdraw when they find the defense morally offensive and the client wants it asserted. But when the lawyer remains in the case and the client wants the defense, it must be pled.

A More Important Issue

I believe a more important issue is with the statutes themselves. They don't deal with the merits or justice of a case. They are merely arbitrary constraints imposed for reasons of practicality.

Statutes of limitations and time limits for notices of claim are, of course, important. History has shown their worth. No one seriously calls for an abolition of these legal defenses with an exclusive return to the doctrine of laches. But perhaps, when we remind ourselves of the arbitrary nature of these statutes and their ability to prevent just cases from even being heard on their merits, we should move toward a policy of more narrowly construing these time limits.

Judges who interpret the laws and legislators who make the laws must, of course, balance the equities. But shouldn't they do all they can to protect those who may have meritorious claims? Shouldn't they be intolerant of ending lawsuits merely because of the constraint of time lapsed when no harm has been done by the delay? Shouldn't there be a broad reading of saving statutes which toll for disabilities such as infancy or incompetence? Shouldn't there be a greater use of the doctrine of equitable estoppels to bar the pleading of the defense of the statute of limitations? In short, when there is no prejudice, shouldn't our lawmakers and judges strain to find a way to give the plaintiff or prosecutor their day in court?

What I'm trying to get at is this: I believe the attitudes that motivated the majority in the notorious *Ledbetter* case[51] are what we must root out. Instead of straining to find a way to reach the merits of the case, there seemed to be zeal on the part of the majority to end the lawsuit in a severe and unforgiving manner.

History is the great teacher. From it, we learn these statutes are imperfect, and it can't be said often enough, they are merely arbitrary instruments to prevent claims from becoming endless in time. They are not substantive rules. They do not help to find justice. They are merely rules of practicality and, therefore, should be treated as such. Respected, yes, but applied with that wisdom and flexibility that have always characterized our most enlightened judges.

To put it simply, legislators should be careful about imposing strict limits on the time to sue or prosecute, and judges should be careful not to interpret these statutes in a way that permits little escape from their harsh limits. Why? Because injustice may lie that way.

A good example of the path to be followed has been shown by a recent decision of the Supreme Court of Vermont in *Turner v. Roman Catholic Diocese of Burlington, Vermont*.[52] It is another all-too-familiar and sorrowful case of a parishioner alleging that as a minor he was sexually molested by a priest. The statute of limitations was, as usual, the obstacle.

The Vermont court held that the statute only began to run when the parishioner was on notice that the diocese may have breached its duty to prevent the abuse, not just when the parishioner was assaulted.[53] The Vermont court acknowledged its holding was against the majority rule.[54] The court reasoned, however, that the existence of any duty was not apparent to the plaintiff at the time his injuries were inflicted. It argued that the majority rule is unrealistic given the limitations on a plaintiff's ability to discover the necessary evidence.[55]

The point here is not as to the specifics of the case but rather to the willingness of the Vermont court to reach out and try to get to the merits of the case rather than apply the statute in an inflexible way.

In New York, courts have occasionally imposed an equitable estoppel against the pleading of the statute of limitations when the defendant's wrongdoing caused the delay in filing suit.[56]

In applying the doctrine of equitable estoppel, the New York Court of Appeals stated:

> Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing – a carefully concealed crime here – which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.[57]

But New York has been reluctant to use this doctrine extensively.[58] I believe justice would be better served by an expansion of this doctrine.

It is encouraging to read the United States Supreme Court's recent unanimous ruling in *Merck v. Reynolds*.[59] The Court held that the litigation was timely and must go forward in spite of the defendant's insistence that the suit was filed too late under the two-year statute of limitations. The Court found that the clock should start ticking only after the plaintiffs discovered the facts of the fraud violation.[60] This ruling did not guarantee that the plaintiffs would prevail; it only allowed them their day in court.

A further step in the right direction came two months later in *Krupski v. Costa Crociere S.p.A.*.[61] The Supreme

Court held that even though the statute of limitations expired, Krupski could amend her original complaint and add Costa Crociere as a defendant. In this decision, Justice Sotomayor stressed that "repose would be a windfall for a prospective defendant who understood, or should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity."[62]

On the other hand, it was discouraging to read that the New York State Senate, by a vote of 9-6 in the Senate Codes Committee, doomed the reform legislation concerning sexual abuse once again for the remainder of that session.[63] The legislation would have permitted victims to file lawsuits against predators after the original statute of limitations expired. The bill, known as the Child Victims Act, was fervently opposed by the Catholic Church and several Orthodox Jewish groups which were concerned about potentially devastating financial implications.[64] When the bill was expanded to include public institutions like schools, it earned the opposition of the New York State School Boards Association, the New York Council of School Superintendents, the New York Association of Counties and the New York Conference of Mayors.[65]

The financial argument seems pale alongside of the rights of the victims. However, the power of the purse is much greater than the power of a principle, even in support of victims of sexual abuse. Or, to put it another way, some seem to have forgotten that one of the main purposes of the law is to make sure the powerful do not always get their way.

Not a Radical Departure

While it is true that many cases would be resolved differently if we adopted a policy of construing statutes of limitations more narrowly, I do not believe it would be a radical departure from traditional judicial reasoning. In fact, Judge G.B. Smith of New York's Court of Appeals, in his dissent in *Estate of Boyle v. Smith*,[66] said plainly that the policy considerations of repose "do not outweigh the policy considerations of addressing affirmative wrongdoing." That is it. That is the argument I would like to make personally to every judge who has to decide whether to bar a claim because too much time has elapsed. Yes, there must be time limits but more important, our judicial system must be an accessible forum for the undoing of wrongdoing. The genius of our common law has been in trying to find ways to provide a remedy for the wrongs that afflict us.

Different Results

Had the attitude espoused by Judge G.B. Smith been controlling, certain cases would have been decided differently, and in my opinion, most respectfully intending no presumption, more correctly. Several examples are as follows.

Judge G.B. Smith of New York's Court of Appeals, in his dissent in *Estate of Boyle v. Smith*, said plainly that the policy considerations of repose "do not outweigh the policy considerations of addressing affirmative wrongdoing."

Zumpano and *Estate of Boyle*

In February 2006 the New York Court of Appeals decided two cases of alleged abuse by priests exploiting young people entrusted to their care – *Zumpano v. Quinn* and *Estate of Boyle v. Smith*.[67] Both cases presented the legal question of whether equitable estoppel applies to toll the statutes of limitations for plaintiffs' claims.

In *Zumpano v. Quinn*,[68] Zumpano brought an action against a priest, a bishop, and the Catholic Diocese of Syracuse, alleging an ongoing abusive relationship beginning when he was 13 years old, and continuing until he was 20. The complaint was brought years later. Zumpano argued that the statute of limitations should be tolled because (1) equitable estoppel should apply; and (2) he suffered from a mental disability created by the defendants' conduct, rendering him unable to function in society or protect his own legal rights.[69]

In *Estate of Boyle v. Smith*,[70] 42 plaintiffs instituted an action, likewise for clergy sexual abuse, against 13 individual priests, a monsignor and both the bishop and the Roman Catholic Diocese of Brooklyn. Most of the abuse occurred while the plaintiffs were minor children, between 1960 and 1985.

The supreme court held that both of these actions were time-barred. The Appellate Division and Court of Appeals affirmed. The Court of Appeals dissent, on the other hand, would have allowed plaintiffs to replead their case.[71] *Boyle* is the very case where Judge G.B. Smith urged that the policy considerations for repose do not outweigh the importance of addressing affirmative wrongdoing.[72]

Sporn

In *Sporn v. MCA Records, Inc.*,[73] a disc jockey, Kae Williams, arranged for a musical group, the Silhouettes, to record a song. Williams leased all rights to the other party, Ember, with the condition that if Ember liquidated its business, the tape of the song would be returned. Ember later liquidated but never returned the tape.

Williams objected to the use of the recording, but he took no action because he could not afford the cost of litigation. He later assigned his rights to the plaintiff, who commenced this action.

The supreme court dismissed the complaint on the ground that the three-year limitations period barred the action.[74] The Appellate Division and the Court of Appeals affirmed. Judge Meyer, of New York's Court of Appeals, dissented,[75] arguing that the cause of action involved a continual violation of the plaintiff's rights and therefore the plaintiff should have his day in court.

IDT Corp.

In *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, IDT alleged that Morgan Stanley breached its fiduciary duty by disclosing confidential information.[76]

New York's First Department held that claims were not time-barred because they fell under the six-year statute of limitations. However, that was overruled by the Court of Appeals which concluded that the three-year limitations period applied. As a result, the plaintiff's claims of breach of fiduciary duty, tortious interference with contract and misappropriation of confidential information were never heard.[77]

Dodd

In *Dodd v. United States*,[78] the U.S. Supreme Court had to decide on which date the limitation period began to run: (1) was it the date on which the Court "initially recognized" the right; or (2) was it the date on which the right was "made retroactive"?[79] The majority held for the date on which the right asserted was initially recognized.

In enforcing the statute of limitations based on a strict reading of 28 U.S.C. § 2255 ¶6(3), the majority recognized the potential for harsh results.[80] Justice Stevens, in his dissenting opinion, argued that the majority's reading resulted in the possibility that the statute of limitations period could run before the cause of action even accrued.[81]

In short, those who would have allowed the claims to survive were trying to find a way for these cases to be heard on the merits. In my view, had they prevailed, justice would have been better served and the fabric of the law would not have been injured.

Conclusion

Statutes of limitations and statutes of frauds, while necessary, are not designed to ensure a just result. When applied severely and unforgivingly, they produce injustice. They are merely statutes of convenience. As such, they should be legislated and applied sparingly and flexibly and not given quite the same weight as the Magna Carta, because they can wreak terrible injustice.

The approach for which I contend is not something radically removed from the mainstream. I can think of no better way to end this article than by quoting a country lawyer from upstate New York who went on to become a Justice of the Supreme Court.

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.[82]

That was Justice Robert Jackson writing in the year 1945.

We were wise to codify these statutes of repose but all too often they seem to have taken on a life of their own. Some have mistaken these expedient, pragmatic devices as fundamental rights for the defense. They are not. I believe it is time for a wiser and more flexible approach. ■

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1. David Hoffman, A Course of Legal Study, Addressed to Students and the Profession Generally 754 (2d ed. 1836). Hoffman's statement has been challenged by several legal ethics scholars, including Yale Law School professor Daniel Markovits. *See* Daniel Markovits, A Modern Legal Ethics: Adversary Advocacy in a Democratic Age 215–16 (2008) (while I do not find Hoffman as elitist or as generally outdated as some authors . . . I do think he goes too far here).

2. David Hoffman lived from 1784–1854. He was a Professor of Law at the University of Maryland from 1816–1832. His influence continues to impact the legal world today as demonstrated by claims calling him the father of American legal ethics.

3. Michael E. Baughman, *Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Repose For Corporate Directors*, 143 U. Pa. L. Rev. 1065, 1070 (1995); *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944).

4. *Developments in the Law Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1177–80 (1950) (*Developments*).

5. *Id.* at 1177–78.

6. *Id.* at 1178.

7. *Id.* at 1177.

8. *Id.*

9. *Id.* at 1177–78.

10. *Developments*, *supra*, note 4 at 1188–89.

11. *See Tynan v. Walker*, 35 Cal. 634 (1868).

12. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, (amending 42 U.S.C. § 2000e-5(e) with respect to claims of discriminatory compensation).

13. *Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting).

14. *Heslin v. Cnty. of Greene*, 14 N.Y.3d 67 (2010).

15. *Id.* at 72–73.

16. *Id.* at 78–82; *see Toll of Statute of Limitations in Wrongful Death Action Allowed When Infant Is Sole Distributee, Doesn't Apply in Personal Injury Action*, 2010 N.Y. St. L. Dig. 604. (Professor Siegel points out that Greene County, the potentially liable defendant, is the winner. Although he comments with some irony that if the infant siblings need public support, the County of Greene will have to foot the bill.).

17. *See* William M. Schrier, *The Guardian or the Ward: For Whom Does the Statute Toll?*, 71 B.U. L. Rev. 575, 587 (1991).

18. *Developments*, *supra*, note 4 at 1183–85.

19. *Id.* at 1188–89.

20. Andrea C. Rodgers & John A. Parkins, Jr., *Recent Development in Delaware Case Law: No Need to Revert to the Unfair Burdens of an Open-Ended Medical Malpractice Statute of Limitations*, 3 Del. L. Rev. 253, 254 (2000).

21. *Gaines v. City of New York*, 215 N.Y. 533, 536 (1915).

22. Corey E. Delaney, *Seeking John Doe: The Provision and Propriety of DNA-Based Warrants In the Wake of Wisconsin v. Dabney*, 33 Hofstra L. Rev. 1091, 1103 (2005) (Those states are Alabama, Kentucky, Maryland, North Carolina, Rhode Island, Virginia and West Virginia.).

23. Mark C. Dillon, *An Overview of Tolls of Statutes of Limitations on Account of War: Are They Current and Relevant in the Post-September 11th Era?*, 13 N.Y.U.J. Legis. & Pub. Pol'y 315 (2010).

24. CPLR 214-a.

25. Rodgers, *supra* note 20, at 268–69.

26. *See*, Delaney, *supra* note 22.

27. *Id.* at 1120.

28. *Id.* at 1119.

29. Lawrence Lessig, *A Better Chance at Justice for Abuse Victims*, N.Y. Times, Apr. 27, 2010, at A23.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Rachel Donadio, *Vatican Revises Abuse Policy, but Causes Stir*, N.Y. Times, Jul. 16, 2010, at A1 & A3.

37. Michael E. Chaplin, *Reviving Contract Claims Barred by the Statute of Limitations: An Examination of the Legal and Ethical Foundation for Revival*, 75 Notre Dame L. Rev. 1571, 1589 (2000).

38. *Id.* at 1591.

39. *Booth v. Haskin*, 17 P. 225, 226 (Cal. 1888).

40. Eli Wald, *Loyalty in Limbo: The Peculiar Case of the Attorneys' Loyalty to Clients*, 40 St. Mary's L.J. 909, 939 (2009).

41. *See* N.Y. Rules of Prof'l Conduct 1.2; 1.4. (Since the client has ultimate authority on decisions involving the overall goals and purposes of the representation, (s)he needs to be informed of all relevant information in order to make the best decision.).

42. *See* Robert Lawry, *The Central Moral Tradition of Lawyering*, 19 Hofstra L. Rev. 311 (1990).

43. Jack Salmon, Lawyer Professionalism 24 (1988).

44. *See* N.Y. Rule 1.6.

45. Hoffman, *supra* note 2.

46. William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1123–24 (Apr. 1988).

47. Lawry, *supra* note 42 at n.307.

48. *Id.* at 359–60.

49. Daniel Markovits, A Modern Legal Ethics: Adversary Advocacy in a Democratic Age, 64 (2008).

50. Daniel Markovits & Robert E. Rodes, Jr., *Book Review: A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*, 54 Am. J. Juris. 187, 193, n.10 (2009).

51. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fairpay Act of 2009, Pub. L. No. 11-2, 123 Stat. 5.

