NYSBA SPRING 2014

Perspective

A publication of the Young Lawyers Section
of the New York State Bar Association

A Message from the Section Chair

Dear Young Lawyers Section member:

Welcome to our latest edition of *Perspective*—the printed publication of the NYSBA Young Lawyers Section (YLS)! Our last publication was printed at the beginning of our 75th Anniversary Year, and here we are approaching the term's end on May 31st. We continue to be proud of "growing old while staying young."

Since we last touched base, we have had a lot of fun and exciting events happening around the State.

During the last week in January, we held our Annual Meeting as part of NYSBA's Annual Meeting at the New York Hilton Midtown. Our Executive Committee meeting and half-day CLE program were held on January 29th. The CLE program focused on bankruptcy law and was extremely well-received. We thank our CLE co-chairs, Nathan Kaufman, Esq. and Erica Weisberger, Esq., for putting together an amazing program. Thank you also to our wonderful speakers.

The Young Lawyers Section each year honors a young lawyer who has rendered outstanding service to both the community and legal profession. After our Annual Meeting CLE program, we were proud to present this award to Muhammad Faridi, Esq.

Our two-day Bridging the Gap program was then held on January 30th and January 31st and was co-chaired by John Christopher, Esq. and Courtney Radick, Esq. A variety of substantive legal topics were covered, including intellectual property, personal injury, appeals, matrimonial law, estate planning, ethics and much more. We thank our speakers for their participation as well. Our programs would not be possible without their support.

March 29th through April 2nd found the Young Lawyers Section in Ithaca, NY for the Fifth Annual Trial Academy. This program is an intensive five-day trial techniques program, which provides attorneys with the opportunities to improve their trial skills. With over 60 attendees this year, it was the best attended year to date. Thanks to our co-chairs Michael L. Fox, Esq. and Sarah E. Gold, Esq. for your efforts in ensuring that this Trial Academy was a success. Thank you also to Megan O'Toole and Adriana Favreau, our NYSBA Staff, for your assistance with our Trial Academy. The program would not be the same without your guidance and hard work.

Throughout the year, the YLS' District Representatives from throughout the State have been holding events near you. We held a few annual parties, including a Toys for Tots drive, during the holiday season. We also had a wine tasting event on Long Island and attended

Inside

NYSBA

a Syracuse football homecoming game. These events are a great way to network with colleagues in your area in a fun and informal setting. Keep your eyes and ears open for the opportunity to attend future district events.

On April 26, YLS members volunteered with City Harvest at their Mobile Market in Washington Heights. Volunteers were each supplied with thousands of pounds of fresh produce which they distributed to the market-goers, free of charge. This wonderful opportunity to volunteer was organized by our Community Service and Pro-Bono Committee, chaired by Kara J. Buonanno, Esq. and Erica Weisgerber, Esq. We thank them for organizing this great opportunity for our Section to volunteer in the community! We are also excited to be in the process of picking our winners for the second annual YLS Civics Poster/Essay Contest.

Young Lawyers Section Chair Lisa R. Schoenfeld (left), and New York State Bar Association President David M. Schraver (right) present the Outstanding Young Lawyeys Award to Muhammad Faridi at the Young Lawyers Section Annual Meeting in New York City in January.

As this is the last edition of *Perspective* that will be printed during my time as Chair, I wanted to thank my wonderful Executive Committee for all of their hard work this year. While the year is not yet over, it has been absolutely remarkable so far. Our Section would not be nearly as successful as it is without all of your efforts. I would love to personally name each one of you, but there is not enough space in *Perspective* for me to do so! However, I would like to take this opportunity to give a special thank you to the other Officers of the Section. To Sarah Gold, Esq., who will be Chair of the Section starting on June 1, 2014—the Section is sure to continue thriving under your leadership. To Erica Hines, Esq., our incoming Chair-Elect, Erin Flynn, Esq., our incoming Treasurer, and John Christopher, Esq., our incoming Secretary—thank you all for your dedication and for the time you have put into our Section. Thank you also to Jason Clark, Esq. for all of his work as Treasurer this past year. Finally, a sincere thank you to Tiffany Bardwell, our staff liaison. None of what we do would be possible without you! Thank you for never saying "no," for your optimistic outlook and for your insight. You are truly incredible!

It has been an honor to serve as the Section Chair this past year. Thank you for the opportunity!

Sincerely,

Lisa R. Schoenfeld, Esq.
Section Chair, June 2013-May 2014
Schlissel Ostrow Karabatos, PLLC

Scenes from the
Young Lawyers Section

Bridging the Gap Program

Thursday and Friday,
January 30-31

New York City

Immigration Law: On Your Turf

By Anna K. McLeod

In our profession there is increasing pressure to specialize in a particular practice area. While dedication to one practice area may build expertise more quickly and avoid the skepticism met by "jack-of-all-trades" lawyers, ample exposure to other relevant practice areas is necessary to best serve your client. U.S. immigration law is one such body of law that intersects with a variety of other disciplines. We need not stumble across these intersections, but rather we should see them up ahead and prepare for the ways they may complicate our devised strategy for accomplishing our clients' goals.

This article intends to better prepare young lawyers to see the intersections between their practice areas and immigration law, demystify immigration law (to a degree), and urge diligent study of these intersections and others to protect your client.

Immigration Law Today: Overview of the Law and Agencies

The basic body of our nation's immigration laws is the Immigration and Nationality Act (INA).[1] It was passed by Congress in 1952 and consolidated and codified many existing provisions regarding immigration. It has been amended several times since 1952, most notably by the Immigration Reform and Control Act of 1986[2] (IRCA), and with the latest overhaul in 1996, known as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[3] (IIRAIRA).

Generally speaking, our U.S. immigration system is divided into three parts: family-based immigration, employment-based immigration, and miscellaneous (nonimmigrants). Foreign nationals (here to mean everyone but U.S. citizens and U.S. nationals) may immigrate to the U.S. on the basis of a qualifying familial relationship, qualifying employment relationship, or due to particular individualized circumstances which provide for nonimmigrant status for a period and eventual eligibility to apply for lawful permanent residence on the basis of the nonimmigrant status.[4] To immigrate is to come to the U.S. with the intent to permanently reside here.[5]

"While dedication to one practice area may build expertise more quickly and avoid the skepticism met by 'jack-of-all-trades' lawyers, ample exposure to other relevant practice areas is necessary to best serve your client. U.S. immigration law…intersects with a variety of other disciplines."

However, nonimmigrants are generally defined by the fact that they have a foreign residence that they do not intend to abandon.[6] The dichotomy between immigrants and nonimmigrants is an important one because of the rights generally available to each group. Lawful Permanent Residents (LPRs), or green card holders, have the right to live and work freely in the U.S. and apply for citizenship once they meet the several requirements, including the accrual of the requisite time in the U.S. as a lawful permanent resident.[7]

By way of example, the three facets of our immigration system include the following scenarios:

(1) John Smith, U.S. Citizen, petitions for his wife, Bella Italiana, a national of Italy. John Smith and Bella Italiana's marriage provides a qualifying relationship that is the basis for a family-based green card case for Ms. Italiana.[8]

(2) Ms. Bella Italiana is employed as a doctor for a U.S. employer; the U.S. employer may file a petition for her establishing the foundation for an employment-based (EB) green card case.[9]

(3) Lastly, the miscellaneous category I mentioned above includes an alphabet soup of nonimmigrant visa categories with a variety of requirements. One such nonimmigrant status is the U visa.[10] The U visa provides nonimmigrant status to undocumented victims of certain qualifying crimes following cooperation with law enforcement in the investigation of the crime committed against them.[11] The U nonimmigrant status is not lawful permanent residence, but after 3 years of continuous presence in the U.S. in U nonimmigrant status, he or she may apply for lawful permanent residence based on his or her U nonimmigrant status.[12] This lawful immigration status is independent of her employer or her family members; rather, the U visa, like other nonimmigrant visas in the alphabet soup, is based on a particular set of individualized circumstances.

There are several federal agencies which handle various aspects of the immigration system. For example, the Department of Labor manages the Program Electronic Review Management (PERM) process,

a necessary step for many employment-based lawful permanent resident cases, or "green card" cases. The Department of Homeland Security houses several component agencies, including the United States Citizenship and Immigration Service (USCIS), U.S. Customs and Border Patrol (CBP), and U.S. Immigration and Customs Enforcement (ICE). In addition to these agencies, the Department of State is typically involved in an immigrant's lawful journey to the U.S. Each agency's functions affect the lives of immigrants in different ways.

Family Law

Our family-based immigration system is predicated upon familial relationships, formed through birth, marriage, and adoption.[13] The INA defines "child," "spouse," "parent" and other key terms for the purposes of determining qualifying relationships.[14] To derive a benefit from a child, the parent must meet the INA definition of parent.[15] "She has his eyes" just will not cut it. Therefore, a paternity action or court action to legitimate the child under state law of the child's domicile may be necessary to establish the parent-child relationship under the INA.[16]

Marriage has long been recognized as a "social relation subject to the State's police power"[17] and so marriage is largely a matter of state law. For immigration purposes, the analysis of whether a marriage is valid for immigration purposes hinges on whether the marriage is valid according to the laws of the place of celebration.[18] Also, when assessing the validity of a marriage, any prior divorces must be valid, that is, the divorce must be valid under the laws of the jurisdiction granting the divorce.[19] The validity of remarriage depends on the laws of the state of remarriage, and depending on said state's laws, if the prior divorce was not final at time of remarriage, the remarriage may be voidable not void.[20] Each formation and dissolution of a marriage must be done correctly according to state law or there are profound limitations to family-based immigration options. Also, few shocks are as problematic as learning a U.S. citizen spouse is not actually a spouse.

I can recall an instance when I was representing a couple who were victims of a qualifying crime for U nonimmigrant status. The woman was the principal applicant, and she planned to petition for her husband to be granted derivative U nonimmigrant status. However, after obtaining the signed U visa law enforcement certification, we learned that the couple was not in fact legally married. The "husband" was still married to his estranged wife. They had been living separate lives for over 15 years and he had fathered three children with his current "wife," though they were not legally married. "Husband" needed to divorce and remarry within 6 months in order to be the beneficiary of a derivative U visa petition as planned. A U visa certification, which is signed by law enforcement, expires after 6 months, so time was of the essence.[21] It was critical that we find a family lawyer who could swiftly assist the client in filing for divorce and see the matter to its conclusion. For this and many other reasons, family lawyers must ensure that their clients' marriages and divorces comply with the relevant state law or else a family-based petition will not be granted for lack of a qualifying relationship. The burden of proof is on the petitioner[22] and the qualifying relationship must be established by "clear and convincing evidence."[23] Often there is no time for hiccups.

Domestic violence is another relevant family law topic. It intersects squarely with immigration law due to the previously mentioned U visa and the Violence Against Women Act (VAWA) self-petition.[24] In the case of the U, filing a Domestic Violence Protective Order is cooperation with a qualifying "certifying agency"[25] (court) and assists in the detection of a qualifying crime (domestic violence). Also, a VAWA self-petition is available for an abused spouse of a U.S. citizen or LPR.[26] Child custody is another family law matter that can substantially affect a child's immigration options. For example, changes in child custody may provide the basis for automatic U.S. citizenship for certain minors under the Child Citizenship Act of 2000.[27] Needless to say, quality representation in the family law arena can profoundly affect foreign nationals' immigration options.

