NEW YORK STATE BAR ASSOCIATION

# Journal

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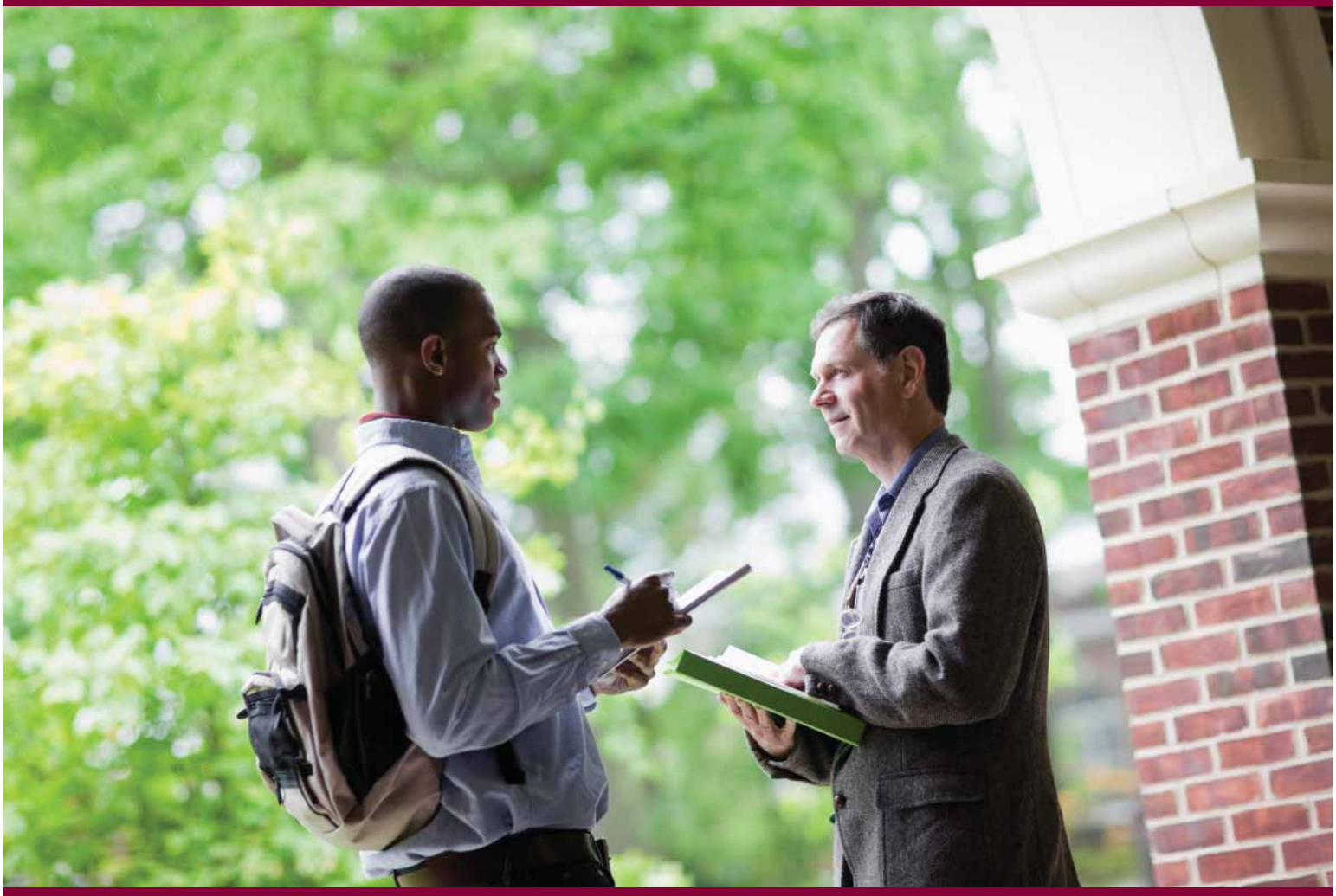


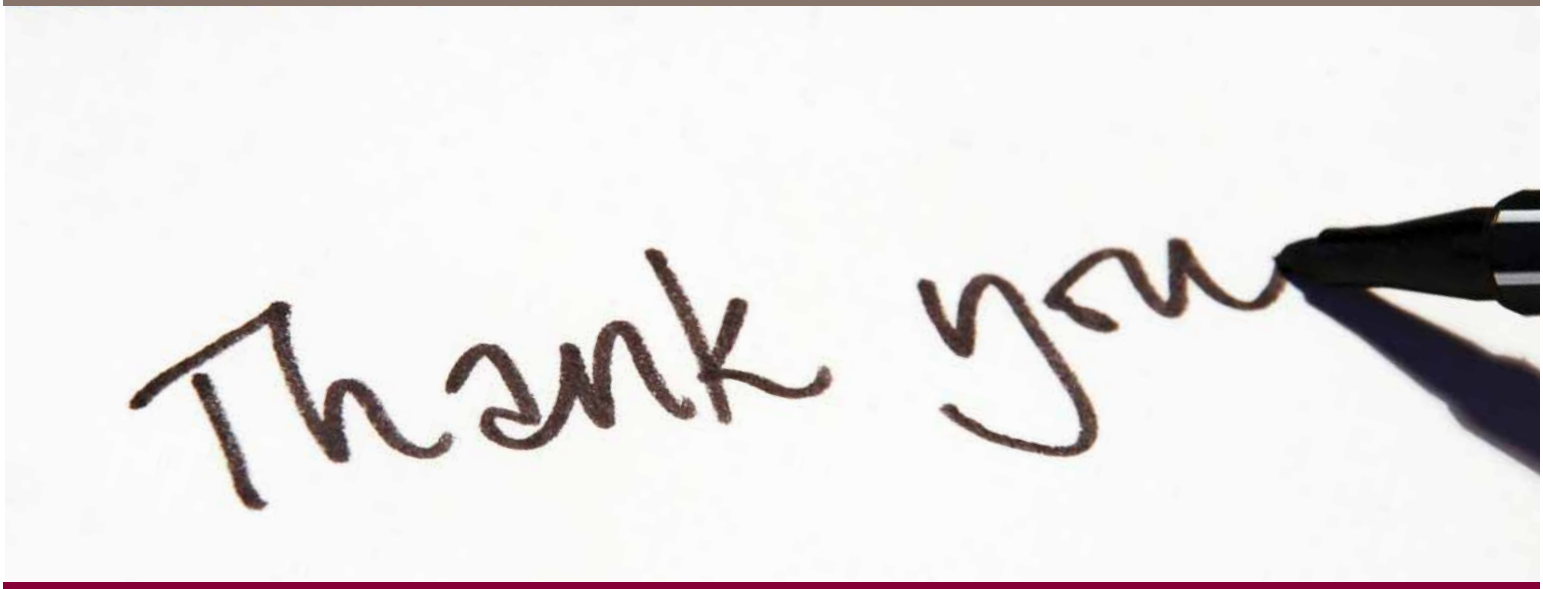
# So, You Want to Be an Adjunct Law Professor?

## The Processes, Perils, and Potential

*by Catherine A. Lemmer and Michael J. Robak*

## *Also in this Issue*

THE NEW YORK STATE BAR ASSOCIATION

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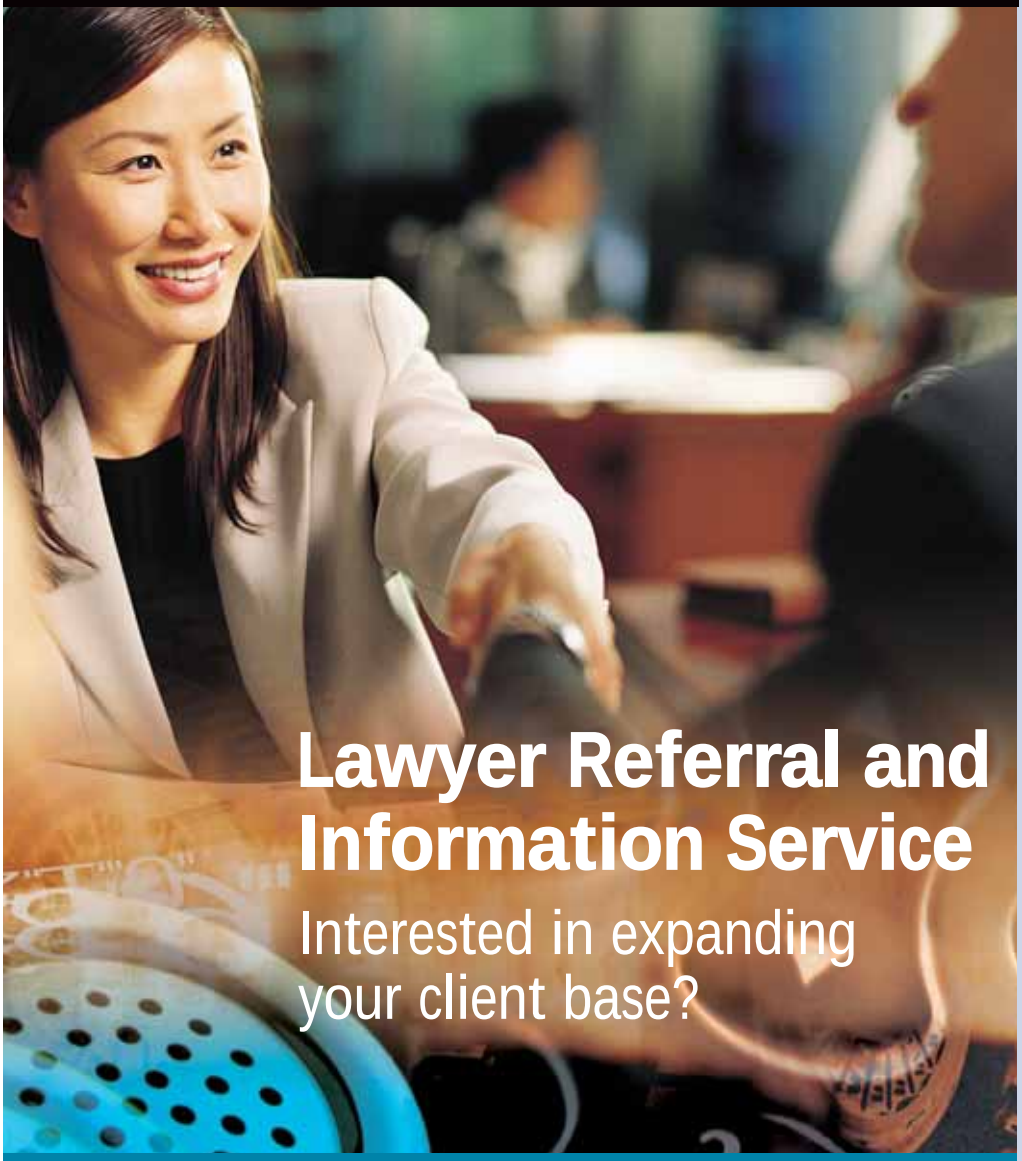

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**EUGENE C. GERHART**
(1912–2007)
*Editor-in-Chief*, 1961–1998

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BY CATHERINE A. LEMMER AND MICHAEL J. ROBAK

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# The Gap

Speaking at this year's Rensselaer Polytechnic Institute President's Commencement Colloquy, IBM CEO Ginni Rometty described how a convergence of three factors – big data, the cloud and the increased mobility of the business world – has created a "spinning" rate of change that will determine the fate of industries over the next decade.

Certainly the impact on the legal profession has been profound. Throughout the state, New York courts are moving to e-filing. Discovery has been transformed by artificial intelligence software. For many of us, however, the greatest changes are felt at the everyday level through our cell phones and tablets. With just a few keystrokes, attorneys can access cases, rules and procedures, and if they've moved document storage to the cloud, almost any document needed. The virtual law office is increasingly becoming a reality for many newer attorneys, who can practice law anytime and anywhere one can get a secure Internet portal.

Lawyers are guided by ethical rules that have been developed and, after careful study, modified over time, supported by consensus and further explained through comments and opinions. And the legal profession's fate does not lie in its ability to embrace new technology. The profession's fate hinges on its ability to maintain, through this period of intense change, its core values, as shown in its strict code of legal ethics and rules of confidentiality to protect the attorney-client relationship.

Notice the gap. A spinning rate of technology development. The slow, incremental rate of ethics development. How we as a legal profession and as individual attorneys navigate that gap is critical.

Can our profession's ethical underpinning keep pace with the current rate of new technology introduction and development? The constantly evolving reality of the virtual law office raises concerns not previously considered. Using technology service providers such as Dropbox, OneDrive, Google Drive, Box or Amazon to store data and documents in the cloud, raises serious security and confidentiality concerns. Even email presents daily minefields. What if you hit "reply all," rather than "reply," or forward an email chain without ensuring that all confidential or proprietary information has been removed?

Have a lawyer's ethical concerns changed in substance along with the ever-developing technology? Or have these concerns just become more complicated in the technological world in which we now operate? From the days of the quill pen to the cell phone, a lawyer has been prohibited from revealing protected information. As attorneys we are entrusted with protecting our clients' confidentiality. This is the core issue in navigating the gap.

At its August meeting two years ago, the American Bar Association adopted a recommendation from its Ethics 20/20 Commission to add to the Comment to Rule 1.1 a requirement that a competent lawyer's obligation to keep abreast of changes in the law and its practice extends to "including the benefits and risks associated with relevant technology." So far, New York has not adopted this change into its own rules, but the Association's Committee on Standards of Attorney Conduct is examining the issue.

The New York State Bar Association has long been deeply engaged in the continual process of researching and providing comment on ethical questions raised by practicing attorneys. In recent years, these questions have increasingly involved the nexus between technology advancements and legal ethics. In short, the Association tasks itself with helping guide its members as they navigate the gap. The Committee on Standards of Attorney Conduct monitors and evaluates the New York Rules of Professional Conduct. The Committee on Professional Ethics has for the past 50 years issued advisory opinions interpreting the ethical rules governing lawyers. Most of the Committee's opinions are based on inquiries from lawyers. Increasingly, questions now involve ethics and the use of social media.

Social media networks like LinkedIn, Twitter and Facebook present their own sets of issues. They have increasingly become part of the landscape, indispensable tools used by attorneys and by those with whom

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they communicate. These networks, combined with our increased mobility, have changed the practice of law and the ways in which people communicate.

Realizing this, our Association's Commercial and Federal Litigation Section recently developed a set of Social Media Ethical Guidelines. Adding to the challenge is that each social media platform has its own rules, which change rapidly. Communication via these networks generally reaches across multiple jurisdictions, often implicating other states' ethics rules. The new Social Media Ethical Guidelines cover best practices regarding on-line legal advice and advertising on social media sites, and offer advice on viewing the public portion of a person's social media profile and/or requesting permission to view the restricted portion of a person's site.

As an example of the complexity of this area, the ABA ethics committee recently issued an opinion, two years in development, that lawyers can ethically scan the social media sites of potential jurors. But, the ABA added, lawyers should not actively "follow" or "friend" jurors or otherwise invade the private areas of their social media profiles. Our Professional Ethics Committee reached the same conclusion in Opinion 843.

At the Association, as we consider how to help our members maintain their commitment to the ethical practice of law through this intense time of technological developments, we take particular interest in helping our solo and small firm practitioners sift through the deluge of information out there so they can fulfill the duty set out by the ABA – to be knowledgeable about "the benefits and risks associated with relevant technology."

The bottom line, however, is that high tech or low tech, an attorney's duty to his or her client has not changed. An attorney is required to: practice law competently (Rule 1.1), to abide by a client's decision regarding the scope and objectives of the representation (Rule 1.2), to practice with diligence (Rule 1.3), and keep the client informed (Rule 1.4). As the Preamble to the Rules state, they are "rules of reason." In all matters, an attorney must be guided by common sense, due diligence and judgment. And judgment is something, that unlike the latest in technology, will *never* become obsolete.

** Attorneys with ethical questions can submit them to the Association by e-mail to ethics@nysba.org. They can also be mailed to the Association at One Elk Street, Albany, New York 12207 or faxed to (518) 487-5694, but a return e-mail address should be included.* ■

# NYSBACLE

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July 18 Albany

**Practical Skills: The Nuts and Bolts of Contract Drafting: From Basic to Advanced Topics**
(live & webcast)
July 21 New York City

**Basics of Criminal Law**
September 9 Albany
September 10 Buffalo
September 16 New York City (live & webcast)

**Telehealth & Telemedicine Symposium**
(12:30 p.m. – 4:30 p.m.)
September 17 Albany

**Representing the DWI Defendant**
September 30 Buffalo
October 7 Long Island
October 8 New York City
October 21 Albany (live & webcast)

**Henry Miller**
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(9:00 a.m. – 1:00 p.m.)
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# So, You Want to Be an Adjunct Law Professor?

## The Processes, Perils, and Potential


**By Catherine A. Lemmer and Michael J. Robak**

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## Introduction

The American Bar Association's 2013 list titled "50 Simple Ways to Market Your Practice" includes as No. 43 "Do adjunct professor work."[1] Law students routinely report high interest in and satisfaction with courses taught by practicing attorneys. In addition, today's law school economics and restructurings are creating new opportunities for adjunct professor work. If you have been practicing law for several years and are intrigued by the possibility of adjunct teaching, now may be just the time to explore such an opportunity with a law school. Yet a successful teaching experience doesn't just happen!

There are a number of things to consider before sending your resume to the dean of your local law school. This article describes best practices for attorneys interested in undertaking adjunct professor work. We also take you through the entire process of becoming an adjunct professor, from examining your motivations for teaching through what you can expect in today's law school classroom.

## First Considerations

Unless you are a retired U.S. president, Nobel laureate, or best-selling author, adjunct law faculty positions are rarely, if ever, associated with wealth, accolades, or even employee benefits. So why would an attorney consider taking on this additional work?

Adjunct faculty positions are "teaching positions." Law schools use adjunct faculty for a variety of reasons, including to fill sabbatical positions, add specialized courses, or maintain the status quo while awaiting resolution to the current crisis in legal education. Adjunct faculty are not considered part of the full-time faculty and typically receive a special appointment to teach. As such, they are not part of faculty governance – that is, they are not required to attend faculty meetings and events, research and publish, serve on committees, or assist in the management of the institution. For the most part, adjunct faculty are outside the politics associated with higher education institutions.

What you will do is teach. Think about your recent interactions with colleagues or clients that involved teaching or explaining some aspect of the law. Did you enjoy it? Did you have the patience for it? Were you able to convey the concept? Did the colleague or client understand the concept at the end of the presentation or discussion? If, based on these experiences, you think you would enjoy interacting with law students in the classroom, you might want to explore an adjunct faculty position.

There are other benefits to adjunct faculty work other than the intellectual stimulation that comes from interacting with students in the classroom. Law faculty status, tenured or adjunct, still engenders a bit of awe and prestige. In addition, you will be paid, not anywhere near your hourly billing rate, but likely from $3,000 to $5,000 per course, depending on the course and the law school.[2] And, yes, there are some places where the opportunity to add adjunct faculty status to your resume is so appealing that the law school doesn't pay the adjuncts.

Last, adjunct faculty work enhances your reputation; it validates your expertise in a particular area of the law. Your resume, website, LinkedIn profile, and other client marketing materials should be updated to include your teaching position. This additional validation may lead to referrals and even to opportunities for media commentary. In short, in your enthusiasm for teaching, don't forget to leverage your adjunct faculty work in your marketing and networking efforts.

## The Era of the Mutually Beneficial Opportunity

As mentioned earlier, there is widespread agreement that the legal industry, which includes legal education, is in crisis and is undergoing significant change. For legal education much of that hinges on the significant and continuing drop in law school admissions, now entering its third straight year. It will take two to three more years to determine whether this signals a profound new reality.

For that reason in particular, there is a greater demand from law schools for adjunct professors. In this new normal, law school budgets are under intense pressure just as the ABA is calling for changes in the law school curriculum.

One significant concern for the academy is the complaint that law schools fail to provide the courses most needed to produce practice-ready graduates. Law schools are struggling to add courses that focus on practitioner skills, that is, skills associated with the actual practice of law. In many cases, the tenured law faculty focus on academics and research and are not interested in or skilled in teaching such courses. Yet, in the evolving world of education and law practice, courses that blend both practice management skills and contextualization for learning this skill set are of the most interest. And, within this new subset, courses that incorporate technology and its application in the practice of law are particularly attractive. Such courses might also include ones that introduce students to competitive intelligence, factual investigation, principles of finance and risk management, e-discovery, and project management. Thus, law schools and lawyers have a mutually beneficial opportunity. Adjunct faculty positions are opening up as law schools are adding on a trial basis the new courses the ABA, the legal profession, and students are demanding. Lawyers have new opportunities and law schools can hire skilled practitioners at a lower cost than hiring tenure-track faculty.

In addition, there is the goodwill engendered when law schools hire their own alumni to teach as adjunct faculty. And perhaps most important are the networking and experiential opportunities afforded students when a course is taught by a practicing attorney.

In short, new opportunities for adjunct faculty with the right expertise are opening up and, unlike in the past, law schools may place a higher value on these relationships.

## Do You Have the Right Stuff?

There are a number of things to consider before you approach a law school with your interest in an adjunct faculty position. OK, let's say you have been a successful practicing attorney for several years and have developed a level of expertise in a particular area. A good start, but this doesn't mean you will be a shoo-in for an adjunct position. The law school is going to vet your background and credentials. In addition, the law school is going to look for evidence of your teaching ability. Your resume may require some revamping to include teaching experience. Have you taught CLE courses? Conducted in-house training sessions for associates? Presented at law conferences or practice group meetings? These are all evidence that you can engage an audience and convey your knowledge in an educational setting.

In addition, do you have the time? Teaching is time-consuming, even more so the first time you teach the class. Even if you walk into the first class with a well-pre-

pared plan, it is likely you will find yourself constantly adjusting over the course of the semester. Student interests, changes in the law, or exercises that fail are just a few reasons you will need to adjust the course. Examine your upcoming workload carefully and be honest. Teaching a class isn't something you can hand off to a colleague mid-semester. Calculate how much time it will take. A good rule of thumb is to plan for about four hours of preparation time for each hour of class time.

Yet, even if this isn't the time to take on a full four-credit course, you can start to build your resume with the law school. Look for other opportunities to become involved and "pop up" on the dean's radar. Law students are generally hungry to interact with practicing attorneys, and there are lots of ways to do so. Perhaps volunteer to be a moot court judge; contact a professor and offer to do a guest lecture; do a presentation for a student group; or invite students to an in-house session on your area of expertise. Not only will these be resume-building teaching experiences, they also might help you determine if you really want to pursue teaching in a classroom.

## The Application Process

Do your due diligence. Remember, each law school is its own unique environment. Adjunct positions are not always posted, which means you will have to do some investigatory work. Luckily, most of the information you need is likely to be found on the law school's website.

If you are interested in developing a new course, you will want to determine if there is a need for it. Take a look at the law school course catalog and the schedule of courses offered in the last few semesters to determine if the course you are proposing might be needed. Course syllabi or course summaries are often found on or linked from the faculty bio pages.

Contact professors at the law school currently teaching in the same or related field to find out if the law school would be interested in offering your course. Before going further you will want to find out who manages the hiring of adjunct professors and any procedures for approving a new course. Current adjunct professors are usually identified on the law school website. You may also want to contact one or two to ask them about their experiences.

If you still want to proceed, send a cover letter, resume, and course description to the individual in charge of hiring adjunct professors. For example, at the University of Missouri-Kansas City, the adjunct faculty currently are administered by the Associate Dean for Faculty Development. Resumes and consideration are often submitted to the Dean of the School of Law, but the administrative vetting process is handled as a joint effort between the Associate Dean responsible for class scheduling and the Associate Dean for Faculty Development. Any new course proposal would then be submitted to the Course Development Committee and then, if approved, moved to a vote by the entire resident faculty for inclusion in the catalog. As a precondition, the adjunct faculty member's appointment would also need to be approved by the Resident Faculty. These approvals normally occur in February for a fall course and September for a spring course.

Model your course description after those posted on the law school's website. The course description should be specific enough to enable the reader to ascertain what you want to teach, why the course is important, why it provides a student an opportunity for knowledge not available in other courses currently offered, and why you are qualified to teach it. Read your course description from the point of view of a student. Ask yourself, "Would this description pique a student's interest and encourage him or her to take the course?"

If the law school determines a need for your course and is generally satisfied with your credentials, the next step is the interview. Now is the time, if you haven't already, to contact the law school's other adjunct faculty for some insider advice. These faculty members may be able to share the types of interview questions that are typically asked of adjuncts and if the hiring person has any particular interests you might want to touch on in your interview. In addition, take a crash course in the language of education. Higher education, just like law, has its own vocabulary. The legal academy is under significant pressure to move to more outcome-based teaching. So, be prepared to talk about your method and practice of teaching, assessments, student outcomes, and course objectives – in other words, how you plan to teach the course, grade the students, and generally what you expect the students will learn from the course. Two resources to check out are: *Teaching Law by Design: Engaging Students from the Syllabus to the Final Exam* and *Teaching Law by Design for Adjuncts.* Both books are written by the author team of Michael Hunter Schwartz, Sophie Sparrow, and Gerald Hess.

## Courses and Course Approval?

The law school indicates its interest in you and your course. Great! Now the real work begins. You need to focus on course development and course approval.

The first thing to understand is the structure of education delivery in the law school. The ABA standards define and regulate course credit. ABA Standard 304: Course of Study and Academic Calendar provides that course credit is a measure of in-class time. Standard 304 requires 700 minutes of instruction time, exclusive of the examination period, for each course credit hour. If you want to teach a two-credit course over a 14-week semester you will need 1,400 minutes of in-class time. Class breaks are deducted from the total meeting minutes. For example, at a law school on the semester schedule, a two-credit class would require two weekly 50-minute class periods for 14 weeks to satisfy the 1,400-minute requirement.

You need not be constrained by the 14-week semester. Short-term classes are popular with students as the compressed schedule allows them to finish a course prior to

the examination period for their other classes. For example, you may have the opportunity to teach a two-credit course over 10 weeks or to use some weekend blocks.

You will need to have a well-developed course outline to submit to the law school's approval process. The course outline should detail the topics that will be covered in the course and the materials and methods you plan to use in the course. You should also include which assessments you plan to use and the grade percentages. For example, midterm 20%; research paper 30%, etc. If you weren't provided with working examples by the law school, check in with the faculty contacts you made during the application process. Ideally, the course outline will be detailed enough that it will easily morph into your syllabus.

You will also need to understand the mechanics and timing of the course approval process – that is, which dean coordinates the process and which committees are involved. You may want to see if you can submit your course for review and comment prior to the document's going to the full committee for a vote. For example, at Robert H. McKinney School of Law, the faculty Curriculum Committee may approve a one-time new course offered by adjunct faculty if the course is sponsored by a full-time faculty member. If the course does not have a sponsoring full-time faculty member, the course must be approved via the Academic Affairs Committee process.

Also, as mentioned, most law schools create schedules well in advance of each semester. So if this is April, you would be on track to teach the following spring, after the approval process that will take place in September.

