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NEW YORK STATE BAR ASSOCIATION

Journal

NYSBA

Ethical Issues and Alternative Fee Arrangements

by Richard B. Friedman and P. Michael Freed

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The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media. Copyright © 2012 by the New York State Bar Association. 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.

VINCENT E. DOYLE III

Our Goal: Justice for All

With the end of my term as president of the New York State Bar Association in sight, I will use my final President's Message to reflect upon all that we have achieved together during the past year. At the beginning of my term we adopted "Justice for All" as our theme for the year, and we undertook several initiatives aimed at improving access to justice. We approached these matters from multiple perspectives, focusing on broader concerns such as court funding, judicial compensation and wrongful convictions, while also examining the unique challenges that affect specific populations, such as veterans and respondents in immigration matters. At the same time, we worked to enhance the practice of law and reaffirmed our long-standing commitment to improving diversity in our Association and the legal profession. This past year, we celebrated not only our 135th anniversary, but also many victories and a great deal of progress.

While I could easily fill an entire issue of this *Journal* with an overview of the accomplishments made possible by our hard-working and talented volunteer members, I would like to use these few pages to highlight several initiatives of which I am particularly proud.

The President's Section Diversity Challenge

At the beginning of my term, we asked our sections to plan and execute additional initiatives to enhance the diversity of their membership, leadership and programs, and to evaluate the results of their efforts. I am incredibly impressed by the response we received, and the creative approaches taken by our sections. The President's Section Diversity Challenge, ably coordinated by co-chairs Glenn Lau-Kee and Sherry Levin-Wallach, will culminate with a a final report, presented at the 2012 Section Leaders Conference. It is my hope that the initiative will serve as a framework for continuing efforts to foster diversity. I know that President-elect Seymour James, Jr., is strongly committed to diversity and will do a wonderful job building upon the State Bar's efforts in this area.

Court Funding

In response to dramatic reductions in the state judiciary budget, the New York State Bar Association undertook a statewide examination of the impact of budget cuts upon New York state courts. Last fall, we reached out to our Judicial District Vice Presidents and asked them to gather information about the effects of court funding cuts. We asked them to consult with their local bar associations, administrative judges and practitioners to help determine what types of matters have been most seriously affected and to identify specific unmet areas of need in their regions. We also asked them to investigate how court funding cutbacks have affected judges, court staff, parties to civil and criminal matters, attorneys and the public.

Our vice presidents collected a wealth of compelling information about different experiences across the state. Important programs and resources are casualties of drastic budget cuts: courthouses have had to reduce their hours and staff; there is less administrative help for the many pro se parties seeking assistance with filings and paperwork; library services have been limited; pro bono coordinators who would ease the burden have been laid off; child care resources have been cut. One particularly disturbing finding is that jury pools have been reduced; in some instances, courts have run out of potential jurors. These are just a few of the findings included in our "Report on the Impact of Recent Budget Cuts in New York State Court Funding," which you can see by visiting www.nysba.com/courtfundingreport.

At the Presidential Summit held during the Association's Annual Meeting, we discussed the results of this report with an impressive panel of speakers from New York State and beyond. We were also fortunate to be joined by ABA President Wm. T. (Bill) Robinson III, who delivered an impassioned and energizing keynote address. We believe this report will be a valuable resource, and we will draw on its findings as we continue to advocate for adequate funding for our courts.

Judicial Compensation

Appropriate judicial compensation has been a State Bar priority for nearly two decades, because we strongly believe that our democratic society depends upon the justice system, and that the justice system depends upon

VINCENT E. DOYLE III can be reached at vdoyle@nysba.org.

CONTINUED FROM PAGE 5

the judges who control it. Although the cost of living has increased more than 40% since 1999, our judges have not received any increase in compensation during that time. Salary stagnation has made it more difficult to attract and retain the high quality judges for which New York State is renowned.

Last summer, we formed a working group and retained a private economist to study the issue of judicial compensation. The Bar Association approved the working group's report and recommendations, including an adjustment of judicial pay to a level of at least $192,000 per year for trial judges, with increases for appellate judges, and the implementation of regular adjustments to allow salaries to keep up with the cost of living. In July 2011, I testified before the Special Commission on Judicial Compensation to share our findings and state our position. We were disappointed when the Commission recommended a less substantial salary increase, to be phased in over three years, but we are pleased that it was approved without further reductions, and we will continue to work on this important issue.

Civil Legal Services

As we fight for adequate court funding and judicial compensation, we are also working to ensure that the providers of important civil legal services receive appropriate funding. Every year, millions of New Yorkers navigate the civil legal justice system without an attorney. Many are involved in matters related to basic necessities or sensitive family law cases. This year, the State Bar was once again honored to take part in hearings held by Chief Judge Jonathan Lippman's Task Force to Expand Access to Civil Legal Services. The Task Force found there continues to be a significant unmet need for civil legal services – only approximately 20% of that need is currently being met. We will continue to urge policymakers to provide stable, adequate sources of funding for civil legal service providers.

Special Committee on Immigration Representation

When I took office, I designated immigration representation as a major priority for my term as president. To this end, we established a Special Committee on Immigration Representation, led by Joanne Macri and Jojo Annobil. The Committee is currently finalizing its report and recommendations to improve the quality and availability of representation in immigration proceedings. The report will include standards for immigration representation, proposals to enhance enforcement of existing laws against fraud and unauthorized practice of law and effective methods to educate immigrant communities about unscrupulous providers. The Committee has also been examining the Board of Immigration Appeals's recognition of organizations through its accredited representative program, and exploring other strategies to improve representation in underserved areas around the state, including the dissemination of pro se resources and a proposal for a pro bono program. The Committee plans to present its report for a vote by the House of Delegates at our June meeting in Cooperstown.

Special Committee on Veterans

Veterans also face unique challenges in our justice system. With the influx of veterans returning home from multiple armed conflicts around the world, there is a heightened need for qualified attorneys willing to lend a hand. After sacrificing so much for our nation during active duty, many veterans confront a host of difficult issues as they re-enter civilian life. Some suffer from physical and psychological disabilities related to combat. Others face indirect consequences such as unemployment, consumer credit problems, stress in their family relationships, mental health issues, and even substance abuse or homelessness. And too many veterans have a difficult time with basic needs such as accessing their benefits.

We established a Special Committee on Veterans, co-chaired by Karen Hennigan and Michael Lancer, which aims to help veterans identify their legal problems and connect them with qualified attorneys. Committee members have been working to gather information about services currently available and to make them more accessible to veterans seeking free or affordable legal assistance. The Committee is also working to bolster the quality of representation by identifying areas where civilian lawyers may need specialized substantive training, or where they may need to be familiarized with military culture. The Committee hosted a terrific CLE program at our Annual Meeting, offered free of charge to attorneys who agreed to take on a veteran's civil case on a pro bono basis. The Committee is also working to facilitate the implementation of additional veterans courts. These courts recognize and deal with the presence of service-related issues such as traumatic brain injury, depression or other mental health concerns that may contribute to veterans' involvement in the criminal justice system and work to treat those underlying conditions to help participants get their lives back on track.

Task Force on Non-Lawyer Ownership

Non-lawyer ownership of law firms recently re-emerged as a significant issue to practitioners in New York State and beyond. Last year, the American Bar Association's Ethics 20/20 Commission issued a discussion paper proposing amendments to Model Rule 5.4 that would allow lawyers and law firms to share legal fees with non-lawyers, who could hold a limited ownership interest in the practice, as long as certain conditions are met. Our Association had studied this issue over a decade ago and led the effort within the ABA to oppose multi-disciplinary practice. Those proposals were defeated.

CONTINUED ON PAGE 52

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May 3 Westchester
May 4 Albany

Immigration Law Update 2012: Basics and Beyond
(two-day program)

May 8–9 New York City

DWI on Trial – 2012

May 10 New York City

The Examination Before Trial – Honing Your Deposition Skills

May 11 Buffalo; New York City
May 18 Long Island

Matrimonial Trial Institute I: Trial Techniques and Strategies

May 11 Long Island
May 18 Rochester
June 1 Albany
June 8 New York City

Dealing With Your Client's Retirement Assets
(9:00 a.m. – 1:00 p.m.)

May 15 Westchester
May 17 Buffalo
May 23 Syracuse
May 30 Albany
June 5 Long Island
June 8 Rochester
June 13 New York City

What You Need to Know as a Guardian Ad Litem
(9:00 a.m. – 1:00 p.m.)

May 15 Long Island
May 18 Albany
May 23 New York City
May 31 Rochester

Starting a Practice in New York

May 18 New York City

Advanced Insurance Coverage

May 21 Albany; Buffalo; Long Island
June 1 New York City
June 7 Syracuse

Public Sector Labor Relations

May 30 Syracuse
June 8 New York City
June 13 Albany

Practical Skills Series: Basics of Handling an Auto Accident Case

May 31 New York City
June 5 Albany
June 6 Long Island; Syracuse
June 7 Buffalo

Ethics 2012: Being Good When Times Are Bad
(9:00 a.m. – 1:00 p.m.)

June 5 Rochester
June 7 New York City
June 11 Buffalo
June 13 Long Island
June 18 Ithaca
June 22 Albany
June 27 Syracuse; Westchester

Key Issues for Health Care Providers: In-House Counsels' Perspective
(1:00 p.m. – 5:00 p.m.)

June 11 New York City

Power of Attorney: Practice and Litigation Under the New Law
(9:00 a.m. – 1:00 p.m.)

June 12 New York City

Practical Skills Series: Basic Tort and Insurance Law Practice

June 12 Long Island
June 13 Buffalo
June 14 Albany; Westchester
June 15 New York City

Representing a Political Candidate
(9:00 a.m. – 1:00 p.m.)

June 15 Long Island; Syracuse
June 19 Albany; Buffalo
June 21 New York City
June 28 Westchester

Marcellus Shale: New Regulation Challenges

June 15 Albany
June 22 New York City

Bridging the Gap
(two-day program)

June 27–28 New York City (live session)
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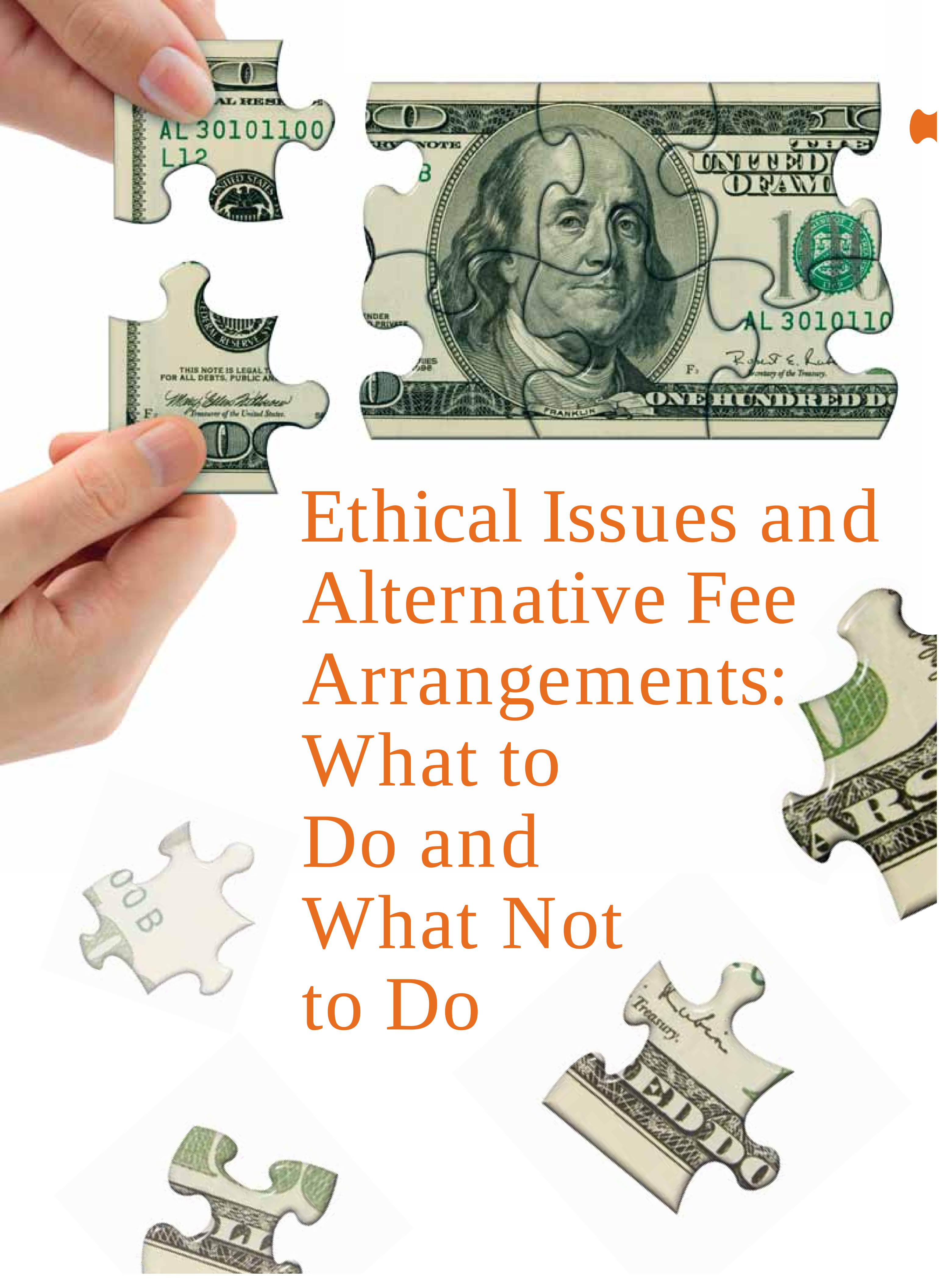


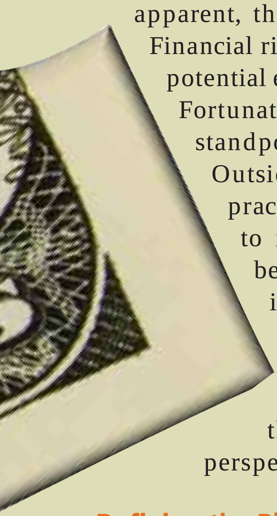
Ethical Issues and Alternative Fee Arrangements: What to Do and What Not to Do

Richard B. Friedman (RFriedman@mlalaw.com) is a litigation partner at McKenna Long & Aldridge LLP.
P. Michael Freed (MFreed@mlalaw.com) is a litigation associate at the same firm.

By Richard B. Friedman and P. Michael Freed

Few topics in the practice of law have generated as much discussion over the last few years as alternative fee arrangements (AFAs). Most of those discussions focus on clients – their desire to gain some level of control over costs. And, when properly implemented, AFAs not only can benefit clients, but can also improve the overall quality of legal services rendered and, as a result, lawyers enhance relationships with their clients.

AFAs' most obvious benefit is predictability – clients can more accurately budget and plan for legal costs. This, in turn, encourages practitioners to provide legal services more efficiently. AFAs also encourage lawyers to increasingly focus on value-driven client services. Finally, AFAs reinforce the sense of shared commitment towards a client's goals and shared financial risk in obtaining those goals.[1]



While the potential benefits of AFAs are readily apparent, the potential risks are often less obvious. Financial risks aside, practitioners face a plethora of potential ethical pitfalls when implementing AFAs. Fortunately, effective practices, from a business standpoint, can serve to resolve the ethics issues. Outside counsel who adopt certain of the practices discussed below will be better able to incorporate AFAs in their practice and be better positioned to grow their practice in the future. In-house counselors who understand the ethical issues that arise with respect to AFAs will be better equipped to implement arrangements that are successful from their employer's perspective.

Defining the Playing Field

AFAs have become more prevalent as attorneys and their clients have collaborated to construct creative solutions for managing legal costs. There are numerous types of AFAs, so first we will define the relevant terms and the types of AFAs being considered.

Generally speaking, an AFA is a fee arrangement based on factors other than solely on hourly rates.[2] The most effective AFAs are customized to the needs of the particular client and matter. As a result, AFAs can come in countless shapes and sizes. Among the most popular ones are the following:[3]

Flat or fixed fee – a set fee for an entire matter or specified portion of a matter (e.g., $500 for the drafting of a simple will).

Blended rate – a fee where the same hourly rate is charged for all timekeepers or the same hourly rate is charged for all partners and a different rate is charged for all associates.

Success fee – a result-oriented arrangement where a fee in addition to the agreed-upon hourly rates is assessed upon occurrence of a specified result.

Collar fee – the coupling of a targeted budget number for a particular matter with an hourly rate; the client and attorney periodically review fees against a budgeted amount and make necessary adjustments if fees are outside a predetermined range (e.g., attorneys bill hourly fees, but if the actual fees are more or less than the budgeted total by a certain amount (e.g., 10%) (i.e., the "collar"), the firm and the client share savings below or additional costs above the collar).

Retainer – a fixed fee per month (or some other agreed-upon period of time) for predetermined services regardless of how much time attorneys devote to the matter.

Capped fee – a fee arrangement based on standard hourly rates with a cap on the total amount that can be billed during a particular period of time or on a particular matter.

Portfolio fixed fee – a fixed fee for a number of matters (e.g., all real estate closings or all patent prosecutions).

Performance-based hold back – a fee arrangement based on standard hourly rates where a client pays only an agreed-upon percentage of those rates (e.g., 80%) and then pays additional amounts at certain intervals based either on its own assessment of the attorneys' performance or certain agreed-upon criteria.

Hybrid hourly rate/success arrangement – blending an agreed-upon hourly rate with an additional success fee upon the achievement of certain defined goals.

Ethical Considerations

As with any fee arrangement, AFAs present certain ethical issues. One general ethical concern is whether the financial and business considerations inherent in operating a law firm will interfere with attorneys' ethical obligations to their clients. Other concerns include preserving the client's absolute right to terminate the relationship at any time without penalty and the attorney's rights and obligations regarding flat fees or other fees paid in advance.

Fee agreements that fix or cap the client's fees at a specified amount can tempt an unethical attorney to curtail work after the cap has been reached. For example:

a law firm and its commercial real estate client implement a portfolio fee arrangement pursuant to which the client pays the firm $400,000 per year for the firm's legal services related to all the client's real estate closings. The standard hourly rate for the attorneys on the file is $400, meaning that it would take 1,000 total hours at the attorneys' standard rate to reach the $400,000 annual fee. A potential issue arises when the firm reaches or exceeds those 1,000 hours prior to the end of the year and additional work on the client's files is required.

Because of hypothetical situations such as the foregoing, some clients have become leery of "low-ball" flat fee proposals knowing that the actual cost for the quality of work they expect exceeds the amount proposed.[4] Clients considering a flat fee arrangement may fear that the firm will "under work" the matter.[5] On the flip side, some attorneys refuse flat fee work imposed by clients because they fear they will not get paid if additional work is required.[6]

> more extensive services probably will be required, unless the situation is adequately explained to the client.[10]

Comment 5 imposes a high standard on attorneys using any type of capped fee arrangement because it prohibits any fee agreement that "*might* induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest."[11] On its face, this is a high standard because, arguably, any type of fixed or capped fee arrangement *might* induce any attorney to curtail his or her services after the specified cap has been reached. The Comment goes further, prohibiting such an agreement if it is merely *foreseeable* that additional services will be needed – unless the attorney adequately explains the situation to the client.

The Model Rules contain additional relevant guidance. Model Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client."[12] Comment 1 states in relevant part as follows:

At the risk of stating the obvious, AFAs must work for both the client and the attorney or law firm to be successful.

Another ethical issue related to fixed fees is whether a fixed fee payment immediately becomes the property of the attorney or remains the property of the client until earned by the attorney's performance of legal services.[7] This issue has generated much discussion since the District of Columbia Court of Appeals wisely held that a flat fee is not earned upon receipt but upon the performance of legal services.[8] The answer to this question affects attorneys' obligations in handling flat fees.

Model Rules

The ABA's Model Rules of Professional Conduct provide guidance on many issues of AFAs. Perhaps most important is Rule 1.5 of the ABA Model Code, which establishes a reasonableness standard for assessing legal fees: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[9] This general rule applies to all types of fee agreements.

Comment 5 to Rule 1.5 is especially relevant to any type of fee agreement that caps the client's payment at a specified amount (including fixed or flat fees, capped fees, retainers, and portfolio fees):

> An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client with zeal in advocacy upon the client's behalf.[13]

In addition, Comment 10 to Model Rule 1.7 states that "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client."[14] These Rules prohibit lawyers from allowing their financial interests to interfere with or supersede their obligations to their clients. This has implications for AFAs. For example, these Rules govern a lawyer's conduct where a flat or fixed fee, retainer, or capped fee has been earned in full, but necessary work remains on the client's matter(s).

Then there is Model Rule 1.1, which requires a lawyer to "provide competent representation to a client."[15] Comment 1 provides the following non-exclusive list of factors for determining whether a lawyer is "competent" to handle a particular matter:

- "the relative complexity and specialized nature of the matter";
- "the lawyer's general experience";
- "the lawyer's training and experience in the field in question"; and
- "the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question."[16]

Model Rule 1.1 has implications for a lawyer tempted to "push work down" to less experienced attorneys when a blended rate is used. The supervising attorney must ensure that all work is assigned to attorneys with sufficient skill and experience to handle the particular project.

Of course, outside counsel implementing AFAs must adhere to these Rules (and any other governing rules or precedent). The challenge for these attorneys is to provide legal services as efficiently as possible without in any way sacrificing effectiveness or compromising their obligations to the client. The Model Rules provide a good starting point for learning to strike this balance.

Implement Best Practices for Addressing the Potential Ethical Issues Associated With AFAs

The use of AFAs is still relatively new in most practice areas. As a result, some practitioners are undoubtedly attempting to implement AFAs without much, if any, experience doing so. This can make navigating the potential ethical and legal issues difficult. It is critical, therefore, that law firm lawyers contemplating the use of AFAs consider the applicable ethical issues and develop systems and best practices to avoid the potential risks. Outside counsel who embrace and effectively address these challenges will almost certainly reap the benefits, given the nature of today's legal marketplace.

Best Practices – General Considerations

At the risk of stating the obvious, AFAs must work for both the client and the attorney or law firm to be successful. AFAs must succeed from a business standpoint and must avoid the associated ethical issues. Effective AFA practices that further the purposes and benefits of AFAs while minimizing the ethical, professional, and legal risks should be predicated upon the following: knowledge, experience, trust, collaboration, and communication. Implementing these concepts will assist outside counsel in avoiding the ethical and legal pitfalls associated with AFAs and help attorneys foster a closer relationship with their clients.

Knowledge

In-house and outside counsel considering implementing AFAs should first take time to educate themselves about the various types of AFAs, how each works, their respective benefits and risks, and the types of matters for which each AFA is best matched.

Of course, it is also critical that attorneys considering AFAs understand the unique ethical and legal issues they present. This should include, at the very least, consideration of the governing rules of professional conduct and other bar- or jurisdiction-specific rules. This will help practitioners implement AFAs that meet their clients' needs while avoiding the ethical and legal issues that these arrangements can present.

But being fluent in the various AFAs is not enough. Even if an attorney has an advanced knowledge of AFAs, he or she will not be able to implement an effective AFA without also obtaining an adequate understanding of the client's business, its legal needs, and how the two fit together. The practitioner should then work with the client's in-house counsel or other personnel to select and craft a fee agreement that best addresses the client's needs.[17]

The client, too, must be knowledgeable about its fee options. It is incumbent upon in-house counsel to learn various AFA options. Outside counsel should be able to advise the client on the pros and cons of each option for the particular matter at hand. All of this should go hand-in-hand with the attorney's knowledge of the client's business and legal objectives.

Experience

AFAs that effectively meet the client's business and legal needs while balancing the practitioner's need to run a profitable practice should be based, in part, upon the attorney's or law firm's experience in handling similar matters. It is difficult to implement an effective AFA for matters with which the attorney or law firm has little experience.[18]

Of course, an attorney who has experience handling similar matters or projects will be better equipped to predict the fees and costs associated with a matter, and to suggest appropriate terms and parameters for the fee agreement. The experienced attorney should look at data collected over time, which includes the number of hours necessary for completing specific tasks, the associated tasks, and the necessary staffing. Experience and data will put the attorney in a better position to implement a fee arrangement that meets the needs and expectations of both the client and the attorney while simultaneously decreasing ethical risks.

Trust

Trust between the attorney and client is essential for an AFA to work. For this reason, AFAs work best for matters where there is a pre-existing attorney-client or other relationship which has allowed the parties to develop a trust in one another. However, a pre-existing relationship is not a prerequisite ethically or otherwise for a successful AFA. Trust is often intertwined with experience. A client is more likely to trust an attorney who has handled similar matters and has experience and expertise in the relevant area.

Collaboration (Pre-Engagement)

Practitioners should decide upon and implement an AFA in close collaboration with the client. The first step is to work with the client to determine whether an AFA would be effective for the particular matter(s), and which AFAs might work best. This type of collaboration provides an opportunity to develop the client's trust regardless of whether an AFA is eventually implemented: the attorney has the opportunity to listen to the client and learn about his or her business and legal needs and to educate and advise the client on various fee agreement options.

The second step is for the outside counsel to carefully draft a fee agreement in collaboration with the client. The agreement should address the client's needs and goals. It should also clearly define the scope of the representation, the details of the fee and how it is to be determined, and how the matter will be staffed.

> Trust between the attorney and client is essential for an AFA to work.

