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Chair's Message

By Sharon M. Porcellio

A Nation of Laws and Lawyers

As I am writing this message, the country, and the world for that matter, eagerly awaits the outcome of the presidential election. Given the ever-increasing number of lawsuits, the jokes about lawyers have turned up again and in high volume. But at the same time, by all accounts, the nation and world are riveted to every aspect of this drama as it unfolds, whether by the Internet, television, print, or some other medium. People are watching appellate arguments in their living rooms or on their computers. They are watching lawyers and judges, with virtually no prior celebrity, in action with the most important job in the world on the line.

Yet, despite the plethora of lawyer jokes, there is a belief in our nation of laws—we are deciding this battle by rule of law—not by rule of might. If the pundits and pollsters are to be believed at any level these days, they claim that most Americans, of whatever political persuasion, expect, want, and trust the United States Supreme Court to decide this momentous conflict.

Whatever the result, we may be on the verge of engaging in a great debate of constitutional proportions over the separation of powers, states' rights, and the Electoral College. This is exciting stuff and gives us, as lawyers, all a chance to lead and educate the public. We should not let the opportunity slip away or tarnish our time to shine. Although there is the political/partisan backdrop to this entire controversy, it will ultimately be a test of our laws and Constitution.

This dispute comes at an opportune time in another way. While the nation is looking at how it elects officials, the legal profession is determining how it should conduct itself in the new millennium with ever-expanding opportunities and possibilities in the new global economy. As associates' starting salaries and bonuses skyrocket, the profession is examining the question of multidisciplinary practice; i.e., how to permit lawyers to provide ancillary non-legal services and to provide services to clients in cooperation with non-legal firms while preserving the core principles of the profession—safeguarding confidentiality, avoiding conflicts of interest and maintaining independent professional judgment. This debate is taking place at all levels of the practice—both domestically and internationally. Various bar associations and appropriate rule-makers must determine how to modify ethics rules to balance these objectives. Lawyers do not want the public to view this dispute merely as lawyers seeking to preserve their monopoly or, on the other hand, as lawyers seeking financial gain to the detriment of their clients. The New York State and American Bar Associations and others have studied and joined in the debate. For example, see the spirited comments on this issue by Dean Daniel Fischel and former Chair of the ABA Litigation Section Lawrence Fox.[1]

At the same time the profession explores how to work ethically with non-lawyers, it faces the perceived and real increase in lack of civility amongst practitioners. I have the benefit of practicing in a smaller legal community than some of my colleagues. Most of us in the Buffalo legal community know each other and the judges and have to see each other regularly. In this situation, familiarity does not breed contempt but, thankfully, civility and decency. Your opponent *will* have an opportunity to respond in kind to your behavior. Unfortunately, it seems that guidelines, sanctions, and codes must now provide the parameters for attorney behavior where there is not familiarity.

With all of the important issues facing us—the issues that drew most of us to the profession—let us hope we can move forward, perhaps beginning at the law school level, to regain a reputation commensurate with the issues attorneys are called upon to resolve. We currently have the attention of the world, a chance to educate and increase the public trust and confidence in our system. Let's use it wisely.

Endnote

1. Daniel R. Fischel, *Multidisciplinary Practice*, 55 Bus. Law. 951 (2000); Lawrence J. Fox, *Dan's World: A Free Enterprise Dream; An Ethics Nightmare*; 55 Bus. Law. 1533(2000).

An Introduction to Civility and Ethics in Civil Litigation

The Discussion of a Hypothetical Situation Involving Employment Contracts

What follows is a panel discussion that generated many interesting comments in the area of civility in litigation. The discussion itself revolved around a hypothetical situation. The panel included Judge Nina Gershon of the United States District Court for the Eastern District of New York; Alan B. Horn, Senior Vice President & General Counsel to European American Bank; Steven A. Berger, a partner at Berger Stern & Webb; Mark C. Zauderer, a partner at Solomon, Zauderer, Ellenhorn, Frischer & Sharp and former Chairman of the Commercial and Federal Litigation Section; Hal R. Lieberman, of counsel to Beldock Levine & Hoffman; and Lawrence N. Weiss, a partner at Pantaleoni & Weiss, LLP. The panel was moderated by Vincent J. Syracuse, a partner at Tannenbaum Helpern Syracuse & Hirschtritt LLP.

Mr. Syracuse: It is time for our colloquium on ethics and civility. I don't know whether any of you had a chance to read the fact pattern. I just want to briefly introduce the factual situation to you.

Phil Smith, a senior sales associate at a company that we call Large Co. was unhappy with his job and decided it was time to look for greener pastures. Large Co. manufactured machine tools.

After assessing his prospects, Smith approached another corporation that was called UpStart and was hired to start a sales division at UpStart that would compete with Large Co.'s customers.

Smith convinced Karen Jones who was one of his subordinates at Large Co. to join him at UpStart. Both salespeople had different employment agreements with Large Co. Jones's agreement contained a clause which purported to restrict her from working for competitors of Large Co. and with other former employees of Large Co. for a period of time once she left Large Co. Smith's contract did not contain such a clause, but required that he not disclose Large Co.'s trade secrets and confidential information. Smith's agreement also prohibited him from soliciting Large Co.'s employees and customers and clients.

Now, we are very fortunate this afternoon to have a number of people who were involved in the affairs of Large Co. and Smith. Let me make some introductions so that you know who they are.

First of all, I am very pleased to welcome Judge Nina Gershon. The next person I am going to introduce is Large Co.'s chief executive officer, Alan Horn. Next, we have Larry Weiss. Larry Weiss's night job today is John Q. Rainmaker. John Q. Rainmaker is a partner at the firm of Thorn & Thicket. Mr. Rainmaker's biggest client is Large Co. Also present is Steven A. Berger. Steve is chief litigator for Thorn & Thicket. Steve and Rainmaker are partners. Mark Zauderer is Mr. Whitehat, chief partner of Whitehat & Partners. Mark will be representing Smith and Jones, the individuals in today's discussion. Finally, we have Hal Lieberman. Hal will play a utility role here as this proceeds, giving us comments and observations as time goes on.

I'd like to note that a lot of this is role-playing. I am going to make a disclaimer right up front, that nothing we say can be cited against us, used against us in any way, shape or form.

Having said that, let me continue with the fact pattern. Smith and Jones knew that leaving for the competing sales division of UpStart would make Large Co. very angry and that that might lead to legal action on the part of Large Co.

Smith and Jones sought legal advice from the law firm of Whitehat & Partners, so they would know what their contracts meant. Smith and Jones were advised that in the absence of trade secrets or unique services, restrictive covenants were generally unenforceable under New York law.

Mr. Whitehat, would you tell us about the ethical considerations that you have in meeting with these clients.

Mr. Zauderer: Well, the first thing Hal Lieberman might tell me is that I might have no problem in meeting with and representing these two people. I have, nonetheless. Maybe it is a matter of my own style and practice, concerns about representing these two people. I don't like to represent two people, if I can help it. I like to represent one person or one entity that has a single interest. I like to work solely on behalf of one client. I think that is the highest form of expression or manifestation of one's professional efforts.

I see in this particular case a possible conflict in the situations of Smith and Jones in that their situations are not congruent. There could, for example, be arguments I could make on behalf of one, that by not making on behalf of the other, would tend to prejudice that client's position. One has a certain restrictive covenant in the contract while the other does not. So that is a concern.

Other than that, if I have satisfied myself that I can represent both, and of course taking into consideration that they deserve representation and it may be imprac-

tical and financially impossible for them to hire two lawyers, I am now proceeding with the case. So far, I am ethically in the clear as far as I know.

Mr. Syracuse: What do you tell them about their contract when they ask if this contract is worth anything or can they violate the contract?

Mr. Zauderer: I am not sure. If you are asking me a legal opinion, which I don't think is the purpose of our program, I can answer that. I am taking as a given the statement in here that I have advised them that, in the absence of trade secrets or unique services, restrictive covenants are generally unenforceable under New York law.[1] That is half-true in my experience.

If, as is the case here, there is a restrictive covenant that goes beyond that, and that restricts the employees' ability, for example, to work in a particular job or in a particular industry, I do believe those are still enforceable.

I think they must be reasonable as to time and scope. There have been some recent cases about how to determine whether they are or are not enforceable. I think a statement that appears here, in my opinion—that restrictive covenants are generally unenforceable under New York law—is stated too broadly.

Mr. Syracuse: Smith and Jones end up resigning from Large Co. at the end of August. The reaction of Large Co. is immediate. Large Co.'s president contacts his friend John Rainmaker at the firm of Thorn & Thicket.

As I said before, Large Co. was Rainmaker's biggest client and was responsible for Rainmaker's success at Thorn & Thicket.

Corporate lawyers at that firm have prepared many employment agreements containing restrictive covenants similar to the ones contained in Smith and Jones's employment agreements for several important clients including Large Co. When Rainmaker spoke with his litigators concerning Large Co.'s problems with Smith and Jones, he learned there are serious problems with the restrictive covenants and that there was a good chance they would not be enforceable.

Mr. Rainmaker, tell me how you react when your litigator tells you the restrictive covenants are unenforceable.

Mr. Weiss: I ask him why he didn't tell me this before when we were writing those restrictive covenants.

Mr. Syracuse: He says I told you before. Steve, did you tell him before?

Mr. Berger: Absolutely.

Mr. Weiss: Do you have a copy of that memorandum? I don't recall it, to be honest with you. I am sure that if I had been told such a thing, I would have advised the client that there is a question as to whether or not these restrictive covenants are enforceable. I probably would have revised them so as to make them more enforceable by restricting their geography or time scope. That wasn't done and I am quite confident it is because we didn't receive the input of the litigation department on that issue.

Mr. Berger: Actually, I told him not that they were unenforceable under any circumstances, but that it was an uphill battle. It is fact specific in trying to find what is proprietary in nature that needs to be protected.

Mr. Weiss: I don't recall all of that. Your statement does ring a bell in my memory that perhaps you said something to the effect that sometimes these contracts are not entirely enforced. Then I asked you to just go back and make sure that you wrote the most enforceable type of contract you could.

Mr. Berger: Remember, I am in the litigation department, not the corporate.

Mr. Syracuse: Had you told your client the restrictive covenants are arguably not enforceable?

Mr. Weiss: I don't recall that I did.

Mr. Syracuse: Mr. Horn, did you ever ask him whether these covenants are enforceable or not?

Mr. Horn: I assumed they were enforceable because they were presented to us as enforceable documents. We didn't get into the specifics of that particular provision, but when I pay for legal services, I expect them to be what they purport to be.

Mr. Weiss: I will tell you that to this day, I believe that we intended to write agreements that were enforceable and our litigation will present that position as vigorously as possible.

Mr. Syracuse: Alan, you just found out that two of your principal salespeople are leaving, and you have these restrictive covenants which you are calling Rainmaker about. What kind of instructions, as a client, are you giving Rainmaker? Do you feel this should be an aggressively pursued litigation?

Mr. Horn: I am less concerned with the ethical and professional considerations than I am with winning. I want life to be difficult for these two individuals and a message sent to my other employees that I am not going to roll over when faced with a similar situation. So, my sense here is to pursue this aggressively.

Mr. Syracuse: Litigator, you heard your client say he wants you to win. Are there restraints on what you can do?

Mr. Berger: The first restraint is that we are lawyers, not prophets, and we cannot dictate what the court is going to do. We can certainly tell the client we are going to enforce it to the extent we can, and pursue it as vigorously as possible. Certainly there are no guarantees in this business, particularly with these kinds of agreements.

Mr. Syracuse: If there is an appellate case that severely questions the enforceability of this agreement, do you have a conversation with your client about the possibility of being sanctioned for asserting this claim?

Mr. Weiss: First of all, I suppose the conversation would be with me since I am the client contact.

Mr. Syracuse: I understand you might not want your litigators to meet with your client.

Mr. Weiss: That would be a rule.

Mr. Syracuse: Tell us what you tell your client. Do you take it upon yourself to advise your clients about the risk of sanctions?

Mr. Weiss: I think I might work that into a conversation somewhere along the line when we are discussing the overall strategy or results of the litigation to date. I will tell you now I am certainly not going to pursue a litigation that I think is frivolous, and I have already taken the position I don't think it is frivolous.

Mr. Horn: I would throw one more wrinkle in this. From my perspective, I got this advice from the law firm, notwithstanding the disagreement between different departments of the firm, and I intend to hold the firm accountable for the advice that I have been given.

Mr. Syracuse: In fact, you tell them that unless you pursue this, I am going to hire somebody else.

Mr. Horn: Yes, at a minimum.

Mr. Syracuse: What do you tell your partner, Mr. Rainmaker?

Mr. Weiss: I am not presented with a situation that raises the question unless my litigator is telling me, in his opinion, that not only are these covenants questionable, but it is frivolous to attempt to enforce them. I haven't heard that opinion. So, unless I receive an opinion that we have no good grounds for even bringing an action, I have not yet been presented with a situation where sanctions are an issue.

Mr. Syracuse: The first thing you do after meeting is have Thorn & Thicket contact Smith and Jones to remind them they had employment agreements with respective covenants.

Mr. Lieberman: Well, there is something called the anti-contact rule.[2] If it is known that Smith and Jones are represented by counsel, it would not be proper to contact them directly.

Mr. Syracuse: Now, who makes the contact?

Mr. Berger: At that point I did not know counsel represented them. I called. They told me Whitehat represented them. As soon as they told me a lawyer represented them, I did not have a substantive conversation with them. I said good-bye and I called Whitehat.

Mr. Syracuse: Tell me about the conversation. Let's hear the conversation between Whitehat and chief litigator over these issues.

Mr. Zauderer: "Hello."

Mr. Berger: "Hi, I represent Large Co. and it has come to our attention that you represent Smith and Jones. They have restrictive covenants, although different, in each of their agreements, and I want to be absolutely certain that they are not going to violate them. I am calling to discuss those issues with you."

Mr. Zauderer: "Steve, I am delighted you're on the case. A pleasure to do professional business with you again. In particular, I know you will understand what this case is about. This is a case that you and I have seen before. Your client is clearly upset and is going to do everything within its power, fueled by its great economic muscle and represented by your very expensive but fine law firm, to do what it can to put my clients out of business. As you know, I won't permit that. As you also know, the restrictive covenant at issue, which you and I both looked at, is clearly unenforceable under New York law. I think any attempt to enforce this is going to be met with rebuke by the courts. I must say, while I am not a fan of sanctions for many reasons, I think I owe it to my client to press that point because I think this would be a clearly frivolous case. I want you to know my view on it."

Mr. Syracuse: You tell him you are going to hold him accountable for sanctions?

Mr. Zauderer: I certainly raise the issue. This is, in my view, in that category of case.

Mr. Syracuse: Do you tell your client about that?

Mr. Berger: The first thing I would say, "Mark, I am surprised you even turned the volume up to that level at this early stage of this litigation. First of all, there is not just one covenant, there are a lot of covenants involved in both of these contracts. They involve nonsolicitation promises, trade secret issues, and going to work for a competitor.

I don't know if you have sufficiently investigated the facts, but I certainly have looked into them before making this call and I believe there is a basis to bring

on an order to show cause for a temporary restraining order to prevent them from going to work for UpStart."

Mr. Syracuse: In fact, you believe a little more than that, your client told you there was a computer file that was taken by these employees.

Mr. Berger: Absolutely.

Mr. Syracuse: Don't you bring that to Mr. Zauderer's attention?

Mr. Berger: I do.

Mr. Syracuse: Mr. Zauderer, when you met with your clients didn't your clients tell you they had this computer diskette? They said we have this little diskette. It really is my address book. Of course it has names, addresses, and numbers of every company contact in my address book that Large Co. had.

Mr. Zauderer: Well, I have had two separate conversations. I had a conversation with my client about it, which I am not prepared to tell you about because it is privileged. As for Mr. Berger in response to his last comment, I'd say, "Steve, I have facts very different from my own clients. But I ask you to give me the facts that you say support this strong position that you have articulated. I will certainly be happy to review it, take it up with my client, as appropriate, and respond to you."

Mr. Berger: "I will do that at the appropriate time."

Mr. Zauderer: "That will be good. We look forward to it."

Mr. Syracuse: Did you guys try to conduct negotiations to try to resolve the problem?

Mr. Berger: My problem in this setting is that I can't wait too long because if I don't get to a courthouse very quickly, judges will look at me and say, "Mr. Berger, where have you been? If you thought this was such a problem why did you wait so long?"

I have got to obtain, as quickly as possible, a TRO to prevent them from going to work for UpStart. I don't have a lot of time. Now if Mr. Zauderer is willing to consent up front they won't go to work until we have an opportunity to discuss this, I am fine with that. If not, I have got to do what I've got to do.

Mr. Syracuse: To move the fact pattern along, negotiations become difficult and reach an impasse because both sides are inflexible. There are numerous acrimonious telephone calls and correspondence. At the negotiations, Mark says his clients are innocent. You say his clients are dirty. At some point you have a conversation with Mr. Rainmaker. Mr. Horn says that Smith and Jones had an intimate relationship that they concealed from their respective spouses. Rainmaker insists the litigator is conducting negotiations in bad faith by threatening to disclose the relationship in a litigation that would be commenced if the dispute is not settled.

Negotiations continue for several weeks until the hostile atmosphere created by increasingly belligerent phone calls and letters cause negotiations to break down completely. Is the relationship something you feel your lawyer should be using?

Mr. Horn: Well, it is certainly within the parameters of our situation here. My desire and goal is to win the case and to prevent these individuals from doing harm to my company. So if there are facts relevant and useful to me in my pursuit of my goal, I believe they should be used.

Mr. Syracuse: Is that a problem for you?

Mr. Berger: You can't just, for its own sake, raise an embarrassing situation to try to extract something from the other side. What is interesting about this fact pattern is that it may be more likely than not that Smith would have revealed certain confidences to Jones that he is otherwise precluded from revealing because of the other relationship that they had. So, as part of the litigation, it would be appropriate for me to introduce that, but not to try to embarrass the people.

Judge Gershon: I think unless he has a better ground of relevance than has yet to be articulated, I don't think it would be appropriate to use it. The issue is whether or not they have exchanged information. Why they decided to exchange information or the nature of their relationship doesn't seem to me to be relevant to the ultimate question of what information they exchanged. They may have exchanged more information as co-workers than they would have because of the intimate relationship. He needs to find out more about it.

Mr. Syracuse: The judge is telling you that you have to consider how she is going to react to hearing that evidence before you use it. So, what do you tell your client about that?

Mr. Berger: I would have felt it sufficiently culpable if I didn't settle this matter, I had a basis that was not trying to embarrass people for its own sake. It was relevant to an issue. It was more likely than not they would have shared this kind of information. I felt it would be appropriate to include it in the affidavit and certainly I wouldn't think that is the kind of conduct that should be sanctioned as trying to extract something from an embarrassing situation.

Mr. Syracuse: Mark, this morning you told us that we should all conduct ourselves in a way so that we weigh how we would look in the eyes of the judge. Would you care to comment on that further?

Mr. Zauderer: The first thing I am going to do here is wait and see what Mr. Berger does about this whole issue. But, it would be premature, and too defensive, and would not be good litigation strategy, to anticipate it and do something about it, in my view. It will come out in some form. He may say something about it in a piece of paper. He may indicate in a discovery request he wants information on it. Then, depending upon how the issue is introduced, I would then pounce on it.

It could be a simple refusal to provide the information requested. In which case if he wants it, he is going to have to go to the judge to get it. Then it will join issue. What I would argue to the judge, keeping in mind that I want our position to be reasonable, civil, and legally justifiable, is that the court has to weigh the relevance of information, and likelihood it will lead to admissible evidence, against a number of other factors, including the prejudice to the party.

Here we have, at most, possibly tangential information. It is at most relevant to credibility because these two people are going to be asked, what did you know and when did you know it. Presumably he is going to inquire about what information was exchanged between them.

But now he is saying he wants to introduce this highly prejudicial information. He wants details about a personal relationship on the grounds that it will ultimately go to the credibility of what they say about the other questions they have been asked. At a minimum, it is premature. It is perhaps never discoverable because of the prejudice here and the invasion of privacy. So I am going to wait and see what he does with it and then I am going to pounce on it.

Mr. Syracuse: Large Co.'s president tells Rainmaker and chief litigator that it is time to file the lawsuit. He says, "I want them to know that we are at war and that we won't let up for a minute until they cave in and settle on our terms." Is that a fair demand for you to make as a client, is that a fair demand to put on your lawyers? I happen to know you can outspend them, you can outspend them into oblivion and you can litigate them to death.

Mr. Horn: It is not a fair demand.

Mr. Syracuse: Would you do it anyway?

Mr. Horn: Well, would I do it for purposes of encouraging this discussion, absolutely. Would I do it in real life, absolutely not.

Mr. Syracuse: You tell Rainmaker I want to spend them into oblivion, I want to litigate them to death. What do you say, Rainmaker?

Mr. Weiss: Within the constraints that govern what I do for a living, absolutely. I have no problem with that. It may be a misfortune of life but some people have more money than others and can afford bigger cars or more vigorous lawsuits. You are fortunately in the position where you can afford a more vigorous lawsuit than the other guy. I will assert every tenable position that I think we have. And I will do so with expedition and with all deliberate speed.

Mr. Syracuse: By the way, he also tells you, "When the lawsuit is filed, I don't want any extensions of time."

Mr. Weiss: Well, you know, I have got to leave a certain amount of leeway to my litigator on that.

Mr. Syracuse: Do you tell him he is wrong?

Mr. Weiss: No, I don't tell him he is wrong.

Mr. Syracuse: What do you tell your litigator?

Mr. Weiss: "Look, Steve, we are under constraints from the client to be stringent about extensions of time. I know you have to get along with this guy Whitehat. I know his style, he always tries to take the high ground in these things. So, what I think you need to do is grant the minimum reasonable requests and always deny a second."

Mr. Berger: Well, I don't think this is in the realm of what the client gets the right to decide. For two reasons, there is a matter of professionalism in play here. Unless you can stand up in front of a judge in good conscience and give a basis as to why it is you won't grant a more reasonable request for time, you should allow for the extension. All you're involved in is an answer or response to some discovery request, and you cannot take the position of denying the extension, as it is unprofessional. More so, from a litigation strategy standpoint the last thing you want to do is appear before this judge as being unreasonable because that will hurt you terribly and substantively later on in the litigation. So sometimes you just have to say to the client, "Look, when it comes to settling, it is your decision. When it comes to how to litigate this case, it is my decision."

Mr. Weiss: "I am not going to infringe on that boundary. I agree with you and I bend to your judgment as to what you think the judge who will ultimately be assigned to this case will regard as reasonable. What I am asking you though, is to take a narrow view of what that might be. There are good reasons. I think I reached the point in my career where I am not inclined to take a 25 percent reduction of income. This client is worth that to me. I have a large house and a large mort-

gage. I have two children in expensive schools and I have a wife with luxurious taste. I will not take a 25 percent reduction in my income if we lose this client."

Mr. Berger: "I know how Rainmaker feels about rain. I know how important it is. But within the bounds of propriety for purposes of professionalism as well as litigation strategy, I get the message and I will be very limiting in my grants of extensions."

Mr. Weiss: "I think that is a good idea."

Mr. Syracuse: We will hear from Mr. Whitehat in a second, but Thorn & Thicket commenced the action on behalf of Large Co. against the two former salespeople. Thorn & Thicket lawyers take the position that the loss of Large Co.'s business would become irreparable unless proper relief was granted, and they refuse to grant any extensions of time. They also told the Whitehat lawyers that while they were still prepared to negotiate a settlement, the litigation would proceed on a fast track. They also said all meetings had to take place at the Thorn & Thicket offices. The Whitehat lawyers tried to negotiate, but it became clear as part of any settlement that the Thorn & Thicket lawyers wanted Smith and Jones to quit their new jobs.