## The Actual Teaching of Law: Things to Expect, Things to Consider

Understanding and mastering pedagogy will be the single most important effort you undertake as an adjunct. There are volumes of materials to explain pedagogy and, with time and effort, you will discover your own path. Although it is true that you are the "expert" and you are in control of the materials to be taught, the students will not be overwhelmed by your credentials or your background. Much like sharks, they will sense your newness and perhaps uncertainty in your first foray into teaching. In this regard, the resident faculty have provided them something of a preconceived notion of what to expect from their legal instructor.

The key here is to remember the importance of the syllabus for the class. It is your contract with the students and lays out the expectations associated with the class. The more detailed and precise your syllabus is, the less opportunity there is for ambiguity and confusion as to your expectations of the students. And, much like a contract, it can serve as a reference point should there develop a misunderstanding as to class expectations.

The other essential elements of the course are the readings and the content you are delivering. Course materials can be expensive, and we no longer live in the day of assigning a single course textbook or taking "select readings" to the copy center to create a course packet. Materials may be digital, but copyright must still be respected. As a teacher, you certainly have more leeway when it comes to distribution of materials in the name of "educational purposes," but even that exception has limits. You are best advised to seek out a law librarian at the law school to help you navigate course reserves and develop course readings. A common solution is to use an online hosting site that links all your course content. Law librarians, if given sufficient notice, may offer to create a LibGuide that hosts all your materials or, as noted below, you may wish to link all your resources on the course learning management system (LMS) or other site.

Most law schools will give you access to LexisNexis®, Westlaw®, and Bloomberg BNA® as well as resources such as HeinOnline® and ProQuest® Congressional. These resources should contain many of the readings you will want to assign in your course. Besides presenting an opportunity for teaching a bit of legal research skills, such as listing the items for them and having them locate them in the available sources, it also allows for developing digital materials with persistent URLs that can be accessed from anywhere via the law school subscription access. Again, your law librarian is your best access point for learning about and delivering readings and other content for your course.

Finally, while there are many good writings in the area of pedagogy in the legal academy; one very useful article is by Gerald Hess, titled "Hearts and Heads: The Teaching and Learning Environment in Law School."[3] Among other things, Hess identifies and discusses the "Seven Principles for Good Practice" developed by Chickering and Gamson.[4] Listed simply, good teaching:

- Encourages contact between students and faculty
- Encourages cooperation among students
- Encourages active learning
- Gives prompt feedback
- Emphasizes time on task
- Communicates high expectations
- Respects diverse talents and ways of learning

The Hess article is highly recommended because it provides a good overview of the teaching process.

In most instances, students will ask for your classroom PowerPoint presentations. As you develop your course presentations, consider whether you want to provide your PowerPoints to the students prior to or after the class, or not at all. Each choice comes with different concerns, some of which can be mitigated with pre-planning. For example, you may provide the slides but strip out the note fields or provide the slides as a static PDF that cannot be altered. Don't forget to include a copyright notice and date on your presentations to protect your work.

And, as a further gentle reminder, remember the scope of work outside of class. As mentioned earlier, a good

rule of thumb is four hours of prep time for each hour of class teaching. But then there will be post-class analysis of the work, assignment grading or review, meeting with students, finding new material, and on and on. Of course, once you've developed the course, keeping it up-to-date will take up less time. However, to keep a course current and fresh, you will still need to devote outside hours.

## Educational Technology

The odds are that even relatively recent graduates will experience a moment of awe at the variety of technology now available in law school classrooms. The simple rule to keep in mind is that technology is another teaching tool. For a tool to be effective, it must solve a problem or fill an instructional need. Most important, you must be comfortable using it, and it must advance the students' learning. In short, don't use the tool simply to say you are using it in your classroom. Also, ask yourself if the "ed tech" is working seamlessly. If the students see you struggling with the technology or focus on the technology rather than the content, you need further training.

Learning management systems provide a platform for you to conduct your class. In most instances, the law school will have adopted, and provided support for, a particular LMS. The LMS provides a platform for you to host your course. In most instances, you will be able to customize the LMS by turning off unwanted features. For example, if you want to use a specific email for the course, you will be able to disable the email feature on the LMS.

Using the LMS may create additional challenges: for example, you may become the after-hours tech support for the LMS. Don't assume that all the students have used and are comfortable with the LMS, as not all law schools require that professors use an LMS. Use the first class period to gauge your students' abilities and interest in using the LMS and have a printed syllabus ready to hand out.

The classroom apparatus available will vary from law school to law school. Chalkboards still abound. A new "interactive learning environment," which is what many call added classroom apparatus, can be as simple as a whiteboard. (A word of caution: it often isn't clear who is supposed to make sure the dry erase pens work and that erasers are in the room; you are well advised to carry your own dry erase pens and an eraser.)

Often the overhead projector, screen, computer, and other equipment are controlled through one device that looks like a small touch panel. Usually these are fairly intuitive but in most cases instructions are on the teacher podium. Still, it is best to arrange a one-on-one session with the person tasked with AV in the law school. Don't forget to ask for and test your password access during this session. If you are bringing print or other materials there will probably be a document projection device – often generically called an ELMO. If there's an emergency – the computer or your PowerPoint presentation isn't displaying – you can show print copies of your presentation via the ELMO one page at a time, much like the now-venerated but disappearing overhead transparency projector. Again, the types of classroom technology available will vary from law school to law school.

Another type of technology gaining traction in the legal academy is audience response systems, sometimes referred to as "clickers." The university or law school may have settled on a particular response system – for example, Turning Technologies or the i>clicker. These systems are a terrific way to ramp up student participation and interaction. They can also serve as an automated way to take attendance and measure student engagement. However, these systems require clear understanding and often have a bit of a learning curve. If you are developing a course for the first time, though, it will be easier to consider integrating this technology as part of the course development.

Two additional considerations: first, many law schools have instituted "lecture capture." This means there will be cameras in the classroom and technology for recording the class so that it can be viewed later by students. You will need to understand clearly what equipment the school uses and the policies developed for this, including attendance policies. Second, each law school will have its own network and its own security considerations. If you are using a third-party software or bringing your own device to the school, you may be asked to go through a security review. Seek out the law school IT staff, often part of the law library, to review the process.

## Student Interaction Is Part of Your Teaching

Student interaction is part of teaching and requires the same planning and consideration you give to the content and instruction you plan to deliver in the course. Student interaction, both in the classroom and out of the classroom, should reflect a respectful professional relationship. Many law students are still developing their professional interaction skills, so don't be surprised to receive emails with exclamatory phrases, *txt* spellings, passive/aggressive language, emoticons, and phrases that most would find inappropriate in a professional context. And don't hesitate to use the opportunity to work on these practical skills with your students as well.

Most important, check with the law school. It is likely that the faculty handbook includes standards and provisions with respect to student-teacher interaction. In addition, use the syllabus and the first class meeting to establish the ground rules for out-of-class interactions. Specifically discuss how you prefer to be addressed and the when, where, and how to contact you outside of class.

Technology and social media offer a wide variety of student interaction options and you may use different options for different purposes. For example, in the absence of an LMS, you may choose to create an email just for this class that you will check at pre-arranged

times for specific purposes. You might use this option for students to report class absences or to request help or clarification with respect to assignments.

Technology may make holding office hours more convenient. Skype, AdobeConnect, and Google Chat compose a short list of synchronous online options that will enable you to hold office hours that don't require either you or your students to travel to a particular location. A more simple option might be to advise students that during "set" office hours you will respond to emails immediately.

Alternatively, if you want to have physical office hours, consider times convenient to student schedules. Consider holding office hours just prior to or after class, or even taking a short poll to find relatively convenient times for all involved.

Facebook or Twitter are options if you need to reach all the students with the same message. However, interacting with students via social media comes with its own particular challenges. Some professors will not "friend" a student on Facebook but will accept an invitation from a student on professional networks such as LinkedIn. Explain to your students what your social media boundaries are and apply them evenly. Given the growing use of social media, it is likely the law school has developed social media policies. Be sure to review and abide by these policies when developing your policy for your course.

There is one last important aspect of student interaction. Law students are under more pressure than ever. Many students are balancing work, family, and school obligations. As a law professor you will be in a unique position to observe student behavior. Be alert for students who appear to be struggling more than the law school "norm." It is better to have a conversation that alerts the law school's dean of students to a potential problem than to have a student self-destruct.

Following the provisions in the faculty handbook, establishing guidelines, and using basic common sense will help you create useful and productive student interactions and avoid any pitfalls.

## Grading

Grading may be the largest challenge you face as an adjunct. If you are involved in hiring at your firm, you are perhaps more attuned than regular law school faculty to the important role grades play in interview selection and, ultimately, hiring decisions. If you go into the grading process expecting to be challenged by students, you will be better prepared for student meetings. Create a rubric for each assignment. You may wish to read some or all of the students' papers to get an understanding of how the students responded to the assignment. Even the best-designed and -tested assignment can generate unanticipated responses. A preliminary reading will give you the chance to make any adjustments to the rubric on the front end and apply it consistently across all the students' work. Update the rubric and keep a copy of it to use during student conferences.

If you are giving points for classroom participation and attendance, be sure to keep those grades current. There are two reasons for this: First, it is most likely you won't remember if you let too many class meetings pass before updating the grade book. Second, if you enter these grades immediately after each class you will start to see a pattern of student performance. This will help you identify any student who is at risk and allow you to intervene while there is still time for the student to perform well in the class.

Last, keep copies of graded work and the related notes and grading rubric. Students tend to challenge grades on assignments at the end of the semester. This often occurs after they've calculated how many points they need on the final to achieve a certain grade in the class. You will need to be prepared to discuss grades that were awarded throughout the semester. Keeping good records will ensure you treat all students fairly.

## Feedback

You will receive student evaluations to distribute to your class at the end of semester. However, this is too late for the students you are currently teaching. Throughout the semester, encourage students to make suggestions for changes in content and delivery; put a statement to this effect right up front in the syllabus. Among responses such as "this course is too much work" and "the assignment was too hard" you are likely to get some good solid advice. In addition, everyone appreciates the opportunity to express an opinion. You can easily create a short, simple, anonymous survey using online tools such as Survey Monkey[5] to solicit feedback from your students. Be sure to acknowledge the comments and suggestions in the classroom. Include an explanation of why or why not the suggestions are feasible.

## The Law Library

The increasing price of textbooks, course packets, and other resources are of constant concern to law students. The library reserve system may be a good option depending on the size of your class and the materials you plan to use. Consult with the law library early to determine if it makes sense to place items on reserve instead of requiring your students to purchase the materials. The library will also be able to advise you on any potential copyright issues. As the library is typically inundated with last-minute law faculty requests, take care of this part of your coursework as early as possible.

If you are going to ask your students to prepare a research paper or other writing that requires legal research don't hesitate to reach out to the law library. Law librarians are very willing to do in-class specialized research sessions or create online library guides

on a particular research topic if you give them enough time to prepare. Not only do the students benefit from these, but the overall work product is typically of a higher quality when students know where to start their research.

## Don't Turn Down Unexpected Gifts

Many law schools offer adjunct faculty orientation. For example, an adjunct faculty orientation is held each semester at Indiana University's Robert H. McKinney School of Law. It includes short presentations by the IT department, legal research vendors, law library, student services, and others.

The recent calls for changes in the way in which legal education is delivered have prompted many law schools to develop teaching strategies that promote an active and engaged learning pedagogy, such as incorporating online or blended classroom environments that include problem-based learning, group projects, and the flipped classroom.[6] At Robert H. McKinney School of Law, for example, the faculty routinely host programs on new instructional techniques and online education. These programs are open to all faculty, including adjunct faculty.

Make the time to attend if such gifts are offered at your law school.

## Conclusion

"Doing adjunct faculty work" may not be lucrative but it can be highly rewarding. Very little compares with the experience of connecting with a student in a way that allows you to say, with certainty, that you made a difference in that person's understanding and development as a lawyer-to-be. Not only can you enhance your credentials, you can enhance the reputation (and therefore the branding) of the law school you work for in a way that translates directly to the school's ability to attract students. No question there are perils and pitfalls in this endeavor but, done well, you will gain a good deal of satisfaction on both personal and professional levels. ■

1. Stephanie Francis Ward, *50 Simple Ways to Market Your Practice*, ABA J. (July 2013) p. 34, http://www.abajournal.com/magazine/article/50_simple_ways_you_can_market_your_practice/ (last viewed Mar. 1, 2014).

2. Brent E. Newton, *The Ninety-Five Theses: Systematic Review of American Legal Education and Licensure*, 64 S.C.L. Rev. 55, 123 (2012).

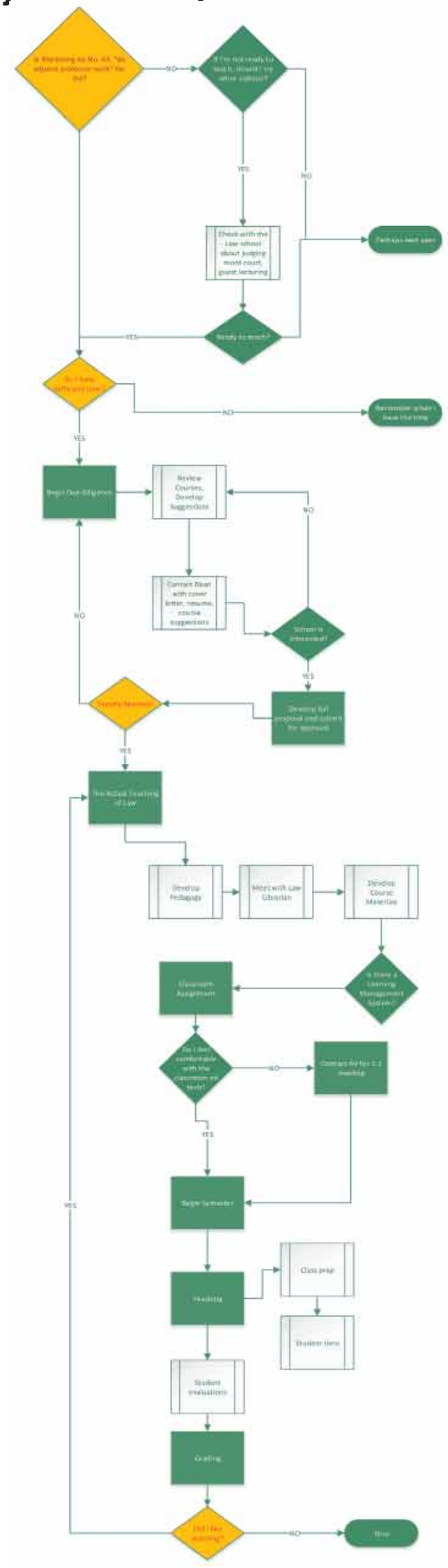
3. Gerald Hess, *Hearts and Heads: The Teaching and Learning Environment in Law School*, 52 J. Legal Education 75 (2002).

4. Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice in Undergraduate Education*, AAHE Bull. (Mar. 1987) p. 3.

5. https://www.surveymonkey.com.

6. "Flip teaching or a flipped classroom is a form of blended learning in which students learn new content online by watching video lectures, usually at home, and what used to be homework (assigned problems) is now done in class with teachers offering more personalized guidance and interaction with students, instead of lecturing. This is also known as backwards classroom, flipped classroom, reverse teaching, and the Thayer Method." (http://en.wikipedia.org/wiki/Flip_teaching).

## A Decision Tree/Flow Chart for the Adjunct Faculty Decision Process



# BURDEN OF PROOF

BY DAVID PAUL HOROWITZ

**David Paul Horowitz** (david@newyorkpractice.org) has represented plaintiffs in personal injury cases for more than 25 years and is "of counsel" to Ressler & Ressler in New York City. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), as well as the 2008 and forthcoming 2014 Supplements to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches *inter alia*, New York Practice at Columbia Law School and Brooklyn Law School. He serves on the Office of Court Administration's Civil Practice Advisory Committee, as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee, and is a frequent lecturer and writer on these subjects.

# "Heaven?" Part 2

## Introduction

Last issue's column reviewed some of the rules of the Commercial Division, including some contained in the new Preliminary Conference form that has been in use since June 2, 2014. This column continues my exploration of the Commercial Division Rules and directives in the Preliminary Conference form, focusing on expert disclosure.

## Expert Disclosure in the Commercial Division

I reviewed the new Rule 13(c):

> Rule 13. Adherence to Discovery Schedule, Expert Disclosure.
>
> (c) If any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure – including the identification of experts, exchange of reports, and depositions of testifying experts – all of which shall be completed no later than four months after the completion of fact discovery. In the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objection with the court.
>
> Unless otherwise stipulated or ordered by the court, expert disclosure must be accompanied by a written report, prepared and signed by the witness, if either (1) the witness is retained or specially employed to provide expert testimony in the case, or (2) the witness is a party's employee whose duties regularly involve giving expert testimony. The report must contain:
>
> (A) a complete statement of all opinions the witness will express and the basis and the reasons for them;
>
> (B) the data or other information considered by the witness in forming the opinion(s);
>
> (C) any exhibits that will be used to summarize or support the opinion(s);
>
> (D) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (E) a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and
>
> (F) a statement of the compensation to be paid to the witness for the study and testimony in the case.
>
> The note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Expert disclosure provided after these dates without good cause will be precluded from use at trial.

Expert disclosure is also addressed in the new Commercial Division Preliminary Conference form:

> IV.(i) EXPERT DISCOVERY (if any):
>
> Pursuant to the Commercial Division Rules 13(c) and 8 (*available at http://www.nycourts.gov/rules/trial courts/202.shtml#70*), which mandate consultation with opposing counsel, the Court hereby ORDERS that if any party intends to introduce expert testimony at trial or in support of a motion for summary judgment, the parties, no later than thirty (30) days prior to the completion of fact discovery, shall confer on a schedule for expert disclosure – including the identification of experts, the agreement to exchange expert reports and the timetable for the deposition of testifying experts. Expert disclosure shall be completed no later than four (4) months after the completion of fact discovery.
>
> In the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objections with the Court.
>
> *The note of issue and certificate of readiness may not be filed until the completion of expert disclosure.*

## Expert Disclosure Under the CPLR

The Commercial Division's rules for expert disclosure were utterly foreign to me. I was familiar with CPLR 3101(d)(1)(i):

> (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.[1]

I knew that CPLR 3101(d)(1)(iii) permits additional expert disclosure, but only in very limited circumstances:

> (iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate.[2]

Additional disclosure is typically ordered where one party's expert has the opportunity to examine evidence, after which time the evidence is altered or destroyed. This prevents the opposing party's expert from examining the evidence. In this scenario, courts generally order that the expert who examined the evidence produce to the other side, after redacting any opinions, the expert's report, if one was written, together with all other materials pertaining to the examination. Thereafter, the expert is produced for deposition to be questioned about factual observations and findings, but not opinions.

## Separate Time Periods for Fact and Expert Disclosure

Before delving into the differences between the scope of expert disclosure in the Commercial Division and in all other civil cases in Supreme Court, there is a notable innovation in Commercial Division pretrial practice: "Expert disclosure shall be completed no later than four (4) months after the completion of fact discovery."[3]

Long the practice in federal court, mandating that all fact disclosure be completed before parties are required to have their experts opine clearly makes good sense. What is remarkable is that this is a recent innovation in state court practice; equally remarkable is that the practice exists only in the Commercial Division.

Requiring that all fact disclosure be completed before the time to conduct expert disclosure begins, and then establishing a time period for expert disclosure for all parties, eliminates many of the difficulties practitioners routinely encounter in civil practice. The "*Singletree/Rivers*"[4] issue of the timing of the exchange of expert information when a previously undisclosed expert offers an affidavit either in support of, or in opposition to, a summary judgment motion would, for all practical purposes, be a thing of the past. Equally important, parties no longer would be forced to choose between exchanging experts without all of the factual testimony, documentation, data, and other matter available through formal disclosure in hand, or delaying the expert exchange at the risk of preclusion for untimeliness.

However, the rule mandates pre-note of issue expert exchange by all parties, something the *Rivers* court[5] found to be just one of a number of acceptable deadlines for expert disclosure, and something not required by a plain reading of CPLR 3101(d)(1)(i).

## Objecting to Expanded Expert Disclosure in the Commercial Division

Portions of the Commercial Division rules on expert disclosure clearly conflict with the statutory provisions of the CPLR. All first-year law students learn that, where a statute and court rule are in conflict, the statute controls: "[I]t is well established that, in the event of a conflict between a statute and a regulation, the statute controls."[6] So, can the Commercial Division rules trump the CPLR?

The answer is found in identical language in both Rule 13 and Section IV. of the Preliminary Conference form:

> In the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objections with the Court.

Both Rule 13 and the Preliminary Conference form acknowledge the right of an attorney to object to the expert "procedure or timetable."[7] It would, of course, be meaningless to provide for a conference to discuss objections in the absence of a legal basis to both make, and prevail upon, an objection to the Commercial Division's expanded expert disclosure.

A change in the language regarding the exchange of expert reports from the wording used in Rule 13 to the wording used in the Preliminary Conference form is informative: Rule 13 states:

> . . . the parties shall confer on a schedule for expert disclosure – including the identification of experts, exchange of reports, and depositions of testifying experts . . .[8]

**Expanded expert disclosure does increase the cost of disclosure and may impose a real burden.**

The Preliminary Conference form, drafted after Rule 13, states the parties

> . . . shall confer on a schedule for expert disclosure – including the identification of experts, the agreement to exchange expert reports and the timetable for the deposition of testifying experts.[9]

The difference? The language in the form refers to "the agreement" to exchange reports and to a timetable for expert depositions. The reason? Because the court does not have the authority to order either the exchange of reports or deposition of experts, absent "a showing of special circumstances."[10] However, where the parties enter into an "agreement" to follow the Commercial Division's expanded expert disclosure, the authority of the court to order the disclosure is no longer an issue.

The requirement that "[i]n the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objections with the Court" places the burden of objecting to the expanded expert disclosure on the party seeking to enforce the statutory limitations on expert disclosure. The party objecting to expanded expert disclosure beyond that required by the CPLR must request

a conference with the court. At the conference, the objecting party must, in essence, tell the court that the court's procedural rules and practice exceed what is permitted by statute, and it therefore declines to agree to follow them. This is not the easiest thing to do, even for seasoned litigators, and it is unfortunate that the burden falls on the objecting party, rather than on the party seeking expanded expert disclosure.

## Conflicting Practices

Areas where the rules governing experts in the Commercial Division diverge from, and conflict with, the CPLR include:

1. that experts be deposed;[11]
2. that a report, prepared and signed by the expert, be exchanged;[12]
3. that the report contain any exhibits that will be used to summarize or support the opinion(s);[13]
4. that the report contain a list of all publications authored by the expert in the previous 10 years;[14]
5. that the report contain a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years;[15] and
6. that the report contain a statement of the compensation to be paid to the witness for the study and testimony in the case.[16]

The fact that these requirements are in conflict with the CPLR does not, of course, mean that they should be rejected out of hand. These same requirements have been followed in federal courts by litigators for many years, and many will no doubt argue that they are not just good practice but represent the "best practice."

That being said, expanded expert disclosure does increase the cost of disclosure. This may be of little concern in a multimillion (or billion) dollar commercial matter, but it may impose a real burden in a case that meets, but does not significantly exceed, the $25,000 monetary threshold currently in place in three of the counties with Commercial Divisions.

## Conclusion

My review of the Commercial Division Rules will conclude with next issue's column. At that time you can decide if the Commercial Division is, or is not, heaven.

Until then, as the days grow shorter, but hotter, I wish everyone a relaxing and enjoyable summer. And no judgments if you don't get around to reading this until after Labor Day. ■

1. CPLR 3101(d)(1)(i).
2. CPLR 3101(d)(1)(iii).
3. Commercial Division Preliminary Conference form Section IV.(i).
4. *Constr. by Singletree, Inc. v. Lowe*, 55 A.D.3d 861 (2d Dep't 2008); *Rivers v. Birnbaum*, 102 A.D.3d 26 (2d Dep't 2012).
5. *Id.*
6. *Sciara v. Surgical Assoc. of W.N.Y., P.C.*, 104 A.D.3d 1256 (4th Dep't 2013) (citation omitted).
7. Presumably, objection may be raised to both the procedure and the timetable.
8. Rule 13.
9. Commercial Division Preliminary Conference form Section IV.(i).
10. CPLR 3101(d)(1)(iii).
11. Rule 13(c).
12. *Id.*
13. Rule 13(c)(C).
14. Rule 13(c)(D).
15. Rule 13(c)(E).
16. Rule 13(c)(F).

**Editor's note:** We regret to inform our readers that Gertrude Block is retiring from writing "Language Tips." Her column was always a delight – smart, insightful and witty – and we will miss her. As a tribute to her work, we are reprinting Skip Card's profile of Ms. Block, which first appeared in the September 2006 *Journal*.

# Writers' Block

## The *Journal* Peeks Behind the Column to Meet One of the Nation's Most Trusted Legal-Writing Advisers: Gertrude Block

### By Skip Card

Inside her tiny University of Florida office, language expert Gertrude Block logs onto email and reads yet another plea from a lawyer who isn't quite sure how to put his legal expertise into words.

Some past examples from Block's in-box: An attorney wants to know if "ground for divorce" is preferable to "grounds" if there is only one cause. Another seeks the linguistic differences among the terms lawyer, attorney and counselor. One has a question about the Latin legalese "assuming arguendo." And yet another is chiming in on the simmering debate about the proper salutation for business correspondence now that "Dear Gentlemen" seems politically incorrect.

Block tackles each query, calling upon her considerable experience in linguistics and law, often delving into a host of thick reference works in the campus law library. She enjoys the work but, more to the point, she knows she provides a service to the legal profession. A good lawyer must learn to use language effectively and correctly, Block believes.

"It can't be done without words," she said. "Their tools are words."

Making distinctions about word usage and settling disputes over the proper use of language – specifically the language of the law and the courtroom – is at the core of Block's work as a linguist. Her book *Effective Legal Writing for Law Students and Lawyers*, originally published in 1981, was the first college guide designed to teach lawyers and would-be lawyers to write with precision. Today, her language columns appear in five law journals, including the New York State Bar Association *Journal*.

**Skip Card** is the owner/operator of Hookline Fish Co., outside Kingston, N.Y., where he produces Northwest-style smoked salmon for markets from New York City to the Catskills. Previously, he reviewed NYC public schools for InsideSchools and wrote the "Elementary Dad" column. He has written for the *Journal* on topics ranging from baseball to environmentalism.

Block has also written numerous articles for legal and lay periodicals, conducted seminars on legal writing, served as an expert witness and consultant, and spoken before bar associations and other groups around the country. But it's through her advice columns that she has most endeared herself to New York attorneys eager to sound competent and professional.

## Required Reading

Some attorneys consider Block's advice required reading.

"I read it every month," said Edmund Rosenkrantz, a partner in the New York City firm Migdal, Pollack & Rosenkrantz and a Block fan. "It's interesting, and it's witty."

"I'm very particular in my own documents," he said. "I like to be very precise." Other admirers of Block's work (call them "Blockheads," perhaps – although Gertrude herself likely would shudder at such coinage) say it's heartening to know someone is trying to halt the slow erosion of language skills in the legal profession.