Communication (Post-Engagement)

After the representation has begun, the attorney should keep the client informed on the status and the budget.[19] Attorneys should consider a provision in the fee agreement that allows the parties to reassess the agreement at specified points during the representation and to allow for alterations in certain specified instances. This provides both the practitioner and the client with a "safety net" should the matter and the billing not play out as anticipated.

Specific Tips

In addition to the general principles discussed above, the following specific issues should be considered when implementing AFAs:

- For blended rate agreements, consider a tiered system in which there is one rate for partners and one for associates. Some blended rate agreements contain even more narrow tiers, applying a separate rate for senior partners, junior partners, senior associates, and junior associates.
- For blended rate agreements, the attorney and client should agree upon and understand how the matter will be staffed and how work will be delegated to junior attorneys.
- For flat or fixed fees, consider a "collar fee" or "true-up" provision that would provide partial compensation in the event the actual fees are significantly above or below the agreed-upon fee.
- The fee agreement must allow the client to terminate the representation at any point without any penalty.

Conclusion

Alternative fee arrangements are important tools in the current legal services marketplace. Although AFAs can present unique ethical issues, outside counsel who embrace the solutions to those issues are more likely to succeed in this environment. And in-house counsel who familiarize themselves with various kinds of AFAs and understand the ethical issues confronting outside counsel will be better equipped to structure such arrangements that benefit their employers in the long term. ■

1. *See* Andrew Nicely & Elisa Kantor, *Malpractice Risks in Alternative Fee Arrangements*, 20 No. 10 Westlaw J. Prof. Liability, March 2011; *Strategies for Alternative Fee Arrangements*, ZG Alert, 1 (Mar. 2010), http://www.consultzg.com/assets/Uploads/ZGAlert-AFAs-March2010.pdf ("The reasons for this renewed interest in AFAs are clear: clients want to drive costs down, they want greater predictability, and they want their lawyers to have 'skin in the game.'").
2. *See* J. Randolph Evans & Shari L. Klevens, *Alternative Fees May Lend Solutions*, Daily Report, Oct. 10, 2011 ("Alternative fee arrangements are fee agreements or billing agreements customized to fit the goals and needs of a client and matter based on discussion between a client and its counsel as opposed to the standard hourly fee arrangement.").
3. *See id.*
4. Rebecca M. Lamberth et al., *Alternative Fee Arrangements: Who's Responsible for Making Them Work?*, 22 No. 2 Cal. Litig. (2009).
5. *Id.*
6. *See* Meredith Hobbs, *Lawyers: Flat Fees Pose Ethics Issues*, Daily Report, Jan. 10, 2011.
7. For an extended discussion on this issue, see Tyler Moore, *Flat Fee Fundamentals: An Introduction to Ethical Issues Surrounding the Flat Fee After* In re Mance, 23 Geo. J. Legal Ethics 701 (Summer 2010).
8. *In re Mance*, 980 A.2d 1196 (D.C. 2009).
9. Model Rules of Prof'l Conduct R. 1.5.
10. *Id.* cmt. (5).
11. *Id.* (emphasis added).
12. Model Rules of Prof'l Conduct R. 1.3.
13. *Id.* cmt. (1).
14. Model Rules of Prof'l Conduct R. 1.7 cmt. (10).
15. Model Rules of Prof'l Conduct R. 1.1.
16. *Id.* cmt. (1).
17. David T. Brown, *Approaching Alternative Fees*, Chicago Daily Law Bulletin, Nov. 18, 2010 ("[A] firm must maintain the flexibility to work with each client to define the best approach based on its unique business and legal needs, as well as the specific challenges of each case or transaction.").
18. *Id.* (noting that "one-time deals (which are more typical at midsize firms) are much harder to predict and control, making it that much more difficult to employ alternative fee arrangements.").
19. James A. Comodeca & Scott R. Everett, *Alternative Fee Arrangements: Risk Sharing Requires a Strong Partnership*, The National Law Review (May 3, 2010), http://www.natlawreview.com/article/alternative-fee-arrangements-risk-sharing-requires-strong-partnership ("[R]elationships created on alternative fee arrangements will only be successful if there is an open and honest dialogue between the parties.").

BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for more than 23 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *New York Civil Disclosure* and *Bender's New York Evidence* (both LexisNexis), the 2008 and 2012 Supplements to *Fisch on New York Evidence* (Lond Publications), and the annual "Evidence Survey" for the *Syracuse Law Review.* Mr. Horowitz teaches New York Practice, Professional Responsibility and Electronic Evidence & Disclosure at Brooklyn Law School. He serves on the Office of Court Administration's CPLR Advisory Committee and the New York State Bar Association's CPLR Committee, and is a frequent lecturer and writer on these subjects.

The Producers, Redux

Introduction

The May 2010 *Burden of Proof* column addressed the question of which party was responsible for the cost for the production of electronic data – the party demanding the disclosure, or the party responding to the demand? Titled "The Producers,"[1] the column attempted to draw the reader in with a discussion of the plot of the 1968 film of the same name, and then segued (seamlessly, I hope) into an analysis of the cost of production issue. Hoping to once again lure the reader into a column about this rather dry procedural issue, I return to a discussion of the film *The Producers*.[2]

The Producers (Film Version)

In the original film version from 1968, Zero Mostel played Max Bialystock, a scheming, washed-up Broadway producer, while Gene Wilder played Leo Bloom, an innocent accountant who is corrupted into becoming Max's partner in a scheme to deliberately engineer a Broadway flop, titled *Springtime for Hitler*.[3] The film opened to mixed reviews, but over time secured a top spot in the comedic pantheon. Roger Ebert, long after the film's release, called it "one of the funniest movies ever made."[4] Ebert also related the following story:

> I remember finding myself in an elevator with Brooks and his wife, actress Anne Bancroft, in New York City a few months after *The Producers* was released. A woman got onto the elevator, recognized him and said, "I have to tell you, Mr. Brooks, that your movie is vulgar." Brooks smiled benevolently. "Lady," he said, "it rose below vulgarity."[5]

Not content to rest on that cinematic record, fast forward to 2005, and a remake of the film was released, with Nathan Lane in the role of Max, and Matthew Broderick in the role of Leo.[6] In short, "The Producers, Redux."

"The Producers" (ESI Version)

In the world of electronic disclosure there are also producers, "producing parties," that are called upon to exchange electronic data, often referred to as "ESI."[7] As the column two years ago pointed out, the long-standing and prevailing view in New York state court practice has been that the party requesting the disclosure, the "requesting party," must agree in advance to bear the costs incurred by the producing party in producing the requested electronic disclosure.[8] Only when this preliminary monetary issue is resolved by the requesting party agreeing to bear the cost is the producing party's obligation to furnish ESI triggered.[9]

Over the course of five months, starting in September 2011, the First Department issued three critical decisions addressing ESI. The first, *Tener v. Cremer,*[10] addressed issues involving the production of ESI by a non-party, and the second, *Voom HD Holdings, LLC v. Echostar Satellite LLC*,[11] addressed the issues of ESI preservation and litigation holds. The February 2012 decision of the First Department in *U.S. Bank National Association v. GreenPoint Mortgage Funding, Inc.*,[12] revisited the question of which party, the demanding or producing party, was responsible for the cost of production. Together, these three decisions provide clear appellate guidance for most ESI issues in New York state courts.

In *U.S. Bank*, the First Department concluded:

> We disagree with the motion court's conclusion that the requesting party bears the cost of discovery that is responsive to its document requests. Rather, it is the producing party that is to bear the cost of the searching for, retrieving, and producing documents, including electronically stored information.[13]

Again, "The Producers, Redux." Only this time, the end of the story does a 180-degree turn.

2010's *MBIA* Decision

The earlier column profiled a decision by Justice Eileen Bransten of the Commercial Division, Supreme Court, New York County, *MBIA Insurance Corp. v. Countrywide Home Loans*,[14] which took aim at the prevailing view governing the allocation of costs associated with electronic disclosure and, indeed, disclosure of any matter in any medium.[15] The decision pointed out that this "rule" may "stand[] on more precarious footing"[16] than the cases citing, and cited for, the rule, suggest. After reconciling two First Department cases seemingly reaching contrary conclusions,[17] Justice Bransten decided the motion seeking a determination of which party, producing or demanding, was responsible, in the first instance, for the costs associated with producing the ESI at issue.[18] She concluded that the producing party was required to bear the cost of production, and that nothing in the record provided a basis for deviating from "the rule":

> Countrywide [producing party] urges that *Clarendon Natl. Ins. Co.* should be viewed as an anomaly. Far from being an anomaly, it is consistent with *Waltzer* in that application of the relevant rule in both resulted in cost allocation determinations only when the electronically-stored information to be produced was not readily available. While producing readily-available electronically-stored information (*Clarendon* – all of an insurance company's claims files; *Waltzer* – data stored on 2 compact discs) will not warrant cost-allocation, the retrieval of archived or deleted electronic information has been held to require such additional effort as to warrant cost allocation. Furthermore, under CPLR 3101(a), the lodestar in granting a protective order granting allocation of discovery costs is the prevention of "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." Hewing to this principle and the applicable case law, it is eminently reasonable to refrain from allocating discovery costs at this juncture.
>
> Countrywide fails to show that it is settled law that the party requesting discovery must bear the cost of its production or that cost allocation is here warranted. Accordingly, Countrywide's motion for a protective order allocating the costs of discovery is denied.[19]

2010's *Response Personnel* Decision

There is no record of an appeal from *MBIA*, so Justice Bransten's decision was the final word for the parties in that case on the issue of cost-allocation. Post-*MBIA*, the next First Department decision addressing the issue of cost-allocation of disclosure, including an ESI component, was *Response Personnel, Inc. v. Aschenbrenner*.[20] The plaintiff moved for a protective order in response to the defendant's demand for the plaintiff's tax returns and other documents. The trial court denied the motion for a protective order, and directed the plaintiff to produce, at its own expense, the requested discovery. The holding? Producer pays. The judge? The Hon. Eileen Bransten.

Agreeing that the trial court properly denied the motion for a protective order, the First Department reversed Justice Bransten's determination that the producing party shoulder the cost of producing the requested discovery in the form of electronic documents:

> Under these circumstances, directing plaintiff to produce documents in electronic form may be an appropriate response to defendants' argument that they have insufficient office space in which to review voluminous papers, but requiring plaintiff to bear the cost of the production imposes an undue burden on it, since, generally, the cost of production is borne by the party requesting the production, and the cost of creating electronic documents here would not have been inconsequential (citing *Waltzer*).[21]

2012's *U.S. Bank* Decision

The next, and most recent, First Department decision addressing the issue of the cost of production of ESI dates from the end of February this year. In *U.S. Bank National Association v. GreenPoint Mortgage Funding, Inc.*,[22] the First Department neatly framed the issue and its holding:

> This case requires us to determine which party is to incur the cost of searching for, retrieving and producing both electronically stored information and physical documents that have been requested

> as part of the discovery process. Consistent with this Court's recent decision in [*Voom*], which adopted the standards articulated by [*Zubulake*] in the context of preservation and spoliation, we are persuaded that *Zubulake* should be the rule in this Department, requiring the producing party to bear the cost of production to be modified by the IAS court in the exercise of its discretion on a proper motion by the producing party. Accordingly, the matter is remanded to the motion court for further proceedings.[23]

Requiring the producing party to bear its own cost of discovery, including the searching, retrieving and producing of ESI, supports the strong public policy favoring resolving disputes on their merits.

Citing Justice Bransten's *MBIA* decision, the First Department acknowledged that "we note, with some concern, that commentators and courts have called into question the underpinning of the requestor pays rule."[24] The First Department proceeded to explain its adoption of the producer pays rule:

> The question of which party is responsible for the cost of searching for, retrieving and producing discovery has become unsettled because of the high cost of locating and producing electronically stored information (ESI). The CPLR is silent on the topic. Moreover, while our courts have attempted to provide working guidelines directing how parties and counsel should prepare for discovery, including ESI, these guidelines generally abstain from recommendations concerning the issue of cost allocation.
>
> * * *
>
> Indeed, the courts that have spoken on the issue of cost allocation have not done so with one voice. For example, at least one court has held that the requesting party should bear the entire cost of searching for, retrieving and producing discovery that included ESI. This Court has previously acknowledged the requestor's obligation to pay for discovery and ESI costs, but has allowed for an exception requiring the producer to pay where the cost of ESI production is less significant, such as where the ESI is readily available.
>
> By contrast, there has been a movement among other courts, where the cost of discovery production is significant, to adopt the standards articulated by the United States District Court in [*Zubulake*], and to place the cost of discovery, including searching for, retrieving and producing ESI, at least initially, on the producing party ([the general rule is that "during the course of the action, each party should bear the expenses it incurs in responding to discovery requests"]).
>
> We are now persuaded that the courts adopting the *Zubulake* standard are moving discovery, in all contexts, in the proper direction. *Zubulake* presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI. As noted, *Zubulake* requires, consistent with the Federal Rules of Civil Procedure, the producing party to bear the initial cost of searching for, retrieving and producing discovery, but permits the shifting of costs between the parties. When evaluating whether costs should be shifted, the IAS courts, in the exercise of their broad discretion under article 31 of the CPLR, may follow the seven factors set forth in *Zubulake*:
>
> "(1) [t]he extent to which the request is specifically tailored to discover relevant information;
>
> (2) [t]he availability of such information from other sources;
>
> (3) [t]he total cost of production, compared to the amount in controversy;
>
> (4) [t]he total cost of production, compared to the resources available to each party;
>
> (5) [t]he relative ability of each party to control costs and its incentive to do so;
>
> (6) [t]he importance of the issues at stake in the litigation; and,
>
> (7) [t]he relative benefits to the parties of obtaining the information."
>
> The motion courts should not follow these factors as a checklist, but rather, should use them as a guide to the exercise of their discretion in determining whether or not the request constitutes an undue burden or expense on the responding party.[25]

The First Department rejected the defendant's arguments against adopting the *Zubulake* standard, noting that "requiring the producing party to bear its own cost of discovery, including the searching, retrieving and producing of ESI, supports 'the strong public policy favoring resolving disputes on their merits.'"[26] Furthermore, "having the requestor pay 'may ultimately deter the filing of potentially meritorious claims' particularly in circumstances where the requesting party is an individual."[27] "Finally, the adoption of the *Zubulake* standard is consistent with the long-standing rule in New York that the expenses incurred in connection with disclosure are to be paid by the respective producing parties and said expenses may be taxed as disbursements by the prevailing litigant."[28]

The First Department remanded the case to the trial court:

> Applying these standards to the instant motion for a protective order, we find that the motion by defendant was premature. The more prudent course of action would have been for defendant to first make a motion to limit or strike the discovery requests initiated by plaintiff that it found to be overbroad, irrelevant, or unduly burdensome. If, following the resolution of that motion, defendant still believed the costs associated with searching for, retrieving, and producing ESI to be prohibitive, defendant could then file a motion for the costs to be shifted to plaintiff.[29]

The First Department flagged the shortcomings in the moving papers as guidance for the trial court on remand:

> There is no occasion, however, for us to opine on the propriety of shifting costs in this matter. There is simply no evidence in the record supporting the fee structure proposed by defendant. There is no indication, for example, as to what experts, if any, will be used to restore deleted or missing documents, or even if there are deleted or missing documents that need to be restored. Indeed, it is unclear how defendant arrived at the retrieval costs it cited. While it may be, as the motion court noted, that defendant demonstrates a reason for either limiting or narrowing plaintiff's discovery requests and shifting some or all of the cost to plaintiff, it has simply not done so on the record to date.[30]

Conclusion

It is difficult to understate the importance of *U.S. Bank*. First, there is nothing in the opinion that limits application of the producer pays rule to ESI disclosure issues. Second, whether one agrees with the reasoning underlying the decision of the First Department, there is clarity going forward in First Department cases on the issue. Third, since it can be argued that there is no other appellate authority directly on point, the decision may be binding on trial courts in the other appellate divisions.[31] Finally, having state court practice mirror federal practice offers consistency and uniformity to practitioners who navigate back and forth between state and federal court.

Next issue's column will discuss the First Department's decisions in *Tener* and *Voom*.

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1. David Paul Horowitz, *The Producers*, N.Y. St. B.J. (May 2010) p. 20.
2. For those familiar only with the 2001 Broadway musical, *The Producers* did not originate on Broadway but in the 1968 Mel Brooks film of the same name. Closing the circle, the 2001 Broadway musical in turn inspired the 2005 film remake, directed by Susan Stroman.
3. If you have never seen the film, see it. Now.
4. Wikipedia, The Producers, http://en.wikipedia.org/wiki/The_Producers_(1968_movie).
5. *Id.*
6. If you have never seen the remake, see it. *After* you see the 1968 version.
7. Electronically stored information.
8. *See, e.g.*, *Lipco Elec. Corp. v. ASG Consulting Corp.*, 798 N.Y.S.2d 345 (Sup. Ct., Nassau Co. 2004).
9. *Id.*
10. 89 A.D.3d 75 (1st Dep't 2011).
11. 93 A.D.3d 33 (1st Dep't 2012).
12. 939 N.Y.S.2d 395 (1st Dep't 2012).
13. *Id.* at 398.
14. 27 Misc. 3d 1061 (Sup. Ct., N.Y. Co. 2010).
15. *Id.*
16. *Id.* at 1074.
17. *Waltzer v. Tradescape & Co.*, 31 A.D.3d 302 (1st Dep't 2006); *Clarendon Nat'l Ins. Co. v. Atl. Risk Mgmt., Inc.*, 59 A.D.3d 284 (1st Dep't 2009).
18. "Countrywide and MBIA dispute whom must pay the costs associated with producing electronically-stored information. Countrywide argues that the cost is the responsibility of the requesting party, while MBIA argues the responsibility is that of the producing party." *MBIA*, 27 Misc. 3d at 1074.
19. *Id.* at 1075–76 (citations omitted).
20. 77 A.D.3d 518 (1st Dep't 2010).
21. *Id.* at 519.
22. 939 N.Y.S.2d 395 (1st Dep't 2012). Reminiscent of *Six Degrees of Separation*, there is a family connection between *MBIA* and *U.S. Bank.* Shepardizing *MBIA* yields a "related proceeding" in *Syncora Guarantee Inc. v. Countrywide Home Loans, Inc.*, 935 N.Y.S.2d 858 (Sup. Ct., N.Y. Co. 2012).
23. *U.S. Bank*, 939 N.Y.S.2d. at 396.
24. *Id.* at 400 (citations omitted).
25. *Id.* at 398–99 (citations omitted).
26. *Id.* at 399–400 (citation omitted).
27. *Id.* at 400 (citation omitted).
28. *Id.* (citation omitted).
29. *Id.*
30. *Id.*
31. *See, e.g.*, *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dep't 1984) ("The Appellate Division is a single State-wide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule." (citations omitted)).

James M. Altman (jmaltman@bryancave.com), a litigation partner in the New York office of Bryan Cave LLP, is a member and the former chair of the NYSBA Committee on Attorney Professionalism.

Respecting Someone Else's Confidential Information

By James M. Altman

With the proliferation of electronic communications, it is increasingly common for a lawyer (the Receiving Lawyer), during the representation of a client, to gain access to confidential communications between an opposing counsel and the opposing party that neither of them intended the Receiving Lawyer to see. The most common situation is when the Receiving Lawyer comes into possession of confidential information[1] through an inadvertent disclosure.

But, besides that, there are at least three other situations when a Receiving Lawyer may confront confidential information of another lawyer's client. First, the Receiving Lawyer may receive an intentional transmittal of such confidential information from someone without authority to make such transmittal (an "unauthorized disclosure"). Second, the Receiving Lawyer may intentionally search for and uncover such confidential communications embedded in the initially invisible metadata of an electronic document sent by opposing counsel or the opposing party (metadata mining). Third, an organizational client may retrieve from the organization's computer system and deliver to the Receiving Lawyer an employee's electronic communications with personal counsel about a personal legal matter (an "employer disclosure").

When confronting an inadvertent disclosure of confidential information, the ethical obligations of a Receiving Lawyer admitted in New York are prescribed by Rule 4.4(b). The sole ethical duty is to notify the sender promptly of the receipt of the confidential information.[2] The Receiving Lawyer no longer has the obligation to stop examining the information or to follow the sender's instructions as to its disposition.[3] But, what are the Receiving Lawyer's ethical obligations, if any, with respect to the situations of (1) unauthorized disclosure, (2) metadata mining, and (3) employer disclosure? Does Rule 4.4(b) govern those situations as well? And, if not, what is the impact, if any, of Rule 4.4(b) on the ethical obligations prescribed by ethics committees in New York regarding those situations before Rule 4.4(b) became effective on April 1, 2009?

These questions have not yet been answered by the courts or ethics committees in New York. But, unfortunately, the answers provided by the American Bar Association Standing Committee on Ethics and Professional Responsibility (the ABA Committee) to analogous questions regarding the scope and impact of Model Rule 4.4(b) (MR 4.4(b)) have subordinated the importance of preserving someone else's confidential information to other considerations. Over the past six years, that ABA

Committee has viewed the adoption of MR 4.4(b) as the basis, in part or in whole, for (1) withdrawing ABA Opinion 94-382, the ABA Committee's prior ethical guidance protecting confidential information in the context of unauthorized disclosure;[4] (2) permitting metadata mining,[5] which both the New York State Bar Association Committee on Professional Ethics (NYSBA Committee) and the New York County Lawyers' Association Committee on Professional Ethics (NYCLA Committee) have viewed as unethical;[6] and (3) allowing a Receiving Lawyer to examine and use confidential communications between an employee and the employee's personal counsel about a personal legal issue that have been recovered from the employer's computer system, without notification to the employee or the employee's personal counsel.[7]

Rule 4.4(b) contains language identical to MR 4.4(b). If, based on an interest in uniformity, the ethics committees in New York reflexively mimic the ABA Committee's recent opinions regarding MR 4.4(b)'s impact in those situations, they will undermine New York's separate tradition of giving great deference to a broad view of the principle of client confidentiality under Rule 8.4(d) and its predecessor, DR 1-102(A)(5).[8] Instead, based upon Rule 8.4(d), the ethics committees in New York should (1) continue to require prompt notice to the opposing party or its counsel when a Receiving Lawyer gains access to confidential information through an unauthorized disclosure, (2) continue to prohibit metadata mining, and (3) require prompt notice to the opposing party or its counsel when a Receiving Lawyer gains access to confidential information through a good-faith review of metadata or an employer disclosure.

Two Different Traditions of Legal Ethics

In order to understand the choice that New York ethics committees face about the scope and impact of Rule 4.4(b), it is fruitful to view the distinct histories of MR 4.4(b) and Rule 4.4(b).

MR 4.4(b)

The history of MR 4.4(b) begins with the problem of the errant fax. Facing what in the late 1980s and early 1990s was a burgeoning problem, the ABA Committee, in Formal Opinion 92-368, opined that the Receiving Lawyer confronting an inadvertently disclosed document that appears on its face to contain confidential information has three ethical obligations: first, to refrain from examining the document after receiving notice or realizing that the document had been inadvertently sent; second, to notify the person who had sent the document (the Sender) of its receipt; and, third, to abide by the instructions of the Sender as to the disposition of the document.[9] Two years later, in Formal Opinion 94-382, that Committee reached a similar conclusion with respect to an unauthorized disclosure of confidential information:

> A lawyer who receives on an unauthorized basis materials of an adverse party that she knows to be privileged or confidential should, upon recognizing the privileged or confidential nature of the materials, either refrain from reviewing such materials or review them only to the extent required to determine how appropriately to proceed; she should notify her adversary's lawyer that she has such materials and should either follow instructions of the adversary's lawyer with respect to the disposition of the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.[10]

> **With respect to the situations of unauthorized disclosure, metadata mining, and employer disclosure, does Rule 4.4(b) govern?**

When the ABA Committee issued both opinions, there was no rule or statement in the Model Rules directly addressing the situation of either inadvertent disclosure or unauthorized disclosure. The ABA Committee based its opinions on a medley of legal and ethics principles, including recognition that a Receiving Lawyer's ethical duty "to maximize the advantage his client will gain from careful scrutiny of the missent materials" "pales in comparison to the importance of maintaining confidentiality."[11]

Some commentators and state bar association ethics committees criticized those opinions because, among other reasons, the ABA Committee was not interpreting a particular Model Rule.[12] Consequently, in February 2002, the ABA adopted a new rule specifically addressing inadvertent disclosure – MR 4.4(b).[13] Compared to Opinion 92-368, MR 4.4(b) dramatically reduces the ethical obligations of a Receiving Lawyer with respect to the protection of confidential information.[14] It requires the Receiving Lawyer only to "promptly notify the [S]ender."[15] It does not require the Receiving Lawyer to refrain from examining or using the document ("to Refrain"), or to return, destroy or sequester the document, as the Sender might request ("to Return").

New York's Different Ethics Jurisprudence

No ethics committee in New York directly addressed the issue of inadvertent disclosure until the second half of 2002, after MR 4.4(b) had been adopted. In 2002 and 2003, the NYCLA Committee and then the Association of the Bar of the City of New York's Committee on Professional and Judicial Ethics (City Bar Committee) opined, with certain qualifications, that a Receiving Lawyer who receives an inadvertently disclosed document has the same three ethical obligations prescribed in ABA Formal Opinion 92-368 – to Notify, to Refrain, and to Return.

