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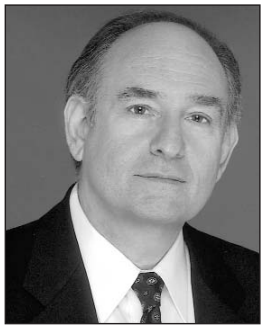
Message from the Chair

By Lewis M. Smoley



The search for truth has always been a daunting and difficult—some say, impossible—task to fulfil. Although the conflicts and confusion that naturally surround such a quest are ever with us, recent events seem to highlight both public and private concern about what we are told and what is in fact true. As a nation, we have once again engaged in a conflict beyond our borders that in retrospect, may have been fought for reasons other than those given us. At home, we witness the dissolution of enormous businesses under a cloud of apparent misrepresentations and falsehoods. Local government agencies that control our daily lives are accused of offering the public misleading information in the process of increasing the cost of our work-a-day transportation. Even otherwise sacrosanct cultural institutions face accusations of misusing donations in violation of prescribed conditions. The list of complaints about misrepresentation and accompanying malfeasance continues to grow.

As litigators, we are often confronted with a conflict between truth-telling and the interests of our clients. Ethical standards should guide us here. Yet we are sometimes told that the litigation process is not a means by which to seek truth but to resolve conflict. Such an ideology may serve to undermine our image as professionals who have been invested with the mantle, "officers of the court." If we turn a deaf ear to facts that do not well serve our client's interest without facing them squarely and trying to mitigate the harm they might do, we simply perpetuate the negative public image that has been a curse to our profession for all too long. If truth be told, however, we lawyers should have nothing to fear from those members who fail to abide by codified ethical standards, as long as we are vigilant in our efforts to maintain those standards and to take strong action against those who violate them. If we weaken our resolve to abide by the highest ethical standards required of us, non-lawyers will set and enforce their own standards upon us. A clear example of such a result can be seen in provisions of Sarbanes-Oxley. By its passage, Congress has sent a not-so-subtle message to our profession that we have not done enough to police ourselves in a particular area of practice.

Some of us may be fortunate not to have been confronted with an ethical dilemma during our careers; but most of us are not so fortunate. If any lesson can be extracted from the headlines, it should be that each of us should take seriously the ethical constraints that are as much a part of our profession as are the skills necessary to engage in it. Pride in our great profession, and the need to foster a positive public image, should be something we all take seriously. Pursuit of the truth may be unavailing at times, but the practice of falsehood must not be permitted to taint our beloved profession.

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Committee Report: The State of State Antitrust Enforcement

I. Introduction

Questions arise from time to time as to the role of the state attorneys general in enforcing the antitrust laws, compared to that of their federal counterparts at the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). For many, the *Microsoft* case[1] brought these questions into sharp focus. *Microsoft* raised not only many substantive antitrust and procedural litigation issues, but also questions concerning the appropriate functions of both federal and state officials in national antitrust enforcement.

We will leave to others the formidable task of analyzing *Microsoft*. Instead, recognizing the effect of that case in sensitizing the antitrust community to concerns of federal and state enforcement tensions, our report addresses the role of the states in antitrust enforcement today from a more global perspective. More particularly, we discuss the factors that lead states to bring antitrust actions, the relationship of state enforcers to the federal agencies and private parties, and the nature of enforcement actions by the states in recent years. Much of the information in this report is based upon interviews with the key antitrust enforcers in the offices of the attorneys general of California, Connecticut, Florida, Maryland, New York, Texas and Wisconsin.[2] In talking with these enforcement officials, the authors and other members of their committee believe they interviewed a representative cross section of individuals from states in the forefront of antitrust enforcement. After discussing major themes that emerged from these interviews, several of the leading cases involving the states are discussed (it would be impossible in a piece of this length to recite all of them)—including those in which federal and state authorities have worked together and those in which the states have proceeded independently.

As is well known, the states have the authority to act under both federal and state antitrust statutes. The Supreme Court in *California v. American Stores Co.*,[3] and lower federal courts, have also recognized that antitrust enforcement decisions by federal officials do not preclude state enforcers from taking an entirely different course of action.[4] This case law suggests that, generally, there is no issue of supremacy of authority of federal antitrust authorities over the states' officials. The federal courts are the ultimate arbiters of antitrust policy, and both sets of enforcers may present cases to them and advocate for the competition policies that they support. The states have, and should have, a role in protecting the interests of their citizens. The states have better knowledge of local conditions and are more sensitive to local issues.

States have availed themselves of their enforcement authority, invoking the antitrust laws sometimes in conjunction with the federal government, and sometimes not. While this may create concerns for litigants because they may face antitrust officials with diverse views, the states have cooperated with federal authorities and each other to facilitate resolution of alleged antitrust violations.

States are most active in investigations and litigations where local consumer interests may be affected. Thus, it should be no surprise that the bulk of state enforcement involves local price-fixing, resale price maintenance, and mergers of entities directly interfacing with the public such as retail establishments, and the enforcement of state indirect purchaser statutes. Sometimes, however, local and national interests coincide. And when they do—as in cases such as *Microsoft*, *Primestar*[5] and *Hartford Insurance*[6]—the states do not hesitate to sue.

II. Views from State Enforcers

While there were different points of emphasis among the interviewed state enforcement officials, overall the interviews showed that the states are generally aligned in their approach to the factors that persuade them to become involved in an antitrust enforcement action. To reiterate, all of the states surveyed are particularly interested in matters that affect individual consumers within their state. Additional interests include those related to state agencies, *e.g.*, Medicaid, state hospitals, state mental health facilities and state procurement entities. Therefore, restraints affecting health-care services, pharmaceutical prices, consumer-oriented products and retail sales generally, and the like, will draw the attention of state enforcers.

Generally, if there is not an identifiable effect on local consumers (either public purchasing entities or individuals), the states probably will not get involved. To refine their analysis further, states try to determine how many consumers are affected and how significantly adverse the effect is on those consumers. Further, in deciding whether to take action, states also will consider the egregiousness of the violation, the duration of the restraint, and the nature and severity of the harm. Because of their concern for consumers, states are more likely to be interested in retail level mergers than in mergers of suppliers or manufacturers.

As might be expected, in deciding whether to pursue a case, the states consider the available resources within their offices and whether other government enforcers or private parties may be prosecuting an

action involving the conduct in question. Some states are less inclined to get involved in "business-to-business" disputes, particularly when private counsel is already involved. However, even if a business could privately vindicate its rights, the states at times also attempt to determine whether there is consumer harm that may not be addressed by the private business plaintiff. In some cases in which private plaintiffs are involved, the states have participated by filing an amicus brief in support of the position of the private plaintiff.[7]

Of course, the more states challenging a particular conduct or merger, the less costly it is for any individual state to pursue the matter.[8] Further, to the extent that the federal authorities are involved, the state can conserve its resources by leaving some of the investigation and prosecution to the federal enforcers. Therefore, before deciding to proceed, states look carefully at the role being played, or that could be played, by the federal agencies and other states. The situation with federal enforcers today is rather different than that which prevailed in the 1980s. Then, in the eyes of many antitrust practitioners, there was a tense relationship between the federal agencies and various state attorneys general.[9] This relationship is now viewed positively by the states even though there have been occasions of disagreement about whether certain claims should be prosecuted.[10]

State antitrust authorities recognize that both the FTC and DOJ have significant resources from which to draw. The federal agencies have far more economists than do the state enforcers, and also have attorneys with significant experience in particular product market areas.[11] However, this complementary relationship can run the other way as well. The federal agencies recognize that people "on the ground" at the state level can be very helpful in certain types of cases. In connection with the recent action challenging the EchoStar/DirecTV satellite television merger,[12] for instance, the DOJ staff encouraged the states to identify witnesses to testify concerning local market conditions. Moreover, in some cases, the states have added value through expert witnesses. For example, during the liability phase in *Microsoft*, the trial attorney representing the United States selected the states' retained economic expert, rather than the economic expert engaged by the DOJ, to testify on behalf of the governments' case. Also, during the first remedies phase of *Microsoft*, another economist retained by the states was a key witness-affiant.

The states have also complemented federal enforcement by filing amicus briefs to support the position of a federal agency, much as they have done with private parties. For example, in *FTC v. Staples*,[13] several states investigated a proposed merger between two office supply companies, Staples and Office Depot. When the states were denied leave to intervene in the FTC's challenge to the merger, they submitted an amicus brief.[14]

Private counsel similarly can form a good synergistic relationship with state antitrust authorities. Private counsel frequently represent consumer interests, often in class actions, thereby suggesting the potential for a natural alliance with state enforcers. Private counsel (and their clients) can bring economic knowledge of the industry to a case, whereas the states can bring a public purpose element that the private party cannot make as easily.[15]

III. Major State Cases

The states have been active on several fronts in recent years, including cases in which damages have been sought on behalf of consumers, and numerous cases involving potential mergers. In some of these matters, the states have acted with the federal authorities, and in other cases, states have been at the forefront by taking action independently or when the federal authorities have passed on a matter or transaction. In the material that follows, some of these major cases are discussed.

A. Consumer Damages Cases

Since 1976, states have had the statutory authority to bring damage claims for violation of the federal antitrust laws as *parens patriae* on behalf of consumers under the Hart-Scott-Rodino Antitrust Improvements Act.[16] Armed with this authority, in many cases the states have sought monetary relief on behalf of consumers under federal law. This is an important state role, as the DOJ has no authority to secure such recovery on behalf of consumers. Moreover, until *FTC v. Mylan Laboratories, Inc.* ("*Mylan*"),[17] the FTC had only sought monetary recovery (disgorgement) in one case.[18] In *Mylan*, 31 states (including New York), the District of Columbia and the FTC cooperated to bring suit in federal court, alleging that Mylan Laboratories, Inc. sought to restrain trade by cornering the supply of the active pharmaceutical ingredients in two drugs. This conduct inflated the drugs' prices by large amounts at the retail level. The states, together with the FTC, negotiated a $100 million settlement that was distributed to consumers and state agencies.

As reflected in cases such as *Mylan*, the states have worked with the federal authorities in enforcing the antitrust laws. One of the most recent examples of such cooperation occurred early this year when the DOJ, Ohio and California announced three consent decrees addressing a market allocation agreement in California and Ohio, which involved the *Village Voice*.[19]

More commonly, the states have independently initiated consumer damages cases. In *In re Disposable Contact Lens*,[20] 32 states (including New York) brought suits

on behalf of consumers alleging that a conspiracy to limit the sales of replacement contact lenses to eye care professionals, and retail optical and mass merchandisers inflated retail prices. In 2001, after years of tenaciously litigated pretrial proceedings and settlements with various defendants, the case went to trial against the remaining defendant, Johnson & Johnson. The states tried the case with counsel for private plaintiffs before a jury, and after two months of trial, the parties reached a settlement. Overall, the case produced approximately $90 million in cash and consumer product coupons, as well as injunctive relief. In *Toys 'R Us Antitrust Litigation*,[21] 44 states (including New York), the District of Columbia and Puerto Rico brought suit against Toys 'R Us and four other toy manufacturers to recover damages for buyer-imposed vertical restraints. The case settled for $57 million in cash and consumer product coupons, $37 million of which was used for toy distributions to underprivileged children.

States also have been active in areas such as resale price maintenance. Beginning in the Reagan era, the DOJ largely abandoned the area of vertical price fixing, and the FTC tended to be reluctant to act as well. Thus, the states have taken the lead on resale price maintenance cases, such as those brought against Minolta[22] in 1988, Panasonic[23] in 1989, Mitsubishi[24] in 1991 and Nintendo[25] in 1992. More recently, in *New York v. Reebok International, Inc.*,[26] all 50 states filed suit alleging conspiracy to fix resale prices relating to Reebok shoes.[27] Similarly, in *Nine West*, all 50 states and the District of Columbia sued Nine West Shoe Company alleging resale price maintenance. The case was settled on behalf of consumers for $34 million.[28] The states' most recent vertical restraints cases involved cooking grills and compact discs. The states brought suit against Salton, Inc. for conduct relating to the George Foreman grill.[29] In late May 2003, the court approved a settlement of roughly $7.7 million and significant injunctive relief.[30] Similarly, various state antitrust enforcement authorities recently settled the litigation involving compact discs in which the states had challenged policies involving minimum advertised price restrictions ("MAP") of CD distributors on the basis that retailers would have discounted CDs more had it not been for the MAP policy. (As such, the MAP essentially served as a form of resale price maintenance.)[31] On June 13, 2003, the court approved a settlement of $143 million in cash and products.[32]

B. Merger Cases

In addition to restraint of trade cases leading to claims for damages, the states are active in the area of merger enforcement. Most often, this has involved working with the federal authorities. However, there have been particular areas (such as hospital mergers) where states have acted alone in recent years, and there have been some cases in which states have acted because their view of the relevant market was different from that of the federal authorities.

1. Examples of Joint State-Federal Action

State merger enforcement in the modern era goes back almost 15 years to the leading case of *California v. American Stores Co.*[33] in which California successfully brought suit seeking divestiture of a supermarket merger after the FTC had negotiated a more limited remedy as a condition to permitting the transaction to proceed. Joint merger enforcement by federal and state authorities started with the challenge to the merger of two Florida hospitals that resulted in a 1994 consent decree.[34]

There are several prominent recent merger cases in which the federal and state authorities worked together. In *California v. Chevron Corp.*[35] and *In re Chevron Corp.*,[36] 12 states and the FTC investigated the proposed merger of Chevron and Texaco. Both the state and federal agencies reached consent decrees with the merging companies, which included significant divestiture relief. In *New Jersey v. Exxon Corp.*[37] and *In re Exxon Corp.*,[38] numerous states (including New York) and the FTC filed suit to challenge a proposed merger of Exxon and Mobil which the governments alleged would significantly injure competition and allow Exxon/Mobil to raise gasoline prices for consumers. The parties reached a settlement, which included substantial divestiture relief including over 1,700 Exxon and Mobil gas stations on the East Coast, 360 stations in California and 319 stations in Texas. More recently, in *United States v. EchoStar Communications, Inc.*,[39] suit was filed by 23 states (including New York), the District of Columbia, Puerto Rico, and the DOJ to block a proposed merger between the nation's two satellite television services, EchoStar and DirecTV. The parties abandoned their proposed merger several weeks after the states and the DOJ filed suit.

Questions have been raised whether both federal and state involvement is needed when a merger has national implications. Apart from the general benefits that federal and state authorities can provide to each other in enforcing the antitrust laws, in merger cases the states often can focus on regional issues, which might not be that significant to the federal authorities, while the federal agencies focus on national issues. In two waste disposal merger cases, *United States v. USA Waste Serv., Inc.*[40] and *United States v. Waste Management, Inc.*,[41] 13 states (including New York) and the DOJ challenged, in two separate venues, proposed mergers between Waste Management and other major national waste disposal companies. There was concern among various states that the federal agencies would only look for divestitures in certain areas of the country. For example, because the DOJ said that it would require

divestitures only in the top 15 markets, and because Milwaukee was the 18th largest market, Wisconsin decided to become involved so that it could seek divestiture in the Milwaukee market. Ultimately, both cases were resolved through consent decrees requiring divestiture in several local markets. Similarly, in the Wells Fargo/Interstate Bank merger, California looked at the impact on agricultural lending in the Central Valley of California, an issue that might well not have been of concern to the federal authorities.