Block's style also appeals to many lawyers. Her columns bear an air of competent authority and politeness more associated with "Dear Abby" than William Safire.

In answer to one writer who began his letter, "Please do something about the improper use of the word *parameter*," Block replied with a characteristic blend of humility and certitude: "Your faith in my ability to affect the way Americans use words is gratifying, but unfortunately not justified."

When a lawyer challenged Block's answer to a question about double negatives and ambiguity by citing the "Square of Oppositions" (a fancy bit of Aristotelian logic), Block replied, "I confess that I was unaware of the 'Square of Oppositions.' The problem with an argument based on logic, however, is that language is not always based on logic."

Block ended her reply by citing examples from Chaucer and Shakespeare to support her argument.

## Bridge to Linguistics

Despite her reputation and credentials, Block freely admits she stumbled into her career almost by accident. Her early schooling in Pennsylvania, Block said, took place "in a time when you studied grammar," and included four years of Latin. She attended Pennsylvania State University, earned a bachelor's degree in economics (plus a Phi Beta Kappa key), then took a job as an assistant buyer.

After marrying Seymour Stanton Block, she soon settled into a life dedicated to raising two children. The couple moved to Florida in 1944. Other dates, such as the year of Block's birth, her graduation or the couple's wedding, are not pertinent public information, Block said.

"I want people to think I'm young enough to be relevant but old enough to know what I'm talking about," she said.

Family responsibilities ebbed by the time the couple's youngest child was in high school, and Block began looking for something else to do. Correcting lawyers' language was not on her list.

"I was thinking of playing a lot of bridge," Block admitted. The thought of a wife devoted to acquiring international master points and studying the Stayman Convention horrified her husband, who felt it was a waste of time when the University of Florida offered courses near their Gainesville home. Block agreed.

"Intellectually, I needed something," Block said. "Bridge wouldn't do."

Back in college, Block earned a master's degree in English at the University of Florida, became fascinated with linguistics and worked toward earning her doctorate. But as she was set to defend her dissertation, her academic advisor transferred to another university, and the linguistics department began to emphasize exotic languages over semantics. She never earned a Ph.D.

Block began teaching English and humanities at the University of Florida, but knew her lack of a doctorate would keep her from receiving tenure. However, in the late 1970s, the university's College of Law started to put more focus on the written word, requiring applicants to submit essays and grading students in greater part on their ability to write and use language. The law dean phoned Block and asked her to join the faculty on a temporary basis, saying she could remain if the arrangement proved satisfactory to all.

Block started advising students, then began tutoring, then established a writing clinic. "It was pretty clear who needed help and who didn't," she recalled. The clinic soon proved extremely popular with students.

"As word spread that it really helped their grades, I found students sitting in the back of the class who didn't belong there," Block said.

Teaching English to lawyers soon became a career. Block attended all the basic law courses, where she learned legal terminology and studied the nuances of case law. When she couldn't find a suitable textbook for her English course, she wrote her own. The pioneering *Effective Legal Writing* is now in its fifth edition.

Block continued to teach as a writing specialist until she retired in 1990 and became an emeritus lecturer. Today, she maintains a tidy office ("I get distressed if I have a mess around me") at the Gainesville campus, where she works four or five days a week, mostly checking email, researching answers to questions that will appear in her columns, and writing.

> The problem with an argument based on logic, is that language is not always based on logic.

As noted, her office isn't spacious. "If you picture a big closet, that's it," she said. "If I have two visitors, one of them has to stand outside."

Block researches, writes and rewrites her language columns – a different version for each of the five law journals that publish it – at the university campus. Often, the column is set aside for a few days so Block can re-read her own words with a fresh eye.

"I never send my first draft," she said.

Since retiring from full-time teaching, Block has focused more on writing and publishing. Her book *Legal Writing Advice: Questions and Answers*, largely a collection of columns, was published in 2004 by W.S. Hein & Co. Today, Block is writing a new work, what she calls a "fun book" about peccadilloes in language.

Outside the office, she spends time with her family, including a new great-grandchild.

## Gertrude's Rules

Part of Block's appeal as a judge in the court of language law stems from her Pennsylvania-born practicality and her willingness to see the English language as flexible and capable of growth.

"We all want the language to stay as it was when we learned it as children," she said, "which means the language of people who are long-since dead."

As a result, Block pooh-poohs several grammar rules that have been wrongly foisted upon past generations.

She sees no stigma attached to beginning a sentence with "And" (so long as it's not overused). She does not cringe at a split infinitive ("to boldly go"). After "compared," she might place either a "with" or a "to," regardless of whether the sentence stresses similarities or differences. She has given up on changing "I could care less," "more importantly" and the sentence-starting "Hopefully," grudgingly giving these grammatically incorrect phrases status as rule-bending idioms.

"In language, public acceptance always overcomes grammar, style, and even logic," she has written.

Yet, Block does admit to having "a sense of discomfort" about some words or phrases.

She doesn't care to hear people use "uninterested" or "healthy" when they mean "disinterested" or "healthful." She cringes at careless past-tense constructions like "drug" and "stunk," which ought to be "dragged" and "stank."

"That bothers me," she said. "It's not the way I learned it."

But Block also is quick to admit her own mistakes. She is chagrined that she long ago wrote "fragrant" in a column when she meant to write "flagrant." More famously, she gave a hilariously incorrect response when a New Jersey reader asked about the meaning of "agita."

Noting that she could find nothing in her usual reference sources, she ventured a "wild guess" that agita was a New York dialect pronunciation of "agitur," and therefore "the third person singular Latin subjunctive form of a verb meaning 'an action has been brought.'"

That reply, published in Block's "Language Tips" column in the New York State Bar Association *Journal*, drew an avalanche of shocked responses from Gotham attorneys quick to point out that "agita" was slang for mild heartburn or indigestion, usually used figuratively to mean anxiety or distress. Notably, Block was later able to trace the word's etymology and point out that its roots were Latin, not Italian or Yiddish as many readers claimed.

"The hundreds of letters I received left me with mixed feelings of humility and gratitude," Block recounted in *Legal Writing Advice: Questions and Answers*, "– the latter because I had not realized that so many New Yorkers read my column!" ■

**David B. Saxe** has been an Associate Justice of the Appellate Division, First Department, since 1998.

# A Dog's Tale

## By David B. Saxe

Not that long ago, the *New York Law Journal* reported on a pet custody case[1] that, not surprisingly, involved strong passions from the participants. Fortunately for all concerned, Justice Matthew Cooper of the State Supreme Court, New York County, fashioned a settlement that offered a template for future controversies. This matter caused me to recall similar experiences I had when I sat as a matrimonial judge in New York County. The following is a composite treatment of some of those matters that I had buried but later realized that, even with time, the issues and passions remain the same and the stories deserve retelling.

The Smiths'[2] divorce was on my calendar for trial, and with all the expert witnesses expected to testify, a four- to five-week trial was probable, and all my other ready cases would then be stacking up. My statistics would surely take a beating, I thought. So, I began to mull over the unsuccessful attempts that I had previously made to settle this case and whether possibilities for settlement might still exist.

In matrimonial cases, more than any other type of civil litigation, a judge obtains unique insights, especially as a result of impromptu conferences held in the robing room or in chambers, to deal with all the petty disputes that arise between spouses in the process of getting divorced.

The Smiths had been officially warring for more than two years, since the time Mrs. Smith had been presented with a summons and complaint instituting a divorce proceeding on the grounds of cruelty[3] – a grab bag of all sorts of marital discontents. Mrs. Smith countered with her own list of grievances. Repeated conferences with the Smiths and their lawyers had been held by me and my law clerk in the hope of arriving at an overall resolution of the case, but the acrimony between the parties had all but ruled that out. Voluminous motion practice followed and had continued unabated; but, still, I held out hope for a cease-fire.

As soon as I sat down at my desk, my clerk pushed open the heavy wooden door to the robing room, bringing the morning's calendar and some good news.

"Judge," said the clerk, "I think they're making some progress; the lawyers want to speak to you."

"Fine," I said. "Send them in. Tell them to bring their clients, too."

I had learned through hard experience that some matrimonial clients mistrusted their own lawyers and so it was a good idea to keep the litigants fully informed.

In a moment, the two lawyers, accompanied by their clients, entered the robing room and took seats at the opposite sides of the long, rectangular table. The husband's lawyer took the seat to my left and ushered his client to the chair next to him.

"Good morning, your honor," said the lawyer as he sat down and surveyed the less than snappy quarters. "When are they going to give you guys some decent furniture?"

I murmured something unintelligible in response. It had not taken me long to develop a dislike for this lawyer – due especially to his sarcastic tone, which was usually directed at the less than enviable economic position of the judiciary and the fact that he probably spent more garaging his car each month than most judges pay in rent or maintenance. In fact, at the last conference, he had made a snide comment about my unfashionable button-down shirts. I thought, however, that although this attorney was expensively attired and well manicured, he had a quality that reminded me of the bookies who used to hang out at the Jerome Avenue Cafeteria in the Bronx when I was a boy.

At the other side of the table, the wife's lawyer, a diminutive, middle-aged woman in an unfashionable gray suit, sat expressionless next to her more fashionably dressed client.

"So, what's the story?" I asked. "I'm ready to begin this trial unless you have something to tell me."

"Your honor," said the husband's lawyer, "we have actually reached agreement on almost everything: maintenance, equitable distribution, the co-op on Central Park West, the condo in Palm Beach, medical coverage, insurance, and custody and visitation."

"So what's holding up the settlement?" I asked quizzically.

"Custody and visitation," interjected the wife's counsel.

"I thought you said that was settled," I said, looking harshly at the husband's lawyer, only too happy to catch him in an error.

"No, judge, that's been settled. My client doesn't want the kids; she can have them. We never wanted custody."

"Well, then, what's this about custody and visitation?" I asked, feeling my annoyance level rising.

"It's about the family dog, your honor," explained the husband's lawyer. "My client owned this dog before he even knew Mrs. Smith."

"He may have purchased the dog, but that's the last thing he ever did for her," snapped Mrs. Smith, a thin, intense woman in her early 40s, who seemed to be brimming with anger.

"She's a damn liar," said her husband, his normally calm and controlled demeanor contorting into lines of pure rage. He rose from his chair, glowering at his wife.

"Sit down, sit down," said his lawyer, rising to place his hands on his client's shoulders and gently ease him back into the chair.

"What's so special about this dog?" I asked.

"Fifi is special, your honor. She's a champion Bichon Frisé, and she's been with me since she was about four or five months old. I can't imagine living without her."

"He's lying, judge," interrupted Mrs. Smith. "Your honor, this man hasn't walked the dog even once since we've been married. Not only that – he doesn't feed the dog, doesn't play with her, doesn't take her to the vet or to exercise class. He's worse than an absentee father. Fifi has been my dog for years and he knows it. He's only trying to extract the last ounce of blood from me."

"How can she get away with this garbage!" screamed Mr. Smith, looking at his lawyer. "She's got the co-op, my condo, my kids and my stocks. I don't even have a place to live and now she wants my dog too."

"Take it easy," said his lawyer. "We can work this out."

"I don't know what I'll do if I lose her," sobbed Mr. Smith. "I don't know what I'll do. You know, she sleeps right on my back," he said to no one in particular.

"Better her than me," snapped his wife.

"Let's stop the recriminations right now," I said sternly, adding, "Do you mean that I might have to spend three weeks or more trying this case, all because of a stupid mutt?"

"She's no mutt," Mrs. Smith said, glancing menacingly at me, "she's a champion Bichon Frisé."

"Fifi doesn't need a shrink," said Mrs. Smith. "Anyone with an idea like that ought to have his head examined."

"Your honor," interrupted the wife's attorney, "there's really no reason for everything we've worked so hard for to break down now. My client has been very reasonable in her requests."

"Extortion, that's what I'd call her demands," blurted out her husband.

"Can't you keep your mouth shut for even a minute?" growled his wife from across the table.

"Enough, enough," I shouted, trying to squelch this outburst.

"Anyway," said the wife's lawyer, "my client and Fifi are inseparable. She takes care of every aspect of the little pooch's life."

"Like hell she does," roared Mr. Smith. "The only thing she does is have my driver take her to the vet, her exercise class, and her groomer. This she calls concern?"

"All right," I said, attempting to regain some control and authority over this fractious meeting. "Get the dog down here right away."

All four participants stopped and stared at me for a second.

"You want the dog brought down to court?" the husband's lawyer asked quizzically.

"Did you turn off your hearing aid?" I asked the dapper counsel.

With that, the parties were ushered out of my robing room and directed to produce the dog. Mrs. Smith went to call the family driver to fetch Fifi.

In less than half an hour, both sides and their lawyers were back in my robing room, this time accompanied by Fifi, a white Bichon Frisé dog, held on its leash by the family driver. I noticed that the dog was shaking uncontrollably, and I sought to allay the anxiety of the small animal by leaning down and offering the dog some leftover egg on a roll. Suddenly, the dog leapt for the treat, almost tearing off my thumb and forefinger in the process.

"That little son-of-a-bitch almost got me!" I exclaimed.

"What did you call my dog?" Mrs. Smith yelled. "You have no right to call her names like that."

"Calm down," I said. "This is what we'll do. You," I said, pointing to the husband, "stand at this end of the room. And you," motioning to the wife, "stand at the other end. Now," signaling to the driver holding Fifi, "you stand right here in the center of the room, and when I say three, you release the chain and we'll see where the dog goes. One, two, three."

At that point, the driver let go of the leash. Almost instantaneously, each party entreated the poor dog with their own special brand of affection.

"Here, sweet Fifi, here, darling girl," murmured Mrs. Smith.

"Oh Fifi, oh Fifi, come to daddy," entreated Mr. Smith.

With each call, the poor dog would take a step toward the caller, only to retreat and start in the other direction at the call of the other spouse. In a few minutes, the dog was totally confused and passed a small puddle on my robing room carpet. Just as I was about to utter some unprintable exclamation about this poor creature, I noticed the protective glance of Mrs. Smith and thought better of having another confrontation with her.

"All right, this isn't working," I said. "This is what I'm going to do. I'm going to appoint an animal behaviorist to do a forensic and examine Fifi and both of you, too, and make a report to me as to which one of you will take care of her best."

"Fifi doesn't need a shrink," said Mrs. Smith. "Anyone with an idea like that ought to have his head examined."

"You're trying my patience, Mrs. Smith," I said. "Keep those kinds of remarks to yourself."

"Your honor," said the husband's lawyer, "we reluctantly find ourselves in agreement with Mrs. Smith on this issue. My client does not want some shrink prying into his life, his habits, talking to his neighbors, you know, things like that, all to determine whether he's a fit parent for a dog."

With the prospect of a month-long trial staring me in the face, I tried desperately to think about alternatives to what lay ahead.

"I've got it. Shared custody. That's it. I'm awarding shared custody to both of you. Fifi will live with one of you from Monday through Wednesday afternoon and with the other until Friday evening. You'll alternate weekends."

"Well, I don't know," said Mrs. Smith. "I'm not sure he can take of her properly. Can I come back and seek sole custody in the future?"

"Sure, sure," I said, "if it's not working out. But, it's in everyone's interest, Fifi's too, to make an effort."

"And judge," continued Mrs. Smith, "I'd like you to order my husband not to use his recreational drugs when Fifi is around."

"That's a lot of crap, judge," Mr. Smith said. "Maybe I once smoked a little grass. That didn't hurt the dog."

"And, keep your hands away from her private parts, too," said Mrs. Smith.

"Judge, you see how crazy she is, the next thing you'll hear her say is that I'm sexually abusing the dog."

"Don't tempt me," said Mrs. Smith.

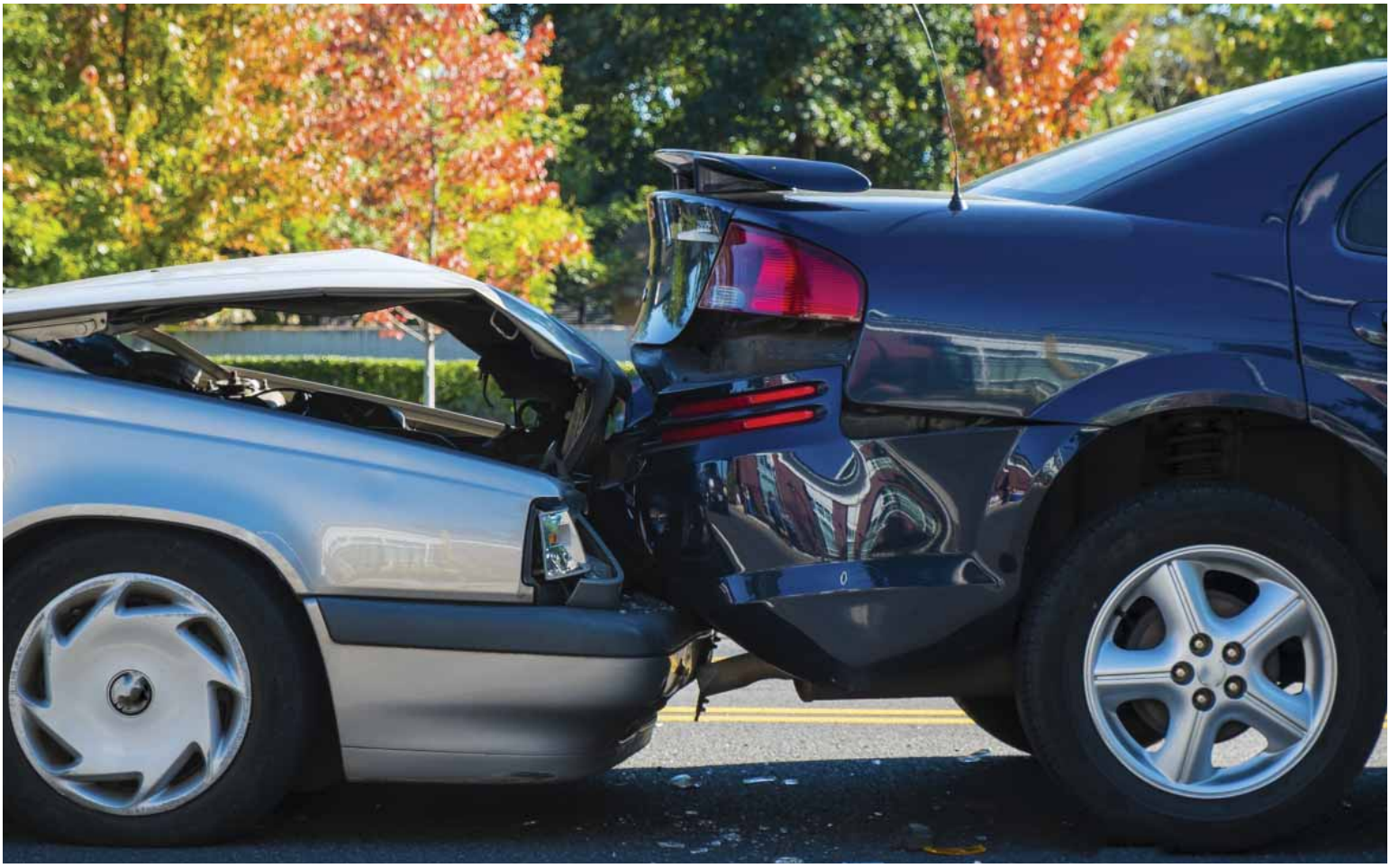
"All right, that's it," I said, with a ring of finality. "Shared custody it is. Put everything else on the record, the matter is settled. When you're finished, I'll do an uncontested divorce."

Exhausted by the morning's events, I sat in my chair for what seemed like a long time after everyone had left the robing room. I thought about the extent to which people getting divorced argue about almost anything, perhaps perversely to keep the marriage from really being over. And I wondered what other unusual controversies awaited me. ■

1. *Travis v. Murray*, 42 Misc. 3d 447 (Sup. Ct., N.Y. Co. 2013), reported in the N.Y.L.J. (Dec. 11, 2013), p. 21.

2. Name is fictitious.

3. Prior to the enactment of the law establishing irretrievable breakdown as a ground for divorce (*see* Domestic Relations Law § 170(7), enacted by 2010 N.Y. Laws ch. 384, eff. Oct. 12, 2010).



# 2013 Review of UM/UIM and SUM Law

**By Jonathan A. Dachs**

Once again, I am honored to present this annual survey of developments in the area of uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) law and legislation from the previous year. Not surprisingly, 2013 was another busy and significant year in this ever-changing and highly complex area of the law.

## GENERAL ISSUES

### Insured Persons

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

### "Named Insured"

By Chapter 11 of the N.Y. Laws of 2013, effective April 16, 2013, and applicable to any policies issued or renewed on or after that date, N.Y. Insurance Law § 3420(f) (Ins. Law) was amended by adding a new subdivision (5), which requires that all policies under which a fire department, fire company (as defined in General Municipal Law § 100), ambulance service, or "voluntary ambulance service" (as defined in Public Health Law § 3001) is a named

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insured shall provide SUM/UIM coverage to an individual employed by or who is a member of such entities and was injured by an uninsured or underinsured motor vehicle while acting in the scope of his or her duties for the named insured entity, except with respect to the use or operation by such individual of a motor vehicle not covered under the policy.[1]

Accordingly, the definition of "insured" in the Supplementary Uninsured/Underinsured Motorists Endorsement – New York was amended (effective September 25, 2013) to include the following new subdivision:

> (2) any person while acting in the scope of that person's duties for you, except with respect to the use and operation by such person of a motor vehicle not covered under this policy, where such person is:
> (i) your employee and you are a fire department;
> (ii) your member and you are a fire company, as defined in the General Municipal Law section 100;
> (iii) your employee and you are an ambulance service, as defined in Public Health Law section 3001; or
> (iv) your member and you are a voluntary ambulance service, as defined in Public Health Law section 3001.

### Residents

In *A. Central Ins. Co. v. Williams*,[2] the court noted, "While '[a] person can have more than one residence for insurance coverage purposes,' residency in this context generally entails something more than mere temporary or physical presence, and requires some degree of permanence and intention to remain."

### Insured Events

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

### Use or Operation

In *Allstate Ins. Co. v. Reyes*,[3] where the respondent was bitten on her breast by a dog that reached out through an open window in a parked car (in a no-parking zone), the court held that the term "use" in the definition of an "uninsured motor vehicle" (i.e., "ownership, maintenance or use") did not encompass the facts of that case. As explained by the court in granting the insurer's petition to stay arbitration,

> [u]se of an automobile encompasses more than simply driving it, and includes all necessary incidental activities such as entering and leaving its confines. To satisfy the requirement that it arose out of the "ownership, maintenance of use of" a motor vehicle, the accident must have arisen out of the inherent nature of the automobile and, as such, inter alia, the automobile must not merely contribute to the condition which produces the injury, but must, itself, produce the injury. "[T]he [vehicle] itself need not be the proximate cause of the injury," but "negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury." "To be a cause of the injury, the use of the motor vehicle must be closely related to the injury."

Here, the court concluded that the claimant's injuries did not result from the inherent nature of the vehicle, nor did the vehicle itself produce the injuries. Rather, the injuries were caused by the dog, and the vehicle "merely contributed to the condition which produced the injury, namely the location or situs for the injury."[4] The causal relationship between the car and the incident was lacking.

> Use of an automobile encompasses more than simply driving it.

The Third Department, in *Kesick v. New York Central Mutual Fire Ins. Co.*,[5] held that a question of fact existed as to whether the claimant state trooper/paramedic's alleged injuries, which he sustained in the course of rescuing the victim of a motor vehicle accident, who was driving an underinsured vehicle, and lifting that individual out of his damaged car, arose out of the use of an underinsured motor vehicle. The plaintiff's SUM claim was denied by his insurer on the ground, *inter alia*, that he was not injured as a result of a motor vehicle accident.

The court rejected the insurer's view that the insured's injuries must be *directly* caused by an accident that arose out of the use of a vehicle and its related assertion that the accident complained of here occurred only at the time of the attempted post-accident rescue. Construing the language of the policy liberally, and resolving ambiguities in favor of the insured, the court concluded that the "use" of the underinsured vehicle was its operator's negligent operation of his vehicle, and the "accident" occurred when he collided with the other vehicle. The court then noted that the plaintiff invoked the doctrine of "danger invites rescue," which imposes liability upon a defendant who "by his [or her] culpable act has placed another person in a position of imminent peril which invites a third person, the rescuing plaintiff, to come to his [or her] aid,"[6] to establish the requisite causal connection between the motor vehicle accident and the plaintiff's injuries. In order for that doctrine to apply, the rescuer must have had a reasonable belief that the person being rescued was in peril,[7] and the reasonableness of a decision to intervene is generally a question for the fact finder.[8]

With respect to the "danger invites rescue" doctrine, the court held that if the facts here warranted application of the doctrine, the plaintiff's injuries were not so remote in either time or space to the use of the underinsured vehicle as to preclude a finding of proximate cause as a matter of law. As explained by the court, "[t]here is no dispute that Prindle's negligent use of his vehicle directly caused the accident that led to Williams' injuries which,

in turn, led to plaintiff's intervention." Thus, considering the open question of the applicability of the "danger invites rescue" doctrine and liberally construing the provisions of the SUM policy in the plaintiff's favor, the court held that the state Supreme Court properly denied NYCM's motion for summary judgment dismissing the complaint.

### "Motor Vehicle"

The court, in *State Farm Mutual Automobile Ins. Co. v. Fitzgerald*,[9] addressed the question of "whether a police vehicle qualifies as a 'motor vehicle,' as that term is used in a certain supplementary uninsured/underinsured motorist endorsement," and held that it does.

In that case, Fitzgerald, a police officer, was riding as a passenger in an NYPD vehicle, which was driven by a fellow officer, Knauss, when he was injured in an accident with an underinsured vehicle. Fitzgerald demanded SUM arbitration under Knauss's policy with State Farm, which defined an "insured" as the named insured (i.e., Knauss) and "any other person while occupying . . . any other motor vehicle . . . being operated by [Knauss]." State Farm denied the claim and petitioned for a permanent stay of arbitration on the ground that the police vehicle involved in the accident was not a "motor vehicle" for purposes of the endorsement.

