NEW YORK STATE BAR ASSOCIATION

# Journal

FEBRUARY 2014
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# Appellate Brief Writing: What Not to Do

*by Tamala Boyd*

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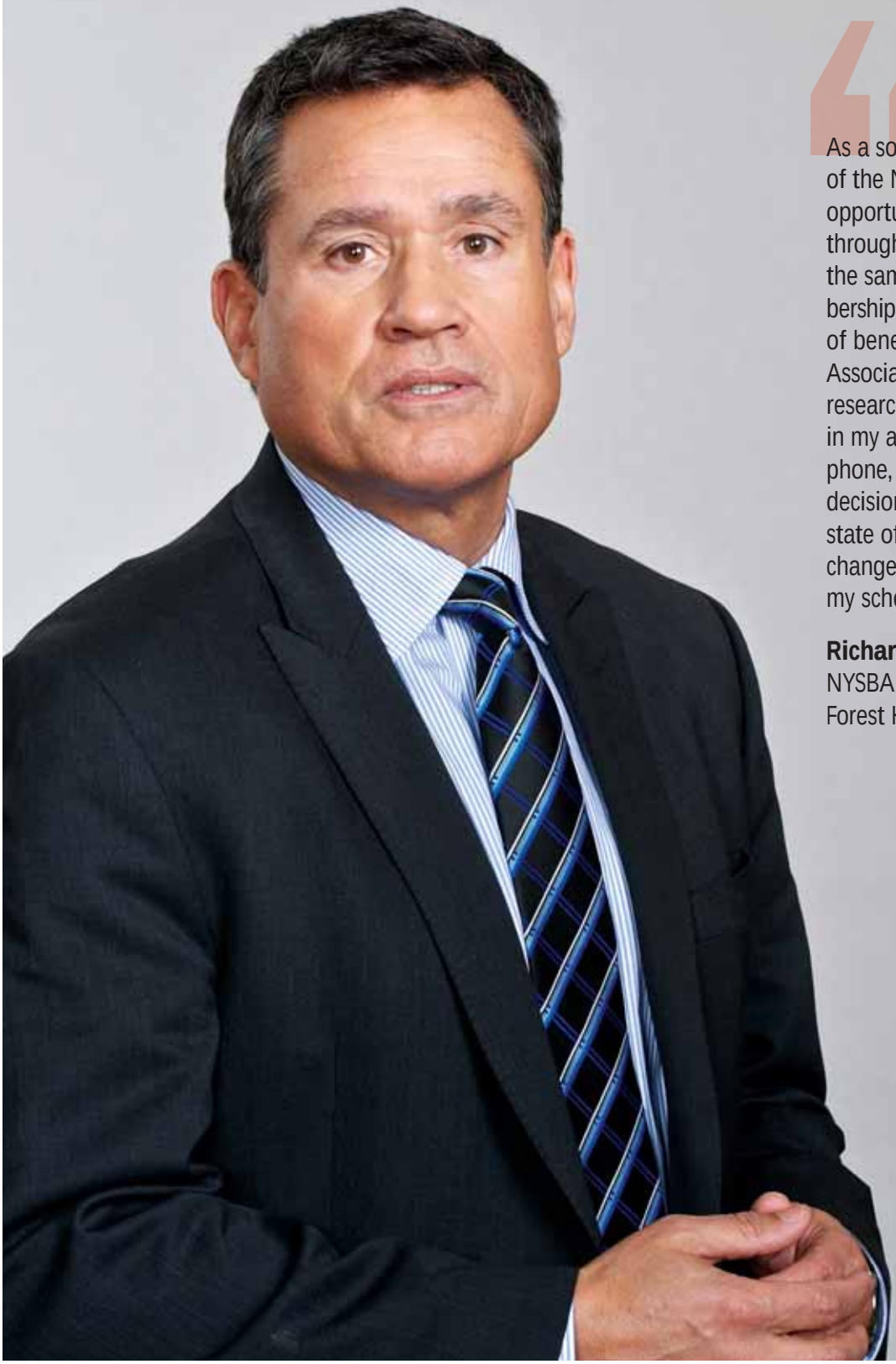
NEW YORK STATE BAR ASSOCIATION



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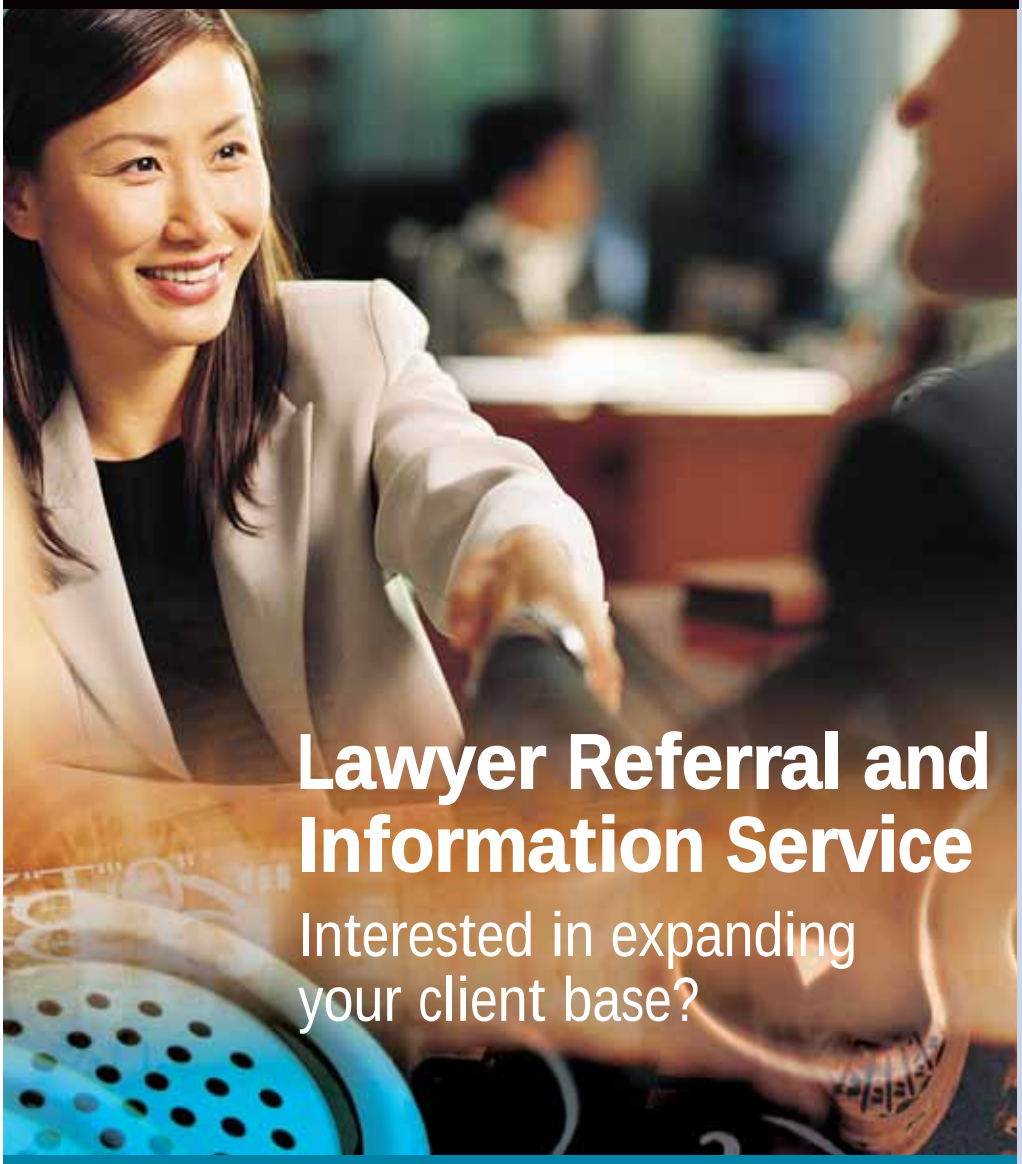

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BY TAMALA BOYD

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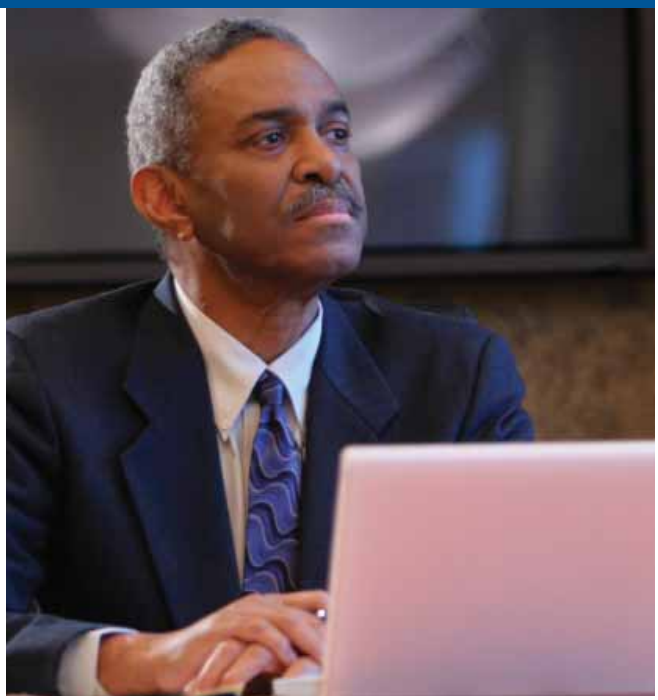

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DAVID M. SCHRAVER

# "For the Survival of the United States as We Know It"

We hear a lot these days about education, the "core curriculum," and the importance of STEM education (science, technology, engineering, mathematics). I support STEM education – my son teaches AP chemistry and statistics. My daughter majored in mathematics. But what about civics, humanities and the social sciences? This month we celebrate Presidents' Day, and this provides an opportunity to focus on the critical importance of civics education.

Presidents' Day was originally established in 1885 in recognition of George Washington's birthday, but unofficially it began in 1800, the year after Washington's death. Since 1971, the day of remembrance has been changed from February 22 to the third Monday in February, and we now celebrate both Washington's and Abraham Lincoln's birthdays on that day.

Both of these great presidents' writings emphasize the importance of civics education and relate to the activities and core values of our Association, and more particularly to our advocacy and programs promoting understanding of and respect for the rule of law.

In his 1796 Farewell Address, Washington recognized that with its new Constitution and government structure, the United States was very much an "experiment." While acknowledging important regional differences, Washington repeatedly urged "carefully guarding and preserving the union of the whole":

> This government, the offspring of our own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. . . . The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.

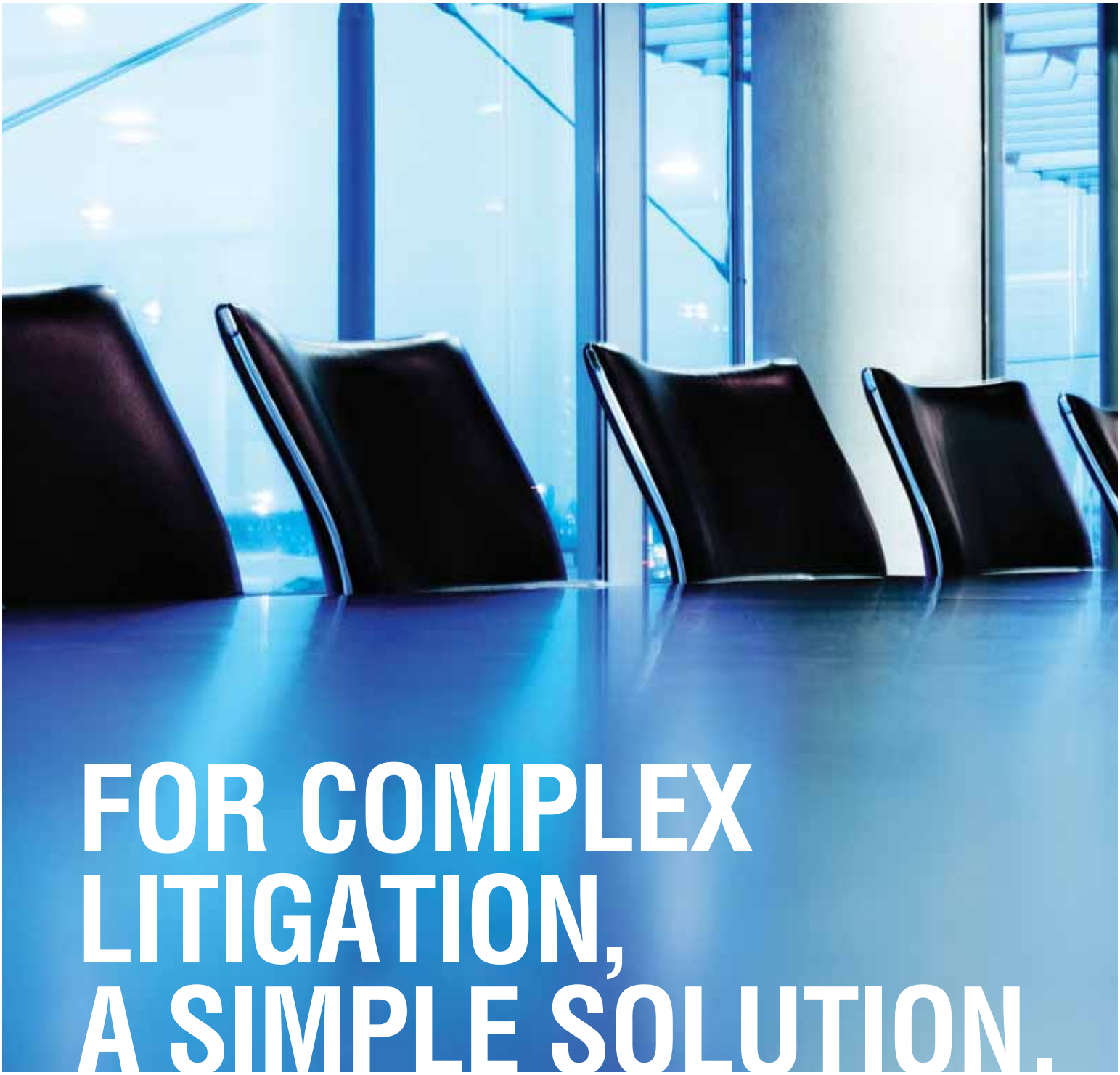
In 2013 we marked the 150th anniversary of Lincoln's Gettysburg Address, delivered November 19, 1863. In this address, given 67 years after Washington's Farewell, Lincoln spoke of "a new nation" that was "engaged in a great civil war," which was "testing whether that nation . . . can long endure." Although Lincoln did not expressly refer to the government of the union of the whole as an experiment, he urged the nation to "resolve . . . that government of the people, by the people, for the people shall not perish from the earth."

The preservation of our democratic government of constitutional value depends on a citizenry educated about the history and government of the United States, our democratic values and the importance of responsible participation by thoughtful citizens in the democratic process. This past fall, the State Bar was one of the sponsors of a speech in Albany by former U.S. Supreme Court Justice David Souter. Justice Souter spoke forcefully of the need for education in the humanities and social sciences as vital "*for the survival of the United States as we know it.*" (*See State Bar News*, November/December 2013 at 8.)

To this end, the Association's Law, Youth and Citizenship (LYC) Program has since 1974 promoted civics and law-related education in New York's public and private schools. The LYC Program assists educators in preparing students, prekindergarten through 12th grade, for active, engaged roles as citizens who have the knowledge, skills and civic attitudes fundamental to a healthy democracy. Its purpose is to provide programs, training and materials that enhance student understanding of the law, our constitutional form of government, and the rights and responsibilities of citizens. Resources and current program information can be found at www.lycny.org. We congratulate the Committee on Law, Youth and Citizenship and the Program staff on receiving the New York State Council for the Social Studies' Partners Award for the Program's work in civic education and education advocacy. The award will be presented at the Albany Institute of History and Art on March 27, 2014.

Yet, promoting understanding of and respect for the rule of law is not only the business of the LYC Program. All of us can and must seize opportunities in our local schools and communities to do our part, because we understand it is vital for the survival of the United States as we know it. ■

DAVID M. SCHRAVER can be reached at dschraver@nysba.org.

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| | |
|---|---|
| February 26 | Albany |

**2014 March Marketing Program**

| | |
|---|---|
| March 5 | New York City |

**Medical Malpractice**

| | |
|---|---|
| March 7 | Long Island |
| March 14 | Albany; Buffalo |
| March 21 | Syracuse |
| March 28 | New York City |

**Securities Arbitration**
(live & webcast)

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| March 11 | New York City |

**Bridging the Gap**

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| March 11–12 | New York City (live program)<br>Albany; Buffalo (videoconference from NYC) |

**10th Annual International Estate Planning Institute**

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| March 13–14 | New York City |

**Construction Site Accidents**

| | |
|---|---|
| March 14 | Albany; Long Island |
| March 21 | New York City |

**CPLR Update 2014**

| | |
|---|---|
| March 15 | Buffalo (9:00 a.m. – 12:40 p.m.) |
| March 21 | Albany (1:00 – 4:40 p.m.) |
| March 22 | Syracuse (9:00 a.m. – 12:40 p.m.) |
| April 10 | Long Island (5:30 – 9:10 p.m.) |
| May 8 | New York City (5:30 – 9:10 p.m.) |

**Practical Skills: Family Court Practice Support**

| | |
|---|---|
| April 2 | Buffalo; Long Island |
| April 3 | Syracuse; Westchester |
| April 9 | New York City; Rochester |
| April 10 | Albany |

**Introductory Lessons on Ethics and Civility**

| | |
|---|---|
| April 4 | Long Island; Syracuse |
| April 11 | Albany; Buffalo |
| April 25 | New York City |

**18th Annual New York State and City Tax Institute**

| | |
|---|---|
| April 29 | New York City |

**Practical Skills: Purchases and Sales of Homes**

| | |
|---|---|
| April 29 | Long Island |
| May 1 | Albany; New York City; Rochester; Syracuse; Westchester |
| May 6 | Buffalo |

**Advanced Insurance Practice**

| | |
|---|---|
| May 2 | New York City; Syracuse |
| May 9 | Albany; Buffalo |
| May 16 | Long Island |

**Immigration Law Update**

| | |
|---|---|
| May 6–7 | New York City |

**DWI: The Big Apple XIV**
(live & webcast)

| | |
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| May 8 | New York City |

**Trial of a Custody Case**

| | |
|---|---|
| May 9 | Westchester |
| May 16 | Rochester |
| May 30 | Long Island |
| June 6 | Albany |
| June 13 | New York City |

**Practical Skills: Easement Law in New York**
(9:00 a.m. – 12:15 p.m.)

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| May 14 | Long Island |
| May 21 | New York City |
| May 28 | Albany |

**Starting a Practice in New York**

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| May 16 | New York City |

**Commercial Litigation Academy**
(live & webcast)

| | |
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| June 5–6 | New York City |

**Bridging the Gap**

| | |
|---|---|
| July 14-15 | New York City (live program)<br>Albany; Buffalo (videoconference from NYC) |

**Practical Skills: The Nuts and Bolts of Contract Drafting: From Basic to Advanced Topics**
(live & webcast)

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|---|---|
| July 21 | New York City |

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# Appellate Brief Writing: What Not to Do

**By Tamala Boyd**

The author Isabel Allende said, "Write what should not be forgotten." Of course, she was speaking about writing fiction, but the quote also fits perfectly within the realm of legal writing – especially when you are writing for a court like New York's Appellate Division, First Department, quite easily one of the busiest courts in the country. The First Department handles approximately 3,000 appeals, 6,000 motions and 1,000 interim applications each year. Unlike many other intermediate appellate courts, the First Department has broad powers to review questions of both law and fact, and to make new findings of fact. With few exceptions, appeals to the Court of Appeals are by permission only; the First; Department, along with the other three Appellate Departments, is the court of last resort in the majority of its cases.

Until recently, I was a principal appellate court attorney in the First Department's Law Department. The Law Department includes the chief and deputy court attorneys, a group of supervisors, attorneys who primarily do motions and applications, and a team of court attorneys with varying degrees of experience and expertise. Court attorney titles range from "appellate" at the junior level to "principal," the most senior. While, generally speaking, all court attorneys research and analyze legal issues and questions for the court, and perform other related duties as assigned, such as motions and applications, more senior court attorneys tend to work on more complex legal issues with little to no direct supervision.

In my time as a principal appellate court attorney, I worked on hundreds of appeals, read close to a thousand briefs, and pored over a mind-boggling number of records. Significantly, while court attorneys are not the first people to look at your briefs (that would be the wonderful people in the clerk's office), they are the first to truly scrutinize your submissions, parse the various sections, and evaluate your arguments. Moreover, as one of the people charged with producing detailed, often lengthy, reports based upon a review of your materials and the court attorney's own independent legal research, I feel confident in saying that court attorneys probably care the most about the quality of your work product.

With that background, you understand that when I borrow from Ms. Allende and say to you, "Write only what you want us to remember," I know from whence I speak. And while I do not presume to speak for every court attorney working in the First Department, much of the advice given below finds support among those with whom I have spoken.[1]

Because there is a rich variety of offerings available covering what you should do when drafting an appellate brief, I thought it might be most useful to tell you, from a court attorney's perspective, what not to do. What are the things that made my heart skip a beat with despair; lay my head down on my desk and cry; scroll back to the cover page to see who submitted the brief; run for the nearest window, shredder or fire pit and – well, you get the point. So, appellate brief, section by section, here is my list of what not to do.

## Preliminary Statement

A preliminary statement should, ideally, not

1. take up any significant portion of your page count;
2. contain any facts or argument.

The purpose of a preliminary statement is to give the reader a concise rendering of the case. It should identify the party, the order being appealed from, why the appeal was taken and the result sought. It is helpful to include the order entry date and the judge who rendered the decision. While it is perfectly fine to include a short preview of your case (think of a 30-second advertisement), it is not okay for this to be part and parcel of your factual recitation or argument.

Now, you are perfectly welcome to submit a preliminary statement that goes on for five or more pages. Just do so with the knowledge that you may have set the tone for the reception of the remainder of your brief.

## Question Presented

For reasons I fail to understand, some parties seem to believe that the more questions they can present, the better their chances on appeal. Allow me to disabuse you of that notion. Try the following exercise. Close your eyes and imagine the following scenario: I have just put the finishing touches on a 50-page report. Your appeal is the second of the week, and there is a third waiting. I open your brief, flip to the questions presented, and find 12 of them. What do you suppose I am feeling? If your answer is "impressed by my ingenuity," you're wrong.

Questions presented should not

1. contain numerous subparts;
2. contain argument;
3. disparage the lower court; or
4. be contrived, or otherwise lacking in any bases in the law.

While there is no magic number for how many questions presented are appropriate, rarely did I encounter a situation where more than five or six questions, stated in one or two pages, proved insufficient. If you find your questions presented section running longer than that, consider examining whether you have sufficiently parsed your case and understood your viable legal issues. Go over your questions presented to be certain that you are not using them as an opportunity to make factual argu-

**Tamala Boyd** (ttb1368@gmail.com) is an associate general counsel with the New York City Department of Consumer Affairs. She began her legal career in private practice with the New York City law firm Simpson Thacher & Bartlett, LLP, as a general litigation associate. She then spent three years as a principal appellate court attorney with the Appellate Division, First Department. Ms. Boyd earned her law degree from Duke Law School.

ments or answer legal questions. Bottom line: resist the urge to overstate the complexity of your case, because doing so adds nothing.

## Statement of Facts

The statement of facts should be just that – a statement of facts – not an attorney's characterization of those facts. Moreover, a statement of facts should not:

1. Be in a personal relationship with adjectives, italics, underlining or exclamation points.
2. Obscure facts, especially in criminal cases. If I sensed that counsel was obscuring facts, that person's arguments would begin to lose credibility.
3. Underutilize correct citations to the record. Nothing would send me to your adversary's brief faster than a statement of facts with no citations to the record or with citations that were mostly incorrect. I once received an opening brief where every citation in the first 13 pages was wrong. And not just a little off, but completely wrong. Although I muddled through, I also counted the errors and dropped a footnote to the judges about the unreliability of that party's papers. Suffice it to say, my initial understanding of the case came not from the brief of the party who had instituted the appeal but from the better-drafted and error-free respondent's brief.
4. Cite to portions of the record that do not actually support the statement for which it was cited. Or, worse still, cite to portions of the record that contradict the statement. Do that and not only do you lose credibility, but if you win, you do so only in spite of yourself.
5. Characterize the facts. Example of a factual statement: "Witnesses at the scene identified the car as a green Mercedes Benz." Example of a characterization: "The speeding car that plastered plaintiff all over the sidewalk was a flashy green luxury vehicle." You get the point.
6. Pull "facts" exclusively from an attorney's affirmation. More specifically, on a motion to dismiss, facts should come almost exclusively from the complaint. On a motion to dismiss on the documents, facts should come from those documents. On summary judgment, facts can come from the record generally, but you should take care that your facts are not contradicted by other record evidence because, I assure you, most court attorneys check. And, dare I say it again? When the record contradicts your characterizations, you lose credibility.
7. List every single fact there is to know about every single aspect of your case. Although it is called a "statement of facts," you should think of it more as a "statement of relevant facts." This is not an invitation to obscure those facts that go against you. This is merely to say that if you are appealing only certain aspects of an order, you need include only those facts that are relevant to what is being appealed. Example: forcing me to read a long recitation of your client's injuries when the threshold issue was one of liability did not make me feel sorry for your client. It just made me tired.

In short, "show, don't tell." Show the reader where in the record your facts originated and where they are supported. Be brutal in both your brevity and clarity. But don't fret. Remember, you have an entire section in which to let the reader know exactly what you think of those facts. Which brings me to . . .

## Argument

I have always considered the argument section to be the meat and potatoes of the entire appeal. This is where you get to be the super lawyer. This is where your case comes to thrive or to die a slow, painful death. Here are some of the things that can help it along its path to the grave:

1. *Not knowing, or simply not considering, the procedural posture of your case.* It matters whether an appeal is taken from a motion to dismiss, summary judgment or a trial on the merits. And nothing made me want to bang my head against the wall more than an attorney who wanted to wax nostalgic about failures of proof and material issues of fact when the appeal was taken from the denial of a motion to dismiss.
2. *Not knowing the standard of review for the issues on appeal.* This is especially true where an appeal is taken from an arbitration award, or from an Article 78 proceeding.
3. *Refusing to acknowledge that "motion to dismiss" is not the equivalent of "free-for-all."* Yes, you get the benefit of the doubt, but no, the reader is not obliged to abandon his or her common sense. To wit, the sky does not become green because it says so in the complaint, and if you try to tell the court that it does, you begin to lose credibility.
4. *Failing to cite authority from the Appellate Department presiding over your matter.* The First Department is not bound by the decisions of her sister Departments, and it is not uncommon to find wildly divergent views. It made my job more difficult if a brief had citations only to, or primarily to, cases from other Appellate Departments, especially if I knew from previous experience, or discovered from my own independent research, that there was ample First Department authority on the issue. Citations to cases from other Appellate Departments is even more off-putting when the First Department authority an attorney fails to cite contradicts the authority cited.