Mr. Zauderer: The first thing that is most important in everything you said pertains to where these meetings will be held. I have a very comfortable chair in my office. What I am sensing in this whole presentation is that this is a case where they just want to crush my clients. When I get the right moment I am going to make that clear to Judge Gershon when we have a dispute. I just file away in my own mind the notion that we are going to have to keep a civil relationship at all times. We have to have level ground and courtesies back and forth.

Now as for my clients, if there is no restraining order, time is on my side. They are working, presumably earning money. That is great. I have to do what I have to do professionally to respond to this complaint. So, if I need time, I am going to ask Mr. Berger for an appropriate amount of time to respond to this complaint. I say, "Mr. Berger, I would like 20 days to respond to this complaint."

Mr. Syracuse: What do you say?

Mr. Berger: Again, if it is an extension of time to answer a complaint, I don't think you can refuse a reasonable request for extension.

Mr. Syracuse: Your client said you can't do that.

Mr. Berger: I told my client that is not his decision. I have told Rainmaker to tell him that. He should tell him that you are going to just hurt yourself in the long run because the judge is going to react terribly if you push me to the point of going in and making the other party use an order to show cause to get an extension of time.

It is going to work against you. Not to mention, I am going to be in that courthouse again. I don't want to do something as unprofessional as that because it is going to affect me the next time I appear before this judge.

Mr. Syracuse: Do you have a problem?

Mr. Weiss: No. I agree with what Steve says and I think I know how to present it to the client. I don't think it is a particularly difficult thing to do.

Mr. Zauderer: Since Mr. Berger has been classy enough to support my position in this, as a matter of principle, I would like to reciprocate. In Mr. Berger's situation, one of the things I would keep in mind in telling a client who put pressure of this kind on me is that, "Look, when you hired me, one of the things you get with me is a certain amount of capital. I can't promise any result in court, but I have practiced there for a long time. You will have the advantage in that if I go in and say something or take a position, I believe it will get heard and respected. It doesn't mean you are going to win every time. That can work to your advantage. I am not the lawyer to spend that capital foolishly on your behalf or on behalf of any other client." That is the kind of approach I generally take.

Mr. Syracuse: They do more than that. Because what is happening is that while they are negotiating with you, the back office guys are drafting an order to show cause and a motion for preliminary injunction. Eventually, you get a phone call from Thorn & Thicket indicating that Large Co. will move by order to show cause to restrain Smith and Jones from working for UpStart. Now, is there anything wrong from the point of view of ethics or civility for you to be double-teaming?

Mr. Berger: I don't see it. I think we litigate and settle matters.

Mr. Syracuse: You don't have a problem with that?

Mr. Zauderer: I don't know what they are doing. My clients are working. So far, nothing has happened. So I am going to wait.

Mr. Weiss: Whitehat must be assuming we are doing such a thing. If we are negotiating with him to resolve the matter, we are certainly not negotiating out of weakness. He has to understand if the negotiations fail to achieve a result satisfactory to our clients, there is going to be litigation. Why would he be surprised we are working on it?

Mr. Syracuse: So, the Thorn & Thicket lawyers call Whitehat to tell him they're filing the order to show cause. The Thorn & Thicket litigators also know that the

senior litigator at Whitehat observes religious holidays. In the telephone call they said they intended to submit their papers the day before the religious holiday observed by the Whitehat litigator and to seek an immediate hearing the day after the holiday.

The Whitehat lawyer had told Thorn & Thicket he planned to take a one-week vacation beginning that day, but had not mentioned the religious holiday. Although several weeks had passed since the salespeople had left the employment of Large Co., Thorn & Thicket said that its need for injunctive relief was an urgent matter that had to be heard immediately. Whitehat complained the timing of the motion did not affect the substance of the case. It was designed to disrupt the holiday and vacation plans and put unnecessary pressure on Whitehat.

Judge Gershon: I would just go back to the telephone call from Thorn & Thicket to Whitehat and say the proper way to do it is that we are about to present an order to show cause to the court. I don't know whether your client would be happy that you engaged in this ethical and civil behavior or not. But more often than not, TROs and orders to show cause are presented to me *ex parte* for no reason whatsoever. There are occasional times, where an *ex parte* application is appropriate. But, more often than not, a lawyer just shows up in court with a TRO and an order to show cause and has made no effort at all to communicate with the other side.

I think in federal court and even now in state court, the more common requirement of the judge is that we ask the lawyer, "Have you notified your adversary?" If they say, "No," and I look at the papers and if there is no reason for anything that is *ex parte*, we say, "Call your adversary and make an appointment to come down here on the question of whether I will even sign the order to show cause." I would say three-quarters of the time I resolve the whole business when both lawyers are in front of me. I think it is very important that you not assume that just because you want emergency relief you can do it without any notice to your adversary.[3]

Mr. Syracuse: I would like to hear from Mark and Steve about this business concerning vacation and religious holidays. You knew he was going on vacation, which didn't stop you from filing the papers.

Mr. Berger: Well, again, in this kind of a setting, to not make as fresh a complaint as possible is problematic. Of course, he is not the only lawyer in the law firm.

Mr. Syracuse: You were doing much more than that. You were filing the papers the day you knew he was going away. Is that civil behavior in litigation?

Mr. Berger: No, of course not. It so happens in this fact pattern that there was the filing of the lawsuit and then a delay and then the filing of the application for a TRO. At the time of the filing of the application for the TRO, if you had waited so much time from the commencement of the action and since they went to work for UpStart, there is no reason in the world you couldn't have waited a little bit longer to accommodate your adversary. I would feel different if it was the start of the litigation and it was a matter of days or hours where I had to again make that fresh complaint. Holiday notwithstanding, I would have to do what I would have to do.

Mr. Syracuse: Going into the fact pattern, Mark, he is calling your office and saying, "I am going to file this order to show cause." You're saying it is either a religious holiday or I'm going away. Let's hear about that conversation.

Mr. Zauderer: "Steve, as you know, I am going away for a week's vacation, we have been talking about this matter for I don't know how many weeks now. I guess if you decided you have to start the case, you have to do what you have to do. I am the only lawyer in the office familiar with this. And my clients, as your clients well know, don't have a lot of money and certainly can't afford to educate another lawyer on the case. I would just ask you, as a matter of courtesy, to put this over a couple of weeks and we will deal with it."

Mr. Berger: "Mark, it is just not that easy. Yes, we have been talking about this for some time now. Time is clearly of the essence because I am losing a lot of the ability to make that complaint to the court on a timely basis. And, we are going nowhere in our discussions. I have to do what I have to do, Mark. Please involve somebody else in your firm if you can't do it."

Mr. Zauderer: "I will tell you what I propose to you, Steve. Why don't we stipulate that the time between tomorrow morning and when I get back from vacation won't be used in opposition to your application arguing you waited for the last six months and didn't do anything."

Mr. Weiss: I guess in the fact pattern that is an issue agreed to.

Mr. Syracuse: That is agreed to. What happens is Thorn & Thicket's chief litigator, Steve, decides to postpone the submission to show cause and gets Whitehat to agree not to assert the delay as a defense to the motion.

But for some reason, the agreement is not confirmed in writing. And the next morning Mr. Horn finds out that his instructions were not followed. He

complains to Rainmaker that his needs were not being satisfied and he threatens to fire Thorn & Thicket.

Rainmaker then picks up the phone and tells the litigator, "Go to court immediately." Tell me about this conversation. Your partner just told you he gave his word to Mr. Zauderer not to file the papers. Your client calls you up and says, "I don't care about his word." You are not going to tell him to go back on his word; that is a tough conversation.

Mr. Weiss: "Steve, I just got the most disturbing telephone call from Mr. Horn. I would like you to let me know if it is true that we haven't filed an order to show cause that he asked us to do a long, long time ago. And you have agreed to give them an extension for what, ten days or something like that. Didn't he tell us not to grant any extensions unless there is a very good reason for it?"

Mr. Berger: "I felt, under the circumstances, I had to give it to him. We weren't really going to be prejudiced because he agreed during this period of time there would be, in effect, a tolling and there would be no holding of time against me for delay."

Mr. Weiss: "Maybe he can agree to that himself. I don't know if he can, but is that binding on the judge?"

Mr. Berger: "It is not binding on the judge. Even though we didn't put it in writing."

Mr. Weiss: "Wow, it is not in writing?"

Mr. Berger: "It is not in writing."

Mr. Weiss: "Are we in state court?"

Mr. Berger: "Technically, this is not an enforceable stipulation. You're quite right. But I made a deal. If I can't practice in a way where my word is my bond, that's a serious problem with me."

Mr. Zauderer: You can come to my firm, Mr. Berger.

Mr. Berger: Don't make that offer to me in the middle of this litigation.

Mr. Weiss: As a matter of fact, are you considering going to work for Whitehat?

Mr. Berger: No.

Mr. Syracuse: Steve, your partner just told you based upon the conversation he had with the client that you have to go back on your word. Do you try to talk to the clients? Do you try to calm the clients down?

Mr. Berger: I would hope so. What is going to happen here, while we understand why the client is upset, is that not only is it something that is going to hurt us from a professional standpoint, but it is also going to hurt us in the litigation if the judge finds out.

Mr. Weiss: It is easy for him to say. I am the guy that has to do it.

Mr. Berger: Let me go talk to him.

Mr. Weiss: No. I have to do it.

Mr. Syracuse: Mr. Client what about lawyers whose word doesn't mean anything? Does a client want to be represented by lawyers whose words are meaningless?

Mr. Horn: I am not a party to those discussions in this fact pattern. I want to win. I want to win by any means possible. I have instructed my firm as to what my expectations are. I expect those to be carried out.

Mr. Syracuse: So, that means it is your job to carry out those instructions. Now you are calling Zauderer.

Mr. Weiss: "Let me talk to him. There has been a foul up. I am going to begin by apologizing and tell you where we are and the limitations on what we can do. Horn made a deal. The deal he made was that we gave Whitehat a week or so more time to respond to our papers. That is not going to hurt us as to the quality of his papers. He says he is going on vacation, and he is most likely not going to work on it during that period. It takes a little bit of a pressure off us.

The problem is it shouldn't have been done. I agree with you it shouldn't have been done. You told us not to do it. Somehow it got done anyway. The problem is that if we renege on that deal, the first time we see the judge in this case we are going to look awful. It is going to affect us every step of the way. Whitehat will be the beneficiary. These two SOBs who quit on you are going to be the beneficiaries of our mistake."

Mr. Horn: "I am being moved to tears. So, I will agree to back off this time. But I want pounds of flesh. I will agree to a delay."

Mr. Weiss: "That is not affecting the way we are going to prosecute this case and the result we are going to try to achieve for you. We all understand this is a case, because of the arguable weakness of the contracts, which we have to settle on your terms. The way to do that is to keep the pressure on. I absolutely agree with you."

Mr. Syracuse: You listen to reason but I want to hear from Hal. Are there special circumstances or should a lawyer be permitted to go back on his verbal word in a deal like this? What are the ethical considerations?

Mr. Lieberman: Well, the ethical considerations are spelled out in Canon 7. A lawyer shall not knowingly make any false statements or misrepresentations.[4] Also, under Canon 1, a lawyer shall not engage in conduct involving dishonesty, deceit, fraud or misrepresentations.[5] If a lawyer gives his or her word the lawyer sim-

ply cannot go back on that word. The lawyer can go back to the person to whom the word was given and say, look, there is a problem, I made a mistake, I have to go back on my prior representation. Will you agree to change your mind? The lawyer can't simply unilaterally go back on his word.

Mr. Syracuse: That means Mr. Horn was gracious in terms of taking back the instruction. Had he gone the other way, then Berger would have to speak with Zauderer. Berger tells you, "Well, I have to change the deal because my client won't agree."

Mr. Zauderer: "What, we had an agreement? You are going to renege on it now?"

Mr. Syracuse: But how do you use that against him in the litigation?

Mr. Zauderer: Well, let's be clear what he is doing, he is not going to give me an extension?

Mr. Syracuse: That's right.

Mr. Zauderer: Well, the first problem I am confronted with, since he is not giving me the extension, is that I have to go to court.

Mr. Syracuse: First of all, how can you act civil to him for not giving you the extension?

Mr. Zauderer: I think at this point, I would leave him in some doubt as to what my future course is going to be in terms of dealing with me. I would express my disconsolation in what he has done, then I would cut off communication on this issue for the time being. I would go to court and make the application.

I probably would lay out for the court what had transpired. I think Mr. Berger, being the smart lawyer, knows to expect that. I think he is in a difficult situation. He has been put in a situation, and I am going to take legitimate advantage of it because I need to for my client. I need that extension, the client's interest demands it. I think I am entitled and should explain to the court not only that I need that extension, but it had been agreed to. Now, for the reasons that Jim just explored, he decided not to do it. I think it is a relevant fact a court ought to know in this litigation.

Mr. Syracuse: Judge, how do you react to that?

Judge Gershon: I grant the extension.

Mr. Syracuse: Do you do anything else? Do you sanction him?

Judge Gershon: I would certainly express my displeasure. I wouldn't reach out and sanction.

Mr. Syracuse: Steve Berger told the truth in his conversation with Mark Zauderer when he said, "Mark, I have to go back on my word." But, Mark, are there situations where a lawyer, not as ethical, perhaps, as Steve, would lie to you? And how do you handle that?

Mr. Zauderer: When I believe a lawyer has lied to me, it will permanently affect the way I deal with that lawyer. While I cannot avoid my ethical responsibilities and those honoring the principles of civility of continuing to deal with the lawyer and making accommodations just as before, I will always have in my mind I cannot believe the lawyer, and I will structure the way I deal with him in a way that I will not have to rely upon the truth of what he says. Let me comment on lawyers' relations and truth between lawyers.

There are signs that you can pick up that lawyers don't tell the truth. I had a situation many years ago with a former judge who was in private practice. This ex-judge was called in to represent a client and called me up to encourage some settlement discussions. This person said to me, "You know, I would like to explore these numbers with you on a confidential basis." I said, "Okay, if we can flesh out what that means." He said, "I can tell you if you put out a number or have this discussion with me, if I am asked, I will deny it ever happened." He was trying to encourage me to do it.

My thought as an even younger lawyer than I am now, was how can I trust this person? He has just told me he is going to engage in a lie. So we make judgments based on our dealings with people. You have at your command the tool of simply not responding or saying forthrightly, I will not discuss that. There should not be an occasion where we have to lie.

It could be that not confronting a question will give a signal to the other side that is damaging to your client. There are other ways to deal with it. Maybe don't return the call quite as promptly as you would otherwise. But you should not have to lie.

As for positive aspects, there are some lawyers—maybe you have experienced this—where the depth of trust goes very deep. I could have a situation with a lawyer I trust very highly, where we make an agreement but then we have a disagreement as to what the agreement contained. I think there would be circumstances where I would not take advantage of that disagreement even if my version of it was more plausible and where I hoped to persuade a judge. I do not feel I want to embarrass the other lawyer because I think there is an honest disagreement. I am not going to be an advocate in that situation as to what was actually agreed to. I don't feel that is sacrificing my client's interest. I think it is part of the overall picture of how I represent the client's interest aggressively but fairly, in a way that keeps my credibility with the court and also, at the highest level, with the adversary.

By the way, I would not refer to Mr. Berger as my adversary when I am before the judge. I would refer to

him as my colleague. That is so even if I am having a disagreement with him because he is my adversary. I think judges are much more open to hearing your arguments if they are not distracted directly or indirectly by accusations against the other side. Also, I don't think it is something to be embarrassed about to present a sharp dispute to the judge. It's the way in which you do it. Just as judges may say to you, sometimes I think unfairly, "Can't you work out the discovery dispute, I don't want to be bothered by it."

Sometimes you are going to have honest disagreements with your colleague or adversary on the other side. You have to be prepared to say to the judge, whatever your style is, "I am sorry we have to bother you with this" or, "We have an issue we need to present to you. We have a disagreement which requires judicial decision." Anyway, this is all under the general rubric of how we deal with our adversary. I think if there is a very high level of trust it can work to your advantage professionally without sacrificing the legitimate interests of your client.

Mr. Syracuse: Steve, do you agree with that? Aren't you hired to defeat him when you are in litigation? He is talking about some collegial approach to solving a problem; is that what litigation is about?

Mr. Berger: Somebody asked me a question that goes directly to what you're talking about. Of course I am hired to tell the story on behalf of a client as well as it can be told, but, no, I am not hired to beat my colleague.

The relation between lawyers and litigators is something that is at the heart of litigation practice. To me, when dealing with another lawyer, I always feel the judge is in the room. I want to always comport myself in a way that if I were ever called upon to defend myself with the judge, I would have absolutely no problem with it.

Second, it is critical to try and solve the problem with the lawyer on the other side. I am always reaching out to the other lawyer to try and find the common ground to solve the problem our clients can't solve themselves. You always want to go to court and say, if it is not a race to the courthouse or an injunction setting, "I'm sorry we are here. I am sorry we have to take up your time. I am sorry we couldn't solve this problem ourselves." You really have to try, at the outset of the problem, to always call the lawyer and to sit down and talk off the record the way I try to do and see if you can solve the problem. We are here to solve a problem. We are not here to make a dollar and tell a story.

Mr. Zauderer: I would just add to Steve's point, part of this is representing your clients vigorously. We talked about the tension of competing ethical demands this morning. At the same time, while the lawyers are getting along, they have to respect their differences where they can't resolve a point.

Let's take the example of the issue over the intended use of the relationship between Smith and Jones. The clients may have one perspective, that is to use that against them. Now the lawyer, maybe, will realize it may have value in the litigation, and that it may be justifiable. The judge may rule. I mean Steve made the argument it has relevance. We didn't explore it, but perhaps it is a legitimate position.

The fact it may embarrass my clients is not a reason to leave it out, nor should I expect him not to press on that point. We are advocates. If our positions are within the parameters of legitimate advocacy, it should not be wrong for us to pursue those points vigorously. But we must not resent one another for doing that. We can't continue to have trust if we are going to personalize issues. We have to know and have the ability to depersonalize these issues if we are going to continue to work together in this relationship of trust.

Mr. Syracuse: Judge Gershon, I hear Mark saying we lawyers who litigate cases are colleagues, not adversaries. Isn't the system we have, the system you preside over, an adversary system?

Judge Gershon: Well, it is an adversary system. But, I think that I would agree with the idea that more is accomplished for the clients, not just because it is more pleasant for the judge, if the lawyers develop a relationship where they can work together. That certainly helps the client.

I like Steve's point about your trying to resolve a problem. The great bulk of litigation is resolved short of trial. It is not all settlement, but the great bulk of it is settlement, and then some will be decided on motion. But it means from the very beginning there is an alternative mode of resolution that is the likely result from your litigation, whether you are the ones who start trying to get settlement discussions going or the other side attempts it. So if you think about that, you know you can't get together and sign papers on anything unless there is some degree of trust and communication, and that involves learning what the true interests of the other side are.

If you recognize that, the likelihood when you file the suit or when the suit is filed against your client is that it is going to be settled. You realize how important it is that you have those lines of communication with your colleague. That will enable issues to be resolved more cheaply and more quickly and not on the eve of trial.

Mr. Syracuse: Alan, I have heard it said that litigators are supposed to be aggressive and that clients want aggressive litigators. Do you agree with that?

Mr. Horn: I think that is generally true. But I think, in some instances, you will have clients who don't understand the principles being discussed here today and who will cross the line and go well beyond aggressiveness.

There are really two relationships. One is the relationship between the attorney and the client. The other is the attorney-to-attorney relationship. I think it is the burden of every lawyer representing the client to manage the client while performing his duty in a civil and ethical fashion vis-à-vis the other attorney in the matter.

Mr. Weiss: I think one of the things we do, if we are any good, is carefully pick our fights. It is easy from the standpoint of not having to make very difficult decisions to fight about everything there is to fight about. Sometimes we lose our welcome at the courthouse if we insist on asserting every possible position and driving for every possible advantage, including the ones that aren't particularly important. I don't think the patience of judges is inexhaustible, and their time is valuable. Judges will get just as annoyed, as we all do when people come to us constantly with the same problem or a variety of tiny little nit-picking problems that can be resolved. It may be in our interest to allow the other guy to bother the court much more than we do.

I think that is a judgment factor most litigators learn over time. They begin to see where the important issues are and how to address them without the excrescence of the unimportant ones and then let the other side punch himself out with minor ones.

Mr. Syracuse: Where do we draw the line between being aggressive and being civil? How do you accomplish both objectives?

Mr. Weiss: The Marquis of Queensbury Rules are a civil form of aggression, and the Geneva Convention is an attempt to civilize war. Those are similar to what we are doing now. One puts two fighters in a ring expecting they will try their utmost to knock each other out and impose brain damage on each other. In the process, though, we expect them not to hit each other below the belt. I think that is a reasonable thing to do.

Mr. Lieberman: I would certainly like to come back to the discussion that kind of tailed off about the lawyer-client relationship and the management of the client. From where I sat as counsel to the disciplinary committee, it was obvious the single biggest cause for complaint by clients against lawyers was lack of good communication from the outset. When things went bad in the litigation, and the case didn't get settled or resolved or the outcome wasn't what the client expected, you can expect if not a malpractice claim, certainly a complaint filed with the grievance or disciplinary committee.

It starts in the beginning with the lack of communication with the client about what to expect. I guess I take a little bit of issue with Steve's point. I understand where he is coming from. It is up to the lawyer to make all the decisions about the litigation. It is up to the client to decide on settlement.

I think that is an oversimplistic approach. I think you have to spend a lot of time and effort working at client management from the get-go. This is especially so, when you have a difficult and important client. It is really an investment that is not only economical, and from a professional standpoint important, but from the standpoint of this litigation it is a very important investment so you don't get into this situation.

You were put, Steve, into an impossible situation and you did the right thing. I don't think you made a misrepresentation when you said you gave the extension then went back on it. Basically you were put in a situation where you had to go back on your word, which is not the same thing. You didn't intend not to make the representation, but that shouldn't have come up in the first place.

There may be a communication issue between the corporate department and litigation department, but there is a broader issue of communication that needs to be addressed between the firm and the client. This is the kind of thing that can absolutely undermine the whole representation, affect the outcome of the litigation, and affect the judge's view. It all starts with that basic premise of give and take.

Mr. Berger: The conversation with the client about litigation strategy is certainly an important one. Certainly from a cost benefit analysis, how many depositions you are going to take and how much you are going to spend on the litigation is very much the client's ultimate decision. But the lawyer saying you have to do this much in order to prepare for the case influences this decision.

As it relates to the issues of aggression and as it relates to the strategic decisions in the case, I would echo what Mark said before. When you are hiring a lawyer, you are hiring that lawyer because he is experienced, has a good reputation, and has credibility with the court. There are some decisions, most of them litigation-type decisions, that are the lawyer's and not the client's.

Mr. Lieberman: But the problem is that you have the client saying to you from the get-go that we are going to pursue a scorched earth policy. I think that requires sitting down and really talking about what does that mean before you begin.

