NEW YORK STATE BAR ASSOCIATION
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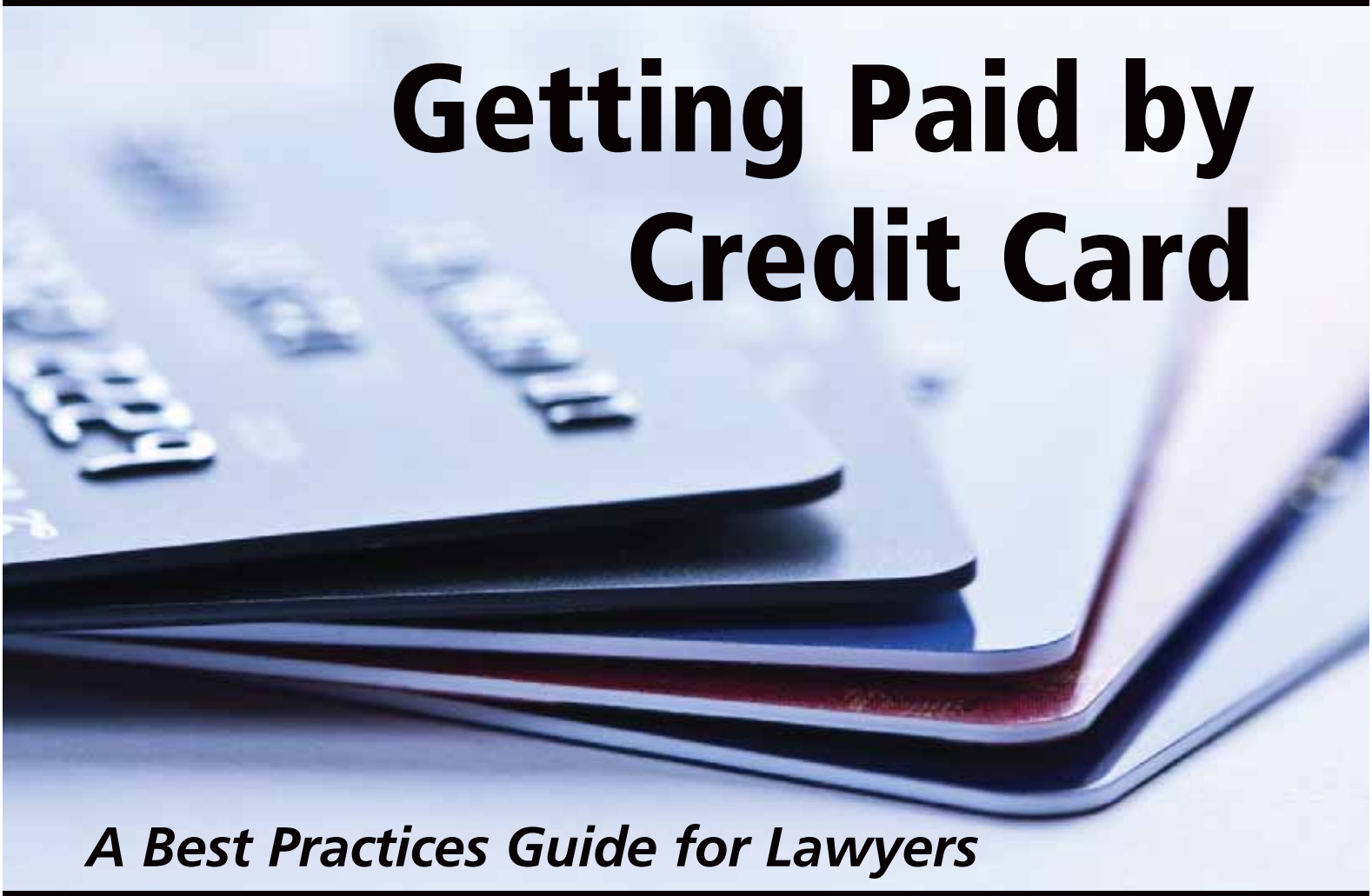
Getting Paid by Credit Card



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By Nat Wasserstein

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October 2014

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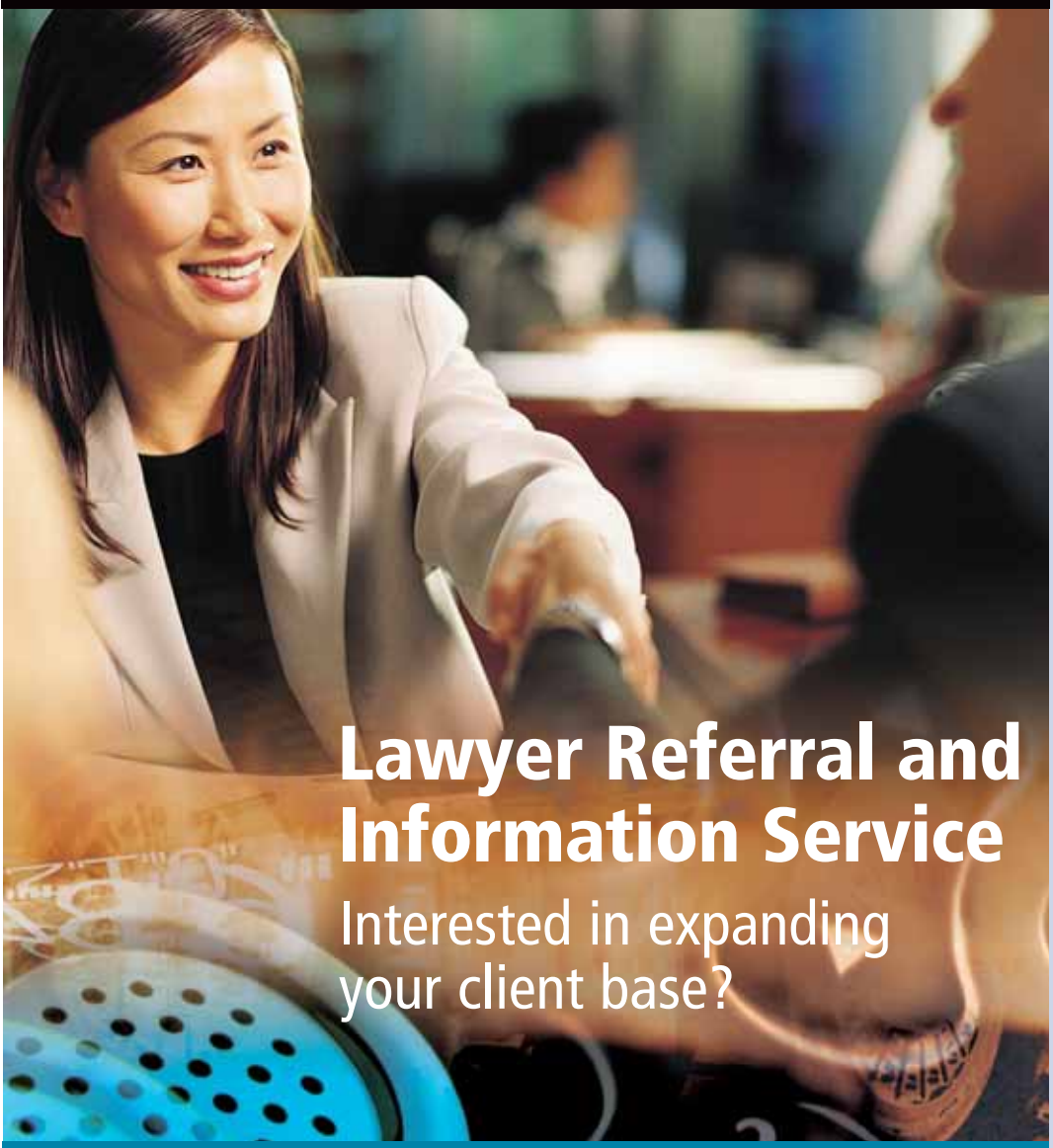

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GLENN LAU-KEE

The 2014 Partnership Conference

At the Legal Assistance Partnership Conference, the New York State Bar Association gives out several Denison Ray Civil Legal Service awards to legal services attorneys and a legal services organization that represent Ray's passion, his commitment, and a sense of call to service. Ray began his career on Wall Street, at Cravath, Swaine and Moore, but he found himself drawn to public interest law. It was the early 1960s when he and his wife became increasingly politically active, first in the open housing movement, then in the civil rights movement, focusing on—school integration in New York City. The more he got involved, the more his passion grew. Ray moved to Mississippi to work for a civil rights law firm, where he represented civil rights activists Martin Luther King, Jr., and James Farmer, Jr. By the time he returned north, his heart was no longer in the commercial practice of law. For the next 25 years, Ray led legal services programs. There are still many in Albany who have stories about his days as the executive director and chief counsel of the Legal Aid Society of Northeastern New York in Albany.

One of the award recipients this year, Karen Murtagh, executive director of Prisoners' Legal Services, shared a quote from Ray when accepting the Association's Denison Ray Award for Nonprofit Organization on behalf of her organization. "It would seem that if at a minimum we merged criminal and civil legal services, there would be a louder and more effective voice for the poor community," Murtagh said, reading from a 1985 interview with Ray, who died in 1994.

The Partnership Conference, held every 18 months since 1994, has become both a building block in the legal services arena and a partner in the alliance of stakeholders working together to try to increase the poor's access to legal representation. To, in effect, speak with one "louder and more effective voice for the poor community."

This year's Partnership Conference was splitting at the seams – in July, the Bar Association's Pro Bono Services Department had to cut off registration at 650. To give you an idea of how much this conference, organized by the Association's Committee on Legal Aid, has grown, the previous Partnership Conference, in 2012, had 450 in attendance; the earliest conferences, closer to 60. New York Legal Assistance Group sent 116 staff attorneys; Legal Services of the Hudson Valley sent 51; the Legal Aid Society of New York sent 40.

The program directors I spoke with were using the Conference to give their new staff attorneys training in the core areas of civil legal service practice. They talked about how the Conference provided an important and rare opportunity for their staff members to meet their colleagues from around the state. "We all work in our own offices, in our separate counties, and it's really critical for front-line staff to meet others doing this work and to share experiences," said Barbara Finkelstein, executive director of Legal Services of the Hudson Valley.

On Wednesday, I spoke with Yisroel Schulman, president and attorney-in-charge of the New York Legal Assistance Group. "This is it. This conference is the seminal opportunity for New York State legal services providers to get together and network and share ideas and form collaborations," said Schulman, who said he has gone to every Partnership Conference. "We need to work together."

Twenty percent is a number often quoted in conversations about the legal services needs of the poor. At best, only 20% of the legal services needs of the poor are met. This estimate is derived from testimony from the hundreds of stakeholders who participated in hearings that Chief Judge Jonathan Lippman's Task Force to Expand Access to Civil Legal Services has held throughout the state over the past four years.

In my capacity as president of the Bar Association, I have participated in these hearings and will return to Albany later this month for this year's final hearing at the Court of Appeals. The clients who have testified, including veterans suffering from service-related disorders or injuries, along

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with their families, have demonstrated the importance and value of competent and timely legal services. When the poor face problems related to fundamental needs, such as housing, public assistance, custody issues, and protection from domestic violence, without legal representation, the ramifications for themselves, and society, only snowball. Timely and well-trained legal assistance can make all the difference in the lives of these individuals and their families. Judge Lippman's Task Force concluded that every $1 spent on legal help eventually returns $5 to the state.

Conference Chair Edwina Frances Martin called the first day of the Partnership Conference a "think-tank." Program directors and Bar leaders gathered around a large conference table to continue and advance the dialogue on how to bridge the access to justice gap.

The range and nature of the conference's programs highlight the complexity of the civil legal services needs of the poor and underserved. In one of the seminar rooms, Jameelah Hayes, program director of Legal Information for Families Today, spoke of how her organization's staff tries to build clients' knowledge of the court system and manage their expectations, working toward the goal of clients being able to advocate for themselves. Another workshop, evocatively titled "The Color of a Bruise: Addressing Racial Inequalities in Legal Protection for Victims of Bruising Injuries," centered on a peer-review study highlighting how the same injury leads to very different visual results on people of varying skin tones. "It was incredible seeing that," said Kelly Fairchild, staff attorney, Hiscock Legal Aid. "For some skin tones there is no visual documentation, even though there was trauma. I can definitely see using this study."

In the hallway, Robert Elardo, the managing attorney and CEO for the Erie County Bar Association's longstanding Volunteer Lawyers Project, talked about how the conference helped him move beyond the day-to-day to think and learn about best practices and grow his organization. He paused, stopping to greet Sheila Hubbard, a panelist from a morning workshop and executive director from the Volunteers Lawyer Project, Boston. "You were one of the programs we visited and modeled ourselves after," he told her, reaching into his briefcase for his business card.

In another seminar, Paul Curtin, managing attorney for the Civil Legal Services Unit, Legal Aid Bureau of Buffalo, Inc., spoke about an innovative reentry court youth initiative, where high school teachers and advocates try to minimize the increasing criminalization of children. Runa Rajagopal, a team leader and supervising attorney for the Civil Action Practice of the Bronx Defenders, advised civil legal services lawyers to go to criminal court dates to facilitate both sides working together so that clients would have an understanding of the full implications of their potential criminal plea actions. Audience member Joanne Macri, director of regional initiatives for the New York State Office of Indigent Legal Services, spoke up to tell the attorneys in attendance about the immigration resource centers her office is working on creating.

These connections and these conversations may not reduce the access to justice gap in the short term. But this engagement, this call to service, is part of addressing this important issue.

The New York State Bar Association is a major part of this partnership; serving the public is one of the Association's core values. The Partnership Conference, which is partially subsidized by the Association, is just one tangible demonstration of our commitment to bridging the access to justice gap. The Association has a longstanding policy of encouraging the thousands upon thousands of hours of pro bono service provided by our members through incentives such as our awards programs, including the President's Pro Bono Awards and the Empire State Counsel program. The Bar also provides seed money to legal services programs via grants from the Bar Association's philanthropic arm, The New York Bar Foundation, and small loan forgiveness grants to public interest attorneys through its Steven C. Krane Student Loan Assistance for the Public Interest program. And because this issue is too complex to be solved at the case or individual level, the Bar Association's Governmental Relations Department works with Bar leaders to advocate for sufficient funding for legal services at both the state and federal level.

Since his appointment in 2009, Chief Judge Lippman has specifically earmarked funds in the annual Judicial Budget for legal services. According to the Office of Court Administration, the Court has, so far, provided $70 million in funds to legal service providers throughout the state. By the end of 2015, this number will reach $132.5 million. This funding has allowed legal services providers to hire new staff, many of whom came to the conference. For example, the New York Legal Assistance Group has hired 45 attorneys and paralegal case handlers with funds it has received from the OCA; Legal Services of the Hudson Valley has been able to fill 35 attorney, paralegal and attorney support positions.