Criminal Law

The U.S. Supreme Court recognized in *Padilla v. Kentucky* that "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[28] When deportation is one of the most severe consequences of a criminal conviction, and is swiftly handed down under today's immigration laws Sixth Amendment protection against ineffective assistance of counsel is triggered for the non-citizen client. Therefore, when criminal counsel advises her non-citizen criminal defendant client regarding the consequences of a particular plea deal, she must provide assistance that does not run afoul of the standard set out in *Strickland v. Washington*.[29] Under *Padilla*, when the consequences are clear, criminal defense counsel must provide correct advice to her noncitizen criminal defendant client regarding the immigration consequences of the particular plea deal. Also, when the consequences are not clear, criminal defense counsel has a duty to inform her client that the consequences are not clear but the plea deal in question "may carry a risk of adverse immigration consequences."[30] Although the duty of criminal counsel established under *Padilla* is not retroactive,[31] as of the *Padilla* decision, criminal counsel

must familiarize themselves with the immigration consequences of criminal activity and be prepared to advise their client correctly.[32] Increased cooperation between the criminal defense bar and the immigration bar is crucial to ensure the full protections guaranteed by the Sixth Amendment are available to each represented criminal defendant. With deportation and exile on the line, the stakes are high.

Business Law

Within the alphabet soup of nonimmigrant visas, there is a core group of visas (E, H, L) based on an employer-employee relationship.[33] For example, where Alpha U.S. Company is 100% owned by Alpha Foreign Company, the predicate ownership relationship exists between a foreign entity (sending company) and a domestic entity (receiving company). After Mr. High Achiever has been with Alpha Foreign Company for a year in a qualifying position, he may qualify to be an "intra-company transferee," the shorthand term for an L visa.[34] Due to the ownership relationship between the foreign entity and the U.S. entity, the U.S. entity can petition for Mr. Achiever to work in the U.S. in a qualifying position on L nonimmigrant status. However, if Alpha Foreign Company is bought by another U.S. company, then there is no requisite foreign entity, even though Mr. Achiever may already be working the U.S. for Alpha U.S. Company. This sale undermines Mr. Achiever's status and he is no longer authorized to work in the U.S. on the L visa. Additionally, any filed green card case based on this intra-company transferee status has vanished. This is just one example of how corporate ownership structures are foundational components to certain immigration benefits. Therefore, U.S. employers of foreign national workers must carefully assess how business decisions create or limit opportunities for their foreign national workers and at what cost.

Employment Law

In 1986, IRCA created the obligation for employers to verify the identity and work authorization of their employees and prohibited them from hiring unauthorized aliens.[35] Thus, the I-9 form is born.[36] The form has various fields for the employee and the employer to complete. It is very important for companies to properly train their human resources personnel to manage I-9 compliance.[37] Employers have responsibilities with regards to the proper completion, handling, updating, and retaining of an I-9 form. Writing "U.S. Gov" instead of "SSA" or "Social Security Administration" as the issuing authority on List C of the form is considered a technical violation, one that can be remedied, but when uncorrected and appearing throughout the entire batch of I-9s, the civil fines could quickly add up. The form I-9 is a liability minefield for employers who neglect to properly train their human resource personnel.

Involved in verifying identity and work authorization of a new hire is the examination of documents. Foreign nationals will have more documents to present because U.S. citizens can prove identity and work authorization with one document: a U.S. passport. When asking a new hire to complete the I-9, the employer should merely give the I-9 form (with instructions) to the employee, and complete Section 2 of the form with the documents the employee chooses to provide. Requiring certain documents or more documents than necessary ("document abuse") is a recipe for possible civil liability under the anti-discrimination law.[38]

The key is for companies to establish consistent HR practices with regards to the I-9 completion process. There are ample tools available online to do this.[39] Multiple individuals with disparate practices generate incomplete and incorrect I-9s and in the event of an ICE audit, only 3 days' notice is required before the I-9s must be produced pursuant to a Notice of Inspection.[40] Therefore, centralizing the I-9 management process is recommended in order to avoid costly errors and potential liability for discriminatory practices.

Generally speaking, consistency is the name of the game with foreign national workers. Employers should apply the same policies and procedures to foreign national workers as to U.S. citizens in order to avoid exposure to discrimination liability. Establishing and abiding by procedures is crucial in other contexts, too (e-verify compliance, employment contracts, and applicable federal and state labor laws). Be correct in your I-9 practices, but if you cannot be correct, be consistent. With documented efforts at correct procedures and consistent application of the procedures the employer believes to be correct, the employer may be able to negotiate a reduced fine from ICE following an ugly audit.

Tax Law

Tax law and immigration law commonly intersect because each actor, be it a company or a foreign national, wishes to understand the tax consequences of a particular action. Confusion regarding the tax treatment of foreign nationals begins with the fact that the same key terms in each realm have different meanings. For example, a basic tax treatment inquiry is whether the individual is a U.S. resident or a U.S. non-resident under the Internal Revenue Code (I.R.C.). I.R.C. § 7701(b) defines each of these terms. However, U.S. resident under the I.R.C. is not exclusively applicable to U.S. citizens and "lawful permanent residents" (LPRs). In fact, a U.S. resident under the I.R.C. includes U.S. citizens, lawful permanent residents, and individuals who meet the substantial presence test[41] set forth in the I.R.C.[42] Further complicating the issue, there are exceptions to the substantial presence test.[43]

The U.S. resident versus U.S. nonresident distinction is crucial because U.S. residents are taxed on their worldwide income, while U.S. nonresidents are solely taxed by the Internal Revenue Service on their U.S. earned income. Another term affecting tax deductions which has a different definition under the INA is "dependent." In immigration law, one's dependents may include spouse or children who are going to piggy-back onto a particular immigrant visa petition, for example, or who are considered "derivatives" of the principal applicant for a particular visa application. It is possible for someone to be a dependent of a foreign national for immigration purposes but not her dependent for tax purposes.

"When distinguishing yourself in your respective practice area, please remember that the trust your client places in you is not bound to one practice area, but demands that you keep your eyes ahead and do your best to anticipate issues…"

Because tax treatment often is a factor in foreign nationals' decision-making, companies and others transacting with these individuals need to be conscious of the issue. Finally, the tax treatment of foreign nationals is relevant to employers for W-4 compliance and withholdings purposes, since "foreign persons" receive different withholding treatment than "U.S. persons."[44] Again, the immigration categories are imperfect indicators of tax treatment.

Conclusion

As you can see from this sampler of intersections between immigration law and other bodies of law, there is need for study and collaboration. When distinguishing yourself in your respective practice area, please remember that the trust your client places in you is not bound to one practice area, but demands that you keep your eyes ahead and do your best to anticipate issues, even if you must call on a colleague to fully address the issue.

Endnotes

1. 8 U.S.C. § 1101-1537.
2. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 STAT. 3445.
3. Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 STAT. 3009.
4. 8 U.S.C. § 1153.
5. 8 U.S.C. § 1101 (a)(15)(B).
6. *Id.*
7. 8 U.S.C. § 1427(a)(1); 8 U.S.C § 1430(a).
8. This is an example of an Immigrant Visa Petition filed pursuant to INA § 204(a)(1)(A) on behalf of an "immediate relative" as defined under INA 201(b)(2)(A).
9. Green card cases, by their very nature, require an immigrant visa number. However, the speed at which a beneficiary can obtain an immigrant visa number depends on the type of qualifying relationship she has with a U.S. employer or family member (U.S. citizen or LPR). *See* 8 U.S.C. § 1153 for annual allocation of visas per year.
10. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 22 U.S.C. § 7101 et seq.
11. 8 U.S.C. § 101(a)(15)(U).
12. 8 C.F.R. § 245.24(b).
13. The Hague Adoption Convention entered into force in the U.S. on April 1, 2008, so petitions filed with USCIS after that date must conform to the Hague process, where home country is also a party to the Convention, in order for the immigration benefits to follow based upon the familial relationships established in the INA. *See* http://www.uscis.gov/adoption/immigration-through-adoption/hague-process.
14. 8 U.S.C. § 1101(a).
15. 8 U.S.C. § 1101(b).
16. *See* 8 U.S.C. § 1101(b) and (c) for definitions of child use within the various titles of the INA.
17. *Loving v. Virginia,* 388 U.S. 1, 7 (1967) (citing *Maynard v. Hill*, 125 U.S. 190 (1888)).
18. *See* 9 FAM 40.1 N1.1(b); see also *U.S. v. Gomez-Orozco*, 289 F. Supp. 2d 1092 (C.D. Ill. 1998), *rev'd on other grounds*, 188 F.3d 422 (7th Cir. 1999); *In re Ceballos*, 16 I&N Dec. 765 (BIA 1976); *see also* http://www.uscis.gov/family/same-sex-marriages, USCIS's Statement on July 1, 2013 from Secretary of Homeland Security Janet Napolitano regarding USCIS's implementation of U.S. Supreme Court decision in *U.S. v. Windsor*, 570 U.S. __ (2013), confirming that, generally, the place of celebration determines the validity of a marriage for immigration purposes.
19. *In re Hamm*, 18 I&N Dec. 196 (BIA 1982); *In re Miraldo*, 14 I&N Dec. 704 (BIA 1974); *In re Karim*, 14 I&N Dec. 417 (BIA 1973); *In re Darwish*, 14 I&N Dec. 307 (BIA 1973).
20. *In re Arenas*, 15 I&N Dec. 385, 386 (BIA 1983).
21. http://www.uscis.gov/sites/default/files/files/form/i-918instr.pdf.
22. *In re Brantigan*, 11 I&N Dec. 493 (BIA 1966); *In re Ma*, 20 I&N Dec. 394 (BIA 1991).
23. *Id.*
24. 8 U.S.C. § 1154(a)(1)(A)(iii).
25. 8 C.F.R. § 214.14(a)(2).
26. *Id.*
27. *See* 8 U.S.C. § 1431; s*ee also* 8 C.F.R. § 320.2.
28. *Padilla v. Kentucky*, 559 U.S. 356, 6 (2010).
29. *Strickland v. Washington*, 466 U.S. 668 (1984).
30. *Padilla*, 559 U.S. at 12.
31. *Chaidez v. U.S.*, 568 U.S. __ (2013).
32. *See* INA § 212(a) and INA § 237(a) for the criminal grounds of inadmissibility, applicable to individuals not "admitted" to the U.S., and the criminal grounds of deportability, applicable to lawful permanent residents, respectively.
33. 8 U.S.C. § 1101(a)(E), (H), (L).
34. 8 U.S.C. § 1101(a)(L).
35. Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 359.
36. 8 C.F.R. Part 274(a)(2)(a)(2). Employer must complete the I-9 form for every new hire after November 6, 1986.
37. 8 U.S.C. § 1324(a) establishes the imposition of civil penalties for various specified unlawful acts related to the employment eligibility verification process (i.e. Form I-9) and the employment of unauthorized aliens.