Mr. Weiss: I agree with Hal, not only about extreme situations like those postulated by today's hypothetical,

but about any litigation. One of the things we have not talked about, but is crucial in client litigation management, is the cost benefit analysis that Hal referred to. We have all had clients who come to us and said, "We expect you to be extremely aggressive. We want to make this motion, take 20 depositions, and discover five rooms full of documents. By the way, your last bill was too high." The cause of that problem is more often than not, us. We are not telling the client that we are happy to do these things for them, but it will cost a lot of money. "Maybe you want to rethink how vigorous you really want me to be in the context of how costly that is going to be to you." Otherwise, you get involved in enormous difficulties with clients telling you that you haven't been sufficiently aggressive and you have been overbilling me. Or, if you are as aggressive as I want you to be, you are charging me too much. It is a bit of a Catch-22. The way to avoid it is to be up front about it. Too many of us, because we want to keep clients and we want to expand our client's base, will say, "Yes, you're right I will do that, no problem." Then, when we present the bill, we are faced with drop-jawed astonishment over what we are charging.

Mr. Zauderer: Larry, apropos of your observations, let me ask you a real world question. You are a lawyer in a small firm with a fine reputation. Suppose a prospective client comes to your office, who is a very well heeled businessman, and he has been sued. It is a significant case that will keep you busy most of the year. It is just the thing you do well. That client has been interviewing another firm. You have been recommended. He comes in and says to you, "Mr. Weiss, you know I want to be aggressive. I have one question for you, are you a killer litigator?" What do you say?

Mr. Weiss: No, I am not a killer litigator. I am not a bomber. I don't go after people for the sheer joy of kicking them around. I pick my fights carefully. As far as my economics are concerned, my stress level will benefit from not taking a client who has that attitude and is going to require me to go through a year of extraordinarily involved, difficult, and time-consuming work days, nights, and weekends. I think I would rather forego that pleasure at this point.

Mr. Syracuse: I want to hear Steve's answer to that question. I think Larry just lost a client.

Mr. Berger: I think if somebody comes in, and it is a big piece of business and he asks you if you are a killer litigator, you say you are not a killer litigator but are a terrific litigator. What you are is an effective litigator. An effective litigator is one that has credibility, knows when and when not to enter the arena, and can prepare and tell a story as well as anybody around. If I am a client with a difficult problem, that is who I want to hire. I am not looking for a killer. I am looking for somebody who is going to get me through the problem effectively and hopefully to a very good result at the end.

Mr. Weiss: Killers are not necessarily winners. That said, there are situations where a client doesn't care about the outcome, and wants to inflict pain.

Mr. Syracuse: Judge, you have heard this discussion back and forth. Is aggressiveness persuasive in your court or in any court?

Judge Gershon: I think if you are using the word aggressiveness to mean killer, the answer is no. But, I see very effective, very properly aggressive lawyers who are totally civil and ethical. I don't think that those things need to be viewed as opposites. A lawyer very civilly, properly, and politely can say, "I'm not going to agree to something that the other side wants because it would be wrong for my client to agree."

Mr. Syracuse: How do we teach young lawyers to see that distinction between being aggressive and being civil and ethical? How do we teach young lawyers to see that difference when we who have been practicing law a long time may have difficulty seeing that distinction ourselves?

Mr. Zauderer: I think when you see a young lawyer do something you would regard as uncivil, or perhaps in a situation in which a young lawyer is looking for praise, tell the young lawyer the way you think it should have been accomplished. Explain the ethics and civility interests as well as the practical interests. I think it is a mentoring training process when you see the activity, to act.

We have been talking in this discussion about the tension between competing obligations. There are times, just as I suggested in my comments this morning, that only you can resolve them. I think there are situations in performing your duty to your client where you are going to know it is going to produce problems with the lawyer on the other side because he perceives you as acting uncivilly. You have to have the fortitude to do it. I would like to give you one example of a case that comes to mind. In a case a number of years ago, we represented the plaintiff who bought stock in a company and it was claimed that there were misrepresentations in connection with the sale. In any event, there were two or three years of very aggressive fighting by the defendants over all kinds of jurisdictional issues and other things.

Eventually, the case was dismissed, but the Court of Appeals reinstated it. Finally, three years after our attempt on behalf of the plaintiff to move forward and more attempts to block discovery, we go over to London where documents are produced. I am there with an associate. The lawyers in the U.S. have made arrangements with the client's UK counsel to make a room

available full of documents and they have two lawyers there. They said, "Okay, we have got all the documents organized by category of the request." They said, "If you would like, we will copy anything you want while you are here. If you would like copies of any particular documents, please let us know." We said, "Fine, thank you very much."

In the course of the document production we came across a memorandum. Without getting into the facts of the case, the issue was whether there were problems with the company that were not disclosed. There was a memorandum written by a man who happens to be a lawyer but from the best we can tell was retained by the company as a business consultant to investigate the problems with one of the company's lines of operations. In that memorandum this person painted a lurid picture of what had occurred and how this operation was probably underwater from day one and people knew about it. It was as close to a smoking gun as one could imagine in the case.

On the top it said, "privileged and confidential" and this person sent it to the company's chairman. Now we looked at this document, but we did not know all the facts. Number one, we did not know if it was even intended to be withheld. From what we saw and what we knew about the case, this person was hired as a business consultant. So it may have been a conscious decision was made to produce it. So then we gave that and three or four other documents, as instructed, to somebody to copy. The lawyer said, "I will be happy to," took the four documents, including that one memo, and gave us copies and we went home. We used it in connection with the litigation. Two months later, there was a motion to suppress the document on the grounds that it was privileged and was inadvertently turned over. Furthermore, our ethics were questioned for having come away with the document. As it happens, the court ruled the document was not privileged because it was clear that he had been retained as a business consultant.

I certainly would say when we took the document, after bringing to bear on the situation all the principles we knew, we believed this was appropriate. Also, it was needed. We knew that if we didn't do it, our client's interest would be prejudiced. But had we flagged the issue at that point we were persuaded, sure, the issue would not have come out that way. It would have been presented as sure, we put it in the wrong folder, and it was meant to be privileged. That would have been the end of the matter. In any event, the point of this is that I think there are times you have to make judgments that a lawyer on the other side is going to find questionable.

In another case where we were the plaintiffs, the defendants didn't want the case to come to trial. We talked about extensions of time. You know, first it was lawyer A's vacation, then it was lawyer B's vacation. Then we had to agree on a discovery schedule to get the case to trial. I said "Can we get this done in 60 days?" The other side said, "No, because we have a trial coming up. We need 120 days." I said to the lawyer, "You know what, if you need whatever it is, let's agree to it and have an understanding you are not going to ask for a further extension." So we agreed to that. We came to the end of the period, and there was an associate on the case who wanted a further extension. Am I uncivil when I say, "No, I am not going to agree to a further extension? We have to get the case to trial after two years trying to do so." Yet, it certainly was perceived as uncivil.

So I said to the associate, "I'm sorry, in my judgment what apparently happened is some lawyer in your firm wants you to work on another case now. This case has been quiet for a while. I am sorry you are going to have to work on this case as far as I am concerned. I'm sorry, it is not fair. We made an agreement. It is not appropriate to ask me to do it. Yet I am portrayed as the one being uncivil." That is the other side of this issue.

Mr. Syracuse: Judge Gershon, what do you think? What is the role of the judge in monitoring civility issues?

Judge Gershon: Well, so many of the issues that are presented through this hypothetical are issues that really, for the most part, never come to the judge. We have a very passive role. We only deal with issues that are brought to our attention. You have to keep that in mind. It is only if someone presents us with an application that these things really lead to a ruling. For example, you asked me about whether I thought it was wrong for Steve Berger to discuss the issue of relationship between Smith and Jones as part of the negotiation tactics. I made a comment about it.

Of course, I would never see it at that point. I wouldn't see it until somebody makes an application, either a motion *in limine* to withhold it or a motion to compel discovery. If I am directly supervising discovery and am meeting with counsel regularly, I may get involved in these types of issues, principally by indicating what I feel the proper standards are if an issue comes up.

In that way, I would be somewhat more active than simply ruling on a motion. What I am impressed with here is the number of lawyers who are saying I want to act as if the judge is in the room. It made me chuckle a bit because it makes the judge the true Whitehat. I think that is a very wise prophylactic thing for the lawyers if they know someone else hearing this would feel comfortable with what they are doing, then I think we are playing a good role.

I want to make one point about how we teach young lawyers. I think with the young lawyers there is a pressure, whether it is from TV or whatever, when you don't have enough confidence in yourself because you are new at the game, you may not want to show weakness. That has become very important. You have the feeling you have to be the killer litigator. I think the more seasoned lawyer plays a tremendous part in making clear to the newer lawyer that is not what it means to be aggressive. That is not what it means to be a good advocate.

I think it really depends a lot on the confidence of the lawyer. The lawyers who I have seen who have a lot of confidence in themselves and what they are going to be able to accomplish in the litigation really don't have to engage in the unpleasantness that others might feel is necessary for their success.

Mr. Syracuse: We have all encountered many different kinds of lawyers who feel that they can get away with anything because they often don't end up in your court. I would like to hear from the panel why do we think there are lawyers who feel they can get away with a lack of civility?

Mr. Zauderer: My intuition would be: because sometimes they do.

Mr. Syracuse: So what do we do about it?

Mr. Zauderer: That is the right question. My thought is to depersonalize and expect it. In other words, lower your expectations of the other lawyer. There is not that much that a lawyer can do to you through uncivil behavior. You can protect yourself. In some ways it is easier to deal with a lawyer who is uncivil than it is with a client who is uncivil. Because with clients, you want to do the most to please and to service them within the bounds of what you have to do professionally. There is often a tension there.

You have more tools to deal with the lawyer on the other side. What can a lawyer do to you? A lawyer can raise his voice or act up at a deposition. In the deposition setting, you have tools to deal with that. You have a record, you can stop the deposition or you can apply to the judge. When a lawyer talks to you uncivilly on the telephone, you can discontinue the conversation, or you can tell him we are only going to communicate in writing. There are only so many things a lawyer can do to you.

There are some difficult situations where, particularly if money is a problem, you are at an economic disadvantage in litigation and a lawyer can adversely affect you. They can file marginal motions. You do what you can in the litigation to bring this to the judge's attention, and at some point maybe the judge will be sympathetic to that.

Sometimes you have to take an aggressive action back. It is not an uncivil action, but an aggressive action back. When a lawyer repeatedly interrupts at a deposition, don't feel you have to get the deposition done. Resign yourself to the fact it will take another day. Make an application. If it goes on, ask the judge to appoint a referee. Take action on it, because you are also being tested, and because people that do this will do as much as they can get away with.

I think there are some inconveniences that can be visited upon you by an uncivil person—such as when you have an out-of-town deposition, and they want to cancel at the last moment. These can be real problems and I don't think you always have an effective remedy, because the judge does not have a feel for what is going on. So, I think that the answer, to me, is identify the problem, and use the tools at hand. Also, have a certain degree of patience and keep the white hat on.

Endnotes

1. *Greenwich Mills Co., Inc. v. Barrie House Coffee Company, Inc., et al.,* 91 A.D.2d 398, 459 N.Y.S.2d 454 (1983) (holding that restrictive nonsolicitation covenants in question were unenforceable unless it could be shown that defendants were privy to trade secrets); *See also Zellner v. Conrad*, 183 A.D.2d 250, 589 N.Y.S.2d 903 (1992) (stating that promise to refrain from competition is unreasonable and unenforceable where promise is not ancillary either to contract for sale of business or to existing employment or contract of employment).
2. *Meachum v. Outdoor World Corp.,* 171 Misc. 2d 354, 654 N.Y.S.2d 240 (1996) (holding that class counsel's conduct in assisting one representative in surreptitiously tape recording telephone conversation with defendant's supervisory employee, when counsel knew or should have known defendant was represented by or acting through its attorneys, rendered counsel unfit to proceed further); N.Y. Comp. Codes R. & Regs., Title 22, § 1200.35(a)(1).
3. Jill M. Dennis, *The Model Rules and the Search for Truth: The Origins and Applications of Model Rules 3.3(D),* 8 Geo. J. Legal Ethics 157 (1994) (discussing counsel's ethical duties in *ex parte* proceedings).
4. *In re Friedman,* 196 A.D.2d 280, 609 N.Y.S.2d 578 (1994) (stating that an attorney may be punished by the sanction of disbarment for misconduct that includes several acts of intentional dishonesty, including filing of knowingly false and misleading affidavit, giving false testimony at hearing before federal judge, and soliciting false testimony from fact witness); Code of Prof. Resp., DR 1-102(A)(4-6), DR-7-102(A)(3-6, 8), (B)(2), DR 7-106(C)(1), DR 7-109(A).
5. *In re Mazzei,* 81 N.Y.2d 568, 618 N.E.2d 123, 601 N.Y.S.2d 90 (1993); Code of Prof. Resp. DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The Choice Between Federal Court, the Commercial Division of the State Supreme Court (New York County), and Arbitration: A Report on a Survey Entitled, "Factors Affecting Choice of Forum for Commercial Litigation"

[Editor's Note: This report was approved at the November 16, 2000 meeting of the Commercial and Federal Litigation Section's Executive Committee.]

This report summarizes the results of a survey entitled "Factors Affecting Choice of Forum for Commercial Litigation" that was undertaken by the Committee on the Federal Judiciary of the Commercial and Federal Litigation Section of the New York State Bar Association.

The survey, undertaken last year, was designed both to identify factors that affected the choice of forum for commercial disputes and also to determine the views of practicing commercial litigators as to various litigation practices and procedures.

The response from practitioners was substantial. Among the highlights of the results (described in detail below) were the following:

- Far and away the most significant factor in the choice of forum was the perceived quality of the decision makers.
- The other most significant factors were speed of decision making, continuity of assignment of decision maker, and overall cost to the client.
- Respondents strongly favored early and regularly scheduled pretrial conferences and more rigorous judicial control of discovery.
- Respondents favored firm cut-off dates for discovery and the setting of trial dates early in the pretrial process.
- Respondents favored a more active judicial role in settlement in both jury and bench trial situations.
- The creation of a "rocket docket" (trial within 60-120 days from filing) was widely supported where all parties consented (with no meaningful difference among those who said they mostly represented plaintiffs and those generally representing defendants).

The Questionnaire

A questionnaire entitled "Factors Affecting Choice of Forum for Commercial Litigation" was distributed to members of the New York State Bar Association, Section on Commercial and Federal Litigation, and also to members of the New York County Lawyer's Association and members of the Association of the Bar of the City of New York.

The three forums for commercial disputes addressed by the questionnaire were: the U.S. District Court for the Southern District of New York, the Commercial Division of the Supreme Court (New York County), and arbitration.

The questionnaire contained three sections. Part I sought background information about those responding to the survey, Part II asked the respondents to consider the extent to which 16 specific factors would affect the respondent's choice of a forum for commercial litigation, and Part III asked the respondent's views on certain specific practices (e.g., judicial involvement in settlement). There was a final question which asked respondents to indicate in "essay" form changes that should be made in a forum's practices in order to make the forum more attractive for commercial litigation.

Approximately 7,480 surveys were distributed and 500 responses were received. (Not every response contained answers to every question.) Of the surveys received, 221 contained a response to the final "essay" question. The results of the survey were compiled and various cross-tabulations were prepared by the Siena Research Institute at Siena College.

Part I—Qualifying Information

This section sought various identifying characteristics of the attorneys who answered the questionnaire, e.g., years in practice; nature of practice (private, in-house or government); size of firm if in private practice; whether the attorney generally represents plaintiffs, defendant or both; and the portion of the attorney's practice that involves litigation and commercial litigation. (The answers to those questions were used by Siena to cross-tabulate the responses to the Part II and Part III questions according to these factors, e.g., years in practice, size of firm, etc.)

Based on the qualifying information, the 500 respondents, as a group, were attorneys in private practice with many years of experience (a majority have been practicing for more than 20 years). Approximately 50% of the respondents said they represented plaintiffs and defendants about equally. Of the remaining group more represented defendants regularly than plaintiffs. Much of the respondents' practices involved litigation and a substantial portion of their litigation practices involved commercial litigation.

Part II—Factors Considered in Choosing a Forum

Part II of the survey listed sixteen factors and asked respondents to rank them as "very important," "of some importance," and "of no significance" to the extent each would affect his or her preference for a forum.

The most significant factor in forum selection was "quality of decision maker." 92.7% of the respondents considered this factor to be "very important" in selecting a forum. A distant second in factors considered to be "very important" by the respondents was "speed of final determination" (50% of the respondents),[1] followed by "continuity of assignment of judicial personnel (49.2%)" and "overall cost to litigant" (45.7%).[2] The other factors and the percentage considering them to be "very important" were as follows:

- availability of discovery (40.5%)
- clarity of explanation (36.9%)
- ease of calendaring for trial and predictability of trial date (35.1%)
- accessibility of judge or arbitrator (31.8%)
- applicable rules of procedure and/or evidence (30.0%)
- pre-filing knowledge of identity of decision maker or limited group of potential decision makers (28.8%)
- limits on discovery (28.6%)
- client preference (24.3%)
- availability of informal procedures (23%)
- active role of tribunal in settling the matter (17.1%)
- right of interlocutory appeal (12.6%)
- adequacy of resources (technology, support services, etc.) (11.3%)

In the category afforded the most weight, namely, quality of personnel, respondents rated the Southern District most highly among the forums considered. The Commercial Division ranked second in this category and the arbitration process was ranked third. Arbitration was viewed as the speediest and least expensive of the forums.

On the issue of speed of determination, each of the forums was viewed as "very speedy" or "adequate" by a large majority with respect to the timeliness of actions on discovery and scheduling disputes. Each forum was viewed less favorably in the timeliness of its resolution of dispositive motions and the conduct of trials. The arbitration forum was viewed as the speediest in both of these latter respects with more than 83% of the respondents stating that its resolution of dispositive motions was "very speedy" or "satisfactory" and a similar number putting its conduct of trials in the same category. Neither the Southern District nor the Commercial Division matched these numbers, and fewer than 10% of the respondents thought that either resolution of dispositive motions or trials was "very speedy" in these forums.

As one comment from a respondent noted, however, a legitimate interest in speed should not be allowed to obscure other factors significant in choosing a forum. This is reflected both in the respondents' overwhelming selection of "judicial quality" as the key factor in forum selection and in their insistence that they preferred a detailed opinion with respect to a dispositive motion even at the cost of delay when compared with a summary order. (While 85% of the respondents preferred a quicker summary order for resolution of discovery disputes, 94% preferred a detailed opinion over a summary order for dispositive motions.)

Surprisingly, "active role of tribunal in settling the matter" was considered to be "very important" by only 17.1% of the respondents, the third lowest percentage for the 16 factors. However, in response to questions about specific practices in Part III of the survey (see below), a large majority of respondents felt that judicial involvement in settlement discussions was desirable and, in response to the final question in the survey seeking changes that should be made in a forum's practices (see below), judicial involvement in settlement was one of the most frequently mentioned changes recommended.

Part III—Specific Practices

Part III of the questionnaire asked the respondents whether certain specific practices were considered to be desirable or helpful in advancing the resolution of cases. These included: early pretrial conferences, regularly scheduled pretrial conferences, jointly prepared pretrial orders, tighter control of discovery, pre-motion conferences, preparation by a court of detailed opinions as opposed to speedier but summary decisions, judicial

involvement in settlement discussions, creation of "rocket dockets," creation of procedures to deal with delays in deciding motions, whether direct testimony (by all witnesses or expert witnesses) should be presented by sworn written statement in bench trials, and whether there should be a general rule requiring oral arguments on all motions.

Judicial involvement in the settlement process drew considerable support from the survey respondents. 88.5% of those returning the survey felt that it was "a good idea," in jury trials, for a judge or his or her designee to become involved in settlement discussions. Even where a bench trial was expected, half of the respondents (50.9%) still felt that it was a good idea for the judge to become involved in settlement discussions. And, of those respondents favoring judicial involvement in settlement discussions, a majority (55.0%) favor settlement conferences conducted by the presiding judge in a jury case or a designated settlement judge in a non-jury matter. Settlement conferences conducted by other court personnel were favored by far smaller numbers of respondents, i.e., a judge other than the presiding judge (19.3%), a magistrate judge or a judicial hearing officer (17.5%), or a mediator appointed by the court (5.9%). Finally, 69.3% of the respondents would prefer a system of mandatory settlement conferences.[3]

In addition to the specific questions addressing settlement, many of the "write-in" comments in response to the final question mentioned increased judicial involvement in settlements as a change that would render a forum more attractive for commercial litigation. (see below).

There also was strong approval by the survey respondents for certain other specific practices. Three out of four respondents were of the opinion that early pretrial conferences (77.2%), regularly scheduled pretrial conferences (75.5%), and tight judicial control of discovery (72.0%) would be helpful in advancing the resolution of cases.[4] However, the respondents were evenly divided on whether jointly prepared pretrial orders (Yes - 49.9%; No - 50.1%) and pre-motion conferences (Yes - 53.3%; No - 46.7%) would similarly be helpful. A number of the write-in comments urged the elimination or drastic restructuring of pretrial orders on the ground that they imposed great burdens without corresponding benefits.

If given a choice between detailed opinions and speedier but summary decisions, the respondents were overwhelmingly (94.0%) in favor of detailed opinions on dispositive motions and three-quarters of the respondents (74.1%) favored detailed opinions on merits issues short of final determinations. On the other hand, a large majority (84.9%) felt that speedier, but summary decisions were desirable on discovery issues.

A desire for a faster resolution of litigation is further evidenced by the fact that three-quarters of those responding to the survey favored creation of a limited "rocket docket" (e.g., trial within 60-120 days of filing) that would be available only where all parties consent (73.4%) and also the creation of a procedure to deal with complaints about delays in deciding motions (75.0%).[5]

However, whatever advantages in terms of speed might flow from the use of written direct testimony, a majority of the respondents disapproved of the general use of direct testimony by sworn written statement in bench trials—with 77.1% opposing it for all witnesses and 52.7% opposing it even if it was limited to expert witnesses.

Finally, a majority of the respondents (54.5%) also opposed a general rule requiring oral arguments on motions.

Suggestions by Respondents

The final question in the survey asked respondents to indicate changes that would render a forum more attractive for commercial litigation. The essay comments, often detailed and wide ranging, can nevertheless be grouped into several subject areas.

The largest number of write-in comments focused on the speed of the ultimate determination as a factor affecting choice of forum and, specifically, on the discovery process. One major area reflected in comments about both federal and state courts was a desire for greater judicial control over discovery. More conferences to oversee discovery, establishment of firm discovery cut-off (and trial) dates, enforcement of discovery rules, "limited" discovery, "expedited" discovery, and "more streamlined" discovery were frequent write-in suggestions. There also were repeated suggestions for greater use of magistrate judges (or their equivalent in state court) for discovery as is currently the practice in the Eastern District of New York.

There was considerable support in the written comments, as there was in response to specific questions, for greater judicial involvement and assistance in settlements, earlier and "more meaningful" settlement conferences, mandatory settlement conferences, more attempts at settlements, etc. As one respondent noted, a "more aggressive approach to settlement is needed."

A third group of comments related to judge's rules and pretrial orders. A large number of respondents urged that there be uniform rules for all judges in a particular court eliminating all individual judges' rules. Sentiment was also expressed that joint pretrial orders should be eliminated or made "less onerous." One

respondent suggested that they be limited solely to exhibit and witness lists.

There were a number of general comments urging "more judges" and "better judges," "greater understanding by judges" and "judicial understanding of pressure on lawyers." Some respondents also commented that there should be "less judicial attitude" and that "judges should have better attitude and work with lawyers."