It is unknown at what level funding will continue in the coming years. But the New York State Bar Association will continue its role as one partner among many in trying to maintain sufficient funding. And, once again, in 2016, the Bar Association will gather together the most engaged and most experienced stakeholders from across the state. We will continue to marshal our resources and our best ideas and remind each of us that no one is working on this alone.

For it is through partnerships and collaborations that we can, in the words of Denison Ray, serve as a "louder and more effective voice for the poor community." ■

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Tentative Schedule of Fall Programs *(Subject to Change)*

The New York State Bar Association Has Been Certified by the New York State Continuing Legal Education Board as an Accredited Provider of Continuing Legal Education in the State of New York.

Practical Skills: Basic Matrimonial Practice
October 1 Long Island; Rochester
October 2 Westchester
October 7 Albany
October 8 Buffalo; Syracuse

Introduction to Bitcoin
(live & webcast; 9:00 am - 1:00 pm)
October 2 New York City

Handling the DWI Case in New York
October 6 Long Island
October 7 New York City
October 21 Albany (with webcast)

Women on the Move 2014
(1:00 pm – 5:00 pm)
October 8 Westchester

Valuing Intellectual Property
(live & webcast; 12:00 pm – 2:00 pm)
October 15 New York City

Superior Legal Writing Workshop: Raising Your Skills to the Next Level
October 15 Albany
October 16 New York City (with webcast)

Henry Miller – The Trial
October 15 Albany
November 13 New York City (with webcast)

Taking on Dodd-Frank Series: Banking
(live & webcast; 12:00 pm – 1:00 pm)
October 16 New York City

Honing Your Deposition Skills
(9:00 am – 1:00 pm)
October 16 Long Island
October 17 Albany
October 23 Buffalo
October 24 New York City (with webcast)

Practice in the Second Circuit Court of Appeals
(1:30 pm – 4:40 pm)
October 17 New York City

Risk Management 2014
(9:00 am – 1:00 pm)
October 17 Westchester
October 24 Long Island
October 30 Albany
November 14 New York City
November 21 Buffalo
December 5 Syracuse

Divorce Anniversaries 2014: CSSA, Equitable Distribution and Maintenance
(9:00 am – 1:00 pm)
October 17 Syracuse
October 24 New York City (with webcast)
October 31 Albany; Buffalo; Long Island

Workers' Compensation Update 2014
October 17 Buffalo
November 21 Albany (with webcast); New York City; Syracuse

Representing the Start-Up Venture
(live & webcast)
October 22 New York City

Social Media Issues in Labor and Employment Law
(9:00 am – 1:00 pm)
October 24 Albany
November 14 New York City (with webcast)

Representing Comic Book Properties: From Creation to the Panel to the Silver Screen
(live & webcast; 12:00 pm – 2:00 pm)
October 29 New York City

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Update 2014
(live & webcast)
October 29 New York City
November 14 Syracuse

Emerging Issues in Environmental Insurance
(live & webcast; 9:00 am -1:00 pm)
October 30 New York City

3D Printing and the Future of IP Law
(live & webcast; 12:00 pm – 2:00 pm)
November 5 New York City

Intermediate Elder Law Update
November 5 Albany
November 6 New York City (with webcast)
November 18 Buffalo
December 2 Long Island
December 4 Westchester

Practical Skills: Probate and Administration of Estates
November 5 Buffalo
November 7 Rochester
November 18 Westchester
November 19 New York City (with webcast); Syracuse
December 8 Long Island
December 12 Albany

Taking on Dodd-Frank Series: The Consumer Financial Protection Bureau
(live & webcast; 12:00 pm – 1:00 pm)
November 6 New York City

Gain the Edge! Negotiation Strategies for Lawyers
November 6 Albany
November 7 New York City

Practical Skills: Mortgage Foreclosures and Workouts
November 13 Long Island; Westchester
November 14 Albany; Buffalo
November 17 New York City (with webcast)

Hot Topics in Law Practice Management: 2014 Summit
(live & webcast)
November 20 New York City

A Primer on Intellectual Property
November 20 New York City
November 21 Albany (with webcast)

HIPAA/HITECH for Lawyers Update 2014
(live & webcast; 1:00 pm – 3:00 pm)
December 3 Albany

Taking on Dodd-Frank Series: Systemic Risk, Prudential Standards and Volcker Rule
(live & webcast; 12:00 pm – 1:00 pm)
December 4 New York City

Advanced Real Estate
(live & webcast)
December 5 New York City

Commercial Division Practice: What You Need to Know
(live & webcast; 12:00 pm - 2:25 pm)
December 5 New York City

The Non-Tax Lawyer's Guide to Tax Law
(live & webcast; 9:00 am - 1:00 pm)
December 9 Albany

Bridging the Gap – Fall 2014
December 10–11 New York City (live program)
Albany; Buffalo (videoconference from NYC)

12th Annual Sophisticated Trusts and Estates Institute
December 11–12 New York City

Cybersecurity for Lawyers: 12 Ways to Protect Yourself and Your Data
(live & webcast; 9:00 am -1:00 pm)
December 12 Albany

Getting Paid by Credit Card

A Best Practices Guide for Lawyers

By Nat Wasserstein

Nat Wasserstein (nat@lindenwoodassociates.com) is the managing director of Lindenwood Associates, a strategic development and restructuring firm helping owners of small to medium sized businesses navigate through times of change, redirection and financial distress.

Gone are the days of standing in line at the grocery store, waiting for someone to painstakingly write a check for produce. Gone too are the days of receiving a hardcopy paycheck every other Friday. Now, funds are direct deposited, and nearly every merchant offers the opportunity to pay by credit card. Some merchants even process payments using trendsetting devices plugged into the cellphones of their store-roaming customer service representatives or tap-and-pay devices that do not require a payor to take his card out of his wallet.

Historically, law firms have accepted payments for retainers and services in two formats: check or cash. Clients, many of whom no longer carry checkbooks, are now demanding that their attorneys keep up with new technology and start accepting credit and debit cards for the payment of fees. In addition to making your clients happy, doing so may reap additional rewards for firms by allowing them to cut back on administrative costs and time-consuming trips to the bank, leaving them more time to focus on fee-generating tasks.

The American Bar Association has approved the acceptance of all credit cards for payment in formal Opinion 00-419[1] as has the New York State Bar Association (NYSBA).[2] This allows interested firms to meet the demands of their tech-savvy clients and, in some circumstances, to reset the bar on technology use in the workplace. Of course, like all new technological advancements, the acceptance of credit cards by law firms may give rise to ethical and professional concerns; it is not an operations change to be implemented without careful thought and consideration. These main items of concern are outlined in these best practice guidelines.

Ethical and Professional Considerations

Before a firm begins to shop around for a credit card processor, it must carefully consider the ethical and professional issues that may arise when processing fees and expenses via credit or debit cards so that it knows the right questions to ask when speaking with payment processor customer representatives to choose the payment processor that meets the firm's needs.

Client Confidentiality

One of the main tenets of attorney/client privilege is that attorneys should not reveal the existence of a relationship with a client. However, the existence of a relationship, including the client's name and address, must necessarily be revealed to a third-party processor to process a credit card or online payments. Thus, it is imperative that all firms that wish to use credit card processors obtain their clients' consent to sharing such confidential information with a third party. For sensitive cases or matters, it is perhaps best to avoid credit card processing altogether. The best way to obtain consent is through the inclusion of a credit card payment provision in the attorney engagement letter and the use of a credit card payment authorization form. A sample engagement letter with provisions addressing these issues as well as a sample payment authorization form are included in this article.

Commingling of Operating Account and Trust Funds

ABA Model Rule 1.15, N.Y. Rules of Professional Conduct, Rule 1.15 (N.Y. Rules), and N.Y. Judiciary Law § 497 prohibit firms from commingling operating funds and client funds. For firms that accept credit card payments only for fees or expenses earned, no ethical problems generally arise related to conversion of client property held in trust. However, for firms that wish to accept retainers using credit cards, special attention must be paid.

N.Y. Rule 1.15(a) provides:

> A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

Thus, attorneys wishing to accept retainers or payments for unearned funds must be diligent about ensuring that all transactions are deposited into the correct account and that any and all fees associated with payments, such as services fees or chargeback fees, are taken from the firm's operating account and not its trust account.

Firms that ultimately choose to go with a large payment processor, such as First Data or Elavon, will be assisted by trained customer service representatives who help ensure that pay-to accounts are delineated and the billing accounts for all fees and charges, regardless of pay-to account, are set to operating accounts (or any other accounts the firms elect). Firms that choose to work with smaller providers, such as PayPal, however, may find it too troublesome to vigilantly ensure compliance, choosing instead to simply forgo acceptance of credit cards for any payments other than for services rendered or case-related expenses.

Accepting Credit Cards for Payments Other Than for Services Rendered

In addition to accepting credit cards for payments of retainer, expenses and services rendered, New York has specifically condoned the acceptance of credit cards for other reasons, such as debt collection settlement payments where a contingency fee arrangement is in place with the client.[3] For such payments, N.Y. Rule 1.5(d) requires that a written retainer be in place.[4]

Passing on of Merchant Fees to Client

Finally, credit card processors charge what can be exorbitant fees for the use of their services, thereby potentially drastically reducing firms' profit margins. Firms may inquire whether these high fees can be passed on to clients. The ABA[5] as well as the NYSBA[6] have indicated that the passing on of credit card processing fees is generally permissible and is a matter to be settled between the client and firm during the engagement process.

Choosing a Merchant Services Provider

After a firm has considered the ethical and professional issues raised by the use of credit cards, it must choose a credit card processor. The decision as to which merchant service provider to choose for credit card payment processing is an individual one for each firm. It should be based on a variety of factors, including (1) the software currently used by the firm; (2) the firm's and its clients' aptitude for and comfort level with cloud or online-based services; (3) the firm's hardware needs, such as card-swipe machines or cellphone-based swipe devices; (4) the availability of the funds after processing; and (5) the fees charged by the service provider. There is no one-size-fits-all processor, and firms are encouraged to speak to, interview, and consider the terms of as many payment processors as possible before making a final decision.[7]

Software Considerations

What is the firm's current software bundle? This should be one of the initial considerations when choosing a payment processor because many practice management and accounts receivable systems already integrate with credit card processors or offer their own. This is especially true for online, cloud-based management systems. MyCase, for example, offers its own online payment processor, while also integrating with other online processors, such as PayPal and Authorize.Net.

Additionally, Quickbooks, which many firms utilize, also offers payment processing through its affiliate, First Data, a Bank of America affiliate. Quickbooks' rates, however, may not be competitive with other processors as it currently permits processing only through its single partner. Alternatively, firms may investigate processing directly with First Data or its competitor Elavon (a U.S. Bank and Costco affiliate), thereby cutting out the soft-

Sample Engagement Letter Language[1]

Pre-Authorized Payment and Retainer, Security & Guarantor Terms

For ease in handling the payment of all legal costs and to ensure that time is not spent unnecessarily on administrative matters, such as account collection efforts, which take away from our primary job of providing effective legal services to the Client, our law firm offers to the Client and any guarantors signing this agreement two methods of account payment. First, a credit card pre-authorized payment plan is offered. Alternatively, a retainer plan is offered.

The Pre-authorized Credit Card Payment Plan: You, or the person or persons providing the credit card authorization below, authorize and direct to pay to our law firm the total invoice amount contained in each account that is rendered immediately upon the account being rendered or at a time after. This procedure will continue until the file is completed, or until you have notified us in writing to discontinue the same. At that point, you may decide to change over to the retainer plan or to discontinue all requirements for legal services. In the event that you notify us to discontinue the use of the pre-authorized credit card payment plan, you authorize and direct us to render a final account utilizing that plan and to pay the same forthwith, and then we will discuss alternative arrangements for the payment of future billings, if any.

The Retainer Plan: You, or the person or persons directing the provision of legal services, provide to our law firm the full, or the estimated, amount of the legal costs anticipated for the particular matter handled by our law firm on behalf of the Client. In this case, the initial matter(s) will require that a retainer in the amount of $___ be paid to our firm in trust. The retainer will serve as a source of payment for legal fees, disbursements and sales taxes on all accounts rendered. You will replenish this retainer from time to time as requested so that it is sufficient to cover the estimated cost of work in progress plus the cost to complete the work. [Please note: If the pre-authorized credit card payment plan is chosen, please enter "nil" above. If the retainer plan is chosen, please enter the full amount referred to in the cover letter attached.]

Until the retainer is replenished as requested, or in the event that the credit card authorization is withdrawn or if payment using the credit card is not effective, then if no other arrangements have been agreed upon by our law firm, our firm shall not be obliged to carry out further work.

Regardless of the plan decided upon, the security given by the Client and the guarantees and the security given by the guarantor(s) below apply and remain effective.

Security for Unpaid Accounts: It is anticipated that either the retainer plan or the pre-authorized credit card payment plan will enable all legal costs to be paid immediately. But in the event that sums remain owing to our law firm for whatever reason, name of law firm obtains security from our clients (and other person(s) as Guarantor) for amounts which are due and owing. By signing this agreement, you, the Client (and any Guarantor(s) or company also signing this agreement in the place(s) provided below) grant to our law firm a security interest over all of your (and the Guarantor's, Guarantors', other company's or companies', or other person's, as the case may be, who sign below) present and after acquired personal property as security for any and all amounts due and owing to our firm from time to time. All enforcement costs incurred by our firm are also secured. By signing this agreement, you hereby waive notice of the filing of any financing statement or receipt of any verification statement relating to this security interest.

The Guarantor or Guarantors hereto, if any, hereby guarantee the debts and obligations of the Client to **name of law firm** hereunder and covenant with **name of law firm** to pay the same to **name of law firm** in the event of default in payment by the Client hereunder.

1. Courtesy of the California Bar.

ware provider but perhaps also losing software integration ability.

Finally, firms may also consider credit card processing with their bank because many banks, such as Regions and Chase, now also offer credit card processing. Though bank-provided payment processing may have higher fees than an online provider, some firms may find having payments processed by the same institution that holds their operating and trust accounts to be beneficial and most efficient.

In addition to payment processors that integrate directly with firms' accounts receivable systems, some firms, especially small and solo practitioners who do not have a large volume of transactions per month, may wish

to consider other low-cost web-based alternatives, such as online "wallets" like Square, Skrill, LawPay, or the ever-popular PayPal. While not credit card processors in the traditional sense, such services provide an online gateway to allow attorneys to receive payments sent via the Internet (i.e., directly from a client's bank account, credit card, or debit card).

Cash Flow

Firms must also consider cash flow when choosing a payment processor. Some processors hold funds for several days before depositing them into a firm's account to ensure funds have cleared and to gain the interest income on the float.