NYCLA Opinion 730 deals expressly with the conflict between the principles of client confidentiality and zealous representation posed by an inadvertent disclosure of confidential information, ultimately concluding, like the ABA Committee in ABA Formal Opinion 92-368, that the principle of client confidentiality trumps the principle of zealous representation.[16] In reaching that conclusion, the NYCLA Committee articulated an expansive view of the principle of client confidentiality: "[A]ll lawyers share responsibility for ensuring that the fundamental principle that client confidences be preserved – the most basic tenet of the attorney-client relationship – is respected when privileged information belonging to *a* client [i.e., any client, whether one's own or another lawyer's] is inadvertently disclosed."[17] "[T]he Disciplinary Rule prohibiting lawyers from knowingly revealing the confidences and [secrets] of *their own* clients [i.e., DR 4-101] does incomplete justice to the fundamental principle that client confidences and secrets be preserved," because lawyers have broader ethical obligations to preserve the confidential information of all clients, even those of other lawyers.[18] "Recognizing that lawyers have an ethical obligation upon receipt of inadvertently disclosed privileged information *supplements* and *enhances* the Code's existing requirement that lawyers preserve the confidences and secrets of their own clients."[19] Despite the ABA's adoption of MR 4.4(b), the ethical obligation, in the view of the NYCLA Committee, is to comply with the Receiving Lawyer's three duties recognized in ABA Formal Opinion 92-368.

The NYCLA Committee did not anchor in any particular rule of attorney conduct its view that all lawyers, as part of their professional obligations, share responsibility for preserving confidential information, even confidential information of clients not their own.[20] Indeed, it specifically rejected the need to do so.[21]

But, in Opinion 2003-04, the City Bar Committee "focus[ed] the issues presented by inadvertent disclosure through the lens of DR 1-102(A)(5)," which prohibits "engag[ing] in conduct that is prejudicial to the administration of justice."[22] It concluded that a failure to protect the principle of client confidentiality incumbent on all attorneys in the context of inadvertent disclosure was prejudicial to the administration of justice and, therefore, a violation of DR 1-102(A)(5):

> Obligations of a receiving attorney with respect to a misdirected communication containing confidences or secrets cannot rest squarely on the duties imposed by DR 4-101. After all, the receiving attorney has no attorney-client relationship with the client whose information is exposed. The Code nevertheless recognizes that preservation of client confidences and secrets is crucial to stability of the legal system. As EC 4-1 states, "the proper functioning of the legal system require[s] the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer." Failing to notify the sender of an inadvertent disclosure would deprive the sending attorney of the opportunity to seek appropriate protection for the disclosed information and thereby prejudice the administration of justice. Likewise, reading beyond the point where the lawyer knows or reasonably should know that the communication is an inadvertent disclosure of confidences or secrets undermines the duty incumbent on all attorneys pursuant to DR 1-102(A)(5) to respect the foundations on which our legal system is based.[23]

In relying upon DR 1-102(A)(5), the Committee drew support from other New York ethics opinions construing that provision in similar contexts, as when a Receiving Lawyer has gained access to an opposing party's confidential information without the opposing party's knowledge or intent.[24]

In short, despite certain limited exceptions,[25] NYCLA Opinion 738 and N.Y. City Opinion 2003-04 imposed on New York lawyers the same threefold duty as ABA Formal Opinion 92-368: to Notify, to Refrain, and to Return. In the course of adopting much of the reasoning, and preferring the conclusion of ABA Formal Opinion 92-368 over the more limited approach of MR 4.4(b), the NYCLA Committee and the City Bar Committee distinguished New York's ethics jurisprudence from the ABA's ethics jurisprudence in two important respects:

1. Both Committees agreed that the principle of client confidentiality is broader than the duty to preserve the confidential information of one's own client; that principle protects the confidential information of other lawyers' clients as well, because protection of the principle of client confidentially for all clients is fundamental to the proper functioning of our legal system.
2. Because that protection is so fundamental, the failure to respect and support it, at least in the circumstance of inadvertent disclosure, prejudices the administration of justice and, therefore, violates DR 1-102(A)(5).

In 2005, the NYSBA Committee on Standards of Attorney Conduct (COSAC) commenced the process of revising New York's Code to make it, in both form and substance, more like the ABA's Model Rules. There is no indication, however, that when the NYSBA proposed a new rule specifically addressing inadvertent disclosure or when the Appellate Divisions adopted Rule 4.4(b) that the bar or the bench intended to repudiate either of these two distinguishing features of New York's ethics jurisprudence.[26]

When COSAC proposed Rule 4.4(b) to the House of Delegates, the Reporters' Notes explained that "the provision is needed to guard against breaches of confi-

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dentiality and other harms to clients that inevitably arise, even among careful and conscientious lawyers, with the proliferation of email, faxes and other electronic means of communication."[27] There was nothing indicating that Rule 4.4(b) curtailed the previously understood ethical obligations of Receiving Lawyers, except with respect to the particular situation of inadvertent disclosure, and nothing indicating that the principle of client confidentiality was no longer a fundamental element of our legal system or that, except for inadvertent disclosure, the previously understood balance between the principle of client confidentiality and the duty of zealous representation had been altered. Given the ABA Committee's interpretation of MR 4.4(b), it might be asked why the adoption of Rule 4.4(b) does not imply a change in view of the relative importance of the principle of client confidentiality. But, the Reporter's Note that "[a] more detailed rule . . . would likely be difficult to apply and enforce, and could not possibly anticipate all of the situations"[28] explains that Rule 4.4(b)'s limited notification obligation was due to drafting and enforcement concerns, rather than a changed evaluation about the role or significance of the broadly conceived principle of client confidentiality. Not surprisingly, then, Rule 4.4(b) was not even one of the Rules identified by the courts as marking an important change in New York's ethical jurisprudence.[29]

Rule 4.4(b) does not imply a change in view of the relative importance of the principle of client confidentiality.

The Three Other Situations

Given these two different bodies of ethics jurisprudence, what do the recent ABA Committee opinions mean for New York attorneys who confront someone else's confidential information in the three situations other than inadvertent disclosure?

Situation 1: Unauthorized Disclosure

Unauthorized disclosure of confidential information is different from inadvertent disclosure. Unlike inadvertent disclosure, an unauthorized disclosure is not the result of a mistaken transmission of confidential information by an adversary or an opposing party. With an unauthorized disclosure, someone – but *not* the party whose confidential information it is – intends to send or provide the confidential information to the Receiving Lawyer.

Second, because an unauthorized disclosure is not caused by carelessness, there is no justification for allowing the Receiving Lawyer to exploit the disclosure as an incentive to make senders of confidential information more careful, and there is no basis to penalize the party whose confidential information it is, since that party did nothing wrong.

Third, when confidential information is disclosed without authorization, there is no issue of a privilege waiver. Thus, there is no basis for arguing that the Receiving Lawyer may review such confidential information because it is no longer privileged.

Before MR 4.4(b) was adopted, the ABA Committee had opined in Formal Opinion 94-382 that a Receiving Lawyer confronting an opposing party's confidential information that had been disclosed without authorization should (1) Notify; (2) Refrain; and (3) Return, or, in the case of a dispute, refrain from using the information until the court resolves the dispute.[30] In Formal Opinion 06-440, the ABA Committee withdrew that opinion, holding, in essence, that no Model Rule provided a basis for that prescription absent special facts indicating criminal conduct or dishonesty or deceit. Although it viewed MR 4.4(b) as inapplicable to unauthorized (as opposed to inadvertent) disclosure, the ABA Committee pointed out that MR 4.4(b) imposed only a notice requirement, but no requirement limiting examination or use of inadvertently disclosed confidential information and, therefore, those two additional ethical requirements were not supported by MR 4.4(b).[31] In effect, the Model Rules impose no ethical obligations or limitations upon a Receiving Lawyer being offered or gaining access to an unauthorized disclosure of confidential information.

The ABA Committee's withdrawal of ABA Formal Opinion 94-382 in light of MR 4.4(b) indirectly raises a question for New York lawyers: Are the ethics opinions in New York regarding unauthorized disclosure still valid after Rule 4.4(b)? The answer is yes.

In N.Y. City Opinion 1989-01, the City Bar Committee considered, among other things, what a lawyer representing a spouse in a matrimonial action should do when the client provides copies of documents reflecting communications between the other spouse and that spouse's counsel in the lawsuit. Based on DR 1-102(A)(5), the Committee opined that the Receiving Lawyer should notify opposing counsel of receipt of the documents and the circumstances under which they were obtained and return the documents or copies to opposing counsel.

> The inquirer and his client are privy to communications between the opposing party and counsel that are likely to be privileged and that, whether or not privileged, were obtained otherwise than through normal discovery procedures. Having such information gives the inquirer and his client an advantage that, however slight, they are not entitled to have, and to permit them to retain that advantage, of which the opposing party and counsel are unaware, would in the Committee's opinion be prejudicial to the administration of justice and, therefore, ethically impermissible. DR 1-102(A)(5).[32]

However, because the client-spouse's interception and copying of the attorney-client communication constituted a fraud upon the other spouse, the disclosure of which would be embarrassing or detrimental to the client-spouse, the Committee explained that the Receiving Lawyer could not notify opposing counsel about the circumstances of the disclosure without getting the client-spouse's permission; absent that consent, the Receiving Lawyer would have to withdraw from the representation because of the conflicting duties to notify and not to notify opposing counsel.

In NYSBA Opinion 700 (1998), a government lawyer responsible for prosecuting an administrative proceeding received an unsolicited phone call from a former non-lawyer employee of a law firm representing the respondent in the proceeding, who informed the government lawyer that certain documents submitted by the respondent in discovery had been materially altered. Based on DR 1-102(A)(5) and DR 1-102(A)(4), the NYSBA Committee opined that the government lawyer should refrain from seeking further information from opposing counsel's former employee. In support, the Committee relied, among other things, on N.Y. City Opinion 1989-01, ABA Formal Opinions 92-368 and 94-382, and "the strong public policy in favor of confidentiality, which . . . outweigh heavily the competing principles of zealous representation."[33] The Committee also concluded that the government lawyer should seek judicial guidance regarding the use, if any, that can be made of the information learned from the former law firm employee.

Thus, by the time Rule 4.4(b) was adopted, a Receiving Attorney was ethically obligated to notify opposing counsel of confidential information that is disclosed without authorization and not to use such information prior to such notice. Those ethical requirements conflict with the ABA's current views, which, after Formal Opinion 06-440, do not mandate such notice and place no restrictions on the use of such confidential information.

The adoption of Rule 4.4(b) should not undermine those requirements, because N.Y. City Opinion 1989-01 and NYSBA Opinion 700 were based on DR 1-102(A)(5) and New York's strong public policy in favor of the principle of client confidentiality, even when that principle conflicts with the duty of zealous representation. In April 2009, when New York adopted the new Rules of Professional Conduct, the language of DR 1-102(A)(5) was carried over verbatim in Rule 8.4(d), and there is no indication that either COSAC, which proposed the Rules, or the courts, which adopted them, intended to lessen the importance of the principle of client confidentiality in itself or relative to the duty of zealous representation.[34]

Indeed, if any change in the relative values of the principle of client confidentiality and the duty of zealous representation were intended, it is likely that the relative strength of the principle of client confidentiality was increased, because the Rules eliminated "zealousness" or "zeal" as the standard for ethical representation of a client.[35] Moreover, if the principle of client confidentiality demands prompt notice with respect to an inadvertent disclosure, that principle has even greater weight in the context of an unauthorized disclosure. There, the opposing party and opposing counsel are not responsible for the transmittal of confidential information, so there is no basis for penalizing them for the transmittal (i.e., it's not their mistake) and no justification that allowing the Receiving Lawyer to exploit the unauthorized disclosure will act as a general deterrent against attorney carelessness in handling confidential information.

A lawyer deliberately searching through metadata with the goal of unearthing someone else's confidential information is engaged in "metadata mining."

In short, even though ABA Formal Opinion 94-382 has been withdrawn, the ethical response to an unauthorized disclosure of confidential information under New York's ethical jurisprudence should remain the same under the Rules as it was under the Code. The adoption of Rule 4.4(b), which by its terms concerns only inadvertent disclosure, does not conflict with the reasons supporting a more stringent ethical response to unauthorized disclosure than is required by the Model Rules.

Situation 2: Metadata Mining

"Metadata" is information about other information, often initially invisible, that is embedded in electronic documents.[36] Metadata can be as harmless as information indicating the last date and time that an electronic document was edited, or saved, or printed, but it also can be as consequential as "tracked changes" that can reveal, among other things, the confidential communications between a client and its counsel about an ultimate settlement number or a strategy regarding changes to an agreement being negotiated with opposing counsel.[37] Metadata can just "pop up" when a cursor passes over it or it can be searched for and found using sophisticated forensic tools. A lawyer deliberately searching through metadata with the goal of unearthing someone else's confidential information is engaged in "metadata mining."

Promulgated in 2001, before the ABA adopted MR 4.4(b), NYSBA Opinion 749 was the first ethics opinion anywhere to discuss metadata mining. Even apart from any concerns of illegal conduct under state or federal laws prohibiting the unauthorized interception of electronic communications, NYSBA Opinion 749 prohibits metadata mining because such conduct is dishonest and deceitful and prejudices the administration of justice.

NYSBA Opinion 749 rests upon an analogy between metadata mining and less-technologically-sophisticated means of invading someone else's attorney-client relationship, such as using inadvertent disclosures of confidential information and soliciting and then exploiting disclosure of unauthorized communications. The Committee viewed the relationship between metadata mining and inadvertent disclosure as follows:

> [A]lthough counsel for the other party intends the lawyer to receive the "visible" document, absent an explicit direction to the contrary counsel plainly does not intend the lawyer to receive the "hidden" material or information . . . . To some extent, therefore, the "inadvertent" and "unauthorized" disclosure cases provide guidance in the present inquiry.[38]

Rule 4.4(b) also governs documents that were "otherwise made available" by opposing parties or their lawyers.

Five years later, when the ABA Committee addressed the issue of metadata mining in Opinion 06-442, the ABA had already adopted MR 4.4(b), and that Rule figured prominently in the ABA Committee's rejection of the conclusion and analysis in NYSBA Opinion 749. The ABA Committee started its analysis with the literalist's observation that the Model Rules "do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents."[39] The ABA Committee did not take a position on whether the transmittal of metadata was inadvertent or not, viewing that as dependent upon the facts.[40] But it pointed out that even if the transmittal of metadata was considered inadvertent and, therefore, within the scope of MR 4.4(b), that Rule itself "is . . . silent as to the ethical propriety of a lawyer's review or use of such information."[41] Thus, the ABA Committee said, even if MR 4.4(b) applied, it would not prohibit a lawyer's review or use of confidential information obtained through metadata mining. Moreover, without even an explanation, the ABA Committee expressly rejected NYSBA Opinion 749's conclusion that metadata mining violated the more general ethical requirements that lawyers should not engage in dishonest or deceitful conduct or conduct prejudicial to the administration of justice.[42]

Two years later, in 2008, the NYCLA Committee considered both NYSBA Opinion 749 and ABA Formal Opinion 06-442 and agreed with the former. Based on its own prior opinion regarding inadvertent disclosure and the more general ethical proscriptions against attorney conduct that is dishonest and deceitful or prejudicial to the administration of justice, the NYCLA Committee concluded that a "receiving attorney may not ethically search the metadata in . . . electronic documents with the intent to find privileged material or if finding privileged material is likely to occur from the search."[43]

Both NYSBA Opinion 749 and NYCLA Opinion 738 pre-date the adoption of Rule 4.4(b). Did New York's adoption of Rule 4.4(b) undermine the continuing validity of those opinions?

No. Both NYSBA Opinion 749 and NYCLA Opinion 738 concur with the prevailing view in New York's ethics jurisprudence that client confidentiality takes precedence over the duty of competent client representation. The adoption of Rule 4.4(b) did not change that.

Moreover, if that principle holds in the case of unauthorized disclosure, it is even stronger in the situation of metadata mining, because the Receiving Lawyer had no access to that confidential information until he or she deliberately searched the metadata in the electronic document with the intent of uncovering any confidential information therein. Such action is not dissimilar to a lawyer's deliberately questioning an employee of a represented opposing party about that party's confidential information during an informal interview – clearly an unethical act in the eyes of the New York Court of Appeals and the NYSBA Committee.[44] New York's ethics jurisprudence has long recognized that lawyers representing a client sometimes have to restrain their zeal when confronting conflicting ethical principles. Rule 4.4(b) did not change that either.

A related, but different, question concerns a Receiving Lawyer's ethical obligation if, while reviewing "track changes" or some other metadata on the good-faith belief that the Sender intended the Receiving Lawyer to review that metadata, the Receiving Lawyer comes upon the opposing party's confidential information. What should the Receiving Lawyer do?

No New York case or ethics opinion has confronted that question. But, in the more than 10 years since NYSBA Opinion 749, there has been virtual unanimity among ethics committees across the country, including the NYSBA Committee and the NYCLA Committee, that lawyers have an ethical duty to scrub the confidential information out of metadata before they send emails and other electronic documents to non-clients.[45] That unanimity provides the basis for a presumption that if metadata transmitted by opposing counsel contains their client's confidential information, that confidential information was sent by mistake – that is, inadvertently.

That presumption has been expressly adopted by a few bar association ethics committees in other states.[46] If that presumption were recognized in New York – and it should be – then New York lawyers who come upon confidential information when properly reviewing metadata contained in an electronic document sent by opposing counsel or the opposing party would be obligated to comply with Rule 4.4(b)'s direction to notify opposing counsel of the receipt of such information.[47]

Situation 3: Employer Disclosure

As more and more employees make greater use of their employer's computer systems, there have been more cases regarding the legal and ethical issues posed when a lawyer is provided by an organizational client with copies of employees' emails to their personal counsel about personal legal problems. Depending primarily on whether an employee had a reasonable expectation of confidentiality in sending and receiving such email communications, such email communications may be protected by the attorney-client privilege.[48] Regardless of their privileged status, however, what are a lawyer's ethical obligations when provided such emails?

No ethics committee in New York has considered this issue, but the ABA Committee did so in Formal Opinion 11-460. Once again, it concluded that MR 4.4(b) did not address the situation, either expressly or implicitly, because MR 4.4(b) concerns a document that is "inadvertently sent," and the emails between the employee and personal counsel were not "inadvertently sent." "A 'document [is] inadvertently sent' to someone when it is accidentally transmitted to an unintended recipient, as occurs when an email or letter is misaddressed or when a document is accidentally attached to an email or accidentally included among other documents produced in discovery."[49] In the ABA Committee's view, "a document is *not* 'inadvertently sent' when it is retrieved by a third person from a public or private place where it is stored or left."[50]

But Rule 4.4(b) is not so limited in scope. The NYSBA's House of Delegates approved Comments to Rule 4.4 that differ from the ABA's comments to MR 4.4. Unlike Comment 2 to MR 4.4, NYSBA's Comment 2 includes language indicating that the scope of Rule 4.4(b) is not restricted to documents that were mistakenly sent or produced, it also governs documents that were "otherwise made available" by opposing parties or their lawyers.

This language was added because of a proposal made by NYCLA during NYSBA's drafting and approval process regarding Rule 4.4(b). NYCLA believed that Rule 4.4(b) "should include all situations where a lawyer inadvertently comes into possession of a document, not only where a document was mistakenly 'sent' to the lawyer."[51] As examples, NYCLA specifically referred to "documents inadvertently left in court or in a conference room."[52] Thus, when the House of Delegates adopted Rule 4.4(b) with that additional language in Comment 2, it intended Rule 4.4(b) to cover situations when documents are mistakenly made available on an employer's computer or other electronic device.

In sum, despite their identical language, by virtue of their different histories MR 4.4(b) and Rule 4.4(b) provide different answers to the question of a Receiving Lawyer's ethical obligation regarding confidential information made available on an employer's computer system. Under Rule 4.4(b), private communications between an employee and private counsel that reside on the employer's computer systems are inadvertently made available to the employer and its counsel *if* the employee reasonably believed that they were protected from review by the employer and its counsel. Indeed, in at least one New York case – *Forward v. Foschi*[53] in 2010 – a court has held that Rule 4.4(b) requires a Receiving Lawyer to notify the employee's personal counsel of receipt of such emails.

Conclusion

For years, New York's ethics jurisprudence has recognized that the principle of client confidentiality is fundamental to the proper functioning of our legal system. There is no evidence that when Rule 4.4(b) was adopted, it was intended to narrow the broad construction of that principle in New York's ethics jurisprudence or diminish that principle's value relative to the duty of competent client representation. Accordingly, Rule 4.4(b) gives no reason to retreat from the greater protection afforded confidential information under New York's existing ethics jurisprudence than under the ABA Committee's recent construction of the Model Rules.

This is no small point. One very significant purpose of enforceable ethical rules is to give voice and support to the fundamental underpinnings of our legal system, such as the principle of client confidentiality.[54] If New York's ethics rules do not sufficiently protect the principle of client confidentiality in situations such as unauthorized disclosure, metadata mining, and employer disclosure, then whenever those conflicts arise, that keystone principle will be sacrificed to the particular, short-term interests of partisan clients.

1. "Confidential information" is defined in Rule 1.6(a) of the New York Rules of Professional Conduct (the Rules), which has been effective since April 1, 2009. In the parlance of the New York Code of Professional Responsibility (the Code), which was effective from January 1, 1970, through March 31, 2009, "confidential information" consists of "confidences" – that is, information protected by the attorney-client privilege – and certain non-privileged information called "secrets." *See* Disciplinary Rule 4-101(A) (DR).

2. Rule 4.4(b) simply states: "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Because the word "document" in that Rule includes "email and other electronically stored information subject to being read or put into readable form," Rule 4.4(b), Comment 2, covers the errant email as well as the errant fax.

3. *See* James M. Altman, *Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism*, N.Y. St. B.J., Nov./Dec. 2010, p. 20 (Altman, *Inadvertent Disclosure*).

4. ABA Formal Op. 06-440 (May 13, 2006).

5. ABA Formal Op. 06-442 (Aug. 5, 2006).

6. NYSBA Comm. on Prof'l Ethics, Op. 749 (2001); NYCLA Comm. on Prof'l Ethics, Op. 738 (2008).

7. ABA Formal Op. 11-460 (Aug. 4, 2011).

8. Already two commentators have argued, based in part on uniformity grounds, that the NYSBA Committee should reconsider its views on metadata mining and adopt the ABA Committee's contrary position. *See* Michael B. de Leeuw & Eric A. Hirsch, *Time to Revisit the Ethics of Metadata*, N.Y.L.J., S4, Mar. 19, 2012. In my view, this argument is misguided for the reasons stated below and in James M. Altman, *Broad Protection of Client Information*, N.Y.L.J., Mar. 28, 2012, p. 6, col. 4.

9. ABA Formal Op. 92-368 (Nov. 10, 1992), withdrawn in ABA Formal Op. 05-437 (Oct. 1, 2005) based upon the adoption of MR 4.4(b).

10. ABA Formal Op. 94-382 (July 5, 1994), withdrawn in ABA Formal Op. 06-440 (May 13, 2006) based upon the adoption of MR 4.4(b).

11. ABA Formal Op. 92-368. The ABA Committee reached its conclusion in ABA Formal Opinion 94-382 "for the reasons outlined in ABA Formal Opinion 92-368," among others. ABA Formal Op. 94-382.

12. *See* James M. Altman, *Model Rule 4.4(b) Should Be Amended*, ABA Center for Prof. Responsibility, The Prof. Lawyer, Vol. 21, No. 1, 16, 18 (2011) (Altman, *Model Rule 4.4(b)*).

13. *See id.*, n.3.

14. According to the ABA Committee, MR 4.4(b) "not only directly addressed the precise issue discussed in Formal Opinion 92-368, but narrowed the obligations of the receiving lawyer." ABA Formal Op. 05-437 (Oct. 1, 2005).

15. *See* note 2, above.

16. NYCLA Op. 730 (2002) (citing ABA Formal Op. 92-368).

17. NYCLA Op. 730 (2002) (emphasis added).

18. *Id.*, n.5 (emphasis added).

19. *Id.* (emphasis added).

20. *Id.*

21. *Id.*

22. Ass'n of the Bar of the City of N.Y., Formal Op. 2003-04 (2003).

23. *Id.*

24. *Id.* (citing N.Y. City Op. 1989-1(1989) (concerning unauthorized disclosure); NYSBA Op. 749 (2001) (concerning metadata mining); NYSBA Op. 700 (1998) (concerning unauthorized disclosure)).

25. In N.Y. City Op. 2003-04, the Committee determined that (i) a Receiving Lawyer may retain an inadvertently disclosed document for the sole purpose of presenting it to a tribunal for in camera review and (ii) a Receiving Lawyer may use confidential information learned from examination of the inadvertently disclosed document before the Receiving Lawyer knew or had reason to know that the document was inadvertently disclosed.

26. Those two elements distinguish New York ethics jurisprudence from the ABA's ethics jurisprudence (*see* ABA Formal Op. 06-442, n.10 (Aug. 5, 2006) (specifically rejecting, among other things, the premise of NYSBA Op. 749 (2001) that a lawyer owes a duty to preserve the confidential information of a client not the lawyer's own and that the failure to do so prejudices the administration of justice)), but not from the ethics jurisprudence applicable in some other states. Ethics committee in other states have recognized, for example, that the principle of client confidentiality, broadly construed, is so fundamental to our adversary system of justice that all attorneys, as part of their professional obligations to help safeguard the key underpinnings of our legal system, share the responsibility for preserving confidential information, even confidential information not of their own clients. *See* Altman, *Model Rule 4.4(b)*, p. 17, nn.13–14 (citing several state ethics opinions).