In denying the petition, the court observed that under Ins. Law § 3420(e), every automobile liability insurance policy covering a "vehicle as defined in [Vehicle & Traffic Law § 388 (VTL)]" is required to insure against liability for death or bodily injury. However, police vehicles are specifically excluded from the definition of a "vehicle" in VTL § 388(2). Thus, in its 1988 decision in *State Farm Mutual Auto. Ins. Co. v. Amato*,[10] the Court of Appeals concluded that the City of New York had no statutory obligation to insure police vehicles against liability for death or bodily injury. Critically, however, the Court observed that *Amato* does not stand for the proposition that VTL § 388(2) contains the exclusive definition of a "motor vehicle." Rather, the issue in this case was whether the term "motor vehicle," as used in Knauss's State Farm uninsured/underinsured motorist endorsement, includes police vehicles. As stated by the court,

> *Amato* is inapposite because that case was concerned with the City's obligation, as an unregulated self-insurer, to provide coverage to its police officers injured in police vehicles. If we were to apply *Amato* to this case, it would result in the denial of uninsured/underinsured motorist coverage virtually every time a police officer is injured in a car accident involving a police vehicle, especially since a municipality is under no obligation to provide such coverage to its police officers. This result would be in derogation of the Legislature's "grave concern that motorists who use the public highways be financially responsible to ensure that innocent victims of motor vehicle accidents be recompensed for their injuries and losses."[11]

Thus, the court concluded that, contrary to State Farm's contention, VTL § 125, which defines "motor vehicle" as "[e]very vehicle operated or driven on a public highway which is propelled by any power other than muscular power," and only excludes police vehicles in certain limited circumstances, rather than VTL § 388(2), should be used to define the term "motor vehicle" as it appears in the SUM endorsement. Indeed, this conclusion was fortified by a number of cases in which it was recognized that uninsured motorist coverage extends to all "motor vehicles," as defined by VTL § 125.[12]

### Exclusions

In *GEICO v. Avelar*,[13] the court held that the exclusion in the SUM endorsement for "bodily injury to an insured incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made, or is not a newly acquired or replacement vehicle covered under the terms of this policy" was not ambiguous, and should be construed according to its plain and ordinary meaning. Since the respondent was occupying a vehicle that she owned but was not covered under the subject policy, her demanded arbitration under the policy was permanently stayed.

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

UM, UIM and SUM endorsements require the claimant, as a condition precedent to the right to apply for benefits, to give timely notice to the insurer of an intention to make a claim. Although the mandatory UM endorsement requires such notice to be given "within ninety days or as soon as practicable," Regulation 35-D's SUM endorsement requires simply that notice be given "as soon as practicable." Liability policies generally contain similar notice provisions.

In *Rivera v. Core Continental Construction 3, LLC*[14] and *Ortiz v. Fage USA Corp.*,[15] the courts restated the well-settled rule that where an insurance policy requires that notice of an occurrence be given "as soon as practicable," notice must be given within a reasonable period of time under all the circumstances. An insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent, which, as a matter of law, vitiates the contract.

Generally speaking, notice given to an insurance broker (as opposed to an agent) is not deemed to qualify as notice to the insurer sufficient to comply with the notice provisions of the policy. Thus, in *Strauss Painting, Inc. v. Mt. Hawley Ins. Co.*,[16] the court held that the plaintiff's notice to its broker did not provide timely notice to the insurer, because there was no indication that the broker acted as an agent for the insurer or that the policy listed the broker as the insurer's agent. And, in *Penn Millers Ins. Co. v. C.W. Cold Storage, Inc.*,[17] the court observed that

"the mistaken belief of defendant's President that notice to its broker constituted notice to plaintiff [the insurer] does not excuse defendant's failure to comply with the policy's notice condition, nor does it constitute a material issue of fact in relation thereto."

In *310 East 74 LLC v. Fireman's Fund Ins. Co.*,[18] the court noted that the recent legislation that requires an insurer to show prejudice in order to rely upon a late notice defense (Ins. Law § 3420(a)(5), as added by 2008 N.Y. Laws chapter 388, § 2, effective January 17, 2009) does not apply to cases in which the pertinent policy was issued *before* the effective date of the statute.

Even where notice is untimely given, the delay may be excused in certain circumstances. In several cases decided in 2013, the courts analyzed the reasonableness of excuses for late notice in several different contexts, finding triable questions of fact in some cases[19] and rejecting the excuses in others.[20]

## Discovery

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

In *New York Central Mutual Fire Ins. Co. v. Librizzi*,[21] the parties stipulated to a temporary stay of arbitration of an SUM claim pending the completion of discovery. After the claimant/respondent complied with the insurer's discovery requests, the insurer demanded additional discovery. When the respondent refused and insisted on proceeding to arbitration, the insurer commenced a proceeding to direct the respondent to furnish additional authorizations. In rejecting the insurer's request, the court observed, "Discovery demands that are overly broad, are lacking in specificity or seek irrelevant documents are improper. 'The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one.'" The court concluded that the insurer's additional demands in this case were "overly broad and sought irrelevant material."

## Petitions to Stay Arbitration

### Filing and Service

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

In *Allstate New Jersey Ins. Co. v. Tse*,[22] the court held that the failure of the claimant's letters to include the requisite 20-day notice provision contained in CPLR 7503(c) rendered them insufficient as notice to arbitrate. The 20-day limitation period to contest the obligation to arbitrate did not start to run until a proper demand for arbitration containing the requisite language was served.

### Burden of Proof

In *Hertz Corp. v. Holmes*,[23] the court noted,

> The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which could justify the stay. Thereafter, the burden is on the party opposing the stay to rebut the *prima facie* showing. Where a triable issue of fact is raised, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue.[24]

Here, the documents submitted by Hertz in support of its petition demonstrated the existence of sufficient evidentiary facts to establish a preliminary issue justifying a temporary stay, and in opposition to the petition, the tortfeasor denied any involvement in the accident. Such evidence raised a triable issue of fact as to the alleged offending vehicle's involvement, which should have been determined at a hearing, at which the owner of that vehicle and its insurer should have been joined as additional respondents.

The *GEICO v. Martin*[25] court held that the petitioner established by admissible proof that a vehicle owned and insured by the respondents was involved in the accident. At the hearing, no objection was made to the admission of the police report containing the license plate number of the vehicle. Thus, that evidence was presumed to have been unobjectionable, and any error in its admission was deemed waived. In any event, the contents of the police report were held to be admissible under the present sense exception to the hearsay rule, as they were sufficiently corroborated by the respondent's testimony.

An insurer's failure to defend and indemnify its insured is the determinative factor in deciding whether the offending vehicle is uninsured.

## Arbitration Awards

### Scope of Review

In *Deluca v. Arch Ins. Group*,[26] the court stated, "Since a claim by an insured against an insurance carrier under an uninsured/underinsured motorist endorsement is subject to compulsory arbitration, the arbitrator's award is subject to closer judicial scrutiny under CPLR 7511(b) than it would receive had the arbitration been conducted pursuant to a voluntary agreement between the parties." As noted in several recent decisions, "'[t]o be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious.'"[27]

In *After v. GEICO Ins. Co.*,[28] the court stated:

> "[J]udicial review of arbitration awards is extremely limited." "An arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached. In addition, an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice." "An arbitrator is not bound by principles of substantive law or rules of evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be." Insofar as is relevant to the instant proceeding, pursuant to CPLR 7511(b)(1) (iii), a court may only vacate an arbitration award if the rights of the party moving to vacate the award were prejudiced by the arbitrator "exceed[ing] his [or her] power or so imperfectly execut[ing] it that a final and definite award upon the subject matter submitted was not made." "Such an excess of power occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power."

Thus, in that case, the court held that the state Supreme Court erred in vacating an arbitration award in favor of the claimant on the ground that it was contradicted by the SUM endorsement, noting that the parties agreed to be bound by the arbitrator's award, and nothing in the record indicated that the arbitration award violated a strong public policy, was irrational, or clearly exceeded a specifically enumerated limitation on the arbitrator's power.

In *Klein v. GEICO General Ins. Co.*,[29] the court held that the claimant/petitioner failed to establish entitlement to vacatur of the arbitrator's award pursuant to CPLR 7511(b)(1)(i) and (ii) on the ground of partiality or misconduct because he failed to present evidentiary proof of "actual bias" or the "appearance of bias" on the part of the arbitrator, or any misconduct.

## Statute of Limitations

In *New York City Transit Authority v. Hill*,[30] the respondent was injured in an accident that took place on September 8, 2004, while he was a passenger in an NYCTA bus that was struck by a car. He brought an action against NYCTA and the bus driver, as well as the owner and operator of the car. The owner of the car contended that the vehicle was stolen at the time of the accident, and successfully moved for summary judgment on that ground. An order was issued on April 23, 2009, dismissing the action and all cross-claims against him. On May 10, 2012, the respondent demanded uninsured motorist arbitration against NYCTA based upon the alleged liability of the driver of the stolen vehicle. The issue presented was whether the Demand for Arbitration served just over three years after the grant of summary judgment to the vehicle's owner, but more than 7-1/2 years after the accident, was timely.

The court first noted that the UM claim against NYCTA, a self-insurer, was subject to the six-year statute of limitations of CPLR 213(2) ["Actions to be commenced within six years . . . an action upon a contractual obligation or liability . . . ."]. The court then went on to note, "A claim for uninsured motorist benefits 'accrues either when the accident occurred or when the allegedly offending vehicle thereafter becomes uninsured.'" In this case, the respondent failed to establish an accrual date later than the date of the accident because the April 23, 2009, order granting summary judgment to the vehicle owner, "without more, established only that the owner of the offending vehicle was not liable to [respondent] in the

personal injury action and failed to provide any evidence as to the insurance status of that vehicle prior to the date of the order, including whether the vehicle owner's insurer had provided a defense." As explained by the court, "[a]n insurer's failure to defend and indemnify its insured is the determinative factor in deciding whether the offending vehicle is uninsured within the intendment of the Insurance Law." Accordingly, the court granted NYCTA's petition for a permanent stay of arbitration.[31]

## UNINSURED MOTORIST ISSUES

### Self-Insured Vehicles

In *Contact Chiropractic, P.C. v. New York City Transit Authority*,[32] the court recognized "the obligation of a self-insured to provide the same benefits as those required in an insurance policy." There is "no reason to treat the obligations of a self-insurer differently from those imposed on the owner of a single vehicle." Thus, "[i]t stands to reason that the intent of the legislature was not to impose a lesser duty on a public carrier which posts a bond than the duty imposed upon an owner who purchases insurance."

### Uninsured Vehicles

In *GEICO v. Ally*,[33] the respondent, a New York resident insured by GEICO, was injured when her vehicle collided with a vehicle owned and operated by a New Jersey resident and insured by Camden Fire Ins. Association. Camden Fire Ins. was not authorized to conduct business in New York but was controlled by Auto One Ins. Co., which is authorized in New York. Although Camden, pursuant to New Jersey law, offered bodily injury coverage to its insured, the insured declined such coverage, instead opting only for liability coverage for property damage. The respondent made a demand for arbitration seeking UM coverage under her own policy. GEICO petitioned to permanently stay arbitration on the ground that the tortfeasor was not "uninsured" because, pursuant to Ins. Law § 5107, Auto One was required to provide coverage for bodily injury even if its insured had declined such coverage in accordance with New Jersey law. The policy at issue provided that if an insured was in another state or Canada and, as a nonresident, became subject to higher limits than were shown on the Policy Declarations as a result of a motor vehicle compulsory insurance, financial responsibility, or similar law, then the policy would be interpreted to give the coverage required by the law. The coverage so given would replace any coverage in the policy to the extent required by the law for the insured's operation, maintenance or use of an insured vehicle. Thus, since the tortfeasor was subject to New York's financial responsibility law (see VTL § 318(4)(a), (5)(a)), his insurance policy provided bodily injury coverage by operation of the out-of-state insurance provision, and that coverage conformed to that required by New York's Financial Security Act (see VTL § 311(3), (4)(a)). Accordingly, GEICO's petition to stay arbitration was granted.

### Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer (Ins. Law § 3420(d)(2))

A vehicle is considered "uninsured" when it was, in fact, covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage. Insurance Law § 3420(d)(2) provides that if "an insurer shall disclaim liability or deny coverage for death or bodily injury . . . . it shall give written notice as soon as reasonably possible of such disclaimer or liability or denial of coverage to the insured and the injured person or any other claimant."

In *Penn Millers Ins. Co. v. C.W. Cold Storage, Inc.*,[34] the court reminded that Ins. Law § 3420(d)(2) is applicable only to actions based on "death or bodily injury." And, in *Public Service Mutual Ins. Co. v. Tower Ins. Co. of New York*,[35] the court observed that Ins. Law § 3420(d) does not apply to requests for defense and indemnification between insurers.

In numerous cases decided in 2013, the courts reminded that "[t]he timeliness of an insurer's disclaimer or denial is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage."[36] Moreover, "[w]hile an investigation into issues affecting the decision whether to disclaim coverage may excuse delay, the burden is on the insurer to explain the delay in notifying the insured or injured party of this disclaimer."[37]

The First Department, in *Quality Building Contractor Inc. v. Delos Ins. Co.*,[38] held that "a trier of fact should determine when the grounds for the exclusion endorsement disclaimer were 'readily apparent' to [the insurer] and whether [the insurer] reasonably delayed issuing its disclaimer during its investigation into the applicability of the endorsement."

In *Okumus v. National Specialty Ins. Co.*,[39] the court observed that "[w]hen the explanation offered for the delay is an assertion that there was a need to investigate issues that will affect the decision on whether to disclaim, the burden is on the insurance company to establish that the delay was reasonably related to the completion of a necessary, thorough, and diligent investigation."

*Hartford Underwriting Ins. Co. v. Greenman-Pederson, Inc.*[40] reiterated the well-established rule that a notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated, and any ground known to the insurer but not then asserted is waived.[41] Thus, in that case, the court disallowed the insurer's belated attempt to raise a new reason for the disclaimer.

It is well established that a "reservation of rights" letter is not effective as a denial or disclaimer. Thus, in *QBE Ins. Corp. v. Jinx-Proof, Inc.*,[42] a 2-2-1 decision of the Appellate Division, one of the concurring justices wrote that "the time within which to issue [a disclaimer or denial under Ins. Law § 3420(d)(2)] cannot be extended by reserving the right to do so in the future."[43] The dis-

senting justice wrote, in pertinent part, "A reservation of rights letter may be used to rebut a claim that the carrier waived the right to disclaim by defending its insured, but it does not qualify as a timely disclaimer and 'has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage.'"[44]

In that case, which arose out of an assault on the premises of a bar owned by Jinx-Proof, the letter at issue read as follows:

> This company will promptly and diligently attempt to ascertain factual information to help us in establishing if this late notice has in any way handicapped our ability to investigate and defend this claim. . . . As soon as we can obtain the information, you will be notified of our decision.
>
> Furthermore, we are making this *reservation of rights* because your policy specifically excludes coverage for actions and proceedings to recover damages for bodily injuries arising from assault and batteries. . . . Consequently . . . *QBE Insurance Company will not be defending or indemnifying you under the General Liability portion of the policy for the assault and battery allegations. Accordingly, we suggest that you consult an attorney in order to protect your interests and provide a defense for the assault and battery claim* [emphasis added].

Approximately one month later, the insurer sent another letter to its insured, stating:

> [W]e are defending this matter under the Liquor Liability portion of the CGL coverage, and under strict reservation of rights for allegations of Assault and Battery. Your policy excludes coverage for assault and battery claims. . . . Therefore, should this matter proceed to verdict, any awards by the Court stemming from allegations of Assault and Battery will not be covered under your Commercial General Liability policy.

The state Supreme Court granted the insurer's motion for a declaration that it was not obligated to defend or indemnify Jinx-Proof in the underlying action brought against it, finding that "the underlying incident falls within the assault and battery exclusion of the insurance policy" and that the two above-referenced letters served as effective written notices of disclaimer.

Voting in favor of affirmance of the Supreme Court's order, Justices Friedman and Román wrote, in pertinent part, that "QBE's use of the term 'reservation of rights' in the letters upon which it relies should not be deemed to negate its otherwise clear and unambiguous disclaimer of coverage of claims falling within the policy's assault and battery exclusion because, at the time the letters were issued, QBE was, in fact, obligated to defend even claims falling within exclusion, and had no right simply to wash its hands of such claims by issuing a disclaimer."

Also voting in favor of affirmance, in a separate concurring opinion, Justices Sweeny and Manzanet-Daniels opined that "the disclaimer, issued three days and one month after receipt of notice from the insured, were timely. Moreover, the letters, taken individually and collectively, apprised the insured in no uncertain terms that coverage was barred by the assault and battery exclusion contained in the policy." As these justices further explained, "[a]lthough 'reservation of rights' language may have appeared in the letters, the letters clearly state that 'QBE Insurance Company will not be defending or indemnifying you under the General Liability portion of the policy for the assault and battery allegations,' and should this matter proceed to verdict, any awards by the Court stemming from allegations of Assault and Battery will not be covered under your Commercial General Liability policy.' Such statements cannot be construed by a reasonable person as anything other than a disclaimer of coverage on the ground of the exclusion for assault and battery. Notwithstanding the allegedly 'contradictory' language, the letters 'specifically disclaimed coverage and sufficiently informed the defendants [of the basis for] the disclaimer.'"[45]

In his dissenting opinion, Justice Andrias wrote that he did not believe that either of the two letters, both of which were styled by the insurer as "reservation of rights," could serve as written notice of disclaimer of coverage of the assault and battery based claims asserted against Jinx-Proof in the underlying action. Rejecting the conclusion that the "reservation of rights letters" served as effective written notices of disclaimer, Justice Andrias observed, "A notice of disclaimer should be 'unequivocal [and] unambiguous written notice, properly served.' 'A reservation of rights letter may be used to rebut a claim that the carrier waived the right to disclaim by defending its insured,' but it does not qualify as a timely disclaimer and 'has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage.'"

In the dissenter's view, the first letter was clearly a reservation of the right to disclaim and not a disclaimer. Support for this view was found in the letter's advice to the insured that "[b]ased on the information presently available to us, *it is possible* your policy with our company may not provide coverage," and that "*we are making this reservation of rights* because your policy specifically excludes coverage for actions and proceedings to recover damages for bodily injuries arising from assault and batteries."

As for the second letter, the dissenter noted that it confirmed that the earlier letter was a reservation of rights, stating that "[a]s previously stated in our Reservation of right letter to you dated January 31, 2008 we are defending this matter under the Liquor Liability portion of the CGL coverage, and under strict reservation of rights for allegations of Assault and Battery." Moreover, in its Verified Complaint in the DJ action, QBE described the February 26, 2008, letter as a "reservation of rights letter," and QBE's counsel stated in an affidavit that QBE "did not issue a denial." These constituted "judicial admissions" in Justice Andrias' view, which simply should not have

been ignored. Thus, he concluded that "neither of [QBE's] admitted reservation of rights letters, which contain contradictory and confusing language, can be construed as an unequivocal and unambiguous disclaimer of coverage."[46]

**NOTE:** On February 18, 2014, the Court of Appeals affirmed the Decision and Order of the Appellate Division and held that the insurer effectively disclaimed coverage for the assault and battery claims in both letters, notwithstanding that the letters contained "some contradictory and confusing language," and contained "reservation of rights" language.[47]

The court, in *Hartford Underwriting Ins. Co. v. Greenman-Pederson, Inc.*,[48] said that the insurer's reservation of rights letters did not constitute clear disclaimers of coverage, and that, indeed, those letters "failed the essential purpose of a disclaimer: to timely and clearly inform the insured of where the insurer stands on the issue of coverage for the action, and why, so that the insured can promptly consider appropriate alternatives."

In *Williams v. New York Central Mutual Fire Ins. Co.*,[49] the court stated, "The doctrine of estoppel precludes an insurance company from denying or disclaiming coverage where the proper defending party . . . relied to [his] detriment on that coverage and was prejudiced by the delay of the insurance company in denying or disclaiming coverage based on the loss of the right to control [his] own defense." The court held, however, that no such estoppel was applicable in that case because although the insurer provided its insured with a defense, it had expressly disclaimed coverage and reserved its right to assert further grounds for noncoverage.

The Second Department, in *AutoOne Ins. Co. v. Sarvis*,[50] held, "It is only in the event noncompliance by both the insured and the injured claimant that the insurer may validly disclaim against the injured party. A disclaimer of coverage based only on the insured's failure to comply with the notice provisions of the policy is ineffective against the injured party and the insurer will be precluded from subsequently disclaiming coverage on the ground that the injured party failed to comply with the policy's notice provisions."

In *National Casualty Ins. Co. v. American Home Assurance Co.*,[51] the court held that a 43-day delay in disclaiming for late notice was unreasonable as a matter of law.

The facts supporting the disclaimer were either apparent from the claim documents submitted by the claimant or were readily ascertainable upon performance of a cursory investigation, said the court in *Country-Wide Ins. Co. v. Ramirez*.[52] "Therefore, even if some investigation was warranted in this matter, the burden was on [the insurer] to demonstrate that the two-month delay in disclaiming was reasonably related to its performance of a prompt, diligent, thorough, and necessary investigation. Since [the insurer] merely made a conclusory statement that the delay was occasioned by its investigation, and provided

no details with regard to the specific efforts undertaken in conducting that investigation, it failed to sustain its burden of demonstrating that the delay was excusable, and the disclaimer was untimely as a matter of law."

On the other hand, in *Public Service Mutual Ins. Co. v. Tower Ins. Co. of New York*,[53] the court held that an issue of fact existed as to whether the insurer's 48-day delay in disclaiming was reasonable under the circumstances, where so much confusion was created by conflicting pleadings, bills of particulars, and deposition testimony in the underlying action that it required six weeks of investigation to determine the pertinent facts.

In *Mayo v. Metropolitan Opera Association, Inc.*,[54] the court held that a disclaimer issued within 30 days of receiving notice of the claim was timely as a matter of law. In *GEICO v. Bartlett*,[55] the court held that a disclaimer issued 33 days after receipt of notice of an uninsured motorist claim, based upon the claimant's alleged failure to report a hit-and-run accident within 24 hours, was made "in a timely manner." In *Quincy Mutual Ins. Co. v. Enoe*,[56] the court held that a delay of 21 days in issuing a disclaimer was reasonable as a matter of law. And, in *Brito v. Allstate Ins. Co.*,[57] the court held that the issuance of a disclaimer 20 days after receipt of a copy of a default judgment against the insured was timely as a matter of law.

The court, in *Raner v. Security Mutual Ins. Co.*,[58] held that issues of fact existed as to whether a disclaimer letter issued 65 days after the defendant insurer's receipt of the insured's notice to her broker was timely, because

"[t]he documentation does not clearly establish when defendant insured became aware of the severity of the plaintiff's injuries [and] thus, the reason for disclaimer based on late notice is not readily apparent from the face of the correspondence." Moreover, although the plaintiff argued that "a cursory investigation such as a telephone call could have obtained the necessary information," the court noted that "the report prepared by defendant insurer's investigator states that he had difficulty reaching defendant insured by telephone."

As noted in several recent cases, a disclaimer pursuant to Ins. Law § 3420(d)(2) is unnecessary when a claim does not fall within the coverage terms of the insurance policy. Stated another way, an insurer is not required to deny coverage where none exists.[59]

In *Tower Ins. Co. of New York v. Ray & Frank Liquor Store, Inc.*,[60] the court held that there was no evidence that the insurer timely disclaimed, where the disclaimer letter indicated that it was sent by certified mail, return receipt requested, but the insurer failed to establish that the letter was mailed, and thus should be presumed received. There was no return receipt in the record, and the insurer's only witness did not mail the letter himself, and neither the witness nor anyone else testified as to the insurer's regular office mailing practice and procedure.

In *Hermitage Ins. Co. v. Zaidman*,[61] the court held that an issue of fact existed as to whether the insurer gave the insureds written notice disclaiming coverage, as required by Ins. Law § 3420(d)(2). The affidavit of the insured's claims manager did not suffice as proof of mailing because it was not based on personal knowledge, and it was devoid of any representation that the insurer had a standard office procedure for mailing notices such as the disclaimer. Furthermore, although the certified mail receipt for the letter was signed, the insureds denied signing it, and, in fact, the signer's "one-word name" did not appear to be that of the insureds.

In *Quincy Mutual Fire Ins. Co. v. Enoe*,[62] the court rejected the respondent's (*pro se*) argument that the disclaimer was invalid because the insurer did not provide notice of the disclaimer to the plaintiffs in the underlying action, based upon the fact that those parties did not exercise their right to provide the insurer with independent notification of the claim pursuant to Ins. Law § 3420(a)(3). The court held that, under those circumstances, the insurer was not required to notify the injured parties of the disclaimer – citing two cases that addressed the distinct issue of whether the disclaimer letter must refer to the injured parties' failure to provide timely notice where they do not give notice at all.

**NOTE:** This decision came to the right result, but for the wrong reason. Under the statute (§ 3420(d)(2)), notice of disclaimer must be given to the injured parties. However, the insured, who received notice of disclaimer, does not have standing to raise the injured party's lack of receipt.

One fairly common ground for disclaiming liability or denying coverage is the ground of *non-cooperation* by the insured. In order to support a disclaimer on that ground, the insurer must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation; (2) that the efforts it employed were reasonably calculated to obtain the insured's cooperation; and (3) that the attitude of the insured, after his or her cooperation was sought, was one of "willful and avowed obstruction."[63]

In *American Transit Ins. Co. v. Hossain*,[64] the court held that although the insurer sent letters and investigators to three different addresses for the insured, the record did not establish that the insured received the letters or had actual notice of the attempts to contact him. Further, the insurer never attempted to contact the insured at various other addresses in its file or at a possible work location. Thus, the evidence was held to be insufficient to establish lack of cooperation.

## Cancellation of Coverage

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

In *BRP Construction Group, LLC v. Greenwich Ins. Co.*,[65] the plaintiffs established that the notice of cancellation produced by Greenwich did not comply with the terms of the insurance policy requiring that notice of cancellation be mailed at least 10 days before the effective date of the cancellation. (No specific details are provided in the opinion.)

## Stolen Vehicle

A vehicle that is used without the owner's permission is also considered an "uninsured" vehicle. In *Diaz v. Tombiolo*,[66] the court noted that a strong presumption of permissive use arises from proof of ownership, which can only be overcome by substantial evidence demonstrating that the vehicle was not operated with the owner's permission or consent. The *Diaz* court further observed, "Although the rule is not absolute or invariable, in most cases uncontradicted disavowals of permission by both the owner of the vehicle and the driver will constitute substantial evidence negating permissive use and entitle the owner to summary judgment."

In that case, the court held that the vehicle owner failed sufficiently to rebut the strong presumption that the driver was operating the vehicle with the owner's

consent because her evidence was deficient. First, there was no indication that the post-accident statement the owner gave to an insurance investigator was executed before a person authorized to administer oaths or was properly notarized. Second, that portion of a transcript of a plea proceeding wherein the driver answered "No" when asked if she had "permission" to "take" the vehicle was not admissible under CPLR 4517 ("Prior testimony in a civil action"). Nor was that statement by the driver admissible as an "admission by a party" as against the plaintiff, as opposed to the driver. Moreover, the statement was not shown to constitute a declaration against pecuniary, proprietary or penal interest – exceptions to the rule against hearsay.

> One fairly common ground for disclaiming liability or denying coverage is the ground of non-cooperation by the insured.

## Hit-and-Run

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

In *Progressive Specialty Ins. Co. v. Lubeck*,[67] the court noted, "The insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely, that physical contact occurred, that the identity of the owner and operator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable."