Sample Credit Card Authorization Form[1]

Pre-Authorized Credit Card Payment Authorization and Direction

Name of law firm is hereby authorized and directed to pay all invoices and all accounts rendered to the Client from the following credit card, and to continue to do so until this authorization and direction is terminated by way of written notice to that effect delivered to **name of law firm**, all in accordance with part 4 of this Agreement.

Credit card: VISA - ___ MasterCard - ___ American Express - ___ Other - ___

Card Number: _____ _____ _____ _____ Expiry Date: ___ ___

Name as it appears on Credit Card: _____

Authorization and Direction Signature: **X**_____

1. Courtesy of the California Bar.

Credit Card Processing Application Checklist

- ✓ Law Firm name, address, phone, fax and year established.
- ✓ Contact name and email address.
- ✓ Name of Principal (Owner/Partner/Officer) and Title and/or % ownership.
- ✓ Principal's home address, home phone number, date of birth and social security number. (Please include previous address if current address is less than two years.)
- ✓ Credit cards that firm accepts/will accept.
- ✓ Estimated average sale amount.
- ✓ Bank to which funds would be deposited and voided check for that account.
- ✓ Substitute W-9 – please indicate if firm is sole proprietorship, general partnership, limited partnership or LLC (and indicate if LLC is D, C, or P).
- ✓ Firm's Tax ID Number.
- ✓ On site information:
  - Please indicate if law firm name appears on signage.
  - Please indicate if law firm is located in separate building, private residence or office building.

Hardware Considerations

The aforementioned software options take into account only credit card payments made online, without direct firm-to-client interaction. In essence, this is the modern day equivalent of putting a check in the mail. Unfortunately, this provides little help for attorneys who receive in-person payments from clients – for example, attorneys who may meet a client the day-of at the courthouse for one-time representation in traffic court. For attorneys who wish to receive in-person card payments on the go, mobile card readers for smartphones, such as those provided by Quickbooks, may be the most versatile option. Firms that process payments in-office may also consider wireless or wired card-swipe machines, which can be bought or leased from larger processors, such as Elavon.[8]

Processing Fees

Finally, of all these considerations, firms may be most interested in the fees charged by merchant service providers. Credit card processors have myriad pricing structures at their disposal. These include interchange-plus pricing, tiered pricing, and differential pricing with each structure including different associated fees.

Interchange-plus pricing charges an interchange fee (the card's brand's charge to the processor) and adds the processor's rate (the plus). Tiered pricing, the most prevalent pricing system within the industry, groups transaction types into tiers; the rate for each tier has a built-in margin. Finally, differential pricing, common among bank processors, charges a base rate plus fees and additional rates depending on the transaction type. Of

course, all of these pricing structures generally have a margin built into each rate and fee quoted.

The common fees charged by merchant processors for all pricing structures can be steep and frequently include (1) start-up fees; (2) a flat monthly fee for use of the service or minimum monthly fees; (3) a per-card flat transaction fee; (4) a percentage of transaction fee also known as the discount fee; (5) address verification fees; (6) statement fees; and (7) an annual or monthly Payment Card Industry (PCI) compliance fee. Additional factors may impact these rates, including the card brand (e.g., AmEx[9] or Visa), card type (e.g., signature rewards or business elite), and customer location (e.g., Webpay, in-person, telephonic). Fees can be charged per transaction, monthly, bi-monthly, and yearly.

While some fees are set in stone and others merely contribute to the processor's bottom line, many fees are negotiable depending on transaction volume or processor affiliates. For example, Costco customers who use Elavon as a payment processor typically can expect to see an effective rate of 3%, whereas non-Costco customers may be faced with an average effective rate of 3.5%.

Thus, though necessary, negotiating fees and wading through the terms and conditions of each processor is oftentimes a frustrating experience for time-pressed practitioners, with many eventually settling on the merchant who appears to be the easiest to integrate with the current firm software, regardless of the rate charged.

Firms that already have a credit card payment processor plan but are mystified by all the fees and charges on their monthly statements can calculate their plan's effective rate and compare it to those offered by alternative processors. The effective rate is best measured over a year and is calculated the following way:

$$\text{Simple Effective Rate Formula} = \frac{\text{amount paid to processor}}{\text{amount processed}} \times 100\%$$

By using the above formula, a firm will be able to roughly estimate how much a processor will charge on all credit card transactions. A respectable credit card processor's rate should ideally be between 2% to 4%.

Firms should pay particular attention to cancellation fees and monthly minimums. For example, a dishonest processor may provide in the terms and conditions that cancellation fees are not "locked in" for the contract duration, permitting it to charge any fee it wishes should a firm decide to cancel its plan. In addition, monthly minimums can be highly disadvantageous to small and solo practitioners, because they require the firm to process a minimum amount per month or face high additional charges.

Best Practice Tips for Credit Card Payments

Tip 1: Communicate in the client's engagement letter how credit card payments will be processed.

Tip 2: Work with the processor to ensure all fees and charges are taken from a billing account that is not the firm's trust account.

Tip 3: Negotiate rates and cash flow dates with card processors before signing up for a plan.

Tip 4: Read all fine print and ensure all fees are clear before signing up with a processor.

Tip 5: Stay on top of IRS and PCI compliance.

Tip 6: Negotiate the fees associated with processing terminals. The worst rates will be for leased terminals.

Tip 7: Always opt for paperless statements as statement fees may be lessened.

Additional Considerations

Customer Service

It is the hope of every firm that it will never need to utilize a processor's customer service hotline; however, when the need arises, firms may find that not every processor offers comparable customer service. For example, online gateways (e.g., PayPal and Square) may offer little to no customer service with more personalized service being provided by larger processors with dedicated customer service departments. For time-pressed attorneys, the avoidance of customer service runarounds may be an additional consideration.

PCI Compliance

All firms that accept credit cards must ensure that they are compliant with the standards promulgated by the PCI Security Standards Council in its Payment Card Industry Data Security Standard.[10] Such standards regulate how merchants safeguard payors' property and confidential information. The failure to ensure compliance can result in hefty fines in addition to losing the ability to accept credit cards.

Large payment processors, such as First Data and Elavon, actively assist law firms with the implementation of the PCI standards and maintenance of yearly PCI certification. As mentioned previously, firms that choose to work with smaller providers or online gateway providers may find it too troublesome to vigilantly ensure compliance and to simply forgo acceptance of credit cards altogether.

IRS Compliance

Finally, law firms that accept credit cards are cautioned to ensure that their FEIN (federal employment identification number) and legal name match what is on file with the Internal Revenue Service before accepting payments as a mismatch may result in a 28% withholding penalty by the IRS on all credit card transactions, including trust account deposits.[11] Once again, those firms that choose to use large providers for payment processing are typically pre-screened for IRS compliance before plan implementation. ■

1. ABA Formal Op. 00-419.

2. Taken together, N.Y. State 399 (1975), N.Y. State 362 (1974), and N.Y. State 117 (1969) historically permitted attorneys to take bank cards for payment of services rendered through bank-sponsored charge cards. The rules expressed therein were later modified by N.Y. State 769 (2003).

3. N.Y. State 769, *supra* note 2.

4. N.Y.D.R. 2-106(D).

5. *See* Peter Geraghty & Susan J. Michmerhuizen, *Credit Cards: Service Charges and Chargebacks*, YourABA, Oct. 2012.

6. N.Y. State 769, *supra* note 2; N.Y. Rule 1.15.

7. See the Credit Card Processing Application Checklist at the end of this article.

8. Though this Best Practices Guide references Elavon frequently throughout, this is in no way an endorsement of the services it offers over the myriad other processors available to firms.

9. AmEx charges higher processing fees than Visa and MasterCard; however, unlike the other card brands, AmEx negotiates directly with merchants who can then request that their own pre-negotiated processing rate be implemented into a processor agreement in lieu of the standard AmEx processing rate charged by the processor. Therefore, firms may wish either to forgo accepting AmEx cards altogether to lower the fees charged or negotiate a favorable rate directly with an AmEx merchant services representative.

10. For more information, see Payment Card Industry Data Security Standard, pcisecuritystandards.org.

11. Section 3091(a) of the Housing Assistance Tax Act of 2008.

BURDEN OF PROOF

BY DAVID PAUL HOROWITZ

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"The Road Ahead"

Introduction

May's column, "A Dangerous Intersection," discussed the dangerous nexus between CPLR 202 and CPLR 205(a). In 2013, in *Norex Petroleum Ltd. v. Blavatnik*,[1] the First Department had unanimously affirmed a trial court's dismissal of the plaintiff's action by applying CPLR 202, the "borrowing" statute, and holding that CPLR 205(a), the "saving" statute, was not available to permit a new action because the jurisdiction whose statute of limitations was being borrowed did not have a saving statute of its own. At the time, the case was pending in the Court of Appeals, and on June 26, 2014, the Court issued its unanimous decision on the plaintiff's appeal.[2]

The Intersection of CPLR 202 and CPLR 205(a)

CPLR 202, the borrowing statute, provides:

> § 202. Cause of action accruing without the state
>
> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

Designed to prevent forum shopping by out-of-state plaintiffs whose claims accrue outside New York State, the Court of Appeals previously explained that the statute "requires that a court, when presented with a cause of action accruing outside New York, should apply the limitation period of the foreign jurisdiction if it bars the claim. Only where the cause of action accrues in favor of a New York resident is this rule rendered inapplicable."[3]

Along with the prevention of forum shopping by out-of-state plaintiffs, CPLR 202 "is designed to add clarity to the law and to provide the certainty of uniform application to litigants (citations and parentheticals omitted)," a purpose that would be "frustrated by a rule that would limit its application to cases where a defendant is amenable to suit in another State. Such a rule would lead to results that are anything but uniform or certain."[4]

CPLR 205(a),[5] referred to as the "saving statute," provides, in pertinent part:

> § 205. Termination of action
>
> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

In 1915, Judge Cardozo, speaking for a unanimous Court of Appeals in *Gaines v. New York*,[6] explained the purpose of the saving statute:[7]

> The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts. When that has been done, a mistaken belief that the court has jurisdiction, stands on the same plane as any other mistake of law.[8]

Norex in the First Department

The First Department followed a recitation of the facts with its holding that the second action had not been timely commenced:

> On February 26, 2002, plaintiff, a resident of Alberta, Canada, commenced an action against all but one of the instant defendants (BP) in the United States District Court for the Southern District of New York, asserting violations of the Racketeer Influenced and Corrupt Organizations Act.

Plaintiff amended the complaint, on December 21, 2005, to add BP as a defendant and to add two claims under Russian law, although not as against BP.

The instant action, which plaintiff commenced in 2011, is barred as untimely under Alberta law, which limits the time to bring claims for the torts alleged by plaintiff to within two years from the date on which the claimant first knew or should have known that an injury had occurred, that the injury was attributable to defendants, and that the injury warranted bringing a proceeding, and which, more importantly, does not have a provision that would toll the limitations period in favor of a previously filed action.

. . . CPLR 205(a) could not save plaintiff's claims in any event, because New York's borrowing statute requires the courts to apply Alberta's limitations period. Alberta's limitations periods for plaintiff's state law and Russian-law claims expired, at the latest, in 2004 and 2007, respectively.[9]

Norex in the Court of Appeals

In a decision by Judge Smith, the Court succinctly framed the issue and its resolution:

> This appeal calls upon us to decide whether a nonresident plaintiff who filed a timely action in a New York federal court may refile claims arising from the same transaction in state court within six months of the federal action's non-merits termination, even though the suit would be untimely in the out-of-state jurisdiction where the claims accrued. We hold that such a lawsuit is not time-barred, and therefore reverse the Appellate Division.[10]

The Court began with a lengthy analysis of *Global Financial Corp. v. Triarc Corp.*,[11] where the Court held that a non-resident's contract claim accrued, for purposes of determining the Statute of Limitations, where plaintiff sustained its alleged injury.[12]

Significantly, in *Norex*, the Court explained:

> [I]n *Global Financial* we decided where a nonresident's contract claims accrue for purposes of CPLR 202, not whether a new action commenced pursuant to CPLR 205(a) may be time-barred by CPLR 202 even though the prior action from which the new action flows was timely. In short, the defendant in *Global Financial* did not advance the argument pressed by defendants here. Indeed, citing CPLR 205 we observed that the parties "*do not dispute* that [the state court] action is timely if the Federal action was timely when commenced." We had no occasion to consider, much less decide, whether the parties were correct.[13]

Further on the Court explained:

> Norex points out that defendants' argument breaks down if Florida, like Alberta, has no savings statute. But nothing in our opinion in *Global Financial* indicates that we ever took into account the savings statutes (or lack thereof) in any of the relevant foreign states. And both parties read far too much into our reference to CPLR 205 in a case where, as previously noted, the parties agreed, for whatever reason, that the state court action was not time-barred by section 202 so long as the prior federal court action had been timely filed.[14]

The Court turned next to the argument advanced by the defendant in *Norex*, *to wit*, that CPLR 202 "required Norex's state court action to be timely under Alberta law when filed in March 2011, either because Alberta's statute of limitations had not yet expired or Norex's claims were saved by an Alberta tolling statute":[15]

> Notably, none of the tolling cases relied on by defendants dealt with a *refiled* action like Norex's. These decisions merely show that when assessing whether Norex's *original* action was timely for purposes of CPLR 205 (a), Supreme Court was required to consider the "'net' period[] . . . the [Alberta] period, with the [Alberta] tolls and extensions integrated" (*id.*). Here, the absence of a tolling or savings provision in Alberta law had no practical effect with regard to Norex's original lawsuit. Norex says that it filed its federal complaint within weeks of the events that gave rise to its claims, thereby making its federal action timely under "any potentially applicable" statute of limitations, without tolling. Defendants do not gainsay this.[16]

Along with the prevention of forum shopping by out-of-state plaintiffs, CPLR 202 "is designed to add clarity to the law and to provide the certainty of uniform application."

The Court also rejected defendants' argument, invoking the Court's decision in *Besser v. Squibb & Sons*, that by analogy to the interplay of CPLR 202 and CPLR 214(a)(2) in that case, "CPLR 202 should trump CPLR 205 (a), too:"[17]

> But CPLR 214(c)(2) and CPLR 205(a) bear no resemblance to each other beyond their shared general character as remedial statutes. Importantly, there is no evident legislative intent to limit the savings statute's beneficial scope to resident plaintiffs.[18]

Having addressed, and rejected, each of defendants' arguments,[19] the Court concluded:

> We agree with Norex that, once it timely commenced its federal court action in New York, the borrowing statute's purpose to prevent forum shopping was fulfilled, and CPLR 202 had no more role to play. Because Norex's "prior" federal court action was timely under the borrowing statute, the "new" action that it brought pursuant to the savings statute "would have been timely commenced at the time of the commencement of the prior action" (CPLR 205[a]). Stated another way, it is irrelevant that Alberta law does not have a savings statute similar to CPLR 205 (a) because at the point in time when Norex filed its "new" action in Supreme Court, the borrowing statute's requirements had already been met. In our view, this reading of the way in which CPLR 202 and CPLR 205(a) interrelate best comports with statutory language, and honors both the borrowing statute's purpose to prevent forum shopping and the savings statute's goal to "implement[] the vitally important policy preference for the determination of actions on the merits" (*Goldstein*, 13 NY3d at 521 [internal quotation marks omitted]; *see generally* Horowitz, "Burden of Proof: 'A Dangerous Intersection,'" 86 NY State Bar Journal at 20 [May 2014]).[20]

Conclusion

In the wake of the Court's decision in *Norex*, litigants approaching the intersection of the borrowing statute and the saving statute can proceed, confident in the knowledge that the road ahead is clear.