27. NYSBA, Proposed Rules of Professional Conduct, dated Feb. 1, 2008, at 168.

28. *Id.*

29. Although the Press Release from the New York Uniform Court System identified seven Rules as entailing "significant ethics changes" and identified ten other Rules as "noteworthy developments," Rule 4.4(b) was not mentioned at all. "New Attorney Rules of Professional Conduct Announced," Press Release dated Dec. 16, 2008.

30. *See* note 10, above.

31. The ABA Committee reasoning in Formal Opinion 06-440 is unjustifiably positivistic, since the Committee acknowledges that "the considerations that influenced the Committee in Formal Opinion 92-368, which carried over to Formal Opinion 94-382, are part of the broader perspective that may guide a lawyer's conduct in the situations addressed in those opinions." ABA Formal Op. 06-440. But the Committee did not find those considerations "an appropriate basis for a formal opinion of this Committee, for which we look to the Rules themselves." *Id.* Thus, in Formal Opinion 06-440, the ABA Committee did not discredit the considerations that led to its prescriptions in Formal Opinions 92-368 and 94-382; it just decided that its jurisdiction was limited to interpretation of Model Rules and did not extend to prescriptions based on such a "broader perspective." This self-imposed limitation on the scope of the Committee's role is nowhere stated in the Committee's charter and is inconsistent with the Model Rules themselves, which expressly acknowledge that "the Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer." Model Rules, Scope, ¶ 16.

32. N.Y. City Op. 1989-01 (1989).

33. NYSBA Op. 700 (1998).

34. *See* notes 26–27, above, and accompanying text.

35. *See* Lawrence J. Vilardo & Vincent E. Doyle III, *Where Did the Zeal Go?*, ABA J. Section of Litig, Vol. 38, No. 1, 53 (2011).

36. NYSBA Op. 782 (2004).

37. *Id.;* ABA Formal Op. 06-442 (Aug. 5, 2006).

38. NYSBA Op. 749 (2001).

39. ABA Formal Op. 06-442 ((Aug. 5, 2006).

40. *Id.*, n.7.

41. *Id.*

42. *Id.*, n.10.

43. NYCLA Op. 738 (Mar. 24, 2008).

44. *See* Altman, *Inadvertent Disclosure*, p. 27, n.25.

45. *See, e.g.*, ABA Formal Op. 06-442 (Aug. 5, 2006); N.C. 2009-01 (2010); N.H. 2008-2009/4; Colo. 119 (2008); Ariz. 07-03 (2007). *See also* NYSBA Op. 782 (Dec. 8, 2004); NYCLA Op. 738 (Mar. 24, 2008).

46. *See, e.g.*, N.H. 2008-2009/4; Colo. 119 (2008); Ariz. 07-03 (2007).

47. Under Rule 4.4(b), the Receiving Lawyer would have no obligation, however, not to examine the embedded confidential information and not to use it. This illustrates one of the reasons why Rule 4.4(b) is "ethically anemic" and should be amended. *See* Altman, *Inadvertent Disclosure*, p. 26. Rule 4.4(b) offers no protection for confidential information revealed in a transactional setting. *Id.*, pp. 22–23.

48. *See, e.g.*, *Curto v. Med. World Commc'ns, Inc.*, No. 03CV6327 (DRH)(MLO), 2006 WL 1318387 (E.D.N.Y. May 15, 2006); *Forward v. Foschi*, No. 9002/08, 2010 WL 1980838 (Sup. Ct., Westchester Co. May 18, 2010). *But see Scott v. Beth Israel Med. Ctr., Inc.*, 17 Misc. 3d 934 (Sup. Ct., N.Y. Co. 2007) (such emails not privileged); *Long v. Marubeni Am. Corp.*, No. 05-CIV-639 (GEL)(KNF), 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006) (same). Although these cases arose out of forensic review of the employee's work computer in connection with disputes between the employee and the employer, similar situations may arise following a corporate merger or a takeover by new management when access and control is taken over a computer system previously used by another organization or management team. *E.g.*, *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

49. ABA Formal Op. 11-460 (Aug. 4, 2011).

50. *Id.* (emphasis added).

51. NYCLA, Revised Comments on the Proposed New York Rules of Professional Conduct, 16 (undated).

52. *Id.*

53. 2010 WL 1980838.

54. *See* Altman, *Model Rule 4.4(b)*, p. 16.

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Kenneth S. Kamlet (kkamlet@hhk.com) is Special Counsel at the law firm of Hinman, Howard & Kattell, LLP, focusing in the areas of environmental law, land use and development, zoning, and oil and gas law. Mr. Kamlet received his B.S. *cum laude* from the City College of New York, his M.Phil (Ph.D.-minus dissertation) from Yale University, and his J.D. from the University of Pennsylvania Law School. This article came out of a presentation at the NYSBA Environmental Law Section and Municipal Law Section Fall Meeting, at the Gideon Putnam Hotel, Saratoga Springs, NY, on October 23, 2011. It was first published in the Fall 2011 issue of *Municipal Lawyer,* the newsletter of the Municipal Law Section of the NYSBA. It appears here in a slightly different form.

Land Banking, TIF Amendments, and the Tax Cap: What the Heck Do They Have in Common?

By Kenneth S. Kamlet

This article will address three issues with significant implications for local government finance and economic development. These issues also have major environmental implications because they involve, directly or indirectly, vacant, abandoned, tax-delinquent, or otherwise underutilized, real estate, which is often environmentally impaired.

The three issues are (1) Land Banking, which the New York State Legislature approved in the spring of 2011;[1] (2) Tax Increment Financing (TIF) amendments, which the Legislature failed to enact this year for the fourth or fifth time in a row;[2] and (3) Tax Cap legislation, passed by the Legislature after strong prodding by the Governor.[3]

The Land Bank Act (LBA)

The LBA gives local taxing jurisdictions (called Foreclosing Governmental Units or FGUs) the authority to legislatively establish Land Banks with broad powers "to facilitate the return of vacant, abandoned, and tax delinquent properties to productive use" by acquiring such properties and eliminating "the harms and liabilities caused by such properties." The law authorizes only 10 Land Banks to exist at any given time, with the Urban Development Corporation (UDC) (otherwise known as Empire State Development) given the power to review and approve or disapprove Land Bank resolutions or local laws enacted by local legislatures.[4]

Land Banks are to be structured, similar to Local Development Corporations, as Type C not-for-profit corporations,[5] but they do possess some attributes of state or local agencies.

They are treated as state agencies for the limited purposes of promoting employment and business opportunities for minority and women-owned business enterprises (M/WBEs).

They are treated as "local authorities" under the Public Authorities Accountability Act of 2009 (including review by the Authorities Budget Office[6]) and are considered an "agency" for purposes of compliance with the State Environmental Quality Review Act (SEQRA). They are also subject to the Freedom of Information Law (FOIL) and the Open Meetings Law.[7]

Although not specifically addressed in the LBA, it would appear that Land Banks qualify for the municipal liability exemption under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the New York State Brownfield Cleanup Program (BCP) law as a "public corporation" (which includes a "local public authority" and, presumably, a land bank corporation).[8]

Municipalities may convey environmentally impaired properties to Land Banks without giving up their own municipal liability exemption; at the same time, municipalities add a layer of insulation (the Land Bank, as current owner[9]) between themselves and a subsequent transferee. This is a valuable benefit to local governments reluctant to subject themselves to potential environmental liability by taking title to tax-delinquent properties and retaining them for prolonged periods. This reluctance is understandable given the limitations of the municipal liability exemption.[10] While Land Banks may have the same reluctance, their vulnerable assets will at least generally be more limited than those of the FGU or municipality contributing the suspect real estate. The Land Bank's board of directors will need to decide whether to reject environmentally suspect properties entirely, or – if they do choose to accept them – to accept them only in accordance with strict procedures that ensure adherence to the limitations of the municipal liability exemption or other applicable CERCLA exemptions, such as the "bona fide prospective purchaser" exemption.

While a Land Bank may be able to extinguish liens, including environmental liens, if the property is contaminated, the underlying liability will remain. The U.S. Environmental Protection Agency (and the State) may consider Land Banks, given their role in revitalizing underutilized properties, as preferential recipients of environmental assessment and cleanup grants.[11]

Other benefits to turning underutilized properties over to a Land Bank include:

- The ability to maximize potential returns (shared between the Land Bank and the FGU) on land assemblages that are rehabilitated, redeveloped, and/or resold (especially when done pursuant to a well-considered "redevelopment plan"), rather than selling such properties piecemeal at auction for pennies on the dollar.[12]
- Land Banks that bid at tax auctions are given priority over other bidders, as long as they pay any overdue taxes and certain other costs to the foreclosing municipality (i.e., the municipality is at least assured of being paid what it is owed).[13]
- The Land Bank, in acquiring properties from the FGU (or directly from localities), will negotiate a division of the proceeds (of rentals or resales) between the Land Bank and the FGU (or locality); the returns to the taxing jurisdictions involved will be far higher (although less immediate) than under the current tax auction system.

Municipalities may convey environmentally impaired properties to Land Banks without giving up their own municipal liability exemption.

- When Land Banks acquire properties at a judicial sale, they acquire them with clear title, which greatly facilitates resale and redevelopment.
- Land Banks can issue revenue bonds, which are repaid strictly out of Land Bank assets (with no recourse against the FGU or locality), with no impact on constitutional debt limits.
- Land Banks concentrate their efforts on restoring value to under-performing properties; by doing so, they not only enhance the taxable value of the rehabilitated properties, they also boost the assessed value of nearby properties, the values of which are significantly depressed by the mere proximity of vacant, abandoned, and deteriorating land.

Land Banks have very broad powers ("all powers necessary") to effectuate the purposes and provisions of the LBA, and they are to be "construed liberally." Indeed, in the exercise of its powers and duties, a Land Bank "shall not be subject to restrictions imposed by the charter, ordinances, or resolutions of a local unit of government." However, it is subject to local zoning laws and building codes, and it is expressly denied the power of eminent domain.

Revenue bonds issued by a Land Bank are tax-exempt, and the Land Bank's real property, and its income and operations, are exempt from all taxation by the State and its political subdivisions.

Although Land Banks may acquire all kinds of property from political jurisdictions, they may only acquire property from other entities if the property is tax delinquent, tax foreclosed, vacant or abandoned – unless the agreement to purchase is made consistent with an approved redevelopment plan. For example, the Land Bank could approve a redevelopment plan authorizing the acquisition of all available real estate within the boundaries of an approved Brownfield Opportunity Area (BOA) under the General Municipal Law,[14] where such acquisition would help effectuate the objectives of the BOA plan.

Land Banks should become self-sustaining, supporting future real estate acquisitions from the sale and rent of ongoing real estate holdings.

Local land bank enabling legislation may establish a "hierarchical ranking" of priorities for the use of real property conveyed by a Land Bank. Such uses might include: public spaces; affordable housing; retail, commercial and industrial activities; and wildlife conservation.

The authors of the LBA placed a premium on public accountability and transparency, including the requirement that Land Banks maintain complete inventories of all property received and all real property dispositions. The Land Bank must, in addition, keep minutes and a record of all its proceedings. And, as noted, it will generally be subject to the Open Meetings Law and FOIL. The Land Bank must hold a public hearing prior to financing or issuing bonds and consider the comments received. And, the Bank's chairperson must deliver, orally and in writing, an annual report to the FGU / municipality, describing in detail the projects undertaken, monies spent, and administrative activities. Strict conflict-of-interest rules also apply to any member or employee of a Land Bank.

Tax Increment Financing (TIF)

Land Banks, although they may require some initial infusions of funds or property at the outset, if they function properly, should become self-sustaining, supporting future real estate acquisitions from the sale and rent of ongoing real estate holdings. They can also raise capital by issuing tax-exempt revenue bonds that are repaid from Land Bank assets. Land Banks are also about revitalizing underutilized land and assembling and redeveloping real estate in furtherance of an approved redevelopment plan.

These characteristics of Land Banks are somewhat similar to how Tax Increment Financing (TIF) is designed to operate.[15] Instead of sustaining itself and repaying investors with the proceeds of *real estate* transactions, TIF is a self-sustaining financing mechanism used to fund *infrastructure improvements* in blighted areas, which stimulate economic development in accordance with a redevelopment plan. TIF bonds, like Land Bank bonds, are tax-exempt revenue bonds. In the case of TIF, the bonds are repaid by increased property tax revenues resulting from the new economic activity spurred by the initial TIF infrastructure investment. In the case of Land Banks, the bonds are repaid by the increased value of the Land Banks' real property holdings resulting from selective rehabilitation, redevelopment, and resale of portfolios of those holdings, along with rental incomes and other proceeds of property management. Both TIF and Land Banks promote economic development and revitalization of underutilized or blighted property by enhancing the value of urban real estate.

In other states where Land Banks are operational,[16] effective TIF laws also exist and are used to good advantage in supplementing other sources of revenues to carry out land banking objectives.

TIF and Land Banks are rare examples in New York of self-help programs, which give local governments the opportunity to steer their own destinies, by partnering with private sector investors and developers to expand their tax bases and promote economic development – without financing from the State or increasing the burden on taxpayers. Although the LBA was enacted in New York on the third try (it was vetoed once by then-Governor David Paterson), TIF reform legislation has had more difficulty gaining traction.[17]

After the New York State Constitution was amended in 1983[18] to allow a municipality to contract indebtedness for eligible redevelopment projects by issuing bonds backed, not by full faith and credit, but by "the payment . . . [of] that portion of the taxes raised by it on real estate in such area which, in any year, is attributed to the increase in value of taxable real estate resulting from such redevelopment," the Legislature enacted a TIF law the next year as part of the Municipal Redevelopment Law.[19] The 1984 TIF law, however, had a major defect that has resulted in its being very rarely used.[20] Unlike TIF laws in the vast majority of other states, New York's TIF law does not authorize the use of incremental *school* tax revenues to repay TIF debt. In most parts of the State, school property tax revenues exceed municipal property tax revenues by up to two-to-one, or more, so the unavailability of the incremental revenues resulting from the enhanced value of benefiting-school-district real estate in the TIF-supported redevelopment area makes investing in TIF bonds far riskier than it ought to be.[21]

TIF reform legislation, over the years, has sought to rectify this deficiency. In recent sessions of the Legislature, the Schimminger-Young proposal (2011) and the identical Schimminger-Stachowski bills (2009–2010), as well as prior versions of the Schimminger bill, would all authorize, but not require, school districts within a proposed redevelopment area (TIF district) to opt in to the TIF project, after full review and public process. On this basis, the New York State School Boards Association enthusiastically supported the Schimminger bill in 2008.[22]

What Are the Basic Structure and Mechanics of New York's Current TIF Law?

Structure

The concept of TIF is simple but powerful. Municipalities are empowered to issue TIF bonds or notes for certain allowed public purposes to stimulate private sector economic development in blighted and underutilized areas. Instead of using new taxes to repay the bonds, the bonds are repaid by the increased revenues generated by the new development and tax base enabled by the TIF financing. TIF bonds are "revenue bonds" backed by the earmarked revenue stream, and not "general obligation" bonds backed by the municipality's full faith and credit. They don't count against a municipality's constitutional debt limit. That is a good thing for upstate municipalities like Rochester and Binghamton that are rapidly approaching that limit. Under the revenue bond mechanism, if the expected revenue growth fails to occur, the loss is borne by the investor and / or the developer – not the municipality or its taxpayers.

TIF instruments may only be issued in support of locally approved redevelopment plans in defined project areas (sometimes known as "TIF districts") which are defined by a predominance of "blight."

TIF financing is authorized for a limited number of specified public uses and purposes to remedy conditions of obsolescence, deterioration and disuse "in order to facilitate commercial and industrial development, to promote low- and moderate-income housing, and to maintain and expand employment opportunities for jobless, unemployed and low income persons." And it may only be utilized when such redevelopment "cannot be accomplished by private enterprise alone without public participation and assistance."

Allowed TIF objects and purposes include:

- Acquisition of land and site preparation and, most likely, cleanup of contaminated sites or brownfields.
- Installation, construction or reconstruction of public utilities (including streets, walkways, parking facilities, and water and sewer systems), parks and playgrounds.
- Other public improvements or services integral to the redevelopment plan.

Mechanics

The sponsoring municipality establishes a TIF area, with specified boundaries and duration, and dedicates the increase in property taxes from the area, from the establishment date forward, to the support of one or more eligible development projects within the TIF area. The locality then issues bonds to pay for certain designated allowable uses and purposes. Alternatively, the municipality can issue a promissory note, or TIF bond anticipation note, to reimburse a developer for advancing these funds initially. After the redevelopment project is complete, until the TIF area terminates, the municipality uses the incremental tax revenue to pay off the debt. Once the debt is paid, or when the TIF district otherwise terminates, the municipality reaps the benefits of increased tax revenues, a larger tax base, and increased economic activity.

The process requires that the TIF area meet certain statutory requirements, such as being "blighted" and being suitable for economic development. The project must meet a "but for" test – that is, it must be one which would be unlikely to occur without municipal participation.

The municipality, often with the aid of an involved developer, must establish a TIF area redevelopment plan, which addresses economic feasibility, land use impacts, and estimated costs and benefits.

The municipality must then hold a public hearing and receive inputs from other taxing districts and the public within the TIF area.

Then, the municipality must enact a local law empowering it, or a redevelopment agency, to take the steps necessary to move the redevelopment forward. It establishes the base year against which the tax increment will be measured. It then selects a developer with whom to enter into a redevelopment agreement. A TIF bond or note is issued to incur long-term debt – usually for 15 or 20 years. If successful, the TIF district will produce sufficient incremental tax revenue and the debt is paid off. After the TIF district terminates, the municipality and the region receive the revenue.

TIF financing works best when several adjacent projects are combined into a larger development in order to produce the diversity and economies of scale necessary to generate sufficient incremental revenues.

As of 2004–2005, TIF was the economic development tool most widely used by U.S. municipalities of 10,000 or more and counties of 50,000 or more,[23] second only to general fund revenues. Between 2005 and 2010, seven states generated more than $500 million apiece in revenues from TIF bonds.[24] Ten additional states generated more than $100 million apiece. TIF bond sales nationwide have grown from about $1.7 billion a year in 1990–1995 to $3.3 billion a year in 2005–2010.

> The tax cap law could force municipalities to choose between supporting operations and investing in infrastructure.

The Schimminger-Young TIF reform legislation, or its similar predecessors, have been endorsed or supported by more than 50 organizations, associations, individuals and other entities in all parts of the State and of every political persuasion. They include major business groups, environmental organizations and other non-profits, local governments and government associations, and school districts and associations. It has also been endorsed by the Environmental Law Section of the New York State Bar Association.

Tax Cap Legislation

The local "tax cap" legislation initially proposed by the Governor and passed by the State Senate (S.2706) would cap increases in new property tax impositions by local governments and school districts. However, it purported to cap "the *amount* of the real property taxes" that may be levied. The amount of these taxes "shall not exceed" a specified "tax levy limitation" defined as "the amount of taxes a local government is authorized to levy" in relation to the previous year's *amount* of taxes levied.

This language had some unintended consequences. By basing the tax cap on the previous year's tax levy *amounts*, rather than on tax *rates* or total *assessed value* (or a combination of the two), the legislation did not distinguish between taxes generated by increasing the tax burden on existing residents and businesses (undesirable) and taxes generated by attracting new residents and businesses, thereby expanding the tax base (very desirable).[25]

The problem with this initial approach was that it would have rewarded inefficient, stagnant municipalities while penalizing forward-looking municipalities that were trying to reduce the tax burden on their taxpayers by broadening the tax base. If it had not been subsequently corrected, it would have provided a strong negative incentive against blight-fighting, development-stimulating growth of the sort promoted by programs like Land Banking and TIF.

Fortunately, legislation subsequently passed by the Assembly (A.7916), ultimately approved by the Senate and the Governor and enacted into law, included a "carve-out" to avoid this anomaly. As described in a June 20, 2011, letter to those who had expressed support for tax cap legislation, Assembly Speaker Sheldon Silver described this carve-out as "includ[ing] a tax base growth factor to account for any increase in the full value of taxable real property." Comptroller Thomas DiNapoli, in a more recent summary of the tax cap legislation, described this as

> [a]n adjustment for certain tax base growth, such as new construction (i.e., "tax base growth factor"). This is driven by a "quantity change factor" which is calculated by the Department of Taxation and Finance [DTF] and is used in determining the tax base growth factor, if any, for each local government and school district.

In DTF's Publication 1000 (10/11),[26] the Tax Department further clarifies that the "Quantity Change Factor" provides an adjustment only to reflect "an increase in the full value of taxable [ ] property . . . due to physical or quantity change – i.e., new growth or significant additions to existing properties." It does not cover:

- "[i]ncreases in full value due to changes in assessment only,"
- a change in full value due to the splitting or merging of parcels or
- property returning to the tax rolls after the expiration of a PILOT.

Publication 1000 indicates that the DTF Commissioner "will issue a Quantity Change Factor for all local governments that have experienced an increase in the full value of taxable real property due to a physical or quantity change." Thus, it will evidently not be left to individual municipalities or their assessors to make the case that a Quantity Change carve-out is appropriate. But, at least, such a carve-out was included in the law. Without it, serious anomalies would proliferate.

Unaddressed Issues

The law, unfortunately, left two other, somewhat related issues unaddressed.

It doesn't exclude from the computation of the previous year's tax levy amount, repayment of principal and interest on previously issued general obligation municipal bonds. This is seemingly a problem because the New York State Constitution bars the Legislature from restricting the power to levy taxes on real estate to pay interest or principal on previously contracted indebtedness.[27] The tax cap law could force municipalities to choose between supporting operations and investing in infrastructure. It could also potentially disrupt the municipal bond market. Twenty-seven county attorneys have, reportedly, submitted requests[28] for an opinion from the State Attorney General's office as to the constitutionality of GML § 3-C. Specifically, they have asked whether, in light of this constitutional limitation, a municipality may exclude its debt payments from the tax levy limitation calculation.

It also doesn't exclude from the computation of the previous fiscal year's tax levy amount, repayment of principal and interest on previously issued revenue bonds, including TIF bonds and bonds issued by Land Banks. This is seemingly an even more serious substantive problem because these kinds of revenue bonds rely for their repayment on growth in the value of real estate.[29] Instead of viewing Land Banks and TIF as ways to expand their tax bases and to carve out safe harbors from the rigid application of a tax cap, municipalities are likely to view revenue bond repayments as competing with other budgetary priorities.

Still, the tax cap can be overridden by a 60% vote.[30] And, in any given year, municipal bonded indebtedness (whether of general obligation or revenue bonds) is likely to be a small proportion of annual property tax revenues. So, hopefully, the "constitutional imperative" that debts must be paid will prevail for all types of bonds – whether or not bonded indebtedness is deemed to be an extra-statutory (imputed) carve-out from the general tax cap.

With or without an imputed carve-out for debt service, as explained above, there is an explicit carve-out in GML § 3-C for "quantity growth" associated with expansion of the tax base by increasing the full value of taxable real property. From this vantage point, as I wrote to the Lieutenant Governor, "[i]f properly explained, TIF could be presented as a powerful tool for enabling municipalities to attract economic development (without raising taxes) and expand their tax bases, which would help to offset what they see as the negative impacts of a Tax Cap."[31]

Conclusions

The Land Bank Act (as enacted) and Tax Increment Financing (if enhanced) both provide useful tools, which could reinforce one another, for local governments to revitalize blighted and underutilized land, to further economic development, and to expand their tax bases. They could also operate in conjunction with the New York

Land Bank Approval Guidelines

In November 2011, Empire State Development issued "Land Bank Approval Guidelines," http://www.esd.ny.gov/BusinessPrograms/Data/LandBankPrograms112111/LandBankProgramGuidelines.pdf, which appear to go beyond the authority given to UDC/ESD in several respects:

- Instead of reviewing and approving land bank resolutions on a first-come, first-served basis, ESD "anticipates approving applications in [multiple rounds]," with recommendations to "not exceed five" in the first round to ensure that municipalities will be able to seek approval for their land banks in later application rounds if they are not prepared to submit an application in March [2012].

- The extra-statutory decision to "approve land bank applications in a geographic proportional manner across the state" and to "have the discretion to consider additional factors in determining the relative merits of any land bank application."

- Extra-statutory reporting requirements, calling for annual reporting to ESD on or before March 15 (this is in addition to statutory audit by the Authorities Budget Office and the State Comptroller and potential oversight by the Charities Bureau of the State Attorney General's office).

- Extra-statutory criteria for assessment of applications, including: "the aggregate inventory of vacant, abandoned, tax-delinquent and tax foreclosed properties within the jurisdiction of the FGU"; the "capacity of the participating FGUs and municipalities to undertake acquisition, management and disposition of land bank real property"; the "diversity in the socio-economic characteristics of the FGUs submitting proposals . . . in order that maximum benefit can be achieved across the state from utilization of this new tool"; the "diversity in the nature of the inventory that is to be the focus of the work of a land bank"; the "diversity in the extent of intergovernmental collaboration and cooperation reflected in the land bank proposals"; the "diversity in the stated mission of the land banks (i.e., blight elimination, affordable housing development, market rationalization/stabilization, greening, etc.)"; and "[t]he extent that the geographic area of a land bank includes or is part of a distressed community."