There were a number of comments that were specific to particular forums. A large number of practitioners in the Southern District suggested increasing the number of judges dealing only with civil litigation. While far from unanimous, a majority of the lawyers addressing the issue thought that use of magistrates to supervise discovery as in the Eastern District was desirable; several thought that the parties should be able to designate some discovery issues as substantive and that judges, not magistrate judges, should deal with these issues.

With respect to the Commercial Division, one repeated sentiment was the wish to see such a division available more generally throughout the state. Requests for both greater involvement by judges in discovery disputes and resolution on an informal basis appeared regularly: a number of respondents urged that discovery disputes be submitted by telephone or in letters rather than by way of motion.

A reduction in the availability of interlocutory appeals was urged by a number of lawyers as was the setting of pretrial conferences before any Request for Judicial Intervention has been filed. An automatic forwarding of all decisions to counsel by mail was also suggested.[6] (We note that the Commercial Division has instituted a system to provide online access to dockets and decisions and such system is to be expanded to cover the New York County Supreme Court generally. This will not, however, provide affirmative notification to counsel of new decisions.)

Arbitration as a Forum for Commercial Litigation

In response to the opportunity afforded by the final survey question to suggest practices that would cause attorneys to choose arbitration as a forum for their commercial litigation, survey respondents suggested that arbitrations should be enhanced by the addition of several court-like practices. A large number of those responding to the final survey question focused on the need for more, albeit limited, discovery and increased supervision of the limited discovery currently available in arbitration. Two other frequently-mentioned changes were (i) a limited right of appeal or review, within the arbitration procedure itself, and (ii) more "reasoned" and detailed written decisions supported by law stating the grounds for and explaining the decisions made by the arbitrators. Respondents also objected to spreading arbitration hearings over several months; back-to-back sessions were suggested. Finally, a number of respondents felt that "some" rules of evidence should be applied in arbitration proceedings.

Recommendations:

While some of the most widely held opinions reflected in the survey responses (e.g., reduction of interlocutory appeals in state court) cannot be implemented by the judiciary acting alone, some changes based on these opinions can be. We list a few suggestions below.

1. Mandatory Settlement Conferences

Respondents plainly would like more aggressive involvement by judicial personnel in settlement. This is true among lawyers representing both plaintiffs and defendants. It is perhaps reflective of the depth of feeling on the subject that even in the face of obvious difficulties in judicial involvement in settlement of cases scheduled for bench trials, respondents favored such judicial participation. Whatever the merits of involvement by the presiding judge in such cases, it seems plain that some system of mandatory settlement conferences with judicial personnel warrants very serious consideration.

2. Greater Judicial Control of Discovery

Few situations are more irritating to client and counsel than an out-of-control discovery process, whether characterized by unrestrained and burdensome requests or stonewalling non-responses. While perhaps sometimes viewed by the judiciary simply as an annoying manifestation of the unprofessionalism of the contemporary bar, the problem is one that threatens the faith of clients in the judicial process and is viewed with great concern by the bar itself, as reflected in the number of comments urging greater judicial control of discovery. We suggest a greater emphasis on early deadlines set by the presiding judge, taking into account the relative complexity of the issues at stake in the specific case. Also, comments generally favored the use of informal means of discovery dispute resolution including letters and telephone calls. This makes sense to us.

Use of magistrate judges, as in the Eastern District, was also urged by many respondents. Presumably, JHOs could perform a similar function in the state courts. In our view it is important that there be adequate coordination with the presiding judge to ensure that the discovery process not become an isolated and self-contained process—i.e., not an end in itself. It should be part of overall case management.

3. Adoption of a Procedure to Deal with Delayed Dispositions of Motions

Every practicing lawyer has confronted the dilemma posed by a long-undecided motion. A decision is desired but any communication with the presiding judge urging action runs the risk (real or feared) of encouraging prompt but adverse action. 75% of the respondents favored a mechanism for dealing with delays in deciding motions. Some mechanisms are in place. Computer systems exist to track outstanding matters in both federal and state courts and permit administrative oversight of delayed dispositions. Some approaches, such as an inquiry letter signed by all parties, presumably run no great risk of incurring judicial wrath, but such letters do not always prove effective. Administrative Judge Crane suggests that if such a joint letter elicits no action after two calendar quarters, a similar letter directed to him would be in order. It is not clear if this approach has been utilized often or is well known to the bar.

Whether done through contact with the clerk's office or the chief or administrative judge, there should be a clear and publicly known means to spur prompt action without concern that the very act of communicating on this subject will adversely affect a client's interests.

4. Procedures for Communicating Decisions

Judges follow a variety of practices in notifying counsel of decisions. In the Southern District, the clerk's office mails decisions to counsels of record and a Court Watch Program provides notification of decisions rendered by some judges. No systematic procedures exist in the state court, although individual judges sometimes provide notice or even copies of decisions. Procedures are now in place to make decisions of the Commercial Division available online for counsel who check the Court's Web site and two private services do provide notice of decisions to attorneys who subscribe to the service. In addition, as noted above, it is expected that on-line access to decisions will be extended to New York County cases generally.

We urge that, notwithstanding the existence of these valuable innovations, a uniform procedure be created for affirmative dissemination of notice of a decision, whether from chambers or a central clerk's office. Whether done by telephone call, pre-addressed postcard, or e-mail message to all counsel (or to designated counsel for plaintiffs and defendants in multi-party cases), transmission of notice that a decision has been filed seems to be a worthwhile project to consider.[7]

Endnotes

1. Those practitioners generally representing only plaintiffs or both plaintiffs and defendants equally viewed "speed of final determination" as "very important" to a far greater extent than did those generally representing only defendants (60.0% (27 respondents, plaintiffs only) and 61.0% (147 respondents, both plaintiffs and defendants) as compared with 34.7% (67 respondents, defendants only)). A similar division as to the significance of speed existed based on firm size. 60% (92 respondents) of those practicing in firms of 10 or fewer lawyers thought speed to be a "very important" factor in forum selection, while only 42% (70 respondents) of those in firms of 50 or more lawyers shared this view.
2. The cost factor was considered to be "very important" by 55% (83 respondents) of those practicing in firms of 10 or fewer lawyers; 42% (67 respondents) of those in firms of 50 or more considered this factor very important.
3. More than 75% of respondents practicing 20 years or more (173 respondents) favored mandatory settlement conferences. The number dropped to 54.7% (29 respondents) for those admitted for 10 years or less.
4. 83% (43 respondents) of in-house counsel favored such tight control; 71% (272 respondents) of outside counsel shared this view.
5. A procedure to deal with complaints was favored by 90.9% of the respondents who generally represent plaintiffs (40 respondents) and 77.4% of those who generally represent both plaintiffs and defendants equally (182 respondents), as compared with 68.9% of those who generally represent defendants (126 respondents).
6. The Commercial Division Rules currently describe a procedure by which a litigant may enclose a self-addressed envelope in order to obtain a copy of a decision when rendered (Rule 5). The draft Uniform Rules of the Supreme Court, New York County, Civil Branch (Non-Commercial Division) have a similar provision (Rule 4). The Rules are precatory, however, and do not guarantee such notice will be provided.
7. We are informed that more than 37,000 decisions are rendered in the First Judicial District each year. Obviously, the notification task is no simple project, but we think such a task is nevertheless worthwhile.

Committee on the Federal Judiciary
Dean Ringel, Co-Chairman
Jay G. Safer, Co-Chairman

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Multidisciplinary Practice (MDP): Changing The Way We Practice Law

A Panel Discussion About MDP and What It Means to the Practice of Law in the Twenty-First Century

The following is a fantastic panel discussion, from the Section's annual meeting, about the pros, cons, and concerns surrounding MDP. The panelists were on both sides of the MDP issue, which made for a great discussion. The panel included Thomas O. Rice, then President of the State Bar Association and partner at Wingate, Kearny & Cullen; Claudia L. Taft, General Counsel to KPMG; Steven C. Krane, a partner at Proskauer Rose; Robert E. Brown, a partner at Fowler, Vigdor & Wilson; and Robert L. Ostertag, a partner at Ostertag & O'Leary.

Mr. Rice: In the interest of objectivity and full disclosure, it must be said that I have been identified as having some fairly strong opinions with respect to Multidisciplinary Practice, also known as MDP.

Indeed, I have had serious reservations and have spoken extensively throughout the state, across the nation, and, indeed, internationally, in opposition to the concept of MDP.

The concept of MDP is to put into a single provider the provision of multiple services that traditionally have been distinct.[1] While often working closely and cooperatively in the past, the providers of these distinct services would, in fact, be merged into a single entity. As envisioned, the major "big five" consulting firms, formerly traditional accounting firms, would be a single-entity provider, providing fully integrated services of a multiple variety. They would not simply provide auditing, accounting and tax services, but also provide a vast array of consulting services in the global context typically represented by mergers, acquisitions, and complex corporate transactions, often on a transnational, cross-border basis. MDP has evolved to the point where an expansion of that single-entity provider would include what we would recognize to be the provision of legal services.[2]

In terms of historical background, the precise antecedents or precursors to MDP are hard to determine for certain. Yet it seems clear that, initially, the first suggestion of what has now evolved into a global phenomenon began in pre-World War II Germany, took on some additional steam after World War II in Germany, but never really developed significantly until the late 1980s and early 1990s in France.[3]

The French model is perhaps the most worthy of our understanding concerning how MDP has developed. In France, there is a disparate legal practice that is, traditionally, divided among at least five practice groups, including "notaire," various forms of advocate, either at the trial court level or appellate court level, and an additional functionary referred to as "conseil juridique."[4]

The floodgates opened in the early 1990s when the "conseil juridique" and "avocat" were permitted to merge.[5] The distinctions between the two had been fairly well understood and can be fairly analogized, with varying degrees, to the solicitor/barrister distinction in the UK. Andersen, for example, had several "conseils jurdique" prior to their employ in 1992.

With the merger of the two branches of the legal profession or the variations of the legal profession in France, there was an expansion into the "notaire," who essentially represents the business community.[6] From metropolitan Paris, there was an expansion throughout the civil law jurisdictions in continental Europe.[7] We saw major acquisitions in Spain,[8] and there has also been a very significant expansion of MDP into Germany as a result of its predecessor, dating back to the early 1940s.[9]

Opposition began to develop significantly in the Netherlands with the Dutch Bar's resistance to PricewaterhouseCooper's (PWC) and Arthur Andersen's attempts at acquiring both notary practices and the services of traditional lawyers.[10] Having lost initially in the Dutch courts, Andersen and PWC took an appeal to the European Court of Justice (ECJ), which is now presently pending.

PWC, however, has announced that it is not dependent upon any determination of the ECJ's decision, and has announced formally that it will not wait. In fact, PWC has, through its Landfields UK firm, announced the acquisition of a notary practice in Holland. By July, it will be formally practicing law in Holland, irrespective of the extant losses in the Dutch courts.

The suggestion here is that there is, in fact, among the "big five," a very aggressive posture. What we need to recognize is that this is a local phenomenon carefully orchestrated and developed, first on the European continent, and from there expanded into the common law jurisdictions, including two that are quite important to us. In Australia, beginning in 1994, New South Wales, Sydney, which is the most important commercial center

in Australia, had permission to form MDPs.[11] There are a few important considerations here. First, Australia is a federal system, consciously modeled on the American system. It was not a coincidence that there was initial movement to permit MDP in the state parliament in New South Wales. This resulted in permission for expansion of the big five into the Sydney market. Second, in addition to Australia, we also have to be particularly conscious of our other common law colleague and our very most important trading partner, Canada, particularly with what has happened in Toronto.

Ernst & Young (E&Y) first successfully established what some had referred to as a captive firm in Toronto, going back about five years ago, with the formation of Donahue & Associates.[12] The structure of the relationship existing between E&Y and this reportedly unrelated associate is as follows. Donahue & Associates, as a tenant in a tower in downtown Toronto, is provided all of its administrative services and support by E&Y, and is otherwise utterly dependent upon E&Y for its referral of clients.[13] It nonetheless claims to be an independent entity, despite the belief of the Canadian regulators that, at best, the relationship that exists is dependent upon various management contracts between Donahue and E&Y that allow for escalating fees paid to the related entity. What is important about the Donahue & Associates model in Toronto is that it is not at all dissimilar to what E&Y has done in D.C.

Building upon the Canadian model, E&Y this past fall established a firm in Washington, D.C., comprised of two leading tax practitioners formerly from King & Spaulding in Atlanta and D.C.[14] Not satisfied with the Donahue situation in Toronto, however, it is important to note that E&Y has succeeded, at least temporarily, in going one step further by establishing McKee, Nelson, Ernst & Young.[15]

As has been reported in the general press, the E&Y model in D.C. is of particular interest to those of us who study the issue because they have publicly acknowledged a massive infusion of capital, reported to be at least $10 million, in the form of a supposed arm's-length negotiated loan, existence of a landlord/tenant relationship, existence of a management services agreement between E&Y and this nominally independent law firm, and the existence of a leasing services agreement whereby all the other services, including employees, are leased to this firm by Ernst & Young.[16] It is also publicly acknowledged that McKee, Nelson, Ernst & Young, while temporarily quartered in a facility separate from E&Y, will shortly be housed in the same building.

Just as PWC has announced it cannot and will not wait for the European Court of Justice in the Dutch case, E&Y will not and cannot wait for any further developments either in Toronto or in D.C. Further, it is not unlikely to expect shortly the opening in New York City of a branch of McKee, Nelson, sans the suffix "Ernst & Young." That is not insignificant inasmuch the New York rules are absolutely clear that the use of the trade name would be prohibited.[17]

The McGee, Nelson firm is unique in that their lenders and creditors had their names in the firm. When was the last time your landlord had its name in your firm? When was the last time your management consultant or employee leasing company or your equipment leasing company had its name in your firm? The question then becomes: Is that a de facto partnership? Or if not a de facto partnership, is that, then, at least arguably, a false and misleading suggestion of a relationship between this so-called independent firm and the much larger entity called "Ernst & Young"?

While we focus largely on the efforts of the "big five," it is important to recognize that the expansion and the phenomenon of MDP is not in any way limited to the accounting firms.

The ABA Commission and other proponents of variations of MDP have said that we would not countenance any kind of publicly traded model in a passive investment context so as to permit capitalization upon the practice of law by anyone other than lawyers who are the principal owners. The fact is that there are others who seek to have MDPs.

It may surprise some that the American Express Company is the sixth or seventh largest accounting firm in the United States. It may also come as a surprise that at least four of the big supermarket chains in the UK are actively planning the launch of their own-label legal services.

Clearly, we have the expectation that some business interests are seeking to expand the provision of their traditional services into the provision of legal services. As a result, the issues then presented include, fundamentally, the independence of the legal profession and the maintenance of core values including client confidences, independence of judgment, conflict-free advice, and zealous advocacy.[18]

Can these values be accommodated? And whatever the perceived goals or benefits that can exist by expansion of legal services, can they be achieved in some alternative form? These are some of the fundamental questions that we need to address and recognize.

The ABA Commission issued its report last June. It was widely treated and received with great skepticism and that skepticism has now evolved into very well-organized opposition. While the ABA Commission is expected to report again before July, it is extremely unlikely that the ABA House of Delegates will ever

endorse any concept approximating the proposal that came out of the ABA Commission.

The opposition is beginning to organize seriously so as to ensure that the position of the organized Bar will be perceived seriously as a position well-founded on intellectually sound principles, and one that can, in turn, become the basis for what we need to recognize as the ultimate resolution of this issue.[19]

Whatever position we as lawyers take will be one based on what is in the fundamental best interest of the client. It is the interest of the client, as reflected in our societal obligation as a profession, that we need to place first. It is my view that the preservation of an independent profession is the purest safeguard for the preservation of those rights and protections.

With that, we'll open up the discussion. We have four very extremely articulate and well-informed individuals who have been studying this issue.

Ms. Taft: I'd like to address some of the myths about accounting firms and attorneys. Some typical questions include, Is there really a demand out there for MDPs? Do we really need them? The answer, in my opinion, is no. There is no demand and no need for them. However, MDPs do not mean people without law degrees, and they do not mean people with law degrees who are not subject to the ethical rules that bind lawyers out there giving legal services to clients. MDPs are not about the unauthorized practice of law.

MDPs mean attorneys who hold themselves out to the public and their clients as attorneys who are bound by the ethical rules that bind attorneys, and who are attorneys that report to other attorneys working in a single firm with professionals to provide integrated services to clients. Clients believe that MDPs would be of benefit to them.

In some of the materials, Consumers Alliance for the Southeast for instance, a coalition of consumer groups and community leaders, urges the profession to recognize that people want choices; that small businesses and small business people, for example, trying to get a business up and running, need help. They need lawyers. Financial planners. Technology experts. Those people should have a choice.

The American Corporate Association supports MDPs. American Association of Retired Persons supports MDPs. There's a long, long list of people out there looking for choices, who are looking for the convenience of going to one spot for their legal services.

There was a piece in the *Wall Street Journal* a couple of months ago by a former attorney who had left the law to open a golf store and driving range business.[20] As he said, "When I went into business I needed a lawyer to help me incorporate, draft franchise agreements, and obtain trademark protection. I needed an accountant to arrange books and set up a payroll. I needed a PR adviser to help with marketing and publicity. I needed a financial planner to help me set goals. I needed an insurance broker to arrange insurance and workers' compensation."

"I didn't know people in all those fields, so many choices were hit or miss. Even when my experts were indeed expert, I wasn't able to get the benefit of their collective wisdom regarding my business because I dealt with them separately. It would have been easier and more efficient if I could have gotten all those services from one firm working as a team for my benefit."

Whether you're a global corporation or dry cleaner on the corner, you will benefit from having a team working for you. That team will provide better services, work more efficiently and more cost effectively, and have more access to a wider range of resources, if they operate as a single firm dedicated to client service. Whether you agree with MDPs or not, as attorneys, we do our clients a disservice by denying them the opportunity to make that choice.

To make MDPs happen would require some changes in rules, particularly those relating to conflicts. Those who are opposed to MDPs argue that any change would destroy the core values of the legal profession. Yet, the accounting profession shares the exact same core values as the legal profession. The legal and accounting professions are much more alike than they are different.

There are several myths that have grown up about accountants in the course of this debate. The basic myth is that we would trample all over the independent judgment of any attorneys who were allowed to practice law in any legal division that we might establish. Accounting firms are highly regulated, much more so than attorneys. You can't hold yourself out as a CPA without not only having satisfied the educational requirements, but also having practical experience. Additionally, accounting firms practically invented continuing education. There are onerous and scrupulously monitored educational requirements. We spend millions of dollars in training programs for our professionals.

We have numerous procedures in place to make sure we abide by the rules and regulations. We are ethically bound by the Code of Conduct[21] to maintain objectivity and integrity,[22] free of conflicts of interest,[23] and not to knowingly misrepresent facts or subordinate our professional judgment to others.[24] We value our reputation above all else, as do attorneys. Clients come to us not only for our expertise, but for our name. We would not do anything to injure the reputation of our

firm, nor any of the professionals, including the attorneys, that work there.

Accountants are often accused of blowing the whistle on their clients. That is another myth. Probably the first and foremost ethical obligation of the accounting profession is the obligation of confidentiality to our clients.[25] We take it seriously. Under our ethical rules, we may not disclose information we learn from our client without the client's consent.[26] We do not talk to one client about the business of another, nor do we blow the whistle on our clients to the regulators or anyone else. If we suspect a client is engaged in wrongdoing, we discuss it with the client's management. We advise the client to discuss it with their attorney, and to get it fixed. If they do not, we resign. We do not take out an ad in the *Wall Street Journal* or report to the local DA.

The only exception is a very limited one in the Private Securities Litigation Reform Act of 1995 which says, if you find evidence of illegality in performing an audit, determine that an illegal act has occurred and that it would be material, and further, if the illegality is taken to the company and it does not take appropriate remedial action, then, and only then, do we have to go to the SEC. A lawyer who found himself in a similar situation would not be in a terribly different position. He would not have an obligation to disclose, but I believe he would have an obligation to resign. The fact of that resignation can speak volumes.

Another myth is that client conflict cannot be resolved in an MDP.[27] We audit companies that are in fierce competition with each other, so we rely on our confidentiality obligations. Because rules are designed to protect individuals, we represent the purchaser and seller on different sides of a transaction, for example, assuming we have the appropriate firewalls in place. Modifying rules to ensure that the individual professional is free of conflicts rather than imputing every conflict to the entire firm, is an idea whose time has come, regardless of where you stand on the MDP debate.

It has also been widely said that *pro bono* activity will disappear. This is yet another myth, and I challenge any industry in this country to match the record of accounting firms for community service, both in terms of dollars and time. Accounting firms have always been significant contributors to their communities, and there is every reason to think that lawyers practicing law in an MDP would not only be allowed to, but would be encouraged to satisfy their *pro bono* obligations.

The biggest myth of all is the one that says we practice law. We do not. I'm not telling you we wouldn't like to, but we don't. It's not allowed. We don't do it. We do provide tax advice to clients, which some law firms do, including practice before the IRS. We do provide plenty of other services, too, and people who are trained as lawyers provide some of those. However, clients do not come to us for legal advice. We do not hold ourselves out as attorneys. We do not create any expectation that our communications are covered by the attorney-client privilege.[28] When advising our clients on tax aspects of a transaction, we direct them to consult with their attorneys to prepare legal documents and the like.

I've been talking about the myths about accounting firms, but I think there are some serious myths about law firms and attorneys as well. The first is that law is something done out of the goodness of a lawyer's heart and for the good of mankind. Surely law is an honorable profession, but it is also a business; a business which is changing. We need to recognize that and determine how best to handle that change, not pretend it isn't happening.[29]

The number one reason given why fee sharing should not be changed is the independence of professional judgment. This concept has never been invoked as much as it has in the context of MDP. If attorneys are so wedded to this, and indeed they should be, why do we permit contingency fees? Is there a bigger disincentive to independent judgment? What about hourly billings? What about mandatory minimum hours billed by associates? Independence of judgment? What about the law firm, most of whose revenue is generated from a single client? Should we perhaps have a rule that says a firm that realizes more than 50 percent of its revenue from one client has to resign because it calls into question its independent judgment? The answer is no, because lawyers, just like accountants, value something more than money, and that is their reputation. I find it extremely offensive, both as an attorney and a member of an accounting firm, to suggest that an attorney practicing law in an MDP owned by a non-attorney would be less sensitive to the need to exercise independent professional judgment.[30]

In short, I believe the legal profession needs to consider that a change is coming. The legal and accounting professions can and should work together to provide clients the choice of better, more comprehensive legal and business advice while preserving the core values of each profession which are not so very different. Thank you.

Mr. Krane: Much has been said already here today about MDPs on the pro side and con side.

I sit on the con side of the table. I do so because I am concerned that, notwithstanding all sorts of assurances that may come from the accounting firms and those other organizations that would like to make the practice of law another profit center for their organiza-

tions, there will be an inevitable and slow change in the nature of the legal profession. This change will not be a dramatic change where you'll find accounting firms and those who lead those organizations telling lawyers, "No more *pro bono*, no more confidentiality, forget about conflicts of interest." That is not going to happen. No one is suggesting that it will.

However, we would be heading toward a slow, inexorable change toward a dilution of the values that have set the American legal profession apart from other professions and from legal professions around the world.

Looking at what has happened overseas in other countries in which lawyers have played a very different role is really immaterial in determining whether U.S. lawyers, who are schooled in the American governmental system and in American traditions, should be permitted to engage in partnerships with nonlawyers. We are talking about multidisciplinary partnerships, the difference being control, the difference being a sharing of fees, and the difference being the overall structure and nature of the organization.