   Note also that the Appellate Departments are not bound by federal court decisions or by federal law, even if the federal court at issue sits in New York State. Be especially careful that the federal cases you cite are actually interpreting New York

state law (keeping in mind that the Second Circuit covers more than just New York). And, if the only case you can find to support your argument is from the middle district of east-west Arkansas, perhaps you should rethink your argument.

This is not to say you should never cite cases from the other Departments or jurisdictions. For example, if there is no precedent in the First Department, or you would like to argue that another court's resolution of an issue is more persuasive, by all means do so. But in so doing, do not ignore the First Department (or other appropriate Appellate Department) cases that do exist.

5. *Forcing the reader to guess your argument or the legal basis of your claim.* While stating an argument seems so basic, it is astounding how many briefs fail to do so – probably because the attorney has lived with the issues for so long, they just seem obvious. Although most court attorneys will eventually figure it out, it will help if your argument is stated clearly and succinctly at the beginning of the appropriate section, along with the point of law upon which the argument is premised.
6. *Ignoring contrary authority.* Do not ignore it; distinguish it. If you cannot distinguish it, rethink your argument. In all cases, however, you should at least acknowledge it.
7. *Ignoring your adversary's arguments and counterarguments.* The respondent should address each of the appellant's arguments, no matter how unworthy those arguments might seem. Think of it this way: appellant's arguments are what brought you to the court, and it is a colossal waste of everyone's time for those arguments to be ignored, especially since the court attorney must address them, whether or not you do. You don't want that. Conversely, the appellant should address each of the respondent's counterarguments because, again, the court attorney will.
8. *Using exaggeration and extreme hyperbole.* Keep underlining, exclamation points, bold and italics to a bare minimum.[2] If you need those things to make your point, you probably haven't got much of one.
9. *Insulting the lower court.* I will not soon forget reading in a brief that a lower court decision "lacked intellectual rigor." Hmmm. What was that party saying about the First Department panel considering the case, should it agree with the decision being appealed? And yes, the panel did agree. You should probably resist the urge to insult the lower court and, thereby, risk insulting the panel deciding your appeal.
10. *Engaging in ad hominem attacks on opposing counsel or the opposing party.* I did not care how much you disliked your adversary; I cared only whether you had a viable claim or defense. In most instances, excess emotion and hyperbole were correlated negatively to facts and good advocacy.
11. *Employing a "kitchen sink" theory on appeal.* You should think long and hard about including anything but relevant, viable issues in your brief. Generally speaking, if you cannot come up with a legal reason why the court below failed you, you probably have no viable issues on appeal. Similarly, if your brief presses only extraneous legal theories – i.e., implied covenant of good faith and fair dealing; multiple equitable contractual theories, especially where there is an express contract; unjust enrichment; or conversion – perhaps some rethinking is in order.

> The statement of facts should be just that – a statement of facts.

12. *Citing cases for propositions of law that are not actually supported by those cases.* Read the cases you cite. Understand the cases you cite. When I reviewed a case cited in a brief only to discover that it either: (a) did not support the argument for which it was cited, or worse (b) supported the opposite argument, that party lost credibility.
13. *Making citation errors.* I had a very short amount of time in which to produce a lot of work. I was not going to spend that time trying to figure out what you meant to type. Check your citations and use a format that includes all relevant information, i.e., the decision year. New York cases should be cited from the official reports, if reported, and should include the court and the year. So, for example, I liked to see this: (*Kasachkoff v New York*, 107 AD2d 130 [1st Dept 1985]); but not this: (*Kasachkoff v. New York*, 107 A.D.2d 130, 485 N.Y.S.2d 992).[3]
14. *Making up quotations or misusing quotations marks.* I once encountered a quotation that was a case winner. It perfectly stated a point of law, was from this court, and was from a decision published the previous year. I pulled up the opinion, which turned out to be only two paragraphs long. One of those paragraphs was the decretal. Uh-oh. . . . The second paragraph bore no relation to the quoted language. Curious, I performed a full database search, hoping to find the paragraph somewhere, anywhere – even in a law review article. The quote did not exist. Please don't do that.
15. *Submitting records containing illegible copies of important documents*, i.e., the decision for review and notice of appeal. If I could not read it, it was of no use to me.

Some other things that, while not necessarily sufficient to put your brief on life support, should be avoided to the extent possible:

1. *Putting citations in footnotes.* You are not journal writing, and it was both annoying and inconvenient to have to search through footnotes to find a citation that should have been placed after the proposition for which it was cited. It was especially annoying when footnotes began to contain nothing but "id.s," "supras" and "infras."
2. *Overutilizing footnotes.* Footnotes should be used to deliver information that, while not directly relevant, is still notable. To that end, footnotes should generally not drone on for multiple paragraphs across multiple pages.
3. *String citing cases for general points of law*, i.e., the summary judgment standard. Believe me when I tell you that there is not a person in the courthouse who does not know the summary judgment standard. If you feel compelled to state it, one or two case citations will take you farther than six. Any more than that and the only thing you accomplish is padding your table of authorities.
4. *String citing cases without using pin cites or parentheticals.* You should avoid string citing at all, to the extent possible. But if you must do so, please tell the reader why he or she should care.
5. *Attaching exhibits to your brief.* Most of the court attorneys I knew used PDF versions of your documents and attachments are not scanned with your briefs. So you should put your exhibits in the record, where they belong.
6. *Including excessive volumes of records.* Ask yourself whether 22 volumes of records are actually necessary. For example, if the only issue on your appeal is whether the lower court used the proper standard of review, you do not need to include the transcripts of every deposition taken in the case. Conversely, if your entire argument hinges on the court's misconstruing of facts, you should offer more than your client's affidavit. In most cases, you should include the complaint. It helps if your files are all searchable.
7. *Submitting sloppy, non-paginated records.*
8. *Using reply briefs for information dumps* or regurgitation of arguments already made in the opening brief. Doing so is a missed opportunity and, frankly, a waste of your time.
9. *Failing to proofread your work product.* I have seen it all. Too much punctuation; no punctuation at all; sentences that drop off mid-thought; pasted-in sections wherein the attorney forgot to change the client's name. . . . All of these things could be avoided with one careful proofread. It is folly not to do so.
10. *Submitting a 70-page brief or requesting an enlargement to submit an 80-page brief.* In my experience, it is rare that a 70-page brief proves either necessary or useful. Even in the most complex commercial appeals (which was primarily what I handled), 50 pages was sufficient, with 60 being an upper limit. If your brief is running longer than that, perhaps it can be streamlined by instituting a few of the suggestions listed above.

In closing, I leave you with one final thought by a master of words, Dr. Seuss: "[T]he writer who breeds more words than he needs is making a chore for the reader who reads."

Here's wishing you happy writing, but bountiful editing! ■

1. I feel compelled to reiterate that I do not speak for the court, any other court attorney or the justices. This article contains my advice, based upon my own experiences and observations after three years as a principal appellate court attorney with the First Department.

2. For formatting rules, see the Appellate Division, First Department Rules, Section 600.10, titled "Format and Content of Records, Appendices and Briefs."

3. See the New York Official Reports Style Manual.

BY DAVID PAUL HOROWITZ

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# Proving the Value of Life (Part 2)

## Introduction

Picking up where last issue's column left off, this column reviews the nature and extent of proof necessary to support a claim of pecuniary damages in a wrongful death action, as well as important considerations when preparing a verdict sheet in a wrongful death action.

## Pecuniary Damages

Estate Powers & Trusts Law (EPTL) provides that "[t]he damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought."[1] The Court of Appeals has explained the nature of pecuniary damages:

> Thus, the essence of the cause of action for wrongful death in this State is that the plaintiff's reasonable expectancy of future assistance or support by the decedent was frustrated by the decedent's death. Loss of support, voluntary assistance and possible inheritance, as well as medical and funeral expenses incidental to death, are injuries for which damages may be recovered.[2]

A jury has wide latitude to determine pecuniary loss: "[S]ince it is often impossible to furnish direct evidence of pecuniary injury, calculation of pecuniary loss is a matter resting squarely within the province of the jury."[3]

The elements to be proved in order to recover for pecuniary loss were set forth succinctly in *Chong v. New York City Transit Authority*:[4]

> The elements of a cause of action to recover damages for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent.[5]

PJI[6] 2:320 includes instructions to the jury for completing the jury verdict sheet when awarding pecuniary damages, and alerts the court and counsel to a variation in the charge to be considered by trial courts in the Second Department:

> Your verdict will include answers to the following questions, which will be submitted to you in writing:
> 1. State the total amount of monetary loss, if any, to each of [list the distributees by name] resulting from AB's death. For the children of AB this monetary loss should include the deprivation of the intellectual, moral and physical training and education that AB would have given. [In cases tried in the Second Department, state in place of the preceding sentence: State the total amount of monetary loss, if any, to (list the distributees by name) resulting from AB's death, without specifying the amount of monetary loss for each individual (see Caveat 2 below)].
> 2. For each person for whom an award is made in your answer to Question No. 1, state the period of years over which the amount awarded for such monetary loss is intended to provide compensation. [In cases tried in the Second Department, omit this question, see Caveat 2 below].

## Modification to Charge and Verdict Sheet in Cases Tried in the Second Department

PJI 2:320 directs the reader to two modifications in the model language for cases tried in the Second Department, set forth in Caveat 2 immediately following the model charge:

> Caveat 2: As a general rule, the jury should allocate the total amount of economic loss among the distributees. In *Huthmacher v Dunlop Tire Corp.* the Fourth Department held that the jury must allocate the amount of economic loss among the distributees. However, in *Carter v New York City Health and Hospitals Corp.*, the Second Department stated, in what appears to be dicta, that it was improper in a wrongful death case to ask the jury to itemize the amount of economic loss to be awarded to each distributee. The *Carter* court also stated that the jury's role is limited to determining the total wrongful death damages to be awarded to all distributees and that the apportionment of the award among the distributees is for the Supreme or Surrogate's Court after a hearing. In light of *Carter*, courts within the Second

> Department should consider modifying the charge and verdict sheet in wrongful death cases to require a single lump sum award to the distributees.[7]

The Fourth Department case, *Huthmacher*,[8] requires allocation of each item of pecuniary loss among the distributees of the estate:

> Here, question 1 of the verdict sheet erroneously allowed the jury to make an award to decedent's estate for loss of past earnings from the date of decedent's accident to the date of the verdict ($146,000) as well as for future loss of earnings ($2,160,000), with no allocation among the four survivors. Post-death loss of earnings should have been a component of the wrongful death award; thus, loss of earnings from the date of death to the date of the verdict should have been a component of question 2 of the verdict sheet, concerning pecuniary loss sustained by each of the four survivors up to the date of the verdict, and loss of future earnings should have been a component of question 3 of the verdict sheet, concerning future pecuniary loss sustained by each of the four survivors.
>
> In response to questions 2 and 3 of the verdict sheet, the jury awarded damages to each of the four survivors for "pecuniary loss to date" (totalling $284,000) and "future pecuniary loss" (totalling approximately $3.7 million). The jury allocated 37.7% of the total pecuniary loss to the date of the verdict to each of the minor children and 12.3% each to decedent's spouse and emancipated child. The percentages were 37.5% and 12.5%, respectively, for future pecuniary loss. By contrast, in calculating a structured judgment, plaintiffs' economist simply divided the future loss of earnings equally among the four survivors. We see no basis for adopting that approach, given the fact that the jury did not allocate equal shares for other components of the verdict. Nor do we see any other basis for allocating, ourselves, the loss of past and future earnings without impinging on the duties of the finder of fact.
>
> Similarly, question 4 of the verdict sheet allowed the jury to make combined lump-sum awards to decedent's spouse and estate for loss of household services to date ($6,500) and future loss of household services ($141,000), but without allocation among the four survivors. Again, past and future loss of services should have been a component of pecuniary loss under questions 2 and 3 of the verdict sheet (*see* PJI3d 2:320 [2002]). Because we cannot determine what the jury would have done if it had been presented with a verdict sheet that incorporated past and future loss of earnings and past and future loss of services into the award for pecuniary loss, nor can we determine how it might have allocated such an award among the four survivors, we grant a new trial on damages for pecuniary loss. On retrial, the verdict sheet must direct the jury to make a separate award for past and future loss of earnings, past and future loss of services, past and future loss of parental guidance, and loss of inheritance to each survivor to whom such an award is applicable. The sum of each past and future loss component for each survivor will constitute that survivor's pecuniary loss sustained by reason of decedent's death.[9]

**The fact that the decedent was not a wage earner does not bar a recovery for pecuniary loss.**

The Second Department case, *Carter*, requires the jury to determine the total amount awarded for pecuniary loss, with allocation between the distributees to be determined by either the trial court or surrogate:

> As a new trial is required, we note that it was improper for the Supreme Court in this case to use a special verdict sheet requiring the jury to determine the amount of economic loss damages to be awarded to each individual distributee. The jury's role should have been limited to determining, based on the evidence presented at trial, the total amount of wrongful death damages to be awarded to all distributees. The apportionment of any award of economic loss damages made upon retrial should be determined by the Supreme Court, Kings County, or by the Surrogate's Court, Bronx County, after a hearing in accordance with applicable law.[10]

*Carter* has not been cited by any other Appellate Department decision for this proposition. Other than statutory citations,[11] the Second Department's only case citation, cited as a "*cf.*" case,[12] is the Court of Appeals's decision in *Pollicina v. Misericordia Hospital Medical Center*.[13] *Pollicina* discusses the respective jurisdiction of supreme and surrogate's courts; its support for the *Carter* proposition is difficult to discern.

## Pecuniary Loss for Wage Earners

The most common wrongful death claim for pecuniary loss involves the financial loss distributees of the decedent suffer due to the loss of income from the date of death. The Court of Appeals explained how these damages are to be calculated:

> The "pecuniary injuries" caused by a wage earner's death may be calculated, in part, from factors relevant to the decedent's earning potential, such as present and future earnings, potential for advancement and probability of means to support heirs, as well as factors pertaining to the decedent's age, character and condition, and the circumstances of the distributes.[14]

## Pecuniary Loss for Non-Wage Earners

The fact that the decedent was not a wage earner does not bar a recovery for pecuniary loss:

> In the case of a decedent who was not a wage earner, "pecuniary injuries" may be calculated, in part, from the increased expenditures required to continue the services she provided, as well as the compensable losses of a personal nature, such as loss of guidance.[15]

While lay testimony is a necessary foundation for calculating pecuniary damages, expert testimony may be required to establish the value of components of pecuniary loss:

> The evidence adduced at the trial failed to support the trial court's reduced award of $250,000 for pecuniary loss sustained by the decedent's husband, the plaintiff, Patsy Merola, for loss of the decedent's household services. While the plaintiff established his claim by producing proof as to the nature of the services formerly performed by the decedent, he did not produce expert testimony or other evidence regarding the value of those services. Based on the evidence presented, the award is excessive and should further be reduced to $50,000.[16]

## Conclusion

Next issue's column will continue to examine damages recoverable in a wrongful death claim. ■

1. EPTL 5-4.3(a).
2. *Gonzalez v. N.Y. City Hous. Auth.*, 77 N.Y.2d 663 (1991) (citations omitted).
3. *Parilis v. Feinstein*, 49 N.Y.2d 984 (1980).
4. 83 A.D.2d 546 (2d Dep't 1981).
5. *Id.* at 547 (citation omitted).
6. New York Pattern Jury Instructions – Civil (PJI).
7. 1B NY PJI 3d 2:320 at 954 (2014). *See Huthmacher v. Dunlop Tire Corp.*, 309 A.D.2d 1175 (4th Dep't 2003); *Carter v. N.Y. City Health & Hosps. Corp.*, 47 A.D.3d 661 (2d Dep't 2008).
8. 309 A.D.2d 1175.
9. *Id.* at 1176–77 (citation omitted).
10. 47 A.D.3d at 664 (citations omitted).
11. Surrogate's Court Procedure Act § 2204. Judicial settlement where recovery has been had in negligence action.

> 1. Where a judgment or compromise of a cause of action has been obtained and the proceeds are ready to be paid over and where the recovery is not an asset of the decedent's estate but goes by special provision of law to designated persons or classes of persons, the fiduciary may at any time file a petition for the judicial settlement of his account relating to the proceeds and upon the return of process or upon the waiver of all persons interested, if adult and competent, the court may take and settle his account and direct payment to the parties entitled according to their respective rights and interests and upon filing receipts for the payments the party paying the money and the fiduciary shall be discharged from all further liability as to such cause of action and the proceeds.
>
> 2. Where such recovery has been had and the amount thereof paid to the fiduciary, he may in like manner have a judicial settlement of his account relating to such proceeds at any time and a decree made discharging him from all further liability concerning it.

EPTL 5-4.4. Distribution of damages recovered.

> (a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, except that where the decedent is survived by a parent or parents and a spouse and no issue, the parent or parents will be deemed to be distributees for purposes of this section. The damages shall be distributed subject to the following:
>
> (1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distributee, at such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the surrogate of the county in which letters were issued.
>
> (2) The court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), shall also decide any question concerning the disqualification of a parent, under 4-1.4, or a surviving spouse, under 5-1.2, to share in the damages recovered.
>
> (b) The reasonable expenses of the action or settlement and, if included in the damages recovered, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent may be fixed by the court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), upon notice given in such manner and to such persons as the court may direct, and such expenses may be deducted from the damages recovered. The commissions of the personal representative upon the residue may be fixed by the surrogate, upon notice given in such manner and to such persons as the surrogate may direct or upon the judicial settlement of the account of the personal representative, and such commissions may be deducted from the damages recovered.
>
> (c) In the event that an action is brought, as authorized in this part, and there is no recovery or settlement, the reasonable expenses of such unsuccessful action, excluding counsel fees, shall be payable out of the assets of the decedent's estate.

12. "Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support." The Bluebook (A Uniform System of Citation) 17th ed., 2000.
13. 82 N.Y.2d 332 (1993).
14. *Gonzalez*, 77 N.Y.2d 663 (citations omitted).
15. *Id.* (citation omitted).
16. *Merola v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 24 A.D.3d 629 (2d Dep't 2005) (citations omitted).

# Medicaid Expansion in New York

**By Charles Smith**

Throughout the heated political and legal debate over the Patient's Protection and Affordable Care Act (ACA or, as informally known, Obamacare) the act's enormous Medicaid reforms and expansion were largely overlooked when compared with the controversial "individual mandate" requiring all citizens to buy insurance or pay a fee. Yet the Medicaid reforms are far more likely to affect the average citizen than the individual mandate. They represent the most systematic overhaul to Medicaid since the program was first established in 1965.[1] With 60.4 million people enrolled in 2010, Medicaid is the nation's largest health insurance program, dwarfing even Medicare by approximately 15 million enrollees.[2] Under the ACA's reforms, people with incomes 133% of the federal poverty level (FPL), approximately $29,000 for a family of four, will qualify for Medicaid.[3] The ACA, as originally enacted, required all states to expand the program, but the U.S. Supreme Court struck down that provision and, as of today, slightly over half of the states plan to expand. Along with the Children's Health Insurance Program (CHIP), Medicaid provides health insurance to about 15% of the U.S. population through shared federal-state funding. The federal government pays, on average, 50% to 70% of a traditional Medicaid program and somewhat more for CHIP, with state-specific rates based on per capita income.[4]

Over the past 15 years, the federal government has demonstrated its preference for transforming Medicaid into the country's major health insurance program. The

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process began in 1996, when Medicaid eligibility was delinked from cash assistance, and has continued through the first decade of the new century. While the Supreme Court's 2012 decision on the ACA, holding that Congress could not constitutionally require states to expand their Medicaid programs, will make the transformation less potent nationally, New York is well positioned to handle expansion, due in large part to its already extensive Medicaid program.

In recent years, New York has made great strides in improving its Medicaid system, through cost-cutting measures, hospital modernization, and an emphasis on increasing preventative care. As the state moves forward with implementation of the ACA's main provisions regarding the private insurance market – namely the New York Health Benefit Exchange (the Exchange) for those who are ineligible for Medicaid but unable to get insurance otherwise – experts hold that the state has an unprecedented opportunity to re-envision Medicaid as a source of health insurance.[5] This is possible due to New York State's uniquely broad and extensive system of Medicaid coverage.[6]

Almost five million New Yorkers – about one-quarter of the citizens – receive health insurance through Medicaid.[7] New York is currently the only state that subsidizes children in families with incomes up to 400% FPL and is one of five that provides all children, regardless of immigrant status, with coverage.[8] In 2010, 4.8 million citizens were enrolled, up from 2.8 million a decade earlier,[9] with an enrollment rate nearly double the *national* growth rate expected *after* the 2014 Medicaid expansion.[10] While all states take part in Medicaid, state income eligibility requirements and budgetary issues have resulted in literally hundreds of different Medicaid operations throughout the states and regions. For example, a handful of states avail the program to a family of four making $35,325 (1.5 times the FPL), while as many as 16 states limit coverage to a family of four making $11,000 (or *less* than half the FPL).[11]

With successful execution of the ACA's reforms, New York may become a state with truly universal coverage. As the state's Department of Health (DOH) begins its work in 2014, establishing a consistent and efficient system of coordination between Medicaid and the Exchange is essential.[12] The expansions to Medicaid eligibility, establishment of the Exchange, and federal subsidies should make it easier for New Yorkers to get coverage.[13]

## Changes to the Medicaid Landscape

New York's current coverage requirements are broad enough to make the transition less burdensome and less costly than in other Medicaid-expanding states, which have to grapple with swaths of people with undocumented eligibility levels.[14] Nonetheless, New York must still find a way to enroll 1.1 million uninsured individuals who are currently eligible yet not enrolled for various reasons,[15] along with the 513,000 New Yorkers expected to become eligible this year.[16] As many as 70,000 new enrollees will likely enter into the program as a result of the changes for childless adults with incomes between 100% and 133% of the FPL. Reductions in enrollees "churning" in and out of Medicaid will not only account for a significant increase in enrollment for those currently eligible but will also increase enrollment of uninsured individuals by over 400,000.[17] To accommodate the expected influx – along with the influx of new individuals enrolling through the Exchange – the DOH plans to further centralize Medicaid eligibility determinations, away from 58 local districts, so the DOH will have total oversight over all county administrators in the state.[18] The centralization of New York's Medicaid system into the DOH should be noted: it conforms appropriately to the ACA's vision for a state-run system to streamline and coordinate the application and eligibility process for Medicaid, CHIP, and premium subsidies provided via the Exchange.[19] This is important considering the number of people whose changing income levels will result in their switching back and forth between eligibility for Medicaid and eligibility for the Exchange. To avoid costly, time-consuming, and confusing effects as the result of the churning, combining Medicaid and the Exchange under the DOH's watch was deemed essential.

## Information Services

A critical area requiring advance planning, skill, and a great deal of coordination is the field of information systems and technology (IT). Modern IT is necessary to maintain consumer-friendly eligibility and enrollment procedures, and only a capable IT system can create a continuum of coverage for those moving between Medicaid and the Exchange.[20] With DOH coordination, the goal of the IT system is a simplified enrollment process, with similar processes for Medicaid and Exchange enrollment. Once the "growing pains" are over, the IT system is expected to eradicate the complex paperwork previously required for determining eligibility, relying instead on electronic verification through connections to state and federal databases.[21] Ridding the state of the burdensome income-counting methodology currently used for most Medicaid and CHIP beneficiaries will no doubt make for a more efficient, streamlined, and less paper-heavy process.[22] However, studies show that most New Yorkers cannot correctly complete an application without assistance from an expert, such as a caseworker. Even after New York revised its Medicaid application process several years ago to make it more consumer friendly, many applicants remained unable to navigate the form without assistance.[23] Thus, along with IT, a robust consumer assistance program is also needed. To that end, the state has been closely following federal Health and Human Services guidance on creating a network of "navigators" to assist consumers with Exchange enrollment, tailored to

various state regions, communities, and demographics. A strong consumer-assistance program for the Exchange will naturally overflow into Medicaid.

For this to work well, however, the Medicaid and Exchange programs must be fully, seamlessly, integrated.[24] A shared platform is ideal, considering the number of enrollees expected to shift between sources of coverage as their circumstances change. As implementation moves forward, the system will see ever-higher volumes of applicants with varied technical and language abilities. Once fully implemented, the system should be able to interface with a large number of federal, state, private, and employer databases to verify eligibility data; enable real-time determinations; interface with participating insurance plan systems in order to enroll participants; store consumer information for renewal; assess changes in enrollee circumstances in order to make redeterminations for eligibility and make the necessary changes, if required; and inform applicants of eligibility and renewal periods.[25] This is no small feat.

Despite uncertainty, New York is well situated to make the transition.

## Modified Adjusted Gross Income

Both Medicaid and Exchange eligibility will be determined, for the most part, using a new formula: Modified Adjusted Gross Income (MAGI). MAGI will affect Medicaid in a number of ways. For one, Medicaid applicants will now be divided into two groups: the majority, whose eligibility is based on MAGI, and the minority, whose eligibility will remain based on pre-existing Medicaid budgeting rules. The minority will include Supplemental Security Income-related groups (older than 65, disabled, blind); those eligible for the Medicaid Buy-In Program for Working People With Disabilities; the Medicaid Cancer Treatment Program; and those utilizing the spend-down program by offsetting excess income with medical expenses. Also, under MAGI, "household" is redefined as the tax-filing unit, with limited exceptions to protect children who would otherwise be part of a Medicaid household under previous rules. Now, "household income" includes the income of all members of the tax-filing household, with exceptions for those who are not required to file tax returns. Pregnant women and infants under one year old will also be eligible for full coverage, up to 200% of the FPL, as "family size" includes household members plus expected children. Last, MAGI groups will have continuous eligibility for 12 months, even if their income changes (thereby lessening the churning in and out of Medicaid).

When an individual applies for either Medicaid or the Exchange, the Department of Health will use the same screening process to help determine what program the person is eligible to join. Because there will be a large pool of individuals and families shifting between Medicaid and the Exchange, based on eligibility,[26] those near the cutoff point are most likely to be affected by MAGI determinations (it is worth remembering, however, that a number of populations, such as the elderly, will not use MAGI). Eligibility and subsidy levels will fluctuate in response to income changes,[27] which may disrupt coverage and possibly hurt the quality of care and raise administrative costs.[28] A January 2011 study in *Health Affairs* concluded that, within six months, more than 35% of adults with family incomes below 200% FPL will see a shift from Medicaid to the Exchange or vice versa.[29] Within one year, 28 million, or 50% of adults with family incomes below 200% FPL, will see the same shift in eligibility.[30] While a streamlined and coordinated system will help ensure a continuum of quality care regardless of the program, individuals will no doubt face significantly higher costs when they find themselves eligible for the Exchange enrollment (where they must purchase plans, albeit with subsidies) and not for Medicaid (which is essentially free). Thus, families with incomes between 139% and 200% of the FPL may face financial hardships when they are no longer eligible for Medicaid due to the new MAGI determinations. The ACA provides states with some flexibility to assist individuals, including the opportunity to offer a Basic Health Program (BHP), which New York is scheduled to do.

The BHP will assist New Yorkers with incomes too high to qualify for traditional Medicaid. Offering financial security to these citizens whose incomes are roughly 100% to 150% FPL will ensure their access to affordable and consistent coverage. Unlike Family Health Plus, which the BHP will functionally replace, a BHP will save the state from burdensome costs because of increased federal funding for the BHPs.