2. State Action in Absence of Federal Action

After a series of FTC and DOJ losses in the 1990s in cases challenging hospital mergers,[42] federal authorities seem less inclined to proceed with such challenges, and the attention of states has picked up with respect to these mergers. Some of the federal defeats may have been influenced, at least in part, by the absence of opposition by local and state constituencies who would, presumably, be the victims of the diminished competition. In *Freeman*, for example, the district court denied the FTC's request for a preliminary injunction. The court not only found that competition was unlikely to be reduced by eliminating one hospital, but also commented that "[i]t looks to me like Washington, D.C. once again thinks they know better what's going on in southwest Missouri. I think they ought to stay in D.C."[43] Before the Eighth Circuit, the FTC urged reversal based upon alleged bias by the district court judge. While the Eighth Circuit did not condone this and other allegedly biased remarks, it concluded that the comments did not warrant reversal. Although these comments were extreme, many believe that in the absence of opposition to a merger from local authorities, the federal authorities have a heavier burden in challenging hospital mergers.[44]

Reflecting the reduced federal enforcement role in hospital merger cases, in *California v. Sutter Health Sys.*,[45] California challenged a proposed hospital merger even though the FTC had decided not to proceed. California antitrust officials emphasized to us, however, that the FTC and the California Attorney General's office worked closely during the investigation leading to the state challenge. The two enforcers simply reached different conclusions at the investigation's end. Similarly, when the two dominant hospitals in the Dallas/Fort Worth area decided to merge, the federal agencies declined to challenge the merger. The state continued its investigation, and the hospitals eventually abandoned the proposed transaction.[46] Further, when two hospitals in Kenosha, Wisconsin decided to merge, the FTC, which was heavily involved in *Butterworth* at the time, decided not to proceed. Therefore, Wisconsin took the lead in the investigation, which resulted in a consent decree.[47]

Even though the Department of Justice's Antitrust Division had reviewed and decided not to challenge merger plans of two New York hospitals in the Poughkeepsie area, the state of New York successfully brought suit against the two hospitals, claiming that they were colluding to fix prices. Ultimately, the court granted summary judgment in favor of the state.[48] Thereafter, a consent decree designed to unwind the arrangement was entered into.[49]

Hospital mergers are not the only areas in which state enforcers have acted in the absence of federal enforcement. States have challenged mergers in other industries after reaching different conclusions on the relevant product market than that of their federal counterpart. Two cases from New York, with different results, are illustrative.

In *New York v. Kraft General Foods, Inc.*,[50] New York disagreed with the FTC's conclusion about the relevant product market, and thus sued to challenge Nabisco's 1993 sale of its ready-to-eat cereal assets to Kraft. After a trial on liability, the court dismissed the action based on a failure to show a substantial lessening of competition in the relevant market. The second case—*Bon-Ton Stores, Inc. v. May Dep't Stores Co.* ("*Bon-Ton*")[51]—involved a retail merger in which May Company sought to acquire a Rochester, New York department store chain. The FTC defined the product market more broadly than did the Attorney General, and after the FTC declined to act, New York challenged the acquisition. The state's action was consolidated with a case brought by a private party who also challenged the proposed merger. After the court granted a preliminary injunction restraining the acquisition, the matter settled.[52]

There are numerous other examples of merger cases in which states have acted after federal authorities have not. For example, Connecticut commenced an investigation after a merger of oil terminals was completed and federal enforcers had indicated that no federal enforcement challenge would occur.[53] Massachusetts has been particularly active in this area in these kinds of situations, sometimes challenging mergers after no action was taken by the federal authorities and in other cases taking action after the FTC and the Department of Justice sought and obtained either no relief or lesser relief.[54]

Other states also have pursued matters in the absence of federal action. These have ranged in businesses as diverse as department stores[55] and banks.[56]

C. Other Cases in Which States Have Been at the Forefront

There also have been cases outside the merger area in which states have moved forward even after the federal government decided not to act. An older case, and

one of the most prominent, is *Hartford Fire Ins. Co. v. California*,[57] brought by 19 states and private parties alleging an antitrust conspiracy among insurers, reinsurers, and their trade association affecting nationwide commercial liability insurance industry practices. "The Justice Department declined even to investigate this industry, purportedly because the Federal Trade Commission, during a brief investigation, failed to uncover any evidence of collusion and because 'collusion is highly unlikely in unconcentrated industries like the property and casualty industry.'"[58] This case exemplifies of the use of *parens patriae* when a case is national in scope. The Ninth Circuit expressly upheld *parens* standing:

> Each state here asserts its quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. . . . The State's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction.[59]

After the Supreme Court's 1993 decision upholding the case, the litigation settled with the defendants agreeing to pay $36 million and to make three major industry changes: (1) restructuring the Insurance Services Office, an industry body that develops insurance forms and ratings, to increase involvement and control by those outside the industry; (2) creating a public risk service institute to provide risk-management services to state and local governments; and (3) developing a database to provide insurance risk information to government bodies.[60]

A variation on the theme of state action in the absence of federal action is found in situations in which states have initiated legal action with the federal authorities taking follow-up action. One of the most dramatic examples involves the bid rigging among dairy companies that supplied milk and other dairy products to public school districts and other public institutions in several states. The Florida Attorney General's office brought information about such bid rigging to the Atlanta Field Office of the Antitrust Division in 1986, after which the Division began a grand jury investigation. Since May 3, 1988, the Division has filed 134 milk bid rigging cases involving 81 corporations and 81 individuals. There have been criminal fines totaling more than $69.8 million that have been imposed on corporations and individuals, and 29 individuals have been sentenced to jail. Further, the Division reached civil damage settlements with the defendants in excess of $8 million.[61] Additionally, Florida itself made a $34 million settlement that returned damages to 66 of its 67 school boards.[62]

New York's role in a recent case also illustrates a situation in which the state instituted legal action with follow-up action taken by the federal authorities. The situation involved alleged bid rigging by buyers of collectible postage stamps sold at public auctions, which came to the attention of the DOJ and the New York Attorney General at about the same time. After New York investigated the matter and filed a civil suit,[63] one of the significant participants settled the civil case with New York, while working out a resolution with the DOJ concerning possible criminal exposure.[64] Having thus obtained a cooperating witness, the DOJ pushed forward with an investigation, filed suit[65] and eventually obtained guilty pleas to criminal violations from other participants in the scheme.[66]

IV. Conclusion

As reflected by this report, states play a vital role in antitrust enforcement in the United States. While in some cases they supplement the activities of the federal enforcers, in many cases states have acted on their own. Whether working alone or with the federal authorities, state enforcement officials have an understanding of the local markets and the needs of local consumers and state governmental entities that the federal authorities cannot match.

By the legal actions they have instituted, state enforcers have brought significant economic recovery to local consumers who have been injured by anticompetitive acts. The awards on behalf of such consumers in recent years are significant and demonstrate the very real benefits to state consumers from antitrust enforcement by local authorities.

There are no supremacy issues with respect to state antitrust enforcement, and it is clear that both federal and state regulators have the right to advocate for the policies they support. Because the federal authorities generally look at issues that have a national scope, the states play a vital role in many areas of antitrust enforcement. While there is always the risk that defendants may face regulators with diverse views, the federal and state authorities have cooperated significantly in recent years to try to achieve a consistent approach that does not place the defendant in a particularly disadvantageous position just because two governmental enforcers are involved.

Because states are most likely to become involved when local consumer interests are most affected, it is not surprising that the bulk of state enforcement involves local price fixing, resale price maintenance, and mergers of entities like retail establishments that sell to the public. In these, as well as in many other areas, the states have served, and will continue to serve, a vital role in antitrust enforcement.

Endnotes

1. *United States v. Microsoft Corp.*, Civil Action No. 98-1232 (C.K.K.) (D.D.C.), and *New York v. Microsoft Corp.*, Civil Action No. 98-1233 (C.K.K.) (D.D.C.).
2. We would like to thank Kathleen Foote and Tom Greene (California), Steve Rutstein (Connecticut), Trish Conners (Florida), Ellen Cooper (Maryland), Jay Himes, Robert Hubbard and Richard Schwartz (New York), Mark Tobey (Texas) and Kevin O'Connor (Wisconsin), for their time and assistance in providing helpful information necessary for this article. Mr. O'Connor is now in private practice.
3. 495 U.S. 271 (1990).
4. *See also New York v. Microsoft Corp.*, 209 F. Supp. 2d 132 (D.D.C. 2002); *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D. Cal. 1970).
5. *New York ex rel. Abrams v. Primestar Partners, L.P.*, 1993-2 Trade Cas. (CCH) ¶ 70,403 (S.D.N.Y. 1993) (consent decree in action challenging partnership by cable operators to provide satellite broadcasts). *See also New York v. Visa, U.S.A., Inc.*, 1990-1 Trade Cas. (CCH) ¶ 69,016 (S.D.N.Y. 1990) (action challenging joint venture by Visa and MasterCard to develop the Entrée debit card).
6. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).
7. *See, e.g., Covad Communications Co. v. Bell Atlantic Corp.*, Docket No. 02-7057 (D.C. Cir.); *Servais v. Kraft Foods, Inc.*, 252 Wis. 2d 145, 643 N.W.2d 92 (Wis. 2002), *cert. denied*, 123 S. Ct. 601 (2002); *Levine, et al. v. Abbott Laboratories, et al.*, Index No. 95-117320 (Sup. Ct., N.Y. Co. Nov. 25, 1996), *appeal withdrawn*, 257 A.D.2d 978 (1st Dep't 1999).
8. In 1983, the states formed the Multistate Task Force of the National Association of Attorneys General to coordinate efforts of various states in the investigation and prosecution of antitrust cases. Over the years the states have formed various task forces to study areas of interest. *See* Jay L. Himes and Patricia A. Conners, Antitrust Federalism and Multistate Antitrust Enforcement in ABA Antitrust Section 2002 Annual Meeting Course Materials 593 (2002). A recent illustration is the Pharmaceutical Pricing Task Force, set up in 2002, to address state enforcement of antitrust and consumer laws affecting the pharmaceutical industry.
9. Jay L. Himes, Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the *Microsoft* Case. 11 Geo. Mas. L. Rev. 1 (2003).
10. Roundtable Discussion, ABA 2002 Conference; 70 Antitrust L.J. 261, 266 (2002), Testimony of Hewitt Pate, Hearing of the Senate Judiciary Committee, May 21, 2003.
11. Less visible examples can also be given. For instance, the DOJ Health Care Task Force (which has now been disbanded) went to Texas several years ago to help sensitize that Attorney General's office to issues arising in the analysis of hospital mergers.
12. *United States v. EchoStar Communications, Inc.*, Docket No. 1:02 CV02138 (E.S.H.) (D.D.C.).
13. 970 F. Supp. 1066 (D.D.C. 1997).
14. *See also* Brief of *amici* states in *United States v. Visa USA, Inc.*, Docket Nos. 02-6076, 6078 (2d Cir.) (filed July 3, 2002).
15. That of course could be the subject of a whole other report. The relationship between states and private counsel worked particularly well in *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369 (D.D.C. 2002), and appears currently effective in *In re Cardizem CD Antitrust Litigation*, Master File No. 99-Md-1278, MDL No. 1278 (E.D. Mich.); *In re Buspirone Antitrust Litigation*, MDL No. 1413 (JGK) (S.D. N.Y.); and *Ohio v. Bristol-Myers Squibb Co.*, 1:02 CV 01080(EGS) (D.D.C.) In these latter three cases, settlement approval proceedings are underway.
16. 15 U.S.C. § 15c.
17. 62 F. Supp. 2d 25, (D.D.C. 1999), *modified*, 99 F. Supp. 2d 1 (D.D.C. 1999) (dismissal); *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369 (D.D.C. 2002) (settlement approval).
18. *FTC v. Abbott Labs*, 1992-2 Trade Cas. (CCH) ¶ 69,996 (D.D.C. 1992).
19. *Ohio v. Village Voice Media,* LLC, No. CV 03492804 (Ct. Com. Pl. Jan. 27, 2003); *California v. Village Voice Media,* LLC, No. BC289225 (Calif. Superior Feb. 18, 2003); *United States v. Village Voice Media, LLC*, Civil Action No. 1:03:CV0164 (N.D. Ohio) (United States, Ohio and California filed a civil antitrust complaint against nation's two largest chains of alternative newsweeklies alleging a conspiracy to suppress and eliminate advertising in, and readers of, alternative newsweeklies in Ohio and California).
20. Docket No. 3:94 MDL-1030-J-20A (M.D. Fla.).
21. 191 F.R.D. 347 (E.D.N.Y.2000).
22. *In re Minolta Camera Products Antitrust Litigation*, 668 F. Supp. 456 (D. Md. 1987).
23. *In re Panasonic Consumer Electronics Antitrust Litigation*, 1989 U.S. Dist. LEXIS 6274 (S.D.N.Y. June 5, 1989).
24. *State of Ohio v. Mitsubishi Electronics of America, Inc.*, 1992 U.S. Dist. LEXIS 17470 (D. Md. Jan. 15, 1992).
25. *State of New York v. Nintendo of America*, 775 F. Supp. 676 (S.D.N.Y. 1991).
26. 903 F. Supp. 532 (S.D.N.Y. 1995), *aff'd*, 96 F. 3d 44 (2d Cir. 1996).
27. The states negotiated a $9.5 million settlement, $8 million of which was distributed *cy pres* on behalf of consumers.
28. *In re Nine West Group Inc.*, file 981-0386 settlement agreement (FTC March 6, 2000).
29. *State of New York, et al. v. Salton, Inc.*, Civ. Action No. 02-CV-7096 (LTS) (S.D.N.Y. 2002).
30. *State of New York, et al. v. Salton, Inc.*, Civ. Action No. 02-CV-7096 (LTS), Slip Op. (S.D.N.Y. May 30, 2003).
31. *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, MDL No. 1361.
32. *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, MDL No. 1361, Slip. Op. (D. Me. June 13, 2003).
33. 495 U.S. 271 (1990).
34. *United States and State of Florida v. Morton Plant Health System*, 1994-2 Trade Cas. (CCH) ¶ 70,769 (M.D. Fla. 1994).
35. Case No. 01-07746 (C.D. Cal. Sept. 7, 2001).
36. 2001 FTC LEXIS 135 (Sept. 7, 2001).
37. 99 CV 03183 (RMU) (D.D.C. Nov. 30, 1999).
38. 201 FTC LEXIS 18 (Nov. 30, 1999).
39. Docket No. 1:02CV02138(ESH) (D.D.C.).
40. 1999-2 Trade Cas. (CCH) ¶ 72,678 (N.D. Ohio 1999).
41. 2000-1 Trade Cas. (CCH) ¶ 72,791 (E.D.N.Y. 1999).
42. *See FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999); *United States v. Long Island Jewish Med. Ctr.* ("*Long Island Jewish*"), 983 F. Supp. 121 (E.D.N.Y. 1997); *FTC v. Butterworth Health Corp.* ("*Butterworth*"), 946 F. Supp. 1285 W.D. Mich. 1996); *aff'd*, 121 F.3d 708 (6th Cir. 1997); *FTC v. Freeman Hosp.* ("*Freeman*"), 911 F. Supp. 1213 (W.D. Mo.), *aff'd*, 69 F.3d 260 (8th Cir. 1995); and *United States v. Mercy Health Servs.*, 902 F. Supp. 968 (N.D. Iowa 1995), *vacated as moot*, 107 F. 3d 632 (8th Cir. 1997).
43. *Freeman* at 263.
44. *Butterworth* at 1296. (Court referred to the fact that hospital boards were comprised of community business leaders who had a stake in maintaining high quality and low cost hospital services). *See* Kevin J. Arquit and Richard Wolfram, Mergers and

Acquisitions "United States Government Antitrust Analysis and Enforcement," 116 PLI/Corp. 425, *539 (1999) (The authors concluded that in *Long Island Jewish* an additional factor in the court's decision was the fact that the New York State Attorney General did not join the federal authorities' opposition to the proposed merger. In that case, the Court did note that the New York Attorney General had declined to join in prosecution of the suit. *Long Island Jewish,* 983 F. Supp. at 135.)