52. *Turner v. Roman Catholic Diocese of Burlington Vt.*, 987 A.2d 960 (Vt. 2009).

53. *Id.* at 975–78.

54. *Id.* at 981–83.

55. *Id.*

56. *See, e.g., Gen. Stencils v. Chiappa*, 18 N.Y.2d 125 (1966).

57. *Id.* at 125.

58. *See Zumpano v. Quinn*, 6 N.Y.3d 666 (2006).

59. *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010).

60. *Id.* at 1787.

61. *Krupski v. Costa Crociere S.p.A.*, 130 S. Ct. 2485 (2010).

62. *Id.* at 2494.

63. Paul Vitello, *For 5th Year, Child Sex Abuse Bill Dies in Legislature*, N.Y. Times, June 3, 2010, at A27.

64. *Id.*

65. *Id.*

66. *Zumpano v. Quinn*, 6 N.Y.3d 666, 672 (2006), *aff'g Estate of Boyle v. Smith*, 5 N.Y.3d 703 (2005) (Smith, J., dissenting) (*Estate of Boyle v. Smith* consolidated with *Zumpano v. Quinn*).

67. *Id.* at 671.

68. *Id.* at 671–72.

69. CPLR 208.

70. *Zumpano*, 6 N.Y.3d at 672.

71. *Id.* at 678.

72. *Id.* at 684.

73. *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482 (1983).

74. *Id.* at 488.

75. *Id.* at 489–90.

76. *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132 (2009).

77. *Id.* at 138–39.

78. *Dodd v. United States*, 545 U.S. 353 (2005).

79. *Id.* at 361.

80. *Id.* at 359. (discussing 28 U.S.C. § 2255 [West Supp. 2005] [Title 28 U.S.C.A. § 2255 establishes a "1-year period of limitation" within which a federal prisoner may file a motion to vacate, set aside, or correct his sentence under that section]).

81. *Dodd*, 545 U.S. at 366–67.

82. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945).

Limitations on the Duty to Advise: Knowing When It's Time to Say More, Not Less

By Paul Bennett Marrow

When advising a client, it sometimes is important to consider not only what not to say, but how much you are required to say. Where is the line when it comes to the obligation to advise about *all* the consequences of your client's actions? This question can be troubling, and the answer you choose could possibly lead to a claim for malpractice.

A hypothetical: Suppose you're called upon to represent a criminal defendant, an American citizen, a licensed veterinarian who owns and operates a chain of animal hospitals located throughout the New York metropolitan area, and who has had an average income over the past 10 years of $450,000 annually. The client is charged with custodial interference in the first degree (N.Y. Penal Code § 135.50), a class E felony. You negotiate a plea of guilty to custodial interference in the second degree (Penal Code §,135.45), a class A misdemeanor with a penalty of probation (Penal Code § 65(3)(b)(i)).

Do you have a legal duty to advise the client as to *all* the consequences that might result from the plea? In particular, are you obligated to give advice concerning the possibility that your client's professional license will be the subject of sanctions by accepting the plea? And if you fail to provide adequate guidance, can you be held liable for malpractice?

It turns out that, at least in New York, these are tricky questions. This article is about the twists and turns that must be confronted before a satisfactory answer can be determined.

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Before There Is a Malpractice, There Must Be a Duty to Provide Advice

New York evaluates the validity of a guilty plea by determining if it was made voluntarily. A defendant must be "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel"[1] to ensure a full understanding of what he or she is doing and what the plea actually means. "Consequences," as used in this context, come in at least two flavors: (1) *direct*, which is to say they are meaningful and the defendant must be advised, and (2) *collateral*, in which case there is no requirement to give advice.[2]

> A plea of guilty has the same legal status as a conviction based on a finding of guilt by a jury or judge.

How do we determine which flavor is involved in a particular matter? If the consequence is one that "has a definite, immediate and largely automatic effect on the defendant's punishment,"[3] it is said to be direct and the failure to warn can support a motion for a hearing[4] to determine if the plea should be vacated on the grounds that the defendant was thereby prejudiced. A collateral consequence is one that has "a result peculiar to the individual and generally results from the actions taken by agencies the court does not control."[5] The obligation to advise/warn about a direct consequence is the same whether or not a defendant is represented by counsel,[6] which is to say that the court is obliged to give warning.[7]

The direct/collateral analysis applies to cases involving the failure to warn as distinguished from a claim that the guilty plea came about because of the defendant being misadvised. The latter situation calls for a different analysis. In *Strickland v. Washington*,[8] the Supreme Court established a two-pronged test to determine the impact of "deficient" representation: (1) that the representation was deficient, meaning that "counsel made errors so serious that counsel wasn't functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment,"[9] and (2) that the representation prejudiced the outcome, which is to say the errors were so serious as to deny the defendant a fair trial and thereby render the outcome unreliable. If these elements are satisfied, the judgment can be vacated and a new trial ordered.[10]

In *People v. Ford*, a case involving an attorney's failure to advise about the possibility of deportation, the New York State Court of Appeals indicated approval of cases declaring the following consequences to be collateral: the loss of the right to vote or travel abroad, loss of a civil service job, loss of the right to possess a firearm and an undesirable discharge from the Armed Services. And, most significant, it also found that deportation of a fully documented legal alien after the entry of a guilty plea and conviction of a crime involving moral turpitude is collateral.[11]

Early in 2010 the U.S. Supreme Court weighed in, finding that in a case involving deportation there was no need to evaluate the consequence as being either direct or collateral. Instead, in *Padilla v. Kentucky*, the Court concluded that because deportation is "uniquely difficult" to classify as either direct or collateral, these standards are "ill-suited" for evaluating a claim that an attorney's advice was deficient, at least for purposes of determining if post-conviction relief is available.[12] In the opinion for the Court, Justice Stevens gave great emphasis to the "presumptively mandatory" nature of the removal statute,[13] "the close connection to the criminal process," and the straightforward, truly clear and certain consequences of a plea leading to the conclusion that Padilla was entitled to a hearing to determine if the advice he had received prejudiced his decision to plead guilty. In addition, the Court indicated that, for purposes of evaluating a claim where "but for" the faulty advice the defendant wouldn't have accepted the plea, a court should take into account the desire of a defendant to look beyond the criminal consequences because of a value judgment by the defendant. In *Padilla* the Court took note of the value a defendant might give to remaining in the United States when weighed against having a criminal record.

In sum, for matters involving a guilty plea, *Padilla* appears to create a first-tier standard for the evaluation of a claim for post-judgment relief based on constitutionally deficient legal advice. Where the consequence is found to be presumptively mandatory and closely connected to the criminal process, it can be said to be "uniquely difficult" to classify it as either *direct* or *collateral*, thereby rendering those standards "ill suited" for the task and *entitling* a defendant to a hearing to determine if deficient advice prejudiced the taking of a guilty plea.[14]

Padilla supersedes the *Ford* ruling that earlier found deportation to be a collateral consequence and in doing so makes clear that the "uniquely difficult" and "ill suited" rules are now incorporated into New York jurisprudence to the extent that the post-judgment procedures of the Criminal Procedure Law are in play. This means that from here on when a court considers a CPL § 440.10(1)(h) motion based on constitutionally deficient representation, it must first look to see if the *Padilla* rules apply and if not, then the court must turn to an analysis based on the direct/collateral standards.

What *Padilla* doesn't resolve is what other circumstances, if any, are likely to be deemed "uniquely difficult" so as to be sufficient to avoid the direct/collateral analysis. For example, does the consequence of a sanction

against a professional license rise to the level requiring a *Padilla* analysis? And if so, why?

Does a Sanction Against a Professional License Trigger the Application of the *Padilla* Rules?

Padilla seems to suggest that the determination concerning deportation involves four elements:

1. The law relative to the consequences must be succinct and clear.
2. There must be a presumption that the consequence is mandatory.
3. The consequences must have a close connection to the criminal process.
4. The defendant must be unable to divorce the consequence from the criminal process because of a value judgment of the defendant.

The hypothetical provided in the beginning of this article describes a successful professional, licensed and regulated by the State of New York. Is it fair to assume that if this individual agrees to plead guilty to a Class A misdemeanor, the state will automatically impose a sanction against the license? And if so, is this enough to invoke a *Padilla* analysis for the purpose of deciding if there is an obligation to warn?

The Office of the Professions at the New York State Education Department licenses and regulates 48 professions.[15] (Attorneys are regulated by the Appellate Divisions and physicians are licensed and regulated by the New York State Department of Health. Teachers are licensed and regulated by the Commissioner of Education in accordance with procedures that differ significantly from those prescribed for the other professions.) Veterinarians are included among the professions licensed and regulated by the Education Department.

Licensed professionals must adhere to the professional standards prescribed by the Board of Regents. Unprofessional conduct is broadly defined by N.Y. Education Law § 6509. Conviction for any act constituting a crime under New York law, federal law or the law of any other jurisdiction and which, if committed within New York would be a crime under New York law, constitutes unprofessional conduct and a professional license "shall be subject" to the penalties provided by Education Law § 6511.[16] A plea of guilty has the same legal status as a conviction based on a finding of guilt by a jury or judge.

Once convicted, the Education Department is notified and a hearing is required before the Regents Review Committee for the singular purpose of determining *what* penalty shall be imposed against the defendant's license. Education Law § 6510 provides that the Regents Review Committee *must* make a recommendation "as to the measure to be imposed." The Board of Regents has the last word because it can accept or reject the recommendation and impose any of the penalties prescribed in Education Law § 6511. But neither the Regents Review Committee nor the Board of Regents has the authority to waive the imposition of a penalty as prescribed by law.

In other words, while imposing a penalty is mandatory, which penalty is to be imposed is generally within the discretion of the Board of Regents.

Courts can upset a determination if it is clear that there was no rational basis for the action under review. When applied to decisions involving punishment or discipline, courts look to see if the penalty imposed is "disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness."[17]

Perhaps it's too early for the courts to directly address whether automatic sanctions against a professional license rise to a level requiring that the direct/collateral standards be set aside. The arguments in favor of a *Padilla* analysis leading to the exclusion of the rules in *People v. Ford* seem clear:

- The Education Law is clear and succinct as to the requirement of a sanction.
- The imposition of a sanction against a professional license is mandatory.
- While a court has no control over which penalty will be imposed, the court is required to take judicial notice that upon the acceptance of a guilty plea, some penalty will be imposed by the Board of Regents.
- The imposition of a sanction against a professional license is hard to divorce from the criminal process.
- The imposition of a sanction against a professional license could have severe economic consequences resulting in a willingness of many professionals to accept a criminal record.

What isn't clear is whether the imposition of a mandatory sanction without more is enough to trigger a *Padilla* analysis. It seems we will have to just wait and see.

Is *Padilla* the End of the Line?

If we assume a *Padilla* analysis isn't required, does the inquiry end there or is a *Ford* analysis required? And if a *Ford* analysis is required, is the certainty of *some* sanction against a professional's license a *direct* or *collateral* consequence?

This question was recently considered within the context of whether suspension or revocation of a teaching license is a "severe collateral consequence" within the meaning of the Judicial Diversion Program provided for in CPL Article 216. *People v. Duffy*,[18] the case at issue, was decided in June 2010 by Supreme Court, Nassau County.

Duffy had a New York State teaching license granted by the Education Department. He was charged with drug possession (Penal Law § 220.09, a Class A felony) and an assortment of Vehicle and Traffic Law violations. He moved for admission to the Judicial Diversion Program *without* a guilty plea on the grounds that there would be

a "severe" collateral consequence, i.e., he "would suffer suspension or revocation" of his teacher's license and therefore his job.

In New York, teachers are subject to regulations issued by the Commissioner of Education. Unlike the disciplinary scheme applicable to most other professions, for teachers there is no certainty of punishment for improper conduct. The operative statute[19] provides that, prior to a final determination, a teacher "may" be suspended without pay in situations involving a guilty plea or conviction of the crime of criminal possession or sale of a controlled substance. After a hearing, the hearing officer is not required to but "may" impose one of a series of penalties. Such possible penalties include reprimand, fine, suspension or dismissal.[20] And unlike the disciplinary scheme applicable to other professions, a teacher can immediately seek judicial review pursuant to CPLR Article 78.

While the *Duffy* court acknowledged the *Padilla* decision, consideration of its impact was thought to be unnecessary because *Padilla* appeared limited to matters involving deportation. Instead, the court conducted a *Ford* analysis to determine if the loss of a professional license could be classified as either a direct or "severe" collateral consequence of a plea of guilty.

Noting that the case was one of first impression, the court adopted a modified version of the *Ford* definition of a direct consequence as its definition for the term severe collateral consequence as used in CPL § 216.05(4)(b). The court found that the factors to be considered are "(1) the nexus between the entry of the guilty plea and the consequence and (2) whether the consequence is likely to be presumptively mandatory or likely automatic by operation of law." The court also found no certainty that any penalty would be imposed and therefore the consequence was not a "severe" collateral consequence within the meaning of the statute.[21]

As discussed above, the statute governing the professional includes a mandate that *some* sanction must be imposed against a professional license if a matter involves a plea of guilty. Courts have authority to set aside the imposition of a penalty but not the selection of the appropriate penalty, which is left to the Board of Regents. The *Ford* rules speak to the certainty that some penalty will be imposed, not to which penalty is likely, so it follows that, when using a *Ford* analysis, courts should find sanctions against a professional's license to be a direct consequence requiring that either a court or counsel, or both, advise a defendant considering the entry of a guilty plea.[22]

The *Strickland* Requirements May Be Problematic

Strickland requires a hearing if the petitioner can show (1) deficient representation and (2) prejudice. Establishing "deficient representation" isn't easy. Doing so requires a showing that "in light of all of the circumstances, the identified acts or omissions [are] outside the wide range of professionally competent assistance." In addition, because of the intrinsic difficulties in making such a finding, courts are required to "indulge a strong presumption that an attorney's conduct falls within the wide range of reasonable professional assistance."[23] Proving "prejudice" is likely to be a formidable challenge as well. Demonstrating *prejudice* with respect to a decision to plead guilty requires the petitioner to show that there is a reasonable "probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[24] Within the context of a guilty plea this means there is a reasonable probability that, but for counsel's errors, the petitioner wouldn't have pleaded guilty and instead would have insisted on going to trial.[25]

But Is the Failure to Warn Malpractice?

Returning to the hypothetical set forth at the beginning of this article, let's assume your client pleaded guilty to the misdemeanor of Custodial Interference and that you failed to advise your client about sanctions against the professional license. As a result of the plea the license is suspended for a period of time and the client loses a substantial amount of income. Is this client likely to be successful in suing you for malpractice? In New York the answer is, "It depends."

Criminal malpractice, as distinguished from civil malpractice, is a complicated subject, most of which is beyond the scope of this article. For our purposes, the discussion is about the failure to give advice and situations involving a vacated plea.

Given the lines of reasoning reviewed up to now, it might seem reasonable to conclude that the malpractice analysis should turn on whether damages are a direct consequence, indirect consequence or severe collateral consequence of the plea. Instead, the pivotal issue is whether the client can prove *actual innocence* of the crime he or she pled guilty to. Strange as it may seem, an attorney may fail to offer advice but unless and until the client can prove that he or she did not commit any crime at all, a claim for malpractice will not lie.