    ICE conducts an investigation or "audit" and initiates the process for imposing civil monetary penalties with respect to employer sanctions under section 274A of the INA and 8 C.F.R. Part 274a. 8 U.S.C. § 1324(b) establishes the imposition of civil penalties for specified actions constituting immigration-related unfair employment practices. The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) is responsible for investigating alleged violations of § 1324(b), and is

authorized to file a complaint to initiate a civil penalty proceeding. 8 U.S.C. § 1324(c) provides for imposition of civil penalties for specified actions relating to immigration-related document fraud. ICE conducts the investigations and initiates the process for imposing civil money penalties with respect to document fraud under section 1324(c) and 8 C.F.R. part 270.

38. Immigration Act of 1990, Pub. L. 101-649, Sec. 535(a), created the prohibition of document abuse, which prohibits discriminatory documentary practices during the employment eligibility verification process.

39. United States Citizenship and Immigration Service, M-274 (Rev. 04/30/13), Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form), available at http://www.uscis.gov/sites/default/files/files/form/m-274.pdf.

40. United States Immigration and Customs Enforcement, I-9 Inspection Fact Sheet, http://www.ice.gov/news/library/factsheets/i9-inspection.htm.

41. Internal Revenue Service, "The Green Card Test and the Substantial Presence Test," http://www.irs.gov/Individuals/International-Taxpayers/The-Green-Card-Test-and-the-Substantial-Presence-Test (Page Last Reviewed or Updated: 22-Apr-2013).

42. I.R.C. § 7701(b)(3).

43. The exceptions to the substantial presence test available to aliens are found at I.R.C. § 7701(b)(3)(B) and (C) and I.R.C. § 7701(b)(5)(D) and (E). For foreign nationals, the most common exceptions are for certain students (e.g., F or J nonimmigrant status) who meet certain requirements and I.R.C. § 7701(b)(5)(D) and (E).

44. I.R.C. §§ 1441-1443.

Anna K. McLeod is an Associate Attorney at Chapman Law Firm, a law firm dedicated to assisting people and companies with their immigration matters. She graduated cum laude from Wake Forest University in 2008 with a B.A. in Spanish and Political Science. She earned her J.D. from Campbell Law School in 2012 and is admitted to practice law in North Carolina. Her immigration practice includes assisting individuals and companies with a variety of immigration matters, from employment-based green card cases to U visa cases for undocumented victims of qualifying crimes. Ms. McLeod is fluent in Spanish.

Keep an Eye on an International City, Shanghai, for Your Next Move

By Qing Yang

Introduction

The Big Apple is such an amazing place, attracting talent from all over the world. Like many international law students, within less than three months in New York, I have already fallen in love with this city and would like to strive for some intellectually stimulating work experience here. However, were I not from China, I would consider China for my internship or next career move, especially Shanghai City.

Shanghai as a Business Destination in China

Shanghai in China holds an equivalent position as New York in the United States. Its history serving as a commercial and cultural hub can be traced back even before the 1949 establishment of the People's Republic of China, and it used to be at the forefront in terms of internationalization. You may know from the press coverage that China launched the free trade zone in Shanghai (the "FTZ") at the end of September 2013. The FTZ aims to test freeing up government controls in various areas, such as finance, shipping, business services, professional services, cultural services, and social services. Despite the pessimistic or on-the-sidelines attitude outside China, Shanghai has become the front line of a broader and more profound reform in China.

There is no exception that all reforms are accompanied by new policies and rules. Shanghai´s FTZ has been granted approval from the Ministry of Justice of China for its ***Pilot Program Regarding Exploring the Approaches and Mechanisms of Tightening Cooperation between Sino-Foreign Law Firms in China (Shanghai) Free Trade Pilot Zone***[1] (the "Pilot Program"). The Pilot Program helps many practices of foreign laws, including top international firms, to move away gray areas under Chinese law and provide a legal basis for further business penetrations of Chinese and foreign law firms in both directions. Moreover, the Pilot Program also provides solutions or guidance on real issues that foreign law firms encountered or are facing. For example, the application review period for a foreign law firm to establish a representative office in the FTZ has been shortened from 3 months to 30 days, and further steps will be taken to simplify procedures of the temporary residential permit for foreign lawyers and other administrative approvals. Only by implementing those measures and being less rigid can Shanghai acquire a better position to compete with other international cities, like Hong Kong, Singapore, and New York.

One who is not familiar with the Chinese legal service industry may wonder how foreign laws firms are "discriminated" against in China outside the FTZ. In fact, the Chinese legal service market has been relatively closed and the authority sets barriers for the foreign law firms to protect local players. Pursuant to 2001 ***Administrative Rules of Representative Offices of Foreign Law Firms***[2] (the "2001 Rule"), foreign law firms can only conduct limited activities excluding Chinese Law matters, even though foreign law firms hire Chinese qualified lawyers. Chinese attorneys need to suspend their licenses with the authority to work for a foreign law firm as consultants. Although there are statutory limitations for foreign law firms, foreign law firms are not willing to give any possible shares in the market and commonly take advantage of the leeway in the 2001 Rule allowing the "provision information concerning impacts by Chinese legal environment." What we normally see are "based on our observation on Chinese law…" or "we cannot provide legal opinions on Chinese law" showing in the memo from foreign law firms to avoid regulatory limitations.

Putting the language issue aside, the Chinese bar exam is not foreigner-friendly either. Non-Chinese citizens (excluding those from Hong Kong, Macau and Taiwan) are not eligible to hold a Chinese legal profession certificate either. I have seen that many Chinese lawyers struggle between the choices of immigrating to another country and keeping their legal career in China, since the change of nationality will lead to losing the Chinese legal career as a Chinese qualified lawyer.

After a decade of protection from Chinese authority, large Chinese law firms are also becoming increasingly ambitious in their global reach.[3] In 2012, King & Wood, a top Chinese law firm, and Mallesons Stephen Jaques, one of Australia's largest and most prominent law firms, formed a strategic alliance and established King & Wood Mallesons.[4] This move was ahead of legislation and acted as a main push of the policy advancement, like the Pilot Program in the Shanghai FTZ.

There will be more innovative models of cooperation between the sino-foreign law firm. This will make the Chinese legal service market more integrated with the international one because of irreversible needs from Chinese and international enterprises. Practically speaking, for young legal practitioners who are eager for international experiences, keep an eye on the opportunities in Shanghai, the historical but also energetic city in Asia.

Endnotes

1. Sifabu Guanyu Tongyizai Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Tansuo Miqie Zhongwai Lvshi Shiwusuo Yewu Hezuo Fangshi He Jizhi Shidian Gongzuo Fangan de Pifu (司法部关于同意在中国（上海）自由贸易试验区探索密切中外律师事务所业务合作方式和机制试点工作方案的批复) [Approval from Ministry of Justice for Pilot Program Regarding Exploring the Approaches and Mechanisms of Tightening Cooperation between Sino-Foreign Law Firms in China (Shanghai) Free Trade Pilot Zone] (issued by Ministry of Justice, Jan. 27, 2014), http://www.gdlawyer.gov.cn/uploadfile/publicFile/content/20140221/20140221095107752.pdf (China).
2. Waiguo Lvshi Shiwusuo Zhuhua Daibiao Jigou Guanli Tiaoli (外国律师事务所驻华代表机构管理条例) [Administrative Rules of Representative Offices of Foreign Law Firms] (promulgated by St. Council, Dec. 22, 2001, effective Jan. 1, 2001), St. Council Order, http://www.gov.cn/gongbao/content/2002/content_61860.htm (China).
3. Xueyao Li and Sida Liu, *Globalization and the Legal Profession: The Learning Process of Globalization: How Chinese Law Firms Survived the Financial Crisis*, 80 Fordham L. Rev. 2847, 2854 (2012).
4. *Id*. 80 Fordham L. Rev., 2847, 2854 (2012).

Ms. Qing Yang is having her academic enrichment in the LL.M. program in Fordham Law School. Previously, from 2006, Ms. Yang worked with ConocoPhillips for about 8 years in its Beijing office. Such experience made her communicate effectively in a multi-culture environment, and work proficiently as in-house legal counsel and joint-venture board secretary. She is also keen to promote communication and exchanges of international legal professional education.

Working with a Recruiter: Tips for a Successful Partnership

By Laurie Chamberlin

As President of Special Counsel, the largest full-service provider of legal staffing services in the United States, I have a good understanding of the benefits that can come from partnering with a recruiter to find your next opportunity. As legal recruiters, we view our relationship with our candidates as a partnership with one mission: to find you a challenging, competitively compensated position. We must work together to achieve this ultimate goal.

Here are my top tips for working with a recruiter:

1. **Be flexible.**

   When legal professionals set out to secure a new position or career move, these individuals tend to have the "ideal job" in mind. However, analyze that ideal and determine which attributes of a job are absolute necessities and which are "wish list" items. Communicate these details to your recruiter, and they will do their best to secure a position that most suitably matches your career goals, interests, and other requirements. It is important to keep an open mind when exploring opportunities. Value the advice your recruiter provides you regarding the types of opportunities that make the most sense for you in terms of career progression. Consider your recruiter as your personal "career agent" in the employment marketplace.

   Flexibility is also important when it comes to scheduling interviews and making decisions on offers of employment. Demonstrate your commitment to explore potential career opportunities by making yourself available to meet with employers.

2. **Provide current contact information.**

   Although this simple rule sounds extremely obvious, it is worth mentioning. Always ensure that your placement consultant has your most current personal contact information including home, work, and mobile telephone numbers and e-mail addresses. Inaccurate contact information could result in a missed opportunity for you. Make it as easy as possible for your recruiter to reach you.

3. **Be prepared.**

   Always be "interview ready." To do this, I suggest that you have the following readily available at your fingertips: (i) a current resume and transaction sheet (if applicable); (ii) copies of your transcripts; and (iii) two strong writing samples and a list of at least three professional references. Most employers will request these materials early in the interview process. You want to demonstrate your preparedness and professionalism at the outset of your discussions with the employer by having these materials available at your interview.

   Also, provide copies of these materials to your recruiter to keep in your file in the event an employer requests such information directly from the recruiter.

4. **Maintain open and honest communication.**

   Share your goals, career successes, as well as pitfalls, with your recruiter. If there are gaps on your resume, explain them. Your recruiter will be able to advise you on handling the less than desirable aspects of your career history both on paper and during the interview process. Any information that will be helpful to the recruiter should be shared. For example, advise your recruiter if you plan to move out of the area in the near future or have an upcoming life event or vacation planned. If you are uncertain about whether something in your career history, goals or plans is relevant, be conservative and tell your recruiter. Let him or her be the judge.

5. **Limit the number of recruiters you work with.**

   You will have greater successes with your recruiter if he or she knows whether you're working with him or her exclusively, or if you have a limited number of recruiters with whom you are dealing with. Your goal is to become a priority for your recruiter. Additionally, you want to minimize the potential scenario in which two recruiters are representing you for the same opportunity. However, that said, remember that you are in the driver's seat and need to take control of your job search.

   If after a certain period you need to broaden your search, advise your recruiter that you'd like to expand your search efforts to other sources. Being honest and upfront with

your recruiter will foster a stronger relationship with her.

6. **Be honest with yourself!**

   We all like to believe that any employer would be lucky to have us as an employee. However, realistically, we're each well-suited and qualified for certain types of positions and particular types of work environments and not for others. Be realistic as to both your capabilities and shortcomings.