The claimant, in *Allstate Ins. Co. v. Aizin*,[68] alleged that he lost control of his motor vehicle after a hit-and-run vehicle struck his vehicle in the rear. However, the responding officer noted on the police accident report that the claimant stated that his acceleration pedal got stuck, and the report made no mention that a hit-and-run vehicle was involved. The claimant denied making such a statement to the officer. In modifying the order of the Supreme Court granting the petition, and, instead setting the matter down for a framed issue hearing, the court observed that

> the absence from the police report of any mention of contact with an alleged "hit and run" vehicle did not conclusively establish that contact between [claimant's] vehicle and a "hit-and-run" vehicle did not occur but, at most, raised a factual issue as to whether there was physical contact between [claimant's] motor vehicle and a "hit-and-run" vehicle. Where a triable issue of fact regarding the existence of physical contact with a hit-and-run vehicle has been properly raised, "the appropriate procedure is to stay arbitration pending a determination on that issue." Here, since [claimant] testified that he did not speak to the police officer at the scene of the accident, and the police accident report simply did not mention the alleged hit-and-run vehicle, the Supreme Court, before making a determination on the request for a permanent stay, should have conducted a framed-issue hearing to determine whether a hit-and-run vehicle was involved in the accident.

In *Progressive Specialty Ins. Co. v. Lubeck*,[69] the court held that the claimant's testimony – that he was riding a bicycle through a parking lot when a car pulled out from a parking space in front of him, he engaged the brakes of his bicycle and was thrown over the handlebars – was insufficient to establish a valid hit-and-run claim because his testimony that he landed on the hood of that vehicle was unbelievable insofar as it contrasted with the statements at the hospital that he flew off his bicycle and landed on a parked vehicle.

In *GEICO v. Bartlett*,[70] the court found that the claimant failed to report the alleged hit-and-run accident to the police or to the Commissioner of Motor Vehicles within 24 hours of the accident or as soon as reasonably possible thereafter, as required under the policy. Accordingly, the court granted GEICO's Petition to Stay the Arbitration of the Claimant's Uninsured Motorist claim.

## Actions Against the New York State Motor Vehicle Accident Indemnification Corporation (MVAIC)

*Acosta-Collado v. MVAIC*[71] concerned a bicyclist, allegedly injured when he was struck by a motor vehicle. He failed to demonstrate that the accident was one in which the identity of the owner and operator were unknown or not readily ascertainable through reasonable efforts, as required by statute for the court to permit an action against MVAIC. Thus, the court held that the bicyclist was required to exhaust his remedies in his personal injury action against the owner of the vehicle (who was identified by witnesses), and only if that action ultimately failed as a result of a lack of proof of the identity of the owner or operator could the court consider granting leave to sue MVAIC.[72]

In *Osorio v. MVAIC*,[73] the court (upon renewal) granted the claimant's petition for leave to commence an action against MVAIC because he sufficiently pleaded all of the requirements of Ins. Law §§ 5217 and 5218 – i.e., he demonstrated that he filed a notice of claim with MVAIC, he was a qualified person, he was not operating an uninsured motor vehicle or a motor vehicle in violation of an order of suspension or revocation at the time of the acci-

dent, he had a cause of action against the operator and owner of the motor vehicle which struck him, and that all reasonable efforts had been made to ascertain the identity of the motor vehicle which struck him. In addition, he established, through the police incident report, that there was physical contact between him and the unidentified motor vehicle, and the police were notified within 24 hours of the incident.

SUM coverage in New York is a converse application of the golden rule.

## UNDERINSURED MOTORIST ISSUES

### Purpose

The *Weiss v. Tri-State Ins. Co.*[74] court observed that "SUM coverage in New York is a converse application of the golden rule; its purpose is 'to provide the insured with the same level of protection he or she would provide to others were the insured a tortfeasor in a bodily injury accident.'" In *Unitrin Auto and Home Ins. Co. v. Gelbstein*,[75] the court noted that "when a policyholder purchases supplemental uninsured/underinsured motorist (hereinafter SUM) coverage in New York, he or she is insuring against the risk that a tortfeasor's underinsurance (or complete lack of insurance) will provide less protection for the policyholder than the policyholder provides to others when at fault in causing bodily injury. SUM coverage is not a 'stand-alone policy to fully compensate the insureds for their injuries.'"

### Trigger of Coverage

In *Bobak v. AIG Claims Services, Inc.*,[76] although the evidence established that Reliance Ins. Co., the tortfeasor's primary insurer, was insolvent, and that no benefits would be afforded to the claimant by the guaranty association that assumed the liabilities of the insolvent insurer, the evidence also established that the tortfeasor had a $1,000,000 excess liability policy with Travelers, and that Travelers had not disclaimed coverage thereunder. The court, therefore, counted the Travelers $1,000,000 coverage in the trigger comparison and found, based thereon, that the claimant's $1,000,000 SUM policy was not triggered because the tortfeasor's $1,000,000 bodily injury limits were not less than the claimant's $1,000,000 bodily injury limits.

The lone dissenter (Justice Carni) would have held that the SUM coverage was triggered simply by the insolvency of the primary insurer, and that "where, as here, a vehicle is insured by a motor vehicle liability policy issued by an insolvent insurance company and is thus an 'uninsured motor vehicle,' the existence of an excess insurance policy does not change its status as such." As he explained, "[i]n other words, an excess or umbrella policy does not constitute a 'bodily injury liability insurance policy' for purposes of determining whether a motor vehicle is 'an uninsured motor vehicle' triggering SUM coverage." He further concluded that "the amount of a tortfeasor's coverage under a motor vehicle liability policy may not be combined with the amount of his or her coverage under a commercial general liability excess policy in determining whether SUM coverage is implicated."[77]

### Consent to Settle

In *Travelers Home & Marine Ins. Co. v. Kanner*,[78] the insured executed a release to the tortfeasor and her insurer three days after the insurer tendered the full amount of its policy in settlement of the claim. When the insured thereafter sent a demand for arbitration to her SUM carrier, seeking SUM benefits, the carrier disclaimed because the insured violated the terms of her policy by failing to obtain its consent prior to settling the underlying personal injury action, and its rights had been impaired and prejudiced as a result. In granting the SUM carrier's petition to stay arbitration, the court stated,

> Where, as here, an automobile policy expressly requires the insurer's prior consent to any settlement by the insured with a tortfeasor, failure of the insured to obtain such prior consent from the insurer constitutes a breach of the insurance contract. The failure to obtain such consent disqualifies the insured from availing himself or herself of the pertinent benefits of the policy, unless the insured can demonstrate the insurer, either by its conduct, silence or unreasonable delay, waived the requirement of consent or acquiesced in the settlement.

Moreover, when an insured settles with a tortfeasor in violation of a condition requiring his or her insurer's prior written consent to settle, and fails to preserve the insurer's subrogation rights, the insurer is prejudiced, and the insured is precluded from asserting a claim for underinsured motorist benefits. Here, the insured failed to demonstrate that the SUM carrier waived the requirement of consent or acquiesced in the settlement by its conduct, silence or unreasonable delay. The court rejected the insured's claim that her counsel informed the insurer in writing that counsel was awaiting a response from the tortfeasor's insurer as to the adjuster's authority to offer the policy limits. In the first place, that correspondence was not part of the record. In any event, even if that correspondence was in fact sent and was deemed to constitute the written notice required under the policy, the insured did not give the SUM carrier the required 30 days either to consent to the settlement or advance the settlement amount because the release was issued only two days later. Finally, the insured failed to establish that there was any express limitation in the release that preserved

the SUM carrier's subrogation rights, and there was no evidence of any circumstances surrounding the execution of the release that would give rise to a necessary implication that the release did not operate to prejudice the SUM carrier's subrogation rights.

In *Day v. One Beacon Ins.*,[79] the court held that the "Release or Advance" Condition of the SUM Endorsement (Condition 10) applies only to settlements with motor vehicle bodily injury insurers and not to settlements with non-motor vehicle defendants. In addition, the court held that the provision in Condition 10 that prohibits settlement with "any negligent party" without the SUM insurer's written consent, did not apply only to motorist tortfeasors, but included non-motorist tortfeasors, as against whom the SUM insurer would have a subrogation right pursuant to Condition 13 (Subrogation) of the Endorsement ("any person legally responsible for the bodily injury or loss"). As explained by the court in expressly rejecting the claimant's contention that the consent to settle provision applies only to motor vehicle defendants,

> [t]he provision on its face plainly refers to settlements with "any negligent party" and does not refer merely to motorist tortfeasors. We thus reject plaintiff's "strained, unnatural and unreasonable" interpretation of that policy condition. Plaintiff's interpretation would require the replacement of the word "motorist" for "party" in the last sentence of Condition 10, such that the phrase would read "negligent motorist" rather than "negligent party." Had the sentence been intended to read in the manner suggested by plaintiff, it would have been easy enough to phrase it that way.

Thus, in this case, where the SUM insurer offered to advance the amount of the settlement offered by the motor vehicle tortfeasor, but not the amount offered by the non-motor vehicle tortfeasor, the court held that it complied fully with its obligations under Condition 10. Moreover, where the claimant settled with both the motor vehicle tortfeasor and the non-motor vehicle tortfeasor without the insurer's consent, the court held that the claimant violated Conditions 10 and 13 of the Endorsement and, thus, vitiated the SUM coverage provided by that policy. The court, therefore, granted the insurer's motion for summary judgment dismissing the breach of contract complaint against it.[80]

## Offset/Reduction in Coverage

In *Unitrin Auto and Home Ins. Co. v. Gelbstein*,[81] the court held that where the respondent received $400,000 from the tortfeasor, which was $300,000 more than the $100,000 coverage she provided to others, under the "Maximum SUM Payments" condition of the SUM endorsement, the amount she was entitled to recover under her SUM coverage was reduced to zero. Accordingly, "arbitration would have been academic" and, thus, the petition to stay arbitration was granted.

## Non-Duplication

Regulation 35-D's SUM Endorsement contains a provision entitled "Non-Duplication" (Condition 11), which provides that the SUM coverage shall not duplicate any of the following:

> (a) Benefits payable under workers' compensation or other similar laws;
> (b) Non-occupational disability benefits under article nine of the Workers' Compensation Law or other similar law;
> (c) Any amounts recovered or recoverable pursuant to article fifty-one of the New York Insurance Law or any similar motor vehicle insurance payable without regard to fault;
> (d) Any valid or collectible motor vehicle medical payments insurance; or
> (e) Any amounts recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies or bonds.

In *Weiss v. Tri-State Ins. Co.*,[82] the court held that where the maximum SUM coverage was $500,000 per accident, and the claimants settled the underlying bodily injury action by accepting the $100,000 coverage limit of the offending vehicle, and an additional $255,000 from a defendant bar / diner, in settlement of Dram Shop claims against them – for a total settlement of $355,000 – the SUM coverage was reduced to $145,000. As noted by the court, the Dram Shop recovery constituted under Condition 11(e) (Non-Duplication) an amount "recovered as bodily injury damages from sources other than motor vehicle bodily injury insurance policies or bonds." Since Condition 11 does not allow duplicate recovery of such damages "under the terms of the SUM endorsement, the plaintiff's receipt of the Dram Shop recovery reduces, by that same $255,000 the amount payable under the SUM endorsement. The plaintiffs are not penalized by this reduction, since they secured the maximum amount for which they are covered under the SUM endorsement" (i.e., $500,000). **NOTE:** The court did not appear to consider the question of whether, in fact, the recovery from the Dram Shop defendants constituted duplication or simply additional benefits required to make the severely injured plaintiff whole.

In *Kesick v. New York Central Mutual Fire Ins. Co.*,[83] the court held that the insurer failed to establish its entitlement to judgment as a matter of law pursuant to the nonduplication provision in the SUM policy based upon the insured's receipt of Workers' Compensation benefits. As stated by the court, "inasmuch as the record here does not reflect how much plaintiff received in workers' compensation benefits and such benefits would not compensate plaintiff for any noneconomic damages he suffered, defendant has not demonstrated that recovery would necessarily be duplicative of the benefits he received."

In *Deluca v. Arch Ins. Group*,[84] the court noted that there was "nothing in the record to suggest that the arbitrator's award is duplicative of any Workers' Compensation ben-

efits that may have been received by the petitioner," and, therefore, affirmed the confirmation of the award in favor of the plaintiff. ■

1. *See* Norman H. Dachs & Jonathan A. Dachs, *SUM Legislation – Good News/Bad News*, N.Y.L.J., Mar. 12, 2013, p. 3, col. 1; Norman H. Dachs & Jonathan A. Dachs, *The Insurance "Top 68" and SUM Legislation Update*, N.Y.L.J., May 14, 2013, p. 3, col. 1.

2. 105 A.D.3d 1042, 1042–43 (2d Dep't 2013) (citations omitted).

3. 38 Misc. 3d 478 (Sup. Ct., Dutchess Co. 2012), *rev'd*, 109 A.D.3d 468 (2d Dep't 2013).

4. *Reyes*, 109 A.D.3d at 469 (citations omitted).

5. 106 A.D.3d 1219, 1220 (3d Dep't 2013).

6. *See Provenzo v. Sam*, 23 N.Y.2d 256, 260 (1968); *Wagner v. Int'l Ry. Co.*, 232 N.Y. 176, 180 (1921); *Gifford v. Haller*, 273 A.D.2d 751, 752 (3d Dep't 2000).

7. *See Provenzo*, 23 N.Y.2d at 261; *Carney v. Buyea*, 271 A.D. 338, 342 (4th Dep't 1946).

8. *See O'Connor v. Syracuse Univ.*, 66 A.D.3d 1187, 1191 (3d Dep't 2009), *lv. dismissed*, 14 N.Y.3d 766 (2010); *Gifford*, 273 A.D.2d 752–53; *see also Hughes v. Murnane Bldg. Contractors Inc.*, 89 A.D.3d 1507, 1508 (4th Dep't 2011).

9. 112 A.D.3d 166 (2d Dep't 2013), *lv. to appeal granted*, 22 N.Y.3d 1168 (2014).

10. 72 N.Y.2d 288, 294 (1988).

11. *State Farm Mut. Auto. Ins. Co.*, 112 A.D.3d at 169.

12. *See Progressive Ne. Ins. Co. v. Scalamandre*, 51 A.D.3d 932, 933 (2d Dep't 2008); *Liberty Mut. Fire Ins. Co. v. Rondina*, 32 A.D.3d 1230, 1231 (4th Dep't 2006); *see also Country-Wide Ins. Co. v. Wagoner*, 45 N.Y.2d 581 (1978); Ins. Law § 5202(a).

13. 108 A.D.3d 672, 673 (2d Dep't 2013).

14. 106 A.D.3d 636 (1st Dep't 2013).

15. 105 A.D.3d 720, 721 (2d Dep't 2013).

16. 105 A.D.3d 512, 514 (1st Dep't 2013).

17. 103 A.D.3d 1132, 1134 (4th Dep't 2013).

18. 106 A.D.3d 469, 470 (1st Dep't 2013).

19. *See Raner v. Sec. Mut. Ins. Co.*, 102 A.D.3d 485, 486 (1st Dep't 2013) (issues of fact existed as to whether the insured's notice was timely "since a jury could find that the defendant insured reasonably relied on the plaintiff's promise not to sue in delaying her notification to the insurer"); *Hermitage Ins. Co. v. Zaidman*, 107 A.D.3d 579, 580 (1st Dep't 2013) (despite "familial relationship" (i.e., mother-daughter) between the insured and the injured party, an issue of fact existed as to whether the insured reasonably believed that no claim would be asserted against her, "given that she knew that her daughter Grace had 'sustain[ed] severe and permanent' injuries, described as 'severe head injuries,' as a result of Grace's fall on her property, had spent days with Grace in the hospital, and had cared for Grace during the 'months' following the accident").

20. *See Ortiz v. Fage USA Corp.*, 105 A.D.3d 720, 722 (2d Dep't 2013) (unawareness of existence of umbrella policy not valid excuse for lengthy delay in giving notice to insurer); *310 E. 74 LLC v. Fireman's Fund Ins. Co.*, 106 A.D.3d 469, 469 (1st Dep't 2013) (no reasonable belief in nonliability where insured's superintendent was aware that underlying plaintiff fell off a ladder while removing insulation from chimney, saw underlying plaintiff in pain, and watched him being helped into a taxi by two others – more inquiry was required; also, statements made by underlying plaintiff's boss to the effect that he was going to take care of him "did not constitute an adequate inquiry, in the absence of any evidence that [the insureds] diligently sought to learn of the extent of the worker's injuries"); *Rivera v. Core Cont'l Constr. 3, LLC*, 106 A.D.3d 636, 636 (1st Dep't 2013) (insured's principal was aware of the accident within two days of its occurrence; it involved an accident at the project site and the injured person had to be transported by ambulance, and insured did not undertake any investigation of the incident, or make any inquiry regarding its alleged belief that it was not responsible for the area where the accident occurred).

21. 106 A.D.3d 921, 921–22 (2d Dep't 2013) (citations omitted).

22. 102 A.D.3d 473, 473 (1st Dep't 2013).

23. 106 A.D.3d 1001, 1002–03 (2d Dep't 2013) (citations omitted).

24. *See also Farmers Ins./Truck Ins. Exchange v. Terzulli*, 112 A.D.3d 628, 628 (2d Dep't 2013).

25. 102 A.D.3d 523, 523 (1st Dep't 2013).

26. 109 A.D.3d 912, 913 (2d Dep't 2013) (citations omitted).

27. *See Scottsdale Ins. Co. v. MVAIC*, 107 A.D.3d 1003 (2d Dep't 2013); *Allstate Ins. Co. v. N.Y. Petroleum Ass'n Compensation Trust*, 104 A.D.3d 682, 682 (2d Dep't), *motion for lv. to appeal denied*, 21 N.Y.3d 808 (2013).

28. 110 A.D.3d 1062, 1064 (2d Dep't 2013) (citations omitted).

29. 109 A.D.3d 825, 825–26 (2d Dep't 2013).

30. 107 A.D.3d 897, 898–99 (2d Dep't 2013) (citations omitted).

31. *See also Contact Chiropractic, P.C. v. N.Y. City Transit Auth.*, 42 Misc. 3d 60, 62 (App. Term, 2d Dep't, 2d, 11th & 13th Jud. Dists. 2013) (action to recover first-party no-fault benefits against self-insured transit authority governed by six-year statute of limitations provided in CPLR 213).

32. 42 Misc. 3d at 62.

33. 106 A.D.3d 736, 736–37 (2d Dep't 2013).

34. 103 A.D.3d 1132, 1134 (4th Dep't 2013).

35. 111 A.D.3d 476, 476 (1st Dep't 2013).

36. *Quincy Mut. Fire Ins. Co. v. Enoe*, 107 A.D.3d 775, 776 (2d Dep't 2013). *See also Hartford Underwriting Ins. Co. v. Greenman-Pederson, Inc.*, 111 A.D.3d 562, 563–64 (1st Dep't 2013); *Quality Bldg. Contractor, Inc. v. Delos Ins. Co.*, 110 A.D.3d 505, 506 (1st Dep't 2013); *Country-Wide Ins. Co. v. Ramirez*, 104 A.D.3d 850, 851 (2d Dep't 2013).

37. *See Quincy Mut. Fire Ins. Co.*, 107 A.D.3d at 776 (citation omitted). *See also Okumus v. Nat'l Specialty Ins. Co.*, 112 A.D.3d 797, 798 (2d Dep't 2013); *Hartford Underwriting Ins. Co.*, 111 A.D.3d at 564.

38. 110 A.D.3d 505, 506 (1st Dep't 2013).

39. 112 A.D.3d 797, 798 (2d Dep't 2013) (citations omitted).

40. 111 A.D.3d 562, 563 (1st Dep't 2013).

41. *See also AutoOne Ins. Co. v. Sarvis*, 111 A.D.3d 824, 825 (2d Dep't 2013).

42. 102 A.D.3d 508 (1st Dep't 2013).

43. 102 A.D.3d at 509, n.1 (Friedman, J., concurring).

44. *Id.* (citations omitted). *See also Strauss Painting, Inc. v. Mt. Hawley Ins. Co.*, 105 A.D.3d 512, 513 (1st Dep't 2013) ("The only letters sent by Mt. Hawley to the [insured] were those intended to preserve its right to disclaim. These letters were insufficient to actually disclaim coverage."); *Penn Millers Ins. Co. v. C. W. Cold Storage, Inc.*, 103 A.D.3d 1132, 1135 (4th Dep't 2013) ("Although plaintiff's reservation of rights letter allowed it to 'preserve[] its defense under the policy[] until the facts warranting disclaimer became clear,'[i]t did not permit [plaintiff] to unreasonably delay the exercise of those rights to the detriment of [defendant]'" (citation omitted)).

45. *QBE Ins. Corp.*, 102 A.D.3d at 510 (citations omitted).

46. *Id.* at 514–16 (citations omitted) (emphasis added).

47. *QBE Ins. Corp. v. Jinx-Proof, Inc.*, 22 N.Y.3d 1105 (2014). *See* Norman H. Dachs & Jonathan A. Dachs, *Court of Appeals Decisions: "Jinx-Proof" and "Reservation of Rights Letters,"* N.Y.L.J., May 13, 2014, p. 3, col. 1.

48. 111 A.D.3d 562, 563–64 (1st Dep't 2013) (citation omitted).

49. 108 A.D.3d 1112, 1115 (4th Dep't 2013) (citation omitted).

50. 111 A.D.3d 824, 825 (2d Dep't 2013) (citation omitted).

51. 102 A.D.3d 553, 553–54 (1st Dep't 2013).

52. 104 A.D.3d 850, 851 (2d Dep't 2013) (citations omitted).

53. 111 A.D.3d 476, 477 (1st Dep't 2013).

54. 108 A.D.3d 422, 425 (1st Dep't 2013).

55. 112 A.D.3d 826, 827 (2d Dep't 2013).

56. 107 A.D.3d 775, 776 (2d Dep't 2013).

57. 102 A.D.3d 477, 478 (1st Dep't 2013).

58. 102 A.D.3d 485, 486 (1st Dep't 2013).

59. *See 333 Fifth Ave. Assocs., LLC v. Utica First Ins. Co.*, 107 A.D.3d 568, 569 (1st Dep't 2013) ("The timeliness of Tower's disclaimer is irrelevant, because there was no duty to disclaim in the absence of coverage."); *Williams v. N.Y.*

*Cent. Mut. Fire Ins. Co.*, 108 A.D.3d 1112, 1114 (4th Dep't 2013) (if the claim falls outside the scope of the policy's coverage, there is no duty to provide a timely disclaimer); *Meah v. A. Aleem Constr., Inc.*, 105 A.D.3d 1017, 1020 (2d Dep't 2013) (where policy was rescinded, and, therefore, *void ab initio*, the issue of whether disclaimers are untimely is rendered academic, "as a claimant cannot create coverage that did not otherwise exist by relying on the failure to provide timely notice of disclaimer").

60. 104 A.D.3d 482, 482–83 (1st Dep't 2013).

61. 107 A.D.3d 579, 580 (1st Dep't 2013).

62. 107 A.D.3d 775, 776–77 (2d Dep't 2013).

63. *Thrasher v. U.S. Liab. Ins. Co.*, 19 N.Y.2d 159, 168–69 (1967).

64. 100 A.D.3d 421, 421–22 (1st Dep't 2012), *lv. to appeal denied*, 20 N.Y.3d 859 (2013).

65. 106 A.D.3d 680, 681 (2d Dep't 2013).

66. 111 A.D.3d 877, 878–79 (2d Dep't 2013).

67. 111 A.D.3d 947, 947–48 (2d Dep't 2013) (citations omitted).

68. 102 A.D.3d 679, 680–81 (2d Dep't 2013) (citations omitted).

69. 111 A.D.3d at 947–48.

70. 112 A.D.3d 826, 827 (2d Dep't 2013).

71. 103 A.D.3d 714, 715–16 (2d Dep't 2013).

72. *See also Joseph v. MVAIC*, 111 A.D.3d 831 (2d Dep't 2013) (petitioner failed to demonstrate that the subject accident was one in which the identity of the owner and operator of the subject motor vehicle was unknown (Ins. Law § 5218(b)(5))); *Harrison v. MVAIC*, 110 A.D.3d 806 (2d Dep't 2013) (petitioner failed to demonstrate that the subject accident was one in which the identity of the owner and operator of the subject motor vehicle was unknown (Ins. Law § 5218(b)(5))).

73. 112 A.D.3d 831 (2d Dep't 2013).

74. 98 A.D.3d 1107, 1110 (2d Dep't 2012), *lv. to reargue/lv. to appeal denied*, __ A.D.3d __, __ N.Y.S.2d __ (2d Dep't 2013).

75. 109 A.D.3d 663, 663 (2d Dep't 2013) (citing *Weiss*, 98 A.D.3d 1107) (other citations omitted).

76. 97 A.D.3d 1103, 1103–04, *lv. to appeal denied*, 98 A.D.3d 1326 (4th Dep't 2012), *lv. to appeal denied*, 20 N.Y.3d 1055 (2013).

77. *See* Norman H. Dachs & Jonathan A. Dachs, *"Sandy" Moratorium and SUM Trigger*, N.Y.L.J. (Nov. 13, 2012), p. 3, col. 1.

78. 103 A.D.3d 736, 736–39 (2d Dep't 2013) (citations omitted).

79. 96 A.D.3d 1678, 1681, *motion to reargue granted in part*, 99 A.D.3d 1261 (4th Dep't 2012), *lv. to appeal dismissed*, 20 N.Y.3d 992, *lv. to appeal denied*, 20 N.Y.3d 862, *motion to reargue denied*, 21 N.Y.3d 985 (2013) (citations omitted).

80. *See* Norman H. Dachs & Jonathan A. Dachs, *Settlement With Non-Motor Vehicle Tortfeasor Under SUM Endorsement*, N.Y.L.J. (July 10, 2012), p. 3, col. 1.

81. 109 A.D.3d 663, 663–64 (2d Dep't 2013).

82. 98 A.D.3d 1107, 1107–11 (2d Dep't 2012), *lv. to reargue/lv. to appeal denied*, __ A.D.3d __, __ N.Y.S.2d __ (2d Dep't 2013).

83. 106 A.D.3d 1219, 1222 (3d Dep't 2013).

84. 109 A.D.3d 912, 913 (2d Dep't 2013).

# How (Not) to Make a Contract on YouTube

By Clara Flebus

It is often said that "it pays to advertise." But as social media becomes the lingua franca of business today, lawyers should educate their clients on how to avoid paying *because* they have advertised. In the brave new electronic world, statements posted on the Internet for the purpose of reaching a multitude of people across boundaries with only a few clicks can create unintended binding contracts. The recent decision of *Augstein v. Leslie*[1] is instructive on this point.

In *Augstein*, the Southern District of New York addressed the question of whether an online offer of a reward for the return of a stolen laptop computer containing valuable intellectual property constituted a unilateral contract, which became binding upon the plaintiff's finding and delivering the computer, or whether the offer was merely an innocuous advertisement, or invitation to negotiate. Another interesting aspect of the decision is the court's ruling on sanctions for the defendant's negligent failure to preserve electronically stored evidence in anticipation of litigation.

The defendant, Ryan Leslie, is a singer-songwriter and musician whose laptop computer, external hard drive, passport, and other personal belongings were stolen from the backseat of a car during an October 2010 concert appearance in Germany. The laptop contained music and videos related to his records and performances. Immediately after the theft, Leslie posted a video on YouTube offering a $20,000 reward for the return of the laptop.