The Actual Innocence Rule

Criminal malpractice necessarily involves a finding of guilt and an inquiry about how that finding came to pass. Was it the criminality of the defendant or was it the malpractice of the lawyer? In cases involving a plea, until it is established that "but for" the advice of counsel the defendant would have elected to plead not guilty and face trial, the proximate cause for the defendant's difficulty is unquestionably his or her own admitted criminality.

With this in mind, New York embraces the "actual innocence" rule: If a criminal defendant can establish actual innocence, it can be said that this showing eliminates the defendant's conduct as the proximate cause of a conviction. Thus, in order to state a cause of action in

criminal malpractice, in addition to the traditional elements – (1) failure by an attorney to exercise care and skill common to the legal community, (2) proximate cause and (3) "but for" the negligence things would have turned out differently[26] – the plaintiff must allege his or her innocence and that the conviction was vacated or otherwise upset.[27]

Other states require proof of "legal innocence," that is, a plaintiff need not show that he or she didn't commit the crime, only that the conviction was or will in all likelihood be vacated on appeal and that "but for" the lawyer's negligence, the plaintiff wouldn't have been convicted in the first place.[28] To be clear, in an actual innocence jurisdiction, showing that a guilty plea was vacated and that the charges were dropped or dismissed for any reason other than an acquittal the former defendant must now establish that "but for" the negligence of the attorney, the first conviction would never have occurred and must plead and prove facts to establish that he or she didn't commit the crime that was charged.

The actual innocence rule is harsh and it has been the subject of a lot of criticism by some courts[29] and many in the academic community.[30] In a civil case, the rule shifts to the former defendant the burden of proving innocence, which is to say that in such a civil matter the former defendant is presumed guilty until proven innocent. This may seem bizarre because (1) such a presumption isn't allowed under any circumstances in the very forum where the malpractice occurred, and (2) no other tort recognized in New York imposes as an element a burden of this kind. The criticisms notwithstanding, the rule has many supporters who claim that there are any number of claimed "public policy" and practical reasons justifying the rule.[31] But in the final analysis it all comes down to courts having little sympathy for anyone who is convicted of a crime for whatever reason, including an attorney's malpractice.

The Actual Innocence Rule and Pleas of Guilty

Assuming that your client succeeds in obtaining an order vacating the plea, the client will still have to face whatever the prosecutor has to throw at him or her. An order to vacate on the grounds that a constitutional right was denied is not the same thing as an acquittal. As Judge Richard Posner properly explained: "Criminal law entitles a criminal defendant to competent counsel, but the consequence if counsel is incompetent and conviction results is a new trial, not an acquittal."[32]

At this stage the possibilities are very limited. Your client can face a jury. If guilty, there would not appear to be any claim for malpractice because the verdict makes it impossible for the client to show actual innocence. This result is perhaps unfair because the malpractice runs to the need for a § 440 Petition, not the ultimate finding of guilt. This cuts the defendant off from compensatory damages directly attributable to the malpractice, damages the client wouldn't have sustained "but for" the negligence of counsel. While it is true that these costs would appear to be a reasonable measure of actual damages, courts just don't hold a lot of sympathy for a guilty defendant / plaintiff.[33]

An order to vacate on the grounds that a constitutional right was denied is not the same thing as an acquittal.

But what would happen if the client is found to be innocent? In this case the actual innocence requirement would be met and the client could now proceed with the malpractice claim, showing that "but for" the negligence of the attorney he or she wouldn't have agreed to the plea in the first instance. But what would the measure of damages be? Most likely the client would be entitled to recover the costs associated with the § 440 Petition as well as lost income for the period between the entry of the plea and the entry of the vacancy order. But what about the client's expenses for the trial and the loss of income while the trial was going on? These items would have been the client's had he or she not pled guilty in the first place, so in all likelihood they wouldn't be recoverable as part of the malpractice claim.

Suppose that the plea resulted in your client having to spend time in prison. Would the client be able to claim damages over and above those previously discussed, i.e., could a jury reasonably find a per diem value for the actual incarceration itself? At least one court has held that the calculation for such damages is "more than perplexing."[34] Further complicating matters, New York limits damages in a legal malpractice action to pecuniary damages, meaning the "economic consequences of the injury, such as medical expenses (and) lost earning."[35] Your client's stay behind bars came to pass by virtue of his or her own actions and all that the order of vacancy established is that those actions weren't voluntary. While it isn't entirely clear, in all likelihood the claim for such damages would not be permitted in New York.

There are three additional possibilities. Faced with having to go to trial your client might assert a technical defense that could lead to the prosecution having to drop charges. An example would be a motion to dismiss based on the statute of limitations. In the alternative, a court might order dismissal on such grounds. And the last possibility is that the prosecution, having been confronted with the order to vacate, might just drop the charges. In all three situations, strange as it may seem, the former defendant would in all likelihood have to bear the burden of having to plead and prove facts sufficient to establish

actual innocence as a condition for the recovery of damages for an alleged malpractice.

Conclusion

Whether it involves deportation or the loss of a professional license or any other matter on the outer limits of one's knowledge, no one reading this article wants to intentionally provide misadvice or omit to give advice that a client might require. As a practical matter all attorneys are required to practice defensively so it's not a surprise that they are often reluctant to say anything more than they believe to be absolutely necessary. When does this tension leave the practitioner on the horns of a dilemma, and what is the best way out? In his concurring opinion in *Padilla*, Justice Alito wisely observed that no lawyer should be expected to know it all, but an ethical lawyer should know enough to be able to let the client know about such limits, in addition to advising the client that it's time for them to seek advice elsewhere:

> By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.'"[36] ■

1. *People v. Gravino*, 14 N.Y.3d 546, 554 (2010) (quoting *People v. Ford*, 86 N.Y.2d 397 (1995)).

2. CPL § 216.05(4)(b) creates a third flavor, *a severe collateral consequence*. In a case of first impression, *People v. Duffy*, 28 Misc. 3d 718, 722 (Sup. Ct., Nassau Co. 2010) (Jaeger, J.), the court offers the following definition: "In order to determine whether this defendant will be subject to "severe collateral consequences" as a result of a plea of guilty, the following factors should be considered: (1) the nexus between the entry of the guilty plea and the consequence and (2) whether the consequence is likely to be presumptively mandatory or likely automatic by operation of law (citing *Ford*, 86 N.Y.2d 397; *People v. Patrick*, 24 Misc. 3d 1203(A) (Sup. Ct., N.Y. Co. 2009)). Once the court determines whether the consequence is presumptively mandatory, the Court must consider whether the resulting consequence is more punitive or policy driven and whether the prejudice to the defendant outweighs the public policy considerations." *Duffy*, 28 Misc. 3d at 722.

3. *Ford*, 86 N.Y.2d at 403.

4. CPL § 440.10(1)(h): "The judgment was obtained in violation of a right of the defendant under the constitution of this state or the United States."

5. *Ford*, 86 N.Y.2d at 403.

6. *Compare Gravino*, 14 N.Y.3d 546, *with Ford*, 86 N.Y.2d 397.

7. *See* CPL § 220.50(7).

8. 466 U.S. 668, 687 (1984).

9. *Id.* at 687.

10. The *Strickland* rule has application in situations involving a plea of guilt. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

11. 8 U.S.C. § 1227. In *People v. Becker*, 9 Misc. 3d 720 (Crim. Ct., Queens Co. 2005), a case involving faulty advice about the consequences of the loss of housing, the court found such misadvice met the first-prong test of the *Strickland* rule and ordered a hearing on the merits.

12. *See supra* note 10.

13. 8 U.S.C. § 1227(a)(2)(B)(i).

14. Padilla claimed that he wasn't advised of the certainty of deportation and that his attorney advised that he "did not have to worry about immigration status because he had been in the country so long." *Padilla*, 130 S. Ct. at 1478.

15. Office of the Professions, New York State Education Department, www.op.nysed.gov (last visited Feb. 4, 2011).

16. There are eight penalties to choose from: (1) censure and reprimand, (2) suspension of license, (a) wholly, for a fixed period of time; (b) partially, until the licensee successfully completes a course of retraining in the area to which the suspension applies; (c) wholly, until the licensee successfully completes a course of therapy or treatment prescribed by the regents; (3) revocation of license, (4) annulment of license or registration, (5) limitation on registration or issuance of any further license, (6) a fine not to exceed $10,000, upon each specification of charges of which the respondent is determined to be guilty, (7) a requirement that a licensee pursue a course of education or training, and (8) a requirement that a licensee perform up to 100 hours of public service, in a manner and at a time and place as directed by the board.

17. *Stolz v. Bd. of Regents*, 4 A.D.2d 361 (3d Dep't 1957). In *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 234–35 (1974), the Court noted: "Of course, terminology like 'shocking to one's sense of fairness' reflects a purely subjective response to the situation presented and is hardly satisfactory. Yet its usage has persisted for many years and through many cases. Obviously, such language reflects difficulty in articulating an objective standard. But this is not unusual in the common-law process until, by the impact of sufficient instances, a more analytical and articulated standard evolves. The process must in any event be evolutionary. At this time, it may be ventured that a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved. Thus, for a single illustrative contrast, habitual lateness or carelessness, resulting in substantial monetary loss, by a lesser employee, will not be as seriously treated as an offense as morally grave as larceny, bribery, sabotage, and the like, although only small sums of money may be involved."

18. 28 Misc. 3d 718, 722 (Sup. Ct., Nassau Co. 2010); *see supra* note 2.

19. Educ. Law § 3020-a.

20. Educ. Law § 3020(4)(a).

21. *Id.*

22. In *People v. Mourad*, 13 A.D.3d 558 (2d Dep't 2004), a case involving misinformation about the consequences of a guilty plea and a dental license, the court, employing a *Strickland* analysis, concluded that the possibility of such misinformation did not support a claim of insufficient assistance of counsel.

23. *Strickland v. Washington*, 466 U.S. 668, 689–90 (1984). *See also People v. McDonald*, 1 N.Y.3d 109 (2003).

24. *Strickland*, 466 U.S. at 694.

25. *Diunov v. U.S.*, 2010 U.S. Dist. LEXIS 59723, 24-25.

26. *Cummings v. Donovan*, 36 A.D.3d 648 (2d Dep't 2007).

27. *Carmel v. Lunney*, 70 N.Y.2d 169, 173 (1987); *Claudio v. Heller*, 119 Misc. 2d 432 (Sup. Ct., Queens Co. 1983) (Buschmann, J.).

28. Kevin Bonnardo, *Note, A Defense Bar: The "Proof of Innocence Requirement in Criminal Malpractice Claims*, 5 Ohio St. J. Crim. L. 341 (2007) (citing Otto M. Kaus & Ronald E. Mallen, *The Misguiding Hand of Counsel – Reflections on "Criminal Malpractice,"* 21 U.C.L.A. L. Rev. 1191, n.2 (1974)).

29. *See, e.g., Jepson v. Stubbs*, 555 S.W.2d 307 (Mo. 1977).

30. *See* Bonnardo, *supra* note 28; Meredith Duncan, "*Criminal Malpractice: A Lawyer's Holiday*," 37 Ga. L. Rev. 1251 (2003).

31. *See* Duncan *supra* note 30.

32. *Levine v. King*, 123 F. 3d 580, 583 (7th Cir. 1997).

33. *Wilson v. City of N.Y.*, 294 A.D.2d 290 (1st Dep't 2002); *Gibson v. Trant*, 58 S.W.3d 103 (Tenn. 2001).

34. *Wiley v. Cnty. of San Diego*, 19 Cal. 4th 532, 545 (1998).

35. *Wilson*, 294 A.D.2d 290.

36. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1492–93 (2010).

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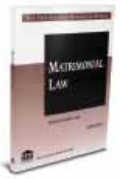

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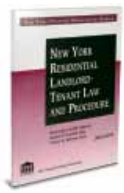

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The views expressed in this article reflect the views of the author only and are not intended as legal advice.

The Other Insurance Dilemma

By Marc A. Perrone

Until recently, New York courts have consistently held that the allocation of loss among concurrent policies on a risk is determined by comparing the terms and intended purpose of each triggered policy to ascertain "the priority of coverage" – the proper sequence in which the policies will be liable to indemnify a loss, up to their respective limits. According to New York courts, the terms of any extra-policy contracts or indemnity agreements are peripheral to the priority of coverage analysis because an insurer has a right to rely on the terms of its own contract with its insured in determining its responsibilities.[1]

In *Indemnity Insurance Co. of North America v. St. Paul*, however, the First Department seemingly adopted a new framework of analysis by determining that the priority of coverage issue was not reached where an underlying trade contract shifts liability from one party to another, and that the primary and excess coverages procured by the liable party are to be vertically exhausted without participation by the other parties' policies.[2] If this ruling withstands appeal it could have a significant impact on construction injury cases and other matters, as it creates a new framework for how courts allocate loss among policies concurrently on a risk where there are underlying indemnity agreements between the liable parties.

Priority of Coverage and Trade Contracts

It is common practice in the construction industry for trade contracts to require the contractor to indemnify the upstream parties (i.e., construction manager and property owner) and to procure insurance protecting the upstream parties and the contractor against any liability arising from the contractor's performance. These trade contracts also typically require that any subcontractor hired by the contractor also indemnify and procure insurance benefiting both themselves and all upstream parties to the project. For example, a project manager hired by a property owner would be required to indemnify the property owner and procure insurance protecting itself and the owner. Similarly, a general contractor hired by the construction manager would indemnify and procure insurance protecting itself and both the construction manager and the property owner. The subcontractor hired by the general contractor would be required to indemnify and procure insurance protecting itself, the general contractor, the construction manager and the property owner, and so on. The coverages each party must procure commonly require both primary and excess policies to satisfy the coverage limits dictated by the trade contract. The ultimate effect is to create a pyramid of coverages, with each layer protecting the owners and more senior

management from any liability arising from construction accidents or injuries.

While this indemnity practice ensures that when accidents occur there is ample insurance to indemnify any liability, the availability of coverage from multiple concurrent policies requires courts to determine how a given loss will be allocated among the various policies. As the Court of Appeals has recognized, determining the "pecking order" of multiple insurers covering the same risk, with each attempting "to distance itself further from the obligation to pay than have the others," has been characterized as a "court's nightmare . . . filled with circumlocution" and has produced "judicial decisions that are difficult to interpret and in some instances impossible to reconcile."[3]

To navigate through this "nightmare," New York courts designate a sequence in which the policies covering the risk will cover the loss, up to their respective limits, until the loss is completely satisfied. So the first policy in the sequence will cover up to its limits of liability, then any loss exceeding the first policy's limits will be recoverable by the second policy up to its limits, then the third policy, and so on. This sequence in which multiple policies on a risk must indemnify a claim is referred to by New York courts as the "priority of coverage."