45. 84 F. Supp. 2d 1057 (N.D. Cal. 2000), *aff'd*, 217 F.3d 846 (9th Cir. 2000).
46. Charles Ornstein, Failure Trends Nip Baylor, Texas Health Merger, Dallas Morning News, Nov. 2, 1999, at 1D; Charles Ornstein, Doctors Air Concerns About Hospital Merger, Dallas Morning News, Sep. 11, 1999, at 3F; Charles Ornstein, Texas Hospital Firms' Merger Approved by Justice Department, Dallas Morning News, Mar. 27, 1999.
47. *Wisconsin v. Kenosha Hospital and Medical Center*, 1997-1 Trade Cas. ¶ 71,669 (E.D. Wis. 1996).
48. *New York v. St. Francis Hospital*, 94 F. Supp.2d 399 (S.D.N.Y. 2000).
49. *New York v. St. Francis Hospital*, Civil Action No. 98CV939 (WCC) (June 30, 2000).
50. 862 F. Supp. 1030 (S.D.N.Y.) (denying preliminary injunction), *aff'd without published opinion*, 14 F.3d 590 (2d Cir. 1993), *denied on renewal*, 862 F. Supp. 1035 (S.D.N.Y. 1994), *decision after liability trial*, 926 F. Supp. 321 (S.D.N.Y. 1995).
51. 881 F. Supp. 860 (W.D.N.Y. 1994).
52. 1995-1 Trade Cas. (CCH) ¶ 70,917 (W.D.N.Y. 1995).
53. *Connecticut v. Wyco New Haven, Inc.*, 1990-1 Trade Cas. (CCH) ¶ 69,024 (D.Conn. 1990).
54. *Massachusetts v. Campeau Corp.*, 1988-1 Trade Cas. (CCH) ¶ 68,093 (1988); *Massachusetts v. J. Sainsbury, PLC,* No. 99-3574A (Mass. Super. Ct. Nov. 16, 2000); *Massachusetts v. Suiza Foods Corp.*, No. 01-11097 (D. Mass. July 6, 2001); *In re Stericycle, Inc.*, No. 03-124 (Mass. Super. Ct. Jan. 7, 2003).
55. *City of Pittsburgh v. May Dep't Stores*, 1986-2 Trade Cas. (CCH) ¶ 67,340 (W.D. Pa. 1986).
56. *Maine v. Key Bank of Maine, Inc.*, 1991-2 Trade Cas. (CCH) ¶ 69,649 (D.Me. 1991).
57. 509 U.S. 764 (1993).
58. Michael F. Brockmeyer, State Antitrust Enforcement, 57 Antitrust L.J. 169, 170 (1988) (fn. omitted), quoting letter from the Assistant Attorney General Douglas H. Ginsburg to Jay Angoff (Apr. 22, 1986).
59. *In re Insurance Antitrust Litigation*, 938 F.2d 919, 927 (9th Cir. 1991) (internal quotations and citations omitted).
60. *In re Insurance Antitrust Litigation*, MDL No. 767 (N.D. Cal. 1995).
61. Joel I. Klein, Antitrust Enforcement and the Consumer, http://www.usdoj.gov/atr/public/div-stats/1638.htm (July 2, 2003).
62. *Florida v. Borden, Inc.*, Case No. 88-0273-CIV-Scott (S.D. Fla.); *Florida v. Barber Dairies, Inc.*, Case No. 89-40019 (N.D. Fla.).
63. *See New York v. Feldman*, 210 F. Supp. 2d 294 (S.D.N.Y. 2002) (denying motion to dismiss).
64. *See United States v. Earl P.L. Apfelbaum, Inc.*, Criminal No. 02 CR 106 (S.D.N.Y 2002).
65. *United States v. Feldman*, Criminal Case No. CR 02-708 (S.D.N.Y. 2002) (indictment charged two British stamp dealers and a British stamp company for conspiring to rig bids for stamps purchased at public auctions in the United States).
66. *United States v. Davitt Felder, Inc.*, Criminal No. 02 CR 461 (S.D.N.Y. 2002); *United States v. Mark Morrow Stamps*, Criminal No. 02 CR 795 (S.D.N.Y. 2002); *United States v. Okey*, Criminal No. 02 CR 865 (S.D.N.Y. 2002). *See generally* "British Stamp Dealers and British Company Indicted on Bid-Rigging Charges" United States Department of Justice, Antitrust Division Press Release, dated May 29, 2002.

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Protecting the Sanctity of Silence: Client Confidences and Responding to a Grand Jury Subpoena Directed to Attorneys

By Jonathan D. Lupkin and Steven Tiscione

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The duty of a lawyer to preserve a client's confidences and secrets is one of the most solemn and significant obligations imposed by the canon of legal ethics.[1] The Practice Commentaries to the New York State Code of Professional Responsibility, for instance, have called DR 4-101 (Preservation of Confidences and Secrets of a Client) "the most important rule in the Code," which "serves as the cornerstone for the majority of the other disciplinary rules."[2]

But when the safeguard of client confidences conflicts with an attorney's duty as an officer of the court, confidentiality is not always sacrosanct. Indeed, when faced with compulsion by a court of law, and even when such an order is contrary to established legal principles, attorneys must navigate a treacherous quagmire in which they face disciplinary sanctions or contempt for the slightest deviation. This article highlights the ethical and practical dilemmas faced by defense counsel in the context of grand jury subpoenas for confidential information. Specifically, it considers the inherent conflict that arises when an attorney's attorney-client or work-product objections to a subpoena are overruled by a court of law.

Weighing the Public Interest of a Grand Jury's Unfettered Access to Information with a Client's Right to Confidential Communications With His or Her Attorney

Traditionally, the grand jury has enjoyed wide latitude in its ability to inquire into violations of the criminal law. The duty of every citizen called before a grand jury to testify has long been recognized,[3] and the power of a federal or state court to compel persons to appear and testify in front of grand juries is not in doubt.[4] In fact, grand juries may even inquire as to the whereabouts of unlocated or unknown witnesses.[5]

The subpoena powers of the grand jury are not unlimited, however. The grand jury "may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law."[6] In particular, discovery in grand jury proceedings is subject to the attorney-client privilege.[7] Moreover, although the Federal Rules of Evidence do not, by their terms, generally apply in proceedings before grand juries, an exception has been specifically carved out for the rules involving privilege.[8] New York courts have also warned against "cavalierly" "encroach[ing] upon well recognized and 'firmly anchored' common law privileges."[9]

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In New York, the attorney-client privilege is a creation of statute. Section 4503 of New York's Civil Practice Law and Rules prevents attorneys from disclosing confidential information communicated during professional employment unless the client waives the privilege. In fact, CPLR 4503 prohibits attorneys from disclosing confidential attorney-client information "in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof." So strong is the state's regard for the confidentiality of attorney-client communications, that the New York Court of Appeals has stated that "the Code of Professional Responsibility bind[s] attorneys to keep private the confidential communications and secrets of their clients on pain of professional discipline, including loss of their license to practice law."[10] New York's commitment to protecting attorney-client communications is animated by the theory that "one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment."[11]

Courts show similar reverence towards the attorney work-product doctrine. Under the CPLR, work product is afforded virtually absolute[12] protection and materials prepared in anticipation of litigation are afforded qualified[13] protection. In the federal system, the doctrine may or may not rise to the level of absolute privilege; work product—particularly an attorney's mental impressions, conclusions, opinions, or legal theories—"is to be protected unless a highly persuasive showing is made."[14] In fact, "the protection afforded such opinion work product may be absolute."[15]

Protection of attorney-client confidences, however, is balanced against the strong public interest in obtaining "everyman's evidence."[16] In fact, New York courts

have held that "even when the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure."[17] New York courts have observed that the privilege can constitute "an 'obstacle' to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose."[18] The question of whether or not to curtail the protection is brought into sharp focus in the context of grand jury proceedings because "[n]owhere is the public's claim to each person's evidence stronger than in the context of a valid grand jury subpoena."[19]

Thus, despite the emphasis on protecting confidential information, New York courts do not rubber stamp invocations of privilege. When the principles of privilege and public interest "clash," New York courts have counseled that "a balance must be struck and an appropriate resolution will not be forthcoming by a wooden application of some general formula."[20] The solution should be mindful "of the particular circumstances giving rise to the problem, ever mindful of the policy considerations which furnish a basis for the two principles."[21]

An Attorney's Ethical Duties When Compelled by Subpoena to Reveal Client Confidences

While the competing interests of public justice and attorney-client trust are matters to be contemplated by legislators and judges, the issue of more immediate concern to practicing attorneys is the scope of their ethical obligations.

The ABA Model Rules state that an attorney "shall not reveal information relating to representation of a client, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."[22] The New York Code offers only slightly narrower protection to client confidences and secrets. Disciplinary Rule 4-101(a) defines a "confidence" as information "protected by the attorney-client privilege under applicable law," and a "secret" as information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Moreover, a lawyer "shall not knowingly: 1) reveal a confidence or a secret of a client; 2) use a confidence of a client to the disadvantage of the client; 3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure."[23]

What if the court erroneously overrules an attorney's assertion of privilege? "However misguided and erroneous a court's order may be, a party is not free to disregard it and decide for himself the manner in which to proceed."[24] Indeed, so long as the court has jurisdiction and the order is not void on its face, an attorney must comply or face contempt and possible sanctions.[25] Is the attorney mandated to risk contempt in an effort to preserve client confidences, or may he bow to the court's will without abrogating his ethical duties?

"While the competing interests of public justice and attorney-client trust are matters to be contemplated by legislators and judges, the issue of more immediate concern to practicing attorneys is the scope of their ethical obligations."

In certain special circumstances, the ethical rules themselves provide exceptions that would allow an attorney to disclose confidential client information despite the general proscription against violating this sacred cornerstone of legal ethics. Rule 1.6(b) of the Model Rules provides two exceptions to the general rule prohibiting lawyers from revealing client confidences and secrets: 1) to prevent the client "from committing a criminal act" likely to result in "imminent death or substantial bodily harm"; and 2) "to establish a claim or defense on behalf of the lawyer" in controversies between the lawyer and the client, or to establish a defense to a criminal charge or respond to allegations to any proceeding involving the lawyer's representation of the client. In addition, the Comment to Rule 1.6 indicates that a lawyer must comply with "the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client."[26] The Comment further states that a lawyer "may be obligated or permitted by other provisions of law to give information about a client."[27]

However, the Committee explicitly provides that when considering whether another provision of law "supercedes" Rule 1.6, "a presumption should exist against such a supersession."[28] Moreover, the Committee has opined that although a court order to disclose confidential information may supercede a lawyer's obligation of confidentiality under rule 1.6, "the lawyer has a professional responsibility to seek to limit the subpoena, or court order, on legitimate available grounds."[29] A lawyer "may" disclose confidential information only after he exhausts all legitimate means of resisting a subpoena seeking the information, "either in the trial court or in the appellate court (in those jurisdictions where an interlocutory appeal on this issue is permitted), and he is specifically ordered by the court to turn over to the governmental agency documents which, in the lawyer's opinion, are privileged."[30]

New York's Code of Professional Responsibility, like the ABA Rules, specifies a number of exceptions to the general prohibition against disclosing confidential client information. An attorney cannot be disciplined either for revealing or not revealing confidences or secrets that fall within these exceptions. These exceptions include: consent of the client after full disclosure to him (DR 4-101(c)(1)); fear that the client might commit a crime (and possession of information necessary to prevent the prospective crime) (DR 4-101(c)(3)); to collect fees or defend against an accusation of wrongful conduct (DR 4-101(c)(4)); or to withdraw a written or oral opinion or representation previously given by the lawyer but since found to be a misrepresentation or used to commit a crime or fraud (DR 4-101(c)(5)).

The most important exception in the context of a judicially enforced Grand Jury subpoena, DR 4-101(c)(2), involves the disclosure of confidences or secrets "when permitted under Disciplinary Rules or required by law or court order." This exception permits an attorney to furnish confidential information over his client's objection if ordered by a tribunal or required by other applicable statutory law. It has also been interpreted to apply when a court's ruling operates to compel the disclosure of information otherwise protected by privilege.[31] "If the lawyer believes that the information is protected . . . , however, the lawyer may have an ethical obligation to appeal the court's ruling rather than comply with a trial court's order to disclose what the lawyer believes in good faith is a communication governed by the attorney-client privilege."[32] These directives should be read in conjunction with DR 7-102(a)(3) (Representing a Client Within the Bounds of the Law), which states that a lawyer "shall not conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

In examining the interaction between DR 4-101(c)(2) and DR 7-102(a)(3), the New York State Bar Association Committee on Professional Ethics has interpreted the words "required by law to reveal" as applying only to "court orders which are not subject to further review."[33] The Committee reasoned that DR 7-102(a)(3) did not mandate immediate compliance with orders which are subject to reversal or modification on appeal or other review and opined that "[w]here the order is subject to good faith challenge, the lawyer should be free to postpone giving the court ordered testimony pending appropriate review."[34]

Thus, under New York law, where an attorney has a good faith belief that information requested in a subpoena is protected by a confidentiality privilege, he should move to quash the subpoena or redact his response, asserting the relevant privilege. If the motion to quash or redaction is denied and the attorney is ordered by the court to disclose the information, the attorney is nevertheless obligated to postpone his compliance with the court order pending the timely exhaustion of available further review.[35]

Appealing a Court Order Compelling Disclosure of Privileged Information

As discussed in the previous section, an attorney served with a subpoena requesting privileged information must seek to quash the subpoena or oppose it on all available grounds, including appropriate appellate review. Under New York State law, no appeal lies, as a general rule, from an order arising out of a criminal proceeding absent a specific statutory provision in the New York Criminal Code.[36] However, the denial or grant of a motion to quash a Grand Jury subpoena, (i.e., a subpoena issued in the course of a criminal investigation, and prior to an indictment) has been deemed a final and appealable order.[37] The reasoning underlying this rule was succinctly summarized by the Second Department's decision in *People v. Johnson*: "Since criminal charges may never be filed, the motion to quash a subpoena issued in a criminal investigation is construed as civil in nature and the order disposing of said motion is deemed to have been made in a special proceeding on the civil side of the court."[38] Thus, an attorney may directly appeal a court order denying the attorney's motion to vacate a grand jury subpoena on the basis of attorney-client privilege.[39]

"[U]nder New York law, where an attorney has a good faith belief that information requested in a subpoena is protected by a confidentiality privilege, he should move to quash the subpoena or redact his response, asserting the relevant privilege."