## Conclusion

Despite uncertainty, New York is well situated to make the transition into 2014 and beyond, particularly when compared to other states that have also opted to expand Medicaid. Because New York, along with only 17 other states, opted to apply to HHS for approval to operate its own state-run Exchange, the state will be free from a number of inevitable state-federal conflicts. This is due in large part to New York's pre-ACA position as a national "leader state" when it comes to "providing access to affordable, high quality health coverage for its low-income residents."[31] New York has made a clear effort to meet the ACA's vision of providing easy access to affordable care.

The success of the Medicaid reforms is dependent on the resolution of a few issues whose implementation is

## Technical Problems?

When the Cuomo administration applied for an Exchange planning grant in 2010, it anticipated a simplified enrollment system built on IT practices.[1] Shortly before issuing the Executive Order to implement the Exchange, Governor Andrew Cuomo was able to waive procurement laws and hire Virginia-based Computer Sciences Corp. (CSC) to manage the Exchange's IT system.[2] On the surface, the CSC pick made sense: it has long been a state contractor and has run eMedNY, New York's system for billing Medicaid, for the last 10 years.[3] The Cuomo administration had initially sought legislative approval to award the contract to CSC without any competitive bidding, but the Legislature refused.[4] Nonetheless, after Dell outbid CSC by tens of millions of dollars (Dell runs Massachusetts Connector Program), CSC was awarded the contract (the exact details were not disclosed).[5] The DOH contended that after reviewing both bids, a panel determined unanimously that CSC was the best fit, namely because its proposal meshed with the eMedNY platform. This is somewhat curious considering CSC's alarming track record in New York. The CSC's eMedNY's $1 billion contract has been riddled with overruns, delays, and programming flaws.[6] A 2010 comptroller report, following a state investigation into CSC's practices, noted that eMedNY failed to catch billing mistakes that ultimately resulted in $450 million of Medicaid overpayments. Other states have had similar problems with CSC.[7] North Carolina's late and over-budgeted Medicaid billing system prompted a state audit in January 2012, and reported that CSC's system was 22 months late and $320 million over budget.

CSC has also had problems in other countries as well. In Canada, one of the largest pension funds sued CSC in a shareholder lawsuit related to its accounting practices. In the United Kingdom, a cross-party committee of lawmakers issued a report scolding CSC for its electronic records program in the U.K.'s National Health Service, which was rife with delays and cost overruns.[8] The U.S. government has also gotten into the mix, with the U.S. Securities and Exchange Commission launching a formal probe into whether CSC's accounting was overstated.[9] In a 2011 conference call, Mike Mansuco, CSC's Chief Financial Officer, noted that "[t]he 10-Q [second-quarter earnings report] will disclose that the investigation has expanded to include our Australian business . . . certain accounting errors, including suspected intentional misconduct, have been identified. . . ."[10] When asked by the *Wall Street Journal* about the eMedNY problems, CSC refused to comment beyond asserting that eMedNY "has demonstrated accurate and cost-effective administration" and emphasized that any contract formed would be one that provides "value for money to taxpayers."[11]

In a study subcontracted by the state to the United Hospital Fund (written in December 2011 and published the month that CSC was contracted), a common question among New York officials was whether it was feasible to complete all the IT tasks that were supposed to be ready by January 2014.[12] Some expressed optimism, but others reserved judgment until the system integrator was hired, at which time they would receive a "reality check" so as to avoid overpromising and under-delivering.[13] Given CSC's past performance, it is not certain whether, in the end, the system will able to accommodate the new challenges that still lie ahead – from eligibility changes due to income fluctuations to maintaining up-to-date, real-time data.[14]

1. Danielle Holahan, *Coordinating Medicaid and the Exchange in New York*, 2 United Hospital Fund (2011) at http://www.uhfnyc.org/publications/880749.

2. Jacob Gershman, T*roubled Firm Wins Health Exchange Bid*, Wall St. J. Online (Apr. 3, 2012, 10:32 p.m.), at http://online.wsj.com/article/SB10001424052702303816504577321902924427774.html#articleTabs%3Darticle.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Conference Call, Computer Sciences (CSC) Second Quarter Earnings Call (Nov. 9, 2011 11:00 a.m.).

11. Jacob Gershman, *Troubled Firm Wins Health Exchange Bid*, Wall St. J. Online (Apr. 3, 2012, 10:32 p.m.), at http://online.wsj.com/article/SB10001424052702303816504577321902924427774.html#articleTabs%3Darticle.

12. *See* Teresa A. Coughlin, Randall R. Bovbjerg, et al., *ACA Implementation in New York – Monitoring and Tracking*, The Urban Inst. 11 (Apr. 2012) (noting that a last-day vote on same-sex marriage also contributed to the failure).

13. *Id.*

14. *Id.*

anything but simple. Since the ACA was passed, New York has taken an aggressive and proactive stance toward implementation of the law, beginning with the centralization of Medicaid into the DOH and the creation of a blueprint for Medicaid expansion and Exchange implementation. The state is now in the process of executing these plans.

As long as New York is able to maintain a large and diverse pool of enrollees in the Exchange, with a seamless coordination with Medicaid, the programs should successfully provide expanded coverage. Achieving this is no small feat, of course. Should the inevitable IT glitches prove too frustrating for the public, individual enrollment into the Exchange may drop, and entire populations may find themselves uninsured. Yet, New York's history of public welfare spending and its commitment to maximizing coverage will encourage resiliency and patience while the growing pains become manifest. If

New York maintains a clear, accessible program, encourages consumer outreach, and tackles the complexities of income tax reform and churning between Medicaid and the Exchange, it will go a long way toward achieving the reforms envisioned in the ACA. ■

1. Amy Goldstein, *Priority One: Expanding Coverage, in* Landmark: The Inside Story of America's New Health-Care Law and What It Means for Us All 76–77 (Marcus Brauchli ed., 2010).

2. Andrea Sisko et al., *National Health Spending Projections: The Estimated Impact of Reform Through 2019*, Health Affairs 29, no. 10 (2010).

3. In *Nat'l Fed'n of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012), Justice Roberts's plurality decision stated that the Medicaid expansion, as written and signed into law, was unconstitutionally coercive in issuing penalties to states refusing to comply. ("[Congress may not] penalize states that choose not to participate in that new program by taking away their existing Medicaid funding.") Reasoning that the Medicaid expansion was a new system, rather than a modification of Medicaid, the Court issued an unprecedented holding in determining Congress's spending power to be unconstitutionally coercive. As a result, states would not be penalized for failing to engage in the Medicaid expansion while still keeping the status quo Medicaid system. *See also* Nicole Huberfeld, et al., *Plunging Into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Businesses v. Sebelius, 93 B.U.L. Rev. 1 (2013). Due to the massive federal funding that would be immediately directed to the Medicaid program, however, which comes at no cost to states for the first three years, a number of outspoken governors critical of ACA have since opted for the Medicaid expansion anyway. *See* Lizette Alvarez, *In Reversal, Florida to Take Health Law's Medicaid Expansion*, N.Y. Times, Feb. 20, 2012, at A13.

4. *See* John McDonough, *Preface* Inside National Health Reform, 142 (2011).

5. Deborah Bachrach, et al., *"Revisioning" Medicaid as Part of New York's Coverage Continuum*, United Hospital Fund (2011) *at* http://www.uhfnyc.org/publications/880724.


6. Danielle Holahan, *Coordinating Medicaid and the Exchange in New York*, 2 United Hospital Fund (2011) *at* http://www.uhfnyc.org/publications/880749.

7. Michael Birnbaum, *Medicaid in New York: Current Roles, Recent Experience, and Future Challenges*, United Hospital Fund (2010) *at* http://www.uhfnyc.org/publications/880717.

8. As recently as 2009, the federal government reauthorized the Children's Health Insurance Program (CHIP), which was first linked to Medicaid in 1997, and states were given new tools to help expedite enrollment in both programs. *See* Birnbaum, *supra* note 7, at 1, 3.

9. Birnbaum, *supra* note 7, at 13.

10. *Id.* at 14.

11. Kaiser Family Found., Comm'n on Medicaid & the Uninsured, *Where Are States Today? Medicaid and CHIP Eligibility Levels for Children and Non-Disabled Adults as of January 1, 2014*; *Where Are States Today? Medicaid and CHIP Eligibility Levels for Children and Non-Disabled Adults (2013)*; and *Where Are States Today? Medicaid and State-Funded Coverage Eligibility Levels for Low-Income Adults* (Dec. 2009), *at* http://www.kff.org.

12. Holahan, *supra* note 6, at 1.

13. Elisabeth R. Benjamin & Arianne Slagle, Policy Brief *Bridging the Gap: Exploring the Basic Health Insurance Option for New York*, N.Y. State Health Found. 1 (June 2011).

14. For example, eligibility levels for adult parents in 17 states has recently been set at, or below, 50% FPL – an income of $11,525 for a family of four. Another 17 states set levels eligibility levels closer to 100% FPL, which equals approximately $23,050 for a family of four. *See* Kaiser Family Found., Comm'n on Medicaid & the Uninsured, *A Foundation for Health Reform: Findings of a 50-State Survey of Eligibility Rules, Enrollment and Renewal Procedures, and Cost-Sharing Practices in Medicaid and CHIP for Children and Parents During 2009* (Dec. 2009). As of December 2009, only five states allowed adults without dependent children to enroll in Medicaid, although two of those states plus another 14 offered some limited set of benefits to some childless adults.

15. *Id.* at 19.

16. *See* Fredric Blavin et al., *The Coverage and Cost Effects of Implementation of the Affordable Care Act in New York State*, Urban Inst. Health Policy Ctr. 4, 5 (2012), *at* http://www.urban.org/uploadedpdf/412534-affordable-care-act-in-New-York-State.pdf; Kevin Lucia, et al., *Cross Cutting Issues: Monitoring State Implementation of the Affordable Care Act in 10 States: Early Market Reforms*, Urban Inst., ACA Implementation – Monitoring and Tracking 19 (2012).

17. Deborah Bachrach, et. al, *Medicaid's Role in the Health Benefits Exchange: A Road Map for the States*, Maximizing Enrollment Program, Robert Wood Johnson Found. (Mar. 2011).

18. Lucia, *supra* note 16.

19. *See* CMS Medicaid, Federal Funding for Medicaid EligibilityDetermination and Enrollment Activities, 75 Fed. Reg. 215 (Nov. 8, 2010) (to be codified at 42 C.F.R. pt. 433).

20. Holahan, *supra* note 6, at 8–9.

21. Birnbaum, *supra* note 7 at 2.

22. *Id.* at 3.

23. Children's Defense Fund of New York and Coalition of New York State Public Health Plans and Community Service Society, *Medicaid Application Redesign*, United Hospital Fund (2009-10).

24. *See* Holahan, *supra* note 6, at 9.

25. *Id.*

26. *See* Sarah Rosenbaum, *Building a Relationship Between Medicaid, the Exchange and the Individual Insurance Market. Report From the Study Panel on Health Insurance Exchanges Created Under the Patient Protection and Affordable Care Act*, Robert Wood Johnson Foundation (Feb. 2012) *at* http://www.nasi.org/sites/default/files/research/Building_A_Relationship_Between_Medicaid_the_Exchange_and_the_Individual_Insurance_Market.pdf.

27. Chris Fleming, *Frequent Churning Predicted Between Medicaid and Exchanges*, Health Affairs (Feb. 4, 2011), *at* http://healthaffairs.org/blog/2011/02/04/frequent-churning-predicted-between-medicaid-and-exchanges/ (citation omitted).

28. *Id.*

29. Benjamin D. Sommers and Sara Rosenbaum, *Issues in Health Reform: How Changes in Eligibility May Move Millions Back and Forth Between Medicaid and Insurance Exchanges*, Health Affairs, Feb. 24, 2011.

30. *Id.*

31. *See* Benjamin & Slagle, *supra* note 13.

# ADR: A Smart Solution for Crowded Court Dockets

## By Robert D. Lang

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Perhaps no area has seen a greater rise in the use of mediation and arbitration than high stakes personal injury cases. Whether cases are in their earlier stages or on the trial calendar, both plaintiff and defense attorneys are increasingly using alternative dispute resolution (ADR) to resolve their cases. Personal injury litigation is particularly well suited to mediation, unlike business and commercial litigation, where there is often a greater common interest, if not collegiality, between counsel for the plaintiff and counsel for the defendant. The nature of these claims, other than in class actions, is such that the roles counsel play could easily be reversed, as both counsel are generally as experienced and comfortable representing the plaintiff in a commercial or business dispute as they are the defendant. This common ground helps communication between opposing counsel, which can lead to settlement without the involvement of a third party to facilitate negotiations. This is not the case for personal injury counsel.

One of the great untruths in personal injury litigation is that a lawyer never should be the first one to raise the prospect of settlement. Few statements are less accurate; lawyers well know that more than 90% of all personal injury cases settle. It is counterproductive to pretend otherwise. Moreover, it is sound business practice to consider settlement as soon as practicable because it reduces litigation costs and expenses. For the defense side in particular, the longer a case is pending the greater is the possibility that the defendant's officers and employees are no longer willing to testify for the defendant or have become ex-officers and ex-employees. What if an employee who would be asked to testify was fired for cause? If that cause is related to honesty, that is something that counsel for the plaintiff will be sure to probe and bring before the jury. Even if the employee is still with the company, that employee may have been transferred, perhaps across the country or to another country. Having that witness leave work to appear in trial is a costly and unnecessary proposition, if the reason is that the attorney refuses to discuss settlement with the adversary unless the adversary brings up the topic first. Clients are usually ill served by attorneys who refuse to broach the topic of settlement for fear of being considered weak or afraid. Fortunately, most attorneys now welcome the opportunity to use ADR to resolve their cases.

### Glamour vs. Results

While one may debate whether law school adequately prepares graduates for the practice of law, and whether law school should be two or three years, most agree that law school fails to address one of the fastest-growing and most important areas of the law: alternative dispute

resolution. Mediation and arbitration achieve faster, less expensive and comparable results to old-time, traditional litigation, with its numerous court appearances, conferences, hearings, trials and appeals. Yet some lawyers privately prefer to take a jury verdict for the personal satisfaction. The lawyer has never lived who does not feel an adrenalin rush on hearing the words, "the jury is in." Many lawyers visualize that moment, based upon books, movies and TV. In film and television, when the foreman of the jury says, "We find the defendant guilty / not guilty," the whole world appears poised to hear the verdict. The camera swiftly moves to the faces of the victors and the vanquished. Especially regarding defense work, nothing binds a lawyer with the client more than a "DV" – defense verdict. To have the client and the claims examiner and supervisor in the courtroom when the jury returns a defense verdict is the closest most defense lawyers will come to the pantheon of great theater, which trial lawyers crave. The celebration immediately afterward, usually with adult beverages, further cements the relationship between the defense attorney, client and carrier.

Certainly no such moments of jubilation or despair occur when the arbitration award is received in the mail. To be sure, lawyer, and their clients will be happy or sad, but there is no great moment of total victory. More common is the low-key firm handshake or "job well done" email received from clients when arbitrations and mediations are concluded. An earlier and less expensive resolution of the case is not as glamorous as a jury trial, but, in many instances, it is the best way for an attorney to zealously represent the client's best interests.

## Plaintiff's Bar vs. Defendant's Bar

In today's world, the ability to settle, not just try, cases can often be a most valuable asset for clients and carriers. However, personal injury litigators do not enjoy the collegiality of business and commercial litigators. Attorneys who typically represent plaintiffs in high-level personal injury cases are rarely, if ever, retained by insurance companies for self-insureds to represent defendants in those same cases. Likewise, the attorneys representing defendants in personal injury suits, who are customarily paid on an hourly or alternative fee basis, seldom represent plaintiffs in those same types of cases, where compensation is based upon a contingency fee. Indeed, some carriers require that their panel counsel agree *not* to represent any plaintiffs at all in personal injury cases. The resulting "opposite sides of the aisle" and "give no quarter" mentality of most plaintiffs' and defense counsel in personal injury cases can lead to skyrocketing legal fees and costs. Given these circumstances, the addition of a third-party neutral or mediator can not only jump-start some negotiations but also lead the talks to a successful conclusion.

In personal injury cases, plaintiffs' counsel can have difficulty conveying to their clients the risks and problems in cases – especially when a relative or friend is whispering contrary advice in a plaintiff's ear, advice based on their memory of an entirely different personal injury case or a "made for television" courtroom drama. The entry of a mediator, often referred to as "Judge" and sporting more grey in his or her hair than the lawyers involved in the case, can often persuade reluctant plaintiffs to settle when their own attorneys are unable to do so.

There are attorneys who, although revered within their firm and among clients as "courtroom lawyers", and razor sharp on the rules of the evidence, recognize that they do not necessarily have the same high skill set when it comes time to settle the case. Courtroom lawyers who can be "compelled" to mediate a case allow clients and carriers to resolve the litigation earlier, with less expense and uncertainty. Attorneys who only deal with their adversaries as mortal enemies rarely fare well in the setting of a mediation. Mediators often encourage an atmosphere of dialogue and communication that promotes resolution of a case. Attorneys who can argue with their adversaries yet maintain cordial relationships with them – retaining some sense of humor – will do better at mediation.

Another consideration is the inevitable delays in courtroom litigation, with its attendant costs. For example, in many venues, it can be years between the time a case is placed on the trial calendar and when it is first called to select a jury. Even then, the actual start of a case may be delayed further if witnesses or counsel are unavailable – especially if some of the attorneys are already actually engaged in trial. On the plaintiff's side, a long wait is a big downside. For defense counsel and carriers, costs relentlessly accrue over time – another reason why mediation in personal injury cases is gaining traction.

## The ADR Offensive

### For the Plaintiff

Often, mediation can be used to hide a significant problem in a case, because it promotes conclusion of a matter before the adversary knows of the difficulty. For example, a plaintiff in a personal injury case may be unable to appear for deposition, a court hearing, or trial for any number of reasons, including deportation, incarceration, or drug or alcohol rehabilitation. Or it may be that a key witness has had a falling out with the plaintiff and, therefore, is no longer willing to cooperate and testify on the plaintiff's behalf. ADR can also conceal adverse medical histories. For example, a plaintiff may have a medical history which shows that the same body parts involved in the present lawsuit were the subject of prior claims and even testimony by the plaintiff. If these prior injuries cannot be explained adequately as being unrelated to the present injuries, plaintiff's counsel understandably want to avoid interrogatory answers, bills of particulars and testimony by the plaintiff becoming known to defense counsel. In all these scenarios, the timing of the offer to mediate is critical.

The moment of truth can also come for plaintiff's counsel when trial is near. Although excellent attorneys in their own right, many lawyers for the plaintiff prefer to hire outside trial counsel if aspects of personal injury cases are outside their immediate areas of expertise. However, with the retention of trial counsel comes a reduction of the fee which plaintiff's counsel will receive. Typically, a trial attorney will receive a contingency fee, one-third of the amount recovered. Thus, the plaintiff's attorneys may turn to private mediation to resolve the case so that, whatever the plaintiff recovers, the plaintiff's attorney will receive the full one-third amount and not have to share the recovery with another attorney.

To avoid tipping their hand to defense counsel, plaintiff's counsel can approach defense counsel and casually suggest that the case be mediated, maybe not even mentioning any particular reason. Or, plaintiff's counsel might suggest that several other cases with the same carrier be resolved on the same day or might make passing reference to "getting some money before the end of the year." Planting the seed of a mediated settlement before defense counsel are aware there may be a problem in the plaintiff's case can be an effective technique, benefiting the plaintiff and the plaintiff's attorneys.

Here is where art and skill can make all the difference. Plaintiff's counsel cannot appear too eager to mediate the case; otherwise, defense counsel, who are notoriously skeptical of plaintiffs, may suspect that the plaintiff's attorney is playing "hide the thimble." Any suggestion by the attorney for the plaintiff that the case be mediated, especially when the facts are such that an objective observer could conclude that the suit is anything but ripe for resolution, can raise suspicions. The attorney for the plaintiff will therefore try to set up a scenario where defense counsel will suggest the case be mediated. Or, the attorney for the plaintiff might innocently point out to the judge that perhaps the suit can be removed from the crowded docket if only the parties could bring themselves to agree on mediation, whether with a court-appointed mediator or a private mediator. No matter the particular words used, it is critical that the plaintiff's attorney not appear overly anxious, even though the plaintiff is intensely motivated to have the case settled before defense counsel becomes aware of the problems the plaintiff is seeking to veil.

### For the Defense

Of course, defense counsel also may view mediation as a way to circumvent a weakness in their case. For example, a main defense witness may have been fired. Or a witness could have left the employer and no longer will cooperate. Perhaps compromising information is in the witness's personnel file. There are even circumstances where defense counsel knows, but counsel for the plaintiff does not, that a major defense witness will not or will fail to cooperate in the defense but may be eager to assist the plaintiff. The lawyer for the defendant can likewise pick up the phone or, when seeing his adversary in court, innocently suggest that the case be mediated (for any reason), perhaps stating that it is "time to clear up some inventory" or "time to get this case off the calendar." The point remains the same: when one side knows, but the other does not, that there is a significant problem in the case (often the situation), mediation can be an effective way to make sure the case is concluded without the adversary's knowing the problem.

### Selecting the Mediator

All too often, attorneys rely on the recommendations of others in the critical step of mediator selection. It is all well and good for a lawyer to canvas the attorneys of the firm or ask colleagues for recommendations. However, those recommendations may fail to address critical relationships between the potential mediator and your adversary, and the prior track records that mediator has with your insurer or claims examiner. If the case proceeds to a mediation and does not settle, or does not settle on terms your insurer finds acceptable, a lawyer can expect questions from the claims supervisor as to why the particular mediator was selected. If that lawyer has nothing more to fall back on than the general reputation of the mediator, that response will likely be found inadequate – especially if the mediation goes poorly. A satisfactory response is that the attorney has had several cases with that specific mediator and those proceedings had good results; this answers the carrier's legitimate questions as to why a particular mediator was selected for this specific case.

Care also should be taken to ensure that the mediator is not a "personal favorite" of your opposing attorney. Although you do want a mediator who can be persuasive with your adversary, too close a relationship may give rise to the suggestion of partisanship, tilting the playing field in favor of your opponent. Learn which mediators are usually requested by your adversary and carefully weigh the pros and cons of agreeing to a mediator specifically recommended by the adversary.

One approach is to speak to your adversary at the beginning of the case and ask generally which mediators he or she uses and which mediators he or she seeks to avoid; in essence, share general information without making specific reference to the controversy at hand, before mediation is considered. Most lawyers learn to take note of their adversary's preferences and remember them when the time comes to agree upon a mediator for the case at hand.

Useful intelligence about which mediators to select or to avoid can be obtained by asking colleagues, often with other law firms, about prior cases they may have had with your adversary. If an attorney learns that the adversary prefers certain mediators over others, that intelligence can be used in creating strategies for mediat-

ing pending cases. It is important not only to know which mediators were used, but whether the mediations were successful. There is little purpose in choosing a mediator because he or she has a winning personality and fawns over you when your client is present at the mediation. The case cannot be settled if a mediator displays partiality. Whether the mediator, through various skills, wisdom and cajoling, can bring the parties across the finish line is critical. Everything else is, as they say, just "conversation."

With a particularly difficult case, it can be quite beneficial to recommend (or "reluctantly" agree upon) a mediator who has successfully concluded cases with your adversary. Keep in mind the prior track record of a mediator during the all-important selection process.

## Mediating During Trial

Venues with favorable jury pools invite plaintiffs' lawyers to avoid mediation. One of the great variables in personal injury law is the jury. Lawyers in all fields agree that no one can predict what a jury will do, especially when potential jurors are drawn from backgrounds similar to those of plaintiffs in personal injury cases. One of the strongest cards that plaintiff's counsel can hope to play is that the jury will be sympathetic to the plaintiff's claims, especially on damages. Hoping to "ring the bell," some plaintiff's counsel therefore prefer not to engage in serious settlement discussions until the jury has been selected and opening statements given. They are keenly aware that insurance carriers for defendants in major personal injury cases are also mindful of the risks of submitting cases with large corporate defendants to sympathetic juries. To be sure, motions can be made to satisfy or reduce verdicts, and appeals can be taken. However, there is no certainty that such motions or appeals would be successful, and all of this militates against settling the case where a "good" jury for the plaintiffs is available or has been picked.

Although some attorneys therefore dismiss mediation as a viable option in such cases, the fact is that mediation is particularly helpful once the jurors are selected so that, with deference to Donald Rumsfeld, there are fewer "unknown unknowns." In many instances, the most effective and to-the-point mediations take place on the eve of trial or even during trial, with the case proceeding during the day and mediation taking place at night. Not only are there fewer variables – discovery has been completed and sometimes testimony is already under way – but since both sides are actually engaged in trial, the mediation quickly gets to the point and proceeds more swiftly, with less haggling. At this point, both sides know that the legal landscape may change tomorrow as witnesses are called and cross-examined.

Major personal injury cases require expert witnesses, certainly on damages but also on liability. Those witnesses called by the plaintiff and defendant include engineers, economists, actuaries, vocational rehabilitation experts, treating physicians and other experts. Many an attorney in the personal injury field has ruefully acknowledged that perhaps he or she would have been better off becoming a doctor, given the hefty fees these expert witnesses earn for testimony in court. Moreover, these fees have to be paid in advance and are not refundable, since a doctor has to sacrifice his or her entire workday to give testimony. Without such expert testimony, however, the case can fail on either side. Mediation is one of the best ways to have the benefits of expert testimony, without paying anew for the experts to appear in court. The expert's report, previously exchanged in discovery, can be utilized by either side in advocating its position. Substantial cost savings can be realized, with benefits to both the plaintiff's and defense counsel.

## Arbitration

Several forms of alternative dispute resolution match well with personal injury cases. Arbitration is one. At first blush, one can assume that attorneys for the plaintiff would be loath to arbitrate any case, since they will be giving up their right to have the case heard and determined by the jury. This analysis is overly simplistic.

First, some plaintiff's counsel will not want their client's case to be heard by a jury because the jury pool may be more conservative than the sitting judge in the particular venue. In those instances, counsel for the plaintiff may not even request a jury trial. Rather, it will be defense counsel who, if given the option, would request a trial by jury.

Second, in many jurisdictions, the wait for trial is greater when the case is placed on the docket for jury trials. Depending on the jurisdiction and venue, the time between the case being called for trial in a jury as opposed to a non-jury setting may be years, not months. Since the attorney for the plaintiff is paid only when the case is resolved, whether by verdict or settlement, plaintiff's counsel has an incentive to ask that the case be tried before the court, and not before a jury. By the same token, insurance carriers may be more inclined to ask for a jury trial. The delay in resolution, particularly when there is a jury pool perceived to be favorable to the defendant, works against the plaintiff.