While a full examination of all the factors possibly relevant to a priority of coverage analysis is beyond the scope of this article, and is so substantial that typically it is assigned multiple chapters in texts and treatises on insurance law, the general framework followed by New York courts is succinct. Priority of coverage is determined first by discerning the purpose of each of the policies on the risk – either primary or excess.[4] Generally, all primary policies covering a risk are exhausted before excess insurance is called upon.[5] To determine whether a given policy provides primary or excess coverage courts focus on each policy's "stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance."[6] Where multiple primary policies or excess policies cover the same risk, courts compare each policy's "other insurance" clause, which usually addresses the policy's intended priority relative to other triggered policies.[7] Notably, additional insureds under a given policy are provided with the same type of coverage (primary or excess) as the named insureds.[8]

Prior to *St. Paul*

State Farm v. LiMauro

New York courts have consistently recognized the Court of Appeals ruling in *State Farm v. LiMauro*, which followed the aforementioned priority of coverage analysis. In *LiMauro*, the court held that the terms of the policies in question, and not any external contracts, control the sequence in which the policies will cover a loss because New York law "recognize[s] the right of each insurer to rely on the terms of its own contract with its insured."[9] Accordingly, several decisions by the Appellate Division have since disregarded the terms of the underlying trade contract and instead compared the various policies to determine "the purpose each policy was intended to serve [primary or excess] as evidenced by both its stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance."[10] New York courts have consistently held that excess and umbrella insurance policies are placed after all triggered primary policies in the priority of coverage sequence because they provide the insured with a "final tier . . . [of] coverage at a premium reduced to reflect the lesser risk to the insurer."[11]

Bovis v. Great American

The First Department addressed these issues in *Bovis v. Great American*.[12] In *Bovis*, the court held, with respect to the priority of coverage for a wrongful death action, that the coverage afforded the owner, construction manager and general contractor by the umbrella liability policy of the subcontractor was excess to the owner's, construction manager's and general contractor's own primary insurance policies.[13] The court reached this conclusion despite the terms of the underlying trade contract, which specifically required the subcontractor to indemnify the owner, construction manager and general contractor, and to procure insurance for the benefit of these parties that would be applicable on a primary basis, without contribution by these parties' own insurance.[14]

Referencing the Court of Appeals holding in *LiMauro*, the First Department reasoned that "an umbrella or excess liability insurance policy should be treated as true excess coverage, and not as a second layer of primary coverage, unless the umbrella policy's own terms plainly provide for a different result. To hold otherwise would . . . merely sow uncertainty in the insurance market."[15] The *Bovis* court, following *LiMauro*, held that the priority of coverage "turns on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance."[16]

The First Department also set aside the argument that the subcontractor's agreement to indemnify the owner, construction manager and general contractor influenced the priority of coverage, holding that "the extent of coverage (including a given policy's priority vis-à-vis other policies) is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage."[17]

The court also specifically addressed the construction manager's argument that the subcontractor's insurers should be held liable for the entire loss because the primary carriers of the owner, construction manager and

general contractor could otherwise seek recovery from the subcontractor, and ultimately its umbrella carrier, as subrogees pursuant to a claim of contractual indemnification. Unpersuaded by this argument, the court nonetheless held that "the possibility of this [subrogation] scenario playing out in the long run does not, however, have the effect, at this stage, of negating the priority of coverage among the applicable policies arising from the terms of those policies," adding "[t]he rights and obligations of the insurers are governed by their respective insurance policies, not by the underlying trade contracts among the insureds."[18]

Tishman v. Great American

Soon after *Bovis*, the First Department addressed very similar issues in *Tishman v. Great American*.[19] In *Tishman*, as in *Bovis*, the Court addressed the priority of coverage for a bodily injury action arising from a construction site. The court held that the commercial umbrella policy issued to the subcontractor provided "pure excess" coverage, and could not be invoked on behalf of the construction manager prior to exhaustion of the construction manager's own primary policy.[20] As in *Bovis*, the court set aside the fact that the subcontractor had indemnified the construction manager pursuant to the underlying trade contract.[21] Instead the court focused on determining the type of coverage each policy was intended to provide – primary or excess – as evidenced by both the ratio of the premium relative to the coverage afforded and the wording of each policy's clause concerning excess insurance.[22]

The court's ruling clearly turned on its finding that the construction manager's policy was intended as a primary policy and the subcontractor's policy was intended as a "pure excess" policy.[23] While the primary policy issued to the construction manager specifically stated it was to be "excess over any other insurance, whether primary, umbrella, [or] excess . . . [i]f a 'claim' arises out of the actions of a hired contractor or subcontractor who has agreed to . . . [c]ontractually indemnify the 'insured' [construction manager]," the court nonetheless reiterated its holding from *Bovis* that "the existence of such a clause did not transform a policy [referring to the subcontractors excess policy] which was clearly intended to be excess into a lower-tier policy, as indicated by the comparatively small[er] premium."[24] Thus, the court was emphasizing that the proceeds of a policy determined to provide excess type coverage cannot be reached before all primary type coverage on the risk has been exhausted.

United States Fidelity & Guaranty Co. v. CNA Insurance Cos.

In *United States Fidelity & Guaranty Co. v. CNA Insurance Cos.*, the Third Department directly addressed whether the indemnity clause in a trade contract can override the priority of coverage analysis.[25] In *United States Fidelity*, a subcontractor's primary insurer (USF) sought contribution from the general contractor's primary insurer (CNA) for loss arising from a bodily injury action occurring on the premises of a construction project.[26] USF sought a priority of coverage determination based on a comparison of both primary policies' "other insurance" clauses.[27] CNA argued that the court should instead look to the underlying trade contract indemnity clause, which provided that the subcontractor would completely indemnify the general contractor for claims arising from performance of the contract.[28] The Third Department held the priority of coverage analysis must be controlled by the policies' comparative "other insurance" clauses, not the trade contract, because "the terms of both policies clearly and unequivocally provide for equal contribution towards the defense and indemnification . . . and we are not at liberty to rewrite them to conform to the terms of a contract to which the insurance companies were not parties."[29]

The court also noted that, pursuant to the trade contract's indemnity clause, after covering the subject loss, CNA would be subrogated to the rights of the general contractor, thereby entitling CNA to seek indemnity from the subcontractor, who would ultimately be covered by USF.[30] Nonetheless, the court refused to short-circuit this process based on this eventuality.

The First Department's holding in *St. Paul* appears to be at odds with prior holdings in several respects.

Travelers Indemnity Co. v. American & Foreign Insurance Co.

The First Department cited *United States Fidelity* as precedent in a contribution action between two excess insurers making identical arguments.[31] In *Travelers Indemnity Co. v. American & Foreign Insurance Co.*, appellant excess insurer American & Foreign Insurance Co. (A&F) sought the First Department to reverse a New York County supreme court's priority of coverage determination based on the policies' "other insurance" clauses.[32] A&F argued that the priority of coverage determination should instead be based on the underlying trade contract's indemnity clauses.[33] The First Department rejected A&F's argument and affirmed the supreme court's decision stating that "the motion court properly declined to give evidentiary weight to the insurance procurement provisions of the

subcontract between plaintiff general contractor and the injured party's employer, since it is the policy provisions that control and not the provisions of the subcontract."[34]

Accordingly, the law in New York seemed, at that point, to be fairly settled concerning the influence of indemnity provisions in underlying trade contracts when determining priority of coverage in similar construction liability contexts.

Indemnity Insurance Co. of North America v. St. Paul – A New Framework of Analysis?

In *Indemnity Insurance Co. of North America v. St. Paul*, the First Department seemingly adopted a new framework of analysis by determining that the priority of coverage issue was not reached where the underlying trade contract shifts liability from one party (the indemnitee) to another (the indemnitor), and that the primary and excess coverages procured by the indemnitor party are to be vertically exhausted without participation by the other indemnitee parties' primary or excess policies.[35]

In *St. Paul*, the City of New York (City) hired Yonkers Contracting Co. (Yonkers) as general contractor for the Manhattan Bridge Renovation Project,[36] which then hired subcontractor Romano Enterprises (Romano).[37] Both Yonkers and Romano indemnified the upstream parties pursuant to their trade contracts and agreed to procure insurance covering their activities and naming the upstream parties as additional insureds.[38]

Yonkers obtained a $1 million primary policy and a $5 million umbrella policy, both from St. Paul Mercury Insurance Co. (St. Paul), naming Yonkers as the insured and the City as an additional insured. Romano obtained a $1 million primary policy from Royal Insurance Co. (Royal) and a $10 million umbrella policy from Indemnity Insurance Co. of North America (IICNA).[39] Both the Royal and IICNA policies named Romano as the insured and Yonkers and the City as additional insureds.

During the project Romano was repeatedly instructed to remove one of its cables because it would interfere with Yonkers' work. Romano failed to remove the cable and a Yonkers employee, Eugene Flood, was later seriously injured in an accident involving the cable.[40] Flood commenced an action against the City and Romano;[41] the City tendered its defense to St. Paul; and Romano tendered its defense to Royal.[42] Several months later, St. Paul requested that Royal assume the City's defense, and Royal agreed to indemnify and defend the City without reservation.[43] After the start of the trial, Royal tendered the defense of the City and Romano to IICNA, based on the potential for exposure in excess of the $1 million limit of the Royal policy.[44] Royal and IICNA continued settlement negotiations with Flood during the trial and the claim settled before verdict for $3 million, to be paid on behalf of Romano and the City.[45] St. Paul did not participate in the settlement agreement based on its conclusion that Romano was ultimately liable for the loss, based on the indemnity clause of the underlying trade contract.[46]

IICNA subsequently filed suit against St. Paul and Yonkers seeking to recoup the $2 million it paid to settle the underlying action, above Royal's contribution of its policy limits. IICNA asserted that the St. Paul primary policy, which named the City as an additional insured, was primary to the IICNA excess policy.[47] Supreme Court, New York County, granted summary judgment in favor of St. Paul and IICNA appealed.[48]

The First Department held that neither of Yonkers' coverages with St. Paul were implicated because, pursuant to the indemnity clause of the Romano's trade contract, any liability passed to Romano and therefore to its insurers.[49] While the court cited *Tishman*'s holding that in determining the priority of coverage among different insurers covering the same risk, a court must consider the intended purpose of each policy, the First Department nonetheless held that "the priority of coverage is irrelevant" because "[e]ven if St. Paul's coverage of the City were primary to that of IICNA, the City's liability still would pass through to Romano and its insurers, Royal and IICNA."[50] The court added, "This is particularly so because Romano accepted tender of the City's defense and unconditionally and without reservation agreed to defend and indemnify the City. In light of this, and of the fact that IICNA settled the action without the consent of St. Paul, IICNA's claim for reimbursement from St. Paul must fail."[51] The court relied on another First Department ruling, *AIU Insurance Co. v. Valley Forge Insurance Co.*, a one-page opinion citing no authority which held that where an insurer did not take part in settlement negotiations or agree to the settlement of an underlying action it was not required to contribute to the settlement.[52]

Analysis of *St. Paul*

The First Department's holding in *St. Paul* appears to be at odds with prior holdings in several respects.

While the *St. Paul* court asserted that the priority of coverage issue was not reached because of the indemnity clause in the underlying trade contract, similar indemnity clauses were also present in *Bovis* and *Tishman*, and in both cases the court reached the priority of coverage issue based on *LiMauro*, which reiterated that the terms of the policies in question, and not any external contracts, control the order in which the policies will cover a loss because New York law "recognizes the right of each insurer to rely on the terms of its own contract with its insured."[53]

In *Bovis*, the First Department specifically addressed the issue of what impact an indemnity provision of an underlying trade contract should have in determining the priority of coverage. The material facts and issues of *Bovis* are fundamentally identical to those of *St. Paul*: (1) a covered liability arising from a construction-injury

claim exhausted the subcontractor's primary coverage; (2) the upstream parties were additional insureds under the subcontractor's primary and excess policies; (3) the subcontractor's excess carrier asserted that the upstream parties' primary coverage was next in the priority of coverage sequence after exhaustion of the subcontractor's primary coverage; and (4) the upstream parties' primary carriers argued that, based on the indemnity clause of the underlying trade contract between the insureds, the subcontractor and his carriers were ultimately liable to indemnify the upstream parties with respect to the subject liability, and therefore the subcontractor's excess policy should be next in the priority of coverage sequence. The *Bovis* court, however, sided with the subcontractor's carriers in holding:

> Based on an examination of the terms and role of each insurance policy at issue, we hold that the additional insured coverage afforded the construction manager and owner by the umbrella liability policy of the subcontractor that employed the decedent is excess to the construction manager's and owner's coverage under the construction manager's own primary insurance. We also hold, based on the same examination, that the construction manager's and owner's additional insured coverage under the subcontractor's umbrella policy is excess to their coverage under the primary insurance maintained by the general contractor that retained the subcontractor. We reach these conclusions notwithstanding that the insurance provisions of the underlying subcontract apparently required the subcontractor to make all of the insurance it provided to the construction manager and owner applicable on a primary basis, without contribution by the construction manager's and owner's own insurance. Our reasoning is that, under applicable precedent, an umbrella or excess liability insurance policy should be treated as just that, and not as a second layer of primary coverage, unless the policy's own terms plainly provide for a different result. To hold otherwise would, we believe, merely sow uncertainty in the insurance market.[54]

While *Bovis* was also a First Department ruling, and is therefore not authoritative in *St. Paul*, *Bovis* nonetheless provides recent precedent directly on point. Yet, it appears irreconcilable with *St. Paul.*

St. Paul also appears to contradict the Third Department's ruling in *United States Fidelity*, which directly addressed the issue of whether it is proper to look to the "other insurance" clauses of the policy or to the indemnity clauses of the underlying trade contract when determining the "priority of coverage."[55] The Third Department stated, "[T]he terms of both policies clearly and unequivocally provide for equal contribution towards the defense and indemnification . . . and we are not at liberty to rewrite them to conform to the terms of a contract to which the insurance companies were not parties."[56]

It is standard practice for trade contracts to require the employed party to indemnify upstream parties and provide them with additional insured coverage on a non-contributory basis.

St. Paul is also difficult to reconcile with the First Department's own ruling in *Travelers*, which relied on *United States Fidelity*.[57] In *Travelers* the First Department was asked to review a supreme court's priority of coverage determination which was based on a comparison of the policies' provisions. The First Department itself stated that "the motion court properly declined to give evidentiary weight to the insurance procurement provisions of the subcontract between plaintiff general contractor and the injured party's employer, since it is the policy provisions that control and not the provisions of the subcontract."[58]

Moreover, *St. Paul*'s reliance on the subcontractor's untested, yet apparent, liability arising from the indemnity clause of the underlying trade contract also seems misplaced given the rulings in *Bovis* and *United States Fidelity*.[59]

In *Bovis*, the First Department specifically addressed the construction manager's argument that the court should hold the subcontractor's insurers liable for the entire loss because the primary carriers of the owner, construction manager and general contractor could otherwise seek recovery from the subcontractor, and ultimately its umbrella carrier, as subrogees pursuant to a claim of contractual indemnification. As noted earlier, the court was unpersuaded by this argument, explaining that "the possibility of this [subrogation] scenario playing out in the long run does not, however, have the effect, at this stage, of negating the priority of coverage among the applicable policies arising from the terms of those policies."[60] To further emphasize this point the court reiterated "[t]he rights and obligations of the insurers are governed by their respective insurance policies, not by the underlying trade contracts among the insureds."[61]

Similarly, in *United States Fidelity* the Third Department also recognized that, pursuant to the trade contract's indemnity clause, after covering the subject loss the general contractors carriers (CNA) would be subrogated to the rights of the general contractor, thereby entitling CNA to seek indemnity from the subcontractor, who would ultimately be covered by its insurer.[62] Nonetheless, the

court refused to short-circuit that process based on its probable eventuality.