The analysis is different in federal court, as are the implications for the subpoenaed attorney. In the federal system, orders enforcing subpoenas issued in connection with civil and criminal actions or grand jury proceedings are not considered "final" under 28 U.S.C. § 1291, and thus are not immediately appealable.[40] Should the attorney choose to defy the court order, he would be left with only one option: endure a contempt citation and then take an appeal.[41] While sanctions for the contempt need not be imposed for appellate jurisdiction to arise, a contempt citation is a necessary prerequisite.[42]

Recognizing these extreme and potentially ruinous implications for the attorney, New York courts have counseled against over-use of the grand jury subpoena

directed to attorneys. As one New York trial judge noted:

> It is clear that whenever an attorney is compelled to testify in the Grand Jury, the attorney may well be placed in the position of becoming a witness against the client or risking contempt. Under these circumstances, it would be ludicrous for any court to ignore the potential "chilling effect" that a Grand Jury subpoena to counsel has on the attorney-client relationship.[43]

But for attorneys faced with this Catch-22, there is a more tenable option than hazarding a contempt citation. New York federal courts (and other courts in the federal system) have recognized an exception to the general rule that discovery orders are non-final and non-appealable. The exception permits a client to intervene and appeal from an order directing his attorney to reveal information that may be protected by privilege. Its justification derives less from a concern for the attorney's interests than for the client's, and it originates from the Supreme Court's decision in *Perlman v. United States*.[44] In *Perlman*, the Court determined that when a subpoenaed party has no direct and personal interest in the suppression of the subpoenaed information, it is unlikely that he will risk contempt and imprisonment to effect immediate appellate review. The Court held that an order of the district court is sufficiently final for the interested party to appeal immediately, because the holder of the privilege would otherwise be powerless to prevent the information from being disclosed.[45] The proverbial "cat" would be let "out of the bag," thereby foreclosing appellate review at a later stage.[46]

Following this reasoning, the Second Circuit has held that a client whose lawyer is subpoenaed may immediately appeal a district court's order enforcing the subpoena.[47] This right to appeal does not require inquiry as to whether the attorney is likely to comply with the order. Instead, the Second Circuit has recognized, as a general rule, that attorneys "cannot be expected to risk a contempt sanction" in order to protect their clients' interests.[48] The Second Circuit, moreover, follows the majority view that a client may immediately appeal anytime his lawyer is ordered to provide evidence that could potentially divulge privileged information.[49] These courts recognize that "allowing an appeal only if the attorney accepts a contempt citation pits lawyers against their clients in a manner [contrary] to interests of justice."[50] In justifying the application of *Perlman* to subpoenaed attorneys, the Fifth Circuit's analysis is particularly persuasive and has been explicitly adopted by the Second Circuit:

> We suspect that the willingness of a lawyer to protect a client's privilege in the face of a contempt citation will vary greatly, and have a direct relationship to the value of the client's business and the power of the client in relation to the attorney. We are reluctant to pin the appealability of a district court order upon such precarious considerations. . . . Although we cannot say that attorneys in general are more or less likely to submit to a contempt citation rather than violate a client's confidence, we can say without reservation that some significant number of client-intervenors might find themselves denied all meaningful appeal by attorneys unwilling to make such a sacrifice. That serious consequence is enough to justify a holding that a client-intervenor may appeal an order compelling testimony from the client's attorney.[51]

Thus, although the attorney himself may only appeal a court order to respond to a federal subpoena by resisting the subpoena and suffering a contempt citation, the client has standing to intervene and immediately bring an interlocutory appeal to vindicate his privileges. This also allows an attorney to comply with all applicable ethical obligations. As long as the attorney prolongs compliance with the subpoena until his client has had an opportunity to either appeal the court order compelling disclosure or waive the privilege, the attorney should be able to avoid both court-imposed and disciplinary sanctions.

Conclusion

Both the American and New York State Bar Associations have declared that an attorney subpoenaed with respect to potentially confidential material must pursue all available legitimate grounds to quash or limit the subpoena. This includes asserting relevant privileges, moving to quash or limit the subpoena and appealing a court order overturning that assertion of privilege if the attorney has a good faith belief that the material requested is shielded against disclosure. But an attorney's ethical obligations do not require that attorney to endure a contempt citation. The ABA Model Rules of Professional Conduct and the New York State Code of Professional Responsibility require only that an attorney take all reasonable steps either to appeal or notify his client so that the client has an opportunity to take an appeal. By following this course, an attorney can satisfy his ethical obligations and avoid disciplinary sanctions.

Endnotes

1. *See* G. Hazard, Ethics in the Practice of Law, 21 (1978).
2. P. Connors, "Practice Commentaries" to DR 4-101.
3. *See In re Grand Jury Subpoenas Served Upon Field*, 408 F. Supp. 1169 (S.D.N.Y. 1976); *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Blackmer v. United States*, 284 U.S. 421, 438 (1932).
4. *See Kastigar v. United States*, 406 U.S. 441 (1972).
5. *See Hoffman v. United States*, 341 U.S. 479, 488 (1951).
6. *Calandra*, 414 U.S. at 346.
7. *See In re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979); *United States v. Mackey*, 405 F. Supp. 854, 857 (E.D.N.Y. 1975); *In re Stolar*, 397 F. Supp. 520, 523 (S.D.N.Y. 1975) and the work-product doctrine (*see United States v. Nobles*, 422 U.S. 225, 236 (1975)); *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973).
8. Fed. R. Evid. 1101(d)(2).
9. *In re Grand Jury Proceedings*, 219 F.3d 175, 186 (2d Cir. 2000); *see also United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("often the importance of the interests promoted by the privilege justify the exclusion of otherwise relevant evidence").
10. *Madden v. Creative Servs., Inc.*, 84 N.Y.2d 738, 622 N.Y.S.2d 478 (1995); *see also D'Alessio v. Gilberg*, 205 A.D.2d 8, 10, 617 N.Y.S.2d 484, 485 (2d Dept. 1994) ("an attorney exposes himself to possible disciplinary charges if he fails to keep confidential a communication from his client without the client's consent").
11. *Priest v. Hennessy*, 51 N.Y.2d 62, 67-68, 431 N.Y.S.2d 511, 513-14, (1980).
12. CPLR 3101(c).
13. CPLR 3101(d)(2).
14. *United States v. Adlman*, 134 F.3d 1194, 1204 (2d Cir. 1998).
15. *ECDC Environmental v. New York Marine and General Ins. Co.*, 1998 WL 614478 at *12 (S.D.N.Y. June 4, 1998); *see also Adlman*, 134 F.3d at 1204 (not even "necessity and unavailability by other means" may be enough to compel disclosure of opinion work product); *but see In re Grand Jury Subpoenas dated March 9, 2001*, 179 F. Supp.2d 270, 284 (S.D.N.Y. 2001) (noting general standard that work-product protection may be overcome if the party seeking discovery demonstrates a "substantial need" for the materials and cannot obtain their equivalent without "undue hardship").
16. J. Wigmore, *On Evidence*, § 2292 (McNaughton, rev. ed. 1961) at 70.
17. *Priest v. Hennessy*, 51 N.Y.2d at 69, 431 N.Y.S.2d at 514.
18. *In re Jacqueline F.*, 47 N.Y.2d 215, 219, 417 N.Y.S.2d 884, 886 (1979); *see also United States v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 119 F.3d 210, 214 (2d Cir. 1997) (stating the attorney-client privilege stands as "an obstacle to the investigation of the truth," and "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle," citing Wigmore, *On Evidence*, § 2291 at 54); *D'Alessio*, 205 A.D.2d at 10, 617 N.Y.S.2d at 485 (stating "since the privilege serves to shield evidence from discovery, and thereby potentially thwart the fact-finding process, it is to be strictly construed in keeping with its purpose"); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973), (citing same Wigmore quotation as *International Broth. of Teamsters*).
19. *In re Grand Jury Proceedings*, 219 F.3d at 186, quoting *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982); *In re Grand Jury Subpoena Duces Tecum dated March 24, 1983*, 566 F. Supp. 883, 885 (S.D.N.Y. 1983).
20. *In re Stolar*, 397 F. Supp. at 524.
21. *Id.* at 524; *see also In re Jacqueline F.*, 47 N.Y.2d at 222, 417, N.Y.2d at 888 ("'much ought to depend on the circumstances of each case,'" quoting *In re Kaplan*, 8 N.Y.2d 214, 219, 203 N.Y.2d 836, 839 (1960)).
22. American Bar Association Model Rules, Rule 1.6(a).
23. DR 4-101(b).
24. *Village of St. Johnsville v. Triumpho*, 220 A.D.2d 847, 848, 632 N.Y.S.2d 263, 265 (3d Dept. 1995) (citing *In re Balter v. Regan*, 63 N.Y.2d 630, 631, 479 N.Y.S.2d 506, *cert. denied*, 469 U.S. 934 (1984)).
25. *See City School Dist. of City of Schenectady v. Schenectady Fedn. of Teachers*, 49 A.D.2d 395, 397, 375 N.Y.S.2d 179, 182 (3d Dept.) ("an order of a court must be obeyed, no matter how erroneous it may be, so long as the court is possessed of jurisdiction and its order is not void on its face"); *see also Sprecher v. Port Washington Union Free School Dist.*, 166 A.D.2d 700, 701, 561 N.Y.S.2d 284, 285 (2d Dep't. 1990).
26. Comment, ¶ 21, Rule 1.6.
27. *Id.*
28. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-385 (1994).
29. *Id.*
30. Formal Op. 94-385. *See also* ABA-AMRPC Rule 6.1, "Disclosure Compelled by Lawyer Subpoenas," Legal Background Section, citing both Formal Op. 94-385 and D.C. Bar Legal Ethics Comm. Op. 288 (1999) (a lawyer must seek to quash or limit a subpoena "on all available grounds" issued by congressional subcommittee to disclose client files; if motion to quash is denied, and subcommittee threatens lawyer with contempt, the lawyer may, "but is not required to," turn over documents, where "threat of fines and imprisonment under federal law meets 'required by law' standard").
31. *See* N.Y.C. Bar Association Committee on Professional and Judicial Ethics Formal Opinion Number 1990-2 (February 27, 1990) ("In this Committee's opinion, a lawyer's obligations under Rule 26(e) are 'required by law' within the meaning of DR 4-101(C)(2) since the Federal Rules of Civil Procedure 'have the effect of law.'") (citing 4 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §§ 1030, at 125 (2d ed. 1987); *Kuenzel v. Universal Carloading & Distributing Co.*, 29 F. Supp. 407, 409 (E.D.Pa. 1939) (Federal Rules of Civil Procedure are promulgated by the Supreme Court and thus "have the force of law"); *cf. United States v. Hvass*, 355 U.S. 570, 575 (1958) ("law of the United States" includes court rules that have been lawfully authorized)).
32. New York State Bar Association Committee on Professional Ethics, Opinion Number ("NY Eth. Op.") 681 (1996). *See also* Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Opinion Number ("NYC Eth. Op.") 1986-5; NY Eth. Op. 528 (1981); NYC Eth. Op. 312 (1934).
33. NY Eth. Op. 528.
34. *Id.*
35. *See* N.Y.C. Comm. Prof. Eth. Op. 702 (1994) (a lawyer can reveal confidential information regarding his client only if he is "brought before a competent legal tribunal and ordered to reveal it, after he interposed a claim of privilege and it was overruled by the court"); N.Y. County 462 (1958); NY Eth. Op. 528 (1981); NY Eth. Op. 405 (1975); N.Y.C. Comm. Prof. Eth. Op. 312 (1934).
36. *See People v. Johnson*, 103 A.D.2d 754, 754-55, 477 N.Y.S.2d 225, 226 (2d Dept. 1984).
37. *Id.* (citing *In re Cunningham v. Nadjari*, 39 N.Y.2d 314, 383 N.Y.S.2d 590 (1976); *In re Santangello v. People*, 38 N.Y.2d 536, 381 N.Y.S.2d 472 (1976); *In re Boikess v. Aspland*, 24 N.Y.2d 136, 138-139, 299 N.Y.S.2d 163, 165 (1969)).

38. *Id.* At 754-55 (citing *In re Cunningham*, 39 N.Y.2d at 314, 383 N.Y.2d at 590; *In re Abrams*, 62 N.Y.2d 183, 476 N.Y.S.2d 494 (1984)).

39. A subpoena issued pursuant to a grand jury investigation, however, must be distinguished from a subpoena issued after a criminal action has been commenced, directing the production of information to aid in the prosecution or defense of a pending criminal trial. (Compare CPL 1.20, subd. [16] with subd. [17].) Unlike a grand jury subpoena, a motion to quash a subpoena issued in the course of a criminal action is considered a proceeding criminal in nature. Thus, an order made on a motion to quash a subpoena issued after a criminal action has been commenced and in preparation for trial is not appealable by either of the immediate parties to the underlying criminal action because the propriety of the order can be resolved on the direct appeal from any resulting judgment of conviction. (*See People v. Marin*, 86 A.D.2d 40, 448 N.Y.S.2d 748 (2d Dept. 1982); *In re Morgenthau v. Hopes*, 55 A.D.2d 255, 390 N.Y.S.2d 109 (1st Dept. 1976), *mot. for lv. to app. dsmd.* "upon the ground that the order . . . was made in a criminal proceeding and no appeal lies therefrom," 41 N.Y.2d 1007, 395 N.Y.S.2d 449 (1977); *People v. Santos*, App. Div., N.Y.S.2d [NYLJ, June 22, 1984, p. 12, col. 1]; *State of New Jersey v. Geoghegan*, 76 A.D.2d 894, 429 N.Y.S.2d 37 (2d Dept. 1980)). Such an order *is* considered final and appealable by a third party aggrieved thereby. (*See People v. Marin*, 86 A.D.2d 40, 448 N.Y.S.2d 748 (Denial of motion to quash subpoena for notes of interviews with company's employees was final and appealable as to company's law firm which took the notes).) Thus, to the extent that a subpoena involves material covered by the work-product doctrine, a privilege that belongs to both lawyer and client, an attorney may appeal the denial of a motion to vacate the subpoena even if the criminal proceeding has commenced. As the New York appellate division commented, "denial of an appeal to the law firm at this juncture" simply because the government initiated the criminal indictment prior to issuing the subpoena "would irrevocably preclude [the firm] from any opportunity to vindicate its position before an appellate body, regarding the serious issues raised [by its assertion of the work-product privilege]." (*Id.*, 86 A.D.2d at 42, 448 N.Y.S.2d at 750.)

40. *See In re Grand Jury Subpoena*, 6 Fed. Appx. 86, 88 (2d Cir. 2001); *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 468 (2d Cir. 1996); *Dove v. Atlantic Capital Corp.*, 963 F.2d 15 (2d Cir. 1992); *Shattuck v. Hoegl*, 555 F.2d 1118 (2d Cir. 1977); *International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW) v. National Caucus of Labor Committees*, 525 F.2d 323 (2d Cir. 1975); *Browning Debenture Holders' Committee v. DASA Corp.*, 524 F.2d 811 (2d Cir. 1975); *Securities and Exchange Commission v. Research Automation Corp.*, 521 F.2d 585 (2d Cir. 1975); *Cobbledick v. United States*, 309 U.S. 323 (1940). Although in extraordinary circumstances, the lawyer might avoid complying with the order by obtaining interlocutory review by way of mandamus. *Pacific Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S.1305 (1977).