As far as defense counsel are concerned, although required to represent their clients zealously, they know that a jury trial takes longer to try than a non-jury case because of delays due to the scheduling of jurors. Indeed, the jury selection process – although quick in some jurisdictions – can take days or weeks in others. Jurors have to be available. A judge has to either sit in a room during jury selection or be available when rulings are needed on jurors. Lawyers will have to wait until the judge is available to make those rulings. All of this adds time. With plaintiff's counsel, their fee is based upon a percentage of the case's resolution; but defense counsel

have the proverbial "meter" running when they are in court, waiting for the case to be called, waiting for jurors to be summoned, and during the selection process and challenges, whether for cause or peremptory. Offering to mediate or arbitrate and therefore eliminate the jury is not necessarily something that the plaintiff's attorneys will find objectionable; it may even be desirable to them, depending on the case.

Moreover, submitting a case to arbitration allows attorneys for the plaintiff the opportunity to sidestep potentially difficult problems which otherwise would take up time in court. For example, although the major players usually testify at arbitration, in many proceedings, each side will introduce evidence by affidavit and, with respect to medical evidence, provide medical reports rather than having the expert testify on the stand. If these major players were called as witnesses, either side might be able to score points by cross-examining such witnesses at trial. Arbitration avoids exposing weaknesses that could be revealed by the opposition's cross-examination.

### High-Low Agreement

Nor is that all. In arbitration, lawyers for both sides can take into account the probable value of the case, based upon the venue and a likely jury pool, without undergoing the time and expense of a jury trial, and the uncertainty of what a jury may do. Often, the parties agree upon a "high-low" for the arbitration. One obvious benefit of a high-low agreement is that there is certainty on both sides. Plaintiff's counsel fear a defense verdict with no monies being paid to the plaintiff, or having a jury so dislike their client's case that it awards only a small figure. By having a guaranteed "low," the attorney for the plaintiff avoids such a situation.

The agreement on a "high" resolves the opposite problem. Defendants and their carriers fear a verdict which is higher than what is reasonably anticipated and which may withstand a motion to satisfy or reduce, or an appeal. Insurance carriers hold monies in reserve for outstanding claims, and one way for them to make certain that the reserve is adequate is by agreeing upon a "high." In complex personal injury suits, high-low arbitration agreements yield real and undeniable advantages for both sides.

### From Mediation to Arbitration

The relationship between mediation and arbitration is such that sometimes one can flow into the other. For example, the parties mediate the case but are unable to bridge the final gap. Often, they will propose arbitrating the case but based on the high-low derived from the last demand and the last offer at the mediation. In such instances, the parties often will agree to arbitrate the case before the same individual who served as mediator. There are several reasons for this. One is that the mediator is already familiar with the case, having read the mediation submissions and heard argument. Another reason is when an attorney believes that the mediator warmed to his or her arguments and therefore that attorney could have an advantage when the case is decided on the merits. However, some mediators decline to arbitrate cases they have mediated. Their reasons for doing so are various, including the concern that, having previously recommended a stated dollar figure for settlement after hearing the evidence, that opinion may change, and the attorney who, in essence, "relied" upon the earlier recommendation made in mediation, can hold the arbitration award against that mediator and therefore choose not to use that individual in future ADR.

### Experts

The choice of doctors retained in complex personal injury cases can directly impact the choice of whether to litigate, arbitrate or mediate. The attorneys for the plaintiff do not have a free choice in selecting all of the expert witnesses. Treating physicians for plaintiffs, emergency room personnel, the plaintiff's personal or family physician, and those doctors who performed surgery typically "come with the case." All other experts, however, are selected by the attorney, whether the lawyer be for the plaintiff or the defendants.

> The ability to settle, not just try, cases can often be a most valuable asset for clients and carriers.

In that selection process, due care is given for the professional background of the experts in medicine, biomechanical engineering, forensics, fire, vocational rehabilitation, and economics. The vetting of the experts is critical, as each side knows that the other is likely to check the experts' backgrounds and scrutinize the bona fides of their expertise. These credentials checks could uncover possible prior lawsuits against an expert. Attorneys for both sides will obtain and meticulously examine the testimony and reports the experts have given in the past.

Some lawyers lean toward experts with impressive academic and professional backgrounds, with curriculum vitae which can run for pages. These experts tend to stand up well on questioning of their expertise.

Experts with stellar academic credentials should be compared with others who, although qualified, may not have outstanding academic and professional pedigrees. However, when it comes time to testify at trial, many such experts have Teflon-like qualities, and it is difficult for opposing counsel to score points in their cross-examination. Undoubtedly, it would be best that the expert has both superior academic and professional qualifications and comes across to a jury as do iconic fictional doctors

(such as Drs. James Kildare, Christina Yang and Steve Hardy).

Now comes the time for resolution of the case. The brilliantly written reports by experts with academic and professional credentials of the highest order help persuade the opposing side to lower its expectations and seek a settlement. But . . . not so fast! Lawyers may find that the extremely well-qualified experts they retained, although brilliant, do not relate well to jurors and can become unduly combative on the stand. In these circumstances, lawyers who retained combative doctors suggest, and strongly prefer, mediation or arbitration so that they can rely on the expert's well-written and well-crafted report rather than have the jury hear live testimony from a mercurial doctor.

One way to approach this subject, which requires some delicacy and finesse, is to "helpfully" suggest that everyone agree not to pay these doctors the exorbitant fees required for live testimony – often nonrefundable – and instead have each side rely upon the written submission of the expert.

However, what if counsel have retained experts who are beloved by juries, who can talk away a question and look at jurors with soft, wise, grandfatherly eyes (like a Dr. Marcus Welby or a Dr. Oz) knowing that whatever the shortcomings in the doctor's opinion, the jurors will like the doctor and believe the testimony? Clearly, this is a-game-within-a-game of courtroom acrobatics, tactics and strategies, in which each side seeks to maximize the strength of the expert and mask or minimize the weaknesses, and is using alternative dispute resolution and litigation concurrently to strengthen its position.

### The Process

In settlement negotiations, attorneys scrutinize their opponents' body language and their tone of voice. But during mediation, the parties are separated. Typically, after each side has made an opening presentation to the mediator, the remaining proceedings go forward with one side sitting by itself in a room while the other side engages with the mediator in another break-out room. Although the attorneys will seek to anticipate the adversary's bottom line as numbers are proposed, to a large extent each side relies upon the mediator to find and, even more important, achieve, the client's settlement objective.

Depending upon the trust the attorneys place in the mediator, the lawyers may hold back on their final number, whether it be a demand or an offer. Other times, if there is a track record between the lawyers and the mediator, the lawyers may be more open and let the mediator know their final authority, in confidence that the mediator will not abuse that trust. In this regard, most private mediators realize that the key to their success is in achieving a settlement that will maximize their opportunity of being retained in the future. Mediators who betray confidences, give false expectations and, most important, fail to deliver, are rarely hired again, no matter how pleasing their personality.

There may also be instances where one side's expert is subject to a serious professional disciplinary proceeding or is about to have a malpractice suit reach trial. In these circumstances, that side may try to resolve the lawsuit in which the expert is slated to testify before, not after, the adversary becomes aware of the impending possible negative on that expert's qualifications. A call to the adversary suggesting mediation is one way to avoid the unpleasantness of having that expert cross-examined on the recent "problem."

Private mediators who are selected for personal injury cases are specifically chosen because they have knowledge, not only of the law, but of the value of personal injuries with particular emphasis on the county or district in which the case will be tried. Law clerks to federal judges usually have exceptional academic backgrounds, expert research skills, and they write brilliantly. When asked to value personal injuries, however, they will not perform as well. Law school teaches how to research issues of law, statutes, and regulations, but not how to put a dollar amount on redress for a quadriceps tendon rupture, acute tears of the posterior horn of the medial meniscus with multiple surgeries and possible future surgery. Accordingly, when a complex personal injury case comes before a judge at a settlement conference, the law clerk and law secretary may not prove to be the best resource for the judge (and litigants). That is why seasoned private mediators, rather than academically distinguished young law clerks and law secretaries, are better suited to resolving such cases.

## Dramatic Differences Between Plaintiff and Defense Counsel in Personal Injury Lawsuits

As mentioned earlier, in litigation involving commercial or business interests, attorneys are capable of representing either side in the dispute. In a corporate takeover dispute, for example, Skadden may be representing the target company, opposing Wachtell, Lipton representing the corporation seeking to acquire; in their next encounter, their positions may be reversed, with Wachtell, Lipton representing the target company and Skadden representing the acquiring company. In this type of practice, lawyers are not wedded to one point of view, one strategy or one state of mind; they can represent either side of the transaction, with equal skill and fervor. The same is true in other areas of law, such as real estate, securities, banking and corporate transactions.

Not so in personal injury suits. The lawyers who typically represent plaintiffs scoff at the thought of representing insurance companies being sued because of an allegedly defective product, negligence or torts. Lawyers who represent defendants in personal injury cases rarely, if ever, represent plaintiffs, and complain that some lawyers

will take any case where there is a significant injury and then try to conjure up facts to support a claim. Plaintiffs' attorneys grumble that the lawyers sent by defense counsel to court barely have authority to settle cases, state they are "handling someone else's" file and do little – other than delay proceedings. The attorneys for defendants counter that the lawyers sent to court by the plaintiff are young, inexperienced per diem stand-ins, who are paid just to cover the court conference, have little knowledge of the case and no settlement authority. Defense lawyers are paid on an hourly basis and are paid as the case proceeds, whereas plaintiffs' attorneys are not compensated based upon their time and are paid, if at all, only a share of the monies their clients receive.

From the sole standpoint of fees, the best result for a plaintiff's lawyer is a large sum of money for the client, one-third of which is kept by the lawyer, who has spent only a minimal amount of time on the case. The optimal financial result for defense lawyers is for their client to have paid little or no monies to the plaintiff, while defense counsel, with their hourly rate, have spent hours achieving that result.

Although collegial relationships can exist between attorneys for plaintiffs and defendants in personal injury cases, there is a definite divide, and a certain distrust by each side of the other. Indeed, although both plaintiff and defense lawyers may be active in bar associations, they often do not serve on the same committees, as they do not have the same interests. More often, each side will gravitate to its own bar association. Attorneys for plaintiffs join plaintiff-oriented bar associations such as the American Association for Justice (AAJ), while defense lawyers join the Defense Research Institute (DRI). Defense lawyers may join AAJ, but AAJ has committees, seminars, and litigation materials which are available only to those AAJ members who are part of the plaintiff's bar. Lawyers in "mixed" groups are less likely to let down their guard, especially since they may be thinking not only of their current case, but also the other pending cases in their offices against the same adversaries. It is no surprise that direct negotiation between such adversaries, when it comes time to settle cases, is neither smooth nor easy. Adding a mediator to the mix is often a necessary and welcome method by which such cases can be resolved.

Judges may try to settle cases in court. Although their interest is sincere, and they may sometimes succeed, there are several impediments to their efforts. First, some judges, particularly federal court judges, are reluctant to become involved in settlement discussions in cases they may later try. Settlement is, therefore, handled by magistrate judges and, in some jurisdictions, law secretaries or law clerks. The result is that the most knowledgeable jurists may be the least involved in major settlement efforts.

Second, judges usually seek to place a value on the case and persuade the parties that their evaluation is correct and should be accepted. However, the settlement process works better when the settlement figure evolves, rather than is imposed. If the plaintiff's attorney has evaluated the case at a certain figure for settlement purposes, or if the claims examiner on the defense side has reserved the case at a particular number, the fact that a judge may have a different number in mind may hinder a final settlement agreement.

Third, resolving a large personal injury case takes a great deal of maneuvering and time – which courts do not have. Often, mediations stretch over hours and may be conducted in sessions over several days. Due to budgetary constraints, the court system does not afford the time needed for long, extended settlement conferences. Private mediations, held outside the court, can start early in the morning, continue all day and into the night, if necessary, provided the parties are motivated and the opportunity to resolve the case is perceived to be obtainable, if only more time, cajoling, pushing and prodding – and giving and taking – can occur.

Private mediation is the best way to resolve larger multi-party personal injury cases for several reasons. Such cases often have multiple defendants – drivers of vehicles, manufacturers, inspectors, owners, managers, supervisors and subcontractors of all kinds. It is difficult to have meaningful settlement discussions unless all the parties are present. One of the only ways to have all the players together is in private mediation when the date is cleared in advance and the money people and claims supervisors with authority to settle are present.

## Court-Ordered vs. Private Mediation

There is a significant difference between parties attending a compulsory court settlement conference or court-ordered mediation, as compared to those attending private mediation. In the former, the parties are required to appear, whether they wish to or not. One or both sides may not even be interested in talking settlement at that stage, for any number of reasons. They will appear at the settlement conference solely because they have been directed to do so by the court. That is a far cry from the attitude and motivation necessary to sit down and negotiate a settlement. Further, although public mediations may be less expensive than private mediations, in cases where the demand for settlement is seven figures, the cost of several thousand dollars for a private mediator is not a deterrent for either side.

In comparison, when the parties agree to private mediation, although they may speak confidently and longingly of having the case tried, they are actually sending the message that they are willing to expend significant effort to settle the case. Furthermore, since private mediators are paid meaningful fees, no side is going to pay for those fees and commit to having attorneys spend several hours negotiating unless each side is serious about trying to resolve the case. Committing to private

mediation denotes a mindset that both sides are taking settlement seriously; the same cannot be said when both sides are required to appear for a court-ordered settlement conference.

Another reason why mediation helps settle personal injury cases is because the damage components are rarely clearly defined; they take time to sort out. The damages in a breach of contract case, for example, may be fairly straightforward. In a personal injury case, however, when it comes time to decide the value of past and future pain and suffering, nothing is exact, most of it is subjective, and everything is negotiable. Questions include whether, and to what extent, the plaintiff is truly disabled and unable ever to work again. Or will he or she be able to return to the workforce at some point in the future and, if so, in what capacity? When surveillance film of the plaintiff shows a supposedly injured person walking, driving and performing other activities, whether those restrictions are significant, temporary, or someone's wishful thinking must be assessed.

Evaluating the evidence and reaching an agreement on the value of the damages takes time, much discussion and comparisons of the opposing expert reports. This painstaking process is better suited to mediation than appraisal by a jury or a sitting judge. Complexities of quantifying injury into a dollar amount indicate mediation as the best way to resolve those important issues. Appraising damages in personal injury cases is neither simple nor direct. A full discussion and analysis of the multiple elements of damages in personal injury cases is required before a case can be resolved.

When a serious personal injury case is coming close to being called for trial on the court docket, the surest way to resolve the case is by spending hours and, if necessary, several days, in private mediation. Although it is possible to engage in settlement discussions while the trial is under way, the time and witness pressures are such that even the best multitasker is greatly challenged to both try the case and negotiate a settlement. Moreover, the meter will be already running for defense counsel, and checks will have been cut by both sides for experts, so the savings on litigation costs and expenses, which many parties seek to obtain by settling, will already be lost.

There are occasions where the attorney for the plaintiff may be perceived to have oversold the value of the case to his client, particularly at the time when the plaintiff hires the attorney. Or it may be that the value of the case was accurately assessed by the attorney for the plaintiff at the inception of the attorney-client relationship, but that later events have eroded its value. So, when it comes time for settlement, the plaintiff may balk, "Wait, you told me I had a great case, why are you changing your mind now?" A neutral, such as a former judge, sitting as mediator, can help persuade the plaintiff to agree upon a sum somewhat less than originally anticipated, especially if the plaintiff no longer has same great trust in the lawyer and/or the lawyer lacks the ability to persuade the client to appreciate the offer that is on the table.

Too often, a review of the case history reveals that no meaningful settlement negotiations have taken place between the time the action was commenced and its placement on the trial calendar. Not only are the parties not close to settlement, they are not even in the red zone. Oddly, much of the time near the end of negotiation is spent on the smaller dollars, since each side is looking for its own fair advantage. Plaintiffs do not wish to leave any money on the table, but the defense does not want to pay one dollar more than necessary. Resolving these final differences takes time and nuanced negotiations, sometimes over several days. Our overburdened court system lacks the critical resource time. Private mediators can place groups of lawyers in separate conference rooms or breakout rooms and maintain continued negotiations for hours.

Achieving finality is one of the biggest advantages of private mediation. If the case proceeds to trial and the plaintiff recovers a larger than expected verdict, the defense can appeal the verdict and, although that appeal may be unsuccessful, it may be another year before the plaintiff and plaintiff's counsel receive any money. An appeal on the defense side involves costs for printing the record on appeal or ordering the transcript of the trial proceedings as well as expenses of filing briefs. Insurance carriers may balk at these additional outlays. In private mediation, once the settlement agreement is signed, the settlement check is issued within a specified period of time.

## Conclusion

In sum, litigation is designed to resolve disputes that the parties have been unable to resolve on their own. No one doubts that the courts are a useful and indispensable forum for dispute resolution. However, there are times when the process distorts the problem. Too often in litigation, the parties face each other and take on increasingly divergent positions, arguing that the accumulated evidence supports their respective positions. Mediation is quite the reverse, with the parties gradually moving toward one another, making compromises along the way, to arrive at a solution upon which both sides can agree. It has been wisely said that mediation is like making a soufflé, where sudden movements and loud noises are discouraged.

Going the route of private mediation, picking the right time to do so and the right mediator can achieve for the parties and their counsel what courts often cannot. That is the main takeaway from today's litigation in difficult, multifaceted personal injury cases, for those lawyers who wish to succeed, whether they represent plaintiffs or defendants. ■

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The foreword is authored by United States Magistrate Judge James C. Francis IV from the Southern District of New York.

# Technology-Assisted Review Disputes

## New York Pilot Rule Provides National Guidance

**By Karl Schieneman and Mark A. Berman**

### Foreword

In October 2011, the Southern District of New York adopted the "Pilot Project Regarding Case Management Techniques for Complex Civil Cases" (the Pilot Project).[1] The purpose of the Pilot Project is to encourage judges to utilize "best practices" in managing complex civil litigation and to evaluate the efficacy of the management strategies employed. One of its most useful components is the "Joint Electronic Discovery Submission and Order" (the Joint Order). The Judicial Improvements Committee recognized that many complex cases are characterized by the need to take discovery of electronically stored information (ESI); indeed, e-discovery is often what makes some cases complex in the first place.

The Joint Order is designed to focus counsel's attention on critical e-discovery issues and to identify for the judge potential areas of dispute. Unlike the Model Order Regarding E-Discovery in Patent Cases adopted by the Federal Circuit, the Joint Order does not impose substantive limitations on the scope, form or volume of electronic discovery. Rather, it provides information to assist the judge in guiding discovery on a case-by-case basis, which may include imposing specific limitations, organizing discovery by phases, and utilizing sampling of ESI.

After soliciting basic information about the nature and value of the case, the Joint Order requires counsel to certify that they are themselves knowledgeable about their clients' technological systems or have involved other persons who have such competency. This provision is intended to avoid the situation where litigation is stymied or becomes unreasonably costly because, for example, counsel are not competent to deal with issues arising from even their own client's technology.

Next comes the heart of the Joint Order. Counsel identify unresolved e-discovery issues relating to specified subjects: preservation, search and review, sources of production, form of production, identification or logging of privileged material, inadvertent production and cost allocation. Counsel are required to indicate all ESI disputes and set forth their respective positions.[2]

Many counsel are unfamiliar with the Joint Order. They have a difficult time filling it out and are unable to locate quality samples. The Joint Order, however, is not for every case. In the simple case, where there is little or no ESI, preparing the form would be unnecessary. In the complex cases for which it was designed, however, it will be a major asset. While it is required only in complex cases filed in the Southern District of New York, counsel

should consider using the Joint Order or a document predicated upon it in the New York trial courts, which would, likewise, benefit from it as a tool for rationalizing complex e-discovery disputes.

> The primary dispute concerned a party's proposal to rely upon technology-assisted review for the purposes of collecting and producing ESI.

In the hypothetical that the panelists utilized at LegalTech in 2013, the primary dispute concerned a party's proposal to rely upon technology-assisted review for the purposes of collecting and producing ESI. Because the parties had been previously required to set forth their positions in the Joint Order, their arguments at the mock court conference were well-developed. Further, as a result of the Joint Order, the mock court had the benefit of a preview of the issues and the judge was thus able to come to the conference armed with questions that would elicit information addressed to specific concerns. As a consequence, the proceeding was significantly more productive than the typical initial conference where the court is underprepared and the discussion with counsel is often disjointed.

## Background

United States Magistrate Judge Lisa Margaret Smith of the Southern District of New York at the New York Predicative Coding Thought Leadership Series held on September 9, 2013, noted, based on her review of decisional authority, the apparent infrequent use of technology-assisted review platforms to search for responsive ESI. She, along with other judges, seeks to educate the Bar concerning its pros and cons.

Set out below is an abbreviated version of a hypothetical Joint Order that may serve as a guide when completing an actual Joint Order that contemplates the use of a technology-assisted review platform. It posits a somewhat common trade dress and restrictive covenant dispute.

The parties in the hypothetical cannot agree whether to use a technology-assisted review platform to collect and review ESI or the more commonly used iterative "keyword" search approach. The parties' responses to the areas that are required by the Joint Order are noted below, as well as commentary on the issues raised by the Joint Order.[3]

## Hypothetical Joint Order

One or more of the parties to this litigation have indicated that they believe that relevant information may exist or be stored in electronic format, and that this content is potentially responsive to current or anticipated discovery requests. This Joint Submission and [Proposed] Order (and any subsequent ones) shall be the governing document(s) by which the parties and the Court manage the e-discovery process in this action. The parties and the Court recognize that this first Joint Electronic Discovery Submission No. 1 and [Proposed] Order is based on facts and circumstances as they are currently known to each party, that the electronic discovery process is iterative, and that additions and modifications to this Submission may become necessary as more information becomes known to the parties.

### Brief Joint Statement Describing the Action

Plaintiff Victory (Victory), a pharmaceutical company, is asserting that Defendant Sam King (Sam King), in 2013, infringed several well-known trademarks relating to the shape, labeling and coloration of a bottle used for a certain over-the-counter drug. Victory also asserts a claim for the wrongful misappropriation of trade secrets by former employees who left Victory to join Sam King. In addition, there are claims that former Victory employees breached restrictive covenants contained in their employment agreements by joining Sam King.

(a) Estimated amount of Plaintiff's Claims:
  x Between $1,000,000 and $49,999,999

(b) Estimated amount of Defendant(s)' Counterclaim / Cross-Claims:
  x Other (if so, specify) Defendant Sam King Plastics is not asserting any Counterclaims or Cross-Claims.

*The description of the underlying case and the amount in controversy seek to frame the issues up front to assist the court to be able to make more informed decisions and to be able to apply the concept of proportionality of ESI expenses to help resolve e-discovery issues.*

### Competence

Counsel certify that they are sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery, and have involved someone competent to address these issues on their behalf.

*This is one of the most important aspects of the Joint Order which requires counsel to affirmatively certify that they have taken steps at an early point in the action to understand their respective clients' technological systems. Such certification should and needs to result in counsel learning their client's own technological systems and having to ask the hard questions of their client early on. This certification provides for issues to be presumptively joined on potentially problematic ESI disputes early on so that they can be properly addressed and/or resolved before the action proceeds too far.*

### Meet and Confer

Pursuant to Federal Rules of Civil Procedure 26(f) (Fed. R. Civ. P.), counsel are required to meet and confer regarding certain matters relating to e-discovery before the Initial Pretrial Conference (the Rule 16 Conference). Counsel for

Victory and Sam King hereby certify that they have met and conferred to discuss these issues.

Counsel and their experts have conducted three meet-and-confer sessions at which e-discovery issue were addressed, on the following dates: December __, 2013; January _, 2014; and February _, 2014.

*If the parties have their first "meet and confer" just prior to filing the Joint Order, it will likely become clear to the court that they really have done little more than have a drive-by meet and confer. This requirement mandates that counsel and their clients take their roles in the e-discovery process seriously and work together in advance of the initial conference to discuss matters and to attempt to resolve as many e-discovery issues as possible.*

## Unresolved Issues

After the meet-and-confer conference(s) taking place on the aforementioned date(s), the following issues remain outstanding and / or require court intervention:[4]

x Preservation;
x Search and Review;
___ Source(s) of Production;
___ Form(s) of Production;
___ Identification or Logging of Privileged Material;
___ Inadvertent Production of Privileged Material;
___ Cost Allocation; and / or
___ Other (if so, specify) _____

*This checklist serves as a balance sheet and provides the court and the parties with a snapshot, as of a particular date, of open issues that may require judicial intervention, as well as issues where the parties are in agreement.*

## Preservation

1. The parties have discussed the obligation to preserve potentially relevant electronically stored information and agree to the following scope and methods for preservation, including but not limited to: retention of electronic data and implementation of a data preservation plan; identification of potentially relevant data; disclosure of the programs and manner in which the data is maintained; identification of computer system(s) utilized; and identification of the individual(s) responsible for data preservation, etc.

Victory plans to use technology-assisted review to identify potentially relevant ESI from within the collection set and to preserve all such ESI throughout the duration of the litigation. ESI from within the collection set that are not identified as potentially relevant will be discarded after three months, unless otherwise reasonably requested by Sam King. All original ESI existing on Victory's systems, regardless of whether or not collected, will be discarded in accordance with Victory's standard electronic document retention program, which provides for such ESI to be deleted after six months. Sam King wants Victory to preserve the entire collection set, as well as any original ESI, for the duration of the litigation.

*Preservation is often one of the thorniest issues in e-discovery. It is imperative that the parties agree or agree to disagree*

*as early as possible in a litigation, and to immediately raise the preservation issue with the court for early resolution.*

***Plaintiff(s):***

Victory has identified as potential custodians all employees, including management, who were directly involved in the marketing and design of the shape, labeling and coloration of the bottle. Each individual was interviewed to identify potential sources of ESI, which generally consists of email stored both locally and on the corporate exchange server, personal hard drives and network shares, as well as Microsoft Sharepoint data containing collaborative data created by multiple authors. Rather than have these employees collect such data, Victory has engaged a third party vendor to obtain a forensically sound copy of the ESI with the chain of custody of the ESI captured. Mirrored copies of the ESI are maintained by the third party vendor. The date range was restricted to beginning with the initial design concept of the bottle. Collection *excluded* system and program files which contain no unique data, but are software tools used by the company, as well as obvious spam (as detected by a commercial spam filter). From this collection, all text-based ESI, including email accounts and social media (excluding images that cannot be meaningfully OCR'd or copied in a way that the words in the document are not readable by the review software), Windows and Internet Temp files, and Javascript would be loaded into the technology-assisted review platform for culling.

***Defendant(s):***

Sam King has identified its custodians, which include its employees and members of management who were directly involved in the marketing and design of the shape, labeling and coloration of the bottle. Custodians also include the members of management who left Victory and who now work for Sam King as well as the Sam King employees who communicated with the former Victory employees before they joined Sam King. All such individuals are considered custodians, and given the number of custodians and the volume of ESI, Sam King has likewise engaged a third party vendor to collect ESI, based largely on witness interviews to better target the collection efforts. Sam King has generally followed the same process employed by Victory for identifying and preserving ESI.

*Each section of the Joint Order contains an overview of the purpose of the section and it sets out the range of issues the parties were to have discussed before coming to the positions reflected in the Joint Order.*

2. State the extent to which the parties have disclosed or have agreed to disclose the dates, contents, and/or recipients of litigation hold communications.

The parties have discussed the use of litigation holds. They have agreed to disclose the recipients of each party's litigation hold and the dates of the litigation hold. The contents of each litigation hold have not been disclosed.