Accordingly, it appears difficult to reconcile the First Department's holding in *St. Paul* with its own holdings in *Bovis*, *Tishman* and *Travelers*, the Third Department's holding in *United States Fidelity*, and the Court of Appeals holding in *LiMauro.*

Nonetheless, although *St. Paul* appears impossible to reconcile with current New York law, other jurisdictions have looked beyond the policy to the vendor's agreement to determine both the priority of coverage as well as the scope of coverage afforded the additional insured.[63]

Conclusion

It is standard practice for trade contracts to require the employed party to indemnify upstream parties and provide them with additional insured coverage on a non-contributory basis. Nonetheless, until *St. Paul*, New York courts have disregarded the non-contributory aspect of these indemnification clauses in favor of a priority of coverage analysis based on the type of coverage each policy was intended to provide – primary or excess – as evidenced by both the ratio of the premium relative to the coverage afforded, and a comparison of the wording of each policy's clause concerning other insurance. The First Department in *St. Paul* instead held that the priority of coverage analysis was not reached where an indemnity agreement assigned liability to a specific party. Although the *St. Paul* court stated it reached this decision "particularly" because the primary insurer defending the action failed to reserve the rights of the excess insurer to seek contribution from the other primary insurer on the risk, and because an insurer cannot be forced to contribute to a settlement to which it did not consent, these grounds appear vincible and otherwise insufficient to justify such a radical departure from recent precedent directly on point and the Court of Appeals ruling in *LiMauro.*

Given that the Appellate Division's holdings in *Bovis*, *Tishman*, *Travelers*, and *United States Fidelity* were based on facts substantially similar those in *St. Paul*, and *LiMauro*'s emphasis on looking to the intent of the policies rather than the implications of the indemnity clauses of the underlying trade agreements, it appears difficult to reconcile these six cases unless the Court of Appeals embraces a new exception to the circumstances where a priority of coverage analysis is required.

Until the Court of Appeals addresses *St. Paul*, the ruling will sow uncertainty into the procedure for allocating loss among concurrent primary and excess policies on a risk where an underlying trade contract with an indemnity clause provides for one party's coverages to cover the liability without contribution. ■

1. *State Farm Fire & Cas. Co. v. LiMauro*, 65 N.Y.2d 369, 373 (1985). *See United States Liab. Ins. Co. v. Mountain Valley Indem. Co.*, 371 F. Supp. 2d 554, 558 (S.D.N.Y. 2005) ("insurance policy provisions take precedence over conflicting provisions found in contracts between insureds"); *Travelers Indem. Co. v. Am. & Foreign Ins. Co.*, 286 A.D.2d 626 (1st Dep't 2001) ("it is the policy provisions that control [priority of coverage] and not the provisions of the subcontract" between the insureds); *United States Fid. & Guar. Co. v. CNA Ins. Cos.*, 208 A.D.2d 1163, 1165 (3d Dep't 1994) ("the terms of both policies clearly and unequivocally provide for equal contribution towards the defense and indemnification of [the additional insured], and we are not at liberty to rewrite them to conform to the terms of a contract to which the insurance companies were not parties").

2. *Indem. Ins. Co. of N. Am. v. St. Paul*, 74 A.D.3d 21 (1st Dep't 2010).

3. *LiMauro*, 65 N.Y.2d at 372 (highlighting the burden such determinations have long placed on courts).

4. *See Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140, 142 (1st Dep't 2008) (citing *LiMauro*, 65 N.Y.2d at 374–75); *Tishman Constr. Corp. of N.Y. v. Great Am. Ins. Co.*, 53 A.D.3d 416, 419 (1st Dep't 2008) (citing *Bovis*, 53 A.D.3d at 142); *and Travelers*, 286 A.D.2d at 626. *See also In re Liquidation of Midland Ins. Co.*, 709 N.Y.S.2d 24, 35 (1st Dep't 2000) (distinguishing between primary and excess policies in holding that "other insurance" clause of primary policy applies to all primary insurance but recognizing that all primary policies must be exhausted before excess policy can be implicated).

5. *See Bovis*, 53 A.D.3d at 142 (citing *LiMauro*, 65 N.Y.2d at 374–75); *Tishman*, 53 A.D.3d at 419 (citing *Bovis*, 53 A.D.3d at 142); *Travelers*, 286 A.D.2d at 626.

6. *See Bovis*, 53 A.D.3d at 142; *Tishman*, 53 A.D.3d at 419.

7. *See Bovis*, 53 A.D.3d at 142; *Tishman*, 53 A.D.3d at 419.

8. *Pecker Iron Works of N. Am., Inc. v. Travelers Ins. Co.*, 99 N.Y.2d 391 (2003) (policy that provides insured with primary coverage implicitly provides any additional insureds with primary coverage, irregardless of other policy language to the contrary, because additional insureds are afforded the same coverage as the named insured).

9. *LiMauro*, 65 N.Y.2d at 373 (citing *N.Y. Dock Co. v. Ernest Brown*, 272 N.Y. 176 (1936) (insurer's contribution to loss cannot be determined by insured's agreement with third party)). *See Mountain Valley Indem. Co.*, 371 F. Supp. 2d at 558 ("insurance policy provisions take precedence over conflicting provisions found in contracts between insureds"); *Travelers*, 286 A.D.2d at 626 ("it is the policy provisions that control [priority of coverage] and not the provisions of the subcontract" between the insured subcontractor ad general contractor); *United States Fid.*, 208 A.D.2d at 1165 ("the terms of both policies clearly and unequivocally provide for equal contribution towards the defense and indemnification of [the additional insured], and we are not at liberty to rewrite them to conform to the terms of a contract to which the insurance companies were not parties").

10. *Bovis*, 53 A.D.3d at 148 (citing *LiMauro*, 65 N.Y.2d at 374–75); *see Tishman*, 53 A.D.3d at 419 (citing *Bovis*, 53 A.D.3d at 145–48).

11. *Bovis*, 53 A.D.3d at 148 (citing *LiMauro*, 65 N.Y.2d at 375); 8A Appleman on Insurance § 4909.85, at 453–54 (1981) ("[U]mbrella coverages . . . are regarded as true excess over and above any type of primary coverage, excess provisions arising in regular policies in any manner, or escape clauses."); 15 Couch on Insurance 3d § 220:41. *See United States Fire Ins. Co. v. CNA*, 300 A.D.2d 1054 (4th Dep't 2002); *Travelers*, 286 A.D.2d at 626.

12. *Bovis*, 53 A.D.3d 140.

13. *Id.* at 142, 145–48, 154–55.

14. *Id.*

15. *Id.* at 142 (referencing *LiMauro*, 65 N.Y.2d at 374 (citation omitted)).

16. *Id.* at 148 (citing *LiMauro*, 65 N.Y.2d at 374).

17. *Id.* at 145 (citing *LiMauro*, 65 N.Y.2d at 373). *See Mountain Valley Indem. Co.*, 371 F. Supp. 2d at 558 ("insurance policy provisions take precedence over conflicting provisions found in contracts between insureds"); *Travelers*, 286 A.D.2d at 626 ("it is the policy provisions that control [priority of coverage] and not the provisions of the subcontract" between the insured subcontractor ad general contractor); *United States Fid.*, 208 A.D.2d at 1165 ("the terms of both policies clearly and unequivocally provide for equal contribution towards the defense and indemnification of [the additional insured], and we are not at liberty to rewrite them to conform to the terms of a contract to which the insurance companies were not parties").

18. *Bovis*, 53 A.D.3d at 154–55 (citing *Harleysville Ins. Co. v. Travelers Ins. Co.*, 38 A.D.3d 1364, 1367 (4th Dep't 2007)); *United States Fid.*, 208 A.D.2d at 1165.

19. *Tishman*, 53 A.D.3d 416.

20. *Id.* at 419–20; *Bovis*, 53 A.D.3d 140.

21. *Tishman*, 53 A.D.3d at 419–20.

22. *Id.*

23. *Id.*

24. *Id.* at 420 (citing *Bovis*, 53 A.D.3d at 150–51). Notably, the court relied on the intent of the policy – primary or excess – over the policy's express terms that it was to be excess to all policies issued to the sub-contractor.

25. *United States Fid.*, 208 A.D.2d 1163.

26. *Id.* at 1165.

27. *Id.* at 1164.

28. *Id.* at 1165.

29. *Id.*

30. *Id.*

31. *Travelers*, 286 A.D.2d at 626.

32. *Id.*

33. *Id.*

34. *Id.* (citing *United States Fid.*, 208 A.D.2d at 1165).

35. *St. Paul*, 74 A.D.3d 21.

36. *Id.* at 23.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 23.

42. *Id.* at 24.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 24–25.

47. *Id.* IICNA also brought a subrogation cause of action against Yonkers which was dismissed and was not relevant to the subject of this article.

48. *St. Paul*, 74 A.D.3d at 27.

49. *Id.* at 23.

50. *Id.* at 26.

51. *Id.*

52. *Id.* at 25 (citing *AIU Ins. Co. v. Valley Forge Ins. Co.*, 303 A.D.2d 325 (1st Dep't 2003)).

53. *LiMauro*, 65 N.Y.2d at 373 (citing *N.Y. Dock*, 272 N.Y. 176) (insurer's contribution to loss cannot be determined by insured's agreement with third party); *See Mountain Val. Indem. Co.*, 371 F. Supp. 2d at 558 ("insurance policy provisions take precedence over conflicting provisions found in contracts between insureds"); *Travelers*, 286 A.D.2d at 626 ("it is the policy provisions that control [priority of coverage] and not the provisions of the subcontract" between the insured subcontractor ad general contractor); *United States Fid. & Guar.*, 208 A.D.2d at 1165 ("the terms of both policies clearly and unequivocally provide for equal contribution towards the defense and indemnification of [the additional insured], and we are not at liberty to rewrite them to conform to the terms of a contract to which the insurance companies were not parties").

54. *Bovis*, 53 A.D.3d at 142.

55. *United States Fid.*, 208 A.D.2d at 1165.

56. *Id.*

57. *Travelers*, 286 A.D.2d at 626.

58. *Id.* (citing *United States Fid.*, 208 A.D.2d at 1165).

59. *Bovis*, 53 A.D.3d 140; *Travelers*, 286 A.D.2d at 626.

60. *Bovis*, 53 A.D.3d at 154–55 (citing *Harleysville Ins. Co.*, 38 A.D.3d at 1367); *United States Fid.*, 208 A.D.2d at 1165.

61. *Bovis*, 53 A.D.3d at 154–55.

62. *United States Fid.*, 208 A.D.2d at 1165.

63. *E.g.*, *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir. 2002) (court reversed priority of coverage determination based on comparison of policies' other insurance provisions and held that the indemnity clause of the vendor's agreement controlled as it reflected a clear intent that the vendor be fully indemnified by manufacturer for any losses caused by its products and to allow manufacturers carrier to obtain recovery from vendor's carrier would result in a "circuitous litigation," resulting in manufacturer's carrier ultimately owing the debt anyway); *Fred Shearer & Sons, Inc. v. Gemini In. Co.*, 240 P.3d 67 (Or. 2010) (Oregon Court of Appeals held that a court may look beyond the policy to extrinsic evidence to determine who qualifies as an insured.); *Am. Indem. Lloyds v. Travelers Prop. Cas. Ins. Co.*, 335 F.3d 429 (5th Cir. 2003) (finding coverage by the subcontractor's policy based on indemnity agreement between a general contractor and a subcontractor that required that the subcontractor's CGL policy pay the entire loss on behalf of the its additional insured general contractor, even though the other insurance clauses of the two policies both provided for sharing with other primary policies); *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 124 Cal. Rep. 2d 218 (2002) (California appellate court held that the scope of coverage for the additional insured would be commensurate with the scope of the indemnity agreement, and not as broad as the additional insured endorsement provided.).

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The Ethical Issues of Lateral Moves

Whether, When and How to Notify Clients of a Lawyer's Resignation

By Barry R. Temkin

Lawyers contemplating lateral career moves are faced with an array of potentially conflicting ethical and fiduciary duties owed to their current firms, existing clients and the firms which recruit them. Partners planning a lateral move must consider when to notify existing clients of the anticipated move, when and whether to "solicit" existing clients, which clients to notify, when to notify their current law firm and how to handle the complicated business of transferring files and personal documents. While the various ethical and fiduciary duties can be identified easily enough, reconciling them is more challenging.

Client Choice of Counsel

Both the departing partner and the former firm must respect the client's right to select counsel. Under the American Bar Association Model Rules of Professional Conduct, a lawyer may not enter into an agreement restricting the right of a lawyer to practice law. According to ABA Model Rule 5.6: "A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement."[1] The commentary to Model Rule 5.6 explains the purpose behind the Rule: "An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."[2]

The New York County Lawyers' Association Professional Ethics Committee has explained, in interpreting a predecessor rule, that "lawyers do not 'own' clients. A client is free to choose the lawyer who will provide representation, and may discharge an existing attorney at any time."[3] ABA Model Rule 1.16(a) requires a discharged lawyer to withdraw from representation of the client, thereby acknowledging the client's authority to discharge the lawyer at will. Thus, basic principles of legal ethics posit that lawyers should be free to make career moves and clients should be free to change lawyers at any time.[4]

Penalties on Competition

The principles of lawyer mobility and client choice were recognized in a line of cases beginning with *Cohen v. Lord, Day & Lord*,[5] which considered the enforceability of a partnership agreement restricting a partner's ability to receive accrued compensation when joining a competing firm. Under the firm's partnership agreement, a withdrawing partner would receive a three-year buyout of the proportionate share of the partner's capital account. However, no payments for trailing fees or profits collected after departure would be made to a partner joining a competing firm in a contiguous jurisdiction. According to the agreement, "if a Partner withdraws from the Partnership and without the prior written consent of the Executive Committee continues to practice law in any state or other jurisdiction in which the Partnership

maintains an office or any contiguous jurisdiction, . . . he shall have no further interest in and there shall be paid to him no proportion of the net profits of the Partnership collected thereafter, whether for services rendered before or after his withdrawal."[6]

Cohen went into competition with his former firm and sued his former partners when they refused to pay him his share of fees collected after his departure. The New York Court of Appeals declared the forfeiture-for-competition clause unenforceable pursuant to Disciplinary Rule 2-108(A) of the former New York Lawyer's Code of Professional Responsibility, which, like New York's current rules, proscribed "a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits."[7] The Lord, Day & Lord partnership agreement violated the Code of Professional Responsibility because it restricted a partner's right to practice law, and, conversely, restricted the client's choice of counsel. According to the Court:

> We hold that while the provision in question does not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the significant monetary penalty it exacts, if the withdrawing partner practices competitively with the former firm, constitutes an impermissible restriction on the practice of law. The forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client's choice of counsel.[8]

The twin principles of lawyer freedom of practice and client freedom of choice were further affirmed in a 1994 legal ethics opinion from the Virginia State Bar, which disapproved a partnership agreement imposing a financial penalty upon withdrawing lawyers who go into private practice.[9] Under the contemplated agreement, "withdrawing lawyers who take clients of the law firm and compete with it following their withdrawal are obligated to pay a certain portion of such clients' post-withdrawal fees to the law firm."[10] Other unspecified financial disincentives were imposed on departing lawyers under the proposed partnership agreement.