Right now we all work with other professionals. When the need arises for an accountant or economist or engineer, there is no problem. We can hire consultants to work with us. We have no problem hiring employees in other professions to work with us on a regular basis in order to provide integrated professional services to our clients.

We have no problem forming subsidiaries. There are a number of subsidiaries of law firms around the country that provide professional services ancillary to the practice of law to our clients. We coordinate, we associate, we do all of these things that, purportedly, clients want us to do. We do so to the extent we are permitted under our existing framework of laws and ethics rules. That is what we should continue to do. To the extent the clients want more of this, we can give them more of this. We must do it, however, without sacrificing control over the way we practice our profession.

It seems that the main arguments by the proponents, on the demand side of the balance sheet, is that clients want this because it might be cheaper. If you ask a client, "Would you like to pay less for legal services?" I think 99 out of 100 would say yes, and the other one I would like to have as my client. Ask them whether they would like to have legal services, as well as other professional services, rendered more efficiently. Again, you'll have the same 99 out of 100 saying yes; everybody wants these things.

It is for the profession itself to make the determination over the next few months or years as to whether we are going to allow ourselves to engage in this kind of business venture. In making that determination, demand alone cannot be the end of the inquiry. We have to take a look back at the unique role that the legal profession has played in American society. Unlike any other profession, lawyers have been at the forefront of every important societal change that we have had in our over 200 years of history as an independent nation.

Lawyers have been the ones to look out for the rights of the oppressed, to be there when government engages in excesses. Lawyers have been there to help protect the rights of the injured. These are things that were not always very lucrative for lawyers to do, but they did it just the same because it was important and because it was part of the nature of our profession to do these things. Right now, we have to take a look at the nature of our profession. It is not a question of independent professional judgment, but it's the independence of the profession, itself, that is at stake.

We can provide the benefits of our services and the services of other professionals by working with them, by hiring them as employees, and by forming subsidiaries without compromising our independence. This can work without risking the attorney-client privilege and our existing conflict of interest rules, which differ dramatically from those of accounting firms. We can give nonlawyers a stake in the venture, but they do not have to have the right to control the way we practice law and the way we go about continuing to fulfill our role in American society. Thank you.

Mr. Brown: I am not sure which side of the pro or con I come down on, but I think attempts by the Bar to forbid MDP are quixotic and ultimately will fail.

I agree that we have to protect the core values of the profession, and certainly our clients have to be our principal focus. Passing mention was made by Steve Krane to *pro bono* activities like civil and criminal legal services for the poor. They are a little different from service to our own clients. I think we need to protect these services also. They are some of the most important things that we have to protect.

As a Bar Association, we need to understand that we also have an obligation to our members. To the extent that, through catatonia or inability, they find themselves pressed into a circumstance where they can't make a living because of what is happening outside of their control, I think we run a very serious risk, not only of damage to those members, but also of pushing them in the direction of malpractice.

From the 1870s, when regulation of the Bar first started in earnest, until the '30s, the Bar used to admit that it had responsibilities both to its clients and to its members. The interests of our members are another of the important things that we have to protect.

Some people have said that the MDP phenomenon is "inevitable." I don't like that word, and I know Tom Rice doesn't like that word. But we dislike it for different reasons. I think it implies that this phenomenon will occur in the future; in fact it is occurring right now. There are important economic and information occurrences outside of the practice of any profession that are pushing us inevitably in the direction of more multidisciplinary practice.

The first of these is increased transactional complexity. It used to be that at a residential real estate closing, you only had to be able to multiply the number of gallons in an oil tank by 19.9 cents a gallon. That was the only real skill involved, other than getting everyone to sign the documents mandated by the bank. Now, any lawyer who did not specialize in residential real estate closings would close a home purchase at his or her peril. There are environmental concerns, RESPA issues and other things that people outside the specialized area of practice could not possibly understand.

Along with transactional complexity comes an increased need to align ourselves effectively with professionals who can supply the factual predicates for the legal conclusions that we're making. One of the things that is pushing us inexorably toward some kind of multidisciplinary practice is that we need to be able to reward those other people with profit-sharing because it helps us to attract the best.

Another thing happening to us is globalization of the economy. Here I think multidisciplinary practice needs to be compared and contrasted with its very close cousin, the multijurisdictional practice. If you have a client now that has a World Wide Web-based sales program, it may well be that you will have to advise them on sales tax and use tax consequences, as well as the business activity taxes of multiple jurisdictions because the tests for those taxes may be different jurisdiction by jurisdiction. It is the unauthorized practice for any of us to practice outside the jurisdictions in which we are admitted, but our clients demand that we do so.

The second big push toward multidisciplinary practice is the growth of consumerism. It's increasingly the case that people insist that they can shop. "Yes, we can shop. We can tell good lawyers from bad lawyers. We can tell good accountants from bad accountants. We can tell good engineers from bad engineers. You're really not in any position to tell us that we can't." It is a phenomenon that, with the increasing leveling of the availability of information that is coming to us, is going to continue strongly in the direction of allowing consumers to insist that they can make the choice whether a lawyer, an accountant, an MDP or an engineer will best serve them. They're not very interested in what the organized Bar or the CPA Society has to say about whether they ought to be making that choice.

The third big push that I see toward MDP is an increasing advance of expert systems. An expert system is a computer system that can mimic intelligent decision-making because it has enough decision trees built into it so that if you give it the right facts, it can tell you where you ought to come out, at least on a continuum.

Most of us think that what we do is far too intellectually demanding to be done by a computer. Linklatters & Alliance, a big London firm, has developed a program called Blue Flag. It's at www.BlueFlag.com if you want to look at it. You cannot do much more than look at it, however, unless you want to pay their fee, but, among other things, it analyzes transactions in 31 countries in the European common market and elsewhere. If, for example, you wish to sell securities in 20 countries, and if you are a subscriber to this program, you can put in the parameters for those securities and all the other relevant information. It will analyze the transaction that you propose and guide you down the path of compliance. It turns out that an initial subscription to the program costs £125,000, which is the cost of one search if you have a lawyer do this with their firm. For an annual maintenance fee of £40,000, you can do unlimited searches. Clients have found this fairly attractive. From what I have read about it, the law firm also finds it attractive.

New York City's Davis, Polk & Wardwell has a program that will search the advice that they have given on across-the-board financing transactions and will lead you toward a conclusion. That program is much more specifically designed to result in additional value-added service being provided by the law firm.

The Sydney, Australia firm of Blake, Dawson & Waldron has a program that will preliminarily make an analysis of your proposed advertising copy to compare it with relevant statutes and regulations relating to advertising in Australia, and will presumably lead to provision of additional value-added services from the firm once you have isolated the things that you need to look at specifically.

There is a program put out by our accounting friends who own the law firm, called "Ernie," to which you can subscribe. You can put a question to Ernie. A human will come back to you with an answer. Your answer is stripped of its identifying data, much like an IRS private letter ruling is stripped of its identifying data. It goes into a database that you are free to search. Again, it will take you down the path to the point where you can decide whether you need additional value-added services from either Ernie's owners or your local law firm. It's a very short step from these systems to a system that could do wills and trusts online.

Much of estate planning involves tax matters, and questions of whether, for example, you have a disabled relative who needs to be protected, or whether there are other special family circumstances. Consultation with an experienced professional is often important. Still, many of the decisions revolving around typical estate and trust planning are formulaic. So the question is: Why don't we, as a law firm, get together with some clever programmer and start up an offshore site (so that the bar association and attorneys general cannot get to us) and let people design wills customized for their particular state. Of course, there will be a cover sheet that shows how many signatures you need. You'll have a will, it will comport with current tax planning, and it will deal with the situation where you have a Medicaid situation or a situation with a relative who has a disability.

Now, let's imagine, further, that a clever MBA who can't find a job with a major consulting firm decides he or she is going to do this with a computer programmer, with no lawyers involved. Suppose, further, that they get one of these fancy new business systems patents that the Supreme Court is moving closer toward, and you ultimately discover yourself in a position where not only are you not getting paid to do it, but you can't even do it without paying a royalty to somebody who's not even a lawyer.

I think changes in information technology are pushing us in the direction where the skills that we have, to the extent that they have been relegated to ministerial functions, are going to mean that the MDP is going to be the practice that we're going to see for many people, not just big firms.

One of the major problems the bar has in trying to prevent or stall MDP is that nobody knows what the practice of law is; there are no definitions. If you look at the ABA report on MDP, it contains an overexpansive definition that includes everything.[31] On the other hand, I've had a member of a New York State Unauthorized Practice Committee say to me that in New York, these days, the unauthorized practice of law means showing up in court and claiming that you're a lawyer when you're not. Just about anything other than that will not get the Attorney General's attention or the attention of anybody else who could conceivably do anything about it.

So you have a distinct problem with the definition itself. One of the most fun examples of that is the January 22nd, 1999, decision of Judge Barefoot Sanders of the United States District Court in Texas about Quicken Family Lawyer. (If anybody here does his or her own tax return and you buy Quicken Deluxe, you get two CDs. One does your tax returns, which is probably unauthorized practice. The other is called Quicken Family Lawyer, and you can get little documents off that CD for powers of attorney and whatever.) Judge Sanders decided that the CD-ROM was engaged in the unauthorized practice of law in Texas, and he enjoined its sale.[32] On the 29th of June of the same year the Court of Appeals reversed his decision.[33]

The reason they reversed his decision was because ten days earlier, the Texas state legislature had overruled the decision by eliminating from the definition of the unauthorized practice of law the computer programs that had an appropriate disclaimer, you know, the stamp that says, "Check with the hapless lawyer down the street."

One very important aspect of the Quicken case is that the owner of Quicken went directly to the legislature on the issue. They decided they weren't going to fool around with the courts. I have a good friend who says the legislatures cannot be bought, but they can be rented for one term at a time. I suspect that's what happened. I would not want to impugn the integrity of the Texas legislature, but it seems plausible.

The massive economic power of many of the players in the field who are proponents of MDP, including the big five accounting firms, will also make lawyer resistance to MDP futile. The Texas Unauthorized Practice Committee has been on the forefront of trying to shut down MDP. In 1998, they decided, in a fit of hubris, that they were going to investigate Arthur Andersen and get them to stop practicing law in Texas.

Well, of course, none of the big five practice law anywhere where they're not allowed to practice law. That's what Arthur Andersen said. In addition to saying that, they also hired Weil, Gotshal & Manges, which shows they meant what they said. The Texas Bar Committee had a budget of about $60,000 to deal with this particular issue all other issues that came up in that year.

It's my understanding that the Bar Committee was outspent by an order of magnitude in their prosecution of the Arthur Andersen case. The complaint was simply dropped after about a year.

The final reason that I think we are headed for a multidisciplinary practice scenario is the desire for the liquidity of professional interests. Practicing a full range of consulting (including legal services) improves the ability to market and sell services.

There was an outfit called Centerprise where several accounting firms, including Urbach, Kahn, & Werlen in Albany, came together, redefined themselves as professional service firms, and intended to go public. The financing was to be handled by Merrill Lynch. It was $120 to $160 million. The idea is that they would sneak in under the radar screens of the "big five" and grab up all the middle-market companies in terms of the full

range of consulting services. The offering was ultimately withdrawn because it was to have gone out the first day that the UPS offering went out. According to the published reports, Merrill Lynch decided that that UPS offering made too much of an impact on the market to have the Centerprise offering be secure.

One of the things that people in the Centerprise organization will tell you is that not only would they have gotten a substantial amount of money to put into marketing, but also many of the partners in the firm would have made out quite handsomely because of the public offering and the now-public status of their firm shares.

Of course, this is what the investment bankers went through, most recently Goldman Sachs. There is an increasing interest on the part of many professionals, including some lawyers, in seeing the capitalization of their firm skyrocket because it had gone public.

So what would I suggest that the Bar ought to be doing? I think we should begin collaborating with the other professions who wish to be in multidisciplinary practices as an elective form of practice so that we can protect our core values statutorily or in terms of ethics rules. That will protect our clients' confidentiality, the freedom from conflicts, professional independence of all of the actors, and our ability to be zealous advocates.

We need to work with these professions affirmatively and proactively to figure out how we're going to continue to provide civil and criminal legal services to the poor, without which I think our system of justice is a sham. I think that we need to work with our members so that they are aware of the issues and so they can prepare themselves for the changes that are overtaking the profession now.

Mr. Rice: I take the position that if we lose the independence of our profession, society is the loser. The possibility that the legislatures are for sale or rent is a very serious issue which thinkers on both sides of the MDP issue have come to recognize.

The likelihood of Bar acquiescence is remote. With that, legislative initiative becomes a serious question. Where will the legislative initiative come from? There is an increasing likelihood that what will be sought is not individual state initiatives but, rather, federal preemption. That sets the battle for a classic confrontation between the Tenth Amendment reservation of rights, to regulate the professions as they have been, or whether the commerce clause could be deemed sufficiently elastic and expand so as to permit a national standard, not simply for the practice of law, but to create a commission on the professions yet to be defined. We need to recognize what is driving us.

PWC's 1998 revenues are generally accurately reported to be in the range of $15 billion. Ernst & Young, perhaps the most aggressive, with only 80,000 worldwide employees, as opposed to PWC's 135,000, has been reported as seeking to achieve the same level and generally is regarded as having revenues in the area of $10 billion. These enterprises are enormous.

There is no doubt that the SEC has signaled clearly that it would be very, very cautious in permitting any structure in which both auditing and legal services were attempted to be provided in a single entity. The SEC Commissioners and the Chief of Enforcement have begun to state that auditing will not be permitted in a multi-entity where legal services are also provided. Indeed, auditing is a singular cause of concern in some of the consulting structures that presently exist, e.g., Arthur Andersen CPA is a distinct entity from Andersen Worldwide Consulting, and Andersen Legal was thought to have been yet a third distinct entity under the Andersen umbrella. So we need to recognize that the SEC has signaled significantly what its attitude is likely to be.

Mr. Ostertag: The State Bar Association puts out an annual publication known as *Current Legal Issues Affecting the Profession*, and this year, *Current Legal Issues* includes a definition of MDP.

Multidisciplinary practice is defined as "more than one profession grouped in a single organization providing professional service to clients." The format that is generating current concern is the hiring of attorneys or the acquisition of law firms by major accounting houses, with the arrangement structured such that legal services are being provided to clients by a firm that is owned and controlled by professionals other than attorneys.

Multidisciplinary arrangements require relaxation of traditional ethical standards that preclude nonlawyers from practicing law or profiting from the ownership of law firms. This raises significant legal/ethical issues for attorneys. These include the extent to which an attorney can maintain professional independence in an organization controlled by nonlawyers. When nonlawyers engage in activities, conflicts of interest and preservation of client confidence are concerns. The latter can be a particular concern when lawyers and accountants are part of the same multidisciplinary firm, as the lawyer's obligation to preserve confidence may conflict with the accountant's duty to reveal client's activity in certain situations.

Multidisciplinary practice is really a misnomer. Lawyers have all practiced in multidisciplinary settings for as long as they have existed. Is there any lawyer here who has not been able to communicate and deal with other professional and nonprofessional people

when serving your clients? No. I suggest to you that that MDP really is a misnomer, because it implies a relationship of equal, or perhaps unequal, status wherein participants have a voice in the management, equal or not, of whatever the multidisciplinary firm they are operating. That's not really what the proponents of MDP are talking about.

Who are the proponents? Well, they don't come from the legal side of the establishment. They don't come from the legal profession. They come from the accounting profession. They are the "big five." They are PricewaterhouseCoopers, Arthur Andersen, Ernst & Young, KPMG, and Deloitte & Touche. They are the prime movers of multidisciplinary practice. But they are not alone.

Sears Roebuck is sitting out there waiting. So is K-Mart. So is the Allstate Insurance Company, American Express, and so are your local accountants and your local title people, and all sorts of other people sitting out there just waiting to see how this battle turns out. These accounting firms want to be able to practice law. Why? Money. Profit. Revenue. The market. That's what we've heard from this side of the table. "The bottom line, stupid," someone said. "Whose money do they want?" Yours. Mine. They want your clients and they want my clients. Money from any source they can get it. Money, money, money.

They've been heard to describe the practice of law as being something like, "management consultancy," and "just another professional service industry." "Another business line." "Just another profit center." "An add-on service." If they can't practice law themselves because they lack the education and license, they want you to do it for them. Not as the private practitioners that you are now, but rather as their agent, their operatives, their employees, and their subservients. If they have to be your partners, they'll live with that, for now. Ideally what they want is to be your owners, your superiors, with majority equity interest, and control over you. They want to reap the profits off your backs, creating another profit for themselves.

The big five are a formidable group.[34] Their efforts are worldwide. The largest law firm in France is PricewaterhouseCoopers. Look at Martindale Hubbell's listing for Germany. You'll find that PWC is listed as lawyers in virtually every major city in Germany, and actually throughout Europe.

The "big five" have a legal presence big-time in England, in Wales, in Australia, and elsewhere. Currently, they are working on Canada and, of course, the big prize, the United States. The "big five" are recruiting aggressively at the nation's law schools.[35] They are raiding our nation's leading law firms.[36] They are already employing thousands of lawyers in this country, certainly not to practice accounting. You don't hire licensed lawyers to practice accounting.

KPMG employs 775 lawyers in this country. Ernst & Young, 900. Deloitte & Touche, 910. Pricewaterhouse-Coopers, 1500 lawyers. They are employing, in this country, larger numbers than Skadden, Arps.[37]

Arthur Andersen employs 2,700 lawyers in countries worldwide. Arthur Andersen's legal service arm, Andersen Legal, reported revenues for the fiscal year ending last August at $480 million, 30 percent higher than the previous year.[38]

Here in the United States, the "big five's" so-called legal service divisions would rank in size with our major law firms as No. 1, No. 2, No. 7, No. 8, and No. 13 in the numbers of lawyers they employ. The New York Lawyers Diary, 1999 edition, included KPMG as a law firm here in New York on page 1212. Deloitte & Touche is listed as a law firm here in New York, on page 1005. They're holding themselves out as law firms, despite our unlawful practice statutes and ethical rules of professional responsibility. They are not, however, in the year 2000 edition, which is pretty interesting.

The ABA Commission on Multidisciplinary Practice has determined that the large numbers of attorneys working for the big five and others are misrepresenting what they do,[39] because they're practicing law. These attorneys are practicing in a setting not permitted by the various codes of professional responsibility. They are representing not their clients, but their employers' clients, and that's not permissible in most situations.[40] Moreover, the employers and lawyers themselves are probably violating statutes by permitting others to practice law in violation of statutes and codes of responsibility, and they are daring us to do something about it.[41]

Lawyers have certain core values. First is independence.[42] Independence in representing our clients, free of responsibility to anyone else, such as an employer, with an agenda that is inconsistent with that of our client's. Second, we have an obligation to maintain the confidences and secrets of our clients.[43] And third, we have the obligation to maintain complete loyalty and fidelity to our clients, and to no one else.[44] Lawyers can be found mentioned in the United States Constitution. The Supreme Court has described us as fiduciaries.[45]

Accountants have a completely different set of core values. They do recognize the need for independence, but their independence is from their clients, not toward their clients.[46] In the 1984 case, *United States v. Arthur Young*,[47] the Supreme Court referred to accountants as the public's watchdog.[48] The accountants have an obligation not to maintain the confidences and secrets of their clients, but rather to inform.[49] They have a public responsibility that transcends any employment relation-

ship with the client. Their obligation of fidelity is to the public trust.[50] The Supreme Court held:

> A lawyer's independence is his or her responsibility and ability to provide advice and service to his or her client that is uninhibited by any relationship with others. . . . The CPA's independence is independence from his client and in favor of the client's creditors, shareholders, and investing public. This public watch dog function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.[51]

How can lawyers possibly conform their core values to those? They speak of Chinese walls. They have tried that in England and it has been less than successful. They talk about having set up separate entities in England, which brought less than acceptable results. One recent survey in England disclosed that after five years of accounting/lawyering experience, 85 percent of corporate financial officers were hostile to MDP and only three percent favored it.[52] Complaints included the lack of lawyer independence, the inability to obtain objective legal advice, conflicts of interest that Chinese walls don't protect against, lack of synergy between lawyers and accountants, and high fees charged by accountants for consulting work.

With less and less success in buying up large law firms in the London area, the accountants there are now seeking to absorb smaller practices. Satchel Paige had an old saying. "Never look behind you. Someone may be gaining on you." For those of you in small firm practices, you'd better not look behind you, someone is gaining on you.

The "big five" are trying, even here in America, to create legal entities and divisions, "firms" they call them, supposedly independent from the accounting firms that finance them or otherwise hold out attractive financial incentives.

They're introducing various models. For example, Ernst & Young has funded the creation of a new law firm, with a name you've heard already in the context of independence of lawyers. The name of the firm is McKee, Nelson, Ernst & Young.

Suppose there is a young lawyer working for one of the big five accounting firms. His nonlawyer supervisor walks into the office and says, "Mr. Lawyer, we have a client for whom we're doing a merger with another company out on the coast, with which we also have an interest, incidentally." "But we're doing a merger for them. We're handling that for them, and we need some legal component to that. I want you to take this file, look at it, study it, do whatever research you have to do, get the client in, and talk to the client. This is where we want to go."

The attorney looks at the file, gets the client in several times, and finally goes back to his supervisor and says, "Mr. Supervisor, I've spoken to the client, and what you tell me you want to do here and what the firm wants to do here is not what the client wants to do necessarily, and it's not in the client's interest."

"Oh? But Mr. Lawyer, I told you, we want to go in that direction."

"Well, that's all right, Mr. Supervisor, except that the client, you know, it's not in the client's interest to go there."

"Well, Mr. Lawyer, we're going there. And if you can't do that for us, then we'll have to get somebody in here who can. So what do you think about that?"

Well, the lawyer in this case happens to be a reasonably young lawyer. And he has one or two children in college, with the expenses attendant upon that, and he has to look upon his future employment and whether or not it is going to continue.

What is the lawyer to do? I'm not going to tell you what he did. But the supervisor said to him, "If you can't play with the team, tell me now and we have to get somebody who will." And the Supervisor also says to him: "And incidentally, Mr. Lawyer, give me your file."

So much for confidentiality. So much for the other core values.

About a year-and-a-half ago the ABA Committee on MDP was formed.[53] It took much testimony. It collected materials and information. It vacillated a number of times, and then, inexplicably, recommended that lawyers be permitted to form partnerships with nonlawyers, to enter into MDP-type relationships with nonlawyers.[54] This would allow lawyers to share fees with nonlawyers whether or not the primary purpose of the MDP is to provide legal services and whether or not lawyers or nonlawyers hold the majority equity interests.[55]

Why did the Commission fold? Obviously, it saw those thousands of lawyers out there already working for the "big five," misrepresenting what they do. They said lawyers have been overwhelmed by this problem, and had better surrender while they can exercise some control over those thousands of bad lawyers. The problem is that no one is enforcing the UPL statutes, and who is enforcing the codes of professional responsibility against those lawyers?

The Commission also recommended in the case of MDPs controlled by nonlawyers, the MDPs must certify annually that they, meaning the entire MDP firm, lawyers, nonlawyers, and all its employees, have observed and abided by the Lawyers' Code of Professional Responsibility.[56] Once again, the problem becomes who is to monitor such enforcement? The Commission responded that it is the courts in the various states that are going to have to monitor this.[57] It is not as if the courts do not have enough to do; they now have to monitor MDP firms.