*Parties sometimes do agree on certain items and included here is an agreement on a consensual litigation hold approach.*

*The Joint Order provides a means to show the court that the parties can agree to some common understandings instead of arguing over every issue. If the Joint Order indicates a disagreement on every issue, it will be clear to the court that the parties are not trying to solve their e-discovery issues.*

3. The parties anticipate the need for judicial intervention regarding the following issues concerning the duty to preserve, the scope, or the method(s) of preserving electronically stored information.

The parties have agreed on preservation generally, but still have disputes on the appropriate method of culling and searching for ESI. If technology-assisted review is used, the structure of the search will be impacted by what is loaded into a coding platform. The value of keyword searching, on the other hand, will be driven by the selection of keywords. The parties are deferring to a future date to decide what types of ESI to include, such as Microsoft Word, PST files for email, and Adobe Acrobat pdf files, and will work cooperatively on this stage of the process.

**Search and Review**

- The parties have discussed methodologies or protocols for the search and review of electronically stored information, as well as the disclosure of techniques to be used.
- The parties disagree on the proper protocol to be used to identify potentially relevant documents for privilege and responsiveness review. Victory believes both parties should use technology-assisted review, while Sam King believes an iterative keyword search process should be used with manual review. Victory proposes the use of technology-assisted review using the following protocol. Victory submits that it will provide transparency and confidence to Sam King and the court in how the process of identifying responsive documents would be accomplished. Victory seeks to use technology-assisted review to save money and to improve the accuracy of the review. Victory submits that studies have demonstrated that human reviewers are less accurate in identifying responsive documents than technology-assisted review. As set forth below, to date, the parties have addressed the following issues:

***Plaintiff(s):***

Victory proposes the use of technology-assisted review using the following protocol.

- Load all text-based documents from the collection set.
- Code the training set relying on a senior lawyer who is knowledgeable about the facts of the case using random selection.

- Log Victory's obvious privileged and sensitive documents.
- Review of the training set by counsel for the opposing party.
  – Limit review of the training set to Sam King's outside counsel.
  – Disagreements as to training set are to be resolved by judicial intervention.
- Implement revisions to the training set as per agreement or court order.
- Implement technology-assisted review.
- Undertake validation of results.
  – Review 385 documents from the relevant set as predicted by the coding software (the Responsive Validation Set).[5] In addition, review 385 documents from the non-relevant set as predicted by the coding software (the Non-Responsive Validation Set). The sample sizes were calculated to achieve a 95% Confidence Level ± and a 5% Confidence Interval of ± 5%.[6]
  – Achieve recall of at least 75% of the responsive documents in the collection and no precision target.[7]
- Identify and log the privileged and sensitive documents from the Responsive Validation Set and the Non-Responsive Validation Set.
- Opposing counsel reviews the Responsive Validation Set and the Non-Responsive Validation Set which does not contain privileged or sensitive documents.
- Implement additional coding, if necessary, if the parties determine additional training of the coding software is required because the recall rate does not reach 75%.

Victory submits that Sam King should be required to follow the same protocol and opposes the keyword search protocol proposed by Sam King. Victory submits that, if the court is inclined to permit the proposed keyword protocol, Sam King should be obligated to undertake the same validation process outlined above with respect to keyword searching to determine whether Sam King's review process was effective and achieved the same recall targets.

This means that Sam King would need to demonstrate that the keywords used to search for responsive Victory ESI actually caused Sam King to find 75% of the responsive documents in the collection set. This would need to be verified by comparing a random sample of 385 documents from documents found by keyword searches identified as relevant after a manual review with a random sample of 385 documents not containing any keywords which were subject to no additional review for responsiveness.

Victory disagrees with Sam King that keyword searching results should be subject to less scrutiny and validation than technology-assisted review results. Victory submits that this would penalize it for being progressive and using an advanced technology which studies suggest is faster, cheaper and more accurate than keyword searching and it would act as a deterrent to improving the discovery process.

***Defendant(s):***

Sam King opposes the use of technology-assisted review, which it claims is an unproven technology for the effective identification of relevant documents for purposes of a production in litigation. Sam King believes putting human eyes on every document as a means to provide reasonable assurances that an effective search was conducted is the appropriate methodology to identify responsive information. Sam King does not believe that proportionality of expense concerns should require the use of technology-assisted review. If the court is inclined to permit technology-assisted review, Sam King submits that Victory should be obligated to work with its technology tools to achieve a "recall" rate not of 75%, as suggested by Victory, but of 90% or better.

> The purpose of the Pilot Project is to encourage judges to utilize "best practices" in managing complex civil litigation and to evaluate the efficacy of the management strategies employed.

Sam King submits that the use of its proposed keyword search protocol follows The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery, dated August, 2007, by using an "iterative" approach based on creating keywords, sampling the hits, and using this feedback to revisit the keywords and improve the keyword list. This industry norm is an approach used in the vast majority of cases. Sam King recognizes that The Sedona Conference® is updating its Commentary, but, at the present time, keyword searching is commonly employed by lawyers in this type of case. Sam King proposes using off-shore reviewers to perform a first pass review to control and reduce the costs of the review.

Sam King does not believe that the Non-Responsive Validation Set or any non-responsive documents should be shared with Victory in any instance, even in small sample sets, which is one reason it is concerned about using technology-assisted review coding at all despite potential cost savings. If human review is undertaken, there is no need for such intrusive review or whether recall rates or targets are met because a lawyer reviews

every document which hit a keyword. Sam King submits that technology-assisted review adds a layer of intrusion and complexity into the discovery process which it is uncomfortable agreeing to.

> Once the Joint Order is filed with the court, the court would work with the parties to resolve the disputed issues.

1. The parties anticipate the need for judicial intervention regarding the following issues concerning the search and review of electronically stored information:

- Whether technology-assisted review and/or keyword search methodologies are to be used to locate potentially relevant ESI.
- Whether Victory may release the preservation hold and discard the non-relevant documents three months after its coding had been validated.
- Whether 75% recall with no precision target is appropriate.
- Are the validation parameters (95% Confidence Level, +/-5% Confidence Interval, and 385 responsive document validation set) appropriate or should the sample size be increased?
- Is the validation protocol proposed by Victory appropriate where it uses random samples of 385 documents from the set of documents predicted as responsive by the technology-assisted review software and random samples of 385 documents predicted as not responsive, and then comparing the two results?
- Is Sam King obligated to undertake validation if its proposed keyword search protocol is permitted?
- Must the validation review be blind without reference to the technology-assisted review or keyword search results? In other words, should the coders who are reviewing the validation set have no idea if the documents come from the responsive or non-responsive predicted categories of documents in order to remove any potential bias of knowing how the software actually coded the documents?
- Is it appropriate to require parties to share some sampling of non-responsive documents to validate that their search approach worked?

*Framing the ESI issues for the court in advance of the initial conference is critical. It permits the court to understand the complexities of the dispute up front, and such advance notice affords the court the opportunity to be able to craft procedures to achieve an orderly resolution of disputes.*

## Production

### *Source(s) of Electronically Stored Information*

The parties anticipate that discovery may occur from one or more of the following potential source(s) of electronically stored information.

Both sides have similar data repositories and anticipate they can agree on the form of production. If any party concludes that any of the sources of information listed above are inaccessible or that collection from or the search of any of those sources would be unduly burdensome, the parties will meet and confer in an attempt to resolve the matter. Parties will use their best efforts to raise any such objections as soon as possible.

### *Limitations on Production*

The parties have discussed factors relating to the scope of production, including but not limited to: (1) number of custodians; (2) identity of custodians; (3) date ranges for which potentially relevant data will be drawn; (4) locations of data; (5) timing of productions (including phased discovery or rolling productions); and (6) electronically stored information in the custody or control of non-parties. To the extent the parties have reached agreements related to any of these factors, describe below:

*Custodians:* Both parties will exchange custodian lists as described in section ____ of the Joint Report on _____ 2014. Each party will have 21 days to file an objection and the parties will meet and confer to resolve any disputes.

*Date Range:* The default date range of discoverable documents and data is from _____ [which is when the initial design concept was conceived] through _____ [the date the lawsuit was commenced]. However, the parties agree that any party may propose a different date range for any particular custodian or type of data or documents.

*Locations of Data:* As noted above, the parties intend to hold a series of meet and confer sessions to determine the appropriate limits of ESI collection and production, finalize each party's plan, and develop a schedule for the rolling production of documents intended to facilitate an orderly and manageable production consistent with the proposed case schedule.

*If there is a disagreement regarding custodians, date ranges and locations, those areas need to be addressed early because they may each have a significant impact on the expense associated with collection, preservation and production of ESI.*

### *Form(s) of Production*

- The parties have reached the following agreements regarding the form(s) of production:

  *Production issues should be detailed. However, production specifications are beyond the scope this article.*

The parties have a working draft of the specifications for production of ESI and hard copy documents. During the upcoming negotiations concerning document collection and production, the parties will work toward finalizing these specifications and alert the court to any disputes arising therefrom. Unless otherwise specified below, the production will be in TIFF format with a Relativity load file.

- Please specify any exceptions to the form(s) of production indicated above:

The parties will initially produce spreadsheets in a form that provides for them to be readable and, on a case-by-case basis, will decide whether specific documents will be produced in native format.

- The parties anticipate the need for judicial intervention regarding the following issues concerning the form(s) of production:
  There will need to be a determination of the scope of data that must be searched for ESI and whether the search process should utilize technology-assisted review or be keyword driven.

### *Privileged Material*

- Identification. The parties have agreed to the following method(s) for the identification (including the logging, if any; or alternatively, the disclosure of the number of documents withheld), and the redaction of privileged documents:
  The parties will follow the protocol described in the law review article by Judge John M. Facciola and Jonathan M. Redgrave "Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework," 4 Fed. Courts L. Rev. 19 (2009).
- Inadvertent Production / Claw-Back Agreements. Pursuant to Fed R. Civ. Proc. 26(b)(5) and Federal Rule of Evidence 502(e) (F.R.E.), the parties have agreed to the following concerning the inadvertent production of privileged documents:
  Given the size and timing of production, the parties will jointly seek the entry of an appropriate order, pursuant to F.R.E. 502(d), to address the attorney-client and attorney work product privileges regardless of inadvertence, and will include appropriate claw-back provisions in a proposed order.
- The parties have discussed a 502(d) Order. (Yes)
  The provisions of any such proposed order shall be set forth in a separate document and presented to the court for its consideration.

### *Cost of Production*

The parties have analyzed their clients' respective data repositories and have estimated the costs associated with the production of electronically stored information. The factors and components underlying these costs are estimated as follows:

- Costs – Plaintiff(s):
  Technology-assisted review involves sampling and language training of a software algorithm. Victory believes that such sampling will cost far less money and be far more effective than guessing at keywords and having to review all the false positive hits containing keywords. Keyword searching is more expensive than technology-assisted review coding but, more importantly, Victory submits that the keyword search protocol proposed by Sam King will not effectively identify sufficient relevant ESI. Many academic studies, as well as actual courtroom experience, indicate that keywords overlook a significant amount of relevant ESI.
  At this point, there is not a good estimate on the potential amount of relevant ESI. Thus, without more information, including keyword validation as discussed above, there is no basis to evaluate the effectiveness of the proposed keyword search protocol, and thus the cost of review using such technique. Sam King is relying on keywords to locate responsive documents and is not going to do any sampling on the documents which do not contain any of the keywords. Relying on technology-assisted review and sampling to validate results is a more effective and economical approach to identifying potentially relevant documents in this case.
  Lastly, Sam King's proposal to save money using offshore reviewers and contract lawyers will not result in huge cost savings compared to having technology perform this same task of culling non-responsive ESI from the review set.
- Costs – Defendant(s):
  Sam King believes that costs can be controlled by using keywords, appropriate date ranges, and agreed upon custodians to derive a manageable data set. Costs can be further controlled by employing offshore reviewers (costing $35 an hour), supervised by counsel, to reduce the data set to a final review set, as opposed to utilizing law firm associates, whose billing rates exceed $400 an hour. Once the review set is generated by the contract review team, counsel will do a second-pass review to determine if such documents are responsive. If statistical sampling is required, Sam King submits that a larger sample size than that proposed by Victory in connection with its technology-assisted review solution is necessary in order to provide sufficient comfort in the results of its review. Sam King is uncomfortable using a smaller sample. It would propose instead a sample size calculated based on a 99% Confidence Level with a Confidence Interval of + / - 2%.
  *This is one of the most useful sections of the Joint Order. It forces counsel to attempt to quantify how much their proposed collection and search methodologies will cost. When the court looks at the beginning of the Joint Order for the amount in controversy and then reviews the cost estimates of each of the parties, it is presumptively easier for the court to address the expense of e-discovery when it is able is review early on the parties' respective views on proportionality and reasonableness.*
- Cost Allocation. The parties have considered cost-shifting or cost sharing and have reached the following agreements, if any:
  The parties agree to bear their own costs of discovery, without prejudice to any future application seeking cost-shifting.

- Cost Savings. The parties have considered cost-saving measures, such as the use of a common e-discovery vendor or a shared document repository, and have reached the following agreements, if any: (None.)

### *Judicial Intervention*

- The parties anticipate the need for judicial intervention regarding the following issues concerning the production of electronically stored information: (To be determined.)

The preceding constitutes the agreement(s) reached, and disputes existing, (if any) between the parties to certain matters concerning e-discovery as of this date. To the extent additional agreements are reached, modifications are necessary, or disputes are identified, they will be outlined in subsequent submissions or agreements and promptly presented to the court.

## Conclusion

Once the Joint Order is filed with the court, the court would work with the parties to resolve the disputed issues. There is no reason why the Joint Order could not be supplemented as the parties proceed through the steps of a complex e-discovery action and as e-discovery rulings are made. The Joint Order attempts to keep the parties focused on where there are disagreements and it provides a dispute resolution framework to address issues as they arise. This is especially true where a party is seeking to utilize technological advances in the face of opposition.

One concept that comes clear from this fact pattern is that Victory is attempting to save money with its proposed protocol and embraces more transparency than many parties are accustomed to in an attempt to provide comfort to the opposing party that the proposed process will achieve its objective. Sam King, on the other hand, is willing to spend more money than Victory, but is opting for the traditional approach of no transparency as it seeks to have every document personally reviewed. This creates a real challenge to practitioners, clients and the courts. The Joint Order is a useful tool to frame issues so that a court can see the pros and cons of different technological approaches suggested by parties. ■

1. The Pilot Project can be found at http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

2. At LegalTech 2013, a panel consisting of a judge, practitioners, and vendors decided to enact a mock conference highlighting a technology-assisted review dispute and how much the Joint Order would make an initial court conference more targeted on the specific e-discovery issues and disputes. Magistrate Judge James C. Francis and Karl Schieneman were participants in this mock conference, as well as Herbert Roitblat, Conor P. Crowley, Ariana J. Tadler and Thomas C. Gricks, III. This article takes the mock conference further and seeks to makes the scenario more applicable to general commercial litigation.

3. The positions taken by the parties in this hypothetical are not intended to be considered "best practices" in e-discovery. The purpose of this article is to highlight how disputes in complex litigation can be clarified and "joined" for resolution by the court through the Joint Order. The commentary of how the Joint Order seeks to facilitate cooperation and to identify undisputed or disputed issues is contained in italicized text. This commentary is not part of the Joint Order and is drafted by the authors to provide explanatory guidance.

4. Even though technology-assisted review is proposed by Victory, attorneys and technologists will differ as to how this or any protocol should be implemented, and some of the positions taken below by Victory may be viewed as controversial. As such, while the below may serve as a guideline, any technology-assisted review protocol must be tailored to the facts of the case and the legal and strategic significance of each step must be well-thought out and clearly analyzed.

5. The 385 document total used in this fact pattern is the total number of documents from a random sample utilized in most collections noted in electronic discovery cases needed to achieve a "Confidence Level" of 95% and a "Confidence Interval" of +/- 5. An approximation of this total can be found by using online sample calculators such as those provided by raosoft.com or surveysystem.com.

6. The Confidence Level and Confidence Interval are selected by a party to determine the size of the sample to be used. The sample size in this example is 385 given the number of documents in the population and it can be calculated by using a formula once the actual population of documents to be reviewed is determined and the desired Confidence Level and Confidence Interval are chosen.

> A confidence interval expresses the degree of uncertainty associated with a sample estimate. It is a combination of a range, combined with a probability statement. For example, we may say that an election poll has candidate A leading with 27% of the vote relative to candidate B with 23%. Both percentages estimate the proportion of the voters who are likely to vote for the two candidates and are accurate within +/-5.35%. The +/-5.35% is the confidence interval at the 95% *confidence level*. Roughly, this means that if the election were held today, predictions based on this poll would be with +/-5.35% of the true vote 95% of the time. The larger the sample size, all other things equal, the smaller the confidence interval. The poll mentioned here interviewed 336 likely voters. A sample of 1,000 likely voters would have a 95% confidence interval of +/-3.10%.
>
> . . . A confidence level indicates the degree of confidence one has in the estimate derived from a sample. Roughly, it is the likelihood that the true value from the population lies within the range specified by the *confidence interval*. If you did [sic] 100 experiments with a 95% confidence level, then 95 of those experiments would find the true value being estimated is included within the appropriate confidence interval for that experiment.

Herbert L. Roitblat, Statistics and Sampling for eDiscovery: Glossary and FAQ, OrcaTec LLC, 2011 (emphasis in the original).

In summary, the concepts of Confidence Level (95%) and Confidence Interval (+/- 5%) are statistical concepts which work in tandem with each other based on the tradeoff of the amount of risk the sampling party is willing to bear in not identifying the relevant information and the level of effort they want to undertake to measure the results. For instance, it takes more resources to review a sample of 2,400 documents or more when compared to 385 documents when the degree of confidence provided by a smaller sample size is adequate for the needs of the particular case.

7. *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 189–90 (S.D.N.Y. 2012).

The objective of review in ediscovery is to identify as many relevant documents as possible, while reviewing as few non-relevant documents as possible. Recall is the number of responsive documents found over the estimated total number in a collection; precision is the fraction of identified documents that are relevant out of the total documents found. The goal is for the review method to result in higher recall and higher precision than another review method, at a cost proportionate to the "value" of the case. *See, e.g.*, Maura R. Grossman & Gordon V. Cormack, *Technology–Assisted Review in E–Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, Rich. J.L. & Tech., Spring 2011, at 8–9, available at http://jolt.richmond.edu/vl7i3/article11.pdf.

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# Fair Use: An Overview

**By Genan Zilkha**

## Introduction

There are some legal concepts that even non-lawyers have strong opinions about – like Rent Stabilization, the Rockefeller Drug Laws, and the "Stand Your Ground" law that was the subject of the Trayvon Martin case. As a civil attorney, non-attorneys will ask me questions about these topics, especially those pertaining to criminal law. My answer – that I haven't studied criminal law since the bar, and that my knowledge of criminal law is basically limited to what I see on *Law and Order: SVU* – rarely, if ever, suffices.

The legal concept of fair use has that same broad appeal to the general public. Whether we know it or not, copyright law permeates many aspects of our lives. For most creative works, the authors are entitled to payment, which permits us to enjoy these works. We must purchase the right to download the MP3s we download and the eBooks we download or borrow. Even services that offer "free" streaming of music must compensate the owners of the music they are streaming.

This article will provide a basic overview of fair use and discuss fair use as it pertains to the *Authors Guild Inc. v. Google, Inc.* lawsuit.

"The U.S. Copyright Act grants certain exclusive rights to the owner of a copyright in a work."[1] These rights are exclusive and are thus limited to the holder of the copyright. These rights include the right to: (1) reproduce the copyrighted work; (2) prepare derivative work; (3) sell, lend or lease copies of the copyrighted work; (4) perform the work publicly; (5) display the work publicly; and (6) perform the work publicly "by means of digital transmission."[2] The copyright arises when the work is created, not when it is registered with the copyright office.[3] Copyright registration places the public on notice that the copyright holder did indeed create the copyrighted work.[4]

Although the rights of the copyright holder are exclusive, they are not absolute. Sections 107 through 122 of Title 17 of the United States Code govern the limits on these exclusive rights. These limits include but are not limited to: fair use,[5] reproduction by libraries and archives, noncommercial broadcasts, certain transmissions, and the so-called first sale doctrine. The first sale doctrine permits "the owner of a particular copy or phonorecord lawfully made under this title"[6] to sell the copy without the permission of the copyright holder.[7]

Fair use is an affirmative defense to an allegation of infringement.[8] It is "a privilege in other than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."[9] If a use is deemed "fair" then the use of this "copyrighted work does not infringe the copyright in that work."[10] If a copyright holder brings a suit against a purported infringer and is able to make a prima facie showing of copyright infringement, then, if the fair use defense is raised the court must evaluate the four fair use factors as they apply to the action and evaluate whether, in fact, fair use applies. "Fair use is a doctrine the application of which always depends on consideration of the precise facts at hand."[11] There is no bright line rule as to whether a use can be qualified as fair use.[12]

The four factors that the courts must evaluate are as follows:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[13]

These factors are non-exclusive. These factors are preceded by a preamble which states that

> the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any


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> other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[14]

Notwithstanding this statement, these enumerated uses are not necessarily "fair," as they too must also be evaluated using the four factors.[15]

There are many misconceptions about fair use. These include a belief that using a specific number of words of a copyrighted text (for example) is not infringement but rather fair use, or that if one is using a copyrighted text but as a non-profit, or without the intent of profiting, this is fair use.[16] These beliefs are erroneous, and can instead expose a user to liability.[17] The only way to evaluate whether or not something is fair use is to evaluate it using the four factors.

## The Purpose and Character of the Use

The first factor of the fair use analysis can itself be divided into two smaller factors. These factors make up the "heart of the fair use inquiry";[18] these are also the most difficult to analyze. The first "subfactor" focuses on the purpose of the use, that is, whether the use is for commercial or a non-profit educational purpose. The courts will provide more leniency in evaluating fair use if the use is in fact for a non-profit educational purpose. Notwithstanding, whether the organization using the intellectual property is a non-profit or for-profit corporation is not determinative in establishing this.

Courts have stated that "the proper focus of the commercial/non-commercial inquiry is 'on the use of the copyrighted material,' not on the profit or not-for-profit status of the user."[19] Courts have also stated that "non-profit organizations enjoy no special immunity from determinations of copyright violation."[20] The "crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of copyrighted material without paying the customary price."[21] Therefore, even if a non-profit is using another's work, this use will not be fair use if it can be considered commercial.

The second "subfactor" focuses on the character of the use, "whether the allegedly infringing work 'merely supersedes' the original work 'or instead adds something new, with a further purpose or different character, altering the first with new . . . meaning [] or message.'"[22] In other words, the court must evaluate whether the new, purportedly infringing work is "transformative."[23] "Although 'transformativeness' is primarily analyzed in connection with the first fair use factor, it forms the basis of the entire fair use analysis."[24] Although the "tranformativeness" of a use cannot be easily defined, a use can be said to be "transformative if it 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'"[25] If a work is deemed substantially transformative, even if it is a strictly commercial work, then the use may be considered fair.[26]

*Campbell v. Acuff-Rose Music*[27] is a notable case which demonstrates how a strictly commercial use can be considered fair use if the use is transformative. In *Campbell*, 2 Live Crew was sued for copyright infringement by Acuff-Rose Music, Inc., which held the copyright for Roy Orbison's song "Oh, Pretty Woman." 2 Live Crew had quoted a portion of the song in "Pretty Woman," a parody of the Roy Orbison song. Despite the fact that 2 Live Crew's use was commercial, the Supreme Court held that this use was fair because it was a parody and thus transformative.[28] In *Cariou v. Prince*,[29] a recent Second Circuit case, the court held that 25 of 30 images, in which the alleged infringer modified photographs created by a photographer, were transformative. In finding the uses transformative the court said that these images "have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."[30] At the same time, not all modifications are transformative.[31] In *Cariou*, the court held that only the modifications in 25 of the photographs were transformative – the remaining were not definitively considered to be transformative. Although these "instances moved the work in a different direction from Cariou's classical portraiture and landscape photos, we cannot say with certainty at this point whether those artworks present a 'new expression, meaning, or message.'"[32]

> Whether we know it or not, copyright law permeates many aspects of our lives.

In contrast to these cases, in *Salinger v. Colting*,[33] the Second Circuit held that a "sequel" to J.D. Salinger's *The Catcher in the Rye* was not transformative in part because the purpose of writing this sequel was "not to comment on Salinger but to write a *Catcher* sequel."[34] In *Castle Rock Entertainment v. Carol Publishing Group*,[35] the Second Circuit found that *The Seinfeld Aptitude Test* – a book containing *Seinfeld* trivia – was not transformative, in no small part because its "purpose, as evidenced definitively by the statements of the book's creators and by the book itself, is to repackage *Seinfeld* to entertain *Seinfeld* viewers."[36] As the purported infringers had done nothing more than "transform[ed] Seinfeld's expression into trivia quiz book form with little, if any, transformative purpose, the first fair use factor weighs against defendants."[37] Instead of creating something that was transformative, the alleged infringers simply created something that would "satiate *Seinfeld* fans' passion for

the 'nothingness' that *Seinfeld* has elevated into the realm of protectable creative expression."[38]

Due to the importance of the "transformative" factor, the "transformativeness" of the allegedly infringing work is generally the point on which the decisions of the courts focus.

## The Nature of the Copyrighted Work

The second factor of the fair use test looks at the "nature of the copyrighted work." In evaluating the nature of the copyrighted work, the courts examine

> (1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to claim for fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope of fair use involving unpublished works being considerably narrower.[39]

This factor "is rarely found to be determinative."[40]

In copyrighted works that are "non-factual or creative" it is less likely that the courts will find fair use, while works that are more "informational in nature are more susceptible to fair use."[41] For example, in *New Era Publications International v. Carol Publishing Group*,[42] the Second Circuit determined that quotations from published works, which were used in a biography of the author, could be labeled as "factual."[43] In contrast, in *Sandoval v. New Line Cinema Corp.*,[44] the court found that this factor weighed in favor of the copyright holder, whose unpublished photographs were briefly displayed in a film.[45]

Courts are less likely to find in favor of an infringer when the work at issue is unpublished.[46] For example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[47] *The Nation* published excerpts of *A Time to Heal: The Autobiography of Gerald R. Ford*, which had not yet been published. The Court gave great weight to the fact that the excerpts were unpublished and found that the use was not fair. In contrast, in *Rotbart v. J.R. O'Dwyer Co.*,[48] where a publisher quoted and paraphrased a lecture, the use was found to be fair in part because the lecturer, having given a lecture to the public, had de facto published his lecture.[49]

## The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The third factor of the fair use test examines the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." This requires a quantitative and qualitative evaluation of the use.[50] The quantitative and qualitative evaluations are intermingled and, as a result, there "are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use."[51]

The quantitative evaluation assesses the actual amount of the original work the infringing work uses in relation to the whole. For example, if an alleged infringer copies an entire work, this use is less likely to be considered fair use.[52] On the other hand, if an alleged infringer uses either a minimal part of the original work,[53] the work is obscured,[54] or the work is only briefly in the new work,[55] then this factor will weigh in favor of the alleged infringer.