Such provisions in a partnership agreement unethically restricted the right of a withdrawing partner to compete with his former firm. According to the Virginia Ethics Committee, "clients of a law firm are not commodities. . . . Clients are not 'taken'; they have an unfettered right to choose their lawyer. Correspondingly, lawyers withdrawing from a law firm have an unfettered right to represent clients who choose them rather than choose to remain with the law firm."[11] As a result, a departing lawyer who takes firm clients with him or her cannot ethically be required to share post-withdrawal fees with the lawyer's former firm.[12] Clients are not commodities to be bought or sold; their freedom of choice must be respected in the event of a partner's lateral move.

However, as suggested by Ronald Minkoff, a past President of the Association of Professional Responsibility Lawyers, some financial disincentives may be imposed on a withdrawing partner, provided the disincentives are applied uniformly to all departing partners across the board and do not unfairly single out partners who leave for competing law firms.[13] For example, a New York court has upheld in principle a partnership agreement that reduces payments to all withdrawing partners "to the extent that the withdrawing partner's annual earned income, from any source, exceeds $100,000."[14] Thus, Minkoff posits that there is at least some authority that "across-the-board financial disincentives for leaving the firm may be acceptable" provided that competing partners are not treated more harshly than other withdrawing lawyers.[15] Moreover, a firm may place restrictions on bona fide retirement benefits. A limited exception to ABA Model Rule 5.6(a) allows "restrictions incident to provisions concerning retirement benefits for service with the firm."[16]

The Minority View

A minority view was taken in a California case, which upheld a partnership restriction not that dissimilar to the agreement found unenforceable by the New York Court of Appeals in *Cohen. Howard v. Babcock* concerned a partnership agreement which provided that departing partners who went into direct competition with their former firm were entitled to a buyout of their capital accounts but not trailing fees collected or profits earned after departure.[17] The departing partners in that case went into direct competition with their former firm – both firms engaged in insurance defense work – and took 200 client files with them. When the former firm refused to pay trailing fees and profits, the former partners sued, claiming a restriction on their freedom to practice. The court sided with the former law firm and upheld the agreement. The California Supreme Court rejected the reasoning of *Cohen*, saying that "a revolution in the practice of law has occurred requiring economic interests of the law firm to be protected as they are in other business enterprises."[18] The California court considered law firms to be subject to the same type of legal analysis as other businesses and concluded that "[a] n agreement that assesses a reasonable cost against a partner who chooses to compete with his or her former partners does not restrict the practice of law. Rather, it attaches an economic consequence to a departing partner's unrestricted choice to pursue a particular kind of practice."[19] California's view, however, remains the maverick, minority interpretation.[20] The overwhelming majority of jurisdictions eschew partnership agreements that impose financial burdens on departing partners who go into competition with their former firms.

Fiduciary Duty to Former Firm

The freedom of lawyers contemplating lateral moves is not untrammeled. They have duties not only to their clients but to their partners as well. There is some interplay between common-law tort principles, which emphasize departing partners' fiduciary duties to their law firms, and ethics rules, which promote client freedom, and lawyer mobility – and proscribe deceptive conduct by attorneys.

A departing partner's common-law fiduciary duty to his former firm was the subject of *Graubard Mollen Dannett & Horowitz v. Moskovitz*.[21] The defendant, Moskovitz, was a founding partner of a small firm, to which he had devoted over 40 years of practice. Moskovitz, along with several other senior partners, entered into a written agreement with the firm's other partners by which they agreed to gradually wind down their practices, and "not do anything to impair the firm's relationship with its existing clients and business."[22] Nonetheless, unhappy with his situation, the still-ambitious 73-year-old senior partner entered into negotiations with a competing firm and obtained the explicit promise of his current firm's largest client to move with him to the new firm. Upon learning of Moskovitz's plan to jump ship with the firm's biggest client, his existing partners locked him out and sued for breach of contract, breach of fiduciary duty and unjust enrichment.

Moskovitz moved unsuccessfully for summary judgment. In affirming denial of the defendant partner's motion, New York's then-Chief Judge, Judith Kaye, wrote that "as a matter of principle, pre-resignation surreptitious 'solicitation' of firm clients for a partner's personal gain – the issue posed to us – is actionable."[23] There is a difference, however, between preresignation *solicitation* of clients and notice to clients. According to the Court:

> As a matter of ethics, departing partners have been permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal into new practice, and to remind the client of its freedom to retain counsel of its choice. . . . Ideally, such approaches would take place only after notice to the firm of the partner's plans to leave.[24]

According to the Court, a lawyer may properly take steps to locate alternative space and interview for a new position, and departing partners may inform clients with whom they have a prior professional relationship about their planned moves. However, such approaches ideally should take place after notice to the partner's existing firm. On the specific facts before it, the Court had no problem finding Moskovitz's conduct actionable: "[L]ying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave, and abandoning the firm on short notice (taking clients and files) would not be consistent with a partner's fiduciary duties."[25]

While exactly what constitutes impermissible preresignation solicitation has been determined on a case-by-case basis, one thing is for sure: courts don't like extensive surreptitious pre-resignation solicitation of clients, particularly when it causes substantial injury to the departing partner's former firm. In *Dowd & Dowd v. Gleason*, partner Nancy Gleason surreptitiously solicited the largest client of her small firm and voted herself bonuses exceeding $150,000, without disclosing to her partners her intention to leave.[26] The largest bonus, $100,000, was paid 10 days before Gleason left her firm.[27] She also paid down the firm's line of credit. Even before informing her partners that she was leaving, Gleason told her future bankers that Dowd's largest client had agreed to follow her to her new firm. Evidence presented at trial included a "business reference" who stated that "Nancy Gleason's group has a real lock on the Allstate business and [that] he believes this client relationship will last for years."[28]

Gleason left abruptly, taking with her the firm's largest client and several key employees, who were also solicited prior to departure. Her conduct was held to be actionable as a breach of fiduciary duty. In finding for Gleason's former firm, the court balanced the freedom of the firm's clients to select counsel of their choice against the interest of the firm in securing the loyalty of its partners:

> We are by no means asserting that clients of a law firm are the property of the firm in terms of "chattel," but we are reaffirming the tenet that preresignation solicitation of firm clients for a partner's personal gain is a breach of the partner's fiduciary duty to the firm.[29]

Thus, the Appellate Court of Illinois affirmed a jury verdict in favor of Dowd & Dowd. Gleason was never disciplined by the Illinois State Bar.[30]

Ethical Issues Under ABA Formal Opinion 99-414: When to Notify Clients

Although they overlap in practice, tort concepts like breach of fiduciary duty are analytically distinct from ethics rules, which are meant to guide the conduct of lawyers, and provide a basis for attorney discipline.[31] Both the migrating partner and former firm have duties to clients under the ABA Model Rules of Professional Conduct and their state analogues. Model Rule 1.4 obligates lawyers to keep clients informed as to the status of their cases. This Rule has been interpreted to require a lawyer and law firm to notify a client of the departure of the attorney actively handling the client's files.

The American Bar Association has authored the most thorough treatment of the topic of whether, when and how to notify clients of a partner's resignation. In Formal Opinion 99-414, the ABA Ethics Committee opined that departing lawyers may ethically notify existing clients with whom they have a direct professional relationship of their departure before resigning. According to the ABA, "[t]he departing lawyer and responsible members of the law firm who remain have an ethical obligation to assure

that prompt notice is given to clients on whose active matters she currently is working."[32]

The ABA added that "we reject any implication of [past opinions] that the notices to current clients and discussions as a matter of ethics must await departure from the firm."[33] Ideally, the resigning partner and current firm should give joint notice to the clients. However, under some circumstances, and with certain safeguards, lawyers may notify their clients prior to announcing their resignation:

> The lawyer does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact *before advising the firm of her intentions to resign*, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation.[34]

While permitting a departing lawyer, in some circumstances, to notify an existing client of an anticipated move prior to resignation, ABA Opinion 99-414 imposes certain ethical guidelines on such notice. These are as follows:

1. the notice should be limited to clients on whose active matters the lawyer has direct professional responsibility at the time of the notice (i.e., the current clients);
2. the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue responsibility for the matters upon which he or she currently is working;
3. the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
4. the departing lawyer must not disparage the lawyer's former firm.[35]

This analysis is consistent with other authorities which have recognized the departing lawyer's duty to give notice of resignation to clients on whose files the lawyer has exercised substantial and direct responsibility.[36] For example, the Colorado Bar Association Ethics Committee has emphasized that clients must be given notice of the departure of a lawyer who has primary authority over the clients' legal matters: "Not only are the remaining and departing lawyers *permitted* to contact clients about an impending change in personnel, they are *required* to provide the client with at least enough information to determine the future course of the representation."[37]

Preresignation Notice vs. Solicitation

These principles invite a comparison between the ethical guidelines spelled out in ABA Ethics Opinion 99-414 and the tort principles of fiduciary duty explained in *Graubard*. Interestingly, even though ABA Ethics Opinion 99-414 cites the *Graubard* case, there is mere overlap, and not complete agreement, at least in emphasis, upon whether or not a lawyer may ethically notify existing clients prior to resigning from the firm. Both opinions express a preference for notifying the firm before the clients. *Graubard* indicates that the first notice should "ideally" be to the partner's current firm. ABA Ethics Opinion 99-414 agrees that the "[f]ar the better course" is for the firm and departing partner to give joint notice to the lawyer's clients.[38] Some ethicists urge lawyers never to give pre-resignation notice of their departure to clients.[39]

The ABA opinion observes, however, that joint notice is not always feasible and repeatedly suggests that the departing partner may notify (but not solicit) existing clients before resignation from the firm. Paralleling some of the reasoning of Ethics Opinion 99-414, the Colorado State Bar has stated that, while it is preferable for the firm and departing lawyer jointly to notify clients of the latter's departure, this is not always possible. If either the departing lawyer or the firm fails or refuses to participate in providing timely and appropriate joint notice, unilateral notice may be appropriate.[40]

One potential scenario where the attorney making a lateral move may seek to provide unilateral notice, or at least be entitled to additional flexibility, could occur where there is a reasonable expectation of overt hostility and/or obstructionism on the part of the partners being left behind. William Schuman, a partner at McDermott Will & Emery, has hypothesized about situations calling for advance notice to clients:

> [A]dvance notice to the firm may not be feasible, especially where the lawyer's announced departure is likely to result in acrimony. The attorney may be immediately escorted out the firm's door, making it impossible to provide clients with advance notice. This contradictory view of "fair play" makes the departing lawyer's determination of what to say and when to say it that much more difficult.[41]

The ABA Ethics Committee has similarly written, "the lawyer's mere notice to the firm might prompt her immediate termination."[42]

There is little judicial authority to support Schuman's view, however. Indeed, most departures involve some form of "acrimony" or some other form of unpleasantness. Permitting an exception to the general rule in situations involving acrimony would swallow the rule. No scholar has persuasively posited precisely what level of acrimony would justify pre-resignation notification of clients.

Active *preresignation* solicitation of clients – even clients with whom the departing lawyer has a direct, personal relationship – can raise ethical issues, as well as give rise to tort liability for breach of fiduciary duty.[43] Under ABA Ethics Opinion 99-414, a lawyer contemplating a lateral move to a competing firm may ethically *inform* clients of the move prior to resignation, provided that the lawyer does not *solicit* the clients' business or disparage his or her current firm.[44] The departing lawyer

must also take into consideration the four conditions cited by the ABA. On the other end of the spectrum is the conduct of the defendant in *Graubard*, where the departing lawyer had aggressively solicited and entered into an explicit agreement with his largest client to move with him to his new firm.

The potential inconsistency between lawyers' ethical duties under ABA opinion 99-414 and their fiduciary duties under the *Graubard* line of cases can be resolved in several ways. First, there is a difference between merely notifying a client of the resigning partner's lateral move (as discussed in ABA Ethics Opinion 99-414) and actively "soliciting" those clients to migrate with the partner to the new firm, as proscribed in *Graubard*.

The question of direct solicitation of clients by a departing lawyer is the subject of Ethics Opinion 679 of the New York County Lawyers' Association (NYCLA) Professional Ethics Committee.[45] That opinion, which was written under New York's former Code of Professional Responsibility, acknowledged that, while in-person solicitation of prospective clients is generally impermissible, a lawyer may engage in direct, in-person solicitation of a current or former client. A lawyer who has left a former practice may ethically solicit business from clients "for whose active, open and pending matters the lawyer was directly responsible as a partner or associate," provided that the lawyer emphasizes the client's freedom of choice to select counsel.[46] The NYCLA opinion presupposed that the lateral partner had already left the former firm and did not address the timing of the notice.

Solicitation is a term of art (and not science) in legal ethics. Judge Kaye did not define the term in her opinion in *Graubard*. New York's Judiciary Law bans solicitation by attorneys, again without defining it.[47] New York's 2009 Rules of Professional Conduct (N.Y. Rules) – which postdate the 1995 opinion in *Graubard* – define solicitation as "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients . . . the primary purpose of which is the retention of the lawyer or law firm, and a *significant motive* for which is pecuniary gain."[48]

Under current N.Y. Rule 7.3(a), a lawyer may not engage in solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client."[49] A lawyer planning a lateral move could not ethically solicit business, before or after notice to his or her current firm, from firm clients with whom the lawyer had no direct personal contact. And, at least under the current rules, pecuniary motive is a factor in determining whether a conversation is impermissible solicitation. Under ABA Ethics Opinion 99-414, a law partner planning to resign from a law firm in order to pursue an opportunity in government service or to retire from the practice of law may ethically notify existing clients of a planned move prior to giving notice to the partnership. In fact, such a lawyer must notify clients of the planned move. The same result would be obtained under the current New York ethics rules, because the lawyer's motive to obtain personal pecuniary gain is part of the definition of solicitation in N.Y. Rule 7.3. And Judge Kaye included the partner's motivation to seek "personal gain" as part of her opinion in *Graubard*.[50]

While there is considerable overlap and interplay between ethics rules and common law, there are important differences which help explain the differing emphases in ABA Ethics Opinion 99-414 and *Graubard*. The ABA Ethics Committee is charged with interpreting the ABA Model Rules of Professional Conduct. The ABA Ethics Committee has no jurisdiction to interpret the common law of, e.g., New York. Thus, a lawyer's conduct may be consistent with the ABA Model Rules of Professional Conduct (which are similar but not identical to the New York Rules of Professional Conduct in regards to lateral moves) and still be liable in court for breach of fiduciary duty, just as a lawyer could be held civilly liable for malpractice without having violated the lawyer's duty of diligence under N.Y. Rule 1.3. At least theoretically, a lawyer's pre-resignation notification to clients may be ethically permissible under ABA Opinion 99-414, yet still potentially subject a lawyer to tort liability for breach of fiduciary duty.