   You should always be "reaching for the stars"; however, be pragmatic. Rely on your recruiter's expertise and listen to his assessment of your qualifications and where you are most marketable in the employment landscape.

7. **Let your recruiter do his job!**

   The job search process is stressful. The anxiety experienced when you are searching for a position or awaiting feedback on your resume or an interview can be overwhelming. As a result, you might be tempted to continuously call your recruiter. Resist the temptation!

   Recruiters are extremely busy professionals. They spend their days interviewing candidates, speaking and meeting with employers, and, most importantly, seeking out job opportunities for the candidates they represent. In between these tasks, the recruiter is sending out resumes and scheduling interviews on your behalf. If your recruiter is constantly fielding calls from you and other candidates, he or she will not be able to do his or her job. As a result, you will get nowhere in your career search.

   However, if you do have some important, relevant information to share, contact your recruiter immediately. For example, if you receive an offer of employment or the urgency of your search suddenly changes or you have decided to put your job search on hold, call your recruiter so that he or she is up-to-speed.

   Furthermore, if you receive a message from your recruiter, call back as soon as possible. Failure to do so may result in you losing out on a potential opportunity or interview. Finally, if you do attend an interview, make sure that you contact your recruiter immediately thereafter to discuss your feedback from your meeting.

Conclusions

Working with a recruiter is an exceptional vehicle for spearheading your job search, whether you are seeking temporary or direct-hire employment opportunities. By sticking to the basic principles outlined above, you will maximize your relationship with your recruiter and greatly increase your odds of landing the right position.

Laurie Chamberlin is President of Special Counsel, the largest full-service provider of legal staffing services in the United States.

You've already experienced the best of NYSBA CLE, now go to www.nysba.org for the rest of the information you need.

> Customized Content and Robust Resource Centers

NYSBA cuts through the clutter:

- The customizable, personalized MyNYSBA page, designed to help you see only the information relevant to your practice, with connections to all the rich information on the NYSBA Web site
- The acclaimed Solo/Small Firm Resource Center, featuring the popular Smallfirmville blog
- A wealth of practice management resources and tools provided by the Law Practice Management Committee

> Professional Resources You Need

When changes in ethics and professionalism rules impact the legal profession, NYSBA members know they can turn to www.nysba.org for the most current information and resources they need.

NYSBA brings you:

- More than 800 ethics opinions (from 1964 to the present)
- The New NY Rules of Model Conduct
- Substantive reports by Association Sections, Committees and other entities
- Updated information and forms such as the changes in Power of Attorney legislation in New York
- Constantly updated feeds of legislation working its way through New York state government

> Career Information that Makes a Difference

NYSBA provides:

- Comprehensive Jobs and Careers resources, including Instant Job Search, recorded career development programs, connections to job listings and links to key elements of any career transition
- The Empire State Counsel designation for members who provide 50 hours of Pro Bono legal services to the poor

> Connections You Can Trust

If you find the new world of social media a confusing place, turn to a leader you can count on to bring you the tools you need to enhance your practice.

NYSBA offers:

- Blogs on substantive legal topics ranging from health, environmental and real property law to case summaries on securities legislation, legal news of interest to general practice attorneys and much more
- A Twitter feed designed to help you keep up on Association news and activities
- LinkedIn groups to help you take the first steps in turning your Association membership into a valuable professional networking asset
- Listserves organized based on Section or Committee membership and focused on specific, substantive topics of interest — an invaluable resource for you

Eugenie C. Yap, *NYSBA member since 2007*

Collective Arbitration in New York

By Samuel Estreicher and Steven C. Bennett

On October 20, 2011, in *JetBlue Airways Corp. v. Stephenson*,[1] a four-judge panel of New York's Appellate Division, First Department, held that whether collective arbitration is permissible under an arbitration agreement governed by the Federal Arbitration Act (FAA)[2] is a question for an arbitrator—not the courts—to decide, thus refusing to expand the narrow list of gateway arbitrability issues reserved for courts. The *Stephenson* court further held that, when an arbitration agreement is silent on the issue of collective arbitration, an arbitrator may permit the action to proceed on a collective basis, distinguishing collective arbitration from the class arbitration addressed by the U.S. Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (*Stolt-Nielsen*).[3]

Procedural Background

Respondents in *Stephenson* included 728 unnamed current and 18 named former JetBlue pilots who each entered into an identical employment agreement with JetBlue. Each agreement required adjustment in the contracting pilot's base salary if there were increases in the base salary of newly hired pilots. These agreements also contained an arbitration clause, which provided, in pertinent part:

> [I]n the event of any difference of opinion or dispute between the Pilot and the Airline with respect to the construction or interpretation of this Agreement or the alleged breach thereof which cannot be settled amicably by agreement of the parties…, such dispute shall be submitted to and determined by arbitration by a single arbitrator in the city where the Pilot's base of operations is located in accordance with the rules of the American Arbitration Association.[4]

The JetBlue pilots contended that the airline failed to increase their salaries properly and filed a single demand for arbitration with the American Arbitration Association on behalf of all pilots. The demand stated that the claims of individual pilots were asserted collectively to resolve an issue of common law and fact between the parties. In response, JetBlue petitioned the trial court, seeking to stay collective arbitration of the claims for breach of independent employment agreements and to compel individual arbitration of the claims pursuant to the FAA. The trial court considered two issues: (1) whether the FAA applied to employment contracts of passenger airline pilots and (2) whether the court or the arbitrators should decide if the arbitrations could be held jointly. Determining that the FAA governed the dispute, the trial court denied JetBlue's petition and remanded the matter to an arbitrator to determine whether the agreements permitted collective arbitration. The Appellate Division affirmed on both issues and added that an arbitrator could require that the action proceed on a collective basis even though the agreement was silent on that issue.

Appellate Ruling on FAA Coverage

The Appellate Division first addressed the argument that the arbitration agreement was not covered by the FAA. The JetBlue pilots argued that the exception under Section 1 of the FAA for "any other class of workers engaged in foreign or interstate commerce" removed their agreement from FAA coverage.[5] The JetBlue pilots cited *Lepera v. ITT Corp.*,[6] which held that a pilot whose primary responsibility was to transport corporate executives in a private jet was not subject to the FAA. JetBlue, however, relied on *Kowalewski v. Samandarov*,[7] which concluded that car service drivers were not exempt from the FAA because they only transported passengers, not goods. The Appellate Division found *Kowalewski* more persuasive because the *Lepera* court, unlike the *Kowalewski* court, did not have the benefit of the Supreme Court's analysis in *Circuit City Stores, Inc. v. Adams*.[8] In *Adams*, the Court interpreted the FAA exception to be limited to "transportation workers" and defined as such workers "actually engaged in the movement of goods in interstate commerce."[9] In *Stephenson*, the Appellate Division found that eligibility for the exemption hinged on the primary purpose of the industry, and only employees involved primarily in the transportation of cargo or goods were exempt. Although JetBlue carried both passengers and cargo, the JetBlue pilots "primarily" moved *passengers* and therefore were not exempt from the FAA.[10]

Appellate Ruling on Collective Arbitration

The Appellate Division next turned to the question of whether a court or an arbitrator should determine whether an arbitration agreement permits collective arbitration. The court noted that "[o]nly three threshold questions may be decided by a court[:]…(1) whether the agreement to arbitrate is valid; (2) whether the parties have complied with the agreement; and (3) whether the claim is timely."[11] The court recognized that the Supreme Court in *Green Tree Financial Corp. v. Bazzle* remanded to the arbitrator the question of whether the

parties' agreement permitted class arbitration, stating that "[a]rbitrators are well situated to answer [the] question [of what kind of arbitration proceeding the parties agreed to.]"[12] JetBlue, echoing the discussion of *Bazzle* in the Court's opinion in *Stolt-Nielsen*, argued that *Bazzle* did not control because it was decided by a mere plurality[13] and further contended that *Stolt-Nielsen* precluded collective arbitration when not explicitly allowed by contract. Drawing parallels to the facts in *Stolt-Nielsen*, JetBlue claimed that each pilot had entered into an individual employment agreement with the airline, which by its "plain language" limited arbitration to the signatory pilot only. The JetBlue pilots, in turn, argued that silence in employment agreements could not be read to prohibit collective arbitration and that *Stolt-Nielsen* did not control because they sought collective—not class—arbitration. Additionally, they asserted, it would be wasteful to require hundreds of individual arbitration proceedings to resolve a single breach of contract issue that applied to all.

The Appellate Division ultimately rejected the arguments offered by JetBlue. The court acknowledged concerns raised by *Stolt-Nielsen* and echoed by Justice Antonin Scalia in *AT&T Mobility LLC v. Concepcion*[14] but concluded that "because the type of proceeding demanded by the pilots is not, like a class proceeding, so fundamentally different from an ordinary arbitration, we cannot, unlike the Supreme Court in *Stolt-Nielsen*, definitively say that the parties did not agree to it."[15] Unlike class arbitration, in the proposed collective arbitration, all the affected pilots would be actual parties. Further, the dispute with the airline presented only one straightforward question to be answered by the arbitration panel, and that disposition would affect each pilot equally. In contrast, in a class arbitration, "common issues need only 'predominate' over issues that are unique to individual members."

The court also pointed out that in addition to the lack of "binding precedent from the United States Supreme Court holding that an arbitrator should decide whether collective arbitration is permissible, there is likewise no authority requiring a court to decide the question as a 'gateway' issue" under New York law. The Appellate Division went on to explain that the categories of gateway issues are "narrow" and limited to questions that involve enforceability of an arbitration agreement, application of the agreement to a particular dispute, the parties' compliance with the agreement and the timeliness of a claim. Consequently, since no such threshold questions arose in the case, the manner in which the arbitration should proceed was ultimately for the arbitrator, not a court, to decide.

"[JetBlue pilots] asserted, it would be wasteful to require hundreds of individual arbitration proceedings to resolve a single breach of contract issue that applied to all."

By remanding the issue of the availability of collective arbitration, the Appellate Division left open the possibility that the arbitrator could conclude that collective arbitration was available, even though the arbitration agreement was silent on that matter. Unlike the *Stolt-Nielsen* Court, the *Stephenson* court refused to declare that the arbitration agreement could not be construed by a reasonable arbitrator to permit collective arbitration, primarily due to the fundamental differences between class and collective, or joint, arbitration.

Finally, the Appellate Division rejected JetBlue's argument that collective arbitration violated the forum selection clause in the employment agreements. The court opined that the forum clause was designed exclusively for the pilots' benefit, and the pilots could therefore unilaterally waive the clause.

Implications

Attempts to bring multi-claimant arbitration have met varying court reactions. The Supreme Court's *Bazzle* decision suggested that arbitrators could interpret silence in an arbitration agreement as implicit authority to impose classwide arbitral proceedings. In response, parties began including class arbitration waivers in their arbitration agreements, but such waivers were not met with universal acceptance. States such as California[16] and New Jersey[17] applied a doctrine of unconscionability under which such waivers were found unenforceable. More recently, the Supreme Court in *Concepcion* held that California's unconscionability doctrine, applied to class arbitration waivers, was preempted by the FAA. The New York state court's *Stephenson* decision adds yet another layer, carving out collective arbitration from class arbitration jurisprudence. It remains to be seen whether other state courts will follow suit, and whether the issue will make its way to the U.S. Supreme Court. Meanwhile, parties should consider whether collective arbitration would be appropriate for their particular situation and avoid ambiguity by including provisions in their arbitration agreements expressly prohibiting or permitting collective arbitration.