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A few days later, Leslie posted another YouTube video at the conclusion of which a written message appeared stating:

> In the interest of retrieving the invaluable intellectual property contained on his laptop & hard drive, Mr. Leslie has increased the reward offer from $20,000 to $1,000,000 U.S.D.[2]

Leslie also publicized the increased reward on Facebook and Twitter; he included a post on Twitter that read, "I'm absolutely continuing my Euro tour plus raised the reward for my intellectual property to $lmm."[3] The reward was reported internationally in various newspapers and on Internet postings. Finally, Leslie appeared on MTV, where he reiterated his offer of a million-dollar reward, saying, "I got a million-dollar reward for anybody that can return all my intellectual property to me."[4]

Public offers of a reward for performance of a specific act are a special type of unilateral offer that becomes binding upon performance.

In November 2010, the plaintiff, Armin Augstein, found a bag in Germany containing Leslie's laptop, hard drive, and passport, and brought it to the local police, who returned it to Leslie in New York.[5] Knowing about the million-dollar reward, Augstein made a demand for payment, but Leslie refused to honor his promise. Subsequently, Augstein retained a law firm in New York and brought suit to enforce the reward. In response to Augstein's claim, Leslie stated that the intellectual property, which made the laptop valuable to him, was not present on the hard drive when Augstein returned it.[6] According to Leslie, he tried to access the information on the hard drive, but was unable to do so.[7] He then sent the hard drive to the manufacturer, which allegedly deleted any material on it prior to issuing a replacement.[8] For his part, Augstein claimed that Leslie caused the information on the hard drive to be erased in the United States, after receiving correspondence from Augstein asking for the reward.[9] Eventually, Augstein moved for summary judgment on the issue of the validity of the offer, reward, and acceptance by Augstein in returning the laptop, and for sanctions due to Leslie's alleged spoliation of evidence on the hard drive.

## Was the YouTube Reward Video a Valid Offer?

The crux of Leslie's argument was that the video was merely an advertisement, and, as such, could not result in a binding contract through unilateral action of Augstein.

First, Leslie relied on *Leonard v. Pepsico*,[10] where a teenager attempted to redeem a Harrier jet featured in a television commercial run in the '90s by Pepsico, the producer and distributor of soft drinks. The ads invited customers to collect "Pepsi Points" found on its products and then redeem the points for "Pepsi Stuff'' contained in a catalog.[11] The Pepsico commercial started with a teenager on his way to school wearing some Pepsi merchandise, such as a T-shirt, a leather jacket, and a pair of sunglasses, with subtitles listing the number of points necessary for each item, and concluded with the teen boy landing in a Harrier jet by the side of the school building with a final subtitle: "Harrier Fighter 7,000,000 Pepsi Points.[12] After watching that commercial, an enterprising teenager obtained a Pepsi Points catalog. Despite noticing that the catalog did not list the military plane, the teenager set out to raise the money necessary to purchase the 7,000,000 points required to claim the jet; he then submitted an order form with a check to Pepsico, which, in turn, rejected the claim and returned the check, explaining that the jet could not be redeemed because it was not included in the catalog.[13]

In *Pepsico*, the court relied on the general rule that an advertisement does not constitute an offer, but an invitation to enter into negotiations or a solicitation for offers.[14] As such, an advertisement requires a further manifestation of assent by the advertising party to become a binding contract, and an offeree's willingness to accept the offer by filling out an order form is not enough. The court went on to explain that, by contrast, public offers of a reward for performance of a specific act are a special type of unilateral offer that becomes binding upon performance, without requiring a reciprocal promise.[15]

The rationale of *Pepsico* was derived from the leading British case of *Carlill v. Carbolic Smoke Ball Co.*,[16] in which the purchaser and user of a mysterious "smoke ball" remedy against influenza was stricken with that illness. The purchaser was awarded a £100 reward pursuant to the company's advertisement that it would pay such a sum to any person who contracted influenza after having used the ball according to the instructions.[17] *Carbolic Smoke Ball* held that an advertisement may be construed as an offer for a reward where it seeks to induce performance, rather than calling for a reciprocal promise.[18]

Applying these principles to the statements made in the YouTube video, the court in *Augstein* distinguished *Pepsico*, explaining that, unlike the Pepsi commercial, the video was intended to induce performance – that is, the actual return of the stolen laptop – and not just a promise from someone to deliver, or help him find, his property.[19] Thus, returning the laptop constituted an acceptance of the reward offer resulting in an enforceable contract.

Next, Leslie contended that, in any event, the offer was not legitimate because it was conveyed through YouTube, a social media site generally used to broadcast advertisements and promotional videos, along with several other kinds of videos. The court found this argument unpersuasive and noted that several courts have held that an offer was legitimate even if made via television or the radio.[20] In this regard, the court specifically stated:

> The forum for conveying the offer is not determinative, but rather, the question is whether a reasonable person would have understood that Leslie made an offer of a reward.[21]

The reasonable person standard was also used in *Pepsico,* where the court stated that when evaluating the Pepsi commercial, it "must not consider defendant's subjective intent in making the commercial, or plaintiff's subjective view of what the commercial offered, but what an objective, reasonable person would have understood the commercial to convey."[22] Thus, if an offer is "evidently in jest," or done without intent to create a legal relationship, there may not be a valid contract.[23] In *Pepsico,* the court concluded that the idea of flying to school in a Harrier jet represented an "exaggerated adolescent fantasy" and could not be understood as a serious offer by any reasonable person.[24]

Conversely, in the laptop case the court implicitly held that the offer of a million-dollar reward by Leslie, a popular musician, could objectively be construed as a serious one considering the potential commercial value of the intellectual property allegedly stored on the hard drive, despite the fact that it was conveyed through social media and amplified over the Internet.

## Were Sanctions Warranted for Failure to Preserve the Data?

The court stated that a party seeking imposition of sanctions for spoliation of evidence must show that: (1) the party with control over the evidence had an obligation to preserve it when it was destroyed; (2) the evidence was destroyed with a culpable state of mind; and (3) the evidence destroyed was relevant to the party's claim or defense.[25] An obligation to preserve evidence arises when "the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[26] Here, the court readily found that Leslie was on notice that information on the hard drive may be relevant to future litigation because he was contacted by Augstein about the reward before sending the hard drive to the manufacturer.[27] He thus had an obligation to preserve that evidence, which, undoubtedly, was relevant to the reward claim.[28]

A more complex question was determining the level of Leslie's culpability, and, consequently, the severity of the sanctions. The court noted:

> The law is not clear in [the Second Circuit] on what state of mind a party must have when destroying [the evidence]. In *Reilly v. Natwest Markets Group Inc.*, we noted that at times we have required a party to have intentionally destroyed evidence; at other times we have required action in bad faith; and at still other times we have allowed an adverse inference based on gross negligence. In light of this, we concluded a case by case approach was appropriate.[29]

The court went on to cite precedent from the Second Circuit holding that ordinary negligence, and not only gross negligence or bad faith, may constitute a culpable state of mind warranting an adverse inference as a sanction, based on the rationale that each party should bear the risk of its own negligence.[30]

Here, several disputed facts emerged at deposition as to the extent of Leslie's efforts to retrieve and preserve the data from the hard drive. Leslie himself stated that he never talked with his team about hiring an outside vendor or computer company to attempt to recover the information, while one of his assistants stated that he consulted a technician who examined the hard drive and concluded it could not be repaired.[31] That assistant also stated that he contacted the manufacturer and requested data retrieval, but was later told the information could not be recovered.[32]

However, the manufacturer, subpoenaed by Augstein, produced an employee, and records, indicating that a request for data recovery was never made by Leslie or his team.[33] In light of this contradictory proof, the court concluded that Leslie was at least negligent in his handling of the hard drive.[34] It further held that Augstein was entitled to an adverse inference jury instruction, meaning the jury can infer that the intellectual property was present on the hard drive when the plaintiff returned it to the police.[35]

*Augstein v. Leslie* was tried at the end of November 2012. At the conclusion of the trial, the jury rendered a verdict in favor of Augstein in the amount of $1 million for the return of Leslie's laptop.[36] A lesson to be learned from this case is to be careful about what you say on the Internet. The old adage "buyer beware" (*caveat emptor*) might be expanded to include ''beware of the buyer." If a client uses social media and makes an extravagant reward offer, he or she may be bound by it if a reasonable person would have deemed the offer to be a real one.

In all events, clients should be advised not to worsen a problematic situation by negligently handling evidence relevant to the claim for a reward; a court may instruct the jury to infer that the prized property was actually delivered. ■

1. 2012 WL 4928914 (S.D.N.Y. Oct. 17, 2012).
2. *Id.* at *2. This video is available at http:/ /www.youtube.com/watch?v=F8Jf0huEyNU.
3. *Id.*
4. *Id.*
5. *See Augstein v. Leslie*, 2012 WL 77880 at *1 (S.D.N.Y. Jan. 10, 2012).

6. *See id.*

7. *See Augstein*, 2012 WL4928914 at *l.

8. *See id.*

9. *See id.*

10. 88 F. Supp. 2d 116 (S.D.N.Y. 1999).

11. *See id.* at 118.

12. *Id.* at 118–19. The Pepsico commercial is available at: http:/ /www.youtube.com/watch?v=ZdackF2H7Qc.

13. *See id.* at 119–20.

14. *See id.* at 122–23.

15. *See id.* at 125.

16. *See id.* (citing *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (Court of Appeal 1892)).

17. *See id.* (citing *Carlill*, 1 Q.B. at 256–57).

18. *See id.* (citing *Carlill*, 1 Q.B. at 262).

19. *See Augstein*, 2012 WL 4928914 at *3.

20. *See id.* n.2 (citing *Newman v. Shiff*, 778 F.2d 460, 466 (8th Cir. 1985); *James v. Turilli*, 473 S.W.2d 757, 760 (Mo. Ct. App. 1971)).

21. *Id.* at *3.

22. *Leonard*, 88 F. Supp. 2d at 127.

23. *Id.*

24. *Id.* at 129.

25. *See Augstein*, 2012 WL 4928914 at *3.

26. *Id.*

27. *See id.*

28. *See id.*

29. *Id.* at *4 (internal citations omitted).

30. *See id.* (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); *see also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.")).

31. *See id.* at *5.

32. *See id.*

33. *See id.*

34. *See id.* at *6.

35. *See id.*

36. *See Augstein*, 2012 WL 7008147.

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# First-Party Indemnification for Attorney Fees

## By Melissa Curvino and Liam O'Brien

In the United States, each party to a lawsuit generally bears its own costs of litigation, including attorney fees, regardless of whether it wins or loses.[1] This general rule holds true in New York, where the prevailing party may not collect attorney fees from the losing party unless authorized by an agreement between the parties or by statute.[2] It is therefore common for contracting parties to include an indemnity clause promising that each party will hold the other harmless for certain enumerated losses, including for attorney fees. But because such a fee shifting arrangement changes the general rule that parties must bear their own costs of litigation, indemnity clauses are strictly construed by New York courts.[3] When a party seeks indemnity for attorney fees resulting from a suit among the parties to the contract – a first-party suit, as opposed to a third-party suit – courts are even more suspicious.[4]

The New York Court of Appeals examined the issue of fee shifting in indemnity clauses in the 1989 case *Hooper Associates, Ltd. v. AGS Computers, Inc.* In that case the plaintiff, Hooper, had sued the defendant, AGS, for breach of contract.[5] In addition to contract damages, Hooper sought to recover attorney fees incurred in bringing the action against AGS.[6] The contract between the parties contained an indemnity clause providing that AGS must indemnify Hooper for "reasonable counsel fees" but did not define the scope of that promise.[7] Because the indemnity clause did not contain "unmistakably clear" language requiring AGS to indemnify Hooper for attorney fees resulting from a suit between them, the court held that the indemnity clause did not create this obligation.[8]

The *Hooper* case set the precedent for New York law in the area of contractual fee shifting. New York courts will not infer a party's intention to indemnify the other party for attorney fees from a first-party suit without "unmistakably clear" language in the indemnity clause.[9] Even when a provision can be fairly read to include first-

party indemnity, courts will not give the provision such a reading if it is not explicit.[10] The Appellate Division, First Department has said that in order to award attorney fees to the prevailing party in a first-party suit "the intention . . . must be virtually inescapable."[11]

But what is "unmistakably clear" language? How can contract drafters explicitly state their intention to include a fee shifting provision for first-party suits in the indemnity clause? And the answer is not clear. Perhaps because of the high bar set by *Hooper* there have not been many decisions finding that an indemnification provision unmistakably provides for attorney fees arising out of first-party suits. There is some evidence that an indemnity provision meets the *Hooper* standard when the provision specifically references a claim between the parties as a ground for indemnification.[12] In *Getty Petroleum Corp. v. DeIorio*, the Appellate Division, Second Department held that an indemnity provision in a lease, which provided for recovery of attorney fees "in defending any claim brought against [Lessor] by Lessee against which [Lessor] successfully defends," was patently clear.[13] Because this indemnity clause unmistakably provided for indemnification for first-party suits, the court held that the lessee was required to pay the lessor's attorney fees.[14] But *Getty* has not yet been cited for this proposition, so it is not clear whether this decision will be followed as precedent.

Even when a provision can be fairly read to include first-party indemnity, courts will not give the provision such a reading if it is not explicit.

Although it is not known what will satisfy *Hooper*, we can draw lessons from a number of cases finding that indemnity clauses were not unmistakably clear. Cases decided in 2013 and 2014 show that an indemnity "against any and all claims" is not enough to provide for first-party indemnification for attorney fees; and an indemnity clause that includes notice and assumption of defense provisions is evidence of an intention for third-party indemnity, and thus will not be construed as providing for first-party indemnification of attorney fees.

### Courts Do Not Construe an Indemnity "Against Any and All Claims" as Providing for First-Party Indemnification

In *Ocwen Loan Servicing, LLC v. Ohio Public Employees Retirement System*, a case decided on February 18, 2014, the Supreme Court, New York County, refused to construe a broad grant of indemnity against any and all claims as requiring the parties to indemnify each other for attorney fees resulting from first-party suits.[15] *Ocwen Loan Servicing* concerned contracting parties who had signed an indemnity clause agreeing broadly to indemnify "against any and all claims, losses, penalties, fines, forfeitures, legal fees and related costs, judgments, and any other costs, fees and expenses that any certificate holder may sustain in any way related to the failure of the servicer to perform its duties."[16] Also within the indemnity clause was a specific grant of indemnity for third-party liabilities, stating that the parties would indemnify each other against claims "if such claim relating to the servicer is made by a third party with respect to this agreement."[17] The plaintiff argued that this specific grant of third-party indemnity should be contrasted with the broad grant of indemnity for all claims, meaning that the parties had intended for the broad grant of indemnity to apply to first-party claims.[18] Although the court found that it would be reasonable to read the broad grant of indemnity as requiring the parties to indemnify each other for suits between themselves, the court refused to do so.[19] Under the exacting standard of *Hooper*, the court held that the failure to specifically require first-party indemnity meant that the parties were not obligated to indemnify each other for first-party suits.[20]

Similarly, in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, a case decided on January 15, 2014, the Supreme Court, New York County, held an indemnity clause that required the defendant to "promptly reimburse . . . the Trustee for any actual out-of-pocket expenses reasonably incurred" did not create an obligation to indemnify for attorney fees arising out of first-party suits.[21] Because this indemnity did not exclusively or unequivocally refer to first-party claims, the parties were not obligated to indemnify each other for first-party claims.[22] And in its 2013 opinion in *J.P. Morgan Securities v. Ader*, the Supreme Court held that an indemnification "against any and all loss, damage, liability or expense, including reasonable costs and attorney fees" stemming from any misrepresentation, breach of warranty, or breach of covenant was not sufficient to create an obligation to indemnify for first-party suits.[23] Although the language providing indemnification against claims stemming from a breach of warranty or a breach of covenant could be fairly read to include first-party suits, the clause did not unequivocally cover first-party suits, so the court held that it did not create an obligation to indemnify for attorney fees arising out of first-party suits.[24]

Even clauses that obligate one party to indemnify the other against liabilities caused "as the result of any action taken by (or failure to act of) [party 2]" do not create an obligation for first-party indemnification.[25] Although

that language can be read as applying to suits between the contracting parties, the parties did not explicitly or unequivocally state their intention to indemnify each other for attorney fees arising from first-party suits.[26] Without explicit language, New York courts will not shift attorney fees.

## An Indemnity Clause That Includes Notice and Assumption of Defense Provisions Is Evidence of an Intention for Third-Party Indemnity, and Thus Will Not Be Construed as Providing for First-Party Indemnification

For example, in *Hooper* the indemnification clause required one party to "promptly notify [the other] of any claim or litigation to which the indemnity provision shall apply."[27] The court held that this obligation to notify the other party of the claim was an indication that the indemnity clause was meant to apply to third-party suits because the other party would not need to be notified if it had brought the suit.[28] To read the indemnity clause as applying to first-party suits would, in the court's estimation, render the notification provision meaningless.[29] The contract interpretation rule that requires courts to read the contract as a whole, giving fair meaning to all of the provisions, means that one provision cannot be read in such a way as to make another provision meaningless.[30] Therefore, when an indemnity clause includes a notice and assumption of defense provision, courts hold that the indemnity is for third-party suits.[31] Any indication that the indemnity clause was meant to apply to third-party suits means that it does not exclusively or unequivocally apply to first-party suits and thus fails the *Hooper* standard.[32]

In 2013, the Supreme Court, New York County reiterated this holding in *AMBAC Assurance Corp. v. First Franklin Financial Corp.*[33] In that case the indemnity clause provided for the insured to indemnify the insurance company "for any payment made by the Insurer under the Policy" and to "notify the Indemnifying Party in writing" any time "any action or proceeding . . . shall be brought or asserted."[34] The court held that if the indemnity clause applied to first-party suits, the notice requirement would be superfluous, which would violate the rule of construction that a reading of one provision of a contract must not render another provision moot or meaningless.[35] Therefore, to avoid making the notice requirement superfluous, the court held that the indemnification provision did not create an obligation to indemnify for the attorney fees arising out of first-party claims.[36]

## Conclusion: An Intention to Indemnify for Attorney Fees Arising Out of First-Party Claims Must Be Unmistakably Clear

Although the courts have not provided much guidance as to what language will satisfy the *Hooper* standard, there is guidance as to what language is not unmistakably clear. Neither an indemnification clause that uses broad language, such as "any and all claims," nor a clause that requires the parties to notify each other of the intention to seek indemnity meet the *Hooper* standard. Contract drafters who seek to create an obligation to indemnify for attorney fees arising out of a first-party suit should not include those two clauses in the indemnity provision. ■

1. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245–47 (1975). There are a few exceptions to the general rule. For example, if the plaintiff brings a case in bad faith, courts can award attorney fees to the defendant. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991). There are also some fee-shifting statutes that require a losing defendant to pay the winning plaintiff's attorney fees. *See* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 Law & Contemp. Probs. 233, 240–41 (1984). Generally these statutes are seen in areas where there is a strong public interest in improving access to the court system for litigants who otherwise couldn't afford it. *Id.*
2. *Mount Vernon City Sch. Dist. v. Nova Cas. Co.*, 19 N.Y.3d 28, 39 (2012) (quoting *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 5 (1986)).
3. *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989).
4. *Id.* at 492.
5. *Id.* at 489.
6. *Id.*
7. *Id.* at 491.
8. *Id.*
9. *Id. Accord Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 207 (1st Dep't 2010); *Ocwen Loan Servicing, LLC v. Ohio Pub. Emps. Ret. Sys.*, 2014 N.Y. Misc. LEXIS 831 *18–19 (Sup. Ct., N.Y. Co. 2014).
10. *Gotham Partners*, 76 A.D.3d at 207–09.
11. *Id.* at 209.
12. *Id.*
13. 194 A.D.2d 762, 764 (2d Dep't 1993).
14. *Id.*
15. 2014 N.Y. Misc. LEXIS at *19.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at *20.
20. *Id.* at *21.
21. 42 Misc. 3d 1213(A) (Sup. Ct., N.Y. Co. 2014).
22. *Id.*
23. 2013 N.Y. Misc. LEXIS 2341 *25–28 (Sup. Ct., N.Y. Co. 2013).
24. *Id.* at 28.
25. *Gotham Partners*, 76 A.D.3d at 205.
26. *Id.*
27. *Hooper*, 74 N.Y.2d at 492.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *See id.*
33. 40 Misc. 3d 1214(A) (Sup. Ct., N.Y. Co. 2013).
34. *Id.*
35. *See id.*
36. *Id.*

BY THOMAS A. DICKERSON AND SYLVIA O. HINDS-RADIX

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# Taxing Internet Transactions: Airbnb and the Sharing Economy

The issue of taxing Internet transactions is, primarily, about how to fairly tax new and unfamiliar business models.[1] But it is also about trying to accommodate traditional and vested business interests threatened by the Internet. Then there is the explosive growth of the sharing economy,[2] particularly in New York City and San Francisco, and whether and how those transactions can be taxed.

## New York Face-Off

Airbnb, a popular Internet apartment-sharing service, recently faced off with the New York Attorney General[3] over the scope of an investigatory subpoena[4] looking into this issue. The clash resulted in a one-year truce whereby both parties declared victory and agreed that Airbnb will provide the Attorney General with "the information he is seeking about Airbnb hosts in New York City, but it will be stripped of names and other personally identifiable information. That satisfies [Airbnb], which did not want its law-abiding hosts to be subjected to what it called a 'fishing expedition' by regulators. The attorney general will have a year to use the data to identify bad actors – hosts who are renting out large blocks of rooms in violation of local laws."[5]

## Airbnb "Hosts" Versus Hotels

The legal face-off between Airbnb and the Attorney General involved much more than just seeking to identify potential tax evaders. It also pitted thousands of foreign tourists[6] and their local Airbnb "hosts," who may offer a "'very cute and cozy' room in a retired police detective's apartment in Kew Gardens ($35 a night) to a 'spacious mansion' on the Upper East Side ($10,000 a night, but it's pet friendly),"[7] against the Hotel Association of New York City, a spokeswoman for which noted that "Airbnb remains a scofflaw company whose business model is at odds not just with multiple New York laws, but with the basics of the New York City real estate market."[8]

## Smart Tourists Versus Genteel Locals

An example of how unreceptive "genteel locals" may be to the sharing concept[9] can be gleaned from the recent case *City of New York v. Smart Apartments LLC*.[10] There, New York City sought to enjoin the operation of an apartment-sharing website, claiming that the defendant's placement of tourists in residential apartments for "transient" stays of less than 30 days is illegal because it violates the Multiple Dwelling Laws, Housing Maintenance Codes and City Building Codes, and that the transients "bother the non-transient residents of the buildings because the transient occupants host loud, late night parties; vomit, dump garbage, and smoke in the hallways... and generally do not conduct themselves in the civilized, genteel manner of the locals." In granting a preliminary injunction the court noted that "placing unsuspecting tourists in illegal, dangerous accommodations constitutes irreparable injury, especially if there is a tragic fire."

## Internet Taxing Methodologies

Certainly, Internet businesses should pay their fair share of taxes in those environments in which they sell their goods and services. It is also fair to subject Internet retailers and resellers to personal jurisdiction in the forums in which they transact business.[11] Developing fair and reasonable taxing methodologies for Internet businesses is a work in progress, which started some time ago with the taxing of Internet retailers or "resellers."

## Taxing Internet Resellers

In *Overstock.com, Inc. v. New York State Department of Taxation and Finance*,[12] the New York Court of Appeals rejected the facial challenge of online retailers (including Amazon.com) to the newly created Internet tax as being unconstitutional "by subjecting online retailers, without a physical presence in the state, to New York sales and compensating use taxes." In so doing the Court noted, "The world has changed dramatically in the last two decades, and it may be that the physical pres-

ence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet." The implementation of this reseller taxing methodology has led to consumer class actions alleging overcharges and the imposition of phony taxes.[13]

## New York City Hotel Taxes

The New York Court of Appeals rejected a challenge by online retailers to the imposition of a local hotel tax to the fees collected from their customers in *Expedia, Inc. v. City of New York Department of Finance*.[14] "This statute allows the City to tax up to six percent 'of the rent or charge per day' for each hotel room [and] authorizes the City to collect these taxes from the hotel operator or any 'person entitled to be paid the rent or charge for the hotel room.'" In finding the hotel tax constitutional the Court noted that "[o]nline travel companies . . . have successfully reshaped the way people book travel."

## Nassau County's Hotel Tax

In *County of Nassau v. Expedia, Inc.*,[15] Nassau County brought a class action on behalf of itself and 55 other similar taxing authorities against many online travel retail sellers and "remarketers" of hotel accommodations, seeking to enforce "the Nassau County Hotel and Motel Occupancy Tax." The online retailers purchase blocks of rooms from hotels at discounted rates and then resell those rooms over the Internet. The dispute is that the county wants the tax calculated as a percentage of the price the occupants pay to the resellers, whereas the resellers want to pay tax based on the lower "wholesale" rate. In any event, the *Expedia* court certified this class action and found that Nassau County had standing to sue as a class representative on behalf of other counties.

## Airbnb: Taxing the Sharing Economy

While Expedia, Priceline and Hotwire are best defined as retailers or resellers and, as such, can be controlled and taxed accordingly, it is much more difficult to find a comparable taxing analogue for the Internet-sharing economy. In addition, and as noted above, travel sharing companies such as Airbnb threaten traditional businesses such as hotels and rental car companies and may annoy the owners and residents of apartment buildings in which, for example, many Airbnb "hosts" reside, "As services like Airbnb and Uber, the ride-sharing service, spread across the country, lawmakers and other officials in some cities have started seeking ways to curb their explosive growth and bring them into compliance with existing laws, written before the companies were ever imagined."[16]

## Conclusion

The Internet and the new business models it has spawned are revolutionary and potentially of great benefit to the general public. The task of taxing such unfamiliar businesses fairly requires an understanding of how each business works and may require an awareness and consideration of competing interests in the local environment. ■

1. *Overstock.com v. N.Y. State Dep't of Taxation & Fin.*, 20 N.Y.3d 586 (2013) (Internet tax); *Expedia, Inc. v. City of N.Y. Dep't of Fin.*, 22 N.Y.3d 121, 124 (2013) (New York City hotel tax); *Cnty. of Nassau v. Expedia, Inc.*, 41 Misc. 3d 626 (Sup. Ct., Nassau Co. 2013) (class action by 56 counties seeking collection of hotel taxes).

2. *See* Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, Forbes (Feb. 11, 2013).

3. *See* Nick Wingfield, *A Victory for Airbnb in New York*, www.nytimes.com (May 13, 2014); Andrea Peterson, *Airbnb Is Facing Off Against New York's Attorney General. Here's Why*, Wash. Post (Apr. 22, 2014); David Streitfeld, *New York's Case Against Airbnb Is Argued in Albany*, N.Y. Times (Apr. 22, 2014).

4. The Attorney General's subpoena sought, *inter alia*, (1) "An Excel spreadsheet identifying all Hosts that rent accommodations(s) in New York State, including . . . (c) Address of the Accommodations(s) rented . . . (d) the dates of guest stay, and the rates charged for the rental . . . (e) method of payment to Host including account information and (f) total gross revenue per Host generated for the rental . . . through your website" and (2) "Documents sufficient to identify all tax-related communications your website has had with the Host."