Risk Management Techniques

Law firms looking to bring on lateral hires may resort to a variety of techniques to minimize their own risks. Ethicist Anthony Davis, a partner at Hinshaw & Culbertson, advises law firms to manage their recruitment centrally to ensure that the hiring process itself is compliant with existing law. Davis explains, "If every individual partner in a large firm is permitted unrestrained freedom to negotiate the potential movement of colleagues at other firms, the hiring firm will always be exposed to the potential that the individual partner went further than is permissible under the standards set out in the new case law."[51]

In addition, the new firm should ensure that the incoming partner understands and complies with existing law. Some ethicists advise incoming counsel to confer with an independent ethics consultant to ensure that appropriate due diligence is conducted and that the incoming partner does not impermissibly solicit existing firm clients or associates. The advantage to using an independent outside consultant to manage the hiring process, rather than having the incoming firm micromanage the conduct of the incoming partner, is that it avoids the so-called Pottery Barn "you break it you own it" problem. In other words, a law firm that gives advice to an incoming partner about his or her solicitation of existing clients and/or associates could potentially find itself legally responsible, by virtue of that advice, for conduct that it otherwise would not be responsible for under the law.[52]

Departing partners making lateral moves should also avoid managerial decisions once they have made up their minds to leave. Bear in mind that a reviewing court is likely to impose common sense notions of fairness and justice. Thus, a partner who votes herself a $100,000 bonus two weeks before jumping ship with the law firm's largest client and all of its associates is unlikely to receive a warm judicial reception.[53]

Conclusion

A partner contemplating a lateral move to a competing firm owes duties to existing clients pursuant to N.Y. Rule 1.4. Both the departing partner and the former firm must respect the client's freedom of choice. To this end, a law firm may not ethically impose a burden on a partner's freedom to compete with it.

The departing lawyer also owes a fiduciary duty to the old firm. While a migrating partner is obligated to give notice to existing clients, the departing partner should avoid active solicitation of existing clients until after giving notice to the former firm. The line between permissible notice and impermissible solicitation is best drawn by ABA Formal Ethics Opinion 99-414.

A word of caution is in order. ABA Model Rule 8.4(c) proscribes attorney conduct "involving dishonesty, fraud, deceit or misrepresentation." Particularly egregious cases involving deception by departing partners in law firms can result and have in some instances resulted in professional discipline. ■

1. ABA Model Rule 5.6(a). The New York Rule is similar.
2. ABA Model Rule 5.6, cmt. [1].
3. New York County Lawyers' Association Committee on Professional Ethics, Op. 679, https://www.nycla.org/siteFiles/Publications/Publications452_0.pdf; *see also* Colorado Eth. Op. 116, http://www.cobar.org/index.cfm/ID/386/subID/10285/CETH/Ethics-Opinion-116:--Ethical-Considerations-in-the-Dissolution-of-a-Law-Firm-or-a-Lawyer%27s-Departure/.
4. The client's freedom to change lawyers or terminate a lawyer at any time explains the proscription on non-refundable retainers. *See In re Cooperman*, 83 N.Y.2d 465 (1994).
5. 75 N.Y.2d 95 (1989).
6. *Id.* at 97.
7. *Id.* at 98. New York amended its current Rules of Professional Conduct on May 4, 2010. The Rules were adopted on April 1, 2009.
8. *Id.*
9. Va. Legal Eth. Op. 1556, http://www.vacle.org/opinions/1556.htm. Virginia's state bar is an integrated arm of the state court system.
10. *Id.* at 1.
11. *Id.*
12. *Id.* at 2.
13. Ronald C. Minkoff, *Ethics Rule Speaks to Departure Restrictions*, N.Y.L.J., Feb. 1, 2010, p. 4, col. 1.
14. *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146 (1995), *quoted in* Minkoff, *supra* note 13.
15. Minkoff, *supra* note 13.
16. ABA Eth. Op. 06-444 (quoting ABA Model Rule 5.6, cmt. [1]).
17. 6 Cal. 4th 409 (Cal. 1993).
18. *Id.* at 420–21.
19. *Id.* at 419–20.
20. *Cf. Capozzi v. Latsha & Capozzi, P.C.*, 797 A.2d 314, 318–20 (Pa. 1992) (following the reasoning and rationale of *Howard v. Babcock*, and explaining Pennsylvania's agreement with the minority, California interpretation).
21. 86 N.Y.2d 112 (1995).
22. *Id.* at 116.
23. *Id.* at 119.
24. *Id.* at 120 (citations omitted).
25. *Id.* at 120–21 (citations omitted).
26. *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754 (Ill. App. Ct. 2004).
27. *Id.* at 764.
28. *Id.*
29. *Id.* at 761.
30. *See* Attorney Registration Disciplinary Commission of the Supreme Court of Ill., http://www.iardc.org/ldetail.asp?id=922011375.
31. *See* Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Resp., Philadelphia Bar Ass'n Prof. Guidance Committee, Joint Formal Op. 2007-300, at 2, http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/EthicsOpinion2007-300.pdf.
32. ABA Eth. Op. 99-414, http://www.abanet.org/media/youraba/200803/99-414.pdf.
33. ABA Eth. Op. 99-414 at 5 n.11. The Pennsylvania Bar has similarly written that: "Any suggestion that the departing lawyer should not be permitted to communicate the fact of departure until after the departing lawyer has left the old firm must be rejected." Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Resp. and Philadelphia Bar Ass'n Joint Formal Op. 2007-300 at 10.
34. ABA Eth. Op. 99-414 at 6 (emphasis added).
35. ABA Eth. Op. 99-414 at 4. *See also*, NYCLA Eth. Op. 679, https://www.nycla.org/siteFiles/Publications/Publications452_0.pdf (departing partner may notify and solicit existing client for representation "germane" to prior representation for same client).
36. *See, e.g.*, NYCLA Formal Opinion No. 728, https://www.nycla.org/siteFiles/Publications/Publications264_0.pdf: "[T]here may be circumstances in which a failure to notify certain clients of a particular partner's withdrawal from the firm could be misleading to the clients, in particular in circumstances in which specific clients believe that the client's legal matters at the firm are being handled by the former partner." *See also* Kenneth L. Jorgensen, *When Firms Break Up*, Bench & Bar of Minn. (1997), www.courts.state.mn.us/lprb/97bbarts/bb0897.html (noting professional discipline against firm associate who failed to give notice to client of his departure).
37. Colo. Bar Eth. Op. 116, http://www.cobar.org/index.cfm/ID/386/subID/10285/CETH/Ethics-Opinion-116:--Ethical-Considerations-in-the-Dissolution-of-a-Law-Firm-or-a-Lawyer%27s-Departure/.
38. ABA Eth. Op. 99-414 at 4..
39. *See, e.g.*, Minkoff, *supra* note 13.
40. *Id.*
41. William Schuman, *Liabilities for Lateral Movers*, Legal Times, May 1, 2006, http://careers.mwe.com/info/L4L.pdf.
42. ABA Eth. Op. 99-414 at 5.
43. ABA Model Rule 8.4(c) proscribes attorney conduct "involving dishonesty, fraud, deceit or misrepresentation." Particularly egregious cases involving deception by departing partners in law firms can result, and have resulted, in professional discipline in some instances.
44. ABA Eth. Op. 99-414.
45. NYCLA Eth. Op. 679, https://www.nycla.org/index.cfm?section=News_AND_Publications&page=Ethics_Opinions.
46. NYCLA Eth. Op. 679 at 5 (quoting from ABA Informal Ethics Opinions 1457 and 1466).
47. N.Y. Judiciary Law § 479:

> Soliciting business on behalf of an attorney. It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements.

48. N.Y. Rule 7.3(b), 22 N.Y.C.R.R. § 1200.52 (emphasis added).
49. N.Y. Rule 7.3(a), 22 N.Y.C.R.R. § 1200.52. The ABA Model Rules lack a direct definition of solicitation.
50. *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 119 (1995).
51. Anthony Davis, *Lateral Movements: Testing the Limits on Firms, Talent*, N.Y.L.J., Nov. 5, 2004, at 3, col. 1.
52. For a general discussion of liability of the hiring firm, see Ronald Minkoff, *Poaching Partners: The Legal Risks*, http://www.fkkslaw.com/article.asp?articleID=188.
53. *Dowd & Dowd, Ltd. v. Gleason*, 816 N.E.2d 754 (Ill. App. Ct. 2004).

incur fewer costs and attorney fees than you would defending the case. Settlement results in finality to your case. Sometimes, however, you might not have the luxury of time to settle before you have to answer the complaint. And sometimes bringing up the subject of settlement with the plaintiff after you've only just received the complaint will signal to the plaintiff that your case is weak.[1] At that point, the plaintiff might make unreasonable settlement demands. A "standstill agreement" is one method to engage in settlement negotiations.[2] The case is at a standstill: the plaintiff won't default you for not answering the complaint; no disclosure or other disclosure devices will be used for a specific amount of time that both sides designate. Either party may revoke the agreement if notice is given to the other side.

You might also want to contemplate arbitration or mediation before you answer. It's cheaper and faster, and both sides might leave happy.

You should also consider seeking protection under the federal bankruptcy laws, if that applies to you.[3] Once you've filed for bankruptcy, federal law automatically stays pending state court litigation.[4]

You may also consider not answering the complaint and, instead, allow the plaintiff to seek a default judgment against you.[5] This is almost always a bad option, however. If, for example, you're not subject to personal jurisdiction in New York, you should challenge jurisdiction and incur litigation costs instead of having a default judgment entered against you. If the court lacks subject-matter jurisdiction, assert this defect as an affirmative defense in your answer before the court in which the suit was filed instead of having a default judgment entered against you. You might be insolvent and believe that not answering the complaint is better than answering: Doing so might be an option if the plaintiff is seeking only monetary damages.[6] But you should also consider that one day your client might become solvent, and the default judgment the plaintiff entered against your client might still be enforced. Consider these risks before choosing not to answer the complaint.

If the litigation involves an injury, contact your insurer before answering.[7] Some insurance policies require the insurer to defend against the action. One condition to your insurance coverage might obligate you to notify the insurer of the action. Look at your insurance policy to make sure you comply with any notice requirement.

If you're a pro se defendant, you might not have found an attorney in time to submit an answer. You might have to find an attorney who is specialized in the area of law particular to the lawsuit. Your attorney will need to investigate the facts and research the law before submitting an answer. All this takes time.

If you won't be able to answer the complaint on time, ask the plaintiff, or the plaintiff's counsel if the plaintiff is represented, to extend your time to answer.[8] Adjournments generally range from two to six weeks. Submit a stipulation to the court, signed by you and your adversary, stating the date you must submit the answer. Some plaintiffs will agree to extend your time to answer, but only if you agree that service of the complaint was proper. Don't waive personal jurisdiction so quickly. Attorney and client need to consider the repercussions of this concession. Answering quickly and preserving your defenses or seeking relief from the court is usually the better option.

If your adversary refuses to extend your time to answer, you may move to extend your time to answer if the deadline has passed or even if the deadline hasn't passed. You should move to extend your time to answer by order to show cause.[9] For a court to grant an extension under CPLR 3012(d), you'll need to show a reasonable excuse to justify the extension.[10] For an extension under CPLR 2004, you must show good cause. If you move after the deadline to answer has passed, you'll need to show a reasonable excuse and a meritorious defense because you've defaulted.[11] If you've served the answer after the deadline has passed, you may move for an order compelling the plaintiff to accept late service; to succeed, you'll need to show a reasonable excuse for the delay.[12]

The court will consider several factors to determine whether to grant an extension.[13] One factor is the length of the delay. The longer you've delayed in submitting an answer, the greater the prejudice to the plaintiff. Also, the court will consider whether the delay was deliberate, the defense is meritorious, the failure to respond is excusable, and the defendant has demonstrated a good-faith intent to defend the action.

Purpose of the Answer

The purpose of an answer is to allow you, the defendant, to respond to the complaint. The answer lets you narrow the factual issues in dispute. The answer also gives you the opportunity to assert affirmative defenses, counterclaims, and cross-claims.[14]

If you have objections to the complaint, you can't interpose those objections in an answer. Reserve your objections by moving to strike some aspect of the complaint or for a more definitive statement if the complaint is vague.[15]

You may include in your answer a counterclaim against the plaintiff and a cross-claim against a co-defendant.

The starting point for drafting an answer should be your own answers to the allegations in the complaint. Read the complaint, and use your version of the facts.

Format of the Answer

All answers must conform to the format requirements applicable to all court papers.[16]

Under CPLR 3014, use separate headings separately to plead affirmative defenses. Although separate headings aren't required throughout the

answer, it's helpful to use separate divisions.

Separate headings are useful for the following parts of your answer: (1) introductory statement; (2) jurisdiction; (3) causes of action; (4) parties; (5) response to allegations; (6) affirmative defenses; (7) conclusions; (8) counterclaims; and (9) cross-claims.[17]

Under CPLR 3014, consecutively number each paragraph in the answer.

Different techniques exist for numbering paragraphs in your answer. One technique is the "corresponding-paragraphs" numbering technique.[18] For each paragraph in the complaint, respond to the corresponding paragraph in your answer with the same number as that in the complaint.

> *Example:* 15. Defendant denies each allegation in paragraph 15 of the complaint.
>
> 16. Defendant denies each allegation in paragraph 16 of the complaint.

This technique makes it easy for the court and the plaintiff to track the complaint and the corresponding answer.

Instead of repeating yourself, refer to series of paragraphs at once.

> *Example:* 15–18: Defendant denies each allegation in paragraphs 15-18 of the complaint.

Another option is to address "several non-consecutive complaint paragraphs in a single answer paragraph."[19] This method disregards the numbering scheme in the complaint.

> *Example:* 1. Defendant denies the allegations contained in paragraphs 1, 7, 9, 21, 35–40, 55, and 59 of the complaint.

Parts to the Answer

Caption: Begin the answer with a caption. Under CPLR 2101(c), state the name of the court, venue (the county where the suit is filed), title of the action, identification of the parties, nature of the paper ("Answer"), and index number of the action. If a judge has been assigned to the case, put the judge's name on the right side of the caption. Copy verbatim the caption from the complaint, including errors the plaintiff made in the complaint. Don't correct the caption in your answer.

> If you fail to respond to any allegation in the complaint, the court will deem the allegation admitted against you. The court will see your silence as an admission.