The quantitative evaluation assesses the substance of the portions used by the alleged infringer as compared to the original. If an infringer uses a small portion of the work, but these portions make up the heart of the original work, the court is less likely to find fair use.[56] For example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, although the excerpt included only 300 words taken from the original, the "portions actually quoted were selected by [the editor] as among the most powerful passages in those chapters."[57] As a comparison, in *Wright v. Warner Books, Inc.*,[58] the court found that this factor weighed in favor of the alleged infringer because the amount taken was minimal, and did not "make the book worth reading."[59] "The test of substantiality is not how much of the allegedly infringing work was taken from the copyrighted material, but rather how much of the copyrighted material was taken by the infringing work."[60]

**The rise of digital media has led to an increased utilization of the fair use defense.**

## The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

The fourth factor evaluates the effect of "market harm caused by the alleged infringement."[61] This factor "requires proof that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."[62] Such inquiry must be cognizant not "only of harm to the original but also of harm to the market for derivative works."[63] In analyzing this factor the court must balance "the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied."[64] This factor also examines whether this allegedly infringing use will replace or substitute for the original in the marketplace.[65] The courts will find that this factor weighs in favor of the alleged infringer if this alleged infringer is occupying a market niche that the copyright holder was not interested in filling.[66] An exam-

ple of such a niche is parody or criticism.[67] For example, in *Abilene Music, Inc. v. Sony Music Entertainment, Inc.*,[68] the court found that three lines of "What a Wonderful World" performed by a rap artist with slight off-color modifications would not impact the sales of the actual song as well as any non-parodic rap versions of the song.

In *Twin Peaks Productions, Inc. v. Publications International, Ltd.*,[69] a publisher released a book consisting of plot abridgements and trivia for the television show *Twin Peaks*. In evaluating the fourth factor, the court found that the infringing book "compete[d] in markets in which [Twin Peaks Productions] has a legitimate interest."[70] In *American Geophysical Union v. Texaco Inc.*,[71] the Second Circuit found that photocopies Texaco made of academic journals would lead to "lost licensing revenue, and to a minor extent . . . lost subscription revenue."[72] As a result of this, the use was not deemed fair.

In contrast, in *Bill Graham Archives v. Dorling Kindersley Ltd.*,[73] the Second Circuit found that seven artistic images, originally used on Grateful Dead concert posters and tickets that were reproduced without the permission of the copyright holder in a book about the Grateful Dead would not negatively affect the market for derivative uses of the images because they were sufficiently transformative. They were transformative because the images were not used in their original format, but rather as a means of illustrating a history.[74]

## *Authors Guild Inc. v. Google, Inc.*

The rise of digital media has led to an increased utilization of the fair use defense. Fair use has been used, unsuccessfully, as a defense in file sharing cases.[75] Recently the question of fair use has arisen in the *Authors Guild Inc. v. Google, Inc.* lawsuit. This case arises from an agreement Google, Inc. (Google) entered into in 2004 with a number of major research libraries to digitize books and other writings in these libraries' collections.[76] Although many of these books were still under copyright, Google did not obtain permission of the copyright holders.[77] Since entering into this agreement Google has scanned and digitized more than 12 million books.[78] The participating research libraries received digital copies of the books, and Google made the books available to the general public for searching in an online database.[79] Search results of this database would provide the users with "snippets" or excerpts of a book.[80] In 2005, the Authors Guild Inc. (the AG) filed a class action suit against Google in the Southern District of New York alleging copyright infringement.[81] This allegation was based on two aspects of the 2004 agreement: (1) reproducing books currently protected by copyright and distributing them to libraries and (2) offering to the public "snippets" of these books.[82] Although Google and the AG attempted to settle the suit, for numerous reasons the settlement was not approved.[83]

In 2012, Google brought a motion to dismiss, and the AG brought a motion for class certification.[84] The AG's motion for class certification was granted.[85] Google appealed the grant of class certification, and the appeal was granted.[86] Google argued that AG could not be certified as a class because not all members of the AG wanted to be included in the class.[87] Google also stated that it intended to utilize a fair use defense, which may deem the litigation moot.[88] The court remanded the case to the district court so that it could evaluate the fair use issues.[89]

On November 14, 2013, Judge Denny Chin of the United States Court of Appeals for the Second Circuit decided this case in favor of Google.[90] In the decision, he conducted an analysis of Google's use of the material, using the four fair use factors, and determined that Google's use was in fact fair.

The first factor weighed in favor of Google. Although Google is a for-profit company, the court determined that Google's use was not itself for profit. Google "does not sell the scans it has made of books for Google; it does not sell the snippets that it displays; and it does not run ads on the About the Book pages that contain snippets. It does not engage in the direct commercialization of copyrighted works."[91] Even though Google might increase traffic to its sites that do in fact have ads, the court still determined that Google Books served an important educational purpose.

The court also looked at the ways that the "snippets" are utilized, stating that "Google Books has become an important tool for libraries and librarians and cite-checkers as it helps to identify and find books. The use of book text to facilitate search through the display of snippets is transformative."[92] The court also discussed how researchers have used Google Books to evaluate "word frequencies, syntactic patterns, and thematic markers to consider how literary style has changed over time."[93] This use of books was transformative, said the court, because "it has transformed book text into data for purposes of substantive research, including data mining and text mining in new areas, thereby opening up new fields of research."[94]

When evaluating the second fair use factor – the nature of the copyrighted work – the court noted that the majority of the books available on Google Books were non-fiction. Of those books that were fiction, none were currently unpublished or not available to the public. The court also weighed this factor in favor of fair use.

However, the court found the third factor weighed against fair use. This finding was based on the fact that Google scanned entire books and made them available to the public, even though Google limited the amount of text that was displayed in response to a search.

The court found the fourth factor weighed in favor of fair use. The AG raised the argument that Google Books would hurt the market by serving as a market replacement for books, and further because "users could put in multiple searches, varying slightly the search terms, to access an entire book."[95] The court dismissed both of

these arguments, stating that "[n]either suggestion makes sense"[96] and pointed to the countless hours of wasted energy that a user would be forced to exert to piece together the entire book and that this person would have to already own a copy of the book in order to determine the correct search terms. To the contrary, the court stated that Google Books would enhance the sale of books by exposing them to the public.

This decision is the result of eight years of litigation. It is an important case for copyright holders whose works are being displayed, often without their consent, in the digital world.

1. "Rights Granted Under Copyright Law," *Bitlaw, at* http://www.bitlaw.com/copyright/scope.html (Last visited, Jan. 10, 2014).

2. 17 U.S.C. § 106.

3. "Copyright in General," United States Copyright Office, http://www.copyright.gov/help/faq/faq-general.html (last visited Jan. 10, 2014).

4. "Copyright Basics," United States Copyright Office, at 7, http://www.copyright.gov/circs/circ1.pdf (last visited Jan. 10, 2014).

5. Codified in 17 U.S.C. § 107.

6. 17 U.S.C. § 109.

7. In *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013), a company attempted to use the "first sale" doctrine, in regards to digital media. "The statute plainly applies to the lawful owner's "particular" phonorecord, a phonorecord that by definition cannot be uploaded and sold on ReDigi's website." *Id.* at 33–34.

8. *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 998 (E.D. Wis. 2011) (citing *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 561 (1985)).

9. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 549 (1985) (quoting H. Ball, Law of Copyright and Literary Property 260 (1944)).

10. *Hofheinz v. A&E TV Networks*, 146 F. Supp. 2d 442, 445 (S.D.N.Y. 2001).

11. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 916 (2d Cir. 1994).

12. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994).

13. 17 U.S.C. § 107.

14. While teachers can make copies for classroom use, professional copy shops are not protected by fair use, and cannot do so without licensing the intellectual property first. *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991).

15. *See Harper & Row, Publishers*, 471 U.S. at 562 (evaluating whether a use was "fair" using the four factors, despite its purported use in news reporting).

16. *See* "Fair Use Doctrine - Top 10 Misconceptions", *Legalflip, at* http://www.legalflip.com/Article.aspx?id=27&pageid=136 (last visited Jan. 10, 2014).

17. *See* "Fair Use," United States Copyright Office, http://www.copyright.gov/fls/fl102.html ("There is no specific number of words, lines, or notes that may safely be taken without permission.").

18. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

19. *L.A.Times v. Free Republic*, 2000 WL 565200 (C.D. Cal.Apr. 4, 2000) (quoting *Am. Geophysical Union*, 60 F.3d at 921–22).

20. *Byrne v. BBC*, 132 F. Supp. 2d 229, 234 (S.D.N.Y. 2001).

21. *Psihoyos v. Nat'l Examiner*, 1998 WL 336655 (S.D.N.Y. June 22, 1998) (quoting *Harper & Row, Publishers*, 471 U.S. at 562).

22. *Byrne v. BBC*, 132 F. Supp. 2d 229, 234 (S.D.N.Y. 2001) (quoting *Castle Rock Entm't v. Carol Publ'g Grp.*, 150 F.3d 132, 141 (2d Cir. 1998) (citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994)).

23. *See Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) ("in other words, whether and to what extent the new work is 'transformative.'").

24. *Hofheinz v. Discovery Commc'ns, Inc.*, 2001 WL 1111970 (S.D.N.Y. 2001).

25. *Wade Williams Distrib., Inc. v. ABC*, 2005 WL 774275 (S.D.N.Y. 2005) (citing *Campbell*, 510 U.S. 569).

26. *Id.* "[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell*, 510 U.S. 569.

27. *Id.*

28. "We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107." *Id.* at 579. The entirety of the 2 Live Crew song and the Roy Orbison song were reproduced in Appendix B to the decision, making this the only Supreme Court decision to employ the phrase "Bald headed woman here, let me get this hunk of biz for ya."

29. 714 F.3d 694, 706 (2d Cir. 2013).

30. *Id.* at 708.

31. "A secondary work may modify the original without being transformative. For instance, a derivative work that merely presents the same material but in a new form, such as a book of synopses of television shows, is not transformative." *Id. See also Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006).

32. *Cariou v. Prince*, 714 F.3d 694, 711 (2d Cir.), *cert. denied*, 134 S. Ct. 618 (2013).

33. *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

34. *Id.* at 73.

35. 150 F.3d 132 (2d Cir. 1998)

36. *Id.* at 142.

37. *Id.*

38. *Id.* at 143.

39. *Swatch Grp. Mgmt. Servs. v. Bloomberg L.P.*, 861 F. Supp. 2d 336, 341 (S.D.N.Y. 2012) (citing *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006)).

40. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001).

41. *Mathieson v. Associated Press*, 1992 WL 164447 (S.D.N.Y. 1992).

42. 904 F.2d 152, 158 (2d Cir. 1990).

43. We have some hesitation in trying to characterize Hubbard's diverse body of writings as solely "factual" or "non-factual," but on balance, we believe that the quoted works – which deal with Hubbard's life, his views on religion, human relations, the Church, etc. – are more properly viewed as factual or informational. *Id.* at 157. *See also Wright v. Warner Books, Inc.*, 748 F. Supp. 105, 109 (S.D.N.Y. 1990) (where the court came to a similar conclusion regarding the quoting of published works in a biography).

44. 973 F. Supp. 409 (S.D.N.Y. 1997).

45. *Id.* Although the courts found that this factor favored the copyright holder, the court still held that the use was protected as fair use. *Id.* at 414.

46. "Unpublished works are the "favorite sons" of the second fair use factor, and where a plaintiff proves unauthorized publication of an unpublished work, this factor weighs heavily against a finding of fair use." *Byrne v. BBC*, 132 F. Supp. 2d 229, 235 (S.D.N.Y. 2001).

47. 471 U.S. 539 (1985).

48. 1995 WL 46625 (S.D.N.Y. 1995).

49. *Id.*

50. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 738 (2d Cir. 1991).

51. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986).

52. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

53. *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983).

54. *See Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 413 (S.D.N.Y. 1997), *aff'd*, 147 F.3d 2145 (2d Cir. 1998) ("Though defendant included in the scene's background plaintiff's ten copyrighted works in their entirety, at most a single one of the Photographs is recognizable as Sandoval's work, and that only after careful scrutiny and repeated viewings.").

55. *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044, 1046 (S.D.N.Y. 1994).

56. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 565 (1985).

57. *Id. See also Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986) ("One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity." *Id.* (quoting *Bramwell v. Halcomb*, 3 My. & Cr. (Ch.) 736, 738 (1837)).

58. 953 F.2d 731, 739 (2d Cir. 1991).

59. *Id.* As a contrast, in *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987), the quotes were qualitative and also made "the book worth reading." *Id.*

60. *Mathieson v. Associated Press*, 1992 WL 164447 (S.D.N.Y. 1992).

61. *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1225 (S.D.N.Y. 1996).

62. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *see also Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992) (The owner of a copyright with respect to this market-factor need only demonstrate that if the unauthorized use becomes "widespread" it would prejudice his potential market for his work).

63. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 568 (U.S. 1985) *See also Robinson v. Random House, Inc.*, 877 F. Supp. 830, 843 (S.D.N.Y. 1995) ("Harm to both the original work and derivative works must be taken into account.") *Id.*

64. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (quoting *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)).

65. *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84, 93 (S.D.N.Y. 2003).

66. *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1377 (2d Cir. 1993).

67. *Id.*

68. 320 F. Supp. 2d 84, 93 (S.D.N.Y. 2003).

69. 996 F.2d at 1366.

70. *Id.* at 1377. *See also Castle Rock Entm't v. Carol Publ'g Grp.*, 150 F.3d 132, 142 (2d Cir. 1998) (coming to a similar conclusion regarding *The Seinfeld Aptitude Test*).

71. 60 F.3d 913, 931 (2d Cir. 1994).

72. *Id.*

73. 448 F.3d 605, 607 (2d Cir. 2006).

74. *Id.* at 612.

75. *Arista Records LLC v. Doe*, 604 F.3d 110, 124 (2d Cir. 2010).

76. *Authors Guild v. Google, Inc.*, 282 F.R.D. 384, 386 (S.D.N.Y. 2012).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* The first proposed settlement in 2008 would permit Google to show 20% of works free of charge. Subscriptions to the service would be available for purchase, with the proceeds of subscription sales split between Google and the Authors Guild. Part of the settlement paid by Google would go to establishing a digital book registry to administer this new system. Part of the settlement paid by Google would also be used to compensate authors. Miguel Heft & Motoko Rich, *Google Settles Suit Over Book-Scanning*, N.Y. Times, Oct. 28, 2008, *at* http://www.nytimes.com/2008/10/29/technology/internet/29google.html (last visited Jan. 10, 2014). The settlement was amended in 2008. Kenneth Crews, *GBS 2.0: The New Google Books (Proposed) Settlement*, Columbia Univ. Libraries/Information Servs. Copyright Advisory Office, Nov. 17, 2008, *at* http://copyright.columbia.edu/copyright/2009/11/17/gbs-20-the-new-google-books-proposed-settlement/ (last visited Jan. 10, 2014). The Authors Guild published a website outlining the 2009 settlement. *Amended Settlement Filed in Authors Guild v. Google*, The Authors Guild, Nov. 13, 2009. *at* http://www.authorsguild.org/advocacy/111309-amended-settlement-filed-in-authors-guild-v-google (last visited Jan. 10, 2014). There were numerous critiques of the settlement. John Timmer, *The Sequel Stinks: Critics Trash New Google Books Settlement*, Ars Technica, Jan. 29, 2010. *Available at* http://arstechnica.com/tech-policy/2010/01/the-sequel-stinks-critics-trash-new-google-books-settlement (last visited Jan. 10, 2014).The settlement was rejected. *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

84. *Id.* Google brought a motion to dismiss the action commenced by Authors Guild of America, as well as a similar action commenced in 2010 on behalf of photographers and individuals who held the copyrights to some of the works featured in the snippets. *Id.*

85. *Id.*

86. *Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132 (2d Cir. 2013).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Authors Guild, Inc. v. Google Inc.*, 2013 WL 6017130 (S.D.N.Y. Nov. 14, 2013).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

# Individual Liability of Board Members After *Fletcher v. The Dakota*

**By Vincent Di Lorenzo**

## Introduction

In *Fletcher v. The Dakota, Inc.* the First Department reconsidered when board members of cooperative corporations will be individually liable for the discriminatory actions of the board.[1] Prior to *Fletcher,* board members had relied on the court's decision in *Pelton v. 77 Park Avenue Condominium*.[2] It stated:

> In bringing an action against the individual members of a cooperative or condominium board based on allegations of discrimination or similar wrongdoing, plaintiffs were required to plead with specificity independent tortious acts by each individual defendant in order to overcome the public policy that supports the business judgment rule. . . . .[3]

In *Pelton* the court refused to impose individual liability on board members because neither the complaint nor plaintiffs' submissions "assert a specific claim against any of the individual defendants other than as a member of the 77 Park board."[4] Specifically, plaintiffs failed to show that any board member engaged in "individual wrongdoing . . . separate and apart from the actions taken by the board members collectively on behalf of the condominium."[5]

Six years later, in the *Fletcher* decision, the First Department concluded that in the *Pelton* decision it had misinterpreted the governing case law.[6] It rejected the independent tortious act requirement and ruled that "although participation in a breach of contract will typically not give rise to individual director liability, the *participation* of an individual director in a corporation's tort is sufficient to give rise to individual liability."[7] Is the *Fletcher* court's interpretation and application of the case law correct? If

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so, what precise involvement triggers individual liability for board members?

## *Fletcher*'s Reading of Prior Case Law – Breach of Contract Actions

The *Pelton* decision's recognition of an independent tortious act requirement was based on the Court of Appeals's decision in *Murtha v. Yonkers Child Care Ass'n.*[8] *Murtha* involved a claim of breach of a contract of employment by Yonkers Child Care Association. The Court addressed the liability of individual defendants in tort for inducing a breach of contract. It concluded that a director or officer of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract merely because, while acting for the corporation, the director or officer made decisions and took steps that resulted in the corporation's contractual promise being broken.[9] Rather, the officer or director is immune from liability "if it appears that he is acting in good faith as an officer [or director] . . . [and did not commit] independent torts or predatory acts directed at another."[10]

Although the *Murtha* decision was indeed a decision regarding individual director liability for inducing a breach of contract, the decision did not explain why actions alleging breach of contract, and seeking to impose individual liability on directors, should be treated differently than actions alleging other wrongdoing – e.g., other tortious conduct, or discriminatory conduct. However, the *Murtha* decision cited lower court decisions that did explain why the courts imposed an independent tortious act requirement for personal liability on the part of board members for inducing a breach of the corporation's contract.[11] The First Department explained in *Brookside Mills, Inc. v. Raybrook Textile Corp.*,[12] a decision cited by the Court in *Murtha*, that:

> [t]o hold otherwise would be dangerous doctrine, and would subject corporate officers and directors continually to liability on corporate contracts and go far toward undermining the limitation of liability which is one of the principal objects of corporations.[13]

The court further explained that the actions of the two directors in question were taken on the corporation's behalf in the exercise of business judgment, and if their actions resulted in a breach of the corporation's obligations under the contract in question, it was the corporation alone that was liable.[14] Similarly, in *Buckley v. 112 Central Park South Inc.*,[15] also cited by the *Murtha* decision, the First Department explained that to be immune from individual liability the corporate officers or directors must have been acting in good faith,[16] i.e., in the interest of the corporation. The *Buckley* decision further explained that:

> [r]unning through many opinions upon the subject, there is the thread of thought that an officer of a corporation may have the right and perhaps the duty of inducing the corporation to breach a contract of the corporation with a third party if it appears to him to be for the best interests of the corporation to do so. . . . This, of course, is but one facet of the freedom of action rule upon which the immunity is based.[17]

Thus, the case law addressing individual director liability for inducing a breach of contract by the corporation contains two reasons to reject a mere participation standard as the threshold for liability: (a) fear of excessive exposure of board members to litigation, and (b) a recognition that what is wrongful conduct on the part of the corporation, acting through its officers and directors, is not necessarily wrongful conduct on the part of the individual director or officer.

## *Fletcher*'s Application of Case Law Involving Tortious Conduct

The *Fletcher* court's refusal to apply the independent tortious act requirement to allegations of discriminatory conduct by board members is also a correct reading of the existing case law. However, the New York Court of Appeals and the Second Circuit have not addressed the exact question at hand. The *Fletcher* court, first, correctly noted that decision-making tainted by discriminatory considerations is not protected by the business judgment rule.[18] The court, second, highlighted that the Court of Appeals has instructed, generally, that the New York City Human Rights Law must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[19]

In *Fletcher*, the court then ruled that "the *participation* of an individual director in a corporation's tort is sufficient to give rise to individual liability."[20] The court cited prior case law supporting the position that a corporate director is not liable in tort only when the director commits a tort independent of the tort committed by the corporation. Rather, personal liability may be imposed for an action taken regardless of whether the officer or director acted on behalf of the corporation in the course of official duties.[21] However, the *Fletcher* court's stated threshold for individual liability raises a great deal of uncertainty, because that decision does not clearly indicate how or when a director can avoid liability. It is not clear if "participation" involves merely casting a vote consistent with the decision of a majority of the board, regardless of whether the vote of the particular director was tainted, i.e., could independently be deemed a violation of the civil rights laws.

The case law involving tortious conduct generally on the part of a corporate board states that a director may be held individually liable if the director either participated in the tort or else directed, controlled, approved or ratified the decision that led to the plaintiff's injury.[22] However, the decisions applying this standard have involved proof of some connection to the misconduct in question. Thus, "participation" has been found to exist when the officer or director *directly* committed the tort even though he was

acting in his capacity as officer or director of the corporation.[23] No personal liability attaches if an officer or director took no part in the tort committed by the corporation.[24]

A scenario where the Court of Appeals has directly addressed the personal liability of a corporate officer or director for tortious conduct has involved a specific tort, an action for fraud against a corporation and its officers. The Court of Appeals discussed the threshold for individual liability. It noted:

> Joseph Russo's individual liability is another matter. As a general proposition, corporate officers and directors are not liable for fraud unless they personally participate in the misrepresentation or have actual knowledge of it. . . . Mere negligent failure to acquire knowledge of the falsehood is insufficient.[25]

The tort of fraud requires, *inter alia*, an untrue representation of a material fact, known to be untrue or with reckless indifference to truth or falsity, as well as intention to deceive.[26] Thus the Court of Appeals has ruled that the "participation" in a corporate fraud by a corporate officer or director, which can lead to personal liability, requires some direct involvement in the actual wrongdoing.

In summary, the corporate case law that has addressed the individual liability of board members, apart from cases alleging discriminatory conduct, has involved allegations of corporate wrongdoing in the form of inducing breach of contract, commission of a tort generally, and commission of the tort of fraud. In all of these cases, to hold a director or officer individually liable some individual wrongdoing on the part of the director or officer appears to be required.

As discussed above, the action taken by a board member, in his or her capacity as a board member, that might be deemed to be inducing a breach of contract is not necessarily wrongful conduct, since the best interest of the corporation may be served by inducing a breach of contract and the board member must always act in the interest of the corporation. In other words the individual board member's action, distinct from the corporation's action, is not improper. As a result the courts imposed an independent tortious act requirement. Similarly, the case law imposing individual liability on a board member for torts generally has in fact involved some individual involvement in the wrongdoing by the director. Where the tort is the negligent conduct itself, the courts have held a director individually liable when the director was himself guilty of the negligent conduct, or controlled or ratified the negligent conduct of others. Where the tort is fraud, the courts have made it clear that an individual director's conduct becomes actionable when there is also evidence of personal participation in the fraud, or at least actual knowledge of the falsity of a representation made by the board and intention to deceive.

Many cases of discriminatory conduct are arguably similar. The misconduct by the board is not necessarily misconduct by each director. The denial of an application to purchase, for example, is not a wrongful act unless the denial was due to discriminatory reason(s). A member of the board who voted to deny an application to purchase is not engaged in wrongful conduct unless that particular individual's vote was motivated by discriminatory reason(s).

## Case Law Involving Discriminatory Conduct

In the *Fletcher* decision itself the cause of action against an individual director, Barnes, for retaliation against Fletcher for opposing alleged discriminatory conduct by the board while he was president of the board, was dismissed based on a lack of factual allegation that Barnes was aware of Fletcher's protected activity (opposition to alleged discriminatory conduct).[27] However, the action was dismissed without prejudice because discovery may reveal that Barnes was indeed aware of Fletcher's protected activity.[28] Thus, the court's opinion suggests that as long as Barnes was aware of the protected activity and "participated" in the *board's* vote to deny Fletcher the right to purchase an apartment adjacent to his own, Barnes could be individually liable. In other words, if Barnes voted to deny Fletcher's application but did *not* do so for reasons prohibited by the civil rights laws, it is not clear if the court's view of the required threshold of "participation" would allow Barnes to avoid liability.

There is some additional case law in the federal district courts supporting this low threshold for individual director liability. In *Sallee v. Tropic Seas, Inc.* the court considered whether the action against two individual directors should be dismissed.[29] In that case the court certainly did not apply an independent tortious act requirement. Indeed, it did not even require that the individual directors *actively* participated in the discriminatory conduct.[30] Rather, the court reasoned that

> [b]ecause the duty to comply with the Fair Housing Act is nondelegable, a corporation's officers and directors may be held individually liable for their failure to ensure the corporation's compliance. . . . This is so even where the individual director or officer did not actively participate in the alleged discrimination and did not subjectively intend to discriminate against the complainant.[31]

In the *Tropic Seas* case the plaintiffs alleged a violation of the Fair Housing Act Amendments of 1988 which prohibit discrimination based on "familial status."[32] Plaintiffs held a proprietary leasehold interest in a Wakiki cooperative apartment complex. The state circuit court had found that the corporation, Tropic Seas Inc., had violated the statute, and HUD had issued a Determination of Reasonable Cause and Charge of Discrimination against Tropic Seas and members of the board of directors. However, the alleged discriminatory actions were all, seemingly, actions of the board in enforcing an occupancy policy of limiting occupancy to two persons.[33] When denying the motion for summary judgment by two individual directors the court noted that

> [t]he acts and omissions alleged by the Sallees [plaintiffs] give rise to at least a genuine issue of material fact as to whether Tropic Seas engaged in discriminatory conduct *during the tenures of Worth and Mello*[34] on the board of directors. Summary judgment in favor of Worth and Mello is thus not appropriate. Thus, the formal action(s) *of the board* during the tenure of the individual directors was enough to potentially hold the directors individually liable.[35]

Arguably, however, *Tropic Seas* is a distinct case. The decision to enforce the occupancy policy itself had the effect of improperly denying access to the plaintiffs based on "familial status" because the couple in question had a child. Any board member voting in favor of enforcing the occupancy restriction would be participating in the civil rights violation. However, what level of participation would be required if the decision itself (e.g., to deny an application to purchase) is not necessarily improper, but only becomes improper based on a prohibited basis (reason) for the decision?