41. *See In re Grand Jury Subpoena*, 6 Fed. Appx. at 86 (court order enforcing subpoena against attorney was not immediately appealable, where attorney had not defied the order, been held in contempt, and appealed contempt order, and where no third party had sought to intervene); *Kaufman v. Edelstein*, 539 F.2d 811 (2d Cir. 1976) (court order in a civil or criminal proceeding denying a motion by a non-party witness to quash a subpoena is not appealable until witness has subjected herself to contempt); *United States v. Fried*, 386 F.2d 691, 694 (2d Cir. 1967) (to obtain right of review, non-party must refuse to comply with court order, and district court must find her to be in contempt and issue sanctions).

42. *See In re Three Grand Jury Subpoenas (Dated Jan. 5, 1988)*, 847 F.2d 1024, 1027-28 (2d Cir. 1988).

43. *In re Grand Jury Subpoena of Stewart*, 144 Misc. 2d 1012, 1023, 545 N.Y.S.2d 974, 981-82 (Sup. Ct. N.Y. Co. 1989).

44. 247 U.S. 7 (1918).

45. *Id.* at 13.

46. *Maness v. Meyers*, 419 U.S. 449, 463 (1975); *In re Katz*, 623 F.2d 122, 124 (2d Cir. 1980); *see also United States v. Ryan*, 402 U.S. 530, 533 (1971).

47. *See, e.g., In re Grand Jury Subpoena*, 6 Fed. Appx. at 88; I*n re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels)*, 767 F.2d 26, 29 (2d Cir. 1985); *In re Grand Jury Subpoena Dated Sept. 15, 1983 (Marc Rich)*, 731 F.2d 1032, 1036 n.3 (2d Cir. 1984); *In re Katz*, 623 F.2d at 124; *In re Grand Jury Subpoena for New York State Income Tax Records*, 607 F.2d 566, 570 (2d Cir. 1979); *United States v. Guterma*, 272 F.2d 344 (2d Cir. 1959).

48. *In re Grand Jury Subpoena*, 6 Fed. Appx. at 88.

49. The vast majority of the circuits, including the Second Circuit, has allowed an immediate appeal in cases where a party's attorney is subpoenaed. *See, e.g., In re Grand Jury Subpoenas*, 123 F.3d 695, 697 (1st Cir. 1997); *In re Grand Jury Proceedings (Gary Katz)*, 623 F.2d 122 (2d Cir. 1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979); *United States v. (Under Seal)*, 748 F.2d 871, 873 n.2 (4th Cir. 1984); *Conkling v. Turner*, 883 F.2d 431, 433 (5th Cir. 1989); *In re Grand Jury Proceedings (Gordon) v. United States*, 722 F.2d 303, 306-07 (6th Cir. 1983); *In re November 1979 Grand Jury*, 616 F.2d 1021, 1024-25 (7th Cir. 1980); *In re Grand Jury Subpoena as to C97-216*, 187 F.3d 996, 997 n.2 (8th Cir. 1999); *In re Subpoena To Testify Before Grand Jury (Alexiou)*, 39 F.3d 973, 975 (9th Cir. 1994); *In re Grand Jury Proceedings*, 142 F.3d 1416, 1420 and n.9 (11th Cir. 1998).

50. *In re Grand Jury Subpoenas*, 123 F.3d at 699.

51. *In re Grand Jury Proceeding in In re Fine*, 641 F.2d 199, 202-03 (5th Cir. 1981).

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Sexual Harassment: To What Extent Need the Conduct Be Sexual in Nature?

By Michael J. Sciotti and John G. Powers

I. Introduction

Michael J. Sciotti

It is well established that workplace discrimination based upon the "sex" of the victim can give rise to a hostile work environment claim under Title VII.[1] In the landmark case of *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court held that the conduct at issue under a hostile work environment theory "must be sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment."[2] In assessing the frequency and severity of the alleged misconduct, the fact finder must view the totality of the circumstances from both a subjective and objective standpoint.[3] In other words, the plaintiff must show that the alleged harasser engaged in conduct that not only the plaintiff but a reasonable person would perceive to be hostile and abusive.[4] Obviously, this type of analysis is laden with questions of fact.

An interesting question arises when the alleged misconduct based on sex is, in fact, not sexual in nature, but is rather based on the gender of the plaintiff. According to the Second Circuit, "the harassment need not take the form of sexual advances or other explicitly sexual conduct."[5] Similarly, the Sixth Circuit has recognized "that non-sexual conduct may be illegally sex-based where it evinces 'anti-female animus'"[6]; according to the Sixth Circuit, to establish that the harm was "based on sex," the plaintiff need only show that "but for the fact of her sex, she would not have been the object of the harassment."[7] Other circuits have followed suit. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) ("[T]he offensive conduct is not necessarily required to include sexual overtones in every instance."); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988) (defendant's verbal attack, "although not explicitly sexual, was nonetheless charged with anti-female animus, and therefore could be found to have contributed significantly to the hostile environment"); *Hall v. Gus Constr. Co.*, Inc., 842 F.2d 1010, 1014 (8th Cir. 1988) ("Intimidation and hostility toward women because they are women can obviously result from conduct other than sexual advances."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) (rejecting narrow definition of sexual harassment that requires predicate acts to be clearly sexual in nature); *McKinney* v. *Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) ("We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now.").

John G. Powers

As clear as these statements of the law seem, however, the courts have been less than consistent in applying these principles.

II. Application

In its decision in *Galdieri-Ambrosini v. National Realty & Develop. Corp.*,[8] the Second Circuit touched on the questions of sexual hostile environment vs. gender-based hostile environment in determining prohibited intent in a Title VII case. The plaintiff [Ambrosini] claimed that she had been fired from her secretarial job at National Realty based on her age and gender in violation of Title VII.[9] Ambrosini's secretarial duties included "typing, filing, answering the phone, generating form letters, preparing marketing packages for mass mailings,[10] and maintaining her supervisor's "database of tenants."[11] Ambrosini was also required to perform work for her supervisor [Simon] on certain of his "personal matters."[12]

Ambrosini was fired, allegedly due to poor work performance. She sued under a hostile work environment theory, [13] alleging that her supervisor treated her more harshly than other female employees because the other women "conformed to a sexual stereotype where Miss Ambrosini did not."[14] Furthermore, Ambrosini alleged that her supervisor's requests that she work on his personal matters demonstrated that he was attempting to conform her to a sexual stereotype.[15]

In upholding the district court's ruling against Ambrosini, the Second Circuit did note that "[e]vidence of sexual stereotyping may provide proof that an employment decision or an abusive environment was based on gender."[16] However, the court held that "accepting all of the evidence . . . as true, and drawing all reasonable inferences in her favor, . . . the events

described were insufficient to permit an inference that either her working conditions or the decision to discharge her were based in any way on her gender."[17] The court noted that the personal tasks Ambrosini was required to perform were more in keeping with her secretarial duties than with her gender, and Ambrosini was not able to offer proof to the contrary.[18] The Second Circuit also noted that the fact Ambrosini was required to work harder than the other female secretaries could not be traced back to her gender because no references to gender were ever either expressly or implicitly made by Simon when delegating work.[19]

There are several plausible interpretations for how the *Galdieri-Ambrosini* decision defines the parameters for actionable conduct in a non-sexual gender-based hostile work environment claim. On a broader level, it is possible that the *Galdieri-Ambrosini* decision reflects a reaction by the Second Circuit against expanding the boundaries of actionable sexual harassment any further beyond the traditional sexual conduct-based hostile work environment claim. While the court commented that a hostile work environment claim could exist if the "harassment complained of was based on gender," the court was not willing to declare that a gender-based hostile work environment claim could be premised on the enforcement of long-outdated and inappropriate workplace gender stereotypes.

But it is equally plausible, if not more likely, that the plaintiff failed in *Galdieri-Ambrosini* for more practical reasons. First, the actual work-place treatment complained of—having to perform non-work related tasks and being subject to undue supervision—was not even close to previously established threshold standards for severity and pervasiveness.[20] Moreover, both the Second Circuit and the jury were asked to assume the critical element of discriminatory intent based solely upon the plaintiff's conjecture that the treatment complained of was the result of gender-based stereotyping. Thus, even assuming *arguendo* that a hostile work environment had been created, the plaintiff did a very poor job connecting that treatment, even circumstantially, with her gender.

At best, plaintiff's case hinged upon the generic assumption that a man in her position would probably not be asked to perform the same tasks as she—without any verification of this theory by way of evidence. Thus, the outcome in *Galdieri-Ambrosini* may not necessarily be the result of a rejection by the Second Circuit of the plaintiff's theory of liability so much as failure by the plaintiff to elicit sufficient facts to establish that theory.

More recently, the Second Circuit has hesitated to apply the hostile environment theory to gender-based (as opposed to sexual) misconduct. In *Brown v. Henderson*,[21] the Southern District of New York granted summary judgment to the defendant employer in a Title VII case, in part, because it determined that the harassment suffered by the plaintiff was not "based on sex."[22] The plaintiff presented evidence that in addition to generic cruel comments and conduct, her harassers publically ridiculed her relationship with a co-worker. This ridicule took the form of posted pictures and cartoons of sexual activity identifying the plaintiff and her paramour as the participants.[23] Nevertheless, the district court concluded that the harassment could not have been "because of sex" because both the plaintiff and her paramour were the target of the harassment.[24] While not agreeing with district court's rationale, the Second Circuit did agree with the outcome—finding that the plaintiff had not met her summary judgment burden of demonstrating a material issue of fact that the harassing behavior was "rooted in her sex."[25]

The court held that the *sine qua non* of the "because of sex" requirement "in the end is not how the employer treated *other* employees, if any, of a different sex, but how the employer *would have* treated *the plaintiff* had she been of a different sex."[26] In applying this standard, the Second Circuit found that while the conduct directed at the plaintiff was "highly cruel and vulgar," it was not directed at the plaintiff because of her sex.[27] Curiously, the court discounted the caricatures of the plaintiff engaging in sexual activity, finding it insufficient to attach "a sex specific character to the course of conduct."[28] The court also appeared to weigh the evidence and assign an alternative motive or intent to the harassers that was not based on sex, but rather internal office politics.[29]

When admittedly "highly cruel and vulgar" conduct is directed at a woman in the workplace that, in part, references the woman's participation in sexual acts, it is hard to plausibly explain how the victim's gender did not play a part in the harasser's course of conduct. The Second Circuit's decision to the contrary in *Brown v. Henderson*, signals quite strongly a narrow view of the "because of sex" element of sexual harassment. The case provides strong precedent for employers in the Second Circuit to avoid Title VII liability where alternative motives are available for explaining harassing activity that involves borderline gender-based conduct.

The Sixth Circuit erected a similar barrier to the expansion of hostile environment Title VII claims in *Morris v. Oldham County Fiscal Court*.[30] In *Morris*, plaintiff Judy Morris was employed by the Oldham County Road Department to provide clerical and secretarial duties in 1984.[31] Beginning in 1994, Morris claimed that her supervisor "frequently told jokes with sexual overtones, once referred to plaintiff as 'Hot Lips,' and several times made comments about Morris's state of dress."[32] On another occasion, upon questioning her

supervisor regarding a drop in her performance appraisal ratings from "excellent" to "very good," her supervisor indicated that if Morris performed sexual favors for him, her rating would improve.[33]

After making complaints to her employer about her supervisor's conduct, her supervisor purportedly gave Morris the "cold shoulder" and "became overly critical of her work."[34] After complaining again, Morris's supervisor was transferred to another office location "out of concern 'about everyone's working environment.'"[35] After the transfer, Morris alleged that her supervisor intentionally harassed her by calling her over thirty times on the telephone, driving to her office location simply to make faces at her through the window, giving her "the finger" and throwing roofing nails onto her home driveway.[36] This behavior led Morris to experience anxiety attacks and to leave work on sick leave.[37]

In considering whether there was a jury question as to the whether a hostile work environment had been created, the Sixth Circuit held that Morris could not establish that she had been subjected to a hostile work environment because, other than the alleged verbal sexual advance, her supervisor's sexual remarks were not made with specific reference to Morris.[38] The court held that even if those remarks were specific enough to the plaintiff, they were not severe enough to create a hostile work environment.[39] The court also noted that Morris's sexual harassment claim failed for the additional reason that she was not able to demonstrate that her supervisor's other actions—such as his stalking—were premised upon her gender, rather than "simple belligerence."[40]

While correctly describing the legal standard for a hostile work environment, the Sixth Circuit in *Morris* hesitated to apply that standard. In assessing the severity and pervasiveness of the conduct complained of, the court refused to consider evidence of some fifteen instances of perceived stalking at the plaintiff's place of employment and home, and an instance of malicious mischief directed at the plaintiff at her home.[41] The court omitted this evidence from its calculation based on its conclusion that it was not committed "because of sex." Rather, the Sixth Circuit concluded that the aforementioned conduct "seems to have been motivated entirely by the [defendant's] personal displeasure toward the plaintiff."

Given the standard of review for summary judgment, this conclusion is somewhat troubling from a procedural prospective in that, like the Second Circuit's decision in *Brown*, the court seems to have drawn its own inference as to the defendant's motivation for harassing the plaintiff. Objectively, the conduct complained of was linked quite plausibly to the plaintiff's previous rejection of the defendant's sexual proposal and her ensuing complaints against him. The Sixth Circuit's pronouncement that this motivation could not have existed, as a matter of law, does not seem to be supported by the court's own description of the events that transpired. On a broader level, the *Morris* decision may indicate that sexual harassment claims based on any theory of liability other than the traditional *Harris v. Forklift Systems* variety, may find tough going in the district courts of the Sixth Circuit.

The First Circuit's decision in *Lipsett v. University of Puerto Rico*[42] also addresses the question of sex harassment vs. gender harassment, but handles the issue differently than the Sixth Circuit did in *Morris*. In *Lipsett*, Plaintiff Annabelle Lipsett claimed that she was dismissed from the University of Puerto Rico's General Surgery Residency Training Program ("Program") because of her gender and that she was sexually harassed while in the program.[43] Lipsett cited as evidence in support of her claims that "the men in the Program dramatically outnumbered the women. . . , [and that the] facilities for women were different from and inferior to those for men."[44] Lipsett also alleged that discriminatory statements were made by her co-workers and supervisors and she was warned that if she should complain about gender inequalities, she would be dismissed from the Program.[45] Lipsett further claimed that the male residents plastered their rest facility with Playboy centerfolds and assigned sexually charged nicknames to all of the female residents.[46] Lipsett also alleged that she received inferior work assignments as compared to her male counterparts based on her sex.[47]

On July 1, 1982, the staff called Lipsett to a meeting to inform her that she had been the subject of two complaints filed by two of her supervisors.[48] These complaints alleged that Lipsett had improperly admitted patients to her ward, and was argumentative, jealous, frequently late and unreliable.[49] As a result of the complaints, Lipsett was dismissed from the Program, and she brought suit under Title VII.

The First Circuit reversed the district court's grant of summary judgment on the sexual harassment counts as to the majority of the defendants. The court held that "there was sufficient evidence in the record from which it could be inferred that the atmosphere described by the plaintiff was so blatant as to put the defendants on constructive notice that sex discrimination permeated the Program."[50] The court ruled that the defendants "*should* have known of sex discrimination (and harassment) in the Program" and that there was evidence that some of Lipsett's supervisors had actual knowledge of the discrimination.[51] The court also noted that no investigations were ever undertaken in response to Lipsett's sexual harassment complaints and, further, that this suggested to other male residents that the Program con-

doned such behavior.[52] The court held these facts to be sufficient evidence to justify a denial of the defendants' summary judgment motion.