Brownfield Cleanup Program law, and other federal and state environmental programs, to promote the assessment, cleanup, and redevelopment of environmentally impaired land, including Brownfield Opportunity Areas (BOAs).

These authorities are especially useful to municipalities as direct and indirect sources of funding, and in promoting economic development, in the wake and aftermath of natural disasters, economic recession, and tax cap legislation (which is regarded by some as the worst of the three). The carve-out in the enacted tax cap for new economic growth makes TIF and Land Banks especially valuable in helping municipalities balance their budgets in these difficult times. ■

1. The Land Bank Act (LBA) was added to the Not-for-Profit Corporation Law as §§ 1600–1617. It also amended § 2 of the Public Authorities Law. It was signed by the Governor on July 29, 2011.

2. TIF legislation was initially enacted in New York in 1984 as part of the General Municipal Law art.18-C, §§ 970-a *et seq.* (GML). In 2011, the Senate TIF reform bill, S.2446, was sponsored by Sen. Catharine Young. It passed the Senate overwhelmingly, 61 to 1. Identical legislation was also incorporated as "Part E" in a Senate omnibus bill, S.5758, introduced by Senate Majority Leader Dean Skelos (to address a tax cap, mandate relief, rent control, and several other issues). The Assembly TIF reform bill, A.5296, sponsored by Assemblyman Robin Schimminger, was reported out of the Local Governments Committee; but subsequently languished in Ways and Means to which it was sequentially referred but never voted on.

3. The tax cap legislation, passed by the Assembly as A.7916 and by the Senate as S.5856, Chapter 97 of the Laws of 2011, was codified in GML § 3-C and Education Law § 2023-A.

4. The LBA doesn't specify the criteria on which the Urban Development Corporation is to base its yea or nay decisions – other than the statute's requirements for the contents of Land Bank local laws and the makeup of its Board of Directors. It would not appear that the UDC has the authority to disapprove a Land Bank on the basis of geographic distribution, or any other factor not contained in the LBA, and must approve complete submittals as received, on a first-come, first-served basis.

5. In addition to being subject to audit by the Authorities Budget Office, Land Banks may also be audited by the State Comptroller.

6. Under N.Y. Executive Law § 172(1), Land Banks, as "charitable organizations" (i.e., not-for-profit corporations), would appear to be subject to registering and filing annual reports with the Charities Bureau of the NYS Attorney General's office. Given the oversight of Land Banks by both the Comptroller and the ABO, this additional requirement would appear to be redundant and superfluous – but may still be legally required.

7. It would not appear that Land Banks are subject to the prevailing wage law because the LBA specifies that a Land Bank is to be "deemed a state agency" for purposes of promoting minority- and women-owned business enterprises "only." Other than state agencies, the prevailing wage law only applies to public benefit corporations, municipal corporations, or commissions appointed pursuant to law. The LBA adds "land bank corporations" to the definition of a "local authority," but distinguishes it from other enumerated local authorities such as a public authority or a public benefit corporation.

8. *See* Environmental Conservation Law § 27-1323(2).

9. The "current owner" bears strict, joint and several liability for non-exempt ownership of contaminated property under CERCLA, while a prior owner or operator who did not cause or contribute to the contamination has no such liability.

10. The municipal liability exemption covers involuntary acquisition of real property by a public corporation acting in its sovereign capacity. While this includes tax foreclosures and their equivalents, it does not cover assumption of ownership or control primarily for investment purposes, or participation in the rehabilitation or development of the site – except for improvements carried out as part of a site remedial program under the BCP law or in furtherance of site safety. The exemption is also voided if the public corporation that has taken possession of the site fails to notify NYSDEC of any hazardous waste release within 10 days of obtaining actual knowledge of such release.

11. Dan Kildee, President and CEO of the DC-based Center for Community Progress, has stated (Binghamton Land Bank forum, Sept. 13, 2011) that EPA frequently awarded brownfield assessment grants to land banks with which he was associated in Michigan. At the state level, New York Governor Andrew Cuomo noted in his News Release (July 29, 2011), announcing he had signed the LBA, that the regional economic development councils that will compete for state economic development funding would "benefit from the creation of land banks" because they would "create an inventory of land that the councils can use when developing their plans."

12. Land, when treated like real estate (i.e., bought and sold on the open market), tends to realize a greater return than when treated like a commodity (i.e., when sold at auction).

13. In some counties, such as Broome, the county pays outstanding tax liens to municipalities in return for taking title to tax delinquent properties.

14. GML § 970-r.

15. Another, albeit less exact, similarity is that the LBA authorizes a municipality, school district or any taxing district, to allocate to a Land Bank, by lawfully adopted local law or resolution, in accordance with regulations adopted by the Department of Taxation and Finance, 50% of the real property taxes collected "on any specific parcel of real property" for a period of five years. (One wonders how often taxing jurisdictions will elect to turn over such revenues to the Land Bank, even though the turnover is limited as to extent and duration.) In the case of TIF, all incremental property tax revenues attributable to TIF-stimulated increases in property values in the TIF district must be set aside for repayment of TIF bonds, until the bonds are paid off or the term of the bonds has expired.

16. According to Dan Kildee (Binghamton Land Bank forum, Sept. 13, 2011), there are currently 79 known Land Banks throughout the United States.

17. Prospects for TIF reform may be more favorable in 2012 for several reasons: several natural disasters in New York in 2011 and the depressed general economy have put a strain on local and state infrastructure and the ability to keep pace with replacement and maintenance needs; the new tax cap legislation has placed stringent new restrictions on the ability of localities to raise money by increasing property taxes; and a majority of Upstate regional councils have reportedly (personal communications) cited an effective TIF law as a key economic development tool.

18. N.Y. Const. Art. XVI, § 6.

19. GML §§ 970-a–970-r (Municipal Redevelopment Law).

20. It was successfully used only twice – in 1987, in connection with the Route 9A Corridor project (a $1.2 million TIF district) in the Village of Elmsford, Westchester County, and in 1994, in the Town of Victor, Ontario County, to fund $8 million in infrastructure improvements to support a $53 million addition to the Eastview Mall.

21. The Governor and legislative leaders included a long-awaited and much-needed TIF amendment in their final budget agreement on March 28 (approved March 30). This action corrects the most glaring defect in the original TIF law, by authorizing school districts to opt-in to TIF-funded redevelopment plans, and to allocate incremental school tax revenues toward repayment of TIF debt. *See* Part U of the Education, Labor and Family Assistance budget bill.

22. In addition to providing school district opt-in authority, recent TIF reform legislation has included four other desirable enhancements:

- A "brownfield" enhancement, which allows TIF bond proceeds to be used for environmental remediation and brownfield redevelopment – including Brownfield Opportunity Area (BOA) projects.
- An incremental "sales tax" enhancement, which allows incremental sales taxes, if any, to be pledged if necessary toward repayment of TIF debt.
- A "special use district" enhancement, which allows a special assessment to be imposed on a TIF district if, but only if, necessary to repay TIF debt.
- And an annual "good faith estimate" enhancement that requires municipalities to keep track of changes in assessed value during the TIF period. This good faith estimate has two objectives – first, to ensure that

incremental property values are keeping pace with initial projections, to ensure that sufficient revenues continue to be generated to repay TIF principal and interest; and, second, to ensure that only property value increments attributable to the TIF investment are siphoned off a municipality's revenue stream to repay TIF debt, and not incidental inflation or appreciation unrelated to TIF.

23. As of 2005, more than 28% of medium and large counties and municipalities used TIF bonds to fund economic development.

24. California – $12.7 billion; Colorado – $846 million; Missouri – $722 million; Pennsylvania – $637 million; Minnesota – $558 million; Georgia – $554 million; and Connecticut – $544 million.

25. The rationale for basing the cap on levy amounts rather than rates was probably to avoid evasion of a rate-based cap simply by raising the assessment on properties.

26. *The Property Tax Cap: Guidelines for Implementation*, N.Y. State Dep't of Taxation & Finance (Oct. 2011).

27. Article VIII, § 12 of the N.Y. State Constitution provides: "Nothing in this article shall be construed to prevent the legislature from further restricting the powers herein specified in any county, city, town, village or school district to contract indebtedness or to levy taxes on real estate. *The legislature shall not, however, restrict the power to levy taxes on real estate for the payment of interest on or principal of indebtedness theretofore contracted*" (emphasis added).

28. These requests were, reportedly, submitted during the week of September 5, 2011. Posted to the MuniLaw ListServ by Richard J. Graham, Esq., Lewis County Attorney.

29. *Flushing Nat'l Bank v. Mun. Assistance Corp. for City of N.Y.*, 40 N.Y.2d 731 (1976), which overturned the state's attempt to impose a moratorium on repayment of New York City bonds, held that debt service payments were not subject to an existing 2.5% cap on New York City property taxes. It read Article VIII, § 12 of the state Constitution (which bars the state from restricting the power to levy taxes on real estate for the payment of interest or principal on previously contracted indebtedness) in conjunction with Art. VIII, § 2 (which requires issuers of public debt to pledge their "faith and credit" to repayment of bonds) to "express a constitutional imperative: debt obligations must be paid, even if tax limits be exceeded." *Id.* at 737.

A subsequent case, *Quirk v. Mun. Assistance Corp. for City of N.Y.*, 41 N.Y.2d 644 (1977), held that the state's diversion of the proceeds of the tax on stock transfers from general City revenues to the Municipal Assistance Corporation does not impair any contractual obligations under the U.S. Constitution (Art. I, § 10) merely because "fewer tax revenues will be available for repayment of principal and interest on city bonds." *Id.* at 646. Neither the bonds themselves (despite a "first lien" on the city's revenues), nor the state constitution, require that the collection of particular taxes be continued. "In no way was the city ever committed to maintain . . . stock transfer tax revenues for the benefit of its bondholders." *Id.* at 646–47. The Court held (citing *Flushing Nat'l Bank*, 40 N.Y.2d 731) that what is important "is that city bondholders are protected by the State Constitution which obligates the city to appropriate moneys for the repayment of city bonds, and to exceed normal real estate tax limitations in order to raise the necessary moneys." *Id.* at 647. The diversion or diminution of a tax does not alleviate the issuer's liability to raise revenues from any source to pay debt service on debt.

However, in the case of tax increment financing, where the issuers of TIF bonds are not required (or allowed?) to pledge their "faith and credit" to repay the bonds (*see* N.Y. Const. Art. XVI, § 6), but must specifically pledge incremental property tax revenues, a cap on property tax revenues would seem to have a much more direct impact on the bondholder's assurance of being repaid. The logic of the *Flushing Bank* case would appear to apply with special force to revenue bonds which rely on property tax increments and are not backstopped by other sources of municipal revenues.

30. Sixty percent of the members of the governing body of a county, city, town or village. Or, 60% of the voters in a school district.

31. Letter of June 6, 2011, to Lieutenant Governor Robert J. Duffy.

2011 Review of Uninsured, Underinsured and Supplementary Uninsured Motorist Insurance Law

By Jonathan A. Dachs

Jonathan A. Dachs (jdachs@shaynedachs.com) is a member of the firm of Shayne, Dachs, Corker, Sauer & Dachs, LLP, in Mineola, New York. Mr. Dachs is a graduate of Columbia College of Columbia University, and received his law degree from New York University School of Law. He is the author of "Uninsured and Underinsured Motorist Protection," *2 New Appleman New York Insurance Law,* Chapter 28 (LexisNexis), and a chapter on UM/UIM and SUM (Pre- and Post-Regulation 35-D) in *Weitz on Automobile Litigation: The No-Fault Handbook* (New York State Trial Lawyers Institute).

Consistent with recent history, 2011 was another busy and important year in the ever-changing and highly complex areas of uninsured motorist (UM), underinsured motorist (UIM), and supplementary uninsured motorist (SUM) law.

PART I. GENERAL ISSUES

Insured Persons

The definition of an "insured" under the SUM endorsement (and many liability policies) includes a relative of the named insured, and, while residents of the same household, the spouse and relatives of either the named insured or spouse.

"Named Insured"

In *Roebuck v. State Farm Mutual Automobile Ins. Co.*,[1] the court held that the plaintiff, a sole shareholder (with his wife) of a corporation that owned and insured a dump truck, could not make a claim for SUM benefits under the dump truck's policy for injuries he sustained while working as a Deputy Sheriff and driving a county-owned patrol car. As stated by the court:

> Where an automobile insurance policy contains a SUM provision and is issued to an individual, that individual and others in his or her family may be afforded SUM coverage under the policy when such person is injured in any vehicle, including a vehicle owned and insured by a third party. Where such a policy is issued to a corporation, however, the SUM provision does not follow any particular individual, but instead "covers any person [injured] while occupying an automobile owned by the corporation or while being operated on behalf of the corporation" (*Buckner v. Motor Veh. Acc. Indem. Corp.*, 66 N.Y.2d 211, 215 [1985]). The policy language is not rendered ambiguous by the inclusion of words such as "you" or "spouse" and "relatives" when a corporation is the named insured, because it is obvious to the average reader, construing the language according to common speech, that a corporation cannot have family members; those portions of the mandatory policy language are merely inapplicable to the corporate insured.[2]

In *American Alternative Ins. Corp. v. Pelszynski*,[3] the court held that a volunteer fireman injured in an accident while en route to a fire emergency in his own vehicle (equipped with blue light and two-way radio provided by the Volunteer Fire Department) was not an insured under the Volunteer Fire Department's SUM Endorsement and, therefore, not entitled to make an SUM claim thereunder. The court explained, "'You' in the definition refers to the Fire Company, which cannot have a spouse or relative." The court did not address Pelszynski's second argument, that is, he was covered under the Volunteer Fire Department's policy because he was occupying a vehicle which was being operated by the Fire Department and for its benefit.

Residents

In *Waldron v. New York Central Mutual Fire Ins. Co.*,[4] the court held that the 22-year-old injured party was a resident of her parents' household at the time of the accident. Although she was renting an apartment off campus while attending college, she maintained a bedroom in her parents' house, where she kept her clothing, visited on weekends and lived on school holidays and semester breaks. Moreover, her college considered her parents' address to be her permanent address, and she retained her parents' address for voting and tax purposes. Accordingly, she was entitled to make a claim for SUM benefits under her father's policy.

In *Farm Family Casualty Ins. Co. v. Nason*,[5] the court found that

> "[t]he term household has been characterized as ambiguous or devoid of any fixed meaning in similar contexts . . . and, as such, its interpretation requires an inquiry into the intent of the parties . . . . The interpretation must reflect the reasonable expectation and purpose of the ordinary business [person] when making an insurance contract . . . and the meaning which would be given to it by the average [person] . . . . Moreover, the circumstances particular to each case must be considered in construing the meaning of the term." In addition, "the term should . . . be interpreted in a manner favoring coverage, as should any ambiguous language in an insurance policy."[6]

In this case, which involved a policy covering a parcel of property upon which the insured maintained his residence and a dairy business, the insured's son did not reside exclusively on the property where the accident took place, but, rather, also resided with his girlfriend at another location. The insurer established that the insured did not consider his son to be a member of his household, nor would he have anticipated that the son would be afforded coverage under his insurance policy inasmuch as he lived separately from the insured, either in a trailer on the subject property or with a girlfriend. Moreover, members of the insured's family testified that the son did not reside with the other members of the family, either, and, indeed, was not welcome in the family home. Thus, the court held that the insurer established as a matter of law that the son was not a member of the insured's household and, therefore, not entitled to coverage under the policy.

Exclusion – Owned Vehicles

The SUM endorsement contains an exclusion for "bodily injury to an insured incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made."[7]

In *USAA Casualty Ins. Co. v. Cook*, the claimant's decedent was riding a motorcycle he owned when he was involved in a fatal accident with a motor vehicle.

The motorcycle was insured under a policy issued by the proposed additional respondent, Pacific Specialty Insurance Co. At the time of the accident, the decedent was married to the appellant, Lisa Cook, who owned a Toyota motor vehicle, which was insured by the petitioner-respondent, USAA. In response to Ms. Cook's attorney's letter advising of "my client's intention to make a claim under the Uninsured and Underinsured provision of the [USAA] policy," USAA responded 28 days later with a disclaimer letter, relying upon the exclusion for "bodily injury incurred while occupying a motor vehicle owned by that insured if such motor vehicle is not insured for at least the minimum bodily injury liability limits and UM limits required by law by the policy under which a claim is made . . . ." In granting USAA's petition to stay arbitration of Ms. Cook's SUM claim, the court held that "the disclaimer notice and 'the policy language in question was not ambiguous and [USAA] is entitled to have the provisions it relied on to disclaim coverage enforced.'"[8]

Insured Events

The UM/SUM endorsements provide for benefits to "insured persons" who sustain injury caused by "accidents" "arising out of the ownership, maintenance or use" of an uninsured or underinsured motor vehicle.

"Accidents"

On March 29, 2011, the New York Court of Appeals rendered a decision that quite unexpectedly overturned the commonly accepted view that the Uninsured/Underinsured Motorist (UM) endorsement does not provide coverage for injuries and/or death intentionally caused by the tortfeasor since such injuries are not caused by an "accident." In *State Farm Mutual Automobile Ins. Co. v. Langan*,[9] a case involving a claimant/decedent who was one of numerous people struck by the offending vehicle, the driver of which pleaded guilty to second degree murder and admitted that he intentionally drove his vehicle into several pedestrians, including the claimant/decedent, the Court of Appeals held that "consistent with the reasonable expectation of the insured under the policy and the stated purpose of the UM endorsement (to provide coverage against damage caused by uninsured motorists), the intentional assault of an innocent insured is an accident within the meaning of his or her own policy. The occurrence at issue was clearly an accident *from the insured's point of view*," and, thus, the claimant was entitled to benefits under the UM endorsement.[10]

Claimant/Insured's Duty to Provide Timely Notice of Claim

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." As numerous recent cases have again held, a failure to satisfy the notice requirement vitiates the policy.[11]

In *Spentrev Realty Corp. v. United National Specialty Ins. Co.*,[12] the court observed that "[w]here an insurance policy . . . requires an insured to provide notice of an accident or loss as soon as practicable, such notice must be provided within a reasonable time in view of all of the facts and circumstances." Providing an insurer with timely notice of a potential claim is a condition precedent, and thus "[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy."[13]

It is well-settled that where an insurance policy requires that notice of an occurrence be given "as soon as practicable," notice must be given within a reasonable period of time under all the circumstances. An insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract. Numerous cases in 2011 reaffirmed this basic principle of insurance law.[14]

In *Waldron v. New York Central Mutual Fire Ins. Co.*,[15] the court observed that "[g]enerally, notice to an insurance broker is not necessarily considered notice to the carrier, whereas notice to an agent of the insurer typically constitutes notice to the insurer."[16]

In *Spentrev Realty Corp.*,[17] the court noted that

> Insurance Law § 3420(a)(3) gives the injured party an independent right to give notice of the accident and to satisfy the notice requirement of the policy. However, the injured party has the burden of proving that he or she, or counsel, acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer. "In determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insured." "The injured person's rights must be judged by the prospects for giving notice that were afforded to him, not by those available to the insured. What is reasonably possible for the insured may not be reasonably possible for the person he has injured. The passage of time does not of itself make delay unreasonable."[18]

The Second Department, in *Tower Ins. Co. of N.Y. v. New Wok Hing Trading, Inc.*,[19] found that the injured parties failed to provide any explanation for their more than *five-month* delay in ascertaining the tortfeasor's insurer's identity and notifying that insurer of the accident, and failed to raise a triable issue of fact as to whether they diligently attempted to identify that insurer. Accordingly, summary judgment was granted to the insurer, declaring that it was not obligated to defend or indemnify those insured.

In determining whether notice was timely, factors to consider include, *inter alia*, whether the claimant/insured has offered a reasonable excuse for any delay, such as latency of his or her injuries, and evidence of the claimant's due diligence in attempting to establish the insurance status of the other vehicles involved in the accident.

In *NGM Ins. Co. v. Haak*,[20] the court observed that "in the SUM [/UM] context, the phrase 'as soon as practicable' means that 'the insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured.' Whether an insured has given notice as soon as practicable should be determined on a case-by-case basis, taking into account all of the relevant circumstances. Factors to consider include the seriousness and nature of the insured's injuries, and the extent of the tortfeasor's coverage, as well as the time within which an insured's injuries manifest themselves.'"[21]

Therein, the court held that the respondent's notice of a potential claim, given almost two years after the accident, was untimely, as "[i]t was obvious from the outset that respondent had sustained a serious injury within the meaning of Insurance Law § 5104 (*see* § 5102[d]), and respondent knew or should have known shortly after the accident that [the tortfeasor] was uninsured." Notably, the court rejected the respondent's argument to the effect that he was not required to provide notice of the claim until the court in the underlying personal injury action had granted the motion by the owner of the offending vehicle for summary judgment dismissing the complaint against it based upon the Graves Amendment (49 U.S.C. § 30106) (which generally exempts rental car companies from the vicarious liability provisions of Vehicle & Traffic Law § 388) because, until then, he did not know that the offending vehicle was uninsured or underinsured. As the court said,

> [t]he Graves Amendment unequivocally applies to [the owner] unless Davis's use of the vehicle was not "during the period of the rental or lease" (49 USC § 30106[a]). In our view, that information could have been ascertained by respondents well before the court granted the [owner's] motion in the underlying action and, in any event, there is no indication in the record before us that respondents made any efforts to obtain such information. We thus conclude that respondents failed to meet their burden "of establishing a reasonable excuse for the [almost] two-year delay in giving notice."[22]

In *Travco Ins. Co. v. Schwartz*,[23] the court held that the respondents met their burden of establishing that they complied with their obligation under the policy to give the SUM carrier notice of the claim "as soon as practicable" by submitting the uncontroverted affirmation of their counsel stating that the respondents were unaware of the seriousness of their injuries until such time as one of the respondents underwent knee surgery. (It is not at all clear why the affirmation of counsel – a person without personal knowledge of the facts – was deemed sufficient for this purpose.) Nevertheless, the insurer, upon a motion to renew, submitted evidence in the form of medical records obtained in discovery, which raised a triable issue of fact as to whether the respondent knew or should have known of the severity of the injuries at an earlier date and, whether, in fact, their notice was untimely.

The New York Court of Appeals rendered a decision that quite unexpectedly overturned the commonly accepted view that the Uninsured/Underinsured Motorist (UM) endorsement does not provide coverage for injuries and/or death intentionally caused by the tortfeasor since such injuries are not caused by an "accident."

The Third Department, in *Waldron v. New York Central Mutual Fire Ins. Co.*,[24] noted that the recent legislation that requires an insurer to show prejudice[25] does not apply to cases in which the pertinent policy was issued before the effective date of the statute. However, "even prior to the statutory amendment, when an insurer received notice of an accident in a timely fashion, the insurer could not properly disclaim a late SUM claim absent a showing of prejudice."[26]

In *Vernet v. Eveready Ins. Co.*,[27]

> the court said that with respect to policies issued before January 17, 2009 (see Insurance Law §3420[c][2][A]), as the subject policy was, an insurer could disclaim coverage when the insured failed to satisfy the notice condition, without regard to whether the insurer was prejudiced by the insured's failure to satisfy the condition. Thus, the absence of timely notice of litigation is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract. Where there is no excuse or mitigating factor for the failure to give notice, the question of reasonable notice is a legal determination.[28]

In this case, however, despite the no-prejudice rule, the insurance policy provided, *inter alia*, that a person seeking coverage must "'send [the defendant] copies of any notices or legal papers received in connection with the accident or loss as soon as reasonably possible,' and further, that the defendant had no duty to provide coverage 'if the failure to comply [with the policy] is prejudicial to [the defendant].'" Thus, based upon this specific policy language, the court held that the defendant was required, on its motion for summary judgment, to show

The interpretation of the phrase "as soon as practicable" continued, as always, to be a hot topic.

that it was provided untimely notice *and* that it was prejudiced as a result of the untimely notice. The court further held that the defendant met its burden by demonstrating that it was first informed of the commencement of an action against the insured more than two years after the commencement of the action, and that the failure of the insured to provide notice until after a default judgment had been entered prejudiced it because it lost its right to appear and interpose an answer, "thus requiring it to shoulder the burden of moving to vacate the default."

The interpretation of the phrase "as soon as practicable" continued, as always, to be a hot topic.

In *Tower Ins. Co. of N.Y. v. NHT Owners LLC*,[29] the court observed that "[a] liability policy that requires an insured to provide notice of an occurrence to its insurer 'as soon as practicable' obligates the insured to give notice of the occurrence within a reasonable period of time." In this case, however, the court was not required to reach the question of whether, under all of the circumstances, the insured's notice of claim, 62 days after the occurrence, was timely, where they conducted an inquiry into the underlying accident and believed that there was no liability because the insurer did not disclaim on the ground of late notice in a timely fashion (see discussion below).

The Third Department, in *Waldron v. New York Central Mutual Fire Ins. Co.*,[30] held that a factual issue existed as to whether a delay of *two months* in giving notice under a liability policy that required such notice to be given "as soon as reasonably practicable, but in no event more than 30 days after the accident" was sufficiently justified under the circumstances, where the insured's daughter had sustained very serious injuries in the accident and he had immediately left New York to be with his daughter in Florida, and even at the time notice was given, his daughter was still hospitalized and there was continuing concern that she might lose a leg as a result of her injuries.

In *Nabutovsky v. Burlington Ins. Co.*,[31] the court held that the insured's failure to give notice of the plaintiff's personal injury claims until more than three months after the incident occurred, despite the insured's knowledge of the incident at the time it occurred, constituted a failure to give notice within a reasonable time.