The case law involving housing discrimination does not delineate the degree of culpability or involvement of an individual board member in group decisions such as a board decision to deny an application to purchase in such a scenario. The only case law in the cooperative or condominium setting in which board members were *not* liable for alleged discriminatory actions involved a situation in which the individual board members did not participate in the decision at all.[36] Moreover, in the lower federal courts in New York the cases in which a director *was* found to be individually liable involved a situation in which the individual board member, distinct from the board, directly and willfully violated the civil rights laws.[37]

## Should the Courts Impose a Higher or Lower Threshold?

In the context of individual liability of board members of cooperative corporations or condominium associations, the differing viewpoints found in the *Fletcher* decision and the older *Pelton* decision are a difference in viewpoint as to which public policy deserves primacy. The *Fletcher* decision emphasizes the policy that the New York City Civil Rights Law, and no doubt the state or federal civil rights laws, should be construed broadly in favor of discrimination plaintiffs.[38] This is arguably to discourage discriminatory conduct. The *Pelton* decision recognizes that aim. However, it emphasizes the adverse impact of a low threshold for individual liability for board members who volunteer to serve the interests of all unit owners. The court noted that board policies and decisions are controlled by the board collectively and not by any individual member.[39] Yet,

> the Supreme Court's decision, if permitted to stand, would, without any evidence of individual wrongdoing, subject these defendants to expensive, intrusive and time-consuming litigation . . . hardly a fitting reward for those "fellow tenants who volunteer their time, without compensation" as members of a governing body that takes on the burden of managing the property for the benefit of the other owners (*see Levandusky*, 75 N.Y. 2d at 536–37) . . . the threat of baseless litigation, with its attendant serious financial and personal burdens, would pose a formidable obstacle to those willing to volunteer their talent, experience and knowledge for the common good of their homeowner communities by serving on such a board.[40]

The tort of fraud requires an untrue representation of a material fact.

The risk becomes a serious risk in light of the existing threshold utilized for plaintiffs to establish a prima facie case. Namely,

> Plaintiffs may establish a prima facie case of housing discrimination by showing (1) that they are members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers.[41]

Thus, under the standard announced in *Fletcher* it is possible that any director who voted with the majority of the board in a decision involving a protected class or activity could be named as a defendant in a lawsuit seeking to hold that director personally liable, even if no evidence is presented that the director in question engaged in any discriminatory conduct, e.g., even if the director had a valid reason to deny consent to a purchase or lease. Such a lawsuit would not be dismissed. Rather, the burden shifts and the individual director now must come forward with evidence that his actions were not motivated by considerations of race, for example.[42] Moreover, in attempting to satisfy that burden of proof the courts will carefully scrutinize reasons that are not objective in nature and view subjective explanations with "considerable skepticism."[43]

Such a scenario would raise the risk of continually subjecting corporate officers and directors to personal liability, a risk the courts sought to avoid by imposing the independent tortious act requirement in cases alleging breach of contract. This was the same risk that had originally persuaded the court in *Pelton* to impose the same requirement for individual liability in cases alleging discriminatory conduct, especially since board members are volunteers taking on the burden of managing the cooperative or condominium. It would be up to the Court of Appeals to decide if this public policy should be paramount and, if so, to recognize an individual "tortious" act requirement when the alleged wrongdoing is a violation of the civil rights laws.

Even if the Court of Appeals chooses not to extend the independent tortious act requirement to civil rights violations, it must clarify what threshold the *Fletcher* court intended to impose for individual liability on the part of board members for alleged discriminatory conduct by the board as a whole. A clarification might be to clearly embrace the commission of tort standard followed in the New York case law. Namely, a director would be individually liable only if he or she personally participated in the discriminatory conduct (i.e., not merely the decision but also the unlawful motivation for the decision) or ratified it.

It is interesting that the case law involving alleged employment discrimination and individual liability of corporate officers or supervisory personnel has also focused on the degree of individual involvement in the wrongful decision. The courts have repeatedly ruled that for an individual to be liable in damages for discriminatory conduct under the New York State or New York City Human Rights Laws the individual must have "actively participated in the discrimination."[44] For liability under §§ 1981 and 1983 plaintiff must show some "personal involvement" by the individual defendant in alleged constitutional deprivations.[45] Such case law suggests that a lower threshold for "participation," seemingly embraced by the *Fletcher* decision, is not the wisest standard to impose. ■

1. 948 N.Y.S.2d 263 (1st Dep't 2012).
2. 38 A.D.3d 1 (1st Dep't 2006).
3. *Id.* at 9–10.
4. *Id.* at 10.
5. *Id.*
6. *See Fletcher*, 948 N.Y.S.2d at 268.
7. *Id.* at 266 (emphasis added).
8. 45 N.Y.2d 913 (1978). The court also cited the First Department's earlier decision in *Konrad v. 136 E. 64th St. Corp.*, 246 A.D.2d 324 (1st Dep't 1998). That decision involved an allegation of breach of fiduciary duty, not breach of contract.
9. *See Murtha*, 45 N.Y.2d at 914–15.
10. *Id.* at 915 (quoting from the Appellate Division's decision in *Buckley v. 112 Cent. Park S.*, 285 A.D. 331 (1st Dep't 1954)).
11. *See id.*
12. 276 A.D. 357 (1st Dep't 1950).
13. *Id.* at 367.
14. *Id.* at 368.
15. 285 A.D. 331 (1st Dep't 1954).
16. *Id.* at 334.
17. *Id.* at 335–36 (citations omitted).
18. *See Fletcher*, 948 N.Y.S.2d at 268 (explaining the applicability of the rule in *Pelton*).
19. *Id.* at 268–69 (quoting *Albunio v. City of N.Y.*, 16 N.Y.3d 472, 477–78 (2011)). The *Albunio* decision broadly construed the word "opposed" to any practice forbidden by the New York City Human Rights law in the context of a claim of retaliation for opposition to discriminatory conduct.
20. *Id.* at 266 (emphasis added).
21. *See Am. Express Travel Related Servs. Co. v. N. Atl. Res.*, 261 A.D.2d 310, 311 (1st Dep't 1999).
22. *Fletcher*, 948 N.Y.S.2d at 268 (citing Fletcher, Cyc. of Law of Corporations); *see generally* Martin Petun, *The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59 Amer. U. L. Rev., 1661, 1668 (2010).
23. *See e.g., Peguero*, 58 A.D.3d 556 (Jeffrey Farkas, president of the corporation, cannot have the complaint dismissed against him merely because his actions were taken in his capacity as an officer of the corporation. However, the "commission of tort" doctrine permits personal liability to be imposed for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act); *Savanah T & T Co., Inc. v. Force One Express Inc.*, 58 A.D.3d 409 (1st Dep't 2009) (defendant Phil Notaro, the corporate defendant's principal, was held personally liable for misappropriation where he withheld plaintiff's goods from them and coerced Edwin Baldin, the plaintiff's principal, into signing a purported lien agreement); *Rajeev Sindhwani, M.D., PLLC v. Coe Business Serv. Inc.*, 52 A.D.3d 674 (2d Dep't 2008) (the evidence adduced at trial established that Coe was responsible for the determination to withhold the subject records from the plaintiff. Accordingly, the jury rationally determined she personally was liable for conversion).
24. The participation theory of tort liability provides that an officer or director who takes part in the commission of a tort by the corporation is personally liable therefor. However, "an officer [or director] of a corporation who takes no part in the commission of a tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other agents, officers or employees of the corporation in committing it, unless he specifically directed the particular act to be done or participated, or cooperated therein," *Mill Run Assocs. v. Locke Prop. Co., Inc.*, 282 F. Supp. 2d 278 (E.D. Pa. 2003) (discussing the general, if not universal, rule and citing Fletcher, Cycl. of the Law of Private Corporations); *see also Clark v. Pine Hill Homes, Inc.*, 112 A.D.2d 755 (4th Dep't 1985) (a corporate officer is not liable for the negligence of the corporation merely because of his official relationship to it. It must be shown that the officer was a participant in the wrongful conduct); *Wesolek v. Jumping Cow Enters., Inc.*, 51 A.D.3d 1376, 1378–79 (4th Dep't 2008) (dismissing action against corporate director).
25. *Marine Midland Bank v. John E. Russo Produce Co., Inc.*, 50 N.Y.2d 31, 44 (1980) (citations omitted); *see also Ecuador ImportadoraExportadora CIA, LTDA v. ITF (Overseas) Corp.*, 94 A.D.2d 113, 117-18 (1st Dep't 1983) (since director Cordero was under the impression Intrafina had more than enough cash to meet its obligations he could not be held personally liable. Even if Cordero could be considered culpable of nonfeasance in this regard to his corporate duties, his liability does not extend to a third party).
26. *E.g., Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 N.Y.2d 403 (1958).
27. *Fletcher*, 948 N.Y.S.2d at 270.
28. *Id.* at 273.
29. 887 F. Supp. 1347, 1366 (D. Haw. 1995).
30. *Id.* at 1347, 1365.
31. *Id.* at 1365.
32. *Id.* at 1353.
33. *Id.* at 1352.
34. *Tropic Seas*, 887 F. Supp. at 1365 (emphasis added).
35. *Id.* at 1365 (emphasis added).
36. *See Sayeh v. 66 Madison Ave. Apt. Corp.*, 73 A.D.3d 459, 460 (1st Dep't 2010).
37. *See* discussion of jury's findings in *Biondi v. Beekman Hill House Apartment Corp.*, 94 N.Y.2d. 659, 664 (2000) (the jury in the federal action found Biondi willfully violated the Broomes' and Demou's civil rights and imposed personal liability on him); *see also Broome v. Biondi*, 17 F. Supp. 2d 211, 229 n.4 (S.D.N.Y. 1997) (the jury found Beckman Hill House Apartment Corp. liable, the members of the board of directors liable in their official capacity, and Nicholas Biondi liable in his personal capacity).
38. *Fletcher*, 948 N.Y.S. at 268–69.
39. *Pelton*, 38 A.D.3d at 10–11.
40. *Id.*
41. *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003); *see also Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979); *Broome*, 17 F. Supp. 2d 211, 216.
42. *See Robinson*, 610 F.2d at 1039.
43. *Id.* at 1040.
44. *E.g., Hirsch v. Columbia Univ.*, 293 F. Supp. 2d 372, 378 (S.D.N.Y. 2003) and cases cited therein; *Westbrook v. City Univ. of N.Y.*, 591 F. Supp. 2d 207, 224 (E.D.N.Y. 2008).
45. *E.g., Westbrook*, 591 F. Supp. 2d 207, and cases cited therein.

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# Residential Contracts of Sale; Investment Bankers' Engagement Letters

## Residential Contracts of Sale

The New York State real estate bar suffers from an infection. The infection, though, is not exogenous. It is caused by a self-generated virus located in the standard form contract for home sales, a contract produced by the New York State and the New York City Bar Associations in conjunction with others, and it is also living in one produced by Bloomberg.

## The Virus

The customary practice in home sales in New York is for the seller's attorney to hold the buyer's down payment in escrow in a segregated account pending closing. Both standard forms for a residential contract of sale, mentioned above, provide in paragraph 6:

> *Escrowee shall not be liable to either party* [seller or buyer] *for any act or omission on its part unless taken or suffered in bad faith or in willful disregard of this contract or involving gross negligence on the part of Escrowee.* (Emphasis supplied.)

Then, to add insult to injury, the forms provide:

> *Seller and Purchaser* jointly and severally (with right of contribution) *agree to* defend (by attorneys selected by Escrowee), *indemnify and hold Escrowee harmless* from and against all costs, claims and expenses (including reasonable attorneys fees) incurred in connection with the performance of Escrowee's duties hereunder, *except with respect to actions or omissions taken or suffered by Escrowee in bad faith or in willful disregard of this contract or involving gross negligence on the part of Escrowee.* (Emphasis supplied.)

## Analysis

In effect, these provisions exculpate the escrow agent, an attorney who should be held to the highest standard of conduct, from the attorney's own malfeasance. They excuse – nay, endorse – careless conduct. Even worse, they require the innocent, those damaged by the error, to protect the person at fault from claims asserted because of that person's improper act. And they obtain even though the attorney carries insurance against negligent acts.

Further, "the most unkindest cut of all"[1] is that unless the attorney's action is "willful," the attorney is excused from and is protected, that is, "indemnified," against disregard of the contract that the attorney prepared.

Attorneys are fiduciaries to their clients. Attorneys *must* act in the best interest of their clients, not in their own best interests. Yet these provisions favor the attorney over the client. They create a conflict of interest, placing the attorney and client in adversarial roles: *first*, excusing the attorney from the attorney's own malfeasance, *and then* requiring the client to protect the client's attorney from that malfeasance, thereby converting the client into an insurer of that very negligence.

Surely attorneys should disclose this conflict of interest to their clients, even suggest – though admittedly the risk is slight – that the client retain independent counsel to advise it. But do they? Did those responsible for preparing these forms consider these issues when they wrote these provisions?

So where is the integrity? These provisions are "industry norm" explained one real estate lawyer, though that same lawyer did acknowledge that the provisions are "distasteful."

## Suggested Solutions

Short of eliminating the provisions entirely, revise them along lines set forth below. The indemnity remains, but now it reflects a reasonable indemnity to which agents are entitled. Question, though, whether the indemnity should be given by both seller and buyer or just by the party whose attorney is holding the down payment. And, further, with the indemnity, the inherent conflict of interest between the attorney holding the deposit and the attorney's client remains.

> Escrowee shall not be liable to either party [seller or buyer] for any act or omission on its part taken or suffered in good faith and in accordance with the requirements of this contract.
>
> Seller and Purchaser jointly and severally (with right of contribution) agree to defend (by attorneys approved by them), indemnify and hold Escrowee harmless from and against all costs claims and expenses (including reasonable attorneys fees) arising out of or in connection with any act or omission on its part taken or suffered in good faith and

in accordance with the requirements of this contract.

In the alternative, simply have the seller's attorney or the title company hold the down payment in escrow providing for its release in accordance with the joint written instructions of the buyer and seller or in accordance with a final court order, after all appeals or after the expiration of all time to appeal.

## Investment Bankers' Engagement Letters

The very same virus that plagues the standard form real estate contract infects the investment banking community.

Frequently, companies will retain investment bankers to assist them in the sale of all or part of their business or in the acquisition of the business of another. Like the standard form contract for home sales, the engagement letters or contracts that these advisers present to their clients excuse the investment bankers from their own negligence and require their clients to indemnify them from claims that arise out of that negligence. The investment banker accepts liability only for gross negligence or willful misconduct.

The parallel between the real estate and investment banking clauses does not end here. In the same manner that the real estate bar defends the provisions in the home sales contract ("industry norm"), the investment banking community seeks acceptance of its provisions by calling them "industry standard." Again, these clauses invite careless conduct. They apply even though the investment banker maintains insurance against its negligence. And these very provisions convert the investment banker's client into an insurer of the banker's own mistakes.

There is, however, a material difference between the situation of the lawyer acting passively as an escrow agent and that of an investment banker actively engaged in an acquisition, rendering advice. The risk of error is much greater in the case if the investment banker.

The investment banker's exposure lies in assessing the transaction, and the crucial ingredient to that assessment is the performance of "due diligence." Due diligence is normally associated with buyers, but if a seller accepts payment, in whole or in part, of anything other than cash – such as stock or debt – that seller itself becomes a buyer. So buyers and seller-buyers must beware.

The fact that the heart of any acquisition is "due diligence," provides the basis for an acceptable compromise between investment banker and client: The client should and must, itself, conduct the due diligence by its own personnel and, if necessary, by independent consultants, not relying on the investment banker – especially when the investment banker's fee includes, as it often does, a contingency component based on success of the transaction. That contingency component puts the investment banker in a conflict with its client.

Further, in the final analysis, it is the client that must make the ultimate decision on whether to proceed with the transaction.

So, the client can – and by proceeding prudently the client will – protect itself against any negligence by the investment banker. Thus, it is perfectly acceptable to excuse the investment banker from liability to the client arising out of its own negligence *except* in cases where that negligence results in a third party claim against the client.

Below is a sample provision based on the foregoing analysis. Several investment banking firms have accepted it.

Sample Indemnity Provisions

Client will indemnify Adviser and Adviser's officers, directors, employees, agents and shareholders (collectively called "Indemnified Parties") against any liability and hold each Indemnified Party harmless from and pay any loss, damage, cost and expense (including, without limitation, reasonable legal fees and disbursements, court costs, and the cost of appellate proceedings) which any Indemnified Party incurs by reason of any claim by a third party (regardless of the merits thereof)

(i) based upon any information furnished or statement made by Client, or

(ii) based upon any other act or omission by Client, or

(iii) based upon any act or omission of the Adviser under and in accordance with this agreement that is not negligent and that does not constitute willful misconduct;

provided, however, that Client may, at its expense, defend any such claim; and if Client elects to do so, Client will not be liable to the Indemnified Party for any expense incurred by the Indemnified Party in defense of the claim after Client notifies the Adviser of its election; but Client will permit the Indemnified Party to monitor the defense at its expense.

Adviser will promptly notify Client of any claim by a third party covered by the foregoing indemnity with full details of the claim. Adviser will, and Adviser will cause each other Indemnified Party to, cooperate in the defense of any such claim, and the same will not be settled without Client's written consent unless Client is released from all of its obligations under the indemnity with respect to the claim. Notwithstanding the foregoing, Client will not assert – and Client waives – any claim against any Indemnified Party based on ordinary negligence except to the extent that a claim is asserted against Client based on that same negligence. *[Add, if applicable: But the provisions of the preceding sentence will not apply to any obligations of confidentiality.]*

*[Add, if applicable: Any limitations on damages will not apply to liability arising from a breach of any obligations of confidentiality.]*

The provisions of this Section will survive termination of this agreement. ■

1. As Marc Antony said of Brutus's stabbing of Julius Caesar, in Shakespeare's *Julius Cesar*, Act 3, Scene 2.

# ATTORNEY PROFESSIONALISM FORUM

## To the Forum:

Jonathan Entrepreneur (Jonathan) had been a long time client of my firm. Back in 2011, he decided that he wanted to set up a hedge fund with his friend, Paul Partner ("Paul"). At Jonathan's request, my firm did the work that resulted in the creation of Hedge Fund GP, in which Jonathan and Paul became equal partners. My firm also prepared the papers for Hedge Fund GP to become the general partner of Hedge Fund Partners, an onshore fund my firm organized. Because of my firm's long-standing relationship with Jonathan, we did not issue an engagement letter for this work. In addition, Jonathan asked that our firm also represent Paul in the formation of the fund entities, and we were happy to grant his request.

My firm generated a bill each month for legal services rendered to Hedge Fund GP, to Hedge Fund Partners, to Jonathan, and to Paul and addressed the bills only to Hedge Fund GP.

Hedge Fund GP was always behind on paying its bills. However, earlier this year, Hedge Fund GP ran into trouble and completely stopped paying our firm's bills.

We want to commence an action against Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul to collect the fees that are owed. I have heard different views from several people on whether we were required to issue engagement letters to Hedge Fund GP, Hedge Fund Partners, Jonathan and Paul if they were all to be responsible for our fees, but I have been unable to get a definitive answer. What are the rules on engagement letters and is the absence of an engagement letter fatal to my firm's claim for unpaid legal fees?

Sincerely,

I.N. Confusion

## Dear I.N. Confusion:

Attorneys should be familiar with the rules requiring written engagement letters. 22 N.Y.C.R.R. Part 1215 (Part 1215) contains several rules that no lawyer can or should overlook:

§ 1215.1. Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter

(1) if otherwise impracticable or

(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term *client* shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) Explanation of the scope of the legal services to be provided;

(2) Explanation of attorney's fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

§ 1215.2. Exceptions

This section shall not apply to:

(a) representation of a client where the fee to be charged is expected to be less than $3,000,

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client, or

(c) representation in domestic relations matters subject to Part 1400 of the Joint Rules of the Appellate Division (22 N.Y.C.R.R.), or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

As originally enacted, the requirement that attorneys issue written engagement letters was a court rule and not a matter of professional responsibility or legal ethics. That changed in April 2009 when New York adopted the Rules of Professional Conduct (RPC). Rule 1.5(b), which essentially incorporated Part 1215, makes written engagement letters an ethical obligation:

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

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> A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

Prior to 2009, the penalty for not having a written engagement letter was arguably, at best, the loss of a breach of contract claim in an action to collect fees. *See Brown Rudnick Berlack Israels LLP v. Zelmanovitch*, 11 Misc. 3d 1090(A), 2006 N.Y. Slip Op. 50800(U) (Sup. Ct., Kings Co. Mar. 14, 2006). Rule 1.5(b) takes the engagement letter rule beyond the realm of fee collection matters and can potentially expose an attorney to disciplinary action. Although this is uncharted territory, there is a risk that cases interpreting Part 1215 in the fee collection context (which we discuss below) will be applied in the disciplinary forum.

Many lawyers believe that there is a safe harbor which makes engagement letters unnecessary when they get new work from existing clients. So the question is, what would be considered new work? And, which existing clients would fall within the scope of the exception? It is true that Rule 1.5(b) says that engagement letters are not necessary for "a regularly represented client" where there is no change in the fee arrangement and the engagement is for "services that are of the same general kind as previously rendered." *Id.* The problem is that there is no definition of "regularly represented client," and there may be a difference in the two rules because Part 1215 does not use the words "regularly represented client" or even the words "existing client." Comment [2] to Rule 1.5 reminds all of us that it is best to always issue an engagement letter and avoid the risks associated with not having one.

> When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. *See* 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

Another issue that is worth avoiding is whether a new engagement involves "services that are of the same general kind" as the services that the firm has been providing. In the words of one commentator, "if it's a close call as to whether the new services are the 'same general kind' as prior matters, it will take less time to send a written engagement letter than to analyze Rule 1.5(b)." *See* Simon's New York Rules of Professional Conduct Annotated at 171 (2014 ed.).

You don't have an engagement letter and want to recover your fees, so what can you do about your non-paying client? Since the enactment of Part 1215, although the absence of a written engagement letter may be fatal to a breach of contract claim, several courts have ruled that a law firm's failure to comply with the written engagement letter rule "does not preclude it from suing to recover legal fees for the services it provided." *See Miller v. Nadler*, 60 A.D.3d 499, 500 (1st Dep't 2009) (citing *Seth Rubenstein, P.C. v. Ganea*, 41 A.D.3d 54, 63–64 (2d Dep't 2007)). One court has also held that

> the caselaw does not distinguish between the recovery of fees under a theory of *quantum meruit* or an account stated. Instead, this Court has held that [22 N.Y.C.R.R. § 1215.1] contains no provision stating that failure to comply with its requirements *bars a fee collection action*. Indeed, the regulation is silent as to what penalty, if any, should be assessed against an attorney who fails to abide by the rule.

*Constantine Cannon LLP v. Parnes*, 2010 N.Y. Slip Op. 31956(U), 15 (Sup. Ct., N.Y. Co. July 22, 2010) (emphasis in original) (internal citations omitted.)

The fact that you did not issue an engagement letter to Jonathan and thereafter sent invoices exclusively to Hedge Fund GP does not in our view prevent you from pursuing a legal fee claim against either Jonathan or Paul, or their related entities. But, as suggested in one case, this may not be an easy road and you may face certain obstacles in your attempt to collect fees. *See Davidoff Malito & Hutcher, LLP v. Scheiner*, 38 Misc. 3d 1201(A), 966 N.Y.S.2d 345 (Sup. Ct., Queens Co. Dec. 11, 2012) (law firm's motion for summary judgment on its *quantum meruit* and account stated claims denied where issues of fact existed arising from the law firm's failure to enter into a written fee agreement with its client).

The better practice would have been to issue an engagement letter to all individuals and entities involved in connection with the formation of Hedge Fund GP and Hedge Fund Partners. Furthermore, because your firm appeared to represent both Jonathan and Paul in connection with this matter, one way your firm could have drafted the engagement letter was to set forth clear language about

the potential for conflicts of interest. Sample language could state:

> While we do not currently see a conflict between your interests, whenever a firm represents multiple parties in a single matter, there is always the possibility that a conflict may develop. In the event such a conflict arises, we may be required to cease representing one of you in connection with this matter. We will make the decision with respect to our representation if and when such circumstances arise. Lastly, you understand that if we continue to represent one or more of you, we will be able to use any information we obtained during the joint representation in the continuing representation.

A word to the wise is that strict compliance with Part 1215 is a critical part of professional responsibility. The importance of this was underscored by the court in *Seth Rubenstein, P.C.*, 41 A.D.3d 54:

> Attorneys who fail to heed rule 1215.1 place themselves at a marked disadvantage, as the recovery of fees becomes dependent upon factors that attorneys do not necessarily control, such as meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon. There is never any guarantee that an arbitrator or court will find this burden met or that the fact-finder will determine the reasonable value of services under quantum meruit to be equal to the compensation that would have been earned under a clearly written retainer agreement or letter of engagement.

*Id.* at 64.

We hope that this gives you an understanding of the rules, their potential impact on fee collection cases, and the possible issues that may arise when law firms fail to issue engagement letters. It should come as no surprise that we believe that lawyers should err on the side of caution when it comes to engagement letters. Borrowing from Professor Simon, if you need to spend time thinking about whether an engagement letter is required, it's probably a good idea to simply send one.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq. and
Matthew R. Maron, Esq.,
Tannenbaum Helpern Syracuse & Hirschtritt LLP

## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

My firm represents Blackacre, a real estate investment trust (REIT) with real estate holdings located throughout many portions of the United States, and has represented the company in almost all of its real estate transactions. A wholly owned subsidiary of Blackacre owns a luxury ski resort development in Utah, and the principals of Blackacre have located a second resort property in Utah that they hope to purchase and add to the company's ever-growing real estate portfolio. My firm only has an office in New York and does not employ any attorneys who are admitted to practice in Utah. Would this transaction require Blackacre to hire local counsel in Utah to assist my firm in the deal? I have heard that if I do not retain local counsel, then I would potentially be engaging in the unauthorized practice of law. Is this true? What are the consequences for engaging in the unauthorized practice of law?