While the sheer volume of objectionable conduct in the record renders the First Circuit's decision rather non-controversial, the court did comment on the distinction between sexually-based vs. gender-based conduct. Specifically, the court addressed the body of evidence presented by the plaintiff which indicated a "constant verbal attack" on the plaintiff which challenged the capacity of women—as a gender—to be surgeons.[53] The court noted that such "anti-female animus," while not "explicitly sexual," could nevertheless have contributed "significantly" to the hostile work environment.[54] The *Lipsett* court in that regard appears to be endorsing the view that a hostile work environment claim can be supported by gender-based as well as sexual misconduct. The problem with *Lipsett* as precedent for defining the parameters of this type of claim is that the record there was also replete with actual sexual conduct-based harassment. There is, therefore, no way to gauge from the First Circuit's decision in *Lipsett*, whether gender-based harassment *alone* would create a *prima facie* case for a hostile work environment claim.

The Third Circuit's decision in *Andrews v. City of Philadelphia*[55] was similarly inconclusive on this issue. *Andrews* involved several female members of the Accident Investigation Division (AID) of the Philadelphia Police Department.[56] The female officers claimed that they were subjected to numerous obscenities in the squad room and that there were pornographic pictures in plain view, which "embarrassed, humiliated and harassed them."[57] One female officer claimed that her work was destroyed or stolen in an effort to harass her and that male officers refused to aid her in her work.[58] She further alleged that she was given more work than the males and that her personal property was vandalized.[59] Another officer alleged that after she refused a male officer's sexual advances, that officer's attitude towards her became "unfriendly" and that she too was subjected to lewd comments and behavior.[60] The second officer also claimed that she was subjected to personal vandalism and that her files were stolen and/or destroyed.[61] Department investigations into these matters were either not performed, or results were deemed to be inconclusive.[62]

The trial court had entered judgment in favor of the defendants on the plaintiff's Title VII claim,[63] in part because of its finding of a lack of evidence of "sexual advances or other conduct of a sexual nature."[64] On appeal, the Third Circuit reversed and remanded the trial court's decision finding, in part, that the trial court had "too narrowly construed what type of conduct can constitute sexual harassment."[65]

The Third Circuit explained that "overt sexual harassment" is not necessary to make out a claim under Title VII.[66] Rather, "it is 'only necessary to show that gender is a substantial factor in the discrimination . . . and that if the plaintiff had been a man she would not have been treated in the same manner.'"[67] The Third Circuit explained that "intimidation and hostility toward women because they are women" can form the basis of a sexual harassment claim even in the absence of "sexual overtones."[68] On remand, the Third Circuit instructed the trial court to consider not only the conduct of a sexual nature like the obscene name calling and pornography, but also the other incidents of alleged harassment such as the anonymous phone calls, the disappearing files and the destruction of property.[69]

In this respect, *Andrews* appears to be at odds with the Sixth Circuit's holding in *Morris,* discussed *supra,* which excluded from consideration in a sexual harassment claim, conduct that was not overtly sexual or gender-based in nature.[70] While applying the same legal standard, the Sixth Circuit appears to be applying it much more narrowly than the Third Circuit. Nevertheless, the Third Circuit in *Andrews* was also considering a set of facts where there was both sexual and non-sexual harassment. While the court held that both types of conduct should be considered together to assess the totality of the circumstances, and thus went beyond the limits set forth in *Morris,* the court was not presented with a situation where there was only gender-based harassment. Thus, while suggesting that such non-sexual conduct alone could constitute a claim, provided it was only directed at females because they were female, the viability of such a claim was not squarely before the Third Circuit in the *Andrews* case.

The Eighth Circuit in *Hall v. Gus Construction Co., Inc.*[71] was also presented with a factual record that contained both sexual and non-sexual gender-based harassment. The district court in *Hall* had entered a verdict in favor of the plaintiffs, three female traffic controllers or "flag persons" who worked at a road construction site.[72] The three women produced evidence at trial that their male co-workers engaged in several varieties of offensive verbal and physical contact including vulgar name calling, repeated sexual propositioning, unwanted touching, indecent exposure and other inappropriate conduct.[73] On appeal, the defendants argued that the sexual harassment, by definition, relates only to conduct of a "sexual nature," defined in EEOC regulations as "unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature."[74] While implicitly conceding that the evidence did contain some evidence of conduct satisfying this definition, the defendants nevertheless argued that the trial court had erred by considering the non-sexual conduct together with that of a sexual nature in reach-

ing its verdict.[75] Specifically, the defendants contended that the nicknaming of one of the plaintiffs "Herpes" by co-workers and the urination in that same plaintiff's gas tank by a co-worker was not conduct of a "sexual nature" and accordingly should not have been considered by the trial court in reaching its decision.[76]

The Eighth Circuit considered the issue of sexual vs. non-sexual gender-based conduct as one of first impression and looked to decisions on the issue by the Tenth and D.C. Circuits, *Hicks v. Gates Rubber Company*[77] and *McKinney v. Dole*,[78] respectively. *Hicks v. Gates Rubber Company*[79] involved a black woman, hired by the Gates Rubber Company as a security guard, who claimed she was subjected to racial slurs and unwelcome sexual advances during the probationary period of her employment.[80] While the trial court only considered the issue of *quid pro quo* sexual harassment,[81] the Tenth Circuit held that the trial court erroneously failed to consider the evidence of unwelcome touching and comments, including name calling such as "Buffalo Butt," by plaintiff's co-workers in the context of a hostile work environment claim.[82] In *McKinney v. Dole*,[83] the D.C. Circuit found that acts of physical aggression could be considered in a sexual harassment claim because the actionable conduct did "not need to be overtly sexual, but rather the plaintiff must provide that it would not occur but for the sex of the employee."[84]

Relying primarily on the holding of *McKinney,* the Eighth Circuit in *Hall* held that to have an actionable sexual harassment claim, the plaintiffs did not have to prove that each incident of harassment resulted in overt sexual conduct.[85] Rather, sexual harassment could be comprised of "[i]ntimidation and hostility towards women because they are women" even if it is "conduct other than explicit sexual advances."[86] The court distinguished the broader concept of gender discrimination from the narrower term sexual harassment, finding that Title VII was intended to encompass the former rather than merely the latter.[87]

Again, while the legal holding announced in *Hall* is fairly straightforward, the fact pattern is not one that would necessarily test the limits of the court's decision because the factual record was rife with instances of misconduct of an explicit sexual nature. Thus, *Hall,* like *Andrews,* provides a theoretical rather than a practical answer as to whether non-sexual conduct, *alone,* can support an actionable hostile work environment claim.

Further clouding the jurisprudential landscape is the Seventh Circuit's decision in *Galloway v. General Motors Service Parts Operations*.[88] There the court considered, *inter alia,* whether verbal abuse—including reference to the plaintiff as a "sick bitch"—and an obscene gesture by a co-worker directing the plaintiff to the co-worker's groin with the instruction, "Suck this, Bitch" constituted actionable conduct to support a sexual harassment claim.[89] The trial court, while not considering the gesture, had found that the term "sick bitch" was not a "sex- or gender-related term" and therefore could not alone support a sexual harassment claim.[90] The Seventh Circuit found merit in this finding, opining that the term "bitch" was simply a pejorative term for a woman and as such could not give rise to a sexual harassment claim.[91] The court considered this name calling, together it seems with the obscene gesture and suggestion, to merely be "undignified and unfriendly" rather than geared toward marginalizing the role of the plaintiff or women in general in the workplace, and thus not sufficient to create a viable sexual harassment claim.[92]

In this respect, the holding of the Seventh Circuit in *Galloway* appears to be consonant with the Sixth Circuit's holding in *Morris,* and at odds with the holdings of *Hall, Andrews, McKinney* and *Lipsett*. The decision in *Galloway* perhaps exemplifies the courts' hesitancy to view generic type gender-based harassment alone to constitute actionable sexual harassment. Indeed, the court's conclusion that the term "bitch" is not "gender-related" seems to strain logic. The apparent contradiction of these various circuit court decisions on this issue has resulted in inconsistent district court decisions; district courts from the Third, Sixth, Seventh and Eighth Circuits seem to adopt the *Galloway* approach,[93] while other district courts in the First, Second, Fourth and Fifth Circuits have adhered more closely to the holding of *Hall*.[94]

Recently, the Seventh Circuit has confirmed its strict view of what constitutes actionable conduct. In *Rizzo v. Sheahan,*[95] the Seventh Circuit affirmed the grant of summary judgment against a Title VII plaintiff based on the finding that the "deplorable behavior" she suffered was not "because of [her] sex."[96] Among the cited activity were several statements by the harasser to the plaintiff that he would like to have sex with her, and on other occasions, with her daughter.[97] Although the court described these comments as "sexually explicit," it nevertheless found that the plaintiff had failed to produce any evidence that the offensive behavior was "based on her sex."[98] Like the *Brown* and *Morris* decisions, the court was willing to ascribe other, non-gender based motives for the harassers' conduct while seemingly ignoring the objective indications of sexual connotation.[99]

III. Conclusion

While courts' statements concerning what motivation is required to constitute actionable sexual harassment seem broad, the application in practical terms has been more narrow. Some courts are hesitant or unwilling to recognize causes of action in patterns of conduct

that are not predominantly sexual in nature or are otherwise explainable by alternate motivations. The Supreme Court's original guidance on the concept of a hostile work environment in *Meritor Savings Bank, FSB v. Vinson,* was based on the principle that an employee need not face "discriminatory intimidation, insult and ridicule"[100] in the workplace. Subsequent decisions by some courts reveal a narrower view of what constitutes gender-based intimidation, gender-based insult and gender-based ridicule. While this judicial attitude may provide some measure of comfort to employers in determining what types of conduct to protect against, it also appears to have eliminated the claims of some borderline plaintiffs who arguably should have been entitled to present their claims to a jury. According to some courts, actionable sexual harassment may need to be actually sexual in nature, or be dismissed as merely "unfriendly" conduct or "simple belligerence."

Endnotes

1. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1002 (1998).
2. *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986).
3. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, 114 S. Ct. 367, 370 (1993). *See also, Oncale,* 523 U.S. 75, 118 S. Ct. at 1002.
4. *Id.*
5. *Galdieri-Ambrosini v. National Realty & Development Corp.,* 136 F.3d 276, 289 (2d Cir. 1998).
6. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 797 (6th Cir. 2000) (quoting *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988)).
7. *Morris*, 201 F.3d at 797 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).
8. 136 F.3d 276 (2d Cir. 1998).
9. *Id*. at 279.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 282.
14. *See id.* at 281 (noting that the receptionist, BJ Olivieri, was "in her early twenties, she was young, she was petite, she was attractive, she dressed nicely" and that another secretary, Dana Cinque, by bringing Mr. Simon unsolicited coffee, dressing and acting a certain way, conformed to a sexual stereotype without complaining about it).
15. *See id*. at 280 (noting that Simon once asked Ambrosini to remove a coffee cup from his desk, call his dry cleaners to negotiate a lost shirt payment, handle various real estate issues when Simon was purchasing a personal residence, call the cable installer, and handle personal deliveries).
16. *Id.* at 289 (citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250-51 (1989); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th Cir. 1991); *Sheehan v. Purolator, Inc*, 839 F.2d 99, 106-07 (2d Cir. 1988)).
17. *Id.* at 290.
18. *Id.* at 291.
19. *Id.*
20. *Id.* at 289.
21. 257 F.3d 246 (2d Cir. 2001).
22. *Id.* at 249.
23. *See id.* at 250.
24. *Id.* at 252.
25. *Id.* at 255.
26. *Id.* at 254-55 (emphasis in original).
27. *Id.* at 255.
28. *Id.* at 256.
29. *Id.* at 256. An inexplicable element of the Second Circuit's analysis is its reliance on the beliefs of the plaintiff to ascribe an intent to the defendants' conduct, an issue of which she plainly had no personal knowledge. *See id.*
30. 201 F.3d 784 (6th Cir. 2000).
31. *Id.* at 787.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 791.
41. *Id.* at 787.
42. 864 F.2d 881 (1st Cir. 1988).
43. *Id.* at 885.
44. *Id.* at 887.
45. *Id.*
46. *Id.*
47. *Id.* at 889.
48. *Id.* at 891.
49. *Id.*
50. *Id.* at 906.
51. *Id.* (emphasis in original).
52. *Id.* at 907.
53. *Id.* at 905.
54. *Id.*
55. 895 F.2d 1469 (3d Cir. 1990).
56. *Id.* at 1471.
57. *Id.* at 1471-72.
58. *Id.* at 1473.
59. *Id.*
60. *Id.* at 1474-75.
61. *Id.* at 1475.
62. *Id.*
63. Prior to the 1991 Amendments to Title VII, Title VII actions were tried as bench trials, regardless of the presence of other claims within an action that required a trial by jury. In fact, the court in *Andrews* was required to address the problem of reconciling inconsistent findings of the court and the jury on parallel issues of fact. *See id.* at 1483-84.
64. *Id.*

65. *Id.* at 1485.
66. *Id.*
67. *Id.* (citing *Thompkins v. Public Serv. Elec. & Gas Col.*, 568 F.2d 1044, 1047 n.4. (3d Cir. 1977) (internal citation omitted)).
68. *Id.*
69. *Id.*
70. *See Morris, infra,* at 787.
71. 842 F.2d 1010 (8th Cir. 1988).
72. *Id.* at 1012.
73. *Id.*
74. *Id.* at 1013 (citing 29 C.F.R. § 1604.11(a) (1986)).
75. *See id.* at 1013.
76. *Id.* at 1013-14.
77. 833 F.2d 1406 (10th Cir. 1987).
78. 765 F.2d 1129 (D.C. Cir. 1985).
79. 833 F.2d 1406 (10th Cir. 1987).
80. *Id.* at 1409.
81. *Id.* at 1414.
82. *Id.*
83. 765 F.2d 1129 (D.C. Cir. 1985).
84. *Id.*
85. *Id.* at 1014.
86. *Id.*
87. *See Hall*, 842 F.2d at 1014.
88. 78 F.3d 1164 (7th Cir. 1996).
89. *Id.* at 1165, 1167-68.
90. *Id.* at 1167.
91. *Id.* at 1168.
92. *Id.*
93. *See Reyes v. McDonald Pontiac-GMC Truck,* 997 F. Supp. 614, 618 (D.N.J. 1998); *Schemansky v. California Pizza Kitchen, Inc.,* 122 F. Supp. 2d 761, 766 (E.D. Mich. 2000); *Lindlom v. Challenger Day Program, Ltd.,* 37 F. Supp. 2d 1109, 1115 (N.D. Ill. 1999); *Lowry v. Powerscreen USB, Inc.,* 72 F. Supp. 2d 1061, 1069 (E.D. Mo. 1999).
94. *See Ruffino v. State St. Bank & Trust Co.,* 908 F. Supp. 1019, 1036 (D. Mass. 1995) ("insulting and demeaning terms relative to women in general may serve as evidence of a hostile work environment"); *Ott v. Perk Dev. Corp.,* 846 F. Supp. 266, 273 (W.D.N.Y. 1994); *Scannell v. Bel Air Police Dept.,* 968 F. Supp. 1059, 1064 (D. Md. 1997); *Humphreys v. Medical Towers*, 893 F. Supp. 672, 683 (N.D. Tex. 1995).
95. 266 F.3d 705 (7th Cir. 2001).
96. *Id.* at 708-09.
97. *See id.* at 709.
98. *Id.* at 712.
99. *Id.* at 712-13.
100. *Meritor Savings Bank, FSB,* 477 U.S. at 66.