Soon after the Commission rendered its recommendations, the American Institute of CPAs dropped off its response in the form of a resolution.[58] The resolution said, in effect, "Thanks, Commission, for taking on this subject, but your recommendation is not exactly what we had in mind for you." They want us, as lawyers, to compromise our core values to meet their financial needs. The New York State Bar Association resoundingly turned thumbs down on the Commission's recommendation.[59] And when the ABA met in August, their House of Delegates voted it down three to one.[60]

Chairman Simmons sought to postpone the vote, realizing he had no meaningful support. The House, instead, voted that there should be no change in our Codes of Professional Responsibility unless and until sufficient evidence demonstrates a public need. The Commission has continued its work. One would have thought a change of mind might be forthcoming; however, they are sticking to their guns with explanations and justifications and requests for help, and they want input from the profession. If the Commission's ultimate recommendation is consistent with its original recommendations, they are certainly going to be voted down again.

This vote is not going to stop the "big five." While the ABA fiddles with the issue, the "big five" say that their clients are clamoring for one-stop shopping. With all the resources they have at their disposal, one would have thought that when the ABA Commission asked them for some hard evidence of that, the big five would have produced it. But the "big five" admitted that they had no evidence, only saying that having to deal with attorneys who are not in-house is inconvenient for their clients.

There may be some inconvenience, having to go to two places instead of one, but if lawyer independence has to be given up for the sake of convenience, I doubt that clients are going to want to do that. The inconvenience factor really applies to the accountants and not to their clients. It is inconvenient for an accounting firm to have to deal with independent lawyers who represent clients who tell them that what's in their client's interest is not necessarily what the accounting firms want them to do or where they want them to go. That is what is very inconvenient.

It is not likely that the accountants will reserve and implement unto themselves attorney codes of responsibility. They don't have any interest in that. The courts will not have any real interest in auditing the nonlawyer-controlled MDPs either. It would be very difficult to convince our Chief Judge, our Office of Court Administration, and even harder to convince any Chief Judge in the United States.

The SEC has put the ABA Commission on notice that it will not countenance any arrangement wherein organizations provide both auditing and consulting services to an entity required to file with the SEC.[61]

For those attorneys who are solo or small-firm practitioners, look at what has happened to your neighborhood bookstore at the hands of Barnes & Noble and Borders, and your local drug store at the hands of major pharmaceuticals, and your local hardware store at the hands of Home Depot. If there is a community bank, Chase Manhattan and others are sure to buy it up. Family farms are going the way of conglomerates. So will the small law firms at the hands of accounting firms. They are sitting on the sidelines just waiting, and it all has to do with money. That's the bottom line. MDPs are not in the public interest at all. They are only in the monetary interest of the "big five" and others like them. If clients are made to understand what's at stake, maybe they will be supportive of us. They do want objective advice from lawyers. They do want their secrets and confidences protected. They do want your complete loyalty and fidelity.

What about *pro bono*? In New York we provide $300 million worth of totally volunteer free legal service directly to the poor each and every year.[62] That amount doesn't include the multiples more attorneys provide to churches, hospitals, schools and local governments and all the other charities that we provide it to. It seems unlikely that the accounting firms are going to be interested in providing free legal service to the poor or to our constituency. Indigent persons do not need the services of an accountant; accountancy and indigency are like oil and water.

Attorneys must start seeking enforcement of the unlawful practice statutes. They have to start educating their own people about what's going on around them. Lawyers must start enforcing the codes of professional responsibility with regard to those people out there practicing law when they shouldn't be, and misrepresenting what they do.

Mr. Rice: One of the issues that seems to have been skirted about is the whole question of demand and whether there should be an issue of demand.

The U.S. Chamber of Commerce conducted a poll in October of 1999, which was released in January. Interestingly, since that time they have appeared to have backed down substantially from the results. The press release from the U.S. Chamber of Commerce stated "the announcement of a poll that shows 70 percent of Americans favor changing legal professional rules to allow lawyers and other professionals such as accountants, financial planners, to work together in the same firm." The press release goes on in great detail to laud the wonderful inevitability, and the benefits. Interestingly, however, what was curiously omitted from the press release were the two questions posed to these 1,013 poll respondents. The people who were polled over the telephone were asked which of these two opposing views were closer to their own:

> Choice No. 1: "Some people think rules prohibiting the joining of lawyers and accountants and other professionals should be changed to allow lawyers and other professionals to work together in the same firm. They argue if a range of financial and legal services were provided by the same firm, it would be convenient for consumers and reduce cost."
>
> Choice No. 2 "Some people think these rules should not be changed because partnering of lawyers with other nonlegal professionals would lower the quality of legal services."

Curiously, the second choice makes no reference to conflicts of interest, preservation of client confidence, independent judgment, or zealous advocacy. Rather, it asks one to choose between what will be more convenient and less costly, or whether it will reduce the undefined and ambiguous nature of legal services. It is hardly evidence of a serious, objective survey, and proof, if not of nothing, at least of the disingenuousness of the pollster. We need to avoid getting involved with this kind of deception and speak more accurately of what it is that we have been unable to effectively articulate in the past. We have a unique role that needs to be preserved, and it's the independence of that profession that is in society's best interest.

Endnotes

1. *See* Ward Bowers, *The Case for MDPs: Should Multidisciplinary Practices Be Banned Or Embraced?*, 25 No. 5 Law Prac. Mgmt 61, 61 (1999) ("Technically, an MDP is an organization owned wholly or partly by nonlawyers that provides legal services directly to the public through owner or employee lawyers. In practice, MDPs include otherwise independent law firms owned only by lawyers that practice in close cooperation with professional service firms owned exclusively or partly by nonlawyers, usually under contract."). *See also* Dianne Molvig, *Multidisciplinary Practices: Service Package Of The Future?*, 72 Wis. Law 10, 11 (1999) ("A multidisciplinary practice (MDP), in its true form, is a partnership owned by lawyers and professionals from other disciplines who work together to solve client problems.").
2. *See* Mary Smith Judd, *Accounting Firms Are Gobbling Up Law Firms Abroad,* Florida Bar News, March 15, 1999, at 16 ("MDPs got their start in post-World War II Germany, where lawyers and law firms were restricted to practice in single cities but lawyers and tax accountants were allowed to practice together.").
3. *Id.* ("In recent years, MDPs have spread throughout western Europe. Arthur Andersen and Deloitte & Touche bought law firms in France, and in 1997 Arthur Andersen acquired the largest law firm in Spain."). *See also* Stuart A. Hoberman, *Defining Multidisciplinary Practices*, 8 N.J. Law.: Wkly. Newspaper 827, April 19, 1999 ("MDPs have been functioning in Europe and other parts of the world since the end of World War II, and initially consisted of lawyers and tax accountants.").
4. A "notaire" gives advice on and documents real and personal property transfers. Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct By U.S. And Foreign Lawyers*, 32 Vand. J. Transnat'l L. 1117, 1117 (1999). A "conseil juridique" counsels clients on business transactions. *Id.* For a detailed discussion on different types of French attorneys and legal advisers *see* Phillippe Fouchard, *The Judiciary In Contemporary Society: France*, 25 Case W. Res. J. Int'l L. 221, 232-37 (1993).
5. Vincent R. Brotski, *European Community Law And The EC Lawyer's Right To Practice In France After The Enactment Of Loi No. 90-1259,* 25 Case W. Res. J. Int'l. L. 333, 333 (1993) (Loi. No. 90-1259, adopted by the French legislature, "merged the profession of avocat (attorney) with the profession of conseil juridique. Prior to the change, avocats were qualified to appear in civil and criminal courts, and could give advice in non-litigious matters, whereas conseils juridiques of any nationality were only permitted to give advice in non-litigious matters and in most instances could not appear in court.").
6. Conseils juridiques counsel the business community, while notaires advise on and document real and personal property transfers. *See supra,* note 4.
7. *See supra*, note 1.
8. *Id.*
9. *Id.*
10. *See* Siobhan Roth, *Bar Going Nowhere Fast on MDPS*, Legal Times, Feb. 21, 2000 (Andersen and PricewaterhouseCoopers challenge Dutch bar's prohibition against MDPs by bringing appeal with the European Court of Justice).
11. The relevant legislation in New South Wales, the Legal Profession Act 1987, was amended with effect from 1 July 1994 to make multidisciplinary partnerships (MDPs) possible, at least in theory, for the first time. Florida Bar News, at 16. ("In New South Wales, Australia, legislation allowed accounting firms to have law practices so long as 51 percent of the practice is owned by lawyers."). *See also* Rocco Camarere, *Invasion Of The MDPs: Your Livelihood At Risk?*, 8 N.J. Law.: Wkly. Newspaper 1125, 1125 (1999) (stating that "only Australia has regulated multidisciplinary practices. Ethics rules there require the partnership to remain under the control of lawyers."); Ronald A. Landen, *The Prospects of the Accountant-Lawyer Multidisciplinary Partnership in English-Speaking Countries*, 13 Emory Int'l. L. Rev. 763, 817 (MDPs require 51% of the owners to be lawyers) (hereinafter "Landen").
12. Ernst & Young established an affiliation with Donahue in 1996. *See Demarcation Dispute*, The Accountant, Jan. 1, 1999 at 8.
13. *But see* Angela Wissman, *Big Five Slow To Exploit Canadian Breach*, Ill. Legal Times, March 1999, at 1 (stating that "While Donahue & Partners is member of Ernst & Young International, it operates as an independent law firm, taking some clients from

sources other than Ernst & Young. . . . Lawyers manage the firm and the firm doesn't share fees with Ernst & Young.").

14. Stephen Gandel, *Unlawful Entry? E&Y Backs Legal Practice; Attaches Name To D.C. Firm; Some Say Pairing Is Improper,* Crain's N.Y. Bus., Nov. 29, 1999, at 10 (Noting that E&Y was able to establish this firm due to the fact that "[u]nlike the rest of the country, the District of Columbia allows non-fee sharing parties to attached their names to law firms.).
15. *Id.* McKee Nelson Ernst & Young currently has 11 lawyers; the firm plans to expand to 50 lawyers by the end of 2000. However, in order to avoid conflicts of interest, the firm doesn't plan to offer legal services to E&Y's audit clients.
16. *Id.*
17. N. Y. Code of Professional Responsibility DR 2-102(b) (stating, in relevant part, that "A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firms.").
18. *See generally supra*, note 1; *see also Multidisciplinary Practice: Is it the Wave of the Future, Or Only A Ripple?*, 66 Def. Couns. J. 460 (1999) (listing 14 arguments against permitting MDPs).
19. See ABA's Commission on Multidisciplinary Practice Report (visited April 2, 2000).
20. Michael Paul, *Manager's Journal: Law Firms Shouldn't Be for Lawyers Only*, Wall Street Journal, Aug. 9, 1999, at A18.
21. See AICPA Code of Professional Conduct (hereinafter "AICPA Code").
22. *See generally* AICPA Code.
23. AICPA Code, Rule 102-2.
24. AICPA Code, Rule 102-1.
25. AICPA Code, Rule 301.
26. *Id*. (stating that "a member in public practice shall not disclose any confidential client information without the specific consent of the client"). *See also* Landen, *supra,* note 11, at 771 (stating that at least 20 states in the United States have some form of recognized accountant-client privilege).
27. *See* Landen, *supra*, note 11, at 771 (citing *A Glimpse of Our Future: Lawyer Accountants, and Management Consultants?*, J.Mgmt. Consulting, at 69-70 (1998) (stating, "Lawyers argue that accounting firms should not practice law because accountants owe duties to their clients that conflict with the client obligations of lawyers. . . . Big 6 firms are so large that there is a high possibility that the interests of one client would conflict with the interests of another.")).
28. *See* Landen, *supra* note 11, at 771 (stating that each profession continues to have its own admission requirements, and penalties may be assessed against anyone falsely purporting to be a member of either profession).
29. *See* Richard E. Mikels and Mark I. Davies, *Straight and Narrow: Multidisciplinary Practices: Ethical Concerns or Economic Concerns*, 1999 ABI Jnl. LEXIS 103 (1999) (hereinafter "Davies") (citing Commission, Background Paper on Multidisciplinary Practice: Issues and Developments, (1999) (stating that the prohibition against MDPs is rooted in the perception that it prevents a layperson from exercising undue influence over the independence of a lawyer in the representation of a client in attempt to subordinate the protection of clients to the pursuit of profit)). *See also* Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook On The Model Rules Of Professional Conduct 470-471 (1985) (explaining lawyer-nonlawyer law partnerships potentially create problems of unauthorized practice of law and interference with lawyers' professional judgment).
30. *But see* Davies, *supra* note 29, at 7 (stating that a non-lawyer owning a law firm may be more influenced by bottom-line financial considerations and that this may lead to a deterioration in the level of legal service being provided to clients). *See also* Landen, *supra*, note 11, at 779 (stating that another argument against a state allowing an ALMDP is the fear that it may further distort the line between the legal profession and other professions and result in poor provision of legal services).
31. *See also,* ABA Journal, 85 A.B.A.J. 84 (Oct. 1999); ABA Journal, 86 A.B.A. J. 10 (Feb. 2000); *but see* ABA, 25 Legal Economics 61 (July 1999).
32. *See generally Unauthorized Practice Of Law Committee v. Parsons Technology, Inc. d/b/a Quicken Family Lawyer*, No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813 (N.D. Tex. Jan. 22, 1999).
33. *Unauthorized Practice Of Law Committee v. Parsons Technology, Inc. d/b/a Quicken Family Lawyer*, 179 F.3d 956 (5th Cir. 1999).
34. Thomas E. Dwyer Jr., *Multidisciplinary Practice: Where are we? Where are we going?* 43 Boston B. J. 2 (1999) (largest law firms in Europe are now some of the big five accounting firms) (hereinafter "Dwyer"); John A. Bailey, Jr., *President's Message: Changes,* 42 Advocate 4 (1999) (they have enjoyed so much success that the big five are now reported to be the largest law firms in Europe).
35. Richard Pena, *Presidents Opinion: Where Do We Go From Here,* 62 Tex. B. J. 328, 330 (1999) (accounting firms are vigorously recruiting lawyers beginning in the law schools).
36. *Id.* (accounting firms employ an overwhelming number of attorneys in the United States, constituting four out of the top five employers of lawyers worldwide).
37. http://www.ljx.com/newswire/stories/chart/accountants.html (lists the number of attorneys employed by the big five firms).
38. http://www.ljx.com/newswire/stories/chart/chart.html (Arthur Andersen claims to have $225 million in revenues annually).
39. Roberta S. Karmel and Robert H. Mundheim, *Professional Responsibility and Conflicts of Interest*, 1154 PLI/Corp 423, 453 (1999) (attorneys should not represent to the public generally or to a client specifically that the services the lawyer provides are not legal ones if those same services would constitute a practice of law if provided by an attorney in a law firm).
40. A.B.A. Model Rules of Professional Conduct 5.4 (rules a practicing attorney must follow in relation to an association with a non-lawyer).
41. Dwyer, *supra*, note 34, at 2 (a union of lawyer and non-lawyer providing services to one client will trample the attorney/client privilege, infringe on an attorney's independent judgment, result in conflicts of interest, and elevate profit over a client's best interests); John A. Bailey, Jr., *President's Message: Changes,* 42 Advocate 4 (1999) (accountant has a duty to disclose in an audit yet an attorney in the same firm must maintain full confidentiality).
42. A.B.A. Model Rules of Professional Conduct 5.4 (lawyer may not practice in a corporation or association where a non-lawyer has an interest, is a director or officer, or has any control over the lawyer); M. Peter Moser, *Rethinking Lawyer Professional Regulation: The Argument for Change*, 9 Sum. Experience 4, 6 (1999) (main focus of the lawyer ethics rules is on preserving the exercise of a lawyer's independent professional judgment in representing a client); *see also* Robert R. Keatinge, *Multi-disciplinary Recommendation: An Analysis*, 28 Colo. Law 45 (1999) (core values of an attorney include professional independence of judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interest).
43. *Multidisciplinary Practice: Is it the Wave of the Future, or Only a Ripple*, 66 Def. Couns. J. 460, 466 (1999) (duties of a lawyer to maintain confidentiality of a client's affairs may conflict with

that of an auditor leading to an actual obligation to disclose information without the client's consent).

44. *Id.* (MDPs could lead to increased risks of conflicts of interest with blurred lines of loyalty).

45. *Lowe v. Securities and Exchange Commission,* 472 U.S. 181, 229 (1985) (Court imposed on investment advisors the same fiduciary duty as a lawyer to a client); *see also Ohralik v. Ohio State Bar Association,* 346 U.S. 447, 469 (1978) (Court stated an attorney has a fiduciary duty to fully disclose facts to his client that may affect his representation).

46. Tim Hopkins, *American Bar Association Annual Meeting: Looking Toward The New Millennium,* 41 Advocate 10 (1998) (all lawyers in the United States are governed by strict rules regarding conflict of interest, including rules of imputed knowledge that accounting firms do not recognize).

47. *United States v. Arthur Young,* 465 U.S. 805 (1984).

48. *Id.* at 817 (accountant serves a function as a public watchdog with complete allegiance to the public trust).

49. *Id.* at 819 (independent auditors' obligation to serve the public interest assures the integrity of the securities market without the need for work-product immunity).

50. *Id.* at 817.

51. *Id.* at 817-18 (differences between an attorney's and an accountant's independence related to their client).

52. Bill Brooks, *Multidisciplinary Practice Task Force to be Formed,* 43 Res Gestae 21 (1999) (complaints basically revolve around who will control the hiring of lawyers, general counsel or chief financial officers since it would differ depending on the type of firm).

53. Roberta S. Karmel and Robert H. Mundheim, *Professional Responsibility and Conflicts of Interest,* 1154 PLI/Corp 423, 449 (1999) (a study of the Commission on Multidisciplinary Practice was undertaken at the direction of ABA President Philip S. Anderson in August 1998 to determine what changes, if any, should be made to the ABA Model Rules of Professional Conduct with respect to the delivery of legal services by professional services firms).

54. *Id. at* 450 (MDP will be permitted to provide legal services if it complies with safeguards); *see also* Dwyer, *supra*, note 34, at 2 (so long as safeguards are in place, lawyers can deliver legal services to clients of MDPs).

55. Dwyer, *supra*, note 34, at 18 (recommended allowing fee sharing between lawyers and non-lawyers).

56. *Id.* (apply ethical rules to all professionals in MDPs, lawyers and non-lawyers alike, subjecting them to regulation in the industry in which they practice).

57. John A. Bailey, Jr., *President's Message: Changes*, 42 Advocate 4, 5 (1999) (commission's recommendation boils down to self-reporting and self-regulation by the MDP, with an "administrative audit" by each state Supreme Court to assure that the MDP has established procedures that implement the Rules of Professional Conduct); *Multidisciplinary Practice: Is it the Wave of the Future, or Only a Ripple*, 66 Def. Couns. J. 460, 462 (1999) (conditions requiring an MDP to submit to the authority of the states highest court for an audit of professional conduct where legal services are being rendered as part of the MDP) (hereinafter "*Multidisciplinary Practice*).

58. *Multidisciplinary Practice, supra*, note 57, at 463-64 (American Institute of CPA's response opposed any regulation of MDPs by the state's highest court); *Roundtable Discussion on Multidisciplinary Practice,* 37 Hous. Law. 9, 13-14 (1999) (AICPA applauded the ABA for its forward-looking position, however it opposed the ABA's position on regulation of MDPs).

59. *Multidisciplinary Practice, supra,* note 57, at 461 (New York supported the Florida Bar Association's resolution to table the proposed amendment to the Model Code of Professional Responsibility).

60. *Id.* at 466 (ABA adopted Florida Bar Association resolution which made no change, amendment, or addition to the Model Rules of Professional Conduct); Cliff Collins, *The ABC's of MDP: How Multidisciplinary Practice Could Reshape the Practice of Law*, 60 Or. St. B. Bull. 17, 17 (1999) (proposal to make changes to Model Rules of Professional Conduct was tabled by a 3 to 1 vote of the ABA's House of Delegates).

61. Bill Brooks, *Multidisciplinary Practice Task Force to be Formed,* 43 Res Gestae 21, 21 (1999) (SEC is very concerned and will play a key role in how the MDP develops by closely monitoring the issue).

62. Thomas O. Rice, *President's Message: Justice for All,* 72 N.Y. St. B. J. 5, 6 (2000) (pro bono work by attorneys in 1999 was an estimated $300 million).

[Editor's Note: On June 24, 2000, subsequent to this panel discussion, the New York State Bar Association's House of Delegates adopted a resolution recommending the revision of the New York Disciplinary Code to permit MDPs in certain circumstances. The text of that resolution can be found on the NYSBA Web site at www.nysba.org/media/newsreleases2000/mdpresolution.htm.]

Effective Oral Arguments and Appellate Advocacy

This discussion highlights effective methods to be used at oral arguments and in appellate advocacy. The talk was given by two very accomplished practitioners and former members of the judiciary. The panel included Judge John J. Gibbons, currently a practitioner at Gibbons, Del Deo, Dolan, Griffinger & Vecchione and formerly Chief Judge of the United States Court of Appeals for the Third Circuit; and Judge George C. Pratt, former Judge of the Second Circuit and member of the Judicial Conference's Standing Committee on Rules of Practice and Procedure.

The Honorable John Gibbons: Today we discuss what you need to know to make an effective oral argument and to write a persuasive appellate brief.

For successful appellate practice, you have to start even before the brief, at the trial level. You cannot get so wrapped up in the trial that you fail to preserve issues on appeal. You cannot let getting along with the trial judge or appearing nice to the jury deprive your client of appellate issues. You have to make objections to evidence. You have to make the directed verdict motion at the end of the plaintiff's case and at the end of the entire case, because compliance with Rule 50(a) and (b)[1] is mandatory. And you have to object to jury instructions pursuant to Rule 51[2] or there will be nothing to appeal.

The most embarrassing question during oral argument often is: Where was that issue preserved in the trial court? And if you can't put your finger immediately on an appendix reference, you know you're going to be in trouble.

As to brief writing, the chief admonition is to be selective in picking subjects to discuss. A brief with ten brief points in 30 pages is not likely to be either useful or persuasive to an appellate court. Selectivity means careful thought about why an appellate court ought to rule in your client's favor. That usually requires emphasis on some policy reason favoring your client. Clutter in the brief will simply distract the judges and their law clerks from thinking about the policy reasons that may favor your side. Think in terms of an opinion in your client's favor. What would an appellate judge want to write about in your case? If you start with that frame of mind, you are likely to come up with a persuasive product.

What is the difference between oral advocacy and brief writing at the appellate level? The main difference to keep in mind is that the average reader can absorb information in printed form about ten times faster than he can absorb information by listening. That is very important to keep in mind in the pyramidal structure of the federal courts, because as you get toward the top of the pyramid, each judge has a lot more information to absorb. The district judge sitting at a trial is concentrating on one thing at a time, whereas the appellate judges in a typical panel will receive a set of 40 briefs.

That time restraint means that for your oral presentation, you must be even more selective. A trial court may be willing to hear two hours of argument on a summary judgment motion or a Rule 12(b)(6)[3] motion to avoid a ten-week trial, but the incentives on appeal are entirely different. The appellate judge has to get through the 40 sets of briefs and decide those 40 cases before the next set of briefs arrives in his chambers.

Now, a word about securing oral argument. The Federal Rule of Appellate Procedure 34(a)(1) says, "Any party may file, or a court may require, by local rule, a statement explaining why oral arguments should or need be permitted."[4] The Second Circuit has a local rule that says, "Oral argument will be allowed in all cases except those in which a panel of three judges, after examination of the briefs and records, shall be of the unanimous view that oral argument is not needed for one of the following reasons,"[5] and then the local rule parallels Rule 34(a): "the appeal is frivolous, the dispositive issues or set of issues have been recently authoritatively decided, or facts and legal arguments are adequately presented in the briefs or record and the decisional process would not be significantly aided by oral argument."[6]

Here in the Second Circuit, of course, as the local rule indicates, the presumption is that you are going to get oral argument.