Endnotes

1. 88 A.D.3d 567 (1st Dep't 2011).
2. 9 U.S.C. §§ 1–16.
3. 559 U.S. __, 130 S. Ct. 1758 (2010).
4. *Stephenson*, 88 A.D.3d at 568.
5. 9 U.S.C. § 1.
6. 1997 WL 535165 (E.D. Pa. Aug. 12, 1997).
7. 590 F. Supp. 2d 477 (S.D.N.Y. 2008).
8. 532 U.S. 105 (2001).
9. *Id.* at 112 (emphasis added).
10. *Stephenson*, 88 A.D.3d 567 (emphasis added).

11. *Id.*
12. 539 U.S. 444, 452–53 (2003).
13. *See* Samuel Estreicher & Elena J. Voss, *Supreme Court: No Class Arbitration Where Agreement Is Silent*, N.Y.L.J., May 18, 2010.
14. __ U.S.__, 131 S. Ct. 1740 (2011). In *Concepcion*, the Court noted the advantages of bilateral agreements over class arbitration in terms of efficiency and costs, specifically noting the potential unfairness to defendants of class arbitration. *Id.* at 1751–52.
15. *Stephenson*, 88 A.D.3d at 573–74. Curiously, the trial court refused to reach the question whether the pilots' demand was a class-action arbitration or "an alternate form of mass action that [did] not raise the same concerns about the differences from bilateral arbitration that the Stolt-Nielsen court addressed."
16. *See* Samuel Estreicher & Steven C. Bennett, *California High Court Weighs in on Class Action Waivers*, N.Y.L.J., Dec. 20, 2005.
17. *See* Samuel Estreicher & Steven C. Bennett, *New Jersey Weighs in on Class Action Waivers*, N.Y.L.J., Jan. 4, 2007.

Samuel Estreicher (samuel.estreicher@nyu.edu) is the Dwight D. Opperman Professor of Law Director at New York University School of Law and Of Counsel at Jones Day. Steven C. Bennett (scbennett@jonesday.com) is a partner at Jones Day and the author of *Arbitration: Essential Concepts* (ALM 2002). Joseph J. Bernasky, an associate in the Jones Day labor and employment group, and Mariya Nazginova, a law clerk at Jones Day, assisted with the preparation of this article. The views expressed are solely those of the authors and should not be attributed to the authors' firm or its clients.

This article originally appeared in the February 2012 issue of NYSBA Journal, *published by the New York State Bar Association.*

E-Mail Netiquette for Lawyers

By Gerald Lebovits

Electronic mail, called "e-mail" and often spelled "email," has electrified the practice of law. E-mail is invaluable. It's "cheaper and faster than a letter, less intrusive than a phone call, [and] less hassle than a fax."[1] It eliminates location and time-zone obstacles.[2]

E-mail isn't perfect. Attorneys are besieged by the volume of e-mails. It's hard to sort through the mix of solicitations, SPAM, correspondence, and critical, time-sensitive information. One result: "people are either annoyed by the intrusion [of e-mail] or are overwhelmed by the sheer number of e-mails they receive each day."[3] E-mail also leads to misunderstandings.[4]

Despite its problems, e-mail is an essential tool. Attorneys must make the most of it—so long as the attorney follows this good advice: "Think. Pause. Think again. Then send."[5] This column reviews e-mail etiquette, e-mail tips, and e-mail's implications for the legal profession. Good protocol makes e-mail fit to print.

Etiquette

Lawyers must consider the e-mail's recipient to determine how formal or informal etiquette should be. E-mails among colleagues sent in a series of quick responses are different from e-mails to a potential client. The varied purposes of e-mails and the diversity of recipients lead to conflicting etiquette rules. Many equate e-mail with traditional correspondence. Others see it as a new and different way to write. Some authorities argue that old-fashioned "snail mail" letters are better when interacting with adversaries, clients, and courts.[6] Others criticize the informal and sloppy writing common in e-mails. To them, "the e-mail culture is transforming us into a nation of hurried, careless note makers."[7]

The following etiquette rules outline general concepts and apply to all forms of electronic mail, regardless of the recipient.

Don't hide behind the electronic curtain. Easy access to e-mail leads to the common but poor practice of relying on e-mail's impersonal characteristics to deal with things better done in person. The mantra must be "Never do anything electronically that you would want others to do to you in person."[8] E-mail writers must ask themselves: "Would I say this in person?"[9] Asking this question reduces the potential to use e-mail for an exchange best suited for oral communication.

"[E]-mail is an essential tool. Attorneys must make the most of it—so long as the attorney follows this good advice: 'Think. Pause. Think again. Then send.'"

End confrontations. If communication leads to confrontation, end the dialogue and, if appropriate, agree to speak by telephone or in person.[10] E-mail is an imperfect way to resolve differences. Unlike oral communication, e-mail provides no tone or inflection. The reader must assign character to the communication. Angry, or "flame," mail[11] escalates disputes.[12]

Cut the back-and-forth. Stop e-mailing when an exchange, called a "thread," turns into a long back-and-forth discussion.[13] It's better to discuss on the telephone or in person any matter requiring more than three replies. Long threads lead to confusion when the discussion strays from the original subject. Sending e-mails also gives senders a sense of absolved responsibility when nothing has been accomplished. Just click the "send" button and it's the other guy's responsibility. Clarifying tasks by telephone or in person avoids this trap.

Interpret generously. Just as e-mail writers must consider the tone recipients might assign to the text, so must recipients generously interpret the writer's text.[14] Recipients should assume the best of the writer to avoid overreacting to a text that might be brief, hostile, or unclear. Avoid misunderstandings by giving e-mail writers leeway when deciphering meaning.

Always edit. Avoid confusion through editing. Reading what you've written will let you see how an intended recipient might misinterpret your writing. An example of this is an e-mail that reads "I resent your message" when the writer meant to say, "I re-sent your message."[15]

Editing includes more than reading for meaning. It means checking spelling and grammar. Informality like making typos or using only lowercase letters is fine between friends. It has no place in professional correspondence. To ensure credibility and respect, avoid grammar and spelling errors. Use your e-mail program's spell-check function. Editing is necessary because "[c]lients often can't tell whether your legal advice is sound, but they can certainly tell if you made careless typos."[16]

Be concise. Given the volume of e-mail and the limited time to read and respond, make e-mail readable. Write so that readers can read and comprehend quickly. Compose short sentences, short paragraphs,[17] and short e-mails. To make the reader's job easier, condense brief, casual e-mails into one paragraph.

This doesn't mean that e-mail writers should abandon all formalities of correspondence for brevity. Maintain a professional tone through proper capitalization and word choice. Many traditional-correspondence rules apply to e-mail.[18]

Front load and summarize questions and answers. If you're asking a question in your e-mail, ask it before you say why you're asking. If you ask the question up front, you're more likely to get an answer; the reader is less likely to stop reading before getting to your question.[19] Another technique when you reply is to summarize the question you were asked—and only then answer the question.[20] That'll let your reader know you're both on the same e-mail page.

Use the subject line to its full potential. Attorneys are inundated by e-mail. They must decide what to read and take care of first. An e-mail's subject line often determines the decision a recipient makes about when, or whether, to deal with it. Use the subject line to inform recipients of the e-mail's subject and purpose.[21]

A recipient will be frustrated by false or insufficient information in the subject line. Include key information to let recipients evaluate quickly whether they've time to deal with your e-mail at that moment. Don't make your subject line too short or too long.[22] Use initial capitals for subject-line messages, but don't capitalize short articles or prepositions. Don't end subject-line messages with a period.

Occasionally you can fit your entire message in the subject line. This works when the message is extremely brief and when asked to reply to a short, simple question. Use the abbreviation "EOM" at the end of the subject line-message.[23] EOM means "end of message." It tells the recipient that the subject line is the complete message and that they needn't waste time opening the message.

Format replies for clarity. Answer at the top of an e-mail so that readers need not search through text.[24] To answer multiple questions or make various points, organize replies with numbers or letters. If you're interlacing your answer between paragraphs of the original e-mail, use a different color, size, or font to set your writing apart from the sender's.[25]

Don't overuse abbreviations. LOL! To be brief and to type quickly, it's tempting to use lots of abbreviations. This isn't as time-saving as it might seem. Abbreviations waste time if your e-mail, filled with ambiguous abbreviations, requires the recipient to reply seeking clarification. The solution is to use them sparingly.[26] Stick with familiar abbreviations that express your meaning.

Use contractions. Although contractions are inappropriate in formal letters, contractions, which enable readers to understand text quickly, are encouraged in e-mails. Not using contractions sounds awkward and fussy and makes readers feel scolded.[27] Using the uncontracted form in the directive "Do not make extra copies of the report," for instance, suggests that dire consequences will follow for doing so.[28] Reserve the uncontracted form for special emphasis.[29]

Be sensitive when e-mailing to and from telephones. Smartphones like Blackberrys and iPhones are increasingly prevalent. Their small screens and cramped keyboards make writing concisely and using the subject line to its full potential even more important. In your quest for concision, never use, in a professional context, SMS (Short Message Service) language, or "textese," like substituting "c u l8r" for "see you later."[30] This extreme form of abbreviation is like writing in another language.

☺ **Emoticons are inappropriate.** Emoticons are small faces made by combining colons, semi-colons, parentheses, and other symbols. The authorities have different opinions about emoticons, but the consensus is that they don't convey meaning in a professional setting.[31]

Correspondence littered with smiley and frowny faces looks juvenile. It reveals the writer's inability to find good words, phrases, and sentences. Readers find emoticons annoying[32] and disruptive.

All capitals are ineffective. All capitals equals SHOUTING. Never use them, regardless of the context.[33]

Exclamation points liven up e-mails! Because e-mail has no affect, "exclamation points can instantly infuse electronic communication with human warmth."[34] They show enthusiasm. Writing "Congratulations!" is more expressive than writing "Congratulations," which sounds apathetic or sarcastic. Don't use multiple exclamation points. Also, don't use exclamation points to convey negative emotion. It means you're throwing a tantrum.[35]

Avoid format embellishments. Many e-mail programs offer options to personalize e-mail. These options include different fonts and background "wall paper" featuring pictures and clip art. Personalize with content, not format embellishments. Stick to a plain font, like Times New Roman or Arial in black type,[36] and 10- to 12-point type size on a plain background.

Project respect. Appropriate salutations and closings express respect. Writers should use salutations and closings in most professional settings. Sometimes official salutations and closings are unwarranted, as in a string of replies between peers or colleagues or among friends.[37]

If you're unsure how to address your recipients, mirror the earlier correspondence.[38] When there's no correspondence, the following are helpful salutations and closings. Use last names and titles until you're told otherwise. For an individual, "Dear Mr./Ms. [*last name*]:" is always appropriate. If you're unsure whether your relationship is familiar enough to allow first names, "Dear [*first*

name] (if I may),"[39] allows informality and addresses whether first names are appropriate.