In *Tower Ins. Co. of N.Y. v. Classon Heights, LLC*,[32] the court observed that "an insured bears the burden of proving under all the circumstances, the reasonableness of the belief [that they had a *good faith belief in non-liability*]." "Where, as here, the policy requires prompt notice of an 'occurrence' that 'may result in a claim,' the issue is not 'whether the insured believes he will ultimately be found liable for the injury, but whether he has a reasonable basis for a belief that no claim will be asserted against him.'"[33] In numerous cases decided last year,[34] the courts analyzed the reasonableness of this type of excuse for delayed notice of claim, in several contexts, and with differing results. These cases are very fact specific and should be analyzed carefully.

Discovery

The UM and SUM endorsements contain provisions requiring, upon request, a statement under oath, examination under oath, physical examinations, authorizations, and medical reports and records. The provision of each type of discovery, if requested, is a condition precedent to recovery.

In *Progressive Specialty Ins. Co. v . Alexis*,[35] the court denied the petitioner's request for disclosure in aid of arbitration pursuant to CPLR 3102(c) because "the petitioner failed to demonstrate that 'extraordinary circumstances' existed 'such that relief would be absolutely necessary for the protection of its rights.'"[36]

Petitions to Stay Arbitration

Filing and Service

CPLR 7503(c) provides, in pertinent part, that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice [of intention to arbitrate] or demand [for arbitration], or he shall be so precluded." The 20-day time limit is jurisdictional and, absent special circumstances, courts have no jurisdiction to consider an untimely application.

In *Auto One Ins. Co. v. Lopez*,[37] the court reminded that "CPLR 7503(c) requires that an application to stay arbitration be made within 20 days after service of a notice of intention to arbitrate," but noted that "'[t]he timeliness of a proceeding to stay arbitration is measured with respect to the earlier filing of the petition, not with respect to the later service.'"[38] Thus, where the respondents served their notice of intention to arbitrate on April 20, 2010, and the petitioner filed its petition to stay arbitration on May 3, 2010, the action was commenced within the 20-day limitation period and was, thus, timely.

In *GEICO v. Morris*,[39] the court held that "the timeliness of a proceeding for a stay of arbitration is measured with respect to the earlier filing of the petition, not with respect to its later service." Thus, the petition in this case, filed within 20 days of receipt of the demand for arbitration (but served after the 20-day period expired) was timely.

In *Maya Assurance Co. v. Hussain*,[40] the court held that "[a]lthough service of the notice of petition to stay arbitration by registered or certified mail (return receipt requested) is sufficient to confer jurisdiction over a party to the proposed arbitration (*see* CPLR 7503[c]), it was insufficient to confer jurisdiction over [the other insurer] since it was not a party to the proposed arbitration."[41]

In *Travelers Indemnity Co. v. Armstead*,[42] the court reversed the grant of the petitioner's petition for a permanent stay of arbitration because the court lacked jurisdiction over the alleged insurer for the offending vehicle, which had not yet been formally joined as an additional respondent and had not yet been served with a supplemental notice of petition and petition. The court, therefore, ordered such formal addition of that insurer, and a hearing on the issue of its purported cancellation of its policy.

Burden of Proof

Based upon a police report that showed that the offending vehicle might have been insured at the time of the accident, and the affirmation of the respondent's attorney in which he acknowledged that the offending vehicle had been insured up until a few hours before the accident, the court, in *GEICO v. Morris*,[43] held that the petitioner made a sufficient showing that the offending vehicle might have been insured at the time of the accident to warrant a framed issue hearing, to which the proposed additional respondents (including the alleged insurer for the offending vehicle) would be joined as a necessary party.

In *Victoria Select Ins. Co. v. Munar*,[44] the court held that the documents submitted by the parties raised issues of fact as to whether the purported insurer of the offending vehicle properly disclaimed coverage for the subject accident. Accordingly, it was error to determine, without the joinder of the purported insurer and the tortfeasors, and without conducting a hearing, that the disclaimer was improper or invalid.

The court in *Allstate Ins. Co. v. Tae Hong Ji*[45] observed that "[w]here, as here, a case is determined after a hearing held before a justice, this Court's power to review the evidence is as broad as that of the hearing court, taking into account in a close case the fact that the hearing judge had the advantage of seeing the witness." In that case, the court declined to disturb the Supreme Court's finding that there was no physical contact with an alleged hit-and-run vehicle.[46]

In *Travelers Ins. Co. v. Rogers*,[47] the court reversed an order that had denied vacatur of an order granting the SUM insurer's petition to stay arbitration upon the respondent's failure to appear at the hearing or to submit opposition papers. As stated by the court,

> [v]acatur should have been granted on the ground of "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3]). A review of the record in this case reveals several potential instances of intentional and material misrepresentations of fact by petitioner, which, at least in part, may have formed the basis of Supreme Court's decision and order to permanently stay arbitration.[48]

The petitioner insurance company denied in its petition that it ever received notice of the SUM claim, despite the fact that it had signed a "green card" acknowledging receipt, and its internal log indicated such receipt.

Arbitration Awards: Scope of Review

In *Miro Leisure Corp. v. Prudence Orla, Inc.*,[49] the court stated,

> Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court reviewing an arbitration award may not "re-weigh or reexamine the evidence," or otherwise "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." The Court of Appeals has "stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice." "An arbitration award can be vacated by a court pursuant to CPLR 7511(b)[(1)(iii)] on only three narrow grounds: if it is clearly violative of a strong public policy, if it is totally or completely irrational, or if it manifestly exceeds a specific, enumerated limitation on the arbitrator's power."[50]

The Second Department, in *New York Central Lines, LLC v. Vitale*,[51] stated, "An award is irrational if there is 'no proof whatsoever to justify the award.' Even if the arbitrator misapplies substantive rules of law or makes an error of fact, unless one of the three narrow grounds applies in the particular case, the award will not be vacated pursuant to CPLR 7511(b)(1)(iii) as exceeding the arbitrator's power. 'An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be.'"[52]

Res Judicata/Collateral Estoppel

In *Mose v. Sangiovanni*,[53] the court held that the doctrine of collateral estoppel was not applicable to the holding by the Supreme Court in the context of a petition to stay a UM arbitration that the statute of limitations on an action against the tortfeasor was tolled during the pendency of the Petition to Stay proceeding, because that finding was "a gratuitous finding that was not material to a determination of the CPLR Article 75 proceeding." Furthermore, neither the driver of the alleged offending vehicle, who was not a party to the Article 75 proceeding, nor the owner of the alleged offending vehicle "had a full and fair opportunity to litigate the statute of limitations issue."[54] The court went on to hold that there was no toll, and, thus, that the action against the tortfeasor was time-barred.

Direct Actions Against Insurers

The Third Department, in *Symonds v. Progressive Ins. Co.*,[55] held that Progressive, the plaintiff's SUM carrier, lacked standing under New York law to seek a judgment, by way of a third-party action in the context of the plaintiff's breach of contract action against it, against the purported insurer for the offending vehicle, declaring that its policy was in effect at the time of the accident. As explained by the court,

> [u]nder Insurance Law §3420(a)(2), a declaratory judgment action seeking a judgment declaring that the at-fault party's insurance company was obligated to defend and indemnify its insured can only be commenced after the third party seeking the declaration obtains a judgment against the at-fault insured, and it has gone unpaid for 30 days (*see Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 354–355 [2004]; *Sabatino v. Capco Trading, Inc.*, 27 A.D.3d 1019, 1021 [2006]). Likewise, since defendant [Progressive], as plaintiffs' subrogee, stands in the shoes of its subrogor and "is subject to any claims or defenses which may be raised against the subrogor" (*Peerless Ins. Co. v. Michael Beshara, Inc.*, 75 A.D.3d 733, 735-736 [2010] [internal quotation marks and citation omitted]; See *United States Fed. & Guar. Co. v. Smith Co.*, 46 N.Y.2d 498, 504 [1979]), and since plaintiffs have not obtained a judgment against [the offending driver], defendant does not have standing to seek a declaratory judgment against [the offending driver's] carrier. . . .[56]

Statute of Limitations

In *Progressive Northeastern Ins. Co. v. Rogers*,[57] the insurer for the offending vehicle (Legion Insurance Company) was declared insolvent after the accident, and all claims against it were assumed by the New York Public Motor Vehicle Liability Security Fund (PMV Fund). After the injured party's claim was denied by the PMV Fund, the injured party filed a claim for uninsured motorist benefits under the UM endorsement of her policy with Progressive. That claim was filed 12 years after the accident.

While the parties agreed that the six-year statute of limitations for contract claims governed the proceeding to compel arbitration of the UM claim, they disagreed on the date on which the limitations period began to run.

The court noted that a claim under the UM endorsement of an automobile insurance policy "accrues either when the accident occurred or when the allegedly offending vehicle thereafter becomes uninsured." Where, as in this case, there was a 12-year period between the accident and the filing of the petition to compel arbitration, the burden was on the injured party to establish an accrual date later than the date of the accident. Here, the injured party met that burden with evidence that the PMV Fund did not deny coverage within the meaning of Ins. Law § 3420(f)(1) until December 30, 2009. As explained by the court, "[w]here the alleged tortfeasor's insurer becomes insolvent, the PMV Fund assumes the obligations of the defaulting insurer, and the injured party is precluded from proceeding against his or her own insurer pursuant to the UM endorsement of the relevant automobile insurance policy until the PMV Fund disclaims liability or denies coverage."[58] Thus, the UM claim did not accrue until the PMV denial, which was within six years prior to the petition to compel, which was, therefore, timely.

The court noted the distinction between a claim for (basic) UM coverage, which this case involved, and a claim for optional SUM coverage, which the injured party chose not to pursue. In the latter type of claim, only, the injured party is entitled to seek benefits upon the insolvency of the alleged tortfeasor's insurer, and need not proceed against the PMV Fund.[59]

PART II. UNINSURED MOTORIST ISSUES

Self-Insurance

In *Elrac, Inc. v. Exum*,[60] the Appellate Division rejected the contention of the UM carrier that since the accident occurred while the claimant was operating a motor vehicle owned by his employer, a self-insured company, and was in the regular course of his employment, the exclusivity provisions of the Workers' Compensation Law precluded the claimant from arbitrating a claim against his employer. The court noted that "although petitioner is self-insured, it is required to provide uninsured motorist benefits pursuant to Insurance Law § 3420(f)(1)." Thus, the court held that "[g]iven the public policy of this State requiring insurance against injury caused by an uninsured motorist, we find that a self-insured employer is required to provide mandatory uninsured motorist benefits to employees and that the Worker's Compensation Law does not preclude the employee from filing such a claim against the employer."[61]

In affirming the First Department Decision and Order, the Court of Appeals held that "[a] self-insured employer whose employee is involved in an automobile accident may be liable to that employee for uninsured motorist benefits, notwithstanding the exclusivity provisions of the Workers' Compensation Law."[62] As explained by the Court,

> Workers' Compensation Law § 11 says: "The liability of an employer [for workers' compensation benefits] . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouses, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom." Although the words "any other liability whatsoever" seem all-inclusive, there are cases – of which this is one – in which they cannot be taken literally. Specifically, the statute cannot be read to bar all suits to enforce contractual liabilities. If an employer agrees, as part of a contract with an employee, to provide life insurance or medical insur-

> ance, and breaches that contract, an action to recover damages for the breach would not be barred, though the action might literally be "on account of . . . injury or death." An action against a self-insurer to enforce the liability recognized in [*Allstate Ins. Co. v.*] *Shaw* [*i.e.*, the liability of providing UM coverage] is, in our view, essentially contractual. The situation is as though the employer had written an insurance policy to itself, including the statutorily-required provision for uninsured motorist coverage. This action is therefore not barred by Workers' Compensation Law § 11.[63]

> is not readily apparent, the insurer has a duty to promptly and diligently investigate the claim.[68]

Similarly, in *Fish King Enterprises v. Countrywide Ins. Co.*,[69] the court noted that "[t]he timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage," and that "[a]n insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay."[70] In this case, the insurer argued that after its receipt of the summons and complaint in the underlying action, an investigation was required to evaluate the full extent of the actions and the identity of all relevant parties. However, the proffered basis for the disclaimer was that the plaintiff in the underlying action was an employee of Fish King – a fact that was readily ascertainable from the face of the underlying complaint. Under these circumstances, the disclaimer, issued *49 days* after receipt of that complaint, was held to be untimely as a matter of law.

A self-insured employer whose employee is involved in an automobile accident may be liable to that employee for uninsured motorist benefits, notwithstanding the exclusivity provisions of the Workers' Compensation Law.

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer: Ins. Law § 3420(d)

A vehicle is considered "uninsured" where it was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage.

In *Loeffler v. Sirius America Ins. Co.*,[64] the court noted that "when an insurer disclaims coverage, the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated (*Hazen v. Otsego Mutual Fire Ins. Co.*, 286 A.D.2d 708, 709, quoting *General Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864)."[65] Since the disclaimer was based only on its insured's failure to notify it of the claim, it was not effective against the injured party, who gave notice of the claim.

Moreover, the court rejected the defendant's contention that the notice provided by the injured party did not need to be addressed in the disclaimer because it was rendered superfluous by notice provided by certain entities claiming to be additional insureds under the policy. "The notice provided to the [insurer] by those entities of the plaintiff's claim against them, arising out of the subject accident, did not operate to provide the defendant with notice of the plaintiff's claim against [the insured]."[66]

In *GPH Partners, LLC v. American Home Assurance Co.*,[67] the court stated that

> timeliness of an insurer's disclaimer is measured from the time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. Thus, where an insurer "becomes sufficiently aware of facts which would support a disclaimer," the time to disclaim begins to run, and the insurer bears the burden of explaining any delay in disclaiming coverage. Where the basis for the disclaimer was, or should have been, readily apparent before the onset of the delay, the insurer's explanation for its delay fails as a matter of law. Even where the basis for disclaimer

In *George Campbell Painting v. National Union Fire Ins. Co. of Pittsburgh, PA*,[71] the First Department declined to follow and expressly overruled its prior long-standing rule, set forth in *DiGuglielmo v. Travelers Property Casualty*,[72] wherein it had previously held that, notwithstanding the statutory language in Ins. Law § 3420(d) requiring a liability insurer to give written notice of disclaimer "as soon as is reasonably possible," an insurer "is not required to disclaim on timeliness grounds before conducting a prompt, reasonable investigation into other possible grounds for disclaimer."[73] Based upon its reassessment of the statutory language and the decisions of the Court of Appeals interpreting it, and "dictated by fidelity to the plain language chosen by the Legislature, the teachings of our State's highest court, and the policy considerations embodied in the law,"[74] the court held – in agreement with prior decisions/law in the Second Department[75] – that "§ 3420(d) precludes an insurer from delaying issuance of a disclaimer on a ground that the insurer knows to be valid – here, late notice of the claim – while investigating other possible grounds for disclaiming."[76] Thus, because the insurer in this case had sufficient information to disclaim coverage on the ground of late notice but did not issue a disclaimer on that ground until nearly four months later, that disclaimer was ineffective as a matter of law. The court further noted that once the insurer possessed all of the information it needed to determine that the plaintiffs, which sought coverage as additional insureds, had failed to give timely notice of the claim, as required by the policy, it "had no right to delay disclaiming on the late notice ground while it continued to investigate whether Plaintiffs were, in fact, additional insureds. . . ."[77] As the court further explained, the plain language of Ins. Law § 3420(d)

> cannot be reconciled with allowing the insurer to delay disclaiming on a ground fully known to it until it has completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim. If the insurer knows of one ground for disclaiming liability, the issuance of a disclaimer on that ground without further delay is not placed beyond the scope of "reasonably possible" by the insurer's ongoing investigation of the possibility that the insured may have breached other policy provisions, that the claim may fall within a policy exclusion, or (as here) that the person making the claim is not covered at all. Stated otherwise, the statute mandates that the disclaimer be issued, not "as soon as is reasonable," but "as soon as is reasonably *possible*."[78]

Finally, the court added that

> [t]o follow the *DiGuglielmo* rule would be in effect to permit an insurer to delay deciding whether to disclaim on grounds known to it while pursuing an investigation of other potential grounds for disclaiming liability or denying coverage. More than 40 years ago, however, the Court of Appeals specifically rejected an insurer's argument that the statute (then codified as Insurance Law §167[8]) should be read to "requir[e] speed [in giving notice] once the decision to disclaim has been made . . . [but to] permit delay in making the decision" (*Allstate Ins. Co. v. Gross*, 27 N.Y.2d 263, 268 [1970]). Thus, "[t]he literal language of th[e] statutory provision requires prompt notice of disclaimer after decision to do so, and by logical and practical extension, there is imported the obligation to reach the decision to disclaim liability or deny coverage promptly too, that is, within a reasonable time" (Payne and Wilson, New York Insurance Law §31:15, at 927 [31 West's N.Y. Prac. Series 2010-2011], citing *Gross*. The proposition that an insurer is entitled to hold a known ground for disclaiming in reserve while investigating other grounds for rejecting the claim cannot be squared with *Gross*. . . . In view of the foregoing, adhering to the *DiGuglielmo* rule would be tantamount to deliberately setting aside the rule promulgated by the Court of Appeals (and flowing naturally from the language of the statute) that "*once the insurer has sufficient knowledge of facts entitling it to disclaim*, . . . it must notify the policyholder in writing as soon as is reasonably possible" (*Jetco*, 1 N.Y.3d at 66 [emphasis supplied]). We decline to replace the Court of Appeals' rule with a rule that measures the timeliness of a notice of disclaimer from the point in time when the insurer has completed its investigation of *any* and *all* possible grounds for rejecting the claim, regardless of when the insurer had sufficient knowledge to disclaim on the particular grounds relied upon . . . . Moreover, just as we would not permit the insured to delay giving the insurer notice of claim while investigating other possible sources of coverage, we should not permit the insurer to delay issuing a disclaimer on a known ground while investigating other possible grounds for avoiding liability. Any uncertainty as to the existence of coverage is irrelevant to the insurer's ability to issue a timely disclaimer based on the insured's breach of a condition precedent to coverage, such as late notice of claim, that is known to the insurer. As previously discussed, such a disclaimer will not preclude the insurer's ability later to take the position that no coverage exists, should that prove to be the case.[79]

UM coverage is available to victims of accidents involving a "hit-and-run," i.e., an unidentified vehicle that leaves the scene of the accident.

The First Department, in *Tower Ins. Co. of N.Y. v. NHT Owners LLC*,[80] held that a disclaimer based upon late notice of the occurrence, which was not issued by the insurer until *33 days* after receipt of the late notice, was untimely as a matter of law.

The Second Department, in *Alejandro v. Liberty Mutual Ins. Co.*,[81] held that a delay of *59 days* in disclaiming, when the basis for disclaiming should have been readily apparent, was untimely as a matter of law.

In *Nabutovsky v. Burlington Ins. Co.*,[82] the court held that a disclaimer of coverage made approximately 30 days after receipt of notice of the occurrence was timely as a matter of law.

In *USAA Casualty Co. v. Cook*,[83] the court upheld a disclaimer based upon an exclusion from coverage issued by the insurer 28 days after it received notice of the claimant's intention to make a UM / UIM claim, rejecting the contention, *inter alia*, that the disclaimer was untimely.

In *Huguens v. Village of Spring Valley*,[84] the court held that the delay in issuing the disclaimer was not unreasonable where the insurer "presented ample evidence demonstrating, as a matter of law, that the delay was reasonably related to a prompt, diligent, and necessary investigation it conducted into the question of whether the third-party plaintiff unduly and inexcusably delayed in providing it with notice of the lawsuit, in violation of the applicable insurance policy."[85]

The First Department, in *GPH Partners, LLC v. American Home Assurance Co.*,[86] noted that "[a] disclaimer is unnecessary when a claim does not fall within the coverage terms of an insurance policy . . . [but] a timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based on a policy exclusion."[87]

And, in *Progressive Northeastern Ins. Co. v. Farmers New Century Ins. Co.*,[88] the court noted that "an insurer will not be estopped from disclaiming coverage where, as here, it timely 'reserve[d] its right to claim that the policy does not cover the situation at issue, while defending the action.'"[89]

Cancellation of Coverage

One category of an "uninsured" motor vehicle is where the policy of insurance for the vehicle had been canceled prior to the accident. Generally speaking, in order to effectively cancel an owner's policy of liability insurance, an insurer must strictly comply with the detailed and complex statutes, rules and regulations governing notices of cancellation and termination of insurance, which differ depending upon whether, for example, the vehicle at issue is a livery or private passenger vehicle, whether the policy was written under the Assigned Risk Plan, and / or was paid for under premium financing contract.

In *Global Liberty Ins. Co. v. Pelaez*,[90] the court noted that "Vehicle and Traffic Law § 313(1)(a) supplants an insurance carrier's common-law right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation, and mandates that the cancellation of a contract pursuant to its provisions may only be effected prospectively." This provision "places the burden on the insurer to discover any fraud before issuing the policy, or as soon as possible thereafter, and protects innocent third parties who may be injured due to the insured's negligence."[91] Since, in this case, there was no evidence that the injured passengers in the insured's vehicle participated in the alleged fraud, the insurer was precluded from denying coverage to those claimants on the ground that the policy was fraudulently obtained.

Hit-and-Run

UM coverage is available to victims of accidents involving a "hit-and-run," i.e., an unidentified vehicle that leaves the scene of the accident.

In *Liberty Mutual Ins. Co. v. Vella*,[92] the court reminded that

> [p]hysical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle. "The insured has the burden of establishing that the contact occurred, that the identity of the owner and operator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable."[93]

In this case, the uncontroverted evidence adduced at the framed issue hearing, which consisted of the claimant's testimony, two post-accident photographs of her vehicle, and a Department of Motor Vehicles report signed by the claimant stating, *inter alia*, that her vehicle was struck from the rear, established that the subject accident was caused by physical contact with a hit-and-run vehicle. Thus, the court reversed the trial court's determination that there was no physical contact, as not supported by the record.

In *State Farm Mutual Automobile Ins. Co. v. Beddini*,[94] the respondents were traveling on a Vespa motor scooter behind a pickup truck being operated by an unidentified driver. A large cardboard box flew off of the pickup truck and became lodged in the front wheel of the Vespa. This caused the respondents to be ejected from the Vespa and to sustain personal injuries. Because the cardboard box was not an integral part of the pickup truck, the court held that the respondent's collision with the box did not constitute the type of physical contact required to impose uninsured motorist coverage.[95]

In *Travelers Property & Casualty Co. of America v. Mayen*,[96] the court upheld the denial of the UM carrier's petition to stay arbitration "since petitioner failed to meet its burden of proof that a hit and run accident did not occur." The evidence adduced at a framed issue hearing demonstrated that the respondent was indeed involved in a hit-and-run accident. "Although the police accident report indicated that the respondent told the responding officer that the crash was the result of a blown out tire, the court reasonably attributed this statement to the fact that the respondent was falling in and out of consciousness at the accident scene."[97]

In *Pagan v. MVAIC*,[98] MVAIC opposed a petition for leave to commence an action against it on the grounds that the petitioner failed to establish his compliance with the statutory requirement and condition precedent to qualifying for benefits from MVAIC, that notice to a police, peace, or judicial officer of the subject accident be given within 24 hours. In support of his contention that the alleged hit-and-run accident occurred on July 27, 2007, and that he told the police of the accident on that date, the petitioner submitted, *inter alia*, an affidavit stating that he was arrested at the accident scene based on eyewitness statements that he had been involved in a crime, and setting forth the criminal identification number and docket number arising from the arrest, as well as an EMS report, dated July 28, 2007, identifying him as a prisoner. The court held that this evidence only indicated that the accident may have occurred on July 27, 2007, and that the petitioner was in police custody on July 28, 2007, but did not contain any evidence that the police were actually told of the accident within 24 hours of its occurrence. Moreover, the court noted that the petition, the petitioner's affidavit of no insurance, a DMV Accident report form, and the proposed Complaint against MVAIC all identified July 25, 2007, as the date of the accident. Thus, there was a question of fact as to whether the petitioner complied with the 24-hour notice requirement, which required an evidentiary hearing to resolve.

Actions Against MVAIC

In *Williams v. MVAIC*,[99] the court held that although "police vehicles are exempted from the provisions of the MVAIC statute to the extent that otherwise eligible claimants are barred from filing a claim for injuries *caused by* the negligent operation of a police vehicle . . . , 'the uninsured occupant of a police vehicle may file a claim with the MVAIC for injuries sustained in an accident caused by an uninsured motor vehicle.'"[100]

PART III. UNDERINSURED MOTORIST ISSUES

Trigger of Coverage

In *AIU Ins. Co. v. Hibbert*,[101] the court held that where the host vehicle, in which multiple claimants were riding, and the tortfeasor's vehicle had identical bodily injury liability limits of 25/50, the tortfeasor's vehicle was not underinsured, and that payment by the tortfeasor's insurer to another passenger in the host vehicle did not render the tortfeasor's vehicle "underinsured" for the purpose of triggering the host vehicle's SUM coverage "since the other passenger was also an 'insured' under the [host] policy and not an 'other person.'"[102] Thus, the tortfeasor's policy limits were not reduced by payments made to any of the occupants of the host vehicle.[103]

Exhaustion of Underlying Limits

In *Liberty Mutual Ins. Co. v. Walker*,[104] the court reminded that a claimant is not required to exhaust the coverage limits of all tortfeasors before being entitled to submit a SUM claim, provided that the claimant exhausts the full liability limits of at least one tortfeasor.