That is not true in all circuits, by any means. If you have an appeal elsewhere, you have to check their local rule be sure that you are not required to request oral argument and give at least a letter or an insertion in the brief as to why oral argument should be granted.

Should counsel ever suggest that there be no oral argument? Rule 34(a)(1) permits you to do so[7] but, in my judgment, an appellant should never waive oral argument. An appellee, perhaps, but probably not.

The key point is the distinction between the purpose of brief writing and the purpose of oral argument. A brief should tell the Court how it can write an opinion in your client's favor if it is disposed to do so. The oral argument, on the other hand, is to enlist at least two judges who are so disposed.

Oral argument is an exercise not in legal reasoning, but an exercise in applied psychology. Does it affect the

outcome? Judge Aldisert, my former colleague who wrote a book that I recommend highly, *Winning on Appeal*,[8] always said, "You can't win an appeal with an oral argument, but you can lose it." Of course, what he meant was that you may, if not adequately prepared, expose a weakness in your case that you managed to conceal in the brief.

Most appellate judges who have written about oral argument say that important though it is, it is, by necessity, limited in time. And you might wonder why judges sometimes ask for argument even when both counsel are not enthusiastic about it. One reason, of course, is a matter of internal advocacy. The judge sitting on the panel may be interested in using the oral argument to direct questions at one or both panel members through counsel. There may be some internal dynamics in the court, and you have to be able to be sensitive to that and use it to your advantage.

Let's assume that we all agree that you should ask for oral argument. How do you prepare? First rule: Do not depend on a prepared text.

In the Supreme Court of the United States the rule is explicit. Rule 28 says, "The court looks with disfavor on any oral argument read from a prepared text."[9] Federal Rule of Appellate Procedure 34(c) says, "Counsel must not read at length from briefs, records, or authorities."[10] It is the universal attitude of appellate judges, state and federal, that an appellate argument read from a prepared text risks putting them to sleep.

Should you use an appellate specialist? The lawyer who tried the case should have the greatest knowledge of the record, and knowledge of the record is a key to successful appellate advocacy. However, sometimes it's hard for a lawyer who tried the case to give up preconceptions about the strengths and weaknesses of the case, and sometimes it's quite appropriate to bring in someone to take a fresh look, even though that will involve additional expense to the client.

Whether the original lawyer or an appellate specialist is chosen, there is a need for a thorough knowledge of the record on appeal. A common mistake in appellate advocacy is to forget what the record on appeal is and to refer to things that the Court simply can't take into account. Rule 10(a) of the Appellate Rule says, "The following items constitute the record on appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket prepared by the district clerk."[11] That is all there is, and that is all the Court of Appeals can refer to, except, for example, where you want to refer to a brief which is not part of the record on appeal to make the point that an issue was raised in the trial court.

If there is an appendix, and usually there is, the advocate must be able to pick up a volume and turn to a page in response to a question, like "Where was that objection made?" or "Where does the record reflect that a directed verdict motion was made?" For that purpose, the person who is arguing the appeal should, with his or her set of appendices, put Post-Its at the key places to avoid wasting time looking for a reference in response to a question that you should have anticipated.

The most common error is to ignore the scope of review. If you did not make a directed verdict motion, maybe you have a new trial argument. But you certainly do not have an argument for outright reversal.

What should you prepare? Again, I emphasize selectivity because of the time restrictions. In the United States Supreme Court you only have 30 minutes. In the Ninth Circuit, you also have 30 minutes. They are the only courts in the federal system where you have 30 minutes, unless the panel is being generous. In the Second Circuit, the local rule is ten to 15 minutes.

How do you prepare notes for an appellate argument? I recommend that you have two sets of pieces. On one, write a precise opening statement: "My name is, and I represent, and I will address issues one, three, and five in our brief, unless the Court wants to hear argument on something else." On the second, prepare a precise closing statement setting forth the precise relief that you want in light of the scope of review. The lamest way to end an argument is to just run out of time and sit down without telling the appellate court what judgment ought to be entered. That closing piece ought to be on an index card, perhaps, so you can use it as your last sentence. Aside from that, you have to rely on an outline or notes, and they should refer to the key or sympathetic facts, with appendix references to the specific legal issues.

You should prepare yourself for questions from the Court by asking, "What do I want the Court to hold? What rule of law should the Court adopt in reaching that holding? Would any other rule support the same result? How will my rule work in actual practice? What are the competing policy reasons in favor of or against my rule? Is the panel free to adopt my rule, or would the Court have to go en banc, or would we have to go to the Supreme Court? Was the legal issue preserved in the record, and if so, where? What weak points can I safely concede without doing my client real harm?"

Once you know the panel, you should check on the background of the judges. See what you can learn about their predilections and idiosyncrasies, and look for prior opinions that may somehow bear on your appeal. It is good psychology to refer to a judge's prior opinion, if it favors you. At that point, you are ready to select what factual and legal issues to focus on in your ten or 15 minutes.

You should prepare two outlines: The ten- or 15-minute outline, and a short-form argument for use in case the Court uses up your time with questions, as will happen in perhaps two out of three cases.

Should you go through a rehearsal? A moot court? In my opinion, that is required in every federal appeal worth pursuing. It is necessary, first of all, for a realistic assessment of time. It is necessary that you do it in a fairly large room so that you get used to projecting your voice for the Court to hear you. If possible, you should videotape it and go through the embarrassing exercise of watching yourself and seeing all your terrible mannerisms, facial or otherwise, and all the infelicitous expressions, such as "uh" or "like" that slip into your presentation. Furthermore, you need to have someone else develop questions and interrupt you, just as the judges will almost always do. And ideally, you should have someone give the appellee's argument, if you're appellant; and vice-versa.

As to the actual presentation of argument, I suggest you visit the courtroom in advance to get familiar with the environment. It helps to know where to sit and whether or not there is amplification. In the Court of Appeals there is recording, so you have to keep yourself within sort of the cone of the microphone.

You also have to get familiar with the timer. In the Court of Appeals, it's a light device. Some other appellate courts are less formal, or at least less mechanical.

In your address to the Court, you have to think about voice projection. A lot of the judges are up there in years and are too vain to wear hearing aids, so you have to remember to speak up.

Since you are engaged in an exercise in applied psychology, you have to maintain eye contact. The worst thing about a written presentation is that you never get to make eye contact. You are trying to persuade two out of three, at least, that they want to go to the conference as your advocate. You have to concentrate on creating a psychic bond with the Court. One good way to do that is, in responding to questions, to use the judge's name. It is usually up there on the podium. If not, you should try to personalize your argument as much as possible. Your attitude should be respectful but not obsequious. You are engaged in a respectful intellectual exercise in the pursuit of a common subject, and the Court does not demand obsequiousness, though it has all the cards and you certainly must be duly respectful.

In making reference to your client, since, as I say, this is applied psychology, you have to personalize the reference. Do not use "appellant" or "appellee." Do not use "plaintiff" or "defendant." Use your client's name. To the extent that you can, symbolically have him up there beside you with your arm around him because you are sincere that you want a good outcome for this decent person. That is the attitude that you want the judges to take to the conference, where the client's cause is going to live or die.

On the other hand, an appellate argument is not a jury argument. First of all, you do not have the time. Secondly, many appellate judges are turned off by emotional appeals to sympathy. You are walking a tight line there.

I am frequently asked: "Is there any role for humor in an appellate argument?" If it is spontaneous, something just comes to your mind and it will add a moment of levity, there is no great harm. But the only jokers in an appellate courtroom are the judges. Be very careful if you resort to humor.

As to appearances and mannerisms, first of all, your attire should indicate the seriousness of the occasion. You should not show up in blue jeans and a sport coat. For a female advocate, no distracting décolletage. When the judges go into chambers after your argument, you want them talking about your client, not you.

How do you handle the inattentive bench? Sometimes you will encounter the judges who will be talking among themselves. It may be a good thing. They may be talking about how to decide the case in your favor. But sometimes they may be talking about the next case. If all three judges appear to be passing notes or talking and not paying attention, judicious use of silence may be appropriate. A momentary pause frequently will bring the courts back to paying attention. But whatever you do, do not appear irritated. If one judge is paying attention, even though the other two are talking, talk directly to him or to her, because that judge may be your advocate in the conference.

Look for clues as to who your friend is on the court. A question addressed to you may, in fact, be addressed through you to some other member of the panel, and you should be looking for signals like that and be prepared to make the argument that will reinforce that judge's position in the conference.

Sometimes a judge will serve you up a home run question which, of course, you should have anticipated. And if you get such an opportunity—I've seen it any number of times—pause, look at the judge as if he's just had the most brilliant idea that's come down in ages, and then give your carefully rehearsed answer.

With respect to the appellee's argument, if a judge or court, during the appellant's argument, seems to be leaning your way, it is a good idea to start with what that judge said as a way of introducing your argument. If the appellant has scored some points and you think you can answer them, no matter what you thought about the order of the argument, start with those,

because you may be interrupted and never get a chance to the respond to the strong points.

The Honorable George C. Pratt: First, the first rule of advocacy is to not annoy the mind you are trying to persuade. This has lots of themes running through what I'm allowed to say.

Second, I ask you to show some empathy for the judges and their problems. They have a pipeline of cases that flow through. Their job is to handle these cases and to hopefully decide all of them correctly, although half the people who come before them always think they've decided it wrong, but that's all right. The judges have no interest in the outcome of any particular case. They are simply looking to find a proper way and, generally, the easiest way to handle this particular appeal. They are looking for decisive issues to focus in on.

By way of background, with respect to how things work in the Second Circuit, I think there are three key facts that drive the dynamics of the Second Circuit. First, a local rule read by Judge Gibbons states that there will be an oral argument in every case. The rule of thumb that we operated under when I was there, and as I understand they still do, is, *pro se* prisoners do not get oral argument but everyone else does, unless it is affirmatively waived.

Second, the decision in the vast majority of cases, for all practical purposes, is made in the post-argument conference, before the judges go to lunch. So your case is going to be decided within, literally, minutes of the time that you complete your oral argument.

Third, judges in this court are scattered all over the Circuit. If the decision is made immediately, you've got a hot court. The judges are prepared. They get the cases fully briefed four to five weeks in advance of the argument. Every judge does his or her own preparation on the case.

Their styles in doing it are different. Some judges will do all of their own preparation. Others will read all of the briefs, or read as much of the appendices as they feel is necessary. Some judges turn to their law clerks for bench memos on particular issues, perhaps on entire cases, using those bench memos to supplement their own work. But when they come onto the bench for oral argument, they know the cases. They have had no communication amongst each other about the cases. They do not exchange memos. They do not have preargument conferences. Oh, occasionally a word may be passed in the robing room before you go on the bench: "Hey, how about that third case on the calendar today? Have you ever seen such a crazy argument?" But that is unusual.

Usually there is no advance discussion amongst the judges. So three individuals have separately prepared themselves to hear the oral argument. Needless to say, they know that within a relatively few minutes they're going to do the most important thing they do as judges: Vote. They have a tentative view as to the disposition of particular issues in cases and as to the general outcome.

When the arguments for the morning are finished, they go into the robing room, take off their robes, sit down, and begin to discuss the cases one by one, and they take a tentative vote. Granted, in a rare case, a judge may say, "I'm not prepared to vote," in which case it will be deferred. But the judge recognizes that if he or she is not prepared to vote, in a sense, it is a let down to his or her colleagues. So, they are prepared to vote. And the pressure is to try to dispose of the cases, at least tentatively, right there. In the vast majority of cases, that tentative vote becomes the final disposition of the case. Cases are disposed of either by summary order or by formal opinion, sometimes a signed opinion, sometimes a *per curiam*.

Summary orders are reserved for those cases where there is no jurisprudential reason for writing an opinion, and it requires the agreement of all three judges. "This case isn't worth our time to write an opinion on. It has particular issues of law that are a well-traveled path. These facts fit into it very nicely. Get rid of it."

Two-thirds of the cases in the Second Circuit are disposed of by summary order. This reflects poorly on attorneys. Why are you bringing such cases to the court if there's no real problem in the case that attracts the attention of the judges? I don't want to get into that.

The summary orders are traditionally prepared by the presiding judge, although in some cases a presiding judge is overworked and may ask one of the other judges to help with it. However, a typical pattern is to prepare a summary order in advance of the argument. The presiding judge keeps them in a folder, and during the conference, the following takes place, "Okay. Case No. 1, so and so. Does anybody have a problem with this case?" There will be a little bit of discussion. Everybody is agreed. It's got to be affirmed. "Is there any reason to write an opinion, or can we do this by summary order?" "Oh, by summary order."

"Good. Here's the order." It's done maybe 20 minutes after you've finished your argument. Those judges who think about it may hold the orders until the end of the week so they do not get filed until the following week. But there are occasions when orders have been filed in the clerk's office affirming all the cases for the day, and those were filed by 12:30 in the afternoon. Is that an unfair disposition of the cases? No. The cases got the proper consideration, and that's the way they came out.

If there's going to be an opinion written, the question becomes whether it should be a *per curiam* or signed opinion. *Per curiams* are generally reserved for those situations where there is a single issue that needs to be explained. The reason for writing an opinion is to create some new law or a new application of the law. If it is a more complicated situation, it will be a signed opinion. Frequently, *per curiams* are prepared by the presiding judge, but not always. The assignment of opinions to particular judges is usually, as I understand it, a matter of consensus.

Depending on what the opinions are, sometimes you may wait until the end of the discussion to see how many opinions are going to have to be written and who wants to do them. Somebody will speak up, "I'd really like to write on this one," or "I don't want to write on this one," and it's generally worked out. In theory, the presiding judge has the clout to say, "Okay. You write this one and you write that one." But there's too much collegiality in this court for any presiding judge to try to throw his or her weight around in that manner.

There are consequences of having an oral argument in every case. One consequence, obviously, is that argument time is short. As indicated, it's ten to 15 minutes per side. Parties may get more time in a complicated case. You also may get more time as the argument develops. You can't depend on the fact that you're going to be through in ten minutes. It is very much in the control of the presiding judge. For instance, in my experience with Judge Meskill, he took the assigned amount of time very seriously, and when that red light went on for the appellant, the first time the appellant's attorney took a breath, he would say, "Counsel, your time is up. If you'd like to use some of your rebuttal time, you may at this point, or you may conclude at this point." Other judges, if there's an active discussion, may let it go. But typically, ten or 15 minutes is what you're going to be stuck with.

Because the argument is short, it is consumed largely by questions. You are not going to get a chance to make a speech. Judges use the oral argument to clear up any uncertainties they may have about the case as a result of their preparation. Also, as Judge Gibbons has pointed out, sometimes they use the device of oral argument to convince their colleagues on a point. If you know a particular issue is going to come up in conference, either from past conferences or discussions on the point, you may want to have counsel develop an argument rather than having you do it, particularly if you think you're going to have a "fight" over the thing. I use the term "fight" in quotes, because while the arguments in conference can get rather active at times, they do not generate ill feelings. Overall, I think oral arguments, from the judge's viewpoint, tend to put the finishing touches on the judge's thinking about the case.

The main conclusion you ought to draw from everything I've said up to now is that the major load on appeal is carried by the brief. The briefs are the centerpiece of the appeal. The judges and clerks study them for hours, not like the 20-or-so-minute oral argument. The brief should include every element that is essential to your success on appeal. This particularly gets into "Don't annoy the mind you're trying to persuade." The brief and appendix are tools for the appellate judge to find the decisive issues in the case and make up his mind as to how those issues ought to be decided. The rules spell out what parts the brief must have and the order in which they must be presented. If the judge wants to know what the question presented is, he knows to turn to a certain page.

Two important things that are now required in the rules are: one, summary of the argument; and two, a statement with respect to every issue as to what the standard of review is. If they are left out, it is a minor annoyance to the mind you are trying to persuade.

In the brief, you are trying to give an accurate analysis of each of the issues that you are presenting. Your arguments should be supported by correct citations to the record for every fact that you rely on, and, of course, correct citations to statutes and the cases. Another thing you should keep in mind as a possibility with respect to briefs is an addendum. It is permitted by the rules and does not count toward the length of the brief.

It is critical to give the judge the tools necessary to fully analyze the case. The judges spend most of their time not at Foley Square, but at chambers or at home. They don't have the libraries there that are available at Foley Square. If you're dealing with a case that involves a regulation, a rule of some agency, a local ordinance, or regulations of a local planning board, these things are not available in the remote locations. Everything necessary for you to win the case should be in that appendix.

Panels in the Circuit are made up six months in advance. The clerk puts together a group of cases for each panel and sends them to the presiding judge. The presiding judge approves the makeup of the work for the sitting, assigns the times for argument, and notifies the clerk of what they are. Once the calendar is approved, it is sent to the judges and they start to prepare for the next sitting. Up to the point that the calendar gets approved, things are very flexible. But once that calendar is approved, it is like an instant freeze. Can you get a change? An adjournment? In a very rare case. But you'd better have both your parents die and your child in the hospital, and even then, probably not. The brief is the key to the whole appeal. You may just have to do without the argument. It is so complex to get the panel together that has prepared this case that a

change just can't be made. The same panel may never again sit in history.

I understand orders on all motions today are signed by the clerk. When I was there, some motions were signed by the clerk, some were signed by a judge, and some were signed by three judges. There are three types of motions. Some of the simpler procedural kinds of motions are handled by the clerk's office. Others are one-judge motions. More dispositive and critical motions are three-judge motions.

Up until the time a case is calendared, one-judge motions are sent to the applications judge. Every week a judge is assigned as an applications judge, and his job is to field these things. When the case gets calendared, it then gets sent to the presiding judge of the panel. If it's a three-judge motion, it will be assigned to the panel that is sitting on the Tuesday that the motion is returnable. If the case hasn't been calendared and is an emergency motion, it will go that way anyway. Otherwise, it may come up through the merits panel. However the motions are decided, they're all signed by the clerk.

Argued motions, bail applications, stays, sometimes a motion to dismiss, and mandamus petitions are frequently argued on Tuesdays. The judges are assisted by the memos given to them by the motions clerk. Virtually all motions are decided from the bench, sometimes while they are being argued. Very often the presiding judge will say, "Counsel, we don't need to hear any more. We're going to deny the motion," or "Grant the motion."

To sum up, I think the key to understanding the dynamics of Second Circuit operations lies in the following three critical facts. One, you get oral argument in every case. Two, the decision is made immediately after the arguments. And three, the judges are scattered all over the lot and don't have access to all the resources that they would have if they were in Foley Square. Thank you very much.

QUESTIONS:

Speaker: This question relates to video conferencing or oral argument by video which the Second Circuit now allows. I myself have found that as we got into the oral argument, all of the judges on the panel and I were so engaged in the issues in the case that there was no sense of disconnect or distance as a result of the television camera. But I wondered, is there yet any reaction from either present judges who have participated, or judges who have served in the past and who have perhaps heard from other judges presently sitting? Do the judges react as well to a video argument as they might, perhaps, to an in-person argument?

Ms. Milton: I can say what I have heard from both the judges who have participated in the video arguments as well as the members of the Bar, that when everything is working well, it is almost like being there.

But, I think if you polled all of the 13 active judges of the court, I'm sure we'd have 13 different opinions as to each judge's individual view. From our perspective, when it works, it's a great system. I think it saves you time and your client's time and money. We have worked very hard, and the court has invested a tremendous amount of financial resources into making the system as state-of-the-art as we can. I can only hope, as technology progresses in the coming years, that we'll be able to make it even better and refine it even more.

The Honorable Pierre N. Leval: I'd like to add a word to what Ms. Milton was saying. It's a terrific system. It works very, very well.

I'd like to point out to those of you who are going to use it one little quirk that can be helpful to you in your argument. There is one difficulty with respect to the system: it is difficult for the judge to interrupt and ask a question. When a judge tries to ask a question, sometimes the remote advocate does not hear and does not stop to allow the judge to ask the question; it is difficult and frustrating. What I often try to do is wave, make an extreme motion, to try to have the advocate see me, if not hear me, so he'll let me ask my question. I would urge you, if you're using that system, to be watching the image of the judges so you can see if they are trying to ask a question. And if you see the judge trying, you should stop and let the question be asked, and the voices will flow in the opposite direction. Other than that little glitch, I think it's a terrific system, and there's no reason to be hesitant to use it.

The Honorable John M. Walker: I think the system works very well. I don't find any real distinction between using video conferencing and regular oral argument. Like counsel, I quickly become absorbed in the issues.

The Honorable George C. Pratt: There's one distinct advantage, from the attorney's point of view, over being in the courtroom, in terms of watching the judges. If an attorney has a question from the judge on the left wing, he generally doesn't have the foggiest notion about what's going on the right wing. But with the video, he can see all three in front of him at the same time.

One related point to that is, for eye contact, it isn't there, literally. But you've got to remember you're talking into a camera lens. Actors get used to this, I guess, but it's not easy for attorneys. It's something to remember. If you watch the video monitors, from the judge's perspective, you're never looking at them. Whether this affects, subconsciously, the whole eye contact theory, I

am not sure. I have not been up on the bench on the recipient side of it. But, I would be worried about that.

Ms. Milton: One other note on the video conferencing that I would suggest to anyone using it, is to remember that you'll be standing at a podium and there will be a microphone. Just as you would at 40 Foley Square, please remember to speak into the microphone. The one thing I have heard back from the judges is that sometimes counsel drifts in and out. It's not that the line is going down. It's that counsel is moving out of that cone of audibility with respect to the microphone.

So just like Judge Gibbons suggested, if you have a video conference argument from a remote site, just as you would for any courtroom, get there a few minutes early. Check in with the clerk's office in the remote courthouse. Identify yourself. Make sure the microphone is the right height for you. Look at the camera lens and accustom yourself. It only takes a few minutes, and I think it will make you more comfortable. I think it will certainly add to the quality of your advocacy, to the judges' ability to hear you, and help them become absorbed in the issues you're discussing, as opposed to the little technological glitches that the judges have noted.

Speaker: Judge Pratt, when you were sitting on the court, you expressed a very strong point of view about footnotes and briefs; namely, you told us not to write them, and if we did, you wouldn't read them. I'm wondering if your point of view is the same today. I'd also be curious to know what Judge Gibbons' thoughts are on that subject.

The Honorable George C. Pratt: I detest footnotes and always have. I used to circulate a memo amongst my colleagues every year on April Fool's Day giving the footnoting averages of each of the judges and awarding for the least number of footnotes, the longest, the worst footnote, and whatever. The effect, over the 13 years I was on the court, was to reduce the average number of footnotes per opinion from somewhere around nine to somewhere below four. From my reading of advance sheets and so forth, it appears that academics coming onto the court have allowed the court to go to hell on footnotes. As an attorney writing a brief now and then, I sometimes say, "Gee. There can't be a reason for the footnote." And I put the rigid test to it. If it is important, put it in the text; if it is not, leave it out.

The Honorable John Gibbons: There are occasions where a footnote is appropriate. But in the typical brief, if there are more than two footnotes, you are apt to be including material that you did not need and will not persuade anybody. I think I, as an opinion-writer, erred on the side of too many footnotes.