5. David Streitfeld, *Airbnb Will Hand Over Host Data to New York*, www.nytimes.com (May 21, 2014).

6. *See* N.R. Kleinfield, *Airbnb Host Welcomes Travelers From All Over*, www.nytimes.com (Apr. 25, 2014) ("Over the past 10 months, Mr. [X] has had a parade of 72 strangers living with him, respondents to his overture of: 'Beautiful room for rent in Astoria' on the website Airbnb. They have drunk his beer and indulged in his muffins and dirtied his guest towels. They have come from Italy, Canada, India, South Korea, Belgium, France, New Zealand, the Czech Republic, Bulgaria. . . . Members of this international bazaar, usually in pairs, have stayed from two nights to a month. . . . This is life as a hyperactive New York City 'host' in that swelling substratum of the hospitality industry that unfolds in people's homes, all part of the modern world's sharing economy, spinning by with serial comings and goings").

7. Streitfeld, *supra* note 5.

8. *See id.* ("A spokeswoman for the Hotel Association of New York City hailed the deal. Liz Krueger, a state senator . . . is a determined Airbnb foe. . . . 'Despite today's settlement, Airbnb remains a scofflaw company whose business model is at odds not just with multiple New York laws, but with the basics of the New York City real estate market,' Ms. Krueger said.").

9. *See* Geron, *supra* note 2 ("[A]n economic revolution that is quietly turning millions of people into part-time entrepreneurs, and disrupting old notions about consumption and ownership. Twelve days per month [X] rents his Marin County home on website [Airbnb] for $100 a night, of which he nets $97. Four nights a week he transforms his Prius into a de facto taxi via the ride-sharing service [Lyft], pocketing another $100 a night in the process. . . . What [X] finds himself in is . . . a share economy, where asset owners use digital clearinghouses to capitalize the unused capacity of things they already have and consumers rent from their peers rather than rent or buy from a company. . . . [O]ver the past four years at least 100 companies have sprouted up to offer owners a tiny income stream out of dozens of types of physical assets, without needing to buy anything themselves").

10. 39 Misc. 3d 221 (Sup. Ct., N.Y. Co. 2013),

11. *See* Thomas A. Dickerson, Cheryl E. Chambers & Jeffrey A. Cohen, *Personal Jurisdiction and the Marketing of Goods and Services on the Internet*, 41 Hofstra L.R. 31 (Fall 2012).

12. 20 N.Y.3d 586 (2013).

13. *Id.* at 595. *See, e.g., Chiste v. Hotels.com LP*, 756 F. Supp. 2d 382, 395–96 (S.D.N.Y. 2010) ("The crux of [the] allegations stem from what is not disclosed on this invoice [for the online purchase of hotel accommodations]. . . . Plaintiffs allege that Defendants are charging consumers a higher tax based on the Retail Rate consumers pay Defendants rather than the Wholesale Rate Defendants pay the hotels. Instead of remitting the full amount of taxes collected to the hotels, Defendants keep the difference between the tax collected and the amount remitted to the tax authorities . . . as a profit or fee without disclosing it."); *Sneddon v. Hotwire, Inc.*, 2005 WL 1593593 (N.D. Cal. 2005); *Marshall v. Priceline.com, Inc.*, 2010 WL 1068197 (Del. Sup. 2010); *Okland v. Travelocity.com, Inc.*, 2009 WL 1740076 (Tex. App. 2009); *Hotels.com v. Canales*, 195 S.W.3d 147 (Tex. App. 2006) ("By its own admission, Hotels.com neither charges nor collects taxes nor does it remit taxes directly to any taxing authority.").

14. 22 N.Y.3d 121, 124 (2013).

15. 41 Misc. 3d 626 (N.Y. Sup. 2013).

16. *See* Wingfield, *supra* note 3.

# ATTORNEY PROFESSIONALISM FORUM

## To the Forum:

I represent one of the defendants in an action brought against a number of parties in an unfair competition case involving various employees who left their employer to work for a competitor. The plaintiff has sued its former employees and their current employer (my client). It is a high-stakes litigation involving huge sums of money, and it has gotten to the boiling point. Plaintiff's counsel and the attorney for one of the employees have been exchanging what I consider to be vulgar and horrifying emails. The level of insults hurled between these two individuals and the language of their exchanges would make schoolyard talk look like dialogue from the Victorian age. One insult by plaintiff's counsel included a reference to the death of opposing counsel's child; another email made a remark about the disabled child of one of the lawyers. I am astounded that two members of the bar would engage in such disgusting behavior or think that their conduct is effective advocacy. Thankfully, none of the attacks have been directed to me. I am trying to represent my client to the best of my ability and have kept out of the fray.

My question for the Forum: How am I supposed to handle this kind of bad behavior?

Sincerely,

Donald Disgusted

## Dear Donald Disgusted:

Your question raises issues strikingly similar to those recently confronted by a Florida court. *Craig v. Volkswagen of America, Inc*., Case No. 07-7823 CI7 (Circuit Court of the Sixth Judicial Circuit, in and for Pinellas County, Florida) proceeded just as many litigations do; after the case was filed and issue was joined, there were motions and court conferences followed by the beginning of discovery. For reasons that are at best unclear, it was discovery that led some of the lawyers to turn to the dark side.

It began with a protracted email exchange among counsel concerning the scheduling of discovery motions. Plaintiff's counsel threw the first stone by insulting defense counsel, his firm and his hearing preparation tactics. In response, defense counsel referred to his adversary as "Junior" and asked him to stop sending "absurd emails," which in turn was answered with an email that called defense counsel an "Old Hack" admonishing him to "[l] earn to litigate professionally." Later, as the parties were attempting to schedule depositions, plaintiff's counsel (who had apparently failed to propose deposition dates) wrote that defense counsel could not "deal with the pressure of litigating . . . " and that "if [his adversary could not] take the heat then [he should] get out of the kitchen . . . " The response was quick. Defense counsel's email again called his adversary "Junior" and accused him of being both on "drugs" and a "little punk" whom he then referred to as a "bottom feeding / scum sucking / loser . . . ." who had a "NOTHING life . . . " and was told to go back to his "single wide trailer . . . " This obviously did not sit well with plaintiff's counsel whose retort to defense counsel was that "God [had] blessed him with a great life" and that he allowed himself ample time for various hobbies, such as traveling, riding "dirt bikes and atvs" and his "motorcycle." This could have easily been ignored but, no, defense counsel had to have the last word, so this is what he put in an email:

> [T]he fact that you are married means that there is truly someone for everyone even a short / hairless jerk!!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization!!!

If you think it could not get any worse, guess again. Approximately three months later, plaintiff's counsel wrote an email that characterized opposing counsel as a "lying, dilatory mentally handicapped person" adding in another email that opposing counsel (whom he called "Corky") had a type of "retardism" [sic] resulting from counsel's "closely spaced eyes, dull blank stare, bulbous head, lying and inability to tell fiction from reality . . . " These statements apparently hit a nerve with defense counsel who then disclosed to his adversary that he had a son with a birth defect but then went on to make various *ad hominem* attacks against plaintiff's counsel's family members and questioned the legitimacy of his adversary's children. If you still think it could not get any worse, it did.

In his response to that email, plaintiff's counsel said the following:

> Three things Corky:
>
> (1) While I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard reproduces, it is a crap shoot [sic] sometimes retards can produce normal kids, sometimes they produce F***** up kids. Do not hate me, hate your genetics. However, I would look at the bright side at least you definitively know the kid is yours.
>
> (2) You are confusing realties [sic] again the retard love story you describe taking place in a pinto

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

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> [sic] and trailer is your story. You remember the other lifetime [sic] movie about your life: "Special Love" the Corky and Marie story; a heartwarming tale of a retard fighting for his love, children, pinto and trailer and hoping to prove to the world that retard can live a normal life (well kinda).
>
> (3) Finally, I am done communicating with you; your language skills, wit and overall skill level is at a level my nine-year old could successfully combat; so for me it is like taking candy from well a retard and I am now bored. So run along and resume your normal activity of attempting to put a square peg into a round hole and come back when science progresses to a level that it can successfully add 50, 75 or 100 points to your I.Q.

When it appears that plaintiff's counsel could not sink any lower, he then writes:

> This guy is an absolute a** clown and what he is not going to use his retarded son with 300+ surgeries (must look just like Mooney so they must be all plastic surgeries) to get out of the trial? I can see already your Honor my retarded son is having surgery for the 301st time so there is no way I can try the case I need a continuance. Absolute joke and a** clown. If this is what a 20 year attorney looks like, then I feel sorry for the profession. Yea, that is exactly what I want to do go watch a jester perform at the Court. How pathetic of a life must you have to run around every day talking about how great a trial attorney you are. Especially, when everybody can see you are an a** clown. After all if I am running around to hearings after 20 years lying to courts and using my time to send childish emails to a third year attorney, the last thing I am going to do is run around saying what a great attorney I am. This guy has to go home every night and get absolutely plastered to keep from blowing his huge bulbous head off. Alright, enough about the a** clown. Later.

And finally, the last exchange between these two "professionals" concluded with plaintiff's counsel referring to his adversary once again as an "a** clown" who should be tending to his "retarded son and his 600th surgery . . . ." He concludes by stating that he heard "the little retards [sic] monosyllabic grunts now; Yep I can make [sic] just barely make it out; he is calling for his a** clown. How sweet."

It should be no surprise that both attorneys were brought up on disciplinary charges, including violations of Rules 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice) and 4-8.4(d) (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic) of the Rules Regulating the Florida Bar. *See* Complaint, The *Florida Bar v. Mitchell*, TFB No. 2009-10,487(13C), Supreme Court of Florida, and Complaint, *The Florida Bar v. Mooney*, TFB No. 2009-10,745(13C), Supreme Court of Florida.

The result was that plaintiff's counsel was suspended from practice for 10 days, ordered to attend an anger management workshop and pay $2,000 in costs. *See The Florida Bar v. Mitchell*, 46 So. 3d 1003 (Fla. 2010). In addition, plaintiff's counsel was subject to reciprocal discipline in both the District of Columbia and Pennsylvania as a result of the Florida disciplinary decision. *See In re Mitchell*, 21 A.3d 1004 (D.C. App. 2011) and *In re Mitchell*, 2011 Pa. LEXIS 2308 (Pa. 2011). Defense counsel was given a public reprimand as a result of his conduct and had to pay $2,500 in costs. *See The Florida Bar v. Mooney*, 49 So. 3d 748 (Fla. 2010).

*Craig* makes it easy to answer your question: always take the "high road" and never go "shot for shot" when an adversary tries to drag you into the fray. As officers of the court, we should be civil to each other and must always act in a manner that is consistent our ethical obligations. To that end, you (and more important, the attorneys on your case) should take note of the Standards of Civility (the Standards) (*see* 22 N.Y.C.R.R. § 1200, App. A) in connection with your duties toward other lawyers. Section I of the Standards provides that "[l]awyers should be courteous and civil in all professional dealings with other persons" and further notes, in part,

> A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.
>
> B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.
>
> *See* Standards (I).

The Standards have been in place since 1997, and, fortunately, most lawyers follow them. They realize that, totally apart from the risks that bad behavior creates, the practice of law should not be a battlefield that brings out the worst in us. Effective lawyers realize that uncivil conduct is not effective advocacy and does not advance the interests of our clients. It should not be necessary to remind the members of our profession that the rules that govern our conduct apply to emails; lawyers do not get a pass when bad behavior manifests itself in email. Your question and *Craig* tell us that while most lawyers get it, there will always be a few who give in to temptation, especially when using email to communicate. The lawyers in your case fall into this category and appear to have acted in contravention of the recommended behavior under the Standards. Moreover, based on what we have described with regard to the attorneys in *Craig*, they could be subject to disciplinary action under the New York Rules of

Professional Conduct (the RPC). As stated in other Forums, while the RPC does not directly address civility, several rules deal with "overly aggressive behavior" by attorneys, including Rule 3.1 (Non-meritorious Claims and Contentions), 3.2 (Delay of Litigation), 3.3 (Conduct Before a Tribunal), 3.4 (Fairness to Opposing Party and Counsel), and 8.4(d) ("engage in conduct that is prejudicial to the administration of justice"). *See* Anthony E. Davis, *Replacing Zealousness With Civility*, N.Y.L.J., Sept. 4, 2012, at 3, col. 1. (*See* Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., Nov./Dec. 2012, Vol. 84. No. 9.) The conduct by both counsel in your action (like the attorneys in *Craig*) could qualify as "overly aggressive behavior."

In addition, the email exchange that you have called to our attention could be viewed as "conduct that is prejudicial to the administration of justice" (*see* Rule. 8.4(d)) and runs contrary to the concept of effective advocacy. Comment [3] states that the Rule "is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in *substantial harm to the justice system comparable to those caused by obstruction of justice . . . .*" and that conduct "must be seriously inconsistent with a lawyer's responsibility as an officer of the court." *See id.* (emphasis added). There can be severe consequences for behavior that runs afoul of these rules. Here in New York, attorneys have been suspended from practice for making offensive remarks to adversaries, clients and even court personnel. *See, e.g., In re Chiofalo*, 78 A.D.3d 9 (1st Dep't 2010) (attorney suspended for two years for using obscene, insulting, sexist, anti-Semitic language, ethnic slurs, and threats in correspondence to his former wife's attorneys and others involved in his matrimonial action. The attorney also filed a meritless federal lawsuit against 29 defendants, including his former wife, her attorneys, judges, and others. The attorney continued to send derogatory and sexist email correspondence to his former wife's attorneys during the pendency of his disciplinary proceeding, indicating a pattern of offensive behavior and a failure to appreciate the seriousness of his actions.); *In re Kahn*, 16 A.D.3d 7 (1st Dep't 2005) (attorney suspended for engaging in a pattern of offensive remarks, including abusive, vulgar and demeaning comments to female adversaries, which included comments about a juvenile client); *In re Brecker*, 309 A.D.2d 77 (2d Dep't 2003) (attorney suspended for two years based on his use of "crude, vulgar and abusive language" in multiple telephone calls and messages to a client and a court examiner over the course of a few hours. The attorney had also been convicted of criminal contempt and had a prior admonition.).

Moreover, there have been instances where attorneys' uncivil conduct has resulted in decisions that had detrimental consequences for their clients in civil litigation. In *Corsini v. U-Haul Int'l*, 212 A.D.2d 288 (1st Dep't 2005), the court found that the attorney's conduct at his own deposition was so lacking in professionalism and civility that the court ordered dismissal of his *pro se* action as "the only appropriate remedy." "Discovery abuse, here in the form of extreme incivility by an attorney, is not to be tolerated. . . . CPLR 3126 provides various sanctions for such misconduct, the most drastic of which is dismissal of the offending party's pleading." *See also Sholes v. Meagher*, 98 N.Y.2d 754 (2002) (the Court denied leave to appeal on procedural grounds for that portion of a case where an attorney was sanctioned and a mistrial granted due to the attorney's lack of decorum by looks of disbelief, sneering, shaking of her head and various expressions designed to indicate to the Court her displeasure); *Heller v. Provenzano*, 257 A.D.2d 378 (1st Dep't 1999) (sanctions awarded against the plaintiff, an attorney, and his counsel because of improper conduct both before and during trial, which included Heller's entering the jury selection room and speaking with jurors without all attorneys present, ignoring the trial judge's warnings not to wander around the courtroom during trial and not to mention another fatal accident which occurred in the same elevator, and referring to the fact that his wife was Hispanic and that he spoke Spanish fluently in an effort to influence Hispanic jury members. Plaintiff's attorney was also sanctioned *because he asked disparaging questions of an expert without a factual basis*); and *Dwyer v. Nicholson et al.*, 193 A.D.2d 70 (2d Dep't 1993), *appeal dismissed*, 220 A.D.2d 555 (2d Dep't 1995), *appeal denied*, 87 N.Y.2d 808, *reargument denied*, 88 N.Y.2d 963 (1996). (A new trial was ordered based, in part, on counsel's "sarcastic, rude, vulgar, pompous, and intemperate utterances on hundreds of pages of the transcript," which were found to be "grossly disrespectful to the court and a violation of accepted and proper courtroom decorum.")

As we have stated both here and previously in this Forum, it is always smart to take the high road when opposing counsel acts inappropriately. Never answer bad behavior with bad (and perhaps worse) behavior.

Sincerely,

The Forum by
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(syracuse@thsh.com) and
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## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I just left a position at a large law firm to start work as an in-house attorney for a well-known multinational conglomerate. I am curious about the ground rules that apply to lawyers who make the switch from law firm practice to in-house counsel. Are there any particular ethical rules that I should be concerned with as I am transitioning to this new position? Have there been any recent developments applicable to in-house lawyers that I should know about?

Sincerely,

Moving Inside

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Theodore Houston Waggner
Christopher James Wahl
Gulai Wang
Ning-feng Wang
Shi-shi Wang
Jenna Anne Ward
Saar Warner-Lipton
Kelly Rose Legrand Weiner
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Nicholas Kyriacou
Timor Lahav
Wendy M. LaManque
Tricia Lendore
Mia Levi
Spencer Kai Yuan Lo
Anny Ramona Lopez
Michael Brian Manning
Samuel Charles Markowitz
Tamara Nicole Marshall
Michael T. Massmann
Jamie Dolores McFarlane
Melissa Delilah Medilien
Douglas Henry Miller
Sofia Papakostas
Rachel L. Pecker
Lailah Hanit Bragin Pepe
Michael Elia Pereira
Paul Richard Piccigallo
David J. Pretter
Austen David Refuerzo
Kenneth Craig Reilly
Jessica Lynn Rickards
Serge Salganik
Leonid Sandlar
Luke Christopher Schram
Cara Bianca Sherman
Gregory Tyler Sidman
Jonathan Siegel
Kayla Rayanne Simpson
Iris E Skornicki
Paul Vincent Sweeny
Ronald Sylvestre
Douglas J. Varacalli
Dale Anthony Ventura
Robert Sherwood Whitbeck
Adam Maxwell Wolk
Deborah Lynn Wollenberg
Katie Lee Wright
Donna B. Yee
Anne Grace Young
Chaim C. Zlotowitz
Evan D. Zucker

**THIRD DISTRICT**

Michael E. Costabile
Nelli Doroshkin
James Parker Farrington
Lisa Mendel-Hirsa
Maston J. Sansom
Andrew Austin Stecker
Lisa Jay Vasnani

**FOURTH DISTRICT**

Lucy Joanette McCarthy
Benjamin P. Pomerance

**SIXTH DISTRICT**

Stacey Paige Eilbaum
Mudi Han
James Howard Husted
Sara Adrienne Slavin

**EIGHTH DISTRICT**

Thomas Raymond Beecher
Thomas Hunter Deberry
Tinya Allison Holt
Brian Conley Kearns

**NINTH DISTRICT**

Mitchell T. Birrittella
Brian Bodansky
Andrew William Buder
Michelle Elizabeth Conston
Paolo Conte
Kathleen Elizabeth Devlin
Jeremy Michael Doberman
Jacob Ross Fiddelman
Christina Lauren Gallinari
Kaitlin M. Hartshorn
Brett M. Kaminsky
Joanna Ivy Karlitz
Danielle Marie Lamake
Thomas J. Larsen
Boris Yurevich Lepikh
Melinda Faye Licciardello
Maaria Mahmood
Michael Gerald McDonough
Matthew H. Mistal
Rebecca Esta Morse
Stephen Carl Nappi
Matthew Ng
Sanchia Samantha Palmer
Andrew A. Peterson
Jessica Charlotte Principe
Rebecca Anne Richards
Laura Anne Rodia
Agatha Joanna Rudz
Julie Christina Ruggieri
Benjamin Feiden Silfen
Matthew Laurence Simon
Whitney W. Singleton
Russell Armand Smith
Rebecca J Sobie
Balal Sultan
Relic Sun
Dennis Patrick Uhlmann

Todd Venning
Joseph Douglas Verga
Leslie Michelle Villacis
Ashley Hannah Webb-Orenstein
Richard N. Wiener
Jessica Rae Witmer

**TENTH DISTRICT**

Carolyn Anne Abdenour
Laura Lourdes Bahmanzad
Michael Joseph Barresi
Barry Zev Bazian
Brenda Beauchamp
Rebecca M. Bielski
Matthew Bloom
James Bongiorno
Cristian Mihai Bratescu
Brendon Anthony Cassella
Justine Jena-ann Cefalu
Christina Chang
Jacob L. Chase
Harrison Paul Corcoran
Sean Michael Costigan
Bryan R. Denberg
Nora C. Devitt
Martin Daniel Dolitsky
Janine K. Downing
Kaitlyn Eisen
Samantha Rose Flores
Jenna Anne Florio
Jie Jun Geng
Ana Getiashvili
Benjamin Goldberg
Chaim Jonathan Grushko
Lauren Guillem
James G. Gundlach
Judith Gutman
Kevin Hagler
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Nicholas Scot Kingsbury
Siobhan Elizabeth Calhoun Klassen
Adam Scott Korn
Nicoletta Lakatos
Sherry Hsuan Yuu Lin
Nicholas Royce Maniscalco
Michael Manning
Michael V. Mantovani
Jeffrey Michael Marchese
Christopher Joseph Masiar
Megan Katherine McNamara
Anne Patrice Meyer
Nicholas Francis Mondello
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Jennifer Eileen Muller
Kevin Michael Mulligan
Mary Elizabeth Murray
Nicholas Robert Napoli
Ashley A. Omubo-Dede
Jacqueline Pearce
Carissa Marie Wesemann Peebles
Christopher Michael Petrossian
Jordan Michael Plesser
Thomas Michael Porrazzo
Vilma Preta
James Pyo
Andrew Ryan Rabin
Danielle Rizzo
Brooke E. Rosenberg
Jessica Lyn Rosenthal
Jennifer N. Russell
Melissa Marie Salsone
Chase Jared Sandler
Seth Etan Schlessel
Jacquelyn F. Schwalb
Lana Brigette Seligsohn
Olga Siamionava-Goldberg
Joel C. Simon
Christopher Ryan Stevens
Adina Giselle Storch
Madeline J. Venjohn
Dean M. Villani
Christopher Donald Warren
Joseph Alan Wexler
Lana Cecellia Yang
David Yaron
Alyssa L. Zuckerman

**ELEVENTH DISTRICT**

Alfia Agish
Amanie Akarah
Katherine Barenboim
Geoffrey Albert Bleau
Thomas D. Bradshaw
Margaret Victoria Cheu
James Jay Chin
Susan Markham Crile
Meredith Hope D'Angelo
Christopher P. Dooley
Conor Patrick Duffy
David Feeser
Rachel Goldenberg
Michael Gottlieb
Laura Harding
Ivan Ho
Megan Houston
Christopher Michael Hultzman
Andrew G. Kao
Garrett Kaske
Timothy P. Keefe
Maya Khodos
Peter Young Kim
Christine Maharaj
Nathalie Bernadette Martelly
Courtney K. Morgan
Christine Gabriella Ortiz
Milana Pinkhasova
Stephen Alexander Roth
Ariel Podolsky Schneller
Charles Claudio Simpkins
Rhaye Heather M. Sina
Christina Michelle Swatzell
Jing Tang
Wilber Trivino
William Daniel Welkowitz
Lulu Wu

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Stuart Elliot Alter
Daniel Frank Arcuri
Linda C. Attreed
Crystal Chen
George Kenneth Gomez
Bilal Husain Haider
Damion C Josephs
William Thaddeus Kuntz
Bart Mayol
Jeffrey Nash
Brian Ramkissoon
Cynthia L. Rivera
Aaron Spolin

**THIRTEENTH DISTRICT**

Andrew Joseph Botelho
Jason M. Cohen
Albina Gertsberg
Benjamin Hugh Haftel
Lindsay Nicole Marturano
Jayde Amanda Wiener
Olga Zagika

**OUT OF STATE**

Gamal Ahmed Abouali
Lopa Meeta Adhikary
Anna Afanasieva-Demaggio
Robert Jeffrey Agar
Naoko Akimoto
Luke James Albrecht
Wendell McCahan Alford
Denis Alexandrovich Almakaev
Carmen Alonso Rodriguez
Michael Salvatore Amalfe
Nicholas Eric Anderson
Azin Arbab
Carolina Sales Cabral Arlota
Andrew Philip Arnold
Emelia Louise Baack
Carlos Eduardo Bacalao-Fleury
Jonathan Ross Bailyn
Benjamin Scott Balden
Annie Maureen Balghiti
Brielle Culver Bandola
Matthew Barlas
Blake J. Baron
Dana C. Barretta
Patrice M. Barron
Nicole Rachel Barton
Guillermo Javier Beades
Colin McCarthy Beauvais
Tracey Barbara Chettle Begley
Gregory James Bennici
Denise Brinker Bense
Grant Alexander Bermann
Joachim Franciscus Petrus Beurskens
Pooja Rani Bhagat
Ryan Joseph Bird
Jonathan Clayton Black
Sarah Faye Blankstein
Jessica Michelle Blydenburgh
Giacomo Bossa
Adrian John Alan Bott
Veronica Ashley Bowen
Valerie Jean Brender
Yissel Cabrera
Steven Victor Camerino
Janyll Rae Canals
Jason William Canne
Kerry Ann Carroll
Niccolo Pietro Castagno
Federico Cenzi Venezze
Cyril Ka Hong Chan
Man Kit Chau
Alice X. Chen
Yuxin Chen
Bernard Wai Lap Cheng
Zena Marie Chidiac
Nelu Ioan Chiper
Bumguen Cho
Robyn Heeyeon Cho
Karen Kawan Chong
Devin Rose Anna Coats
Albert Colldecarrera Vega
Drew Derry Cook
Jory Daniel Cook
Nicholas James Coppola
Bram Gilbert Beatrice Couvrer
Jade Alexander Craig
Marissa Crespo
Jian Cui
Jiongzhe Cui
Michele Curatola
Mary Katharine Cusack
Katherine Leigh D'Ambrosio
Misha Khan Daha
Junda Dai
Shuyang Dai
Leila E. Dalpos
Alexandra Frances Priscilla Davidson
Joshua Paul Davis
Margaret Doris Davis
Tiffany Darlene Davis
Walter Pattison Deforest
Christopher William Dennis
Rahul Rajendra Desai
Suneeta Thadani Dewan
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Christopher Dooley Dodge
Samantha Kurland Drake
Karin Dryhurst
Cemre Dursun
Johannes Niklas Eckhardt
Sarah Elizabeth Elias
Zachary Kenneth Elliott
Gail Lee Ellis
Joby Lynn Emmons
Tiffany Eng
Hwee Lee Danna Dolly Er
Tamara Musa Essayyad
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Bradley Carl Faris
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Joshua Solomon Fischer
Petya Fist
Timothy Philip Fitzsimons
Lisa Beth Flickstein
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Mariana Nardon Fonseca
Margot Fontaine
Lillian Andrea Forero
Hadrien Forterre
Christopher John Freeland
Tabata Elena Freitez-Arteaga
Keren Frumkin
Alfred Hugo Fuente
Michael Jay Fuller
Michael Furlano
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Shari Lee Genser
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Friederike Sabine Goergens
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Ana Gonzalez Fernandez
Carlos Fernando Gonzalez
Javier J. Gonzalez-Sfeir
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Shingo Goto
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Rashage Pleshette Green
Jonathan Allen Greene
Alaina Ashley Gregorio
Dominique A. Guex
Aris Limjoco Gulapa
Denis Nickolaevich Guzilov
Jocelyn Judith Hackett
Alice Kathleen Hadley
Mohamed Hajj
Caitlyn Lee Hall
Seung Han
Alexandra Scharlau Haney
Bridget Anne Harris
Yifei He
Heather Marie Hicks
Taro Hirosawa
Yael Rose Artura Hirsch
Mercedes Lynn Hobson
Daniel Hogan
Justin Ryan Flynn Hollander
Anna Siobhan Holloway
Rasmus Holm
Michael Steven Holtzman
Yi-ming Hsu
Monvan Hu
Cunzhen Huang
Genglei Huang
Hsiang-yu Huang
Shan Huang
Philippine Eugenia Hubin
Harry Neil Hudesman
Kai Isoyama
Kimiko Isoyama
Jordan Tyler Isringhaus
Beema Jazeena Jamal
Julia Elizabeth Jarrett
Marina Kathleen Jenkins
Valentin Jeutner
Xinling Jiang
Zhiyin Jiang
Zhou Jiang
Christine Marie Jones
Paul Robert Juhasz
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Hiroki Kaga
Aminata Nhur Kamara
Dimitrios Katsikis
Yuriko Kazama
Jonathan Anthony Keller
Ksenia Khaimova
Mary Sangmi Khym
Insoo Kim
Jullee Kim
Jennifer May Kline
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Fei Kong
Timothy Carlyle Kopcial
Daniel Alexander Sebastian Kornack
Kersten Dawn Kortbawi
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Yasushi Kudo
Zakari Adam Kurtz