Offset/Reduction in Coverage

The Second Department, in *Liberty Mutual Ins. Co. v. Walker*,[105] held that while the claimant, who had a $100,000 SUM policy, settled with the vehicle that struck her for $25,000, and settled with Verizon, whose trucks were parked at the intersection where the accident occurred, for $650,000, no SUM recovery was possible because there was nothing to arbitrate – i.e., the cumulative total of the payments "received by the insured or the insured's legal representative, from or on behalf of all insurers that may be legally liable for the bodily injury sustained by the insured,"[106] effectively wiped out the SUM coverage.[107]

Note, however, that although in quoting the pertinent policy provision (Condition 6), the court omitted the pertinent words "the motor vehicle bodily injury liability insurance or bond payments," it is clear that those words were important to the decision. The offset was applied to include the payments made by Verizon because those payments consisted of motor vehicle bodily injury insurance payments. If the second tortfeasor was something other than a motor vehicle tortfeasor, e.g., a municipality, a bar (Dram Shop), or a doctor (malpractice), the amounts received from such defendants would *not* be included in the calculation of the offset or reduction in coverage. ■

1. 80 A.D.3d 1126 (3d Dep't 2011).
2. *Id.* at 1127–28 (citations omitted).
3. 85 A.D.3d 1157 (2d Dep't 2011), *lv. to appeal denied*, 18 N.Y.3d 803 (2012).
4. 88 A.D.3d 1053 (3d Dep't 2011).
5. 89 A.D.3d 1401 (4th Dep't 2011).
6. *Id.* at 1402 (citations omitted).
7. 84 A.D.3d 825 (2d Dep't 2011).
8. *Id.* at 826 (citations omitted); *see USAA Cas. Ins. Co. v Hughes*, 35 A.D.3d 486, 487 (2d Dep't 2006); *see also Gen. Acc. Ins. Grp. v Cirucci*, 46 N.Y.2d 862, 864 (1979); *N.Y. Cent. Mut. Fire Ins. Co. v. Polyakov*, 74 A.D.3d 820 (2d Dep't 2010); *Utica Mut. Ins. Co. v Reid*, 22 A.D.3d 127 (1st Dep't 2005).
9. 16 N.Y.3d 349, 922 N.Y.S.2d 233 (2011).
10. *Id.* at 356 (emphasis added); *see also Progressive Ne. Ins. Co. v. Vanderpool*, 85 A.D.3d 926 (2d Dep't 2011) ("Here, from Vanderpool's perspective, his encounter with Pullum's vehicle was unexpected, unusual, and unforeseen. Consequently, whatever Pullum's intent, the occurrence was an "accident" within the meaning of the SUM endorsement of Vanderpool's policy"); Norman H. Dachs & Jonathan A. Dachs, *Definition of "Accident" Undergoes Significant Change*, N.Y.L.J., May 10, 2011, p. 3, col. 1.
11. *See Ciampa Estates, LLC v. Tower Ins. Co. of N.Y.*, 84 A.D.3d 511 (1st Dep't 2011); *Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc. v. Merchants Mut. Ins. Co.*, 84 A.D.3d 717 (2d Dep't 2011).
12. 90 A.D.3d 636 (2d Dep't 2011).
13. *Id.* at 636 (citations omitted); *see also Columbia Univ. Press, Inc. v. Travelers Indem. Co. of Am.*, 89 A.D.3d 667 (2d Dep't 2011).
14. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Great Am. E & S Ins. Co.*, 86 A.D.3d 425 (1st Dep't 2011); *Zimmerman v. Peerless Ins. Co.*, 85 A.D.3d 1021 (2d Dep't 2011); *Tower Ins. Co. of N.Y. v. Alvarado*, 84 A.D.3d 1354 (2d Dep't 2011); *Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc. v. Merchants Mut. Ins. Co.*, 84 A.D.3d 717 (2d Dep't 2011); *NGM Ins. Co. v. Haak*, 81 A.D.3d 1458 (4th Dep't 2011); *Nabutovsky v. Burlington Ins. Co.*, 81 A.D.3d 615 (2d Dep't 2011).
15. 88 A.D.3d 1053 (3d Dep't 2011).
16. *Id.* at 1055 (citations omitted). *See also Nabutovsky*, 81 A.D.3d 615 (notice to the insurance broker for the insured did not constitute notice to the defendant insurer).
17. 90 A.D.3d 636.
18. *Id.* at 637; *see also Tower Ins. Co. of N.Y. v. New Wok Hing Trading, Inc.*, 89 A.D.3d 1079 (2d Dep't 2011); *Hanover Ins. Co. v. Prakin*, 81 A.D.3d 778 (2d Dep't 2011) (injured party failed to explain seven-month delay in notifying defendant's insurer of the accident despite uncontroverted proof that they were informed of the existence of the policy).
19. 89 A.D.3d 1079 (2d Dep't 2011).
20. 81 A.D.3d 1458 (4th Dep't 2011).
21. *Id.* at 1459 (citations omitted).
22. *Id.* at 1459–50 (citation omitted).
23. 83 A.D.3d 1085 (2d Dep't 2011).
24. 88 A.D.3d 1053 (3d Dep't 2011).
25. Ins. Law § 3420(a)(5), as added by L. 2008, ch. 388, § 2 (eff. Jan. 17, 2009).
26. *Waldron*, 88 A.D.3d at 1054–55 (citations omitted).
27. 89 A.D.3d 725 (2d Dep't 2011).
28. *Id.* at 726–27 (citations omitted); *see also Columbia Univ. Press, Inc. v. Travelers Indem. Co. of Am.*, 89 A.D.3d 667 (2d Dep't 2011).
29. 90 A.D.3d 532 (1st Dep't 2011).
30. 88 A.D.3d 1053 (3d Dep't 2011).
31. 81 A.D.3d 615 (2d Dep't 2011).
32. 82 A.D.3d 632 (1st Dep't 2011).

33. *Id.* at 634 (citation omitted).

34. *See Fine Line Builders & Remodelers, Inc. v. Atl. Cas. Ins. Co.*, 90 A.D.3d 702 (2d Dep't 2011); *Lobosco v. Best Buy, Inc.*, 80 A.D.3d 728 (2d Dep't 2011); *Tower Ins. Co. of N.Y. v. Amsterdam Apartments, LLC*, 82 A.D.3d 465 (1st Dep't 2011); *Tower Ins. Co. of N.Y. v. R&R Dental Modeling, Inc.*, 82 A.D.3d 607 (1st Dep't 2011); *Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc.*, 84 A.D.3d 717 (2d Dep't 2011); *Tower Ins. Co. of N.Y. v. Babylon Fish & Clam, Inc.*, 83 A.D.3d 547 (1st Dep't 2011); *Zimmerman v. Peerless Ins. Co.*, 85 A.D.3d 1021 (2d Dep't 2011); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Great Am. E&S Ins. Co.*, 86 A.D.3d 425 (1st Dep't 2011); *Merchants Mut. Ins. Co. v. Rutgers Cas. Ins. Co.*, 84 A.D.3d 756 (2d Dep't 2011); *Tower Ins. Co. v. Alvarado*, 84 A.D.3d 1354 (2d Dep't 2011).

35. 90 A.D.3d 933 (2d Dep't 2011).

36. *Id.* at 933 (citations omitted).

37. 88 A.D.3d 701 (2d Dep't 2011).

38. *Id.* at 702 (citations omitted).

39. 83 A.D.3d 709, 710 (2d Dep't 2011).

40. 87 A.D.3d 536 (2d Dep't 2011).

41. *Id.* at 536 (citations omitted).

42. 90 A.D.3d 460 (1st Dep't 2011).

43. 83 A.D.3d 709.

44. 80 A.D.3d 707 (2d Dep't 2011).

45. 81 A.D.3d 940 (2d Dep't 2011).

46. *Id.* at 940; *see also Am. Transit Ins. Co. v. Tagliaferro*, 84 A.D.3d 1078 (2d Dep't 2011) (ample proof to sustain petitioner's *prima facie* burden establishing that no accident occurred).

47. 84 A.D.3d 469 (1st Dep't 2011).

48. *Id.* at 469.

49. 83 A.D.3d 945 (2d Dep't 2011).

50. *Id.* at 945–46 (citations omitted).

51. 82 A.D.3d 1244 (2d Dep't 2011).

52. *Id.* at 1244–45 (citations omitted).

53. 84 A.D.3d 1041 (2d Dep't 2011).

54. *Id.* at 1043 (citation omitted).

55. 80 A.D.3d 1046 (3d Dep't 2011).

56. *Id.* at 1047.

57. 90 A.D.3d 666 (2d Dep't 2011).

58. *Id.* at 668 (citations omitted).

59. *See Metro. Prop. & Cas. Ins. Co. v. Carpentier*, 7 A.D.3d 627, 628 (2d Dep't 2004); *Am. Mfrs. Mut. Ins. Co. v. Morgan*, 296 A.D.2d 491, 493–94 (2d Dep't 2002).

60. 73 A.D.3d 431 (1st Dep't 2010), *aff'd*, 18 N.Y.3d 325 (2011).

61. *Id.* at 432 (citation omitted).

62. 18 N.Y.3d at 327.

63. *Id.* (citation omitted).

64. 82 A.D.3d 1172 (2d Dep't 2011).

65. *Id.* at 1173.

66. *Id.* at 1174.

67. 87 A.D.3d 843 (1st Dep't 2011).

68. *Id.* at 843–44.

69. 88 A.D.3d 639 (2d Dep't 2011).

70. *Id.* at 641, 642.

71. 92 A.D.3d 104 (1st Dep't 2012).

72. 6 A.D.3d 344 (1st Dep't), *lv. to appeal denied*, 3 N.Y.3d 608 (2004).

73. *George Campbell Painting*, 92 A.D.3d at 105.

74. *Id.* at 106.

75. *Id.*; *see City of N.Y. v. N. Ins. Co. of N.Y.*, 284 A.D.2d 291 (2d Dep't), *lv. dismissed*, 97 N.Y.2d 638 (2001).

76. *George Campbell Painting*, 92 A.D.3d at 106.

77. *Id.*

78. *Id.* at 111.

79. *Id.* at 113–15 (citations omitted).

80. 90 A.D.3d 532 (1st Dep't 2011).

81. 84 A.D.3d 1132 (2d Dep't 2011).

82. 81 A.D.3d 615 (2d Dep't 2011).

83. 84 A.D.3d 825 (2d Dep't 2011).

84. 82 A.D.3d 1159 (2d Dep't 2011).

85. *Id.* at 1160 (citations omitted).

86. 87 A.D.3d 843 (1st Dep't 2011).

87. *Id.* at 843 (citations omitted); *see also Gen. Star Nat'l Ins. Co. v. Niagara Frontier Transit Metro Sys., Inc.*, 82 A.D.3d 1627 (4th Dep't 2011); *Progressive Ne. Ins. Co. v. Farmers New Century Ins. Co.*, 83 A.D.3d 15193 (4th Dep't 2011) (plaintiff was not required to provide "'notice of [disclaimer] when there never was any insurance in effect'"); *State Farm Mut. Auto. Ins. Cos. v. Jaenecke*, 81 A.D.3d 1474 (4th Dep't), *lv. to appeal denied*, 17 N.Y.3d 701 (2011); *McCabe v. St. Paul Fire & Marine Ins. Co.*, 79 A.D.3d 1612 (4th Dep't 2010), *reargument denied*, 81 A.D.3d 1388 (4th Dep't 2011) ("[W]here the issue is the existence or nonexistence of coverage . . . the doctrine of waiver is simply inapplicable.").

88. 83 A.D.3d 1519 (4th Dep't 2011).

89. Id. at 1520 (citation omitted).

90. 84 A.D.3d 803 (2d Dep't 2011).

91. *Id.* at 803 (citations omitted).

92. 83 A.D.3d 716 (2d Dep't 2011).

93. *Id.* at 717 (citations omitted).

94. 88 A.D.3d 519 (1st Dep't 2011).

95. *Cf. Allstate Ins. Co. v. Killakey*, 78 N.Y.2d 325 (1991) (tire and rim from unidentified vehicle were integral parts of the vehicle, essential to its operation).

96. 82 A.D.3d 402 (1st Dep't 2011).

97. *Id.*

98. 82 A.D.3d 1102 (2d Dep't 2011).

99. 82 A.D.3d 1109 (2d Dep't 2011).

100. *Id.* at 1110 (citations omitted).

101. 85 A.D.3d 779 (2d Dep't 2011).

102. *Id.* at 780.

103. *See Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 610 (2009).

104. 84 A.D.3d 960 (2d Dep't 2011) (citing *S'Dao v. Nat'l Grange Mut. Ins. Co.*, 87 N.Y.2d 853 (1995)).

105. *Id.*

106. *Id.* at 961.

107. *See* Norman H. Dachs & Jonathan A. Dachs, *The SUM Offset/Reduction in Coverage Provision*, N.Y.L.J., Nov. 8, 2011, p. 3, col. 1.

To the Forum:

I am an attorney at a law firm with a large litigation practice. Obviously, this entails the exchange of numerous discovery demands between parties, including demands for a bill of particulars or interrogatories, and demands for discovery and inspection. In addition, my cases involve the scheduling of numerous depositions.

Because of the demands of a busy practice, opposing attorneys do not always respond timely to discovery requests issued by my firm. In addition, disputes arise between parties regarding what is discoverable and whether certain documents have to be produced. Parties also struggle with scheduling depositions when written discovery requests have not been honored. I have sometimes encountered attorneys who refuse to respond to requests for their client's availability for deposition.

It is my understanding that attorneys are required to engage in good faith efforts prior to filing motions to compel discovery responses. However, I have received motions to compel from adversaries who have made little to no effort to confer with my office prior to filing their discovery motions. I have even received motions which include the obligatory affirmation of good faith efforts when no effort has been made by that party to speak with me about the allegedly outstanding discovery. In addition, I have often been in the position of making several attempts to contact opposing counsel with respect to outstanding discovery demands or a refusal to cooperate in deposition scheduling, without receiving any response. Phone calls and letters have gone unanswered.

Can the Forum please shed some light on what is required in order to fulfill the good faith efforts requirement prior to filing a discovery motion, including a motion to compel? What efforts are required prior to filing the motion by the party demanding compliance? How long must I wait before filing a motion to compel where opposing counsel is non-responsive to my efforts to communicate on this issue? Do lawyers have an ethical obligation to cooperate with each other during discovery?

Sincerely,
Undiscovered

Dear Undiscovered:

Unfortunately, we all have at least one case where counsel for the opposing party is non-responsive to discovery and refuses to return phone calls or respond to correspondence seeking compliance. Obviously, dealing with such an adversary can be quite frustrating. But in addition to frustration, such behavior also violates the Rules of Professional Conduct, including Rules 1.1, 1.3, 3.1 and 3.2.

Rule 1.1(c) provides that an attorney "shall not intentionally: (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules." When an attorney fails to comply with discovery, whether by failing to respond to written discovery requests or requests to schedule depositions, the attorney exposes his or her client to a possible discovery motion, including sanctions and fees. Even if fees are not awarded to the party making the discovery motion, the non-responsive attorney will have prejudiced his or her client by incurring the legal fees for having to defend against a discovery motion which should have been unnecessary had the attorney merely responded to the opposing party's good faith efforts to resolve the issue. Moreover, a failure to comply with discovery can also cause the attorney and his or her client to lose goodwill with the court.

Rule 1.3(a) requires an attorney to "act with reasonable diligence and promptness in representing a client." While attorneys generally think of this rule in terms of responding to client communications, an attorney's failure to respond to correspondence, discovery requests and inquiries from opposing counsel demonstrates a lack of diligence in the representation and therefore implicates this rule.

Rule 3.1 deals with frivolous conduct, which includes conduct which is undertaken "to delay or prolong the resolution of litigation." Similarly, Rule 3.2 provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." An attorney's deliberate refusal to cooperate during discovery, thereby delaying the resolution of the proceeding, violates both rules. Unfortunately, it is not always possible to determine whether an attorney is deliberately failing to respond.

When faced with unresponsive opposing counsel, it is important to document all efforts to obtain compliance, both by phone and in writing, so that you can demonstrate that you made good faith efforts to obtain opposing counsel's compliance. Correspondence with opposing counsel should detail the issues; it should also

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

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

advise the adversary that you intend to seek court intervention based on continued non-compliance.

Opposing counsel may not respond to good faith efforts to obtain compliance, thereby necessitating a motion to compel discovery responses or for other relief, such as preclusion or striking pleadings. In the event you must seek court intervention, you must demonstrate that you engaged in good faith efforts to secure the opposing party's compliance prior to submitting the motion. Pursuant to 22 N.Y.C.R.R. § 202.7(a), any motion "relating to disclosure or to a bill of particulars" must include an affirmation by counsel noting "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Section 202.7(c) requires that the affirmation "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." Courts strictly construe this requirement, and have routinely held that discovery motions which did not include the requisite good faith affirmation must be denied. *148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co.*, 62 A.D.3d 486 (1st Dep't 2009); *Molyneux v. City of New York*, 64 A.D.3d 406 (1st Dep't 2009); *Cerreta v. New Jersey Transit Corp.*, 251 A.D.2d 190 (1st Dep't 1998); *Barnes v. Nynex, Inc.*, 274 A.D.2d 368; 711 N.Y.S.2d 893 (2d Dep't 2000).

Courts have also held that it is not enough simply to state that counsel engaged in good faith efforts to secure an adversary's compliance. The First Department has held that a motion for sanctions based on an opposing party's lack of compliance with discovery was properly denied where the affirmation of good faith "failed to detail the good faith effort to resolve the discovery disputes." *Reyes v. Riverside Park Community (Stage I), Inc.*, 47 A.D.3d 599 (1st Dep't 2008). In this regard, an affirmation of good faith is considered deficient where it fails to comply with 22 N.Y.C.R.R. § 202.7(c). *148 Magnolia*, 62 A.D.3d at 487 (quoting *Amherst Synagogue v. Schueule Paint Co.*, 30 A.D.3d 1055, 1057 (4th Dep't 2006). Courts generally require a showing that a diligent effort was made to resolve the dispute prior to seeking court intervention. *See Baez v. Sugrue*, 300 A.D.2d 519 (2d Dep't 2002). This effort includes actual communication between the parties. *Natoli v. Milazzo*, 65 A.D.3d 1309 (2d Dep't 2009).

While there is no fixed time frame before the party seeking compliance can make a discovery motion, a good faith effort to obtain compliance should require more than simply one letter or phone call. It is important that opposing counsel be afforded a reasonable opportunity to respond before any discovery motion is filed. Your communication with opposing counsel should also set forth a date by which you expect a response or compliance.

In our experience, discovery motions can be avoided if attorneys have the courtesy to respond to voicemail messages and correspondence seeking compliance. A continued refusal to respond to the opposing party's efforts to resolve an issue, whether deliberate or inadvertent, may cause unnecessary rancor between the parties which could have been avoided. Attorneys routinely encounter situations where, due to the demands of a busy practice, they cannot always provide meaningful responses to correspondence or messages as quickly as they would like. When this occurs, the best practice is for counsel to acknowledge receipt of the communication by a quick email or voicemail message to the party seeking compliance. This acknowledgement should state that counsel is otherwise engaged and unable to respond fully at this time and should set forth a time by which he or she will provide a meaningful response. Even a voicemail from a secretary or another attorney at the firm notifying opposing counsel that you have received the message but are out of the office or on trial, can go a long way toward preventing an unnecessary motion to compel and preserving a cordial relationship between the parties. Moreover, in the event that opposing counsel pursues a motion to compel despite diligent efforts, you can then argue that he or she failed to engage in the requisite good faith efforts to resolve the issue.

An attorney's failure to respond to efforts to secure compliance with discovery not only violates several rules of professional conduct, it can lead to unnecessary costs and fees for motion practice on an issue which should be resolved. On the other hand, counsel seeking compliance also has an obligation to engage in diligent good faith efforts to resolve discovery issues prior to seeking court intervention.

Sincerely,
The Forum by
Jennifer Lewkowski, Esq.,
Traub Lieberman Straus & Shrewsberry LLP
Vincent J. Syracuse, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am a partner in a 10-person law firm and I regularly see prospective clients for initial consultations, which I provide at no charge. We do not take every case presented to us. When we decline a representation, do we have a duty to provide a no-engagement letter or to warn the person about statutes of limitations that may apply to his or her case? What is our risk of malpractice exposure if we decline a representation although the person did have a viable claim and, if the person later pursues it on his or her own, finds that the claim is time-barred? Finally, if a prospective client provides me or one of my partners with confidential information during that initial consultation and I do not take the case, am I obligated to keep the person's confidential information confidential, and can information acquired that way create a conflict that would prohibit me from taking some

CONTINUED ON PAGE 60

PRESIDENT'S MESSAGE
CONTINUED FROM PAGE 6

In light of the thoughtful treatment of the subject by the Commission on Ethics 20/20, we recently implemented a State Bar Task Force charged with re-examining our Association's position on non-lawyer ownership, to formulate a response to the Commission's discussion paper. The Task Force, led by immediate past president Stephen P. Younger, has been charged with evaluating our position with an eye toward protecting the core values of our profession. I look forward to receiving the results of the Task Force's work, which will serve as an useful resource as we participate in this debate at the national level.

Legislative Efforts

Last year, we were proud to play an important role in the successful campaign for marriage equality in New York State, and to take part in the advocacy effort that led to the passage of Governor Cuomo's government ethics reform bill. We are maintaining that momentum, and our efforts this legislative session include work on a comprehensive package of reforms that would help to prevent wrongful convictions. We have been urging lawmakers to pass a series of other measures in addition to DNA database expansion, including videotaping interrogations, improving police lineups to achieve more accurate eyewitness testimony, requiring prosecutors to turn over more exculpatory evidence, and allowing defendants to obtain DNA evidence even after they have pleaded guilty. Wrongful convictions are an unacceptable affront to our justice system, and these reforms could provide important tools to prevent the incarceration of innocent parties while also serving an important crime-fighting function.

Improving the Practice of Law

In addition to all of these initiatives, we are also focused on improving the practice of law in New York State. Earlier this year, we released our first mobile app – the NYSBA Mobile Ethics App features the full database of all of our ethics opinions, from 1964 to the present. The app allows you to search the database of opinions by keyword, category or opinion number, and makes them available on your phone even when you are offline. This is just the first of a suite of apps that are in development, and we hope that you find it to be a convenient and helpful resource.

We also launched eLAP, the first online Lawyer Assistance Program resource featuring thousands of articles on mental health topics, assessments and self-help modules and offering direct electronic communication with a lawyer assistance professional. This allows attorneys to access helpful resources from the comfort and privacy of their homes, in a completely secure and confidential online format. The eLAP site has already made help available to attorneys in need of support. If you or someone you know is facing challenges related to stress, mental health issues or substance abuse, I encourage you to explore the eLAP website, which is available at www.nysba.org/elap; use the access code: NYLAP.

Repeal of Expanded Estate Recovery, Retention of "Spousal Refusal"

The repeal of an expanded definition of "estate" in Medicaid recovery cases was a top priority of the Association this year. "A 2011 change in the definition of estate would have placed undue financial and legal obstacles on the resolution of an estate," said President Vincent E. Doyle III of Buffalo.

The expanded Medicaid recovery law gave the state expanded powers to recover assets from the estate of a Medicaid recipient. It also broadened the definition of "estate" to include "any other property in which the individual has any legal title or interest at the time of death," including jointly held property, retained life estates and interests in trusts. The law took effect April 1, 2011, but it was never fully implemented.

Had it not been repealed, the 2011 measure would have caused confusion over well-established legal rights and triggered lawsuits over the rightful ownership of the real property and other assets of an estate.

"This victory came about through no small effort by the Elder Law, Real Property Law, and Trusts & Estates Law sections of the Bar Association," Doyle said. "Through their persistence, dedication and keen analysis, they persuaded policymakers to repeal the measure."

The Legislature also rejected a proposal to eliminate the "spousal refusal" provision of the state Medicaid program, which Governor Cuomo had proposed as a cost-saving measure, retroactive to April 2011. The proposal would have established eligibility for Medicaid home care services based on the financial resources of both spouses.

"The removal of this vital protection might have forced elderly couples to divorce or separate just to maintain their homes and quality of life," said Doyle. "We are pleased to see that common sense and compassion prevailed."

A Team Effort

All of this tremendous work was made possible by a great team of officers, volunteer lawyers and staff. It has been a pleasure to work with President-elect Seymour W. James, Jr., Treasurer Claire Gutekunst and Secretary David Miranda. We have also received excellent support and assistance from the State Bar's staff under the outstanding leadership of Executive Director Patricia K. Bucklin. Most importantly, all of this work is driven by and relies upon the extraordinary volunteer efforts of our attorney members, who give so generously of their time, talent and energy to accomplish all this important work. I would like to thank each and every one of our members who played a role in making this past year such a success and urge everyone to become more involved with this Association's work, so that our successes will continue for years to come.