Endnotes

1. Fed. R. Civ. P. 50(a), (b).
2. Fed. R. Civ. P. 51.
3. Fed. R. Civ. P. 12(b)(1) (motion to dismiss for lack of subject matter jurisdiction).
4. Fed. R. Civ. P. 34(a)(1).
5. 2d Cir. R. 34(d)(1).
6. Fed. R. Civ. P. 34(a); 2d Cir. R. 34(a).
7. Fed. R. Civ. P. 34(a) ("Oral argument will be allowed unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.").
8. Hon. Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (Nat'l Inst. Trial Advocacy's Practical Guide Series, 1996).
9. Sup. Ct. R. 28.
10. Fed. R. App. P. 34(c).
11. Fed. R. App. P. 10(a).

Case Comment: *Lunney v. Prodigy Services Co.*

By Natasha Filipovic

I. Introduction

Worldwide, millions of individuals, educational institutions, and business entities currently subscribe to the Internet.[1] Most use the Internet for legitimate purposes, whether for communication, entertainment, education, or commerce. Occasionally, however, malfeasants fraudulently obtain an account with an Internet Service Provider (ISP) under another individual's name, without the latter's consent. When a wrongdoer sends threatening or obscene messages under someone else's name to e-mail inboxes or electronic bulletin boards managed or owned by an ISP, is the ISP liable for defamation to the innocent third party whose identity was misappropriated? Furthermore, is the ISP negligent by allowing an unknown party to open an account without verifying their bona fides? Legal precedent on torts arising within the context of Internet use has been sparse. Despite the rapid rise of Internet popularity over the past ten years, only a few cases nationwide have provided any concrete guidance on the issue of ISP liability. In New York, only two cases, *Cubby v. CompuServe*,[2] and *Stratton Oakmont v. Prodigy*,[3] have examined similar issues, though they resulted in opposite conclusions. Recently, however, in the first opinion on this issue by a state court of last resort, the New York Court of Appeals decided the case of *Lunney v. Prodigy Services Co.*[4]

In *Lunney*, a unanimous court[5] granted ISPs a common-law qualified privilege[6] in defamation suits that had previously been available to other communication conduits, such as telephone and telegraph companies.[7] In addition, the court absolved ISPs from negligence, thus obviating the need for them to institute an elaborate and costly system for conducting detailed background checks of all applicants who wish to open an Internet account.[8]

This comment asserts that the Court of Appeals correctly decided this case by limiting the liability of ISPs. The outcome of *Lunney* is correct for three reasons. First, it comports with most prior holdings of significant cases on this issue from other jurisdictions. Second, the outcome in *Lunney*, though decided under New York law, is consistent with the provisions of the Federal Communications Decency Act of 1996 (CDA).[9] Third, public policy considerations, including those elucidated by the CDA, are well-served by limiting an ISP's exposure to liability. Though this comment lauds the outcome reached by the Court of Appeals, it is nonetheless concerned by the narrow applicability of *Lunney.* The decision makes clear that it is limited to situations occurring prior to the enactment of the CDA. This results in a considerable amount of uncertainty for owners and operators of Internet service providers. The court, citing its reluctance to render advisory opinions, declined to comment on the outcome of the case under the CDA. Though this consideration is understandable, excessive caution in an area of law left largely uncharted can only create more opportunity for litigation. This commentator therefore urges future Court of Appeals decisions to clarify the impact of *Lunney* under the provisions of the CDA.

II. *Lunney v. Prodigy Services Co.*

In December 1999, the Court of Appeals decided the case of *Lunney v. Prodigy Services Co*.[10] The Court held that (1) an ISP is not a "publisher" for defamation purposes, (2) an ISP is protected by qualified privilege from liability in defamation actions, and (3) an ISP is not liable for negligence where it failed to prevent an impostor, using plaintiff's name, from opening accounts he then used to send profane, threatening e-mail messages and post vulgar messages to an electronic bulletin board.[11]

The events giving rise to the case began in 1994, when several accounts were opened with Prodigy Services Co. ("Prodigy"), an ISP, by an unknown third party using the name of Alexander Lunney, a 15-year-old boy scout. The impostor sent a lewd and threatening message to a local scoutmaster in Lunney's name.[12] The local police, contacted by the scoutmaster, subsequently confronted Lunney, who denied he was the author of the message. The police accepted Lunney's denial and his claim of innocence.[13]

On September 4, 1994, a Prodigy representative wrote to Lunney, informing him that his account had been suspended due to "transmission of 'abusive, obscene, and sexually explicit material.'"[14] Lunney responded to Prodigy by letter, explaining that he had never subscribed to Prodigy's service and that anyone who had opened an account in his name had done so fraudulently. Prodigy then apologized to Lunney, and informed him that four other accounts had also been opened in his name, but had been closed within two days after they were opened.[15] During the course of this exchange in correspondence, a Prodigy employee memorialized the results of the Prodigy investigation in an electronic bookkeeping record.[16] The memo stated, *inter alia,* that "Alex Lunney . . . is a non-pay disconnect subscriber 143 days delinquent." The plaintiff claimed

that this record was posted on Prodigy's network "for months after this action was commenced."[17]

The plaintiff filed suit seeking to hold Prodigy liable for messages sent by the impostor and for the posting of the investigatory memo on Prodigy's network. The suit was based on three theories: (1) libel, (2) negligence, and (3) harassment/intentional infliction of emotional distress. Prodigy filed three motions for summary judgment, all of which were denied by the Supreme Court. On a consolidated appeal resulting from the denial of the second and third motions, the Appellate Division reversed and granted summary judgment to Prodigy, holding that (i) the messages were not "of and concerning" Lunney and thus did not defame him, (ii) the stigma associated with the messages did not amount to defamation, and (iii) Prodigy was not the publisher of the messages and, even if it were, it was entitled to qualified privilege sheltering it from liability.[18] Lunney was granted leave to appeal.[19]

The Court of Appeals held that Prodigy was not liable for either defamation or negligence. The court stated that, for defamation purposes, an ISP is not a publisher where it transmits messages authored by third parties to e-mail inboxes or electronic bulletin boards. It arrived at this conclusion by likening ISPs to a telephone company; its role in transmitting electronic messages is similar to that of a telephone company, "which one neither wants nor expects to superintend the content of its subscribers' conversations. . . . In this respect, an ISP, like a telephone company, is merely a conduit."[20]

In coming to this conclusion, the Court drew a distinction between e-mail messages and posts to electronic bulletin boards.[21] The Court noted that "[t]he public would not be well served by compelling an ISP to examine and screen millions of e-mail communications, on pain of liability for defamation."[22] However, although the court found that Prodigy was not a publisher of the electronic bulletin board in this instance, it did not altogether eliminate potential ISP liability in other circumstances, stating that this was "[n]o occasion to hypothesize whether there may be other instances in which the role of an electronic bulletin board operator would qualify it as a publisher."[23]

On the issue of negligence, the Court of Appeals based its decision to absolve Prodigy of liability on public policy considerations. It reasoned that to find otherwise would require Prodigy to perform in-depth background checks of millions of potential customers in order to guarantee against defamatory communications. To do so would "open an ISP to liability for the wrongful acts of countless potential tortfeasors committed against countless potential victims. There is no justification for such a limitless field of liability."[24]

Notably, however, the Court declined to examine the applicability of the Communications Decency Act to the case before it. As the facts of this case arose before the enactment of the CDA, the Court cited its unwillingness to issue advisory opinions on matters that are not ripe for adjudication. It noted that "[g]iven the extraordinarily rapid growth of this technology and its developments, it is plainly unwise to lurch prematurely into emerging issues, given a record that does not at all lend itself to their determination."[25]

III. Analysis

In order to establish a prima facie case of defamation under New York law, a plaintiff must show the following elements: (1) a false and defamatory statement of and concerning the plaintiff; (2) the publication by the defendant of such statement to a third party; (3) fault on the part of the defendant, the degree of which depends on the status of the plaintiff;[26] and, (4) injury to the plaintiff.[27] Individuals or entities who are not the authors of the defamatory statements may be held liable.[28] However, there is no potential for liability unless the defendant in question has "some editorial or at least participatory function" in connection with the dissemination of the defamatory material.[29]

For purposes of assessing liability for defamation, courts have identified three categories of individuals or entities who disseminate information: publishers, distributors, and common carriers.[30] Each category purports to reflect the extent of participation or editorial control exercised by an entity or individual, and determines whether liability for defamation can be imposed. Typically, one is deemed a publisher where one "participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility."[31] By repeating or republishing a libelous statement, a publisher is liable for defamation as if he had been the original author.[32] A distributor, likened to a newsstand owner who distributes printed matter without knowledge as to its contents, will not be found liable in the absence of fault. Liability is notice-based, and found only where the vendor either knows nor has reason to know of the possible defamatory contents he or she sells.[33] Finally, a common carrier, such as a telephone company, exercises little or no editorial function in that it generally acts as a conduit and automatically transmits communications from one place to another without knowledge of the transmission's contents.[34] As a result, a common carrier cannot be held liable for defamation.[35] Regardless of the standard applied, however, the disseminating individual or entity may be accorded a common law qualified immunity which further shields it from liability.[36] Insulated by a qualified privilege, an individual or entity is subject to liability only if the plaintiff can prove malice or bad faith.[37]

Until *Lunney,* New York courts differed on whether an Internet service provider is a publisher, a distributor, or a common carrier for purposes of assessing liability for defamation.[38] At the heart of this disagreement lies the issue of ISPs reserving, rather than exercising, the right of editorial control. At the time the incidents giving rise to *Lunney* occurred, Prodigy had installed an automated program which automatically excluded a selected list of epithets that were transmitted over its network.[39] Lunney argued that this automated system constituted editorial control by Prodigy, thereby rendering the ISP a publisher rather than a distributor. The court in *Lunney* rejected this argument, finding an ISP's reservation of the right to edit or delete messages due to inflammatory or threatening content does not make it a publisher.[40]

The court then bifurcated its analysis, applying the law separately to the e-mail message and the posts to the electronic bulletin board. In reference to the transmission of e-mail messages, the court found that an ISP's role is similar to that of a common carrier, noting that its function is akin to that of a mere conduit.[41] Turning its attention to the issue of electronic bulletin boards, the court characterized Prodigy's role as generally passive, and thus not equivalent to the editorial control generally exercised by a publisher. Ultimately, the court decided that even if Prodigy could be characterized as a publisher, the qualified immunity accorded to telephone and telegraph companies[42] should be extended so as to apply to Internet service providers. The qualified privilege would render an ISP immune from defamation liability, subject to plaintiff's showing of actual malice,[43] e.g., knowledge of the falsity of the message. And, as the *Lunney* lower court opinion pointed out, this is "a showing which a plaintiff will rarely if ever be able to make."[44]

IV. The Benefit of *Lunney*

The holding in *Lunney* reflects the outcome of most prior cases decided on both the state and federal level.[45] The notable New York exception to this list of cases is *Stratton Oakmont v. Prodigy Services Co.*[46] In *Stratton Oakmont,* the New York Appellate Division found an ISP to be a publisher based on the mere fact that it had implemented an automated filtering system and reserved the right to exercise editorial control. This holding resulted in the unfortunate outcome that an ISP was more likely to be held liable for exercising editorial control, thus being punished for a good faith attempt to excise possibly defamatory content from a third party author's message. On the other hand, ISPs with a total hands-off policy, though more likely to enable third parties to post or send messages of a more outrageous nature, would be shielded from liability. Largely due to the paradox stemming from the *Stratton Oakmont* holding, Congress enacted § 230 of the Communications Decency Act.[47] The provisions of § 230 largely reflect the majority of caselaw emanating from lower state and federal courts. For one, § 230(c)(1) of the CDA states that an ISP is not considered a "publisher,"[48] facially mirroring the holding in *Lunney.* Moreover, the statute absolves ISPs of liability where they reserve the right to exercise editorial control. The CDA states, in relevant part:

> No provider . . . of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[49]

This "good samaritan" provision absolves an ISP of liability for actions taken to restrict access or availability of generally offensive or objectionable material, including such material that is potentially defamatory. Therefore, by refusing to adopt the "ISP as publisher" rule proposed by *Stratton Oakmont,* the *Lunney* court, though declining to examine or discuss the applicability of the CDA to the instant case, provided state common law protection to ISPs consistent to that provided by federal law.[50]

Although there is little doubt that Lunney suffered (at least to some degree) distress at having his name tarnished, public policy considerations—including those promoted by the CDA[51]—compel the limitation of ISP liability. First, the burden of requiring ISPs to monitor millions of messages transmitted over their networks every day would render operation of an ISP cost prohibitive and unduly burdensome. In the United States, 150 million people currently use the Internet, at an average of six times per week.[52] Mandating surveillance of every message sent by each Internet subscriber would cause electronic communication to grind to a halt. Second, the same rationale would apply to requiring an ISP to institute procedures to conduct detailed background checks on every applicant who wishes to open an account. Five million Americans opened Internet accounts in the first quarter of 2000, and this trend is expected to remain steady.[53] The resulting cost of identity verification for each new subscriber would be astronomical. Moreover, even an individual ISP cus-

tomer whose background had been cleared may nonetheless author defamatory, threatening, or harassing messages. As a result, an ISP would still be on the hook, despite its good faith efforts to prevent impostors from fraudulently opening one or several accounts. The court in *Lunney* recognized this problem, noting that placing this burden on an ISP would expose it to potentially unlimited liability.[54] Third, the requirement for ISPs to monitor transmission of all e-mails sent and received on its network would result in an unjustifiable invasion of privacy of all Internet subscribers. Every Internet user who sends electronic messages via an ISP's network would have the contents of his or her letter read, no matter how personal or embarrassing the account contained within it.

Despite the significance of *Lunney* as the first opinion on this matter by a state court of last resort, its scope and applicability to post-CDA cases is unclear. Though the CDA provides that an ISP is not a publisher,[55] it is uncertain whether its provisions accord ISPs immunity from notice-based liability.[56] Moreover, its effect on ISP liability for other forms of online torts is uncertain.[57] The court's reluctance to discuss these issues was overly cautious, and subsequent decisions should clarify *Lunney's* reasoning and its applicability under the CDA in order to limit future litigation.

IV. Conclusion

In 1999, 200 million people worldwide accessed the Internet for research, entertainment, or business purposes.[58] One billion people are expected to be online by the year 2005.[59] Prodigy, one of the larger Internet service providers in the United States, had 1.5 million subscribers at the end of 1999.[60] Imposing broad liability on ISPs to control the millions of messages transmitted daily on their networks would impose on them the impossible task of assessing the defamatory potential of each transmission. The mere possibility of online defamation does not justify the resulting increase in the cost of operating ISPs or the invasion of privacy to Internet subscribers.

The *Lunney* decision took a step in the right direction by substantially narrowing ISP liability for defamation arising under state law, and supplementing the provisions of the Communications Decency Act of 1996. The only problem with *Lunney* is that uncertainties regarding ISP liability remain. The hesitance of the court to set clear parameters for online tort liability will only serve to cause more ambiguity in an area of the law which has remained largely uncharted. Nonetheless, the reasoning underlying this holding promises to be of significant precedential value in limiting the liability of ISPs.

Endnotes

1. In 1999, 200 million people worldwide accessed the Internet for research, entertainment, or business purposes. World Almanac and Book of Facts 2000, "What is the Internet?" It is estimated that 1 billion people will be connected by 2005. *Id.*
2. 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that ISP could not be held liable for defamatory news publications put together by third party and posted on its network, as ISP was mere "distributor" of information).
3. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding that ISP may be held liable for defamation as a "publisher," as it retains the right to editorial control over messages posted on its network) (hereinafter *Stratton Oakmont*)
4. 94 N.Y.2d 242 (Dec. 2, 1999), *cert. denied*, 120 S.Ct. 1832 (May 1, 2000) (hereinafter *Lunney*).
5. Judge Bellacosa took no part in the decision.
6. *Lunney* at 249.
7. *Anderson v. New York Tel. Co.*, 35 N.Y.2d 746 (1974) (hereinafter *Anderson*).
8. *Lunney* at 251.
9. Communications Decency Act, 47 U.S.C. § 230 (1996). Note that certain sections of the CDA seeking to protect minors from harmful material on the Internet have been ruled unconstitutional, *Reno v. ACLU*, 521 U.S. 844 (1997) (finding that §§ 223(a)(1) and 223(d) of the Communications Decency Act abridge freedom of speech protected by the First Amendment). Section 223(a)(1) imposed criminal penalties for "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age. 47 U.S.C. § 223(a)(1)(B)(ii). Section 223(d) prohibited the "knowin[g]" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. § 223(d). The *Reno* decision, which predates *Lunney*, does not affect the analysis herein as § 230 remains in effect.
10. *Lunney* at 242.
11. *Id.* at 248-251.
12. The subject of the message in question read "HOW I'M GONNA KILL U," with "vulgar" accompanying statements in the body of the message. *Lunney* at 247.
13. *Id*.
14. *Id*.
15. *Lunney v. Prodigy Services Co.*, 250 A.D. 230, 232 (N.Y. App. Div. 1998).
16. *Lunney* at 247.
17. *Lunney v. Prodigy Services Co.*, 250 A.D. 232.
18. *Id.*
19. *Lunney v. Prodigy Services Co.*, 93 N.Y.2d 809 (Jun. 8, 1999).
20. *Lunney* at 249.
21. *Id*. at 249-250 ("As distinguished from e-mail communication, there are more complicated legal questions associated with electronic bulletin board messages, owing to the generally greater level of cognizance that their operators can have over them.").
22. *Id.* at 249.
23. *Lunney* at 250-251.
24. *Id.* at 251.
25. *Id.* at 252.
26. A public official or figure must prove that the defendant published a statement either knowing of its falsity or in reckless disregard whether the statement in question was true or false. *New*

York Times Co. v. Superior Court, 376 U.S. 254 (1964). A private figure, on the other hand, need merely prove that the defendant was negligent in publishing the statement. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

27. *See generally* 43A N.Y. Jur. 2d, Defamation and Privacy § 4 (1999).
28. *Id.*
29. *Anderson v. New York Tel. Co.*, 35 N.Y.2d 746.
30. For in-depth discussion on the distinctions between publishers, distributors, and common carriers, *see* Douglas B. Luftman, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 Geo. Wash. L. Rev. 1071, 1083-1088 (1997); Stephen M. Cordero, Comment, *Damnum Absque Injuria: Zeran v. AOL and Cyberspace Defamation Law*, 9 Fordham I. P., Media & Ent. L.J. 775 (1999).
31. *Lunney* at 249 (citing *Anderson v. New York Tel. Co.*, 42 A.D.2d 151, 163 (N.Y. App. Div. 1973) (Witmer, J., dissenting)).
32. *Stratton Oakmont* at *3.
33. Restatement (Second) of Torts § 581(1) (1977).
34. *See* Luftman, *supra* note 30, at 1083.
35. *Id.*
36. *Lunney* at 249.
37. *Id*.
38. *See supra* notes 2-3 and accompanying text.
39. *Lunney v. Prodigy Services Co.*, 250 A.D.2d at 235.
40. *Lunney* at 250 (stating that "this would not alter its passive character in 'the millions of other messages in whose transmission it did not participate'" (citing *Lunney v. Prodigy Services Co.*, 250 A.D.2d at 237)).
41. *Lunney* at 249.
42. *Anderson* at 747.
43. *Lunney* at 249.
44. *Lunney v. Prodigy Services Co.*, 250 A.D. at 236.
45. *See, e.g. Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (holding that an ISP cannot be held liable for defamation as § 230 of the CDA "plainly immunizes computer service providers like AOL from liability for information that originates with third parties"); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D. D. C. 1998) (finding that an ISP is not liable for content authored or edited by a third party); *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 199l) (holding that an ISP is comparable to a news distributor and thus lacks the requisite knowledge to be held liable for defamatory material posted by a third party on its network.); *Doe v. America Online,* 718 So. 2d 385 (Fla. Dist. Ct. App. 1998) (holding that ISP is immunized by § 230 of the CDA where customer of ISP published pornographic information about plaintiff's son on ISP's network).
46. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
47. H.R. Conf. Rep. No. 458 (1996), *published in* 142 Cong. Rec. H1078, 1130 (Jan. 31, 1996) (noting that "[o]ne of the specific purposes of [§ 230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services."). *See also* David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet,* 61 Alb. L. Rev. 147, 159 (1997) (stating that Congress enacted § 230 of the CDA "to protect a service such as Prodigy from liability based upon its efforts to prevent dissemination of lewd and lascivious material over its network.").
48. 47 U.S.C. § 230(c)(1) (" No provider . . . of an interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider.").
49. 47 U.S.C. § 230(c)(2).
50. Note, however, that 47 U.S.C. § 230(e)(1) states that "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Since the facts of this case arose well before the enactment of the CDA, the Court of Appeals was not necessarily bound by this wording.
51. The CDA states, in relevant part:

> It is the policy of the United States—
>
> (1) to promote the continued development of the Internet and other interactive computer services;
>
> . . .
>
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
>
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material;

47 U.S.C. § 230(b).

52. Nielsen Net Ratings (visited Nov. 18, 2000) <http://209.249.142.27/nnpm/owa/NRpublicreports.usageweekly>.
53. UCLA Center for Communication Policy, *The UCLA Internet Report: Surveying The Digital Future* (Oct. 25, 2000) <http://www.ccp.ucla.edu/pages/internet-report.asp>. This equals 55,000 new subscribers per day, 2,289 per hour, 38 per minute. *Id.*
54. *Lunney* at 251; *see also Pulka v. Edelman*, 40 N.Y.2d 781 (1976).
55. 47 U.S.C. § 230(c)(1).
56. Although *Lunney* distinguished between publishers and distributors, it declined to discuss the issue of notice-based distributor liability. 94 N.Y.2d at 251. Other cases have held that these distinctions were no longer of import under the CDA, thereby according full immunity to ISPs regardless of notice or fault. *See Zeran v. AOL,* 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (holding that CDA definition of "publishers" encompasses "distributors," granting full immunity from defamation liability to both); *Ben Ezra, Weinstein & Co. v. America Online*, 206 F.3d 980, 986 (10th Cir. 2000), *cert. denied,* 121 S. Ct. 69 (2000) (following *Zeran*). *But see* Sheridan, *supra* note 47, at 167 (arguing that "both the text of the CDA and its meager legislative history support the conclusion that when Congress said 'publisher,' it meant 'publisher,' and not 'distributor.'").
57. *Cf. Doe v. America Online*, 718 So. 2d 385 (Fla. Dist. Ct. App. 1998), *review granted,* 729 So. 2d 390 (holding that ISP immunity under the CDA extends to bar state law claims against wrongful distribution of indecent photographs by a third party on ISP's chat rooms).
58. World Almanac and Book of Facts 2000, "What is the Internet?"
59. *Id.*
60. In 1999, Prodigy was the fastest growing ISP in the nation. Prodigy Press Release (Feb. 15, 2000) <http://www.prodigy.com/pcom/company_information/company_index.html >.

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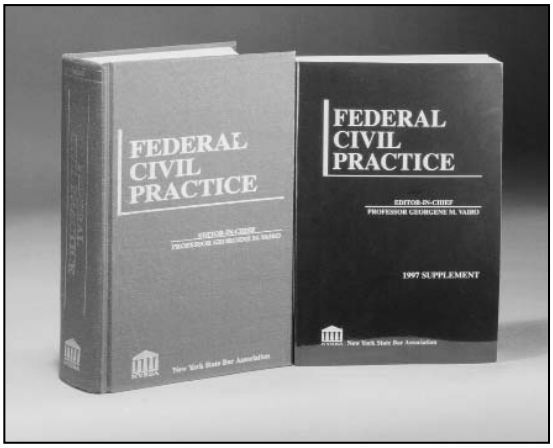

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