These closings aren't comprehensive, but they're a start to your finding the appropriate ending to correspondence: "All best," "All the best," "Best," "Best regards," "Best wishes," "Cordially," "Regards," "Respectfully," "Sincerely," "Sincerely yours," and "Yours."[40]

Sign your e-mail. An e-mail exchange might be your only correspondence with a recipient. Signatures tell recipients how you like to be addressed and signal that the e-mail is complete. The context of your e-mail determines the appropriate signature. Not every e-mail requires a full signature. Quick responses between co-workers and friends about simple issues dispense with e-mail formalities, including signatures. Alternatively, consider correspondence between opposing counsel at the start of litigation. Signatures with full names and titles are informative. Make the most of this line to tell recipients whether you wish to be addressed by your first name, your last name, or a title.

Start smart. Don't both begin and end an e-mail with your name and who you are. A formal, polite way to write is to introduce yourself up front but to sign your name only at the end. Thus: "I represent Mr. Y, the defendant in X v. Y. Please telephone me tomorrow. Sincerely, John Smith." Not: "My name is John Smith. I represent Mr. Y, the defendant in X v. Y. Please telephone me tomorrow. Sincerely, John Smith."

Tell recipients how they can contact you. Include contact information below your signature. It sets the right business tone and shows your desire to be available to recipients. Include your full name, title, organization name, telephone number, e-mail address, mailing address, Web site, fax number, and other relevant information.[41] Save time with your e-mail program's automatic signature-line feature.

Announce prolonged absences. Tell correspondents when you'll be away from your e-mail for more than a day or two. If you don't, they might e-mail expecting quick action and grow frustrated when you don't reply. Use your e-mail software's "Out of Office" function to send an automatic reply announcing your absence. Or set your program to forward mail to an account you'll monitor while you're away.

Limit urgent e-mail. E-mail programs contain an option to flag or highlight messages as "urgent" or "important." This option helps senders and recipients supplement information in the subject line, but only if the "urgent" or "important" designation is accurate. Using flags to entice recipients to read e-mail that doesn't qualify for a flag harms the flag's purpose and your credibility.[42] Use "urgent" and "important" sparingly.

Never forward without permission, but always assume that recipients will forward without permission. E-mail makes it easy to reply with the click of a button. Forwarding and carbon copying e-mail is just as simple. The ease with which you can pass along e-mail makes it tempting to do so. But etiquette dictates that you not forward any e-mail unless you have the original sender's permission. Also, when carbon copying (CC) or blind carbon copying (BCC) someone unfamiliar to your reader, state the reason for copying.

Your commitment to following the rules of etiquette doesn't guarantee that others will do the same. Assume that any e-mail you write will be forwarded, copied, and blind copied to others without your permission.[43] Protect your wish that your mail remain with your recipient by placing that request in the subject line and in your e-mail's body. These precautions don't guarantee compliance. E-mail isn't confidential. Don't assume it is.[44]

Don't abuse e-mail. Sending unsolicited advertisements to a mass list of recipients (SPAM) is like clogging up your friends' and colleagues' inboxes with unwanted jokes and chain mail. Don't be a spammer.

Note e-mail policies. Most large employers have e-mail policies. Follow them.

Beware of using business e-mail for personal use. Most large companies can access their employees' e-mail and hard drives. If in doubt, never e-mail anything you wouldn't want to see in tomorrow's newspaper.[45] Never send inappropriate mail, let alone to or from your office e-mail address.[46]

Your company might require a disclaimer at the end of your e-mail to specify the level of privacy assigned to e-mail communications and a warning that the e-mail shouldn't be used outside its stated context.

The New York State Bar Association provides a sample e-mail policy in its resources for small and solo practice firms.[47] The sample includes a list of risks and liabilities, legal requirements to use company e-mail, and suggested format for company e-mail. The policy is helpful if you're setting up an e-mail system.

E-Mail Tips

Here are some tips to make writing, sending, and receiving e-mail efficient and hassle-free.

Fill in the address box only when you're ready to send. The ease of sending out mass e-mail, purposely or inadvertently, means that you must take care when addressing your message. To avoid sending an e-mail before you're ready, write your entire e-mail, do all your edits, and proofread before you fill in the address box.[48]

Make managing e-mail part of your daily tasks. If the constant inflow of mail becomes overwhelming, set up a schedule to read e-mail just as you would an appointment.[49] Otherwise, read e-mail as received.

Start by answering e-mails that require a response. If you can't give

the e-mail full attention, send a quick response to let the sender know that you received the message and that a more complete response awaits.

Set up a filing system. Most e-mail programs allow multiple folders you can add to manually or automatically based on your criteria. Consider a pending folder for e-mail you must deal with later, a monthly or weekly review folder for follow-up exchanges, a permanent folder for mail you must never delete, and folders for clients or personal matters. Don't clog up your inbox. Deal with your mail and then discard it or place it in a folder.

Take the time to respond appropriately. The immediacy of e-mail leads people to send messages before they've fully thought through their ideas. Combined with the constant access to e-mail, instantaneous e-mail correspondence leads to situations in which senders often wish they could take their message back. This is wishful thinking: "No one will remember that you responded instantaneously. Everyone will remember if you respond inappropriately."[50]

Some people are always online. When they press the "send" button, their computer immediately sends the e-mail. Most e-mail programs allow an intermediate step between sending e-mail and its actual delivery: the outbox feature. An outbox works like your home mailbox. You place the letter in the box, but it isn't sent until the letter carrier picks it up.[51] Set your program to send all e-mails in the outbox at a particular time or only when you manually empty the outbox. In the meantime, the e-mail is in the outbox and available to edit or delete.

This feature also helps those who e-mail outside business hours. Setting your outbox to deliver all messages at 9:00 a.m. will hide that you were awake at 4:00 a.m. when you wrote it.

Watch out for Reply All. The "Reply All" feature is convenient to exchange responses with a large group. The feature can turn disastrous if used in error. The horror stories are well known, but the mistakes continue.

Use CC and BCC properly. Several options let senders address messages. The "To" box should include all those to whom the message is directed. The "CC" box is reserved for those who should receive the message for informational purposes but from whom no response or action is required. The "BCC" box works the same way as the "CC" box but preserves recipients' anonymity.[52]

Check and explain attachments. Correspondents can instantly share documents by attaching them to e-mails. This useful feature requires careful attention. First, consider whether to send a document by e-mail. Sending large files (anything over two or three megabytes) causes problems. Many servers block large e-mails. Or an e-mail that goes through might exceed the memory capacity of the recipient's inbox, causing it to crash. Next, remember to attach a document when you state in your e-mail that you're attaching it. Also, explain early in the e-mail message what you've attached, in what form, and why. Finally, attach the correct document, especially when dealing with sensitive materials.

Use your address book wisely. Most e-mail programs offer options to store contacts in an address book. This allows you to maintain a database of e-mail addresses to send e-mails without searching for addresses. Ready access to your contact list might lead to costly mistakes. Confusing your intended recipient is embarrassing. Although it's impractical to maintain separate address books for each contact, maintain separate address books for media,[53] professional, and personal contacts.

Save time: Set up group e-mails. When you're collaborating on a project or regularly exchange e-mail with a set of recipients, set up a group e-mail list. This assures completeness and saves time.

Request an acknowledgment of receipt. If you're concerned that your recipient might not receive an e-mail with time-sensitive or other important information, request an acknowledgment of receipt. Most e-mail programs have an option to do this, but you can also request an acknowledgment in the body of your e-mail. Not all e-mail communications require acknowledgment. Give yourself peace of mind, but don't burden recipients.

Rely on timestamps cautiously. Each e-mail message sent or received is stamped with date and time information. This information is good for documentation, but it's not 100% accurate.[54] Glitches in computer software and other electronic anomalies result in inaccurate timestamps.

Be careful with interoffice e-mail. Interoffice e-mail systems offer options and features different from personal e-mail programs. Some interoffice systems allow access to the "Properties" of e-mail exchanges to permit senders to check when their recipients read a message, how long the recipient looked at a message, whether the recipient deleted a message, and whether the recipient forwarded a message. Each system is unique. Be aware of these possibilities.

Save your recipient's time with "No reply needed." In an age when so many e-mails are exchanged daily, include a notation in e-mails sent only for informational purposes that no reply is needed.[55]

E-Mail and the Law

E-mail etiquette is important for attorneys because "[e]mail leaves a written, time stamped, and traceable record of your lazy habits, and flip email replies can come back to haunt you."[56]

Not all e-mail between attorneys and clients is privileged: "[E]mail communications in which legal advice is neither sought nor given are not necessarily privileged and could

be discoverable."[57] Avoid off-topic banter when corresponding with clients.

You're responsible for your mail. The costs of misdirecting e-mail containing confidential information are incalculable. Check and double check the accuracy of a recipient's address. Attorneys are charged with a standard of care that includes "carefully checking the addresses prior to sending an e-mail and ensuring that privileged information is not inadvertently sent to a third party."[58]

Consider the impact and repercussions each e-mail might have. Arthur Andersen's fall can be attributed to an Anderson in-house attorney's e-mail directing staff to follow its document retention policy—a direction to shred documents.[59] Because electronically stored data, including e-mail, is generally discoverable in lawsuits,[60] consider the legal implications of what you write.

Conclusion

Corresponding with the click of a button instead of dropping an envelope into a mailbox doesn't give you license to become complacent. When attorneys correspond in their professional capacity, it reflects on their capacity as professionals.