For myself, I will rest a bit easier in the knowledge that the nexus of the two statutes is clear and does not require complicated analysis. If only the myriad legal issues we encounter day today were so straightforward! ■

1. 105 A.D.3d 659 (1st Dep't 2013).
2. 23 N.Y.3d 665 (2014).
3. *Ins. Co. of N. Am. v. ABB Power Generation*, 91 N.Y.2d 180, 187–88 (1997).
4. *Id.* at 187.
5. The remainder of CPLR 205(a) addresses dismissals for neglect to prosecute, and the statute contains two additional subsections:

   > (b) Defense or counterclaim. Where the defendant has served an answer and the action is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the plaintiff or his successor in interest, the assertion of any cause of action or defense by the defendant in the new action shall be timely if it was timely asserted in the prior action.
   >
   > (c) Application. This section also applies to a proceeding brought under the workers' compensation law.

6. 215 N.Y. 533 (1915).
7. *Id.* Addressing a predecessor to CPLR 205(a), Code Civ. Pr. sec. 405.
8. *Id.* at 539.
9. *Norex Petroleum Ltd.*, 105 A.D.3d at 659–60 (citations omitted). The First Department also examined the applicability of a tolling provision pursuant to 28 U.S.C. § 1367 and held that it did not apply.
10. 23 N.Y.3d at 668.
11. 93 N.Y.2d 525 (1999).
12. *Id.* at 527.
13. 23 N.Y.3d at 674 (citation omitted) (emphasis in original).
14. *Id.* at 675.
15. *Id.* at 677.
16. *Id.*
17. *Id.* at 678.
18. *Id.*
19. With regard to the toll set forth in 28 U.S.C. § 1367(d): "Because we have determined that Norex's state court action is not time-barred by CPLR 202, we need not and do not consider whether Norex's claims were timely filed in state court pursuant to 28 USC 1367(d). We note, though, that in light of our disposition of this appeal, the complained-of 'Catch-22' is unlikely to recur." *Id.*
20. *Id.*

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Targeting: The Secret of Effective Business Development

By Carol Schiro Greenwald

"If you don't know where you're going, any road will get you there," said the Cheshire Cat in Lewis Carroll's *Alice in Wonderland*. His aphorism lives on in the approach many lawyers take to building business. Seeking new clients, they move quickly from breakfast meeting to lunch program to dinner, never stopping to consider if these get-togethers are productive conduits to new business.

Building a Business

Building business is NOT a series of random acts of lunch – or breakfast or dinner. Sure, some of these may lead to new work, but there may be many fruitless encounters before you acquire one new client. Looked at in terms of resources, you may be spending more in both time and money than you will recover from the new client.

There must be a better way. There is. Instead of thinking about new business in the context of networking, meals and socializing, think in terms of research and strategy. The goal will be to find the kind of clients you want to work with who need the kind of services you want to provide, and who will value your contributions and pay for them. The secret behind effectively meeting this goal is targeting.

Targeting means finding prospects and new clients by focusing on a particular subset of your current practice or an area you want to grow. The more specifically you

define this group, the more strategic, cumulative and effective your efforts will be. This is because the buying process can be summed up in three sentences:

- People buy for their own reasons, not yours.
- People buy from people like themselves, people who seem to already understand them and the decision-making context in which they live.
- Effective rainmakers continually research and learn all they can about their target market to the point where they become accepted as part of the buyer's world.

Deciding to concentrate on a specific industry or demographic cohort allows you to build on the knowledge you have accumulated through your daily practice. It also helps you to

- really understand that industry or demographic in depth,
- become a participant in their world,
- develop cumulative marketing initiatives that build your reputation with them, and
- become known as the lawyer who can best help them meet their objectives, precisely because you participate in and know their world.

Does this mean you might miss out on other kinds of clients? Not usually. You will still acquire clients through other social and professional channels. It's just that targeting allows you to build a strategic, intellectually based, research-driven plan to foster relationships within a community, which will enable you to obtain the kind of work you prefer.

Targeting is a six-step strategic process focused on aligning your practice growth plans with your search for new clients and referral sources. The six steps are:

1. Define your ideal practice.
2. Create a "persona" that represents your ideal client prospects.
3. Thoroughly and continually research the prospects' world.
4. Become active in and relevant to their communities.
5. Prepare useful conversations that illustrate your capabilities and values in the context of their world. Make it a habit to use them.
6. Acquire new clients who like your value proposition.

Let's discuss each step – its purpose and how to implement it effectively.

1. Define Your Ideal Practice

Begin by asking yourself where you want to be in five years: What kind of work do you want to be doing? For what kind of client? Be specific. Think not just "corporate work" but rather "serve as outside counsel for start-up high-tech companies that need a variety of industry-specific contracts and other documents."

Not just start-up high-tech clients but high-tech clients in the biotech arena. Better yet, drill down further to manufacturers of biotechnology equipment. Add a geographic location for the prospect and its clients. And so the details grow until you have a very complete portrait of the perfect client.

Then consider what you are already doing that moves you toward your goal and what gaps exist that will have to be filled in order to meet the goal. One technique to sum up the pluses and minuses associated with reaching your goal is to complete a basic SWOT analysis (**S**trengths, **W**eaknesses, **O**pportunities, and **T**hreats).

Noting all the pluses and minuses on one page helps you to plan your strategy to get to your goal. You can determine what needs to be reinforced, added, improved, preserved – and the sequence in which you want to implement these actions.

SWOT Analysis of Requirements to Meet Ideal Practice Goals

Strengths of Your Firm/Practice	**Weaknesses of Your Firm/Practice**
Firm resources: people, location, technology	Missing resources: people, technology, locations
Client base in this industry	Financial resources gaps
Characteristics of your "80/20" client segment	Achieving competence in practice goal area
Reputation in this industry	Need to develop new service offerings to meet the industry's needs
Successes/track record	
Opportunities for Growth	**Threats to Growth**
Trends applicable to this industry	Competitors already in the space
New laws, regulations	Fee pressures
Current problems lawyers can resolve	Demand curve for your services
Company-specific growth opportunities	Environmental, geographic risks to the sector

2. Create a "Persona" That Represents the Prospect That Becomes Your Ideal Client

Targeting requires a target – something specific to aim for. In business development we call the target a "persona." This is your ideal prospect; this prospect will be a client whose personality and work style are compatible with yours, whose needs are clearly met by your services, and who pays on time for services received.

In defining this ideal prospect target, consider both tangible and intangible attributes. For example, include persona attributes that answer questions such as those below:

- Do the services the persona requires allow you to focus on the practice area and lawyering skills you like best?
- What are the characteristics of the ideal company's culture or the family's internal dynamic? Is it compatible with your values and your firm's culture? Does it fit with your work style?
- How involved are your best clients in the legal process you follow to obtain a result for them? How involved do you want ideal clients to be?

- As you add attributes, put yourself in their shoes and consider why these ideal clients would hire you and what matters most to them. This helps to ensure that your ideal clients will want your value proposition.

Sometimes people go one step further and anthropomorphize their persona – giving it features, clothes, a lifestyle and so on. Other times people think of symbols to represent the prospect's psychology, using a specific animal, location or color. Once completed, in as detailed a form as you can, this construct becomes your ideal target prospect. The persona represents your ideal client, the client that will fuel the growth of your practice and accomplish your goals.

3. Research the Prospect's World

The next step is to learn about their world as they see it. "As they see it" is the important phrase. It means learn everything you can about the context of their world – everything from the trends that impact an industry or demographic to the emotional relationships of the key decision-makers. Beginning questions include:

- What are their current major problems – within the entity and in the external world?
- What are the major characteristics of the world they operate in?
- How does this context create opportunities and risks amenable to a legal solution?

Research is a crucially important step in developing business, yet it is often overlooked by lawyers who think they know the clients' worlds because they have worked on client matters. These matters offer slices of client concerns, but not big-picture context. The big picture is their world – the world you have to become comfortable in if you want recurring work from these clients.

Why is this so important? Non-lawyers can't judge the legal skills of a lawyer, but they can judge how much you know about their world and their problems. Potential clients judge lawyers as they judge other service vendors – from plumbers to dentists – by their manner, the content of their questions and their suggestions to resolve the situation.

These first three steps are probably the most important part of effectively building business by targeting a defined set of potential clients who need particular kinds of solutions. And you haven't been to a single breakfast or written a single blog post – steps one through three are worked out entirely in your head. You are working out the intellectual strategy to build your practice just as you would work out the legal strategy to move a client forward.

4. Become Active in and Relevant to Their Communities

Now that you have defined your ideal practice, set goals, selected a target and clothed it with specific characteristics, it is time to find where these prospects go, what they read, who they believe. You need to know about their information acquisition habits in order to find comfortable locales in which you can join their conversations.

The fastest ways to do this are:

- Ask your clients what organizations they belong to and what publications they read.

Targeting means finding prospects and new clients by focusing on a particular subset of your current practice or an area you want to grow.

- Use Google to find trade or professional associations for your prospect's industry or demographic category.
- Use LinkedIn's Group feature to find groups your current contacts in the target market belong to.
- If you are interested in public company clients, then go to the company website. If it is publicly traded and available, download an audio version of its quarterly earnings calls. Usually the CEO and General Counsel are on the call.
- Even if you are targeting elsewhere, you may want to follow a key company in the industry you are focused on because, typically, key companies are bellwethers regarding the application of new laws and regulations.

For example, running a Google search for a biotechnology equipment manufacturer will give you 29,500,000 results. Just working down the first page you would find lists of associations for manufacturers, biotech and medical device companies. Beginning with the organizations your clients belong to, investigate each to find which have

- chapters in your state;
- interesting, relevant issues; and
- opportunities for participation by association members.

This will narrow down your choices to a few. The next step is to visit them. Attend programs to see if you want to join the organization. The building business objective is to become a regular and active participant in one or two of these organizations. Belonging will help you learn their jargon, their issues and concerns, and will help facilitate introductions to potential clients. Your goal is to become "one of the crew."

LinkedIn has 25 biotechnology manufacturing groups. Again, look at them and find one or two that you want to join. Once a member, join in conversations where you can add a legal perspective to a current or popular discussion. As a member you can identify, follow and connect with companies you may want to target or people you want to get to know as referral sources and colleagues.

As you become active in these in-person and online communities, you will meet people you want to add to your contacts as referrers, prospects or friends. As appropriate, you will find openings in which to discuss what you do for a living, how you approach your work, your areas of practice, and your knowledge of their concerns.

5. Practice Conversations That Illustrate Your Capabilities and Values in the Context of Their World

Now you are ready to create your USP (unique selling proposition) and elevator speech (a short spoken invitation to a conversation). Then it will be time to network. To prepare your USP and elevator speech, take the following steps:

- First, go back to the earlier self-assessment. Remind yourself about the kind of work you like to do, the specific lawyering style you prefer, and your favorite kind of client.
- Decide what issues you want to use as discussion topics. Probably you will want to choose some that will require the prospects to hire lawyers.
- Decide what your value proposition is. What do you bring to the table that clients will find of value?
- Incorporate what you do, why you do it and how it provides value into an elevator sound bite.

Sounds daunting, but having done your initial SWOT analysis you know the space in your target's market that you want to make your own. Continuing with our biotechnology target example, for your USP you might want to stake out a position as a corporate lawyer who helps clients set up companies that comply with all the biotechnology legal requirements.

Your *value proposition* should focus on the benefits of working with you. These might include how you provide client service; for example, how you define responsiveness to include accommodating your meeting schedule to the time demands of biotech equipment manufacturer clients. It might include your depth of knowledge of their industry trends, issues, or potential problems.

An *elevator speech* is a short statement that encourages the listener to ask follow-up questions. So perhaps in this example, the lawyer might say:

> "I help start-up biotechnology equipment manufacturers begin successful ventures. Together, we create an appropriate legal foundation for their businesses. I understand 'appropriate' because I serve on the planning committee of their trade association."

This could encourage your listener to ask a variety of follow-up questions:

- "What trade association?"
- "What do you think are the key issues today?"
- "Do your clients care that you are active in their trade association?"
- "How would you meet the current environmental regulations that impact work-flow processes for biotech manufacturers?"

Building business is NOT a series of random acts of lunch.

Any one of these questions gives you a chance to begin a discussion of the issues, your view of client service and what working with a client really means. You can illustrate your points with some relevant short stories.

6. Acquire New Clients Who Like Your Value Proposition

Moving along the acquisition road from introduction to client can take many months and certainly many contacts – in person or through electronic communications. Whatever the method, remember to focus on the handful of prospects that fit the specifications of your target persona.

The key to effective selling is to encourage prospects to discuss their goals, problems and concerns. Ask good questions that reflect your research and participation, listen to their answers, be empathetic and suggest possible actions. In this way you will be living your value proposition.

Create a chain of interactions that are timely and relevant. Your behavior in the prospecting process becomes an indicator of your behavior should they hire you. In this situation content and relevance are of major importance. Be sure that whatever you want to do with them – attend an event together, read an article, go out to dinner – is relevant to the prospect in terms of both personal interests and professional/business concerns.

Conclusion

The progression that began with a targeting strategy continues, with each step moving the relationship forward, allowing the prospect to visualize your value and feel comfortable with the idea of working together. It ends with the prospect's decision to proceed with a specific matter.

Incorporating these new clients into your work life will be relatively easy because you already know a lot about the context in which they operate. You only have to learn more about them and the factors impacting their business. ■

Being Prepared When the Cloud Rolls In

By Natalie Sulimani

With each new technological advance comes at least one new term, if not a whole new language. It seems as if once you get a handle on one term there is yet another one to learn – crowdfunding and crowdsourcing, to name two. And then there is social media, which should not be confused with social networks, of course. All of this is in the spirit of and service to technology and innovation. But none strike more fear in the hearts of attorneys lately than the ubiquitous term "cloud computing." What is the cause of the shudder you just may have felt run through the legal profession? Maybe the discomfort comes from the natural desire in the field of law to control as much of our client's situation as possible, and cloud computing is an environment that we, as attorneys, cannot ultimately control. It is, by its very nature, in the hands of someone else. Hopefully, you have found a trusted IT vendor to manage your part of the cloud.