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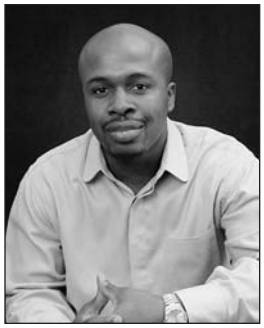
When Bad Things Happen to Good Laws: Fighting Spam With the Law of Trespass and Other Novel Approaches

By Evans C. Anyanwu

Introduction



Many Americans waste valuable time each day deleting e-mails advertising free Viagra, free doctorate degrees, and the opportunity to become rich by assisting a wealthy Nigerian to smuggle millions of dollars to America. The majority of Americans are cyber citizens, part of a community whose members receive an average of over 2,200 unsolicited bulk e-mails per year.[1] The act of sending unsolicited e-mails in bulk is called "spamming," and the unwelcome messages are called "spam."[2] Spamming, which accounts for 40% of global e-mail traffic,[3] is appealing precisely because it is cheap. Unlike traditional direct mail solicitation whereby the sender incurs thirty-seven cents per envelope, the spammer's only investment is the approximately thirty dollars she pays to the Internet Service Provider (ISP) for an e-mail account. The spammer bears basically the same cost for sending one unsolicited e-mail as she would for sending one million. While the cost to the spammer is minimal, the cost to consumers and ISPs is immense.

This article focuses on two legal approaches to combating spam: (i) trespass to chattels and (ii) trademark. This article will review and critique the main cases that have formed, what I consider, the "neo-trespass to chattels doctrine." In addition, this article will show that the misapplication of the trespass to chattels doctrine has drastically (and excessively) morphed the law of trespass. This article concludes by positing the dangers inherent in recent developments of the law of trespass.

Consumers

According to the SpamCon Foundation, an organization dedicated to the protection of "email as a viable communication and commerce medium,"[4] the costs of spam, for cybercitizens, are "diversion of time, loss of productivity and loss over their online privacy."[5] SpamCon, citing a 1998 Washington State Commercial Electronic Messages Select Task Force Report, declares that "between $2-3 of a consumer's monthly Internet bill is for handling spam."[6] Further, for consumers that access the Internet on a per-minute ISP service, the extra time needed to delete spam becomes expensive.[7] For the blind or visually impaired, who use speech-synthesis apparatuses, spam may have a disproportionate impact, in that the time it takes to distinguish spam from real e-mail imposes an undue burden.[8]

ISPs

The Gartner Group reports that 7% of Internet users that switch from one ISP to another do so because of spam, which results in the loss "of more than $250,000 per month for an ISP with 1 million subscribers."[9] Additionally, America Online estimated that it dedicates between 5% and 30% of its e-mail server time to handling spam.[10] The overall effects of spam cost Americans an estimated $8.9 billion dollars annually.[11]

The Government's Response

Many states have implemented measures to combat spam. Presently, twenty-seven states have anti-spam legislation.[12] Almost all of the states with anti-spam laws make it illegal to send unsolicited e-mails with false routing information, a common practice.[13] Seven of these twenty-seven states also make it illegal to disobey an ISP's spam policy.[14] As with false routing information, violations of ISP spam policies still persist.

Recently, Virginia enacted what is considered "the toughest move to date against [spam]."[15] Under the newly enacted Virginia law, anyone who intentionally sends over 10,000 deceptive e-mails in a day or 100,000 in a month may be imprisoned for one to five years and subject to loss of money or property connected with the solicitation.[16] Virginia's new law will not end spam, but if adopted and enforced by other states, it will likely curtail the number of unsolicited e-mails.

On the federal level, although many proposals have been presented, anti-spam legislation has yet to be enacted. On April 10, 2003, however, Montana Senator Conrad Burns and Oregon Senator Ron Wyden introduced what may be a promising anti-spam bill.[17] The bill will mandate that marketers provide legitimate return addresses with their solicitations and honor requests to be removed from mailing lists.[18] In addition, New York Senator Charles Schumer recently introduced a bill to impose criminal penalties for spamming and to create a national e-mail registry for those who do not want to receive spam.[19] Thus far, though, the federal government has not been successful in the war against spam. As reported in an April 5, 2003 *New York Times* article, even the military has found it difficult to stop spam from infiltrating its servers.[20] As the chief executive of an anti-spam software company that services the military remarked, "spam is bad enough when you're here in the States on a high-speed connection. . . . It's painful when you're in the middle of a war."[21]

The Private Sector's Success

For ISPs, spam results in lost profits. Therefore, ISPs have waged a vigilant effort against spammers. Initially, for the ISPs, the dearth of adequate statutes and judicial precedent presented a difficult hurdle in dealing with the cyber nuisance of spam. Consequently, ISPs, spearheaded by CompuServe, found success in using the common law doctrine of trespass to chattels against spammers.[22] Chattel is personal property, not to be confused with intellectual or real property.[23] Trespass to chattels occurs when there is a "direct and immediate intentional interference with a chattel in the possession of another."[24] Further, the use of another's property must be substantial,[25] meaning a use that causes real harm or grave infringement of rights or interference with the chattel which dispossesses harms or interferes with one's use of the chattel in a substantial way or period of time.[26] The trespass to chattels doctrine has been very successful in litigation involving spam, and the leading case is *CompuServe v. Cyber Promotions*.[27]

In *CompuServe*, Cyber Promotions spammed CompuServe servers by sending unsolicited bulk e-mails to thousands of CompuServe customers.[28] According to CompuServe, many of its subscribers complained about the spam, and many demonstrated their unhappiness by canceling their service with CompuServe.[29] Furthermore, CompuServe brought forth evidence to prove that Cyber Promotions had notice that its activities were unwelcome.[30] In building its case against Cyber Promotions, CompuServe relied on *Thrifty-Tel v. Bezeneck*, the first case to use trespass to chattels in the context of electronic medium.[31]

In *Thrifty-Tel*, a long distance phone operator sued the parents of two minors who hacked into the operator's telephone system.[32] The children, after manually accessing the long distance codes by random guesses, used software that automated the process for them.[33] Even though the original claim against the parents was brought under a conversion theory, the court, *sua sponte*, substituted a trespass to chattel theory, concluding that accessing electronic access codes constituted trespass.[34] Consequently, the common law's contingency of tangible appropriation for trespass to chattel was abandoned and in its place arose the precept that electronic signals are "sufficiently tangible to support a trespass cause of action."[35]

Although Cyber Promotions maintained that trespass had to amount to a physical dispossession,[36] the court in *CompuServe* disagreed, finding that possession was not necessary.[37] Further, the court found that the damage to CompuServe's "good will" and the demand that Cyber Promotions' e-mails placed on CompuServe's servers were legally protected interests that were harmed.[38]

The Non-Commercial Trespass to Chattel

On April 2, 2003, the California Supreme Court heard oral arguments in a case involving Kenneth Hamidi, a former employee of Intel Corporation. Hamidi ended his employment with the company after a disagreement concerning a work-related injury.[39] Shortly after his employment with Intel, Hamidi started a campaign against his former employer under the auspices of FACE-Intel (Former and Current Employees of Intel).[40] As part of his campaign tactics, Hamidi sent six e-mails within the span of three years to approximately 30,000 Intel employees.[41] Intel, like CompuServe, convinced the court that, once Hamidi had been given notice that his e-mails were not welcomed, subsequent transmissions constituted trespass to chattel.[42] Unlike CompuServe, however, Intel "could not claim that it lost customers from the transmission, since it is not in the business of providing Internet access. But it could claim that the company was injured due to the time and effort spent attempting to block the messages."[43] Two lower courts have thus far sided with Intel, and a decision from the California Supreme Court is anticipated later this year.

The Latest Extra-Legal Approach to Combating Spam

On March 28, 2003, Habeas, an anti-spam company, announced that it filed two law suits in federal court in San Jose, California.[44] In contrast to CompuServe and Intel, however, Habeas' spam suit does not rest upon a trespass to chattels argument, but rather under copyright and trademark law. Habeas was founded in August of 2002 with a novel approach to fighting spam.[45] The Habeas software, used by many ISPs and spam filtering software, "includes a copyrighted haiku poem, known as a warrant mark, in e-mail headers. With the Habeas service, emailers must agree to abide by Habeas' e-mail rules to send out mailing with the Habeas warrant. Those violating the warrant are liable for prosecution."[46] According to *Business Week Online*, "Habeas' approach is one of the latest in an innovative string that includes pay-per-message plans, limits on outgoing messages, and a concept that forces people to donate money to charity if they want to reach a recipient."[47] Habeas is suing Intermark Media (a financial services company) and Avalend, its affiliate.[48] The suit claims that "the companies included the Habeas mark in their e-mails to ensure the messages got through."[49]

The Problem with the Judicial Approach to Spam

E-mail marketing is an extremely lucrative field. Forrester estimates that spending on e-mail marketing will grow from $1.3 billion in 2001 to $6.8 billion in 2006.[50] Jupiter Media Metrix projects even faster growth, from $1 billion in 2001 to $9.4 billion in 2006.[51] The cost versus benefit analysis that a spammer conducts, for now, will always favor the continuance of spamming. State law

has not been adequately tailored to combat spam, and, although there has been success by the private sectors in using trespass to chattels, these are only limited gains. Laws that predate the information age were created to handle tangible issues, and were not crafted to contend with this type of technological change. This sentiment was expressed in an *amicus* brief filed in the *Hamidi* case by Professors of Intellectual Property and Computer Law. In their brief, the Professors denounced the California appellate court's reasoning (relying on *CompuServe*) "that the doctrine of trespass to chattels no longer requires proof of actual injury to the chattel."[52] The brief further declared that "[r]emoving the actual injury requirement from this ancient doctrine is not a gentle stretch, as the court suggests, but rather a radical break with precedent."[53] Although the Professors posit a sound position, in all fairness to the California courts, the "radical break" occurred in *Thrifty-Tel*. Consequently, the California courts are following precedents, albeit wrongly decided ones.

In *Hamidi*, the neo-trespass doctrine is tested in the non-commercial e-mail sphere. Again, the ghost of *Thrifty-Tel* haunts us. To substantiate the weakening of the tangibility requirement for trespass, and find that electronic signals can constitute trespass, the *Thrifty-Tel* court relied on several cases standing for the proposition that dust, microscopic particles, or smoke can amount to trespass.[54] A closer look at the cases cited reveals that the decision suffers from the fallacy of composition: inferring a conclusion about a whole from incomplete details of its parts. The cases cited in *Thrifty-Tel* did find trespass from dust,[55] microscopic particles,[56] or smoke.[57] Nevertheless, a reading of theses cases reveals that these intrusions were not inherently trespass, but the resulting harm caused to property that arose from them constituted trespass. The appellate court in the *Hamidi* case, now awaiting a final decision by the California supreme court, held that harm transcends denial of access to phone lines (*Thrifty-Tel*) or the burdening of disk space for customers (*CompuServe*). Harm can now be found in "diminished employee productivity, and in devoting company resources to blocking efforts and to addressing employees about Hamidi's e-mails."[58] Essentially, harm is the "impair[ment of] the value to Intel of its e-mail system."[59] Now, tangible harm has been removed from the original trespass to chattels doctrine. *Thrifty-Tel* and its progeny leaves us with the proposition: ***Where any property of another is intentionally used without permission, causing an interference with the property that impairs the value or substantially interferes with one's use of that property, then a trespass to chattels has occurred***.

The implications of this are potentially far-reaching. Using *Thrifty-Tel* and its progeny, citizens could sue every major television network—under the trespass to chattels doctrine—that broadcasts reality television shows. Those shows are electronic signals that, many would argue, have impaired the value of their television. Why stop there? If one can retroactively apply what the courts now call trespass to chattels, suits may be viable against all the radio stations that played Celine Dion's "My Heart Will Go On," or Whitney Houston's "I Will Always Love You."

Conclusion

The foregoing parade of horrible comparisons is, of course, farfetched, but illustrates a point. No one loves spam, but the desire to liberate our inboxes should not be an excuse to water down the underpinnings of long-standing legal doctrines.

Endnotes

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2. The origin of the term "spam" is highly disputed. Most cyber citizens who practice cyber-law believe that the term is from a Monty Python skit in which the actors would sing the word "spam" continuously, with increasing volume until no one is able to hear each other. Apparently, the analogy is that the volume of unsolicited e-mail eventually drowns out legitimate e-mails.
3. Reuters, Senators Introduce Junk E-Mail Bill, at http://www.reuters.com/newsArticle.jhtml?storyID=2546775 (Apr. 10, 2003).
4. SpamCon Foundation, *About Spam Com Foundation—Summary*, at http://www.spamcon.org/about/index.shtml (last updated June 17, 2002).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. P.J. Huffstutter, Military Battling Junk E-Mail; Unsolicited ads pester troops checking for messages from home. Some advertisers use patriotism to lure the unsuspecting, N.Y. Times, Business, Apr. 5, 2003, page 1, at part 3 (citing technology market research firm Ferris Research).
12. David E. Sorkin, Spam Laws: Summary, at http://www.spamlaws.com/state/summary.html.
13. *Id.*
14. *Id.*
15. Saul Hansell, *Virginia Law Makes Spam, With Fraud, A Felony*, N.Y. Times, Apr. 30, 2003, Section C, page 1, Column 5.
16. *Id.*
17. Reuters, *supra* note 3, at http://www.reuters.com/newsArticle.jhtml?storyID=2546775 (April 10, 2003).
18. *Id.*
19. *Id.*
20. Huffstutter, *supra* note 11.
21. *Id.*
22. *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).
23. W. Page Keeton, *Prosser and Keeton on Torts* § 14, 85-86 (Trespass to Chattels), (5th ed. 1984).
24. *Id.*

25. Restatement (Second) of Torts § 218.
26. W. Page Keeton, *supra* note 23.
27. *CompuServe*, 962 F. Supp. at 1015.
28. *Id.*
29. *Id.* at 1023.
30. *Id.* at 1024.
31. *Thrifty-Tel, Inc., v. Bezeneck*, 54 Cal. Rptr. 2d 468 (Cal. Ct. App. 1996).
32. *Id.* at 470-471.
33. *Id.* at 471.
34. *Id.* at 473.
35. *Id.* at 473 n6.
36. *CompuServe*, 962 F. Supp at 1021.
37. *Id.* at 1022.
38. *Id.* at 1022.
39. Dan L. Burk, *The Trouble With Trespass*, J. Small & Emerging Bus. L. 27, 31 (2000).
40. *Id.* at 31.
41. *Id.*
42. *Id.*
43. *Id.* at 32.
44. Brian Morrissey, *Habeas files first spam suits*, at http://www.internetnews.com/IAR/article.php/2176071 (Apr. 4, 2003).
45. *Id.*
46. *Id.*
47. Lisa Bowman, CNET News, *Spam Suits Seek Poetic Justice*, at http://news.com.com/2100-1024-995568.html, April 4, 2003.
48. *Id.*
49. *Id.*
50. Adrian Mello, *Five guidelines for effective e-mail marketing*, at http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2867339,00.html (May 22, 2002).
51. *Id.*
52. Brief of Amicus Curiae Professors of Intellectual Property & Computer Law, at 3, *Intel. Corp. v. Hamid*, 43 P.3d 587 (Cal. 2002), available at http://www.law.berkeley.edu/cenpro/samuelson/projects/hamidi/Hamidi-Cal-2002-amicus-IP-profs.pdf (last updated July 15, 2002).
53. *Id.*
54. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 473 n.6.
55. *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 232-233 (Cal. Ct. App. 1982); *Roberts v. Permanente Corp.*, 188 Cal. App.2d 526, 529 (Cal. Ct. App. 1961).
56. *Bradley v. Am. Smelting & Ref. Co.*, 709 P.2d 782,788-789 (Wash. 1985).
57. *Ream v. Keen*, 838 P.2d 1073, 1075 (Or. 1992).
58. *Intel Corp. v. Hamidi*, 1999 WL 450944 (Cal. App. Dep't Super. Ct. Apr. 28, 1999), *aff'd*, 114 Cal. Rptr. 2d 244 (Cal. Ct. App. (2001)), *review granted and opinion superseded by* 188 Cal. Rptr. 2d 546, 43 P.2d 587 (Cal. 2002), *rev'd.*, 1 Cal. Rptr. 32, 71 P.3d 296 (Cal. 2003).
59. *Id.*

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The preceding article, written several months ago, predates the California Supreme Court's highly anticipated decision in *Intel Corp. v. Hamidi*.[1] In holding that under California law, trespass to chattels should not extend to "communication that neither damages the recipient computer system nor impairs its functioning,"[2] the Intel decision addressed many of the issues presented in the preceding article. The most striking aspect of the decision was the majority's declaration that the failure of Intel's claim lies in the fact that "the trespass to chattels tort . . . may not, in California, be proved without evidence of an injury to the plaintiffs property or legal interest therein."[3] This statement may be the closest intimation that *Thrifty-Tel* may have been wrongly decided.