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Chul-ho Kwon
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Wai Ka Katie Lam
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Scott Michael Lara
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Dong Keun Lee
June Yong Lee
Jung Hee Lee
Sung Jin Lee
Youngchae Lee
Rui Li
Yaoqi Li
Natalie Carmel Lilavois
Kevin Gerard Lillis
Alexandra Tahree Link
Lingyi Liu
Siyu Liu
Yuedan Liu
Yili Lou
Philip George Louis
Kevin Anthony Lucid
Haowen Luo
Shazhou Luo
Benjamin Storey Lyles
Alexia Mandrali
Jillian Mangiacapra
Andres Mauricio Manosalva Castaneda
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JM Mariotti
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Anna Maydanik
Kevin McCall
Judith Nash McCarthy
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Kathryn Angela McNeece
Edwin Francis McPherson
Joseph Ranchford Melanson
Jeannine L. Melly
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Timothy David Miller
Michelle Venice Mills
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Byron McKeller Moore
Mariam Kathleen Morshedi
Amanda Marie Munsie
Chido Tafirenyika Dickson Munyati
Satoshi Murakami
Elizabeth Rita Mutyaba
Tomoko Nagasawa
David Nam
Tae Hoon Nam
Uri Nazryan
Andrew Spencer Nelson
Travis Sean Nembhard
Nicole Marie Nielson-Pachkofsky
Marc Nocera
Jeffrey James Nolan
Stephen Nolan
Amanda Starer Norton
Casey James O'Connor
William Edward O'Neil
Yuko Oba
Tamer Orestis Omran Koukouvitakis
Alexandra Orbezo
George Hodges Owen
Martha Pacheco Machado De Araujo
Yongjian Pan
Amoli Atul Pandya
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Andrew Sang-jin Park
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Nadezda S Paskar
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Lynn R. Peachey
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Joseph L. Pellis
Jing Peng
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David Larry Pflugh
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Natalie Diane Ramsey
Jin Hee Rhew
Amanda Claire Richardson
Jeremy Jacob Rifkin
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Meghan Gregory Riordan
Roberto Javier Rivera-Rodriguez
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Degan Skylar Rosenbloom
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Radhika Sainath
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Matthew Christopher Salito
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Bruce Cory Silvers
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Nisha M. Soens
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Nicholas Ryan Swindle
Emmanuelle Mai Irma Tang
Ricky Yiu Ming Tang
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Sverrir Teitsson
Nikita Aleksandrovich Tepikin
Kendall Maureen Thompson
Keiji Tonomura
Steven Anthony Torres
David Hahn Tracey
Maggie Tran
Keith Richard Travers
Alessia Cathryn Trevisan
Kristen Turiano
Kathleen Jabar Udo
Tomokazu Usagawa
Margaux Julia Valenti
Romain Valere
David Andres Vargas
Kevin Richard Warren
Megumi Watanabe
Matthew Thomas Watson
Jay Tucker Weatherston
David Carl Weinberg
Marissa Weinrauch
Jarryd R. Werts
Katelyn Dorothy Wicks
Ashley Abraham Williams
Chad Evan Wolf
Amanda Claire Wolfe
Michael Wozny
Hung Yi Wu
Pei-Yuan Wu
Feixue Xu
Yuki Yamamoto
Hongmei Yang
Liu Yang
Pegah Yazdy
Shun Shun Yip
Tomohiro Yoneyama
Jung Han Yoo
Jaeho Yoon
Zsofia Young
Shuli Yu
Glib Zaslavskyy
Anran Zhou
Jingbo Zhou
Shizhou Zhu
Erin Linnea Ziegler
David Hugh Zielke
Joseph Zoimen



# In Memoriam

Harold Baer
*New York, NY*

Charles S. Brownstein
*Dobbs Ferry, NY*

Jaghab Easa
*Garden City, NY*

Emilio A. Galvan
*Austin, TX*

Alan T. Kaplan
*New York, NY*

Royden Alan Letsen
*Tarrytown, NY*

Robert J. Levinsohn
*New York, NY*

Paul Alfred Murphy
*Punta Gorda, FL*

David Daniel Rothbart
*Port Washington, NY*

Israel Rubin
*New York, NY*

Thomas M. Stark
*Aquebogue, NY*

Robert Paul Tamarin
*Naples, FL*

Sophia L. Truslow
*Brooklyn, NY*

the court's order.[21] But courts have also used the clear-and-convincing burden of proof for contempt.[22] (This is different from criminal contempt, for which the burden of proof is beyond a reasonable doubt.) The reasonable-certainty standard requires "a quantum of proof . . . greater than a preponderance of evidence but less than proof beyond a reasonable doubt . . . . akin to the clear and convincing evidence standard."[23]

To prevail on a civil-contempt motion, the moving party must prove that the contemnor violated, or disobeyed, a clear and unequivocal court order and that the contemnor's disobedience defeated, impaired, impeded, or prejudiced the moving party.[24]

**• Violated (or Disobeyed).** The moving party seeking civil contempt must show that the contemnor violated or disobeyed the court's order: "The mere act of disobedience, regardless of its motive, is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the right of a party."[25] The moving party need not prove the contemnor's willfulness — intent — in violating the order.[26] The court will not inquire into the contemnor's motives or whether the contemnor's actions were deliberate. (This is different from criminal contempt, in which the moving party, to prevail, must prove that the contemnor willfully — intentionally — violated the court order.)

**• Clear and Unequivocal Mandate.** The court mandate (or order) must be clear, explicit, precise, and unequivocal.[27] The court doesn't need to warn you explicitly of the consequences of disobeying its order.[28] The court order doesn't even need to include the word "ordered."[29] But the order must include "commands capable of enforcement."[30] The order may not be "merely expressions of abstract conclusions or principles of law."[31]

If a court order is ambiguous, make sure you ask the court to clarify its order before moving for contempt.[32]

**• Knowing About the Court Order.** The moving party must prove that the alleged contemnor — who violated the court order — knew about the order. An order needn't be personally served on you before a court may punish you for civil contempt for violating the order.[33] An order is "served" when you, the recipient, know that the order exists and what its terms are. Hearing the order in open court is just as binding as a signed, written order you've received from the court.[34] An oral order in open court is "an order served upon all those assembled to whom it is directed."[35] If your attorney communicates the contents of the order to you, you're presumed to know about it.[36]

**• Defeated, Impaired, Impeded, or Prejudiced the Moving Party.** In your moving papers, explain how the alleged contemnor defeated, impaired, impeded, or prejudiced your rights when it violated the court order. Most practitioners explain in their moving papers the prejudice component to civil contempt — how the contemnor prejudiced their clients' rights. (For criminal contempt, the moving party needn't prove that the contemnor's conduct prejudiced the moving party.)

To prevail on a civil-contempt motion, the moving party must prove that the contemnor violated, or disobeyed, a clear and unequivocal court order and that the contemnor's disobedience defeated, impaired, impeded, or prejudiced the moving party.

## Opposing Civil Contempt

To oppose your adversary's civil-contempt moving papers, you may submit opposition papers. If you submit opposition papers, your adversary may submit reply papers.

**• Service.** In opposing civil contempt, you may contest service of your adversary's moving papers. If your adversary didn't serve the moving papers by the date the court directed your adversary to serve the order to show cause, oppose the contempt motion on the basis of improper service. Also, oppose the contempt motion on the basis of improper service if the court required your adversary to serve the moving papers in person, by certified mail return-receipt requested, by first-class mail (with or without a certificate of mailing), or by some other method and if your adversary failed to comply.

If you don't object to the service, you waive improper service.[37] You waive improper service if you're "seeking an adjournment without reservation of rights, opposing the [civil contempt] application on the merits, or seeking . . . affirmative relief."[38]

**• You Complied, Are Unable to Comply, or Will Comply.** In your opposition papers, tell the court that (1) you complied with the court's lawful order in all respects; (2) you're unable to comply with the order; or (3) you'll comply with the order but need more time to do so.

If you show you've complied with the order in all respects, the court ought not find you in civil contempt.

In the alternative, you may explain, with evidence, your current "inability to comply."[39] You must, "with more [than] mere assertion,"[40] demonstrate this inability to comply. If you're responsible for your inability to comply — self-induced inability to comply — you forfeit that defense to civil con-

tempt.[41] Once you, the alleged contemnor, have proven that you're unable to comply with the court's order, the burden shifts to the moving party to prove your ability to comply.[42]

You may assert a defense of factual impossibility — that it's impossible for you to comply with the order.[43] The argument is that the court shouldn't have commanded the parties "to do something which is entirely beyond [its] power."[44]

You may demonstrate that you've made every reasonable effort to comply.[45]

You may also explain in your opposition papers that you didn't comply with the order but that you have a reasonable excuse for not complying. Offering a reasonable excuse might prevent a court from holding you in civil contempt.[46]

You may further admit that you didn't comply with the court order but that you need more time to comply. By admitting that you didn't comply, you're at the court's mercy. It won't absolve you of civil-contempt liability. Your adversary might also have no mercy on you. In its reply papers, your adversary might argue that if you needed more time to comply, you should have moved, before you disobeyed the order, by order to show cause to obtain more time to comply with the order.

• **No Need to Disprove Willfulness.** Good faith negates the willfulness — intentional — component for criminal contempt.[47] Good faith isn't a defense to civil contempt. You don't need to prove your lack of intent in disobeying or violating a court order. For civil contempt, your adversary needs to show only that you neglected to obey the order. Your adversary needn't prove willfulness; the court needn't find willfulness.

• **No Lawful, Proper, or Valid Order.** Orders that are transparently "invalid, void or frivolous" may be violated without risking contempt liability.[48] Orders out of which the court didn't have personal or subject-matter jurisdiction "may be violated without incurring contempt liability."[49] Other than orders that are invalid, void, or frivolous or orders over which the court didn't have personal or subject-matter jurisdiction, civil contempt always depends on the court's authority to issue its order. (You may still be held in criminal contempt if the court illegally issued its order.[50])

If you're unsure about the legality of the court order, appeal before your adversary moves for civil contempt and seek a stay of enforcement.

If you don't understand how to comply with the order, don't disobey it. Ask the court to clarify its order. Or move to renew or reargue the court's decision.

• **Didn't Defeat, Impair, Impede, or Prejudice the Moving Party.** You'll need to demonstrate that you didn't defeat, impair, impede, or prejudice the moving party.

• **Corporations and Nonparties.** A court may hold a corporation in civil contempt.[51] The punishment for civil contempt on a corporation is a fine. A court's order as to a corporation commands its officers and agents, once they know about the order, to comply with the order.[52] A corporate officer who impedes complying with an order or fails to take steps to comply with the order is subject to civil contempt.[53]

Nonparties may be punished for civil contempt only if they "act as servants or agents of the parties, or, if with knowledge of the order's terms, they act collusively with parties" to disobey a court order.[54]

• **Attorneys.** It's no defense to civil contempt to blame your attorney for giving you bad advice or for misinterpreting the meaning or validity of a court order. Your attorney's "mistaken view of the law is no defense" to civil contempt.[55] Attorneys may be held in criminal contempt, however, if they exceed their "limitation and counsel[] [you] to disregard or disobey the order."[56] A court might, however, consider your attorney's bad advice "in mitigation of punishment."[57]

In the next issue of the *Journal*, the *Legal Writer* will continue with civil-contempt motions. ■

**An order needn't be personally served on you before a court may punish you for civil contempt for violating the order.**

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

1. Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St. John's L. Rev. 337, 344 (1998).
2. *Id.* at 344–45.
3. 1 Byer's Civil Motions § 19:09, at 226 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.).
4. *Id.*
5. *Id.*
6. *Id.* § 19:10, at 227.
7. Gray, *supra* note 1, at 391 (citing *Nelson v. Nationwide Measuring Serv., Inc.*, 59 A.D.2d 717, 717, 398 N.Y.S.2d 443, 444 (2d Dep't 1977)).
8. Judiciary Law § 756.
9. *Id.*
10. *Id.*
11. Gray, *supra* note 1, at 396 (citing *O'Connell v. United States*, 40 F.2d 201, 202 (2d Cir. 1930)).
12. Byer's Civil Motions, *supra* note 3, at § 19:14, at 232.
13. David D. Siegel, New York Practice § 484, at 842 (5th ed. 2011) (citing *N.Y. Higher Educ. Assistance Corp. v. Cooper*, 65 A.D.2d 906, 906–07, 410 N.Y.S.2d 687, 687 (3d Dep't 1978)).
14. *N.Y. Higher Educ. Assistance*, 65 A.D.2d at 906–07, 410 N.Y.S.2d at 687; Byer's Civil Motions, *supra* note 3, at § 19:14, at 231 (citing *Bing v. Sun Wei Ass'n, Inc.*, 205 A.D.2d 355, 355, 613 N.Y.S.2d 371, 371 (1st Dep't 1994); *Long Island Trust Co. v. Rosenberg*, 82 A.D.2d 591, 598, 442 N.Y.S.2d 563, 567 (2d Dep't 1981)).
15. Siegel, *supra* note 13, at § 484, at 841 (citing CPLR Article 4).
16. *Id.*
17. Byer's Civil Motions, *supra* note 3, at § 19:14, at 232 (citing *John Sexton & Co. v. Law Foods, Inc.*, 108 A.D.2d 785, 786, 485 N.Y.S.2d 115, 117 (2d Dep't 1985)).
18. Siegel, *supra* note 13, at § 484, at 841.
19. Judiciary Law § 756; Byer's Civil Motions, *supra* note 3, at § 19:10, at 228 (citing *Cappello v. Cappello*, 274 A.D.2d 538, 539, 712 N.Y.S.2d 41, 41–42 (2d Dep't 2000)).
20. *In re Rappaport*, 58 N.Y.2d 725, 726, 458 N.Y.S.2d 911, 912 444 N.E.2d 1330, 1330 (1982)

("By contesting the contempt application on the merits and failing to object in a timely manner to the omission of the notice and warning required by Judiciary Law, sec. 756, respondent waived the protections afforded by the statute.").

21. Gray, *supra* note 1, at 397 (citing *In re McCormack v. Axelrod*, 59 N.Y.2d 574, 583, 466 N.Y.S.2d 279, 283, 453 N.E.2d 508, 513 ("It must appear, with reasonable certainty, that the order has been disobeyed."), *modified*, 60 N.Y.2d 652, 467 N.Y.S.2d 571, 454 N.E.2d 1314 (1983); *N.A. Dev. Co. v. Jones*, 99 A.D.2d 238, 242, 472 N.Y.S.2d 363, 366 (1st Dep't 1984) ("Civil contempt requires proof 'with reasonable certainty.'"); *In re Hynes v. Hartman*, 63 A.D.2d 1, 4, 406 N.Y.S.2d 818, 819 (1st Dep't 1978) ("[P]etitioner was required to establish, with reasonable certainty, that the respondent willfully failed to turn over records in his possession when served with the subpoena.")); Byer's Civil Motions, *supra* note 3, at § 19:10, at 227 (citing *Ketchum v. Edwards*, 153 N.Y. 534, 539, 47 N.E. 918, 920 (1897) ("[I]t is a reasonable requirement that the mandate alleged to be violated should be clearly expressed, and when applied to the act complained of it should appear, with reasonable certainty, that it had been violated."); *Benson Realty Corp. v. Walsh*, 54 A.D.2d 881, 882, 388 N.Y.S.2d 609, 610 (1st Dep't 1976) ("'[A]s punishment for contempt involves, or may involve, not only loss of property but liberty, it is a reasonable requirement that the mandate alleged to be violated should be clearly expressed, and when applied to the act complained of it should appear, with reasonable certainty, that it had been violated.'"); *State ex rel Porter*, 33 A.D.2d 876, 876, 307 N.Y.S.2d 682, 683 (4th Dep't 1969) ("A person may not be placed in civil contempt for violation of a court order unless it is reasonably certain that his act constituted a violation thereof.")).

22. Gray, *supra* note 1, at 398 (citing *Powers v. Powers*, 86 N.Y.2d 63, 68, 629 N.Y.S.2d 984, 987, 653 N.E.2d 1154, 1157 (1995) ("Petitioner agrees that the burden of proof is hers to sustain, and that a finding of willful violation [of a support order under Section 454 of the Family Court Act] on which a person may be incarcerated requires clear and convincing evidence (an issue this Court has yet to determine).")); Byer's Civil Motions, *supra* note 3, at § 19:10, at 227 (citing *Yalkowitz v. Yalkowitz*, 93 A.D.2d 834, 835, 461 N.Y.S.2d 54, 55 (2d Dep't 1983) ("The party making the application for a civil contempt citation, in this case plaintiff, has the over-all burden of proof to establish, by clear and convincing evidence, that the court order or subpoena has been violated.")).

23. *Kihl v. Pfeffer*, 47 A.D.3d 154, 163–64, 848 N.Y.S.2d 200, 207 (2d Dep't 2007).

24. Byer's Civil Motions, *supra* note 3, at § 19:11, at 228 (citing *Great Neck Pennysaver, Inc. v. Cent. Nassau Publ'n, Inc.*, 65 A.D.2d 616, 616–17, 409 N.Y.S.2d 544, 545–46 (2d Dep't 1978); *Frigidaire Div., Gen. Motors Corp. v. Sunset Appliance Stores, Inc.*, 46 A.D.2d 616, 616, 359 N.Y.S.2d 789, 791 (1st Dep't 1974)).

25. *Id.* at 228–29 (citing *Gordon v. Janover*, 121 A.D.2d 599, 600, 503 N.Y.S.2d 860, 862 (2d Dep't 1986)).

26. *Id.*

27. Gray, *supra* note 1, at 347; Byer's Civil Motions, *supra* note 3, at § 19:10, at 226 (citing *State of N.Y. v. Unique Ideas, Inc.*, 56 A.D.2d 295, 297, 392 N.Y.S.2d 12, 14 (1st Dep't 1977)); Byer's Civil Motions, *supra* note 3, at § 19:10, at 227 (citing *Pereira v. Pereira*, 35 N.Y.2d 301, 308, 361 N.Y.S.2d 148, 154 (1974)).

28. Gray, *supra* note 1, at 348.

29. *Id.* at 349.

30. *Id.* at 348.

31. *Id.*

32. Byer's Civil Motions, *supra* note 3, at § 19:01, at 220.

33. Gray, *supra* note 1, at 359 (citing *In re McCormick*, 59 N.Y.2d at 583, 466 N.Y.S.2d at 283, 453 N.E.2d at 513 ("[T]he party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party."); *Campanella v. Campanella*, 152 A.D.2d 190, 194, 548 N.Y.S.2d 279, 281 (2d Dep't 1989) (holding that contempt is appropriate when recipient actually knows of court order, even though order was not personally served on recipient)).

34. *Id.* at 350.

35. *Id.* at 359.

36. *Id.*

37. *Benson Park Assoc. LLC v. Herman*, 93 A.D.3d 609, 609, 941 N.Y.S.2d 108, 109 (1st Dep't 2012) ("[T]hat particular challenge to the court's personal jurisdiction was waived because it was not raised in Ms. Herman's [the alleged contemnor] answering papers. Nevertheless, Ms. Herman's conclusory denial of service is insufficient to rebut the affidavit of service of the order to show cause.")

38. Byer's Civil Motions, *supra* note 3, at § 19:14, at 232 (citing *People ex rel. Golden v. Golden*, 57 A.D.2d 807, 807, 394 N.Y.S.2d 699, 700 (1st Dep't 1977 ); *Cont'l Bank v. Moscatiello*, 115 Misc. 2d 617, 619, 454 N.Y.S.2d 419, 421 (Sup. Ct. Queens County 1982)).

39. Gray, *supra* note 1, at 367; Byer's Civil Motions, *supra* note 3, at § 19:01, at 220 (citing Judiciary Law § 770) (noting that this exception is for failing to pay alimony, maintenance, or counsel fees or for enforcement proceedings under the CPLR)).

40. Gray, *supra* note 1, at 367.

41. *Id.*

42. Byer's Civil Motions, *supra* note 3, at § 19:01, at 220 (citing *Hough v. Hough*, 125 A.D.2d 791, 792, 509 N.Y.S.2d 897, 898–99 (3d Dep't 1986) ("[A]ny person may assert his financial inability to comply [with an order of support] as a defense."); *Penn-Dixie Indus., Inc. v. Castle*, 77 A.D.2d 844, 844, 431 N.Y.S.2d 34, 35 (1st Dep't 1980)).

43. Gray, *supra* note 1, at 402–03 (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983) ("In a civil contempt proceeding such as this, of course, a defendant may assert a present inability to comply with the order in question. While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.")).

44. *Id.* at 366.

45. *Id.* at 367.

46. *Conforti v. Goradia*, 234 A.D.2d 237, 239, 651 N.Y.S.2d 506, 508 (1st Dep't 1996) ("Furthermore, the asserted contemnors have offered a reasonable excuse for variance from the court's order, stating that tender of the deposit was refused by the Clerk of Civil Court because the file had not yet been received.").

47. Byer's Civil Motions, *supra* note 3, at § 19:11, at 228 (citing *Giordano v. Grand Prix Sales Serv. Restoration Co.*, 113 Misc. 2d 395, 401, 449 N.Y.S.2d 127, 131 (Sup. Ct. Nassau County 1982) ("'Good faith' asserted by a contemnor as a defense relates to criminal, not civil, contempt.")).

48. Gray, *supra* note 1, at 364.

49. *Id.*

50. *See* Gerald Lebovits, *Drafting New York Civil-Litigation Documents: Part XXXIII — Contempt Motions Continued*, 86 N.Y. St. B.J. 64 (June 2014).

51. Gray, *supra* note 1, at 355.

52. *Id.* at 356.

53. *Id.*

54. *Id.* at 357–58.

55. *Id.*

56. *Id.* at 368.

57. *Id.* at 371.


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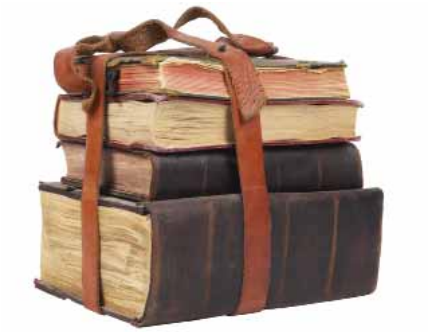

# Drafting New York Civil-Litigation Documents: Part XXXIV — Contempt Motions Continued

In the last issue, the *Legal Writer* discussed criminal-contempt motions. In this issue and the next, we'll discuss civil-contempt motions.

## Civil Contempt

A court may invoke its civil-contempt powers "only at the instance of an aggrieved civil litigant."[1] A court has the authority to act on behalf of public justice to exercise its criminal-contempt power. But a court has no authority to exercise its civil-contempt power, sua sponte, "by standing, without invitation, in the shoes of one of the privately interested litigants appearing before it."[2]

Judiciary Law § 753 gives a court the power to punish for civil contempt "misconduct where a right or remedy of a party to a civil action or a special proceeding pending in the court may be defeated, impeded, or prejudiced."[3]

Civil contempt is meant to vindicate the rights of a party — the aggrieved party — to the litigation.[4] A contemnor must compensate that party for losing benefits or interfering with the benefits of the court's mandate.[5]

## Moving for Civil Contempt

Your application to punish for civil contempt must be in writing.[6]

Under Judiciary Law § 756, you may move for civil contempt against a party either by notice of motion or by order to show cause.[7] Your notice of motion "is returnable before the court or judge authorized to punish for the offense."[8] Serve your papers not less than 10 days and not more than 30 days before the return date.[9] If you move by order to show cause, the accused is required "to show cause before [the court,] at a time and place therein specified, why the accused should not be punished for the alleged offense."[10] The court or the court clerk will set the return date of your order to show cause.

Most practitioners move by order to show cause because it's a faster way to obtain civil-contempt relief than by notice of motion.

Civil contempt is meant to vindicate the rights of an aggrieved party to the litigation.

Your motion or order to show cause must state facts that allege what the alleged contemnor did or did not do in terms of what constitutes the contempt — notice — and give the contemnor reasonable time to establish a defense — opportunity to be heard.[11]

Judiciary Law § 761 provides that a contempt motion "shall be served" on the party unless a court orders service on the party's attorney.[12] Personal service on the party isn't required for civil contempt.[13] Service by regular mail is appropriate.[14] If you move by order to show cause, make sure to follow the judge's service instructions.

If the alleged contemnor wasn't a party to the action or proceeding from which the contempt arises, you must commence a special proceeding to punish for contempt.[15] Commencing a special proceeding is also appropriate if you're seeking to punish for a contempt that arises from a nonjudicial proceeding, such as a proceeding before an administrative agency.[16] Personally serve your contempt papers on the nonparty.[17]

Your contempt papers should include the caption of the action or proceeding "out of which the contempt arises."[18]

Your civil-contempt motion must contain the following on its face, in at least eight-point boldface type in capital letters: **WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT**.[19] Your moving papers will be defective if you're missing this warning. An accused who doesn't object to the notice waives its right to do so.[20]

You must specify in your moving papers that you're moving for civil contempt. Practitioners will often write — in bold, capital letters — that they're seeking to punish for "**CIVIL CONTEMPT**" when they request that remedy. (If you don't specify that you're seeking criminal contempt, the court will assume that you're seeking civil contempt. If you don't specify which contempt you're seeking, the court will similarly assume that you're seeking civil contempt.)

Courts have expressed the burden of proof for civil contempt as one of "reasonable certainty": The movant must demonstrate with reasonable certainty that the alleged contemnor disobeyed

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