In multi-party actions, identify the first named party on each side and use "et al." to indicate that one or more parties exist but aren't identified by name. The best practice is to identify all the parties unless doing so is lengthy and cumbersome.[20]

Introductory Statement: Under the caption, include an "Introductory Statement" in which you identify the defendant, the defendant's counsel, the plaintiff, and the pleading to which the answer responds. *Example:* "Defendant XYZ (Defendant), by its attorney Adams, Babtista, Moretti, and Shulman, P.C., for its answer to the complaint of Adam Smith (Plaintiff), states as follows:"

Response to Allegations: After the introduction, include a section titled "Response to Allegations." This is the body of the answer. The body of the answer contains the defendant's responses to the plaintiff's allegations. You must respond to each allegation in the complaint. If you fail to respond to each allegation, the court will deem the allegation admitted against you. The court will see your silence as an admission.

You have several options in the way you answer the allegations. You may admit the allegation. *Example:* "Defendant admits the allegations in paragraph 58 of the complaint." Admitting an allegation in the complaint creates a presumption sufficient to sustain the plaintiff's burden of proof. The plaintiff can use your admission, instead of evidence, to prove the allegation asserted.

Another option is to "deny" the allegation. This is the best option if you know "first hand that the allegation is false, the denial is outright, without any qualifying language."[21] *Example:* "Defendant denies the allegation in paragraph 7."

Another option is to state that the defendant "lacks knowledge or information sufficient to form a belief as to whether the allegation is true."[22] This option is problematic if the defendant is in a position to know the facts.

Another way to handle the matter is to address the allegation. For example, you may state that the allegation is a legal conclusion and that no response is required.

Because the bulk of the answer is contained in the "Response to Allegations" section, the *Legal Writer* will discuss this in depth in next issue's column.

Affirmative Defenses: If you're asserting a defense under CPLR 3018(b), raise these defenses in a section titled "Affirmative Defenses." Separately state and number each defense.[23] *Example:* "First Affirmative Defense"; "Second Affirmative Defense." Each affirmative defense, similar to the cause(s) of action in the complaint, has elements. Lay out the elements to the defense in the answer.

Affirmative defenses aren't the plaintiff's burden to prove in the action; affirmative defenses are for you to plead in your answer and prove at trial.[24]

Under CPLR 3018(b), an affirmative defense is a matter that would be likely to surprise the plaintiff or raises fact issues not appearing on the face of the complaint.

Under CPLR 3018(b), you have several affirmative defenses to choose from: arbitration and award; collateral estoppel; the plaintiff's culpable conduct under the comparative-negligence rule; discharge in bankruptcy; illegality; fraud; the defendant's infancy or other disability; payment; release; res judicata; statute of frauds; and statute of limitations. Other affirmative defenses include adverse possession; truth in a defamation action; laches; qualified privilege; "several only" liability; and standing to sue.

Counterclaims and Cross-Claims: Assert counterclaims or cross-claims after the "Response to Allegations" and "Affirmative Defenses" sections. You may continue with the numbering scheme from the earlier sections, or you may start this section with paragraph number "1." Separately state and number each counterclaim and cross-claim.

Conclusion: The CPLR doesn't require you to include a "Conclusion" section, but a conclusion section might be helpful to identify the relief you seek. The "Conclusion" is similar to the "Demand for Relief" contained in the complaint.

> *Example:* WHEREFORE, defendant demands judgment as follows:[25]
>
> 1. Dismissing the complaint with prejudice;
> 2. Its costs of suit, including attorney fees, incurred in defending this action;
> 3. Interest at the legal rate; and
> 4. Such other and further relief as the court deems just and proper.

If you've asserted any counterclaim or cross-claim, demand your relief after demanding that the complaint be dismissed.

> *Example:* WHEREFORE, defendant demands judgment as follows:[26]
>
> 1. Against plaintiff dismissing the complaint.
> 2. Against plaintiff on the counterclaim in the amount of $___ plus interest;
> 3. Against defendant XYZ Corporation on the cross-claim in the amount of $____ plus interest;
> 4. Against plaintiff and defendant for the costs of suit, including attorney fees incurred in this action; and
> 5. Such other and further relief as the court deems just and proper.

Indorsement: The answer ends with an indorsement:[27] state the defense counsel's name, address, and telephone number. If the defendant isn't represented, state the defendant's name, address, and telephone number. Also state the date counsel indorsed the answer; the city where the answer was drafted; the party or parties defense counsel represents; on whom the answer will be served; the individual attorney and the attorney's firm; and co-counsel or associated counsel. Some attorneys (depending on local rules) include the last four digits of their Social Security number.[28]

Signature: The Uniform Rules require that the answer be signed by the defendant or defendant's attorney, but the CPLR doesn't require counsel to sign the answer.[29]

Verification: If the plaintiff has verified the complaint, the answer must also be verified.[30] See part IV of this series, in which the *Legal Writer* discussed verification in the context of writing the complaint.

Exhibits: You may attach "writings" to a pleading, as exhibits, under CPLR 3014. These exhibits are meant to provide a complete defense to the complaint.

Proof of Service: You must attach on a separate page at the end of the answer proof that you served the answer. You don't need to attach this proof to the copies you've served on the other parties. Attach the proof of service (affidavit of service or affirmation of service) to the original filed with the court.[31]

In next issue's column, the *Legal Writer* will continue with techniques on writing the answer. ■

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1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 15:464, at 15-49 (2006; Dec. 2009 Supp.).
2. *Id.* at § 15:464, at 15-49.
3. *Id.* at § 15:465, at 15-50.
4. *Id.*
5. *Id.* at § 15:462, at 15-49.
6. *Id.*
7. *Id.* at § 15:466, at 15-50.
8. *Id.* at § 15:461, at 15-49.
9. *Id.* at § 15:722, at 15-73.
10. *Id.* at § 15:724, at 15-73.
11. *Id.* at § 15:742, at 15-74.
12. *Id.* at § 15:740, at 15-74.
13. *Id.* at § 15:751, at 15-75.
14. *Id.* at § 15:481, at 15-50.
15. *Id.* at § 15:482, at 15-50.
16. CPLR 2101.
17. Barr *et al.*, *supra* note 1, at § 15:491, at 15-51.
18. *Id.* at § 15:492, at 15-51.
19. *Id.*
20. *Id.* at § 15:500, at 15-51.
21. David D. Siegel, New York Practice § 221, at 365 (4th ed. 2005).
22. Barr *et al.*, *supra* note 1, at § 15:520, at 15-53.
23. CPLR 3014.
24. Siegel, *supra* note 21, § 223, at 368.
25. Barr *et al.*, *supra* note 1, at § 15:505, at 15-52.
26. *Id.*
27. CPLR 2101(d).
28. Barr *et al.*, *supra* note 1, at § 15:506, at 15-53.
29. 22 NYCRR § 130-1.1-a.
30. CPLR 3020(a). Some exceptions exist: In fraud actions, the answer must be verified even if the complaint isn't verified. CPLR 3020(b)(1). A defense that doesn't involve the merits of the case, such as statute of limitations, must be verified. CPLR 3020(c).
31. 22 NYCRR § 202.5(a); Barr *et al.*, *supra* note 1, at § 15:510, at 15-53.

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LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: How did a small, innocuous word like spin become powerful enough to create and sway public opinion?

Answer: The attorney who asked this question noted that the noun *spin* in its original sense was domestic and innocuous: "the twisting of yarn that could be tightly spun without being damaged." As a verb, however, it became a metaphor, for example, in the phrase, "to spin a yarn," describing the telling of original tales by a story-teller.

"Spin" was not described as a political weapon until the late 20th century. In October 1984, the *New York Times* portrayed lobbyists as modern tale-spinners promoting their agendas:

> A dozen men in good suits and women in silk dresses will circulate smoothly among the reporters, spouting confident opinions. They won't be just press agents trying to impart a favorable spin to a routine. They'll be the Spin Doctors, senior advisers to the candidates.

Today, spin is ubiquitous. The corporate world creates "facts" with spin. One notable success from the 1950s was the Clairol corporation's promotion of a new product using marketing "spin." Clairol had developed a hair-dye that could simultaneously bleach, shampoo, and dye human hair. But to sell it, Clairol had to change the public idea that only "fast" and "cheap" women dyed their hair. To do so, its marketers carefully applied euphemism. First Clairol substituted the inoffensive word *color* for the pejorative word *dye*. This change made dyed hair respectable.

Then Clairol marketers put a question in their ads: "Does she or doesn't she?" And they supplied the answer: "Only her hairdresser knows for sure." (If people could not tell that your hair color was artificial, why not make it the color you'd like?)

Finally Clairol placed full-page ads in women's magazines depicting a beautiful youthful blond woman playing with her equally blond child in a flower-filled meadow. The marketing was now complete. Clairol-colored hair was not merely beautiful but acceptable as well; within a short time the number of women who dyed their hair burgeoned from 7% to more than 40% – and that number continues to increase.

Others groups also became aware of the power of spin – scientists, for example. In a letter to the professional journal *Chemical & Engineering News*, one chemist spoke for many when he objected to the use of the adjective *chemical*, arguing that it had been "tainted by association" in phrases like *harmful chemicals* and *chemical addiction*. A retired engineering professor wrote that the phrase *unleaded gasoline* should be avoided because it implied that gasoline had been removed from lead, which in fact it had never contained. Pharmacists urged that drug stores be called *pharmacies* due to the unsavory connotation of "drugs."

Even academia uses spin to attract students. For example, to promote its Master's degree Public Relations graduate programs, Kent State University promises that it will teach its PR students "cutting-edge techniques" so they can compete successfully in the marketplace.

Politicians of both major parties are masters of "spin." What Democrats call "climate change" Republicans call "climate variability." Democrats decry "clear-cutting" in forests; Republicans talk about the "healthy forests" that result. What Republicans dubbed "ANWAR," Democrats insisted on calling by its full name, "Arctic National Wildlife Refuge." The state of Georgia at first refused to acknowledge evolution, calling it "biological change" (finally admitting, however, that the theory of evolution does exist).

In their literature, environmentalists use the word *problems*: "We have the gopher problem; we have the panther problem; we have the problem of the loss of bald eagle nests." Nonsense, say their critics; environmentalists are "tree-huggers."

Military spokesmen choose euphemisms carefully. Their term "surgical strike" implies a bloodless military procedure. If the strike unintentionally kills civilians, these deaths are called "collateral damage." The military objected to the term "troop surge," instead preferring "troop increase." That change of language removes the expectation of a quick withdrawal afterwards.

The verb *embed* has traditionally been defined as "to fix objects firmly in a mass." But in Iraq, the military created a new noun, *embed*s, to refer to people – members of the press and other civilians accompanying our troops into war zones. People had never before been referred to as "embeds." That new language helped to de-personalize the "embeds."

Even in his madness, indicted Tucson serial murderer Jared Loughner appears aware of the power of spin. He explains in his Web postings that English grammar is not merely a set of rules, it is a government conspiracy intended to standardize people's thinking. He believes he could invent a new grammar to prevent the power of "government" over people's minds.

That was apparently what prompted Loughner's bizarre question at an open meeting in 2007. He asked Representative Giffords, "What is government if words have no meaning?" He told a friend that he was outraged when Representative Giffords did not answer, merely passing on to the next question. And he was surprised when the friend replied, "Dude, no one's going to answer that!"

There is little doubt that language is able to influence thinking. Loughner's irrational belief in the extreme power of that theory, however, is one evidence of his dementia.

Gertrude Block is lecturer emerita at the University of Florida College of Law. She is the author of *Effective Legal Writing* (Foundation Press) and co-author of *Judicial Opinion Writing* (American Bar Association). Her most recent book is *Legal Writing Advice: Questions and Answers* (W. S. Hein & Co., 2004).

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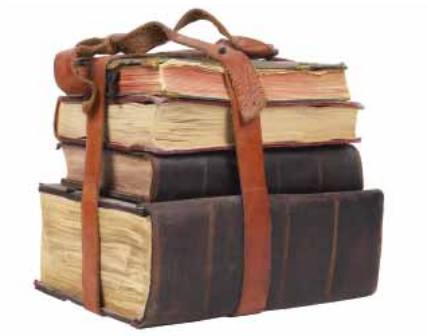

Drafting New York Civil-Litigation Documents: Part VI — The Answer

In earlier articles in this multi-part series, the *Legal Writer* discussed techniques for writing pleadings. The *Legal Writer* continues.

If you're the defendant, you've read the plaintiff's complaint, and you're now ready to respond to it in a formal document called the answer.

Deadlines

Depending on the way the plaintiff served the complaint on you, CPLR 320 provides several deadlines for your response to the complaint.

As the defendant, you have 30 days to respond to the complaint. Some exceptions to this rule exist.

If the plaintiff personally serves the complaint, you must answer within 20 days.

If the plaintiff serves the complaint by mail according to CPLR 312(a), you have 20 days after mailing the acknowledgment of receipt form, which you must do within 30 days of receiving the complaint.

If the plaintiff doesn't serve you personally, but serves someone other than you or affixes the summons and complaint to your door, you have 40 days to answer. The 40-day period is calculated as follows: 30 days under CPLR 3012(c) and 10 days from the actual date of service. If the plaintiff doesn't file the complaint on the same day the complaint was served on you, you might have more than 40 days to answer.

If the plaintiff served you by publication under CPLR 315, you have 30 days to answer from the date service is complete. Be aware that under CPLR 316(c), service isn't complete until 28 days after the first publication. You have 30 days plus 28 days — thus, 58 days to answer.

Before you write, serve, and file your answer, assess your options.

Things to Consider Before Answering the Complaint

As a defendant, you have several options before you answer. Some options depend on the strengths and weaknesses of your adversary's case. Other options depend on the strengths and weaknesses of your case. Your financial ability to defend yourself is just as important as your adversary's financial ability to pursue the case. The judge assigned to your case is a factor, too. Another consideration is the potential jury decision based on the type of case you have and the jurisdiction you're in. Before answering, it is critical to think about your ability to resolve the case without engaging in further litigation.

One option you have before answering is to move to dismiss the complaint under CPLR 3211, a pre-answer motion to dismiss. The benefit to moving to dismiss before you answer is obvious: The lawsuit is over if you're successful. The disadvantage is if you're unsuccessful, you must answer, but the lawsuit isn't yet over. You may move to dismiss the action on the merits for the plaintiff's failure to state a claim in the complaint. You may also move to dismiss the action on procedural grounds, such as jurisdiction, statute of limitations, and standing to sue.

If you have 20 days to answer the complaint based on the deadlines discussed above but choose to move to dismiss in lieu of an answer, you must move within 20 days. If you have 30 days to respond to the complaint, you have 30 days to move to dismiss in lieu of an answer. Likewise, you'll have more than 30 days to move to dismiss if you have more than 30 days to respond, and so forth. Under CPLR 3211(e), some exceptions exist for moving to dismiss on the basis of subject-matter jurisdiction, insufficiency of the cause of action, and nonjoinder of a party; you may move to dismiss the complaint under any of these grounds at any time.

> The starting point for drafting an answer should be your own answers to the allegations in the complaint.

Consult CPLR 3211 for all the ways you can move to dismiss the action. The *Legal Writer* will discuss motions in the upcoming issues.

Another option before answering is to remove to federal court a case that started in state court if permitted under federal law. Consult the federal rules before doing so.

Consider settling the case. Settling a case is advantageous because you'll

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