The California Supreme Court in *Hamidi* did not only reverse the lower court's decision on June 30th; more importantly, it preserved good law. As the majority reiterated, Intel was not without remedy, for "e-mail, like other forms of communication, may in some circumstances cause legally cognizable injury to the recipient or to third parties and may be actionable under various common law [or] statutory theories."[4] Justice Mosk, in his dissent, did not agree with the proposition that other forms of action, including nuisance would better suit Intel, for they "require an evaluation of the content of the transmissions," he wrote.[5] But the dissent failed to notice that, unlike many trespass to chattels actions, *Intel* is unique because it is indeed content based. As the majority declared, "Intel's complaint is thus about *the content of the messages* rather than the functioning of the company's e-mail system."[6] It was only fair that the California court, the body that ignited the flames of trespass litigation in the Internet era, be the same body to curtail the doctrine's attenuation.

Endnotes

1. *Intel Corp. v. Hamidi*, 1 Cal Rptr. 3d 32, 71 P.3d 32 (Cal. 2003.)
2. *Id.*, 1 Cal. Rptr. at 36
3. *Id.* at 37.
4. *Id.*
5. *Intel* at 72.
6. *Intel* at 46.

BOOK REVIEW:

The Deposition Handbook—Fourth Edition

By Dennis R. Suplee and Diana S. Donaldson,
Aspen Law & Business, 2002, 547 Pages

Reviewed by Michael S. Oberman

One of the most important decisions a book reviewer has to make is what to do with the book after the review is written—to keep it for himself or herself for future reference; to send it to the firm's library in the hope someone else might find the book to be helpful; or, in the extreme case, to try to get the Salvation Army to pick it up. I've decided to keep the review copy of *The Deposition Handbook* in my own office, to use myself and to share with colleagues working with me.

The book's title, *The Deposition Handbook,* aptly describes what you will find. It is a "handbook" in the best sense of the word. This compact volume publishes all of the governing rules as well as many court and bar association guidelines for the conduct of a deposition; provides how-to advice for literally each stage of this discovery device; pulls together an impressive range of cases and secondary authorities on deposition practice; and—best of all—puts before you a wealth of practical experience on countless procedural and strategy issues. Now in its fourth edition, this book reflects careful shaping over time. As a comparison to earlier editions confirms, the authors have continued to edit portions of their work and to embellish the basic points with new examples. And, with its 2002 publication date, the *Handbook* addresses the most recent developments in the law plus the latest advances in technology.

Beyond matching the scope of its title, this book also fully delivers on the promises of its preface. The authors succinctly state what they have admirably achieved:

> This guide discusses various objectives, strategies, tactics, mechanics, and problems in taking depositions. By and large, there are no right answers to the questions raised, but the lawyer who considers such matters in advance of the deposition should do a better job of interrogating the witness. To make this handbook useful to recent law school graduates, as well as to more experienced litigators, we have articulated not only the thorny questions, but also basic propositions.

While largely structured around the taking of a deposition, the *Handbook* gives almost equal attention to the defense of a deposition. In particular, it offers a most thorough and informed discussion of how to prepare a witness—confronting the array of practical and ethical issues we all repeatedly face.

The authors, Dennis R. Suplee and Diana S. Donaldson, are partners in Schnader Harrison Segal & Lewis LLP with practices in areas including commercial disputes. They state in the preface that they have drawn on the deposition experience of other lawyers in their firm, and the *Handbook* is stocked with specific case illustrations of deposition practice issues. One of the best features of the book for both younger lawyers and more experienced lawyers is the way in which the authors think through with the reader how to approach the issues—stating an issue; giving a hypothetical example to illustrate it more concretely; and then laying out the points a litigator should consider in resolving the issue.

The authors also liberally draw on other sources of deposition guidance. The footnotes include many references to publications such as *Litigation, The National Law Journal*, and *For the Defense*, and the *Handbook* compiles in one volume the suggestions from numerous articles in these other publications. The authors are not reluctant even to quote at length from individual articles and to give credit to other authors for particular practice techniques. This is extremely useful, since few of us receive all of the cited publications or have the time to read, clip, and save in an easily accessible place all helpful articles on depositions in those publications which we do receive (except, of course, *NYLitigator*, which we all read closely as soon as a new issue arrives and then refer to repeatedly). By combining their firm's experience with these other sources, the authors are able to share detailed examples from both commercial and personal injury litigations.

Before reading the *Handbook*, I jotted down issues of deposition practice from my own cases on which I had done research or consulted my own colleagues. I then looked to see how the *Handbook* addressed these issues. The authors covered almost all of these issues, although my road test of the book leads me to suggest a number of revisions for the next edition. Specifically:

- Most commercial litigators are trying to learn the full reach as well as the limitations of Rule 30(b)(6) depositions. This edition of the *Handbook* includes a new, separate chapter on the topic, which is excellent in describing the scope of the rule, the problems that arise, and the issues that have not been definitively resolved. If you are seeking a ruling on a 30(b)(6) question, this chapter is a great starting point for finding the leading cases. Something, however, is

missing: In the next edition, the authors should include a witness preparation script for 30(b)(6) witnesses.

- Videotaped depositions are becoming commonplace, and commercial litigators need to know how to prepare witnesses for them. The witness preparation script in Appendix A makes no mention of videotaped depositions, but the chapter on videotaped depositions does have additional instructions (§ 14.20 at 255-56–a section easily found in the index under "Videotaped depositions," "preparation of witness"). The chapter contains helpful information about videotaped depositions—starting with the basic procedural steps and ending up with use at trial. However, I noted that § 14.03 at 240 refers to the filing requirement of Rule 30(f) for the original videotape, a requirement which § 8.05(C) states has been eliminated for depositions. It turns out that this reference was carried over from the third edition of the *Handbook* (§ 8.03 at 191), and much of the chapter is the same as in the 1992 second edition—a time when issues about the setting and background for a videotaped deposition seemed more challenging. The chapter struck me as placing too much attention on older issues and offering not enough practical experience on the videotaped depositions of today. For example, the authors could provide more guidance on how to manage and most successfully deal with dozens of videotaped depositions in a large commercial or federal case (e.g., how to most efficiently and economically designate and edit portions for use at trial).
- If not from our own experience, we know at least from our Section's CLE programs about the advances in deposition technology, such as real time reporting, dirty transcripts, and digitizing of videotapes. I did not find these topics listed as main items in the index, but I found them briefly discussed when I read the book. (The index uses terms such as "Computer-assisted depositions" and "Computer-generated transcripts," and includes "real time" as a sub-topic.) The discussion of these subjects is nowhere as exhaustive as the treatment of other issues. In the next edition, for example, the authors might discuss how to make the best use of real time reporting and give greater instruction on how to prepare discs of videotaped depositions for use at trial.
- I have participated in a number of videoconference depositions, which present different issues from telephone depositions. I did not find a discussion of this mode of examination.
- There are a raft of issues concerning nonparty depositions, including the mechanics of scheduling them; allocating time between the parties; and preparing nonparty witnesses. The index and table of contents take us only to a discussion of the location of nonparty depositions. (§ 3.03(B)). Reading through the text, I did find a passing reference to instructing a nonparty witness not to answer (§ 11.02), an anecdote about preparing a nonparty witness (§ 16.15 at 328-29), and a general discussion of allocating time in a multiparty case (§ 2.02(C)). Nonparty deposition practice warrants more extended treatment—if not a separate chapter—in the next edition.
- The authors appropriately note how "infuriating" to the interrogating attorney is the defending attorney's direction to the witness, "if you know." (§ 9.09). I was looking to see how the authors deal with the adversary who repeatedly states, "Objection: lack of foundation." The issue of foundation is not in the index, but the authors do give the important caution that an objection to a question as lacking foundation is a type of objection that can be cured at the deposition but is not an objection to form. (*See* §§ 8.05(D), 11.01 n.1.) They suggest that the interrogating attorney consider not agreeing to the usual stipulation reserving for trial all objections except as to form, since the examiner could be surprised at trial with a foundation objection—a potential block to the admissibility of the testimony which could have been overcome if raised at the deposition. A more detailed treatment about the proper scope of this objection with additional examples would be helpful. For example, the *Handbook* includes as Appendix C an extremely useful "Anatomy of a Document"—a line by line guide on how to question about a document. I will show this appendix to younger colleagues who are preparing to take depositions. Similar appendices of examples on how to deal with objections (such as lack of foundation) and on how to exhaust recollection would be welcomed.
- Any reader of the new edition is likely to turn early to the presentation of the most recent rule changes. The authors discuss all of the changes, and explain some of them based on the Advisory Committee notes. They do not, on the other hand, draw on their own experience under prior rules to suggest how best to adapt to the various changes.

I found much to like about the fourth edition of *The Deposition Handbook*. As I said at the outset, this book is a "keeper."

Michael S. Oberman is a partner in the Litigation and Intellectual Property Departments of Kramer Levin Naftalis & Frankel LLP. He has served as a member of the Section's Executive Committee since the Section's formation in 1989 and of the predecessor Committee on Federal Courts from 1977-89. He has also served as a member of the Commercial Courts Task Force, which created the Commercial Division of the New York State Supreme Court.

BRIEFLY NOTED:

New York Evidence Handbook—Second Edition

By Michael M. Martin, Daniel J. Capra and Faust F. Rossi,
Aspen Law & Business, 2003, 1,102 Pages

Aspen Law & Business has also just published a second edition of its *New York Evidence Handbook*. I've decided to send the review copy to my firm's library, where it will serve as a very current and extremely well-crafted starting point for research on New York evidence questions.

This book's full citation title is not an apt description of what you will find. To begin with, the *Evidence Handbook* is no longer a compact volume. The first edition (a little over 6"x 9") looked like a handbook, but the new volume (now over 7"x 10") looks and feels more like a hornbook. And, apart from its heft, this work is better described as a "hornbook" than a "handbook." There is little how-to advice. Unlike in *The Deposition Handbook* (reviewed on page 28), there are no practice-oriented appendices or forms (e.g., how to introduce a document in evidence or an example of a joint defense agreement.) Unlike in Justice Helen E. Freedman's *New York Objections*, there is no step-by-step guidance on how to frame or respond to evidentiary objections at trial. The lack of how-to advice is not necessarily a drawback; it simply defines the nature of the work. This book is all about the substance of New York evidence law circa 2003. In a good description, the preface to the *Evidence Handbook* states: "Our intent has been to make this a *modern* evidence text for New York."

There is something unusual about the authorship line. The cover lists three co-authors: Michael M. Martin (Alpin J. Cameron Professor of Law at Fordham Law School), Daniel J. Capra (Philip D. Reed Professor of Law at Fordham), and Faust F. Rossi (Professor of Law and Samuel S. Liebowitz Professor of Trial Techniques at Cornell Law School). However, Prof. Rossi's actual role appears to have been limited to two chapters in the first edition.[1]

Yet, in other respects, this is the rare book that you can judge by the cover. The scope of the work is printed like an index—with page references—right on the front cover: Authentication and Identification (875); "Best Evidence" Rule (917); General Principles (1); Hearsay (639); Judicial Notice (27); Opinion Testimony (559); Presumptions (57); Privileges (277); Relevance (105); Witnesses (419).

The writing is crisp, and the book delivers in its 937 pages of text (not counting the tables) a comprehensive discussion of the basic principles of the treated topics. Reflecting their goal of creating an evidence text for today, the authors give special attention to subjects like the attorney-client privilege in the corporate setting, expert opinions based on facts not in evidence, and admissions by employees. The *Evidence Handbook* is richly annotated but—in the authors' words (at xxiii)—"avoid[s] citing unnecessary old cases and lower-court decisions that would only be redundant or of dubious precedential value." I especially liked the extended discussion of some cases, where the authors walk us through opinions so we may see which points of law are now settled and which issues remain unresolved.

The authors have sensibly organized their book on a structure well known to practitioners—the order of the Federal Rules of Evidence. But the utility of the *Evidence Handbook* as an in-court reference work is hampered by two formatting decisions. First, sub-sections as important as "Leading Questions" and "Scope of cross-examination" do not have section numbers and are not included in the Table of Contents. Indeed, scope of cross-examination does not appear in the index. I located this topic only by paging through the section on "Order of Examination" (§ 6.12.2) until I saw an unnumbered heading for "Scope of cross-examination." Second, the running section numbers on the top of the pages do not capture sub-sections that do have numbers—e.g., § 8.3.3.2 covers Excited Utterances, but the top of the page for that sub-section (and the top of 76 pages) has only § 8.3.3 (the main section number for hearsay objections not dependent on declarant unavailability)—making it harder to go from section references in the index to the relevant text.

This brings us to the inevitable question: how does the new *Evidence Handbook* compare with the venerable *Prince, Richardson on Evidence*. It cannot displace *Richardson* as a reference source; I ran a computer search which confirmed that New York courts still repeatedly cite *Richardson* while only beginning to cite the *Evidence Handbook*. Each work contains the basic principles of New York evidence, but these are somewhat easier to find in *Richardson* because it is a less detailed work and almost all of its sections appeared to be indexed. Putting that point in the opposite light, on a section-by-section basis I found the *Evidence Handbook* to cover topics more deeply, with more extensive case discussion and with more citations. It is the more analytical work.

The *Evidence Handbook* is—as the authors say—"a modern evidence text." It earns a spot on my firm's library shelves.

Endnotes

1. The copyright notice reads: "Copyright © 2003 by Michael M. Martin and Daniel J. Capra; copyright in Chapter 7 by Faust F. Rossi." A footnote at the start of Chapter 7 (Opinion Testimony) acknowledges Prof. Rossi's "initial draft of this chapter in the first edition," while a footnote at the start of Chapter 8 (Hearsay) "thank[s] Professor Faust Rossi for his substantial and excellent contributions to this chapter in the first edition of this treatise."

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