Endnotes

1. Kaitlin Duck Sherwood, *A Beginner's Guide to Effective Email*, http://webfoot.com/advice/email.top.php (last visited Oct. 14, 2009).
2. *Id.*
3. Thomas E. Kane, Letters for Lawyers: Essential Communications for Clients, Prospects, and Others ix (2d ed. 2004).
4. Janice Mac Avoy et al., *Think Twice Before You Hit the Send Button! Practical Considerations in the Use of Email*, 54 Prac. Law. 45, 45 (Dec. 2008).
5. Wayne Schiess, *Email Advice Part 2*, Austin Law. 6 (June 2009).
6. Kane, *supra* note 3, at ix.
7. Tom Goldstein & Jethro Lieberman, The Lawyer's Guide to Writing Well 62 (2d ed. 2002).
8. David Shipley & Will Schwalbe, Send: Why People Email So Badly and How To Do It Better 53 (2d ed. 2008).
9. Deborah Bouchoux, Aspen Handbook for Legal Writers 141 (2005).
10. *Id.*
11. Monte Enbysk, Microsoft.com Small Business Center, *Email Etiquette at Work*, http://tech.msn.com/howto/article.aspx?cp-documentid=812126 (last visited Oct. 14, 2009) (defining "flame" mail as e-mail that's terse, critical, or venomous).
12. Shipley & Schwalbe, *supra* note 8, at 11–13.
13. Enbysk, *supra* note 11.
14. Bouchoux, *supra* note 9, at 141.
15. *Id.* at 140.
16. Joshua Stein, *How to Prevent Email Embarrassments, Control the Email Deluge, and Get People to Read the Email You Send*, 19 Prac. Real Est. Law. 7, 9 (Jan. 2003).
17. Shipley & Schwalbe, *supra* note 8, at 132.
18. *See generally* Kane, *supra* note 3 (containing sample letters and examples of legal correspondence).
19. Wayne Schiess, *E-Mail Like a Lawyer*, Student Law. 22, 25 (May 2007).
20. *Id.* at 26.
21. Laura Stack, *12 Tips for Better E-mail Etiquette*, http://office.microsoft.com/en-us/outlook/HA012054101033.aspx (last visited Oct. 14, 2009).
22. Mark Grossman, *Email Etiquette is Important*, http://www.ecomputerlaw.com/articles/show_article.php?article=2008_email_etiquette_is_important (last visited Oct. 14, 2009).
23. Shipley & Schwalbe, *supra* note 8, at 88.
24. *Id.* at 158.
25. *Id*.
26. Bouchoux, *supra* note 9, at 141.
27. Shipley & Schwalbe, *supra* note 8 at 132.
28. *Id*. at 133.
29. *Id.*
30. Wikipedia, SMS Language, http://en.wikipedia.org/wiki/SMS_language (last visited Oct. 14, 2009).
31. Bouchoux, *supra* note 9, at 141.
32. Mac Avoy et al., *supra* note 4, at 51.
33. Grossman, *supra* note 22; Mac Avoy et al., *supra* note 4, at 51.
34. Shipley & Schwalbe, *supra* note 8, at 137.
35. *Id*. at 138.
36. *Id.* at 97–98.
37. *Id.* at 107.
38. *Id.* at 110.
39. *Id.* at 105.
40. *Id.* at 108.
41. *Id.* at 114–15; Stack, *supra* note 21.
42. Shipley & Schwalbe, *supra* note 8, at 95–96.
43. Stein, *supra* note 16, at 10.
44. Bouchoux, *supra* note 9, at 141.
45. Mac Avoy et al., *supra* note 4, at 51; Shipley & Schwalbe, *supra* note 8, at 61 ("Never send anything to a business email address that the recipient would be embarrassed to have the entire company read.").
46. Bouchoux, *supra* note 9, at 141.
47. New York State Bar Association Solo and Small Firm Resource Center, http://www.nysba.org/AM/Template.cfm?Section=For_Attorneys&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=14569 (last visited Oct. 14, 2009).
48. Mac Avoy et al., *supra* note 4, at 49.
49. *See* Dennis M. Kennedy & Tom L. Mighell, The Lawyer's Guide to Collaboration Tools and Technologies: Smart Ways to Work Together 127 (2008) (advising readers to use "triage" on their inbox by identifying which e-mails must be dealt with immediately, which require action but can wait for a response, and which can be deleted immediately because they are of no future use.)
50. Mac Avoy et al., *supra* note 4, at 50.
51. Jonathan Soll, *Managing Electronic Data Risks Through an Email Retention Policy*, 18 Am. Corp. Counsel Ass'n Docket 18, 25 (Apr. 2000).
52. Shipley & Schwalbe, *supra* note 8, at 59–60.
53. Mac Avoy et al., *supra* note 4, at 50.
54. Shipley & Schwalbe, *supra* note 8, at 50–51.
55. *Id.* at 54.
56. Kennedy & Mighell, *supra* note 49, at 125.
57. Christopher Wesser, *Ethical Considerations and the Use of Email*, 49 For the Def. 68, 71 (Feb. 2007).
58. Mac Avoy et al., *supra* note 4, at 48.
59. Veda Charrow et al., Clear and Effective Legal Writing 16-17 (4th ed. 2007).
60. Soll, *supra* note 51, at 19.

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. For their research, he thanks law students Alyssa Wolf (New York Law), Alex de Richemont (Harvard), and Joshua Cohn (St. John's). For her suggestion to write this column, he thanks Martha Cohen Stine, Esq. Judge Lebovits's e-mail address is GLebovits@aol.com.

This article originally appeared in the November/December 2009 issue of NYSBA Journal, *published by the New York State Bar Association.*

Metadata:
The Hidden Disaster That's Right in Front of You

By Randall Farrar

What Is Metadata?

Succinctly defined, metadata is "data about data." Metadata is embedded in all Microsoft Office documents

Microsoft Word, Excel and PowerPoint include automated features to aid in document production and collaboration. These features embed electronic information (metadata) in a file, which can reveal the identity of those who edited the document (revision authors); track the time, date, and frequency of edits (track changes and revisions); reveal inserted comments and the document template; and other data employed to control the document's text and format. Metadata is placed in a document by the operating system, the application, and by users utilizing the automated features of the application.

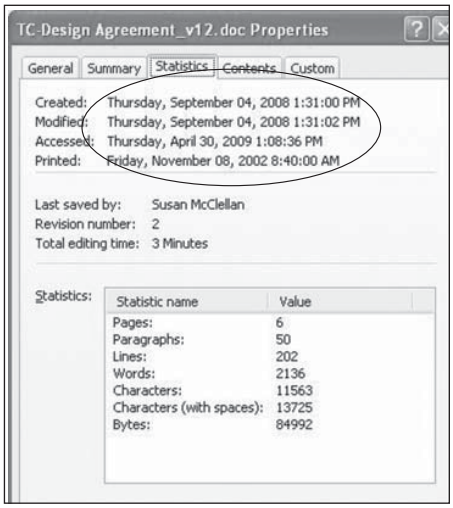
The metadata contained in a Word document doesn't necessarily create risk of adverse disclosure. In fact some document metadata is necessary for formatting or automation macros within a document. Some document metadata, such as tracked changes, may be used to collaborate with co-counsel, but one might not wish to share such information with one's adversary. The commonly held opinion is that information should be removed before a file is shared outside a firm's electronic walls to avoid violating attorney-client privilege, disclosing sensitive information to third parties and so on.

Before determining how your law office is going to manage metadata, it is important to understand the basic facts about document metadata.

Fact 1: Metadata Exists in ALL Microsoft Office Documents

A rule of thumb when considering metadata is that every time a document is opened, edited and saved, metadata is added by the operating system, the application itself, and through the use of certain automation features.

Some firms claim that they do not have a "metadata problem" when in fact ALL Microsoft Office documents contain some kind of metadata. The question is whether the metadata revealed is harmful or not. It is always better to err on the side of caution.



Fact 2: Metadata Can Be Useful

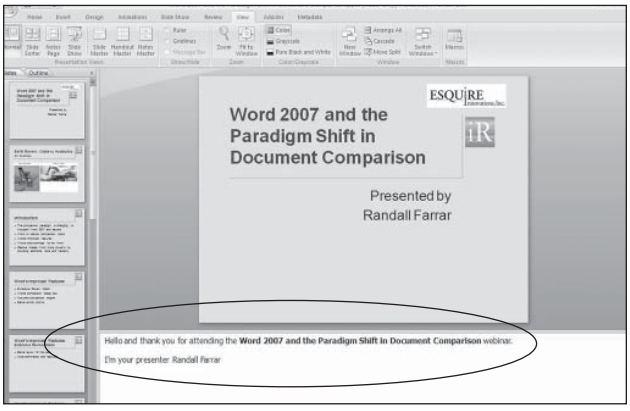
Microsoft Word metadata is often essential to the document production process to automate formatting and reduce editing and collaboration time. For example, the date fields (under document properties) are referenced when searching for documents created in a specified time frame, or to gain quick access to documents from "My Recent Documents."

Tracked changes can be useful when editing a document with multiple co-counsel or colleagues to identify which editors have made specific changes. In Excel, metadata can also be very useful and includes formulas in a spreadsheet, hidden columns, author names and creation dates of documents. In PowerPoint, metadata includes author information and presentation creation dates, as well as speaker notes and links to graphs or other statistics from outside documents.

Fact 3: Metadata Can Be Harmful

Metadata can be harmful when users unknowingly send documents that contain confidential or potentially embarrassing information. There have been many well-publicized cases in which tracked changes or hidden comments have been left in a document sent via email or shared on the Internet. Two examples of high profile metadata blunders are the SCO Group's lawsuit against DaimlerChrysler and a United Nations report.

A Microsoft Word document from SCO's suit against DaimlerChrysler originally identified Bank of America as the defendant instead of the automaker. Metadata revealed that SCO spent considerable time building a case against the bank before changing the name on the suit to DaimlerChrysler. More information can be found at the following web link: http://news.cnet.com/2100-7344_3-5170073.html.



In a United Nations report, tracked changes were discovered in a document that supported the published conclusion that Syria was behind an assassination in Beirut. Confidential and sensitive information as well as evidence that the report may have been altered after it was submitted to the United Nations were disclosed. More information can be found at http://www.timesonline.co.uk/tol/news/world/middle_east/article581486.ece.

Law firms that deal with sensitive and confidential information on a daily basis must be diligent in managing their metadata or they too may find themselves the subject of media reports and embarrassment.

Fact 4: Tracked Changes Can Easily Be Left in a Document

Despite the far-reaching negative effects of metadata discovered in a document, something as simple as leaving tracked changes in a document can easily happen. Consider the following scenario.

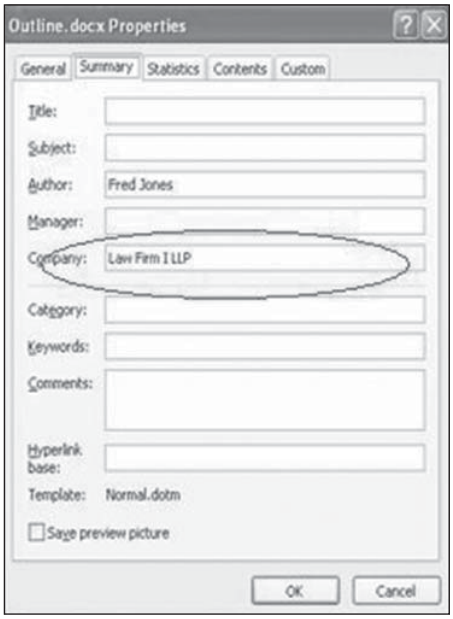
An attorney switches on the "Track Changes" feature in Word to make edits to a document. After collaborating with his assistant and associates he is satisfied with the changes. He decides to send it to the client for review and clicks on the "Review" ribbon in Word 2007 and changes the document to "Final" in the Tracking section.

The tracked changes disappear from the document. He assumes they are no longer there, clicks on send via e-mail and forwards the document to his client. The client opens the document to see all of the tracked changes displayed. This occurred because the attorney did not accept all of the changes in the document; he merely hid them from view. When the client opened the document the "Display for Review" settings were set by default to "Final Showing Markup," thus revealing all of the changes in the document.

To make sure that this scenario does not occur, and that there are no tracked changes left in a document, always accept all changes.

Fact 5: Metadata Can Be Found in the Document Author Information

Multiple author names can remain with a document as it is edited and revised. Microsoft Word automatically pulls the author name from the User Information for the "Last saved by" author (found by accessing the Office Button then Word Options | Popular), and will save the names if there have been multiple editors of a document.



When a document is created from an earlier document using Save As, the author name from the original document will stay with the document as will the company name. Often an attorney will create new documents from legacy documents that could have been produced when working for a previous firm. Unless the company information is manually updated by the user, or cleaned by a metadata software application, it will stay with the document.