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But, while with technology the players and the terminology may change, what does not and never will change are an attorney's ethical obligations. We have a duty to maintain confidences, a duty to remain conflict-free in our representations and, of particular interest to me lately, a duty to preserve.

The lesson has been taught, and sorely learned, that files must be backed up. Hard drive failures are, unfortunately, a reality. So, you back up to an external hard drive, except the unwritten rule of the cyberverse is, Hard drives always fail. Always. Recently, the onslaught of natural disasters, the latest being Hurricane Sandy on the East Coast, has taught some lawyers a very harsh lesson. Redundancy is important. Maintaining files in multiple locations is a must. How many files were lost due to flooding or a server going underwater? How many attorneys were unable to access their files because of these or other similar catastrophes? If it was even one, then it was too many. And worse yet, there is no reason for such things to happen.

Early in my solo career, I had a breakfast networking meeting with an attorney from a midsize firm and the discussion turned to the topic of working from home. Now, technically, I do not have a virtual law firm, but I do consider myself mobile as an attorney. I think most of us do. Technology allows us to do so. Moreover, the amount of work necessitates that we work remotely. Clients expect you to be available on their schedule, and worse yet, clients or opposing counsel may live in a different time zone. Not everyone exists on Eastern Standard Time. So, I casually asked, "How do you manage your work from home?" The answer was, "I email my files to myself." I followed up with, "Okay, to your firm address?" The response that mentally gave me pause was, "No, personal email address." There seemed something wrong about this, but more on that later.

Opinions regarding maintaining confidentiality are numerous and frequent, and as we move forward technologically, the subject keeps returning like a bad penny. We all know that we need to maintain confidentiality, but the challenge as we progress may be to understand new technology so that we are able to use it to be more efficient while at the same time being confident that we are maintaining client confidentiality.

History and the Ethics Trail to Cloud Computing

If you have attended seminars on cloud computing, then you may know that the first iteration of the cloud was voicemail. Answering machines were replaced with voicemail, which meant that your messages were stored on a remote server that required you to use a code to retrieve them. Although this was a shift in where personal and official information was stored, I cannot remember anyone wondering whether this would be an issue of confidentiality or otherwise, and preferred answering machines over voicemail and the convenience of listening to messages anywhere.

The next step in cloud computing came in the form of third-party email providers like Gmail, Yahoo, MSN, Hotmail, AOL, and others. These services stored our communications on remote servers in any number of locations, but most important, all this information resided in the cloud. Again, almost everyone is happy to access his or her email from anywhere without fretting over the fact that all our words and thoughts are floating out there in the cloud.

So how do the courts view this use of the cloud? In 1998, the New York State Bar Association rendered Opinion 709 that a lawyer may use *unencrypted* email to transmit confidential information since it is considered as private as any other form of communication. Unencrypted means that, from point to point, the email could be intercepted and read. The reasoning was that there is a reasonable expectation that email will be as private as other forms of telecommunication. However, the attorney must assess whether there may be a chance that any confidential information could be intercepted. For example, if your client is divorcing his or her spouse, an email that both spouses share, or even an email to which the nonclient spouse has access, should not be the method of communication. The attorney must seek alternate methods of communicating.

Gmail did add an extra twist which other email service providers quickly copied. As a "service" to you, email service providers started to scan emails in order to provide you with ad content. They would scan keywords in your email and provide relevant advertising. For instance, if you were discussing shoes in an email, the email service provider would tailor ads when you were in the email inbox and you would now be receiving advertisements for Zappos or any other shoe vendor. After all, nothing is better than a captive audience.

So, the question now becomes whether a lawyer can use an email service that scans emails to provide computer-generated advertisements. The New York State Bar Association opined in Opinion 820 (2/8/08 (32-07)) that, yes, it was okay, since the emails were scanned by machine and not by human eyes. If the emails were read by someone other than sender and recipient, the opinion would certainly have been different.

And now to the topic at hand: storing client files in the cloud. Through services like Dropbox, Box.com, Rackspace, Google Docs, and others, an attorney can add to his or her mobility and efficiency by storing client files online. Although I know there is a lot of debate surrounding this practice, I do not see how it is very different from storing client files off site in a warehouse. In the cyberworld, electronic files are held by a third party on a secure remote server with a guarantee that they will be safe, and only authorized persons will have access. In the brick-and-mortar world, paper files are held by a third party in a warehouse with the same guarantees. Both are equally secure and equally liable to be broken into by nefarious

agents bent on getting to the diligently hidden confidential information. Again, the technology might change, but the principles are the same. One should not be more or less afraid of one method of storage over the other.

A number of state bar associations have been grappling with the issue of cloud computing and the ethical issues it raises; these include North Carolina, Massachusetts, Oregon, Florida, as well as our esteemed New York State Bar Association. However, surprisingly, to date only 14 of the 50 states have opined regarding use of cloud computing in the legal profession. One would think more would have joined the fray in giving its lawyers some guidance.

The American Bar Association amended its Model Rules last year, perhaps as a beacon to other bar associations, but certainly as a guide for other states.

Model Rule 1.6 holds:

> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Across the board, opinion is cautious about using cloud computing in the practice of law, but there is nothing about it that could be called unethical. The ethical standard of confidentiality is *reasonable efforts to prevent disclosure.* The question, therefore, lies in what is considered reasonable efforts.

Rule 1.6(a) of the New York Rules of Professional Conduct states that "[a] lawyer shall not knowingly reveal confidential information . . ." and, at Rule 1.6(c) goes on to say that "[a] lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client."

It is safe to assume that Rule 1.6(c) imposes the obligation for lawyers to use reasonable care in choosing their cloud computing and/or IT vendors, but indeed those lawyers may take advantage of the cloud and employ those who provide and manage those services in good conscience.

In fact, in September 2010, the New York State Bar Association issued Ethics Opinion 842 regarding the question of using an outside storage provider to store client information. The question that was asked of the New York State Bar Association was whether a lawyer can use an online storage provider to store confidential material without violating the duty of confidentiality.

So What Exactly Is the Cloud?

To understand what the issue is and why it may pose a problem, it is best to understand what it means to store information in the cloud. A cloud, in its simplest terms, is a third-party server. The server in which the information is stored is neither on the law firm's premises nor owned by the law firm. The law firm's IT person or department does not maintain where the database is stored in any way. It is in the hands of a third party offering a service.

An internal storage system is a closed circuit, meaning there is a direct line from your desktop to the firm's server. Absent hacking, the information is controlled internally. Once removed from this closed system and stored in the cloud, your information may be more vulnerable because you have now created access points in which others may gain access to that data. To illustrate, data will now flow out on the Internet and beyond your control to get to the remote server where it is housed. However, encrypt the data, and you have limited the exposure. As stated above, once encrypted it would take a nefarious and willful mind to be able to read what you are sending into the cloud.

> The lesson has been taught, and sorely learned, that files must be backed up. Hard drive failures are, unfortunately, a reality.

Why Should You Move Your Data to the Cloud?

There are many reasons why you would want to move to the cloud and many reasons why it is prudent to move your storage to the cloud. To begin with, properly using cloud computing in the storage of client information reduces the possibility of human error. Emailing files to yourself, transferring them to a thumb drive, storing client files in off-site warehouses, to name a few, are all steps that introduce and increase the chance for human error. Email to your personal email account runs the risk that your family would access your email at home, thumb drives get lost, people break into warehouses and natural disasters happen that can destroy files. Cloud computing, by contrast, puts your files in the hands of competent IT professionals who will secure your information and provide the necessary redundancy, so if a server goes down your files will live on and be available when you need them from another server. Their major, if not sole, purpose (and the reason you pay them) is to safeguard your files and ensure that you will always have access to them when necessary, so they are highly motivated to do it well and properly. [1]

In December 2010, the Federal Trade Commission (FTC) issued a report titled *Protecting Consumer Privacy in an Era of Rapid Change*.[2] While attorneys may be subject

to higher standards in keeping client confidences, I think this is a good guide in understanding the technology and best practices associated with it.

The FTC report recognized that businesses are moving to the cloud because it improves efficiency and is cost effective. However, the overarching concern is privacy. The FTC recommended overall guidelines for technology and consumer data. In particular, there are four recommendations that businesses should follow:

- Scope: Define what information is stored.
- Privacy by Design: Companies should promote privacy in their organizations.
- Simplified Choice: Simplify choice so that the customer is able to choose how information is collected and used in cases where it is not routine, such as order fulfillment.
- Greater Transparency: Companies should be transparent in their data practices.

Using these guidelines, what are best practices for attorneys?

- Consider what client information you will store in the cloud.
- Privacy is easy to ensure; attorney-client privilege should be maintained.
- Determine what information you will share with your clients. For example, will you share their case files with them? You can pick and choose what you share with your clients in the cloud for greater collaboration and reduction of emails going back and forth with attachments. They can upload their data in a secure environment, and you can share information in a secure, password-protected environment where you can ensure that only a specific client or clients have access.
- Choice and transparency go hand in hand. While it is the attorney's best judgment in deciding how to reasonably protect client information, you should make your client aware that you are using these services. Build it into your retainer. If, for any reason, your client objects, you will know and can deal with the reasons why right at the beginning. It may take just a short conversation about the confidentiality, reliability and ease of the cloud to assuage any fears or concerns.
- Finally, have a breach-notification policy in place. This is not just for your corporate clients; any client whose information is in the cloud should be notified of and subject to this policy.

Now that I have you on board with moving your files to the cloud, consider that you need to exercise "reasonable care" in choosing a cloud provider. New York State Bar Association Ethics Opinion 842 offers some guidance:

- Ensure that the online storage provider has an enforceable obligation to preserve confidentiality and security and will notify you of a subpoena.
- Investigate the online storage provider's security measures, policies, recoverability methods and other procedures.
- Ensure that the online storage provider has available technology to guard against breaches.
- Investigate storage provider's ability to wipe data and transfer data to the attorney should you decide to sever the relationship.

Read the Terms of Service and, when you can, negotiate with the cloud vendor. Cloud vendors update their policies and may be willing to change their practices to meet the needs of their (and your) clients. If you have concerns and/or specific needs, contact the vendor, and if it is unwilling to change its practices, go somewhere else. Frankly, there are many online storage providers so be discerning when it comes to client data.

While utilizing an online storage provider, consider its encryption practices. Will your data be encrypted? Will you encrypt the data en route to the online storage? And who has access while it is being stored? Also, if the online storage provides access on mobile devices, just as you would your computer, laptop, tablet and mobile phone, add security by password-protecting the online storage's mobile app. After all, just as in the non-cyber world, a big threat to effective storage is human error. Therefore, it is of utmost importance that you know how to remotely wipe the data if your device is lost or stolen. One aspect of mobile storage to be aware of is that when you download client data to your mobile device, it may be downloaded to your SD card unencrypted. Meaning that while your cloud app would be password protected (because you set it up that way), a file downloaded to your SD card would not be, leaving that file particularly vulnerable to inadvertent or advertent access by other people. Whether you want this is something to consider; take steps to avoid it, if desired. This shows the importance of understanding how the technology works, understanding where problems, such as interception, may occur, and ultimately how to take steps to avoid them. Education is key.

In short, the advantages of cloud computing as outlined in this article make it a perfect complement to an effective and successful law practice. There is little difference in the potential ethical issues or any other such problems that exist in the cloud and in the brick-and-mortar world of physical offsite storage of clients' files. Rather than running away from this new technology, it would be better to embrace it by learning more and making wise decisions that will minimize potential pitfalls down the road, while at the same time increasing the ease and usefulness of client communication and interaction. ■

1. Of course, not everything is appropriate for storage in the cloud.

2. http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

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Too Close for Comfort

Client-Lawyer Relations

By Devika Kewalramani, Alexandra Farber and Robert D. Argen

Introduction

Tucked away in the New York Rules of Professional Conduct (NY Rules) are restrictions on client-lawyer sexual relations.[1] Rule 1.0(u) defines "sexual relations" as "sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse." Express restrictions on sexual relations between clients and lawyers are found in Rule 1.8(j)(1).

Although engaging in intimate relations with clients has long been frowned upon in the legal profession, New York's ethics rules were mostly silent on the topic until 1999, when the New York Code of Professional Responsibility (NY Code) was amended to include Disciplinary Rule 5-111 (DR 5-111). DR 5-111 for the first time set forth restrictions on client-lawyer sexual relations. Its title, "Sexual Relations with Clients," prominently appeared in the table of contents of the NY Code under Canon 5, concerning the duty of lawyers to exercise independent professional judgment. In 2009, the NY Rules replaced the NY Code. Rule 1.8(j)(1) and its related subsections are substantively similar to their predecessor DR 5-111.[2] However, the structural overhaul of the ethics rules stripped the rule regarding client-lawyer sexual relations of its own title, trimmed it out of the table of contents, and tucked it away at the end of a laundry list of other rules regarding specific conflicts of interest involving current clients. Moreover, while DR 5-111 sensibly included the definition of "sexual relations" immediately before the text of the rule, the NY Rules disconnected the definition from the text of the rule, moving it to the "Terminology" section at the front of the rulebook. Given this context, it is important that lawyers and law firms are reminded of the existence of Rule 1.8(j) and the ethical obligations relating to client-lawyer sexual relations.

Constraints on Client-Lawyer Sexual Relations

Out of respect for the desires of consenting adults, the NY Rules do not flatly forbid all sexual relationships between lawyers and clients.[3] Rather, Rule 1.8(j)(1) sets forth certain restrictions on client-lawyer sexual relations. The first two sub-paragraphs of Rule 1.8(j)(1) proscribe what have been deemed "pernicious"[4] sexual relations – they prohibit lawyers from demanding sexual favors in exchange for legal services, and forbid them from employing coercion, intimidation or undue influence to persuade clients to engage in sex. The third sub-paragraph applies

a specific ban on sexual relations with domestic relations clients during the course of the representation.

Notably, the restrictions in Rule 1.8(j)(1) "apply to all lawyers in a firm who know of the representation,"[5] and not only those who are personally representing the client. Furthermore, although Rule 1.8(j) is housed within a rule regarding conflicts of interest with *current* clients, a careful analysis of Rule 1.8(j) reveals that the scope of its restrictions likely extends to *prospective* clients as well. Similarly, the restrictions apply to both individual and organizational clients.[6]

Quid Pro Quo Restriction

Rule 1.8(j)(1)(i) (the Quid Pro Quo Restriction) forbids quid pro quo–type transactions where legal services are surreptitiously exchanged for sexual favors. It states that a lawyer shall not "as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person." This restriction broadly applies to sexual relations between a lawyer and "any person." Consequently, a lawyer may run afoul of the Quid Pro Quo Restriction by exchanging legal representation for sexual relations with a client's colleague, friend, family member or others. The Quid Pro Quo Restriction is particularly vital as a protection for indigent clients who may be more susceptible to pressure to trade sex for legal services.[7] Even if a client is the party who suggests an exchange of sex for legal representation, any attempt by a lawyer to commit such an exchange would constitute an ethics violation under Rule 8.4, the general rule on professional misconduct, which forbids lawyers and law firms alike (through Rule 5.1) from violating or *attempting* to violate the NY Rules. *See* Rule 8.4(a).