I am also extremely grateful for the support and understanding of my partners and colleagues at Connors & Vilardo. I would also like to thank my wife, Kerry, and my children Aidan, Blaise and Isabella. I have many fond childhood memories of accompanying my father to State Bar functions, and I am glad that my children have been able to share that experience as well, to get to know the family of lawyers that makes up our Association. ■

NEW MEMBERS WELCOMED

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Christopher Gregory Arko
Katharine Barry
Jarret William Berg
Lauren Grace Bernard
Zachary Daniel Blumenthal
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Juan Fernandez-Barquin
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Kimberly Goins
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Darren Goodman
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Itrat Zehra Hussain
Ashley Hutto-schultz
Okeroghene Pearl Ighoyivwi
Jeremiah Chika Ike
Stephanie Imbornone
Patreka Iphill
Linda Irerua
Jennifer Elaine Isaias
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Siddharth Jhans
Vijay Bhawani Jhinga
Gregory Johnson
Liam Jones
Jae Wen Joo
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Hyun Jin Jun
Anita Sue Jwa
Michael Kabat
Yoojin Kang
Natasa Karambatsos
Justin Kasprisn
Jennifer Keane
Jonathan Kelly
Ian Kennedy
Andrew Keutmann
Sarbpreet Simon Khinda
Anita D. Khushalani
Paul Wesley Killian
Hyungtae Kim
Sungmin Kim

In Memoriam

Philip Barash
Point Lookout, NY

William P. Barbeosch
New York, NY

Andrew J. Dipaola
Glen Cove, NY

Muriel T. Dorff
West Babylon, NY

Joseph A. Fischette
Rochester, NY

James T. Gerardi
East Northport, NY

Mark Goodman
Granite Springs, NY

Stephen J. Grifferty
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Lanny A. Horwitz
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Linz, Austria

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Syracuse, NY

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THE NEW YORK BAR FOUNDATION

THE LEGAL WRITER
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Sometimes it's too soon to tell whether to move to dismiss. You might need more information about the case — information that might be available only during disclosure. If you're the defendant and you need more information to prepare a defense, it might be better to plead the defense in the answer without moving to dismiss. If you're the plaintiff, you might need to hold off on the motion to dismiss the defendant's defense(s) until you've completed disclosure. Consider the amount of time and money it'll cost your client to prosecute the claim. Consider the time and money it'll cost your client if you eliminate the defense once you've won your motion to dismiss.

All isn't lost if you don't move to dismiss. You can later move for summary judgment or partial summary judgment.

If you move to dismiss on the basis of a deficiency in the pleadings, a court might, depending on the type and severity of the deficiency, grant your adversary leave to amend — that is, to correct, or cure, the deficiency. If you move to dismiss for improper service and prevail, your adversary may re-effectuate service, subject to whether the statute of limitations has run. A dismissal for failure to serve properly is not on the merits.

What Ground(s) Do You Have to Move to Dismiss

You may move for dismissal under CPLR 327 if the forum is inconvenient.

You may move to dismiss under CPLR 3012(b) when the plaintiff failed to serve the complaint within 20 days after you've made a demand for the complaint.

You may move to dismiss under CPLR 3126 when a party has failed to submit to disclosure.

You may also move to dismiss under CPLR 3216 if one party neglects or delays in prosecuting the action.

Practitioners often move to dismiss under CPLR 3211, a focus of this *Legal Writer* column and the next.

Sometimes it's too soon to tell whether to move to dismiss. You might need more information about the case — information that might be available only during disclosure.

CPLR 3211

CPLR 3211(a) contains the grounds for dismissing a cause of action. Any party against whom a cause of action has been asserted may move under CPLR 3211(a).[4] CPLR 3211(b) contains the grounds for dismissing a defense.

You may raise the grounds provided in CPLR 3211(a) in a motion or assert them in your answer as defense. The motion is optional. You may raise some grounds in your dismissal motion and, if the court denies your motion, you may assert the remaining grounds in your answer.[5] Eleven grounds are provided in CPLR 3211(a). Some are discussed below.

Under CPLR 3211(e), you may move to dismiss only once for the grounds specified in CPLR 3211(a) against any one pleading.

Raise all the grounds for dismissal in your motion. You waive a dismissal ground under CPLR 3211(a) in your motion to dismiss or as an affirmative defense in your answer if you don't assert it.

If you fail to raise jurisdictional grounds in your pre-answer motion to dismiss under CPLR 3211(a)(8) or CPLR 3211(a)(9), you won't be permitted to raise those jurisdictional grounds in your answer.[6] CPLR 3211(a)(8) provides for dismissal on the basis of personal jurisdiction; CPLR 3211(a)(9) provides for dismissal on the basis of in-rem or *quasi-in-rem* jurisdiction. If you choose not to move to dismiss, you must assert these jurisdictional defenses in your answer. Otherwise, you've waived them.[7]

If you've already moved to dismiss pre-answer, you may raise non-jurisdictional grounds as affirmative defenses in your answer. You may later raise non-jurisdictional grounds as a basis for a summary-judgment motion. (The *Legal Writer* will discuss summary judgment motions in upcoming columns.)

Some grounds for dismissal are never waived. You may assert the following grounds until the trial: failure to state a cause of action (CPLR 3211(a)(7)) or absence of a necessary party (CPLR 3211(a)(10)). You may raise lack of subject-matter jurisdiction (CPLR 3211(a)(2)) as a basis for dismissal for the first time on appeal. If you move to dismiss late in the proceedings, a court might become displeased.[8] After all, moving to dismiss under CPLR 3211 is meant to dispose of issues early in the litigation. Don't wait until the last possible minute to move to dismiss.

You may not move under CPLR 3211 to dismiss an action commenced by summons with notice. If you're the defendant, wait to move to dismiss until after you've been served with the complaint. If you haven't been served with a complaint, you may prepare a demand for the complaint. If you're not served with a complaint within 20 days of your demand, you may move to dismiss at that point under CPLR 3012(b).[9]

If you're the defendant and you've moved to dismiss pre-answer, your time to answer the complaint will be delayed until 10 days after the court serves its order for your motion to dismiss. You'd answer only if you've lost the motion and the court doesn't dismiss the complaint.

How to Write the Component Parts of a Motion to Dismiss

Bring your motion to dismiss either by notice of motion or by order to show cause. Whichever method you use will depend on your time constraints. The faster you need the court to intervene, the better to bring your motion to dismiss by order to show cause.

If you bring your motion by notice of motion, your notice of motion must contain the following: (1) the time and place of the hearing on the motion; (2) the supporting papers on which you rely for the motion; (3) the relief you're seeking from the court; and (4) the grounds for the relief you're seeking.[10] The relief you're seeking from the court could be to dismiss the action, to dismiss one or more causes of action, to dismiss one or more affirmative defenses, or to dismiss one or more counterclaims or cross-claims.

Begin your notice of motion with a caption identifying the name of the court, the venue, the title of the action, the nature of the paper ("Notice of Motion"), the index number, and the assigned judge or justice.[11] (The *Legal Writer* discussed notices of motion in Part XIII of writing civil-litigation documents.)

Regardless on which ground(s) you move to dismiss under CPLR 3211(a), the court may consider affidavits, minutes (transcripts) from an examination before trial (EBT), documentary proof, admissions, letters, and any other "papers or proof having an evidentiary impact in the particular situation."[12] An exception exists for motions under CPLR 3211(a)(1), discussed below. If you're contending that the pleading is facially defective as a matter of law and concede the truth of the factual allegations in the pleading, extrinsic proof is unnecessary for the court to dismiss the complaint. If you're contending that the pleading is adequate on its face but that the pleading lacks merit or requires dismissal, you'll need extrinsic proof.[13]

Attach a copy of the complaint, or relevant pleading, if you're moving to dismiss.

> All isn't lost if you don't move to dismiss. You can later move for summary judgment or partial summary judgment.

The CPLR 3211(a) Grounds: Defense Founded on Documentary Evidence Under CPLR 3211(a)(1)

Moving to dismiss under CPLR 3211(a)(1) is available when the defense is based on documentary evidence. Courts have defined "documentary evidence" narrowly. A paper qualifies as "documentary evidence" only if (1) it's unambiguous; (2) it's of undeniable authenticity; and (3) its contents are essentially undeniable.[14]

New York state courts have found that mortgages, deeds, leases, contracts, judgments, stipulations of settlement, and judicial records and the like are acceptable documentary evidence that CPLR 3211(a)(1) contemplates.[15] Also, "the paper must, standing alone, warrant dismissal."[16]

Affidavits in support of your motion to dismiss are not acceptable "documentary evidence." Nor are EBT minutes permissible "documentary evidence."[17] Unacceptable as well are "medical records, letters, newspaper articles, printouts of Internet web pages, and transcripts of radio and television interviews."[18] In the event that all your evidence for dismissal is contained in your affidavits and EBT minutes, you'll have to forgo your dismissal motion and, instead, answer the complaint. You may move for summary judgment under CPLR 3212; the court will consider your affidavits and EBT minutes, for example, in determining whether to dismiss the case.

In opposing a motion under CPLR 3211(a)(1), a plaintiff may submit evidence demonstrating that the defendant's evidence doesn't conclusively resolve the action. A plaintiff may also "invoke CPLR 3211(d) to forestall a decision on the merits of the motion pending the plaintiff's receipt of evidentiary materials necessary to frame its opposition."[19]

Subject Matter Jurisdiction Under CPLR 3211(a)(2)

A motion to dismiss under CPLR 3211(a)(2) is appropriate when federal law preempts the subject matter of a state court action. The areas of law where federal preemption exists include employee retirement income under ERISA, tort claims against the federal government, securities regulation, and patent infringement.[20] If no specific preemption provision exists, a court has subject-matter jurisdiction to hear state law claims.

Sometimes a federal law may preempt state law, but the law may authorize federal and state courts to exercise concurrent jurisdiction. If concurrent jurisdiction exists, the state court has subject-matter jurisdiction to hear a claim based on federal law.

A dismissal motion under CPLR 3211(a)(2) is also appropriate when a claimant seeks damages in state court against state agencies or state officials acting in their official capacities. These cases must be brought in the Court of Claims. Actions against state employees brought in Supreme Court, however, are appropriate even if the state may ultimately be liable under respondeat superior.[21]

A court also lacks subject-matter jurisdiction when a claim violates the state's sovereign immunity. The court would have subject-matter jurisdiction if the claim is properly brought as a declaratory judgment action or an Article 78 proceeding.[22]

A dismissal motion under CPLR 3211(a)(2) is further appropriate when a claim is nonjusticiable: The judicial branch may not usurp powers best left to other branches of government. Examples of nonjusticiable claims are political questions, claims not ripe for review, academic matters, and cases that seek an advisory opinion.[23]

Lack of Capacity to Sue Under CPLR 3211(a)(3)

Move to dismiss under CPLR 3211(a)(3) if the party asserting the claim lacks the legal capacity to sue. Invoke this ground if, for example, an infant sues pro se or purports to retain an attorney. Only someone listed in CPLR 1201 may represent an infant. Also invoke this ground for a claimant who's mentally incompetent.

When a representative is appointed for a person or entity, the representative has no capacity to bring or maintain an action. Move to dismiss under CPLR 3211(a)(3). If a representative has not yet been appointed, the representative has no capacity to bring an action. Even if the appointment of a representative is completed after the action is commenced, a court will dismiss the action.[24]

Capacity-to-sue issues arise in post-bankruptcy situations. If a plaintiff's claim isn't listed in the bankruptcy proceeding but should have been, the plaintiff cannot sue because of lack of capacity.[25] That claim would belong to the trustee in bankruptcy, not the plaintiff. A bankrupt claimant, however, may bring an action in a representative capacity. This situation would arise when the action is in the name of a corporation in which the bankrupt is the sole shareholder.[26]

No clear definition exists for "legal capacity to sue" under CPLR 3211(a)(3). Practitioners are sometimes confused about whether to move under CPLR 3211(a)(3) or (a)(7), failure to state a cause of action. If you have any doubt, move for dismissal on both grounds. If, for example, a plaintiff who has no title or right as a trustee sues on behalf of the trust, the plaintiff lacks capacity to sue. Because the complaint is interposed by an "irrelevant person," moving to dismiss under CPLR 3211(a)(7) would be appropriate as well: the complaint would fail to state a cause of action. In this scenario, invoke both grounds under CPLR 3211(a): CPLR 3211(a)(3) and (a)(7). (The *Legal Writer* will discuss CPLR 3211(a)(7) in upcoming columns.)

Legal capacity issues also arise with foreign corporations or limited liability companies doing business in New York. Under Business Corporation Law § 1312, an out-of-state corporation doing business in New York may not maintain an action in New York until the business becomes licensed and pays fees, taxes, and penalties.[27] Section 1312 doesn't forbid the corporation to commence the action; § 1312 bars the corporation from maintaining the action. An out-of-state corporation may defeat a dismissal motion under CPLR 3211(a)(3) once it gets licensed and pays fees, taxes, and penalties. A similar provision exists under Limited Liability Company Law § 802(a) for limited liability companies doing business in New York.

Unlicensed foreign corporations or limited liability companies not doing business in New York may maintain an action.[28] Whether the plaintiff is doing business in New York might be a factual dispute. A court may conduct a hearing on the issue. The court may also deny the motion to dismiss but allow the defendant to plead it in the answer as an affirmative defense.

Use a motion to dismiss under CPLR 3211(a)(3) when you're challenging whether an entity (a county, municipality, or public authority) has appropriate authorization before commencing the action.

Move to dismiss under CPLR 3211(a)(3) when challenging the state Attorney General's powers under Executive Law § 63.[29] Under Executive Law § 63, the Attorney General may seek an injunction, restitution, or damages if a defendant is engaged in illegal activity. Other statutes, like § 112(a)(1) of the Not-for-Profit Corporation Law, may give the Attorney General the power to commence an action.[30]

In upcoming issues of the *Journal*, the *Legal Writer* will continue with motions to dismiss under CPLR 3211. ■

Gerald Lebovits, a New York Civil Court judge, teaches part time at Columbia and Fordham law schools. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's email address is GLebovits@aol.com.

1. The rules are the same for summary proceedings and plenary actions.
2. David D. Siegel, New York Practice § 257, at 438 (4th ed. 2005).
3. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 36:61, at 36-15 (2006; Dec. 2009 Supp.).
4. Siegel, *supra* note 2, at § 257, at 438.
5. *Id.* at § 258, at 439.
6. Barr et al., *supra* note 3, at § 36:03, at 36-11.
7. CPLR 3211(e).
8. Barr et al., *supra* note 3, at § 36:54, at 36-14.
9. *Id.* at § 36:04, at 36-11.
10. CPLR 2214(a).
11. CPLR 2101(c); 22 N.Y.C.R.R. 202(b).
12. Siegel, *supra* note 2, at § 257, at 438.
13. *Id.* at § 257, at 438.
14. John R. Higgitt, *CPLR 3211(a)(1) and (a)(7) Dismissal Motions — Pitfalls and Pointers*, 83 N.Y. St. B. J. 32, 32–33 (Nov./Dec. 2011) (citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C3211:10 at 22).
15. *Id.* at 33.
16. *Id.*
17. Siegel, *supra* note 2, at § 259, at 441.
18. Higgitt, *supra* note 14, at 33.
19. *Id.*
20. Barr et al., *supra* note 3, at § 36:101, at 36-18.
21. *Id.* at § 36:110, at 36-18.
22. *Id.* at § 36:111, at 36-18.
23. *Id.* at § 36:120, at 36-18.
24. *Id.* at § 36:231, at 36-23 (citing *Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 434 N.Y.S.2d 130 (1980)).
25. Siegel, *supra* note 2, at § 261, at 441.
26. Barr et al., *supra* note 3, at § 36:221, at 23.
27. *Id.* at § 36:200, at 36-22.
28. *Id.* at § 36:201, at 36-22.
29. *Id.* at § 36:210, at 36-22.
30. *Id.*

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ATTORNEY PROFESSIONALISM
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future litigation? Recently, we had a situation where one of my partners met someone at a Friday evening cocktail party who talked with her about a potential litigation. By coincidence, I had met the opposing party and had set up a meeting in our office to take the case. We ended by deciding not to take on the matter, which we thought was the only possible decision that we could make. Were we correct?

Sincerely,
W.E. Declined

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INDEX TO ADVERTISERS

LANGUAGE TIPS

BY GERTRUDE BLOCK

Question: The phrase *lucked out* used to mean "out of luck," thus, "in bad luck." Now that phrase seems to have changed 180 degrees, so all my young friends use it to mean "out of *bad* luck," thus, "in *good* luck." Which does it mean? Talk about ambiguity!

Answer: The phrase "lucked out" has completely changed meaning, though it has kept its original form. Public usage probably can be credited (or blamed) for that change. Originally the word "out" was thought of as it appeared in phrases like "out of gas," so "lucked out" carried a negative connotation. Gradually, however, young people began to think of "luck" as in phrases like the luck of the draw. So for them, "to luck out" is positive, confusing their elders.

The English vocabulary contains plenty of ambiguity. Look at dictionary definitions of common English words. Randomly opening an *American Heritage Dictionary* (AHD), I found the word "cover." The editors listed 23 definitions of "cover" as a transitive verb and four definitions as an intransitive verb. Add seven more definitions for when you use "cover" as a noun, you get a total of 34 meanings for that one word.

In a word like *where* there's a different ambiguity, not of what it means, but of what word follows it. Since *where* means "the place at" or "the place in which," the question: "Where is she going?" is sufficient. But when you ask, "Where did she come from?" you do need a word after it: "from." When you ask, "*Where* is she going?" adding *to* is ungrammatical. You must omit the word *to*. For "Where did she come from?" you must add *from*. Not logical, but grammatical.

Sometimes words change meaning because people consider the former meaning offensive. English speakers were extremely prudish during the 19th century. They called chicken legs *limbs*, because the word "legs" aroused sexual images. Other body parts were also considered too explicit, so *breast*, *thigh*, and *leg* and were replaced by *white meat*, *first joint*, and *drumstick*. What had been "bulls," became instead "sires," "male animals," or even "gentlemen cows."

Meaning change also occurs by what is called amelioration and pejoration. We try to improve an idea by giving it a more pleasant name, but the euphemism we substitute then becomes pejorated. For opponents of the theory of global warming, "clear-cut forests" became "healthy forests," and "climate change" became "climate variability." Both new phrases will lose their pleasant connotation as they continue to be used to describe unpleasant conditions.

When the name "drug stores" took on unpleasant connotations by association with phrases like "drug wars," drug stores became "pharmacies" and "druggists" became "pharmacists." Readers of *Chemical & Engineering News* wrote letters to the editor urging the banning of the word *chemical* because it had become "tainted" by pejoration. When the new euphemisms takes hold, they too will suffer pejoration.

The noun *censure* once meant "opinion" (both good and bad), but it was so often used to mean "bad opinion" that it has pejorated as has the verb form *censor*. More recently *attitude* has pejorated to mean "bad attitude" as in the sales clerk's comment, "That customer arrived with an attitude!" The word *criticize* has also worsened, so that it now means "to criticize unfavorably."

Look what has happened to the word *lewd*. It originally referred merely to people who were not clergymen. Then it degraded to mean "ignorant," then to "base," and it now means "obscene." The term *vulgar* has had a similar downward path. It came into English from the Latin noun *vulgus*, meaning "the common people" (the current 99%). Now to be called *vulgar* is a slur.

Some words improve in meaning but may also retain their original sense like *notorious*, which once described only undesirable behavior. Now it also means "famous." The modifiers *prevalent* and *widespread* were once opposites. The statement, "Disease was prevalent" described only unpleasant circumstances; now *prevalent* can mean "widespread." On the other hand, *widespread* is still noncommital, meaning "occurring widely."

Words also change by widening. People used to be "healthy," but food was "healthful." Have you heard the word *healthful* recently? Neither have I – the adjective *healthy* has taken its place, and in consequence it has considerably widened. The word *robust* has widened too. It used to refer only to people or animals, but it now modifies conditions, finance, weather, and numerous other subjects.

Another modifier that has virtually disappeared is *uninterested*. Some of us will miss it, for it permits narrow distinctions from a similar negative, *disinterested*. The distinction, for those who do not recall it, was that *disinterested* indicated objectivity and lack of bias, while *uninterested* indicated lack of interest. Now one has to decide from the context which of those disparate meanings "disinterested" intends.

Words can also narrow in meaning. The word *problematical* meant "questionable, debatable, or difficult to solve." But it now means only "a problem" (and has lost its *-al* ending). The noun *corn* used to mean "grain." The word *meat*, meant "meat and drink," its meaning in the biblical phrase "meat and drink." "To starve" meant "to die"; but it did not explain how. ■

Gertrude Block (block@law.ufl.edu) 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.).

HEADQUARTERS STAFF EMAIL ADDRESSES

Executive
Patricia K. Bucklin
Executive Director
pbucklin@nysba.org

Richard J. Martin
Assistant Executive Director
rmartin@nysba.org

Executive Services
Andria Bentley, *Executive Services Counsel*
abentley@nysba.org

Teresa B. Schiller, *Executive Services Counsel*
tschiller@nysba.org

Mark Wilson, *Manager, Bar Services*
mwilson@nysba.org

Media Services and Public Affairs
Lise Bang-Jensen, *Director*
lbang-jensen@nysba.org

Mark Mahoney, *Associate Director*
mmahoney@nysba.org

Patricia Sears Doherty, *Editor, State Bar News*
psearsdoherty@nysba.org

Brandon Vogel, *Media Writer*
bvogel@nysba.org

Lawyer Assistance Program
Patricia F. Spataro, *Director*
pspataro@nysba.org

Meetings
Kathleen M. Heider, *Director*
kheider@nysba.org

MIS
John M. Nicoletta, *Director*
jnicoletta@nysba.org

Jeffrey Ordon, *Network Support Specialist*
jordon@nysba.org

Lucian Uveges, *Database Administrator*
luveges@nysba.org

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pwos@nysba.org

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bbeauchamp@nysba.org

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rrifkin@nysba.org

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rkennedy@nysba.org

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kkerwin@nysba.org

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dguevara@nysba.org

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jnelson@nysba.org

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ccopps@nysba.org

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cobrien@nysba.org

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dyork@nysba.org

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jfucillo@nysba.org

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egerrish@nysba.org

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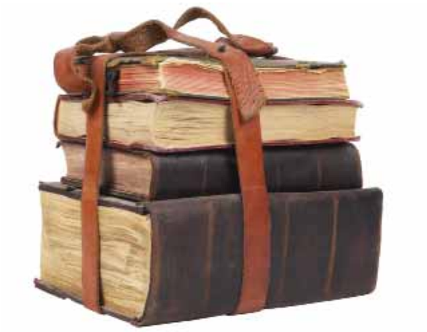

Drafting New York Civil-Litigation Documents: Part XV — Motions to Dismiss

In the last issue, the *Legal Writer* continued its discussion on motion practice. In this issue, the *Legal Writer* discusses drafting motions to dismiss.

Questions to ask yourself before you consider moving to dismiss include these: Who may move to dismiss? When may you move to dismiss? Why should you move to dismiss? On what grounds can you move to dismiss? How do you move to dismiss?

Who May Move to Dismiss, Generally

If you're a defendant (or respondent),[1] you may move to dismiss a cause of action or the entire complaint (or petition).

As the plaintiff, you may also move to dismiss, or strike, defensive pleadings — the answer. Once you've received the defendant's answer, you may assert that the defendant has failed to state a defense or that a defense is meritless.

If you're a plaintiff, you may move to dismiss the defendant's counterclaim.

If you're a plaintiff, you may also move to dismiss your co-plaintiff's cross-claim.

If you're a defendant, you may move to dismiss your co-defendant's cross-claim.

If you're a third-party defendant, you may move to dismiss the third-party claim.[2]

When to Move to Dismiss

As the defendant, you may move to dismiss before you interpose an answer (pre-answer motion to dismiss) or, in limited circumstances, after you interpose an answer. The modern view is that you may move to dismiss even after interposing an answer as long as you've preserved your right to move to dismiss by raising the ground as a defense in the answer.[3]

If a court denies your motion to dismiss, that doesn't mean you lose the case. If you've moved to dismiss before you've interposed an answer and you lose the motion, you may still interpose your answer in certain circumstances. If you win the motion in its entirety and the court dismisses the complaint, you don't need to interpose an answer. If you've moved to dismiss after you've interposed an answer and you lose the motion, the case continues.

If you as the plaintiff lose your motion to dismiss, or strike, the defendant's defense(s), the defendant may pursue the defense at trial. If you win, the defendant won't be able to pursue the defense.

Why Move to Dismiss

In deciding whether to move to dismiss, you'll need to determine the advantages and disadvantages.

Think about your strategy before moving to dismiss. Also think about the ramifications of winning or losing the motion. Think several steps ahead of your adversary. Think about the time, money, and consequences for your client. It's usually more expensive to prepare a motion to dismiss than, say, to prepare an answer. Also consider how the court will perceive your motion. You don't want the court to think that you're bringing a frivolous motion. Just be ethical.

If you're the defendant and the court grants your pre-answer motion to dismiss, you won't need to file an answer. Even if the court doesn't dismiss the entire complaint, it might still dismiss one or more of the plaintiff's causes of action. Interpose an answer with respect to the remaining portions of the plaintiff's complaint. The worst that'll happen is that you'll incur expenses for preparing and filing the motion and the answer.

Think about the ramifications of winning or losing a motion to dismiss.

If, after receiving the defendant's answer, you, the plaintiff, move to dismiss, or strike, one or more of the defendant's defenses under CPLR 3211(b) and the court grants your motion, you might have saved valuable time and money instead of conducting disclosure and preparing for trial. You'll also save time and money if the court grants your motion to dismiss the defendant's counterclaim or the co-plaintiff's cross-claim.

If you're the defendant and the court grants your motion to dismiss your co-defendant's cross-claim, you'll have more time and money to focus on your defense of the plaintiff's claims against you.

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