If a law firm regularly uses the same document for multiple clients and/or uses documents created by lawyers when they were employed by previous firms, the client could see a different author, law firm and client listed in the properties. This information could lead to serious questions from a client as to a firm's billing practices. However, there are ways to control author information on documents. Microsoft Word has five areas that collect author information:

User Name
User Initials
Document Author
Manager
Last Author

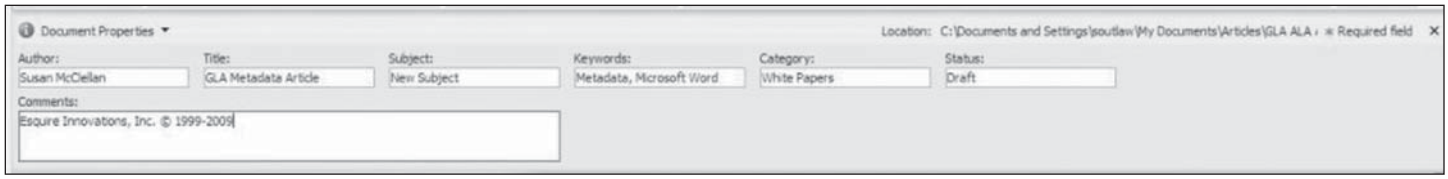
The User Name and User Initials control what appears in the author properties of a Microsoft Word document. User Name and User Initials are found in Word Option | Popular | Personalize, depending on your copy of Microsoft Office.

Microsoft Word documents also contain other properties that reveal the document author, which can be found in the built-in document properties of a document.

To view these properties click on the Office button select Prepare | Properties. A display bar will open at the top of the document.

The document author is pulled from the "Word Options" settings described above and inserted when the document is created. This stays with the document until it is changed or deleted.

The other fields displayed are user input properties. That means one has to manually place text here. Some template and macro applications use



this field for automation purposes and place information in these properties. Unless the firm is using an automated metadata software, be aware of these properties and that they will remain with the document until they are changed or deleted.

Fact 6: Metadata Is a Document's Dates and Times

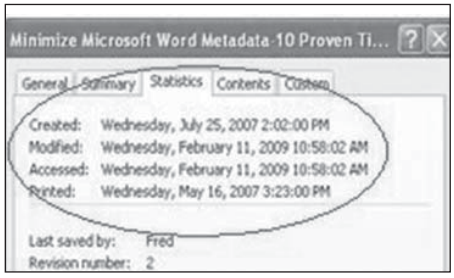
In the Microsoft Word "Statistics" tab the Created, Modified, Accessed and Printed fields are displayed. This information can cause potential problems for a law firm.

For example, an attorney is creating a new contract for a client. The contract requires some standard language. The attorney has prepared similar contracts before, so she opens up a contract that she had created in Microsoft Word for another client when she worked at a different firm. The attorney makes edits as needed and e-mails the contract to her client. Upon receipt, the client opens the document and, since she has heard about metadata, opens "File Properties" to view any data. File properties can be accessed in Office 2007 by clicking on Office Button | Prepare | Document Properties | Advanced Properties. By viewing the Statistics tab the client sees a Created date of Wednesday, July 25, 2007, one year before she was a client and a Modified date of Wednesday, February 11, 2009, which is the current date.

Even more puzzling is the Printed date, which is several years earlier, indicating that the last time this document was printed was Wednesday, May 16, 2007. This date will remain unchanged until the document is printed again.

Word files can contain a history that reveals the true age of a document. That history will stay with the document until it is "cleaned" using a metadata management tool.

Metadata of this type can be useful when searching for documents created in a specified time frame, or to gain quick access to documents from, for example, My Recent Documents. But a firm may not wish to reveal this type of information to a client being billed an hourly rate for creating the document.



Fact 7: There Are More Than 200 Types of Document Metadata

There can be more than 200 types of metadata added to a document.

In addition to the examples cited above, less commonly known metadata include:

Field Codes – Naming conventions for custom field codes may disclose information about the drafting process not disclosed by the text.

Bookmarks – Naming conventions for bookmarks may disclose information about the drafting process.

Routing Slips – When the File | Send | Routing Recipient function is used, the recipients' email addresses are stored in Word's electronic file (not available in Office 2007).

Firm Styles – Custom style names can sometimes be firm specific and therefore considered metadata.

Prevent Metadata Issues—Establish a Metadata Policy

Law firms, more than most users of Microsoft products, can be embarrassed – or worse – if metadata is not properly managed. Each law firm should have a metadata policy that is utilized by all attorneys and staff who work on firm documents. Considerations to take into account when establishing a metadata policy include:

- Educate yourself and your users about metadata.
- Review the applicable New York opinions (and those of other states and entities, as needed) regarding metadata.
- Review firm documents (on internal networks and published on external networks). Is your firm inadvertently sharing confidential information?
- Involve attorneys and your IT department and establish a firm approach based on your findings.
- If necessary, bring in a consultant to advise your firm on a metadata policy.
- Periodically review the firm's policy to address any new rulings on metadata and/or changes to Microsoft.

Enforcing the Policy

All firms should consider purchasing metadata management software. The software should be flexible enough to execute firm policy, automated enough to enforce firm policy and easy enough for users to understand and utilize.

The latest Microsoft Office program includes a metadata tool called Document Inspector. Since Microsoft applications add metadata to files, it presents a somewhat contradictory position for Microsoft to provide a tool for removing that metadata. Firms who already practice a metadata policy have found that the main weakness with Document Inspector is the lack of automation. The onus is

on individual users to "inspect" documents and then decide which metadata to remove. This approach proves ineffective in enforcing a metadata policy throughout an organization. Metadata management software, on the other hand, removes metadata more thoroughly and is designed to help firms automate and therefore enforce metadata policies. The most popular products available for metadata management can be found by searching for "metadata management software" in Google.

The success of any policy hinges on the execution. A firm's metadata policy will be more successful if staff can grasp what metadata is, when it can be useful, when it can be harmful and how to manage the metadata in documents. Consider bringing in outside trainers to help educate your firm with hands-on training.

Metadata and New York Law Firms

Historically, opinions on whether there is a significant risk with metadata and if so what must be done to address that risk have varied among attorneys, IT departments, management, bar associations and other governing entities. In the past few years, a multitude of governing bodies have drafted and issued opinions regarding metadata. New York has opinions specifically addressing an attorney's ethical obligations regarding metadata in place. Law firms in New York should ensure they are in accordance.

Law associations throughout New York, including the New York State Bar Association, the New York City Bar Association and the New York County Lawyers' Association, have released formal opinions on attorneys' ethical responsibilities regarding metadata.

The New York State Bar Association's Committee on Professional Ethics Opinion 749 and Opinion 782 state that a lawyer's ethical obligations regarding metadata are summarized as follows:

> Lawyers may not ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents.[1]
>
> and
>
> Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in "metadata" in documents they transmit electronically to opposing counsel or other third parties.[2]

The New York State Bar Association has also developed a basic guide for attorneys regarding metadata, which outlines the legal and ethical issues for lawyers regarding metadata, how to preserve and produce metadata, and the ethical obligations specific to New York lawyers.[3]

The New York County Lawyers' Association's Professional Ethics Committee Opinion 738 states in part,

> [A]ttorneys are advised to take due care in sending correspondence, contracts, or other documents electronically to opposing counsel by scrubbing the documents to ensure that they are free of metadata, such as tracked changes and other document property information.[4]

As more states sound off on metadata and an attorney's responsibility, New York firms with practices in multiple states should also make sure that their policies are acceptable in every jurisdiction in which they practice.

Endnotes

1. New York State Bar Association, Committee on Professional Ethics: Opinion 749 (2001), *available at* http://ww.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6533.
2. New York State Bar Association, Committee on Professional Ethics: Opinion 782 (2001), *available at* http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=6871&TEMPLATE=/CM/ContentDisplay.cfm.
3. "Metadata: Basic Guidance for New York Attorneys" was produced in April 2008 by the Committee on Electronic Discovery of the Commercial and Federal Litigation. The guide can be found at http://www.nysba.org/Content/NavigationMenu4/Committees/Metadata.pdf.
4. New York County Lawyers' Association, Committee on Professional Ethics: Opinion 738 (2008), *available at* http://www.nycla.org/siteFiles/Publications/Publication1154_0.pdf.

Randall Farrar (randall.farrar@esqinc.com) is the president of Esquire Innovations, Inc., a software company that develops Microsoft Office integrated applications for the legal market, located in Temecula, CA.

This article originally appeared in the October 2010 issue of NYSBA Journal, *published by the New York State Bar Association.*

Enhance Your Practice with

New York Lawyers' Practical Skills Series . . .

Written by Attorneys for Attorneys.

Includes Forms on CD

The 2013–2014 Edition is Bigger and Better with 3 New Titles!

Complete Set of 19

Members save over $200 by purchasing the complete set of 19

2013–2014 • PN: 40014PS | List: $895 | **NYSBA Members $695**

Practical Skills Series Individual Titles (With Forms on CD)

Arbitration and Mediation
Business/Corporate and Banking Law Practice
Criminal Law and Practice
Debt Collection and Judgment Enforcement
Elder Law, Special Needs Planning and Will Drafting
Guardianship
Limited Liability Companies
Matrimonial Law
Mechanic's Liens
Mortgages
Mortgage Foreclosures
Probate and Administration of Decedents' Estates
Real Estate Transactions-Commercial Property
Real Estate Transactions-Residential Property
Representing the Personal Injury Plaintiff in New York
Zoning, Land Use and Environmental Law

NYSBA Members $110 | List $125
(If purchased separately)

Stand-alone Titles (Without Forms on CD)

Labor and Workers' Compensation Law
NYSBA Members $80 | List $95

New York Residential Landlord-Tenant Law and Procedure
NYSBA Members $80 | List $95

Social Security Law and Practice
NYSBA Members $57 | List $65

Section Members get 20% discount* with coupon code PUB2164N

*Discount good until June 25, 2014

Order online at **www.nysba.org/pubs** or call **1.800.582.2452**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.
Prices do not include applicable sales tax.

Mention code: PUB2164N when ordering.

NEW YORK STATE BAR ASSOCIATION
YOUNG LAWYERS SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

This newsletter is published for members of the Young Lawyers Section of the New York State Bar Association. Members receive the newsletter free of charge. The views expressed in articles in this newsletter represent only the viewpoint of the authors and not necessarily the view of the Section.

We reserve the right to reject any advertisement. The New York State Bar Association is not responsible for typographical or other errors in advertisements.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

ISSN 0743-6475 (print) ISSN 1933-8511 (online)

PERSPECTIVE

Editor
Ewa Kozlowska
291 Wardwell Ave
Staten Island, NY 10314
ewakozlowska2@gmail.com

Co-Editor
Sarah E. Gold
Gold Law Firm
1843 Central Avenue, Suite 187
Albany, NY 12205
sg@goldlawny.com

Section Officers

Chairperson
Lisa R. Schoenfeld
Schlissel Ostrow Karabatos PLLC
200 Garden City Plaza, Suite 301
Garden City, NY 11530-3301
lschoenfeld@soklaw.com

Chairperson-Elect
Sarah E. Gold
Gold Law Firm
1843 Central Avenue, Suite 187
Albany, NY 12205
sg@goldlawny.com

Secretary
Erica M. Hines
Heslin Rothenberg Farley & Mesiti PC
5 Columbia Circle
Albany, NY 12203
emh@hrfmlaw.com