Abuse of Power Limitation

Rule 1.8(j)(1)(ii) (the Abuse of Power Limitation) prohibits a lawyer from employing "coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm." Unlike the Quid Pro Quo Restriction, the Abuse of Power Limitation does not include the term "any person"; nevertheless, the scope of the Abuse of Power Limitation is quite broad. Even if a lawyer engages in sexual relations with a person who is only loosely connected to a legal matter, such relations could be considered "incident" to the professional representation and thus a violation of the rule. Additionally, the Abuse of Power Limitation marks dangerous territory for lawyers because, in hindsight, seemingly consensual relationships may fall within the "undue influence" category of conduct.[8] Lawyers can avoid consciously using coercion and intimidation tactics to obtain sex; after a breakup, however, a sexual partner may easily claim to have accepted sexual advances only because he or she was unduly influenced by the lawyer's professional stature. Thus, the bottom line advice to lawyers is not to have sex with clients.[9]

Domestic Relations Matters Blanket Ban

Rule 1.8(j)(1)(iii) (the Domestic Relations Matters Blanket Ban) absolutely bans sexual relations between lawyers and domestic relations clients. This per se prohibition applies to all "domestic relations matters," which Rule 1.0(g) defines to include legal proceedings pertaining to divorce, separation, annulment, custody, visitation, maintenance, child support or alimony. Concerns about the fragile state of divorce clients and "sexploitation" led to the Domestic Relations Matters Blanket Ban. The NY Rules are especially protective of domestic relations clients because they are considered to be particularly vulnerable given the emotional and personal nature of the issues at stake in domestic relations matters.[10]

Rationales for Restrictions

Commentary to the NY Rules published by the New York State Bar Association (NYSBA) identifies several rationales underlying the restrictions on client-lawyer sexual relations.[11] First, lawyers, as fiduciaries, should not abuse the trust and confidence of their clients.[12] Second, client-lawyer sexual relations may impair the professional judgment of the lawyer, especially when the lawyer becomes emotionally involved in the relationship.[13] Third, mixing

legal work and sex creates a "blurred line" between professional and personal relationships, which jeopardizes the confidentiality of client-lawyer communications: the attorney-client privilege does not apply to pillow talk between lovers.[14] Fourth, as implied by the placement of the restrictions within Rule 1.8, titled "Current Clients: Specific Conflicts of Interest Rules," client-lawyer sexual relations often cause conflicts of interest. For instance, a lawyer who wishes to keep "seeing" a client might adjourn court dates or deliberately spoil settlement negotiations. Also, a client's ability to adequately consent to a conflict of interest caused by a sexual relationship is "vitiated" by the potential for undue influence and the client's "emotional vulnerability."[15] Finally, client-lawyer sexual relations create a "significant risk of harm to client interests," including the risk of incompetent representation.[16] As the NYSBA commentary makes abundantly clear, "sexual relations between lawyers and their clients are dangerous and inadvisable."[17]

Marital and Pre-Existing Relations Exclusions

Rule 1.8(j)(2) creates a narrow exclusion for "sexual relations between lawyers and their spouses or [ ] ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship." A lawyer may therefore represent his or her spouse without concern for violating the restrictions on client-lawyer sexual relations. Similarly, so long as a sexual relationship is both ongoing and started before commencement of the client-lawyer relationship, the restrictions in Rule 1.8(j)(1) do not apply. Ironically, Rule 1.8(j)(2) creates a loophole, because the marital exception is not qualified by the timing requirement found in the second part of the rule. Thus, a lawyer who engages in sexual relations with a client *after* initiation of the client-lawyer relationship may avoid violation of Rule 1.8(j)(1) if he or she marries the client. Theoretically then, New York lawyers may avoid violating Rule 1.8(j)(1) by eloping with their client sexual partners. Nonetheless, a disciplinary committee could still find that marital or pre-existing client-lawyer sexual relations violate other NY Rules.

Imputation of Sexual Misconduct

When client-lawyer sexual relations occur, Rule 1.8(k) (the Non-Imputation Rule) protects the other lawyers at a firm (i.e., those who did not engage in improper sexual relations with the client) from being automatically charged with violating Rule 1.8(j)(1) "solely" because of the occurrence of prohibited client-lawyer sexual relations. It provides "[w]here a lawyer in a firm has sexual relations with a client but does not participate in the representation of the client, the lawyers in the firm shall not be subject to discipline under this Rule [1.8] solely because of the occurrence of such sexual relations."

To fully comprehend the Non-Imputation Rule, which many describe as one of the most difficult provisions in the NY Rules to understand, it must be read in conjunction with Rule 1.10(a) (the Imputed Conflicts Rule).[18] The Imputed Conflicts Rule states, "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, *except as otherwise provided therein*." The Imputed Conflicts Rule establishes a presumption that violations of the enumerated conflicts rules *are* imputed to the other lawyers in a firm. But the Non-Imputation Rule (Rule 1.8(k)) *reverses* that presumption and creates the exception to the Imputed Conflicts Rule.

However, the Non-Imputation Rule provides only a partial shield. Lawyers who do not personally engage in sexual relations with clients may be at risk of violating the NY Rules based on the sexual misconduct of other lawyers within their law firms. For example, there may be situations where client-lawyer sexual relations lead to violations of other NY Rules, such as Rule 1.7(a)(2), the personal conflicts of interest rule, which can be imputed to other lawyers in the firm through the Imputed Conflicts Rule (Rule 1.10(a)).[19] Additionally, any "overt act" by a lawyer who facilitates the "occurrence" of improper client-lawyer sexual relations could be found to violate Rule 1.8(j)(1) as such misconduct would not be "solely" due to the occurrence of the sexual relations. For instance, if a partner in a law firm introduces a client to a colleague at his or her firm and the colleague subsequently coerces the client into having sexual relations, then the partner may be in violation of Rule 1.8(j)(1), because the introduction plus the occurrence of sexual relations could be found sufficient to overcome the Non-Imputation Rule (Rule 1.8(k)).

Potential Violations of Other NY Rules

Even where a lawyer's conduct does not fall squarely within the parameters of Rule 1.8(j)(1), client-lawyer sexual relations may violate one or more other NY Rules.

Rule 1.7 – Conflicts of Interest

NYSBA commentary specifically points out that even when a lawyer represents his or her spouse, the professional judgment of the lawyer may be "materially limited."[20] Such an impairment of judgment may constitute an impermissible personal conflict of interest under Rule 1.7(a)(2), which states that a lawyer shall not represent a client if a "reasonable lawyer would conclude . . . there is a significant risk that the lawyer's professional judgment . . . will be adversely affected by the lawyer's own financial, business, property, or other personal interests." While Rule 1.7(b) provides a remedy to cure a personal conflict of interest where the lawyer provides competent and diligent representation and the client gives informed consent, confirmed in writing, this condition may not be adequately satisfied where the lawyer's disclosures and the client's consent may be tainted by the sexual relations.

Rule 1.6 – Confidentiality

Sexual relations between a client and lawyer may endanger the lawyer's duty of confidentiality owed to the client. A fuzzy line between the professional and personal relationship may create a risk that confidential client information may not be properly protected by the attorney-client privilege.[21]

Rule 1.1 – Competence

Handling the legal matters of a sexual partner may lead to incompetent representation in violation of Rule 1.1.[22] This rule states that a lawyer shall not "handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle." For example, a tax lawyer would likely not be fit to provide competent representation for a sexual partner on a patent law matter or an immigration matter. Moreover, Rule 1.1 disallows a lawyer from intentionally prejudicing or damaging a client during the course of representation.

Rule 8.4 – Fitness to Practice

Even when a lawyer's sexual conduct does not fall neatly within the express restrictions on client-lawyer sexual relations in Rule 1.8(j)(1), client-lawyer sexual relations may still "raise questions" concerning the lawyer's fitness to practice law under Rule 8.4(h). This is a catchall provision that prohibits a lawyer from engaging "in any other conduct that adversely reflects on the lawyer's fitness as a lawyer."[23]

Corporate Client Context

Lawyers who interact exclusively with organizational clients are still subject to the restrictions in Rule 1.8(j)(1) on client-lawyer sexual relations that apply to lawyers representing individual clients; in fact, such lawyers (i.e., in-house or outside counsel) should be even more cognizant of the prohibitions because they likely interact with more persons who may be considered "clients" for purposes of the rule. NYSBA commentary explains that when a client is an organization, Rule 1.8(j) "applies to sexual relations between a lawyer for the organization (whether inside counsel or outside counsel) and a constituent of the organization who supervises, directs or regularly consults with that lawyer or a lawyer in that lawyer's firm concerning the organization's legal matters."[24] Although the dynamics and power structure may be different when interacting with business executives or general counsel of organizational clients, the restrictions on client-lawyer sexual relations nevertheless apply to lawyers, whether acting as in-house legal advisors or as outside counsel.

Responsibilities of Law Firms, Legal Departments and Supervisory Lawyers

Under Rule 5.1(a), "a law firm shall make reasonable efforts to ensure that all lawyers in the firm" comply with the NY Rules. Under this rule, supervisory and management-level lawyers have similar duties at their firms. In addition, corporate legal departments and in-house counsel are also subject to these responsibilities because Rule 1.0(h) defines "Firm" or "Law Firm" to include "the legal department of a corporation or other organization." NYSBA commentary provides that "a law firm's failure to educate lawyers about the restrictions on [client-lawyer] sexual relations – or a firm's failure to enforce those restrictions against lawyers who violate them – may constitute a violation of Rule 5.1."[25] Consequently, it is advisable for supervisory or management-level attorneys at law firms and legal departments to conduct training on the topic or to at least include pertinent information on prohibited client-lawyer sexual relations in new-hire packets and employee handbooks to avoid violation of Rule 5.1.

In-house lawyers, who often have multiple roles within their organizations and work with a broader group of corporate employees, are uniquely affected by the restrictions on client-lawyer sexual relations. This is because their colleagues, such as nonlegal business executives or other personnel, may qualify as "clients" within the meaning of Rule 1.8(j). As a result, when in-house lawyers interact with co-workers outside of the legal department, such dealings may be considered to be with clients and, therefore, the restrictions on client-lawyer sexual relations apply including, in some cases, the personal conflict of interest rule in Rule 1.7(a). However, in the law firm context, while sexual relations between co-workers in a law firm may be prohibited by internal firm policy, the prohibitions on sexual relations in the NY Rules were probably not designed to limit such activities within the same law firm.

ABA Model Rules and Beyond

Compared to other jurisdictions, the NY Rules are relatively tolerant of client-lawyer sexual relations. The ABA Model Rules of Professional Conduct (Model Rules) impose an outright ban on client-lawyer sexual relations, regardless of practice area (unlike the NY Rules,

> The NY Rules do not flatly forbid all sexual relationships between lawyers and clients. Rather, Rule 1.8(j)(1) sets forth certain restrictions on client-lawyer sexual relations.

which impose an absolute ban only in domestic relations matters), except where a sexual relationship predates commencement of the professional relationship.[26] A number of states, including Pennsylvania and Illinois, have adopted the blanket ban approach of the Model Rules.[27] Florida's ethics rules are substantially similar to the Model Rules, but they also include a unique rebuttable presumption provision where a lawyer has the opportunity to prove by a preponderance of the evidence that the sexual conduct at issue did not exploit or adversely affect the client's interests or the client-lawyer relationship.[28] On the opposite end of the spectrum from the Model Rules approach are the New Jersey Rules of Professional Conduct, which are silent on client-lawyer sexual relations. Nonetheless, sexual misconduct by New Jersey lawyers has led to a variety of ethical violations, especially in the area of conflicts of interest.[29] California Rule 3-120 of the California Rules of Professional Conduct is similar to Rule 1.8(1) in that it includes provisions that prohibit both quid pro quo sexual relations and coercive sexual relations. Interestingly, the California rule does not single out domestic relations matters for special treatment but states that a member of the State Bar of California shall not "continue representation of a client with whom the member has sexual relations if such sexual relations cause the member to perform legal services incompetently in violation of rule 3-110."[30] Thus, while the California rule does not proscribe all sexual relations between lawyers and domestic relations clients, compared to New York, California directly asserts that client-lawyer sexual relations may violate other applicable ethics rules. By contrast, it is only the NYSBA commentary that describes how sexual relations may violate other relevant NY Rules.[31]

Disciplinary Implications

Ethics violations involving sexual misconduct have serious repercussions. Disciplinary authorities have imposed disbarment in egregious instances of client-lawyer sexual relations involving criminal conduct, sexual abuse of children, and repeat offenses.[32] Two-year suspensions have been imposed where a lawyer has had sex with a client in violation of the NY Rules.[33] Shorter suspensions have been imposed where the lawyer's conduct included offensive touching or sexual comments.[34] Regardless of the severity of formal disciplinary sanctions, the reputational damage from ethics violations involving sexual misconduct is permanent and lawyers often lose their jobs.[35] Thus, it is imperative for lawyers to understand the grave risks surrounding client-lawyer sexual relations.