Sincerely,

I. Need Help

# NEW MEMBERS WELCOMED

**FIRST DISTRICT**
Hameedat Temilade Adeniji
Muhannad Rasheed Alnajjab
Yen-yi Anderson
Katelyn Nicole Andrews
Daniel A. Apgar
Alyssa Josefa Astiz
Jorge Rafael Aviles
Jamil Christopher Baroody
Noemie Alice Marie-louise Bauer
Amanda Elizabeth Bell
David John Berkery
Jonathan K. Blank
Simone Robin Bonnet
Meredith Lee Borner
Marie Anne Bousaba
Amy Susannah Brady
Lyn Marie Brennan
Timothy James Brunst
Lindsey Jayne Canning
Romy E. Carr
Nicholas Collinge Cassin
Deanne Katherine Cevasco
Cynthia Chun
Angela Ijane Chung
Joseph Walter Clementz
Jade Alece Clemons
Rachael Gabrielle Coffey
Mark Alfred Corey
Regina M. Danca
Kate Darracott
Daisy LePoer Darvall
Eva Lopatin Dickerman
Niamh Deirdre Dillon
Elizabeth Margaret Downing
Jeffrey Paul Dunlap
Sean Michael Dusseau
Katherine Greenwald Eickmeyer
Anyu Fang
Cristina Marie Fernandez
Ryan William Finn
Adam Daniel Friedland
Jessica Friedman
Russell Wallace Gallaro
Zachary Lance Garrett
Alexander James Gelski
James Goldfeier
Jeffrey Steven Gordon
Darienne Marika Grey
Christopher J. Gunther
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Yan Benjamin Hankin
Yumi Hayashi
Christopher A. Hazlehurst
Chantal Luzelvi Marie Hernandez
Robert William Homb
Nyiesha Roshell Hudson
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Trini M. Jones
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Namrata Kotwani
Aryel Paige Koval
Sophia Lin Lakin
Janire Lamiquiz
Jessica Michele Lamoreaux
Laura Georgiana Lariu
Roseanne Catherine Lazer
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Ji-Hyong Lee
Wonjun Brian Lee
Dean Parker Leonard
Melissa Diane Leuzzi
Justin Andrew Levine
Emma Charlotte Chiann Lim
Jeffrey Bryan Lipschutz
Steven Aaron Loterstein
Marc Lynde
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Eyal Orgad
Robert Anthony Orren
Ashleigh Jacqueline Owens
Peter Dongyung Park
Yoong Jung Park
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Alexander Ryan Plaum
Jacob Michael Presser
Justin Michael Reitman
Jessica Nicole Renn
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Melinda Anne Rubenstein
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Sho Frank Sato
Kathryn Yvette Schubert
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Brett Alexander Singer
Kyle Raymond Smit
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Skyler B. Sourifman
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Stephanie Michelle Tannenholtz
Cherise J. Teasley
Mark R. Thompson
Christopher J. Tierno
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Robert Michael Tuchman
Rebecca Yaa Serwah Tweneboah
Neil Underberg
Adam B. VanWagner
Anil Karim Vassanji
Arden Askin Wadhwani
David A. Wainberg
Mina Alexis Wallner
Ouou Wang
David Allen White
Ashley Beth Wyand
Catheranne Delores Wyly
Seana Lee Wyman
Gene Jeong Yao
Paul Anthony Zanelli

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Fredericka Patrice Bashir
Jonathan P. Brenner
Nanette Ida Buoneto
Asher Kest

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Joshua David Ackerman
Zachary Taylor West

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Megan O'Hara Easley
Brandon Michael Wilsey

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Michelle Lynn Webb
Brandon Michael Wrazen

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Faith Eleni Kourpouanidis
Mark Jay Kurzmann
Ari Lessa
Dustin Lee Winston

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Meghan E. Dressler
Gavin Clive Grusd
Jeison Arturo Larrota
Rachael Joan Rayzak

**ELEVENTH DISTRICT**
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Urim Lekaj
Sean K. Murphy
Brian Roberts
Joshua Kalman Rosner

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Latoya Joyner
Amanda Raquel Montano
Eric Joseph Souffer
Daniel Clinton Whorley

**THIRTEENTH DISTRICT**
Russell Cirincione

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Nadine Abi Chakra
Folashade Abiola
Aaina Agarwal
Nikoletta Popi Agouras
Zara Sarfraz Ahmad
Asli Aksoylu
Ahmad Mohammed Al Mana
Faisal Saud Al Nabhani
Louis Jerry Amatucci
Suchita Ambadipudi
Safa Jehan Ansari
Joel David Applebaum
Bryan Christopher Armbruster
Andrew Zachary Arnett
Robert Dale Atkins
Nana Adjoa Atsem
Drew Steven Backstrand
Stephen Franklin Wilson Ball
Han Bao
Kaley Noel Barbera
Michal Zipora Brand Gold
Michael John Bruno
Haitao Cai
Michele Cea
Peter G. Chen
Leonardo Baptista Rodrigues Cruz
Stephanie D. Curry
Marco De Morpurgo
Marie Aimee Delaisi
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Alessandra El Kobbi
Peter D. Fenzel
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Catharina Maria Elisabeth Grau
Xavier Lorenzo Hailey
Michelle Allen Hood
Juan Carlos Ibarra
Shivana Arielle Jorawar
Dimitrios Kalyvas
Vasiliki Sylvia Kapnoutzi
Florian Niels Kastler
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Hok Lai Li
Meimei Li
David William Lord
Adrian Magallanes
Dickens Mathieu
Belen Molins
Michelle Alison Newton
Hang Yee Ng
Judith Onyebuchi Olloh
Lara Pacheco
Nga Man Poon
Lynda Reddy
Alexandra Nicole Rothman
Rodrigo Sanchez Mujica
Stacy B. Sulman
Andrew Travis
Ines Tribouillet
Georgina Maria Tsakrios
Marcus Wilson Valverde

# *In Memoriam*

James T. Embser
*Wellsville, NY*

Javad Heydary
*Toronto, ON*

Timothy M. Hudson
*New York, NY*

Lawrence G. Kurland
*New York, NY*

Thomas Albert Rill
*La Fayette, NY*

William A. Schauer
*Ridgewood, NY*

David Branco Silva
*Los Angeles, CA*

Peter Van Nuys
*New York, NY*

Mary E. WanderPolo
*Montclair, NJ*

Stephen J. Wiley
*Albany, NY*

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appear voluntarily; no need exists for you to serve a subpoena on them.[17] But some witnesses, like government employees, will ask you to serve a subpoena to ensure that their employers will give them time off from work to testify. Serving a subpoena will also protect these witnesses from accusations of favoritism.

• **Subpoena Duces Tecum.** Use a subpoena duces tecum to obtain "a paper or thing rather than testimony" from a witness.[18] A subpoena duces tecum will allow you to inspect, copy, test, and photograph the items you seek.[19]

If you want a witness to testify and to produce documents in court, serve a subpoena ad testificandum and a subpoena duces tecum. Or serve one subpoena that contains both clauses — testimonial and duces tecum clauses.[20] CPLR 2305(b) provides that you may join a subpoena duces tecum with a subpoena to testify "at a trial, hearing or examination or [the subpoenas] may be issued separately."

• **Information Subpoena.** Use an information subpoena to enforce a money judgment you've obtained after a trial or an inquest. CPLR 5224(a)(3) discusses information subpoenas.

As a judgment creditor, you may seek disclosure by serving an information subpoena on a judgment debtor: the person or entity against whom you've obtained a money judgment.[21] In the subpoena, identify the parties to the action, the judgment date, the court in which you entered the judgment, the judgment amount, and the amount due on the judgment.[22] Also state that "false swearing or failure to comply with the subpoena is punishable as a contempt of court."[23]

Prepare a set of interrogatories — questions — to get financial information about the judgment debtor to collect on the money judgment. You may serve the subpoena and interrogatories by registered or certified mail, return receipt requested, on the person or entity you've obtained a judgment from.[24] Along with the information subpoena, mail to the judgment debtor an original and one copy of the written questions and a self-addressed, stamped envelope.[25]

The legislature amended CPLR 5224(a)(3) to require a certification in an information subpoena.[26] When judgment creditors or their attorneys sign the certification, they "certif[y] that, to the best of . . . [their] knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the individual or entity receiving the subpoena has relevant information about the debtor."[27]

The judgment debtor responds to the interrogatories in writing and under oath. The judgment debtor must return its responses together with the interrogatories within seven days after receipt.[28] The judgment debtor may mail the interrogatories and responses back to you.

• **Deposition Subpoena.** A deposition subpoena requires a nonparty to appear for an examination before trial (EBT) at a designated time and place. Practitioners use the term "deposition" in federal court and the acronym "EBT" in state court, but they use "deposition subpoena," consistent with the CPLR, to refer to an examination conducted before trial of a witness subject to a subpoena.

The examination may be "on oral or written questions."[29] Serve the deposition subpoena using the same methods as serving a summons.[30] Consult CPLR 308(2) and 308(4) for exceptions.[31] Serve a deposition subpoena at least 20 days before the examination, unless a court orders otherwise.[32]

Serve a deposition subpoena on (1) the person you're subpoenaing; (2) a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person you're subpoenaing; or (3) the designated agent for service of the person being subpoenaed.[33]

Under CPLR 3102(c), you'll need a court order if want to serve a deposition subpoena on a nonparty before an action is commenced.[34]

Give at least 10 days' notice of the deposition, unless you've obtained a court order giving less notice to a deponent.[35] An authorized person conducts the EBT deposition during business hours.[36] On consent, the deposition may take place anywhere in the state before any officer authorized to administer oaths.[37]

**You'll need a court order to subpoena an original record or document for which a certified transcript or copy is admissible in evidence.**

Before the legislature amended CPLR 3120 on September 1, 2003, a distinction existed between obtaining documents from parties and nonparties.[38] A party had to obtain a court order to obtain documents from nonparties.[39] Since the amendment, a party may request any document from a nonparty — in a subpoena duces tecum — that would be discoverable from a party.[40]

Before the amendment, practitioners used a deposition subpoena to obtain documents from a nonparty.[41] A party that sought only documents would have requested the nonparty to provide the documents without sitting for the deposition.[42] Since CPLR 3120 was amended, practitioners rely less on deposition subpoenas to obtain documents from nonparties. The procedure for obtaining documents from nonparties by using a deposition subpoena is the same as the procedure for taking a nonparty's EBT: Serve on a nonparty a disclosure request along with a "notice stating the circumstances or reasons such disclosure is sought or required."[43] Serve copies of the request on all parties to the action or proceeding.[44] Likewise, if you're seeking a nonparty's deposition, serve a

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deposition subpoena on the nonparty;[45] serve copies of a notice of deposition on all parties to give notice of the nonparty's deposition.[46]

You'll need to pay a witness fee, including travel expenses. See the section on "Fees," below.

Sometimes a nonparty will be under the "de facto control of one of the parties to the action."[47] You're better off if you arrange with the party to have the nonparty witness respond to a CPLR 3120 demand voluntarily.[48] If the nonparty cooperates, you'll avoid the effort and expense of serving the nonparty.[49]

• **Form.** The subpoena should have the case's caption. Include in the caption the names of the parties, the designation of the parties (plaintiff or defendant; petitioner or respondent), the index number, the court, and the court's location.

In the subpoena duces tecum, specify the following: (1) the time to produce the items or documents, "which shall not be less than 20 days after serv[ing]" the subpoena;[50] (2) the place to produce or inspect the items or documents; (3) the manner in producing or inspecting the items or documents; and (4) the list of items by item or category. Describe each item and category with "reasonable particularity."[51] In the subpoena, specify the person who possesses or controls the item you're seeking.[52] Specify the time and place the person must produce the item.[53] The person served or some other person familiar with the item must produce the item.[54] In preparing the subpoena, you decide when and where the witness must produce records.[55] For a judicial subpoena duces tecum, the documents must be dropped off with the court or clerk of the court. Many courts and individual judges have specific rules about where subpoenaed documents must be submitted. A court might quash a judicial subpoena duces tecum when an attorney gives a deponent the impression that no court appearance is necessary or makes the subpoena returnable to the attorney's office instead of the court .[56] A court might also sanction,[57] disqualify,[58] and discipline[59] attorneys for misconduct in issuing subpoenas.

If you're serving a subpoena duces tecum on a medical provider to obtain a patient's medical records, you must state in "conspicuous bold-faced type" that the records need not be provided unless the patient's written authorization accompanies the subpoena.[60] If a patient's authorization is absent, a court may nevertheless issue a trial subpoena duces tecum for the patient's medical records.[61]

A trial subpoena duces tecum must state "that all papers or other items delivered to the court pursuant to such subpoena shall be accompanied by a copy of such subpoena."[62]

For a subpoena ad testificandum, specify the date, time, and place a witness must appear to testify. Name the person who must testify. The deponent must appear in court on the specified date, time, and location to give testimony. Make sure you comply with any court rules or judges' individual rules about when and where witnesses must appear to testify. Ensure that the witness will reappear after a recess or at an adjourned date by writing on the subpoena that the witness must appear on the date specified "and any recessed or adjourned date."[63] Ask the judge to instruct a witness to come back after the lunch recess or to appear for every adjourned date to ensure that the witness finishes testifying at the hearing or trial.[64] You might need to issue a new subpoena if the witness needs to show proof to an employer for taking time off from work, as is often the case with government employees.

A subpoena need not say why you're seeking the items or documents. Likewise, a subpoena need not say why you need a person to testify. If the objecting person or entity moves to quash the subpoena, you may give the reasons in your opposition papers.

For a deposition subpoena, the deponent may be summoned to appear to testify at the office of the attorney who issued the subpoena. The deponent may also be summoned to appear for an EBT in the courthouse where the case is pending or at a different location that's convenient for the deponent and the attorneys.

Give the witness "reasonable time" to comply with a subpoena.[65]

• **Fees.** Be prepared to pay the witness you're subpoenaing. You'll need to pay a witness fee. The statutory fee for nonparty deponents — person giving testimony — is $18 a day.[66] The statutory fee for party deponents is $15 a day.[67]

Although not required under the CPLR, be prepared to pay a witness's actual expenses in attending the trial or hearing, such as transportation and lodging costs, as well as lost earnings.[68]

You don't need to pay a mileage fee if a deponent traveling from a location where the deponent was served within the same city as the court where the deponent will testify. If the deponent travels from outside the city to testify in court, you'll need to pay 23 cents a mile each way that the deponent traveled.[69]

You'll need to pay fees for each day the witness testifies.[70]

You must tender these fees either in cash or by check when you serve the subpoena.

You'll also need to pay the reasonable expenses, such as photocopying costs, for a nonparty to produce documents.[71] Unless you're seeking to inspect documents, a nonparty may mail "complete and accurate copies" of the subpoenaed records to you; you're responsible for paying for the mailing.[72]

Exceptions: A judge may waive these fees for pro se litigants, government agencies, and other agencies that provide services to indigent clients, like The New York City Legal Aid Society.

Some witnesses will demand a substantial amount for preparing, appearing, and testifying in court. Beware: Your adversary might cross-examine your witness about the compensation the witness received for testifying and then comment on the compensation during summation. The court might also charge the jury about the witness's

bias or influence in light of the compensation received.

A judgment debtor isn't entitled to any fees, such as a witness fee or reimbursement for travel expenses.[73]

In the next issue of the *Journal*, the *Legal Writer* will continue with subpoenas.

**Gerald Lebovits** (GLebovits@aol.com), a New York City Civil Court judge, is an adjunct at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for her research.

1. David D. Siegel, New York Practice § 382, at 671 (5th ed. 2011).
2. 1 Byer's Civil Motions § 76:01, at 851 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.).
3. Siegel, *supra* note 1, at § 382, at 671.
4. Byer's Civil Motions, *supra* note 2, at § 76:02, at 851–52.
5. Siegel, *supra* note 1, at § 382, at 672.
6. *Id.*
7. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 26:381, at 26-45 (2006; Dec. 2009 Supp.).
8. Siegel, *supra* note 1, at § 382, at 672.
9. CPLR 2302(b).
10. Barr et al., *supra* note 7, § 26:382, at 26-45.
11. *Id.*
12. Barr et al., *supra* note 7, § 76:101, at 27-20.
13. David Paul Horowitz, New York Civil Disclosure § 16.05, at 16-11 (2014 ed.) (citing CPLR 2307).
14. *Id.* § 16.05[2], at 16-12.
15. Byer's Civil Motions, *supra* note 2, at § 76:02, at 852.
16. Barr et al., *supra* note 7, § 26:05, at 26-9.
17. Siegel, *supra* note 1, at § 382, at 673.
18. *Id.* § 382, at 671.
19. Horowitz, *supra* note 13, § 16.04, at 16-10.
20. Siegel, *supra* note 1, at § 382, at 671.
21. David L. Ferstendig, New York Civil Litigation § 12.13[1], at 12-33 (2014.)
22. *Id.* (citing CPLR 5223).
23. CPLR 5223.
24. Ferstendig, *supra* note 21, § 12.13[4], at 12-34 (citing CPLR 5224(a)(3)).
25. *Id.* (citing CPLR 5224(a)(3)).
26. Siegel, *supra* note 1, at § 509, at 893.
27. CPLR 5224(a)(3)(i).
28. Ferstendig, *supra* note 21, § 12.13[4], at 12-35 (citing CPLR 5224(a)(3)).
29. Siegel, *supra* note 1, at § 509, at 892.
30. *Id.*
31. Barr et al., *supra* note 7, § 27:100, at 27-20.
32. *Id.* § 27:102, at 27-20.1 (citing CPLR 3106(b)).
33. *Id.* § 27:103, at 27-20.1 (citing CPLR 308).
34. *Id.* § 27:100, at 27-20 (citing CPLR 3102(c)).
35. Ferstendig, *supra* note 21, § 12.13[2], at 12-33 (citing CPLR 5224(c)).
36. *Id.* (citing CPLR 3113(a)).
37. *Id.* (citing CPLR 5224(c)).
38. Barr et al., *supra* note 7, § 26:370, at 26-44.
39. Oscar G. Chase & Robert A. Barker, Civil Litigation in New York § 15.03[d], at 631 (6th ed. 2013).
40. Barr et al., *supra* note 7, § 26:370, at 26-44.
41. *Id.* § 26:371, at 26-44 (citing CPLR 3111).
42. *Id.* § 26:371, at 26-44.
43. *Id.* (citing CPLR 3101(a)(4)).
44. *Id.* § 26:371, at 26-44.
45. *Id.* § 26:393, at 26-46.
46. *Id.* § 26:390, at 26-45.
47. Horowitz, *supra* note 13, § 16.05, at 16-11 (2014).
48. *Id.*
49. *Id.*
50. *Id.* § 16.05[3], at 16-12 (citing CPLR 3120(2)).
51. *Id.*
52. Siegel, *supra* note 1, at § 382, at 671 (citing CPLR 2305(b)).
53. *Id.* (citing CPLR 2305).
54. *Id.* § 382, at 671.
55. *Id.* § 382, at 672 (noting exceptions: some special subpoena provisions have time minimums) (citing Connors, McKinney Commentary CPLR 2305).
56. *Bldg Mgmt. Co., Inc. v. Schwartz*, 3 Misc. 3d 351, 355, 773 N.Y.S.2d 242, 246 (Civ. Ct. Hous. Part N.Y. County 2004).
57. *Id.* (citing *Henriques v. Boitano*, Oct. 27, 1999, at 27, col. 3 (Civ. Ct. N.Y. County), *aff'd*, 6 Misc. 3d 129(A), *1, 2000 N.Y. Slip Op. 50004(U), *1, 800 N.Y.S.2d 347, at *1, 2000 WL 34492223, at *1 (App. Term 1st Dep't 2000)).
58. *Nagel v. Grayson*, 24 Misc. 3d 476, 480, 877 N.Y.S.2d 666, 669 (Civ Ct. Hous. Part N.Y. County 2009).
59. *See In re Winiarsky*, 104 A.D.3d 1, 7–8, 957 N.Y.S.2d 102, 107–08 (1st Dep't 2012) (censuring attorney who conducted depositions in a special proceeding without leave of court).
60. Barr et al., *supra* note 7, § 26:391, at 26-45 (quoting CPLR 3122(a)(2)).
61. CPLR 2302(b).
62. CPLR 2301.
63. Siegel, *supra* note 1, at § 382, at 672.
64. *Id.*
65. *Id.*
66. CPLR 8001(b).
67. CPLR 8001(a).
68. Siegel, *supra* note 1, at § 382, at 672 (citing CPLR 8001) & § 383, at 673 (citing CPLR 2303)).
69. CPLR 8001(a),(b).
70. *Id.* § 382, at 672 (citing CPLR 2305(a)).
71. CPLR 3111.
72. CPLR 3122(d).
73. Ferstendig, *supra* note 21, § 12.13[1], at 12-33 (citing CPLR 5224(b)).

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# LANGUAGE TIPS

BY GERTRUDE BLOCK

*Editor's note: Gertrude Block is taking a well-deserved break from column-writing. We continue with a few of our favorite pieces, culled from columns first published in 2007 and 2008.*

## The Importance of the Hyphen

Compare the following:

> A little-used sailboat and a little used sailboat.
>
> Extra-judicial duties and extra judicial duties.
>
> Re-covered office furniture and recovered office furniture.

And this from *The Chronicle of Higher Education*, November 1995:

> Anyone who doubts the usefulness of the hyphen may change [his] tune after reading this title, on a statistical table from the National Center for Education Statistics: "mean Teacher Turnover Rates."

(Aren't you glad you didn't have that teacher?)

January 2007

## Potpourri

Have you noticed the difference meaning of certain word-pairs? *Presume*, the verb, means something quite different from *presumptuous*, the adjective. The verb means to "assume as true in the absence of proof to the contrary." But the adjective has unfavorable connotations: "assuming unwarranted liberties." The unslanted verb *precipitate* means "to cause to happen before anticipated." But the adjective *precipitous* is pejorative. It means "abrupt and ill-considered." The verb *contemplate* means to ponder, but the adjective *contemplative* describes the personality of the individual doing the pondering. Then there is *assign* and *assignation*. The verb *assign* means "to designate"; the noun *assignation* can mean an "appointment for a meeting of lovers, a tryst." Better not confuse the two.

November-December 2007

## Potpourri

What seemed obvious during the recent Senate hearings in which Senators questioned General David Petraeus and Ambassador Ryan Crocker about "progress" in Iraq was that the two groups were not speaking the same language. Petraeus and Crocker's definition of the words "winning," "progress," "surge," "success," and even "Al Qaeda," differed from the definition their questioners had in mind. To most Americans, "winning" means that our American military can come home. To General Petraeus and Ambassador Crocker, "winning" seems to mean "progress" toward "success." With no common agreement about the meaning of the terms under discussion, how can an intelligent appraisal of the situation be achieved?

June 2008

## Potpourri

English teachers tell us to avoid negative statements. I can recall one who would not let a hapless student finish a sentence that she began with the words, "I don't think . . ." The teacher would interrupt, "If you don't think, just sit down." But negatives are not all bad. Some vividly portray great emotion, and I wish I could quote them to that teacher. Consider Sir Walter Scott's "unwept, unhonored, and unsung," predicting the death of "the man with soul so dead, / Who never to himself hath said / This is my own, my native land!" Or Lord Byron's account of "the wretch, . . . concentered all in self," who died, "unknelled, uncoffined, and unknown." Or George Orwell's, "not unblack dog [who] chased a not unsmall rabbit across a not-ungreen field."

July-August 2008

## Potpourri

People are not only misusing prepositions, they are deleting them. This morning news contained the statement: "The interstate was closed this morning 15 minutes." One federal administrator recently said, "I take the blame. It was a mistake made by my office, which I take all responsibility." President Bush said, "We reviewed the declaration that was agreed this morning." Scott Simon, on NPR News, commented: "Give me an idea what you're confronted." Our local airport boasts a billboard saying: "Fly Gainesville."

But while we are dropping needed prepositions, we are also adding unneeded words. Sentences start with phrases like *And so*, or *But yet*, and the ornate: *Nevertheless* and *Notwithstanding*. The Animal Rescue people talk about animals that need *adopting out*. We request, "Please report *back* to me"; and "return *back* the book I lent you." We open *up* new lines of communication. We excise *out* errors, when we discover where they're *at*; and in the South we advertise "an umbrella with a substantial handle *to it*."

September 2008

## Potpourri

Overheard in New York City and reported in the *New York Times*:

> A group of construction workers were sitting on a terrace wall on 52nd Street, outside the CBS building. One man pulled a cell phone from his pants pocket. Another said, "Hey, you shouldn't carry that in your pocket; it could make you impudent."

That's a new meaning that probably will not last.

November-December 2008 ■

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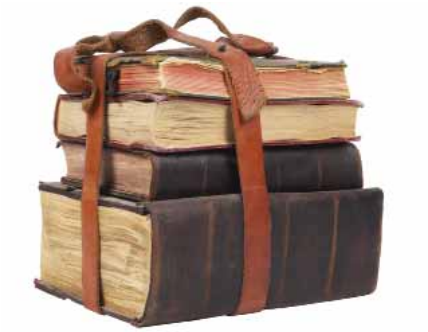

# Drafting New York Civil-Litigation Documents: Part XXX — Subpoenas

In the last issue, the *Legal Writer* discussed conditional disclosure orders, spoliation of evidence, and disclosure in special proceedings. In this issue and the next we'll discuss subpoenas: how to comply with them, what you can do when someone doesn't comply with them, and how to move to quash, modify, or fix their conditions.

## Subpoenas: The Basics

A subpoena is a paper that requires a witness to give testimony or produce materials[1] in both judicial and quasi-judicial proceedings.[2] A subpoena subjects the witness to penalties, including contempt, if the witness fails to comply.[3]

CPLR Article 23 governs subpoenas. Subpoenas aren't disclosure devices. They're not covered by Article 31 of the CPLR, which governs disclosure and disclosure devices. Although not disclosure devices, subpoenas are useful tools to obtain documents and testimony from nonparties to the litigation. Nonparties are individuals or entities not part of the action or proceeding. Nonparties might have information that can help your case. The information might come from documents that the nonparty has or information that the nonparty might testify to during trial, or both.

Practitioners must know about three kinds of subpoenas: (1) subpoena ad testificandum; (2) subpoena duces tecum; and (3) information subpoena.

You might come across such terms as a pre-trial subpoena, trial subpoena, judicial subpoena, and non-judicial subpoena. They're all variations of a subpoena ad testificandum and a subpoena duces tecum. Pre-trial and trial subpoenas are issued, respectively, before trial or for trial; subpoenas duces tecum and subpoenas ad testificandum can be used pre-trial and for trial. A court, court clerk, or officer of the court may issue judicial subpoenas. Many persons, explained below, may issue non-judicial subpoenas;[4] judicial and non-judicial persons may issue subpoenas duces tecum and subpoenas ad testificandum.

Practitioners should also know about deposition subpoenas, discussed below.

Unless otherwise noted, the *Legal Writer* will use the word "subpoena" to refer interchangeably to both a subpoena ad testificandum and a subpoena duces tecum.

• **Leave of Court.** Many persons may issue a subpoena: arbitrators, clerks of the courts, judges, referees, and members of a board or a commission "empowered to hear or determine a matter requiring the taking of proof."[5] An attorney of record to any party to any action, a special or an administrative proceeding, or arbitration may also issue a subpoena.[6]

The attorney general may issue a subpoena without a court order.[7]

If a person disobeys a subpoena, the contempt remedy exists irrespective of who issued the subpoena.[8]

Most of the time, you won't need a court order to issue a subpoena. But if you need a prisoner to testify, you'll need to obtain leave of court.[9] You'll also need a court order if you're subpoenaing a patient's clinical records under Mental Hygiene Law § 33.13.[10] You'll further need a court order to subpoena an original record or document for which a certified transcript or copy is admissible in evidence.[11] If you're seeking personal information in a public agency's possession, you'll need a court order for that, too.[12]

You'll need to move on notice if you're seeking to subpoena documents — a subpoena duces tecum — from a library, department, or bureau of a municipal corporation or from a state or an officer of the state.[13] Serve your motion on at least one day's notice on the library, department, bureau, state, or officer having custody of the documents.[14]

> A subpoena need not say why you're seeking the items or documents.

A pro se litigant, often called a self- or unrepresented litigant, may not issue a subpoena.[15] Pro se litigants must obtain a court order.

Parties to a case don't need a court order if they're seeking documents or other things (including films, photographs, tapes, and physical property) from one another. Sending a notice to produce (also known as a document request) to your adversary will suffice.[16]

• **Subpoena ad Testificandum.** Use a subpoena ad testificandum to secure testimony from a witness, including a hostile witness. Most witnesses will

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