Conclusion

In light of the specific restrictions on client-lawyer sexual relations in Rule 1.8(j), the potential for violating other NY Rules, the limited protection provided under Rule 1.8(k), and the clear ethical responsibilities of law firms, legal departments and supervisory lawyers to educate lawyers and to enforce the restrictions on sexual relations with clients, New York lawyers should think twice before climbing under the covers with a client. ■

1. *See generally* New York Rules of Professional Conduct (2010).
2. *See* The New York Rules of Professional Conduct: Rules and Commentary, 211 (New York County Lawyers' Association Ethics Institute, ed., 2012) (detailing cross-references and differences between the NY Code and NY Rule 1.8(j)).
3. New York Rules of Prof'l Conduct R. 1.8 cmt. [17A] (2010).
4. In 1999, a judicial committee coined the term "pernicious sexual relationships" in a report that led to the adoption of DR 5-111. Simon, Roy D., Simon's New York Rules of Professional Conduct Annotated 540 (2014).
5. New York Rules of Prof'l Conduct R. 1.8 cmt. [17A] (2010).
6. Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 542 (2014).
7. *Id.* at 543.
8. *Id.* at 543–44.
9. *See id.*
10. New York Rules of Prof'l Conduct R. 1.8 cmt. [17] (2010).
11. *Id.*
12. *Id.*
13. *Id.*
14. Simon, *supra* note 6, at 539.
15. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 (1992).
16. New York Rules of Prof'l Conduct R. 1.8 cmt. [17] (2010).
17. *Id.*
18. Simon, *supra* note 6, at 547.
19. New York Rules of Prof'l Conduct R. 1.8 cmt. [20] (2010).
20. New York Rules of Prof'l Conduct R. 1.8 cmt. [18] (2010).
21. New York Rules of Prof'l Conduct R. 1.8 cmt. [17] (2010).
22. *Id.*
23. Simon, *supra* note 6, at 539.
24. New York Rules of Prof'l Conduct R. 1.8 cmt. [19] (2010).
25. New York Rules of Prof'l Conduct R. 1.8 cmt. [17(B)] (2010).
26. Model Rules of Prof'l Conduct R. 1.8(j) (2014)("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.").
27. *See* Pennsylvania Rules of Prof'l Conduct R. 1.8(j) (2013); Illinois Rules of Prof'l Conduct R. 1.8(j) (2010).
28. *See* Rules Regulating the Florida Bar R. 4-8.4(i).
29. *See* 46 N.J. Prac., New Jersey Attorney and Judicial Discipline § 9:10.
30. *See* California Rules of Prof'l Conduct R. 3-120(B)(3) (2010).
31. New York Rules of Prof'l Conduct R. 1.8 cmt. [20] (2010).
32. *See In re Singer*, 290 A.D.2d 197 (1st Dep't 2002) (lawyer disbarred for aggravated sexual battery of a child); *In re Romano*, 246 A.D.2d 152 (1st Dep't 1998) (lawyer disbarred for directing female clients to disrobe in his office and touching them in intimate places).
33. *In re Weinstock*, 241 A.D.2d 1 (2d Dep't 1998) (two-year suspension for engaging in oral sex with a client in a family court conference room); *In re Isaac*, 76 A.D.3d 48 (1st Dep't 2010) (noting that two-year suspensions have been imposed where attorneys had sexual relations with their clients).
34. *In re Greenberg*, 94 A.D.3d 152 (1st Dep't 2012) (confirming nine-month suspension for offensive touching of client's body); *In re Feinman*, 225 A.D.2d 200 (4th Dep't 1996) (suspending lawyer for six months for making unwanted sexual advances to a client).
35. *See In re Greenberg*, 94 A.D.3d 152 (noting lawyer raised his loss of employment as a mitigating circumstance for disciplinary committee to consider when determining sanctions).

War Stories From the New York Courts

By Harold Lee Schwab

Longevity serves multiple purposes besides the obvious. For a trial lawyer, it guarantees participating in or hearing unique, if not surprising, courtroom experiences. And in 50 years as a trial lawyer, I have seen and heard a lot. Here are just a few.

The Cadologist

Lillian Weiss v. Chrysler Motors Corporation was tried in the U.S. District Court for the Southern District of New York before Judge Thomas Griesa. The plaintiff's counsel was Theodore Friedman, an indefatigable and resourceful trial attorney. The plaintiff, the operator of a four-year-old Chrysler Imperial, was grievously injured as a result of a one-car automobile accident. She claimed that the defendant had manufactured a metallurgically defective component part in the steering linkage known as a Pitman arm stud. The issue was whether the Pitman arm stud was broken before the accident, which would have caused the loss of steering control, or whether its post-accident condition was a consequence of the vehicle's impact with a tree stump and tree trunk.

The accident reconstruction expert's testimony was vital to her case due to differences of opinion between the plaintiff's and the defendant's engineers. By way of qualifications, the reconstruction expert stated that he was connected with a specifically named research institute. Cross-examination established that the expert *was* in fact The Research Institute. More significantly, he professed to be an expert in the field of cadology, which he said was the scientific study of automobile accidents.

After two days of direct, the time finally came for cross-examination. The substance of the cross on credentials was as follows:

Q. Did I understand you to say earlier that your field of expertise is cadology?
A. Yes.
Q. And cadology is the scientific study of automobile accidents?
A. Yes.
Q. You are a cadologist?
A. Yes.
Q. How many cadologists are there in the United States?
A. One.
Q. Who?
A. Me.
Q. If I were to submit to you that last night I looked at my son's three-volume edition of *Webster's International Dictionary* and was unable to find the words "cadology" or "cadologist," would you say that I was mistaken?
A. No.

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Q. And if I were to submit that the words "cadology" and "cadologist" do not appear in the *Random House Dictionary*, would you say that I was mistaken?
A. No.
Q. If not in *Webster's* or *Random House*, could you tell me where the word "cadology" comes from?
A. I invented it.
Q. You invented it?
A. I invented it.
Q. Did you perchance register or trademark this word with the United States government?
A. Yes.
Q. So no one else can use it?
A. That's right.
Q. That's why you are the only cadologist?
A. Yes.

Following a one-month trial, the jury returned a unanimous verdict in favor of the defendant. It obviously did not accept the testimony of the cadologist.[1]

> You remember Harold Frost telling you about the Rolls Royce. It's true, I own a Rolls Royce. Twenty years ago my wife Sadie and I decided we wanted to buy one car for a lifetime. We decided to save our money and buy a used Rolls Royce. We did just that and we are still driving around in that used Rolls Royce. For this you shouldn't return a verdict for my client? But you remember Mr. Frost telling you that he thought about the Rolls Royce when he was in his apartment last night. What he didn't tell you was that his apartment is a triplex overlooking Central Park and he made all of his money for that apartment from representing Burns Brothers and other corporate defendants!

The jury returned a plaintiff's verdict. Izzy did not buy another Rolls Royce. His chauffeur was apparently satisfied with the one he had.

A Gun in the Courtroom

Anyone who owned an automobile in the early 1980s will remember the gas shortage and the blocks-long lines for gas. Arguments and fights often occurred as frustrated drivers jockeyed for position. When Andrew Medosa decided to jump the line at the Amoco station on 65th Street in Brooklyn, he cut in front of a mint condition Pontiac Firebird whose owner, Dennis Rosales, prided himself on the beautiful artwork that adorned his automobile.[2] Rosales believed his car had been scraped by Medosa and began to yell at him. Medosa yelled back. A heated argument followed. Both drivers got out of their cars as passions reached the boiling point. Rosales said to his passenger, "Give me my piece." His buddy removed a gun from the glove compartment and handed it to Rosales. Not to be outdone, Medosa said to his pregnant wife, "Give me my bat." Mrs. Medosa reached over to the rear seat for the stickball bat, which she gave to her husband. (A Brooklyn stickball bat is a sawed-off section of a broomstick handle used to hit Spalding rubber balls one, two, or three street sewers in distance depending upon the skill of the batter.) A face-off on the Amoco station premises began. Rosales leveled his gun at Medosa, who pounded his stickball bat on the ground, challenging Rosales: "You're not going to shoot! You're not going to shoot! Go ahead and shoot!" With this, Rosales fired his weapon and Medosa fell to the ground dead. Rosales sped away but was later arrested, tried for manslaughter, convicted, and sent to prison. The weapon was never recovered.

The plaintiff's principal claim in *Medosa v. Ficco, et al.*, tried in January and February 1984 before Judge Leonard Silverman in state Supreme Court, was that fights were

In the 1950s and 1960s, free-wheeling summations were the norm for many trial attorneys, who ignored the need for fair comment on evidence.

The Used Rolls Royce

A. Harold Frost was the managing partner at Emile Z. Berman and A. Harold Frost, Esqs., one of the finest personal injury litigation law firms in New York City in the 1960s and early 70s. Frost was a commanding presence but had not tried that many cases. For decades, his principal client was Burns Brothers Fuel & Oil Company. It was not unusual for a Burns Brothers oil truck to be in collision with another automobile and to be sued. Isidore ("Izzy") Halpern, a plaintiffs' trial attorney, was retained in one of those cases. Izzy was approximately 5' 9" tall, with an almost cherubic face that belied his formidable trial skills. (Once during voir dire, he asked the potential jurors whether anyone knew his sainted brother Rabbi Harry Halpern of the East Midwood Jewish Center!)

The day for summations arrived with Izzy representing the plaintiff and Harold Frost appearing for Burns Brothers. In the 1950s and 1960s, free-wheeling summations were the norm for many trial attorneys, who ignored the need for fair comment on evidence. A master of irrelevancy, Frost told the jury how he had thought about the case while sitting in his apartment the night before. He thought about Izzy Halpern driving around in a Rolls Royce automobile purchased with monies from the numerous unjustified verdicts obtained against defendants such as Burns Brothers. Frost exhorted the jury to return a defendant's verdict if for no other reason so that Izzy could not buy another Rolls Royce.

Izzy did not object. He waited for his turn.

a foreseeable consequence of the gas crisis and that the service station was negligent in not having a guard. This was an appealing theory. A former employee of the gas station testified that prior altercations had taken place on the premises. Gary Pillersdorf, a prominent and skilled plaintiffs' attorney, presented a gas station model and a security expert to prove his client's case. Although the defense had its own security expert as well as a proximate cause argument, something more was needed. Practical considerations precluded the defense calling the shooter as a witness, as he was residing in Attica. Although the weapon was never recovered, the criminal file described it as a .357 Magnum revolver. This was not a mere face-off by someone with a broomstick handle challenging an individual with a Saturday night special, as extreme as that situation might appear. Medosa had been challenging Dirty Harry! The jury had to be graphically shown the stupidity of Medosa's conduct. If not so tragic, it would have been funny. At that time, identical gun replicas could be purchased through the mail. So, for less than $100, the defense law firm of Lester Schwab Katz & Dwyer became the owner of a Dirty Harry Special. It was a big heavy Smith & Wesson .357 Magnum replica with a six-inch barrel, identical in all respects to the real thing, except it could not fire bullets. Fortunately for the defense, there was no need to let opposing counsel know of the exhibit in advance since New York state court practice did not then and does not now require identification of trial exhibits. Fortunately, also at that time, there was no courthouse screening for weapons.

Mrs. Medosa, a widow with a child, undeniably made a sympathetic trial witness and her expert made a compelling case for the deterrent effect of security guards. The defense presented the gas station owner who had no knowledge of any prior incidents, and the defense expert testified to the impossibility of preventing an assault or shooting, which takes place in a matter of seconds.

There was yet one more defense witness to be called. How to get the gun into evidence? If not the shooter, Rosales, it had to be through the plaintiff herself, whose deposition did not include a description of the weapon. The time was right, just before summations and verdict, to recall Mrs. Medosa as the final witness for the defense. She was the key to admissibility.

Q. You saw the gun, right?
A. Yes.
Q. It was a big gun, wasn't it?
A. Yes.
Q. It was like a big western revolver, right?
A. Yes.
Q. And it looked like this?

With that question I pulled the .357 Magnum out of my briefcase and presented it to the plaintiff. The plaintiff jumped out of her chair and screamed. Pillersdorf yelled "Objection! Objection!" The judge lurched rearward in his chair. The jury woke with a start. Only the court officer remained calm because, for obvious reasons, he had been told in advance what was going to take place. Judge Silverman called a recess and summoned both counsel into his robing room. He inquired of plaintiff's counsel as to the basis for his objection, but, except for the unorthodox manner of presentation of the evidence, no valid objection was possible. The court overruled and the trial resumed. Mrs. Medosa was asked again:

Q. And the gun looked like this one, didn't it?
A. Yes.

Based upon that response, the exemplar was received into evidence. For the balance of the trial, I left the gun on the jury rail. The jurors interviewed afterwards said that the size of the gun really made a difference. They did not realize how big a .357 Magnum revolver was until they saw it in court. Their conclusion: You don't go up against Dirty Harry with a stickball bat.[3]

One Question Too Many

Lisio v. Ranchos Realty[4] was a death action tried before Justice Frederick Hammer in Queens. Appearing for the defense was Abraham D. Shackton, known as Abe to his contemporaries, a partner at Emile Z. Berman and A. Harold Frost, and previously senior trial counsel at USF&G. He was a fearless, no-holds-barred cross-examiner.

An excavation had collapsed on Mr. Lisio and a homeowner was called by the plaintiff as a witness to

the manner in which the excavation had been built. Abe cross-examined the witness regarding her ability to perceive the excavation from her porch, her dislike of Ranchos Realty because it knocked down her fence, and the fact that she was a paid witness. Not yet satisfied, Abe turned his attention to "the lady," the number of rooms she rented out in her "house," and that she rented out at least three to "ladies." The number of rooms rented out in the house was clearly intended to imply that the witness was a "madam." However, Justice Hammer would have none of that and *sua sponte* sustained his own objection to the questions.

Abe went off on a new tack.

Q. Have you always been known by the name of Ms. Rose Tobin Cody, or have you ever been known under any other name?
A. No, that's me.
Q. Pardon?
A. That's me.
Q. Never been married?
A. No.

Q. All right –
A. I've been known by another name.
Q. I just got through asking you.
A. I forgot. I took a – I entered the convent years ago.
Q. You entered what?
The Court: A convent.
Mr. Shackton: Judge, it's a big courtroom and the infirmities of age are creeping upon me.
The Court: I have the same problem, counsel.
Mr. Shackton: Well, then you should feel sorry and have empathy.
The Court: I humbly feel sorry. She entered a convent years ago.
Q. All right. And when –
A. I did have another name; that's the point.
Q. What?
A. I did have another name for two years.
Q. Sister somebody?
A. Yes.

Rose Tobin Cody made an extremely credible witness. Abe's cross-examination violated the golden rule "Don't ask a question unless you know the answer (or unless whatever the answer is, it cannot make a difference)."

A Courtroom Demonstration

Thomas Alfred Ruppert set fire to the auditorium balcony of the Jewish Community Center of Yonkers. Decorative Acrylite panels, which surrounded the balcony, were ignited and in moments the building was ablaze. Nine children and two adults died. Jacob (Jack) Fuchsberg, a pre-eminent plaintiffs' trial attorney, later a judge on the Court of Appeals, presented the case of *Greenberg v. City of Yonkers* in White Plains against American Cyanamid, manufacturer of the plastic paneling, and various other defendants. Through expert testimony Fuchsberg established that the decedents expired from inhalation of noxious fumes given off by the Acrylite. Dennis (Denny) O'Connor, a senior member of the Westchester defense bar, represented American Cyanamid. He placed into evidence a sales brochure which claimed that the plastic paneling "was safe for children" and had "a slow burn rate," only one-quarter that of white pine. It even depicted a color picture of the paneling installed in a church (so surely it was safe to use in a Jewish community center). This was impressive but O'Connor decided that more was required, so he made application to perform a courtroom demonstration. His expert would ignite a piece of one-quarter-inch-thick pine and thereafter a one-quarter-inch-thick piece of the plastic paneling to prove the safety of the product (and the truth of the sales brochure). He also produced a fire extinguisher and an asbestos tarpaulin (this was 1968) to cover the counsel table where the demonstration would take place. Jack Fuschberg objected, but was overruled by Justice Marbach, and the test proceeded.

All counsel stood up and surrounded the asbestos-draped table, leaving room for the jury to witness the demonstration. The expert took a small piece of pine, lit a match and held the flame to the edge of the wood. It did not catch fire. A second match was struck and held to the pine, but it also did not ignite the wood. A third match also failed. Finally, the pine ignited with the fourth match, but the wood burned ever so slowly. The expert then was given a piece of the plastic. He struck a match and held the flame to the edge of the plastic and that was all that was needed. The piece caught fire almost immediately. As counsel for co-defendant Zvi Almog, Executive Director of the Jewish Community Center, with cross-complaint against American Cyanamid, I called out, "Hold the plastic straight up the way it was in the balcony." Almost reflexively, the expert turned the burning piece vertically, and the fire took off in dramatic fashion. It was a singularly impressive demonstration, proving the plastic paneling was not four times safer as suggested in the sales brochure, but actually four times more combustible than pine.

O'Connor later claimed that he had earlier run the same test in his office and the pine caught fire right away. However, he did not know if the piece used in the courtroom and the one in his office had come from the same board. His clerk had merely picked up a few scrap pieces from a lumber yard. The jury apportioned 70% of the damages against American Cyanamid. The Court of Appeals affirmed the result.[5]

Harold's Honda

Burgos v. Lutz and Honda was tried before the Hon. James J. Gowan in the Supreme Court, Suffolk County. It was the basic contention of the plaintiff's executrix, Elizabeth Burgos, that her husband David was killed in a head-on two-car automobile accident as a result of the negligence of the adverse driver and because of multiple design defects in his 1979 Honda Civic. A ruptured thoracic aorta was the cause of immediate death. The plaintiff alleged crashworthy defects relating to the seat belt and steering column systems. In particular, the plaintiff claimed that the steering column did not collapse. Honda maintained that its bending plate design nevertheless provided energy absorption. Plaintiff's counsel, Elliot Katz and Arthur Rosenbaum, called 22 witnesses, including four engineers, a racing car driver, a parts manager and a service mechanic to establish product defect and proximate cause. Co-defendant Carol Lutz, the adverse driver, was represented by Dominic Bianco whose principal had offered its $50,000 policy from day one. Success against the co-defendant Honda would cover all trial expenses.

Honda had prepared a full-scale exemplar model for courtroom demonstration purposes. The occupant compartment and all interior components, including the seat belt and steering system were intact, although wheels, suspension components, engine and front end had been removed. The roof was also cut away to permit interior occupant compartment viewing by the jury. Reception of the exhibit into evidence was essential for the defense. It would demonstrate the functioning of the seat belt system, the relationship of the steering wheel to the driver, and occupant kinematics for a non-belted driver. The owner of the body shop, who made the exemplar from an actual 1979 Honda Civic, testified for foundational purposes and the exemplar was marked for identification. Plaintiff's counsel objected to the sectioned-off car and the absence of any roof. He claimed that this gave a distorted view of the size of the occupant compartment. Justice Gowan appeared impressed by this objection.

In response to the objection, I proffered my car as evidence. As defense counsel I was driving a 1979 Honda Civic back and forth to court. It was a vehicle in mint condition in every respect – the owner of the body shop had made sure of that. Although only a temporary gift from Honda, the vehicle was registered in counsel's name. Since it had a roof, the jury could determine the size of the occupant compartment. There was no basis for any objection, and the Civic was received into evidence as Exhibit "GGG." The old adage would appear appropriate here: "Be careful of what you wish for because you may get it."

Throughout the remainder of the trial, Justice Gowan referred to Exhibit "GGG" as "Harold's Honda." A logistical problem, however, arose. The car, now received into evidence, was required for transportation. His Honor ruled that this was no problem since, as an officer of the court, I would be permitted to drive the car for the balance of the trial. Still, there was the possibility of damage to the automobile while in the crowded courthouse parking lot. Justice Gowan authorized the parking of the exhibit in a special space reserved for court personnel. Coincidentally, the space was immediately under and in full view of the second floor jury room of the courthouse where the trial was taking place.

It is unlikely that any other jury has been presented with demonstrative evidence, seen on a regular basis day-in and day-out. Nevertheless, the jury, after 12 days of deliberations, was unable to reach a verdict. Justice Gowan then granted the motion of Honda to dismiss the remaining claims of defective seat belt design and defective steering column design. The judgment of dismissal was affirmed on appeal.[6] As for co-defendant Lutz, the jury returned a no cause. Dominic Bianco had accomplished the impossible!

These real-life experiences in the courtrooms of New York are but a sampling of what I have seen and heard over the decades. There are lessons to be learned from each of them. At the same time, I trust the readers have found them an enjoyable respite from more meaningful legal activities. ■

1. The Second Circuit subsequently reversed, finding that the court erred in precluding rebuttal testimony proffered by the plaintiff. 515 F.2d 449 (2d Cir. 1975).

2. *See* Judith Cummings, *Suspect Accused of Slaying Man in Gasoline Line*, N.Y. Times (June 2, 1979).

3. The case was never appealed, but it has a unique sequel. As a consequence of the trial, Gary Pillersdorf and I became good friends. Some 30 years later he took out a full-page ad in the journal of the New York City Trial Lawyers Association for its October 23, 2014, annual banquet. Among other things, it read, "Congratulations to Harold Lee Schwab, a True Advocate and the Most Distinguished Attorney to Ever Point a Gun at Me in the Courtroom." When I spoke that evening, I told the story behind Gary's cryptic compliment.

4. 42 A.D.2d 996 (2d Dep't 1973).

5. 37 N.Y.2d 907 (1975).

6. 128 A.D.2d 496 (2d Dep't 1987).

Consumers' Loss of Rights in the Internet Age

By Thomas A. Dickerson and Mark A. Berman

When we first examined the significance of Internet transactions, we believed that the Internet may have made it easier to assert personal jurisdiction over the sellers of goods and services whose primary connection with a local forum was their virtual presence on the consumer's computer screen.[1] One of the more ominous developments[2] for e-commerce consumers, however, involves the increasing enforcement of onerous contractual terms and conditions, such as mandatory arbitration, forum selection and choice-of-law clauses, and liability disclaimers, lurking in the hyperlinks and pop-up boxes.

The Bisquick Revolt

Public pressure from consumers exerted over just a few days this past April forced General Mills to remove from its website language directed at users of its online communities who download items of value, such as coupons, that would have required "all disputes related to the purchase or use of any General Mills product or service to be resolved through binding arbitration." General Foods responded to the pressure with the following press release:

Thomas A. Dickerson, an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court, is the author of, among other titles, *Class Actions: The Law of 50 States* (Law Journal Press 2014) and *Travel Law* (Law Journal Press 2014).

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> We rarely have disputes with consumers – and arbitration would have simply streamlined how complaints are handled. Many companies do the same, and we felt it would be helpful. But consumers didn't like it. So we've reverted back to our prior terms. . . . We stipulate for all purposes that our recent Legal Terms have been terminated, that the arbitration provisions are void, and that they are not, and never have been, of any legal effect. . . . We'll just add that we never imagined this reaction. Similar terms are common in all sorts of consumer contracts, and arbitration clauses don't cause anyone to waive a valid legal claim. They only specify a cost-effective means of resolving such matters.

An Unstoppable Advance?

While the Bisquick Revolt was momentarily encouraging, consumers should be aware that things haven't actually changed. Companies continue to seek to limit exposure and litigation expense, with much success, by requiring consumers to agree to significant terms and conditions, as noted above, included on their websites through hyperlinks and scroll-throughs with consumers clicking their acceptance. From a business perspective, it is understandable why merchants want such contractual limitations. And when included properly in a website, so that a consumer is provided appropriate notice of such proscriptions, they will be upheld by the courts.

What Is Adequate "Notice"?

New York courts, however, are grappling with a fine line. When is a hyperlink or a click through on a website so "temporally and spatially[3] decoupled"[4] from a consumer's decision to purchase a product or service as to provide *inadequate* "inquiry" or constructive notice of such provision? Courts are well aware of their role to appropriately balance the right of businesses to rely upon such contractual limitations, but know that, in many cases, consumers do not read such provisions, even after they acknowledge through a click that they had. Just what is inquiry or constructive notice in today's world of e-commerce, and when should consumers be bound to terms they admit they never cared to review? This is what is at issue.

Going the Distance

Merchants continually push the limits of how much distance they can put between consumers' decisions to purchase and the disclosure of mandatory arbitration, forum selection and choice of law clauses, and liability disclaimers, so that consumers may not consider or focus on the fact that they are waiving their right to, among things, sue in court. E-commerce merchants cannot blithely assume, however, that inclusion of, for instance, a mandatory arbitration clause somewhere on a hyperlinked page or on its website will be deemed part of any contract agreed to by a consumer and afford the merchant its sought-after protections.

Continuing Development of the Law

The Second Circuit aptly characterized the issue in *Schnabel v. Trilegiant Corp.*:[5]

> [I]nasmuch as consumers are regularly and frequently confronted with non-negotiable contract terms, particularly when entering into transactions using the Internet, the presentation of these terms at a place and time that the consumer will associate with the initial purchase or enrollment, or the use of, the goods or services from which the recipient benefits at least indicates to the consumer that he or she is taking such goods or employing such services subject to additional terms and conditions that may one day affect him or her.

In New York, the issue first arose more than 10 years ago in a Second Circuit decision issued by then Judge Sonia Sotomayor in *Specht v. Netscape Communications Corp.*[6] In a class action lawsuit, the plaintiffs, Internet users who downloaded free software from the defendants' webpage, claimed that they were not bound to arbitrate their dispute according to the terms included on the defendants' website. In order to resolve "the central question of arbitrability," the court addressed "issues of contract formation in cyberspace."[7] The court noted that, although cyberspace transactions typically lack a physical document containing contract terms, parties can be deemed to have been put on "inquiry notice" of terms that a "reasonably prudent" person would have seen on the website.[8] After document and deposition disclosure had occurred on the issues, the court found that the placement of contractual limitations on an "unexplored portion of [the defendants'] webpage" that had to be scrolled down to, and which was located below the download button and which terms were not set out there, but rather contained in a hyperlink, was not sufficient to bind customers to such terms.[9] The court explained that, when the plaintiffs were prompted to download free software from the site at the click of a button, they could not see a reference to any license terms that they could accept by clicking. Noting that "there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there," the court concluded that a "reference to the existence of license terms on a submerged[10] screen is not sufficient to place consumers on inquiry or constructive notice of those terms." The plaintiffs, therefore, could not be said to have assented to the defendants' arbitration clause when they clicked to download the site's plug-in program.[11]

In *Hines v. Overstock.com*,[12] a consumer class action, the defendant sought to compel confidential arbitration, pursuant to the defendant's terms and conditions, which provided that "[e]ntering this site will constitute your acceptance of these [t]erms and [c]onditions" and which statement could be found only within such terms and conditions.[13] The website did not prompt the consumer

to review the terms and conditions, and the link to the terms and conditions was not so prominently displayed as to provide reasonable notice.[14] On appeal, the court noted that the defendant had alleged nothing regarding the consumer's "actual or constructive knowledge" of the terms and conditions and, more specifically, whether the consumer had an opportunity to see the terms and conditions "prior" to "accepting" them by "accessing the website."[15]

In *Fteja v. Facebook, Inc.*,[16] the court enforced a forum selection provision[17] where the sign-up page for a Facebook account provided: "By clicking Sign-Up, you are indicating that you have read and agree to the Terms of Service."[18] By clicking on an underlined terms of service hyperlink, users would be sent to a different page, which included a forum selection clause. The court described Facebook's terms of use as "somewhat like a browsewrap agreement[19] in that the terms are only visible via a hyperlink, but also somewhat like a clickwrap agreement[20] in that the user must do something else – click 'Sign Up' – to assent to the hyperlinked terms."[21] Although the website did not contain any mechanism forcing the user to actually examine the terms before assenting, the court found the critical question was whether the terms had been "reasonably communicated" to the user.[22] The court reasoned:

> What is the difference between a hyperlink and a sign on a bin of apples saying "Turn Over for Terms" or a cruise ticket saying "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES IMPORTANT! PLEASE READ CONTRACT – ON LAST PAGES 1, 2, 3"? The mechanics of the internet surely remain unfamiliar, even obtuse to many people. But it is not too much to expect that an internet user whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish would understand that the hyperlinked phrase "Terms of Use" is really a sign that says "Click Here for Terms of Use." So understood, at least for those to whom the internet is in an indispensable part of daily life, clicking the hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else. Whether or not the consumer bothers to look is irrelevant. "Failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract."[23]

Accordingly, the court found that, under contract law principles, the plaintiff assented to the forum selection clause on Facebook's website.

The defendant in *Zaltz v. JDATE*[24] submitted evidence that the plaintiff was expressly required to click a specific box to accept the terms of service (that included the forum selection clause), which the prospective member "clicked" on to confirm that he or she read and agreed to the terms of service, and which featured a hyperlink to a webpage displaying such contractual limitation.[25] The plaintiff did not need to scroll or change screens in order to be advised of such terms, and the existence of, and need to accept and consent to, such terms, which were readily visible.[26] The court noted that, whereas Facebook's terms of use in *Fteja* were referenced *below* the button a prospective user had to click in order to assent, the defendant's reference to its terms and conditions appeared *above* the button, thereby making it "even more clear that prospective members of JDate.com are aware that by clicking the button to move forward in the registration process, they manifest their assent"[27] to the website's terms. The plaintiff was required to acknowledge her acceptance of the terms each time she submitted credit card information to cover monthly subscription fees for the website. The plaintiff also was "required to take two specific actions to assent to JDate.com's terms: (1) check the box next to the statement 'I confirm that I have read and agreed to the Terms and Conditions of Service' (with a hyperlink to the Terms . . . over those words), and (2) click the 'Accept and Continue' button."[28] Thus, the plaintiff had to twice denote her acceptance of the terms and conditions, which contained the forum selection clause. In such circumstances, the court noted that "[a] reasonably prudent offeree would have noticed the link and reviewed the terms before clicking on the acknowledgement icon[s]."[29]

In *Starkey v. GAP Adventures, Inc.*,[30] a *pro se* New York resident purchased a tour package and received a confirmation email, confirmation invoice and service voucher. None contained any forum selection and choice of law clauses. The email confirmation, however, stated that the plaintiff "must read, understand and agree to the following terms and conditions" and then provided a "link that [plaintiff] could click on to review the 'Terms and Conditions.'"[31] The confirmation invoice and the service voucher contained a link that directed the plaintiff to the terms and conditions and included the language: "Confirmation of your reservation means that you have already read, agreed to and understood the terms and conditions, however, you can access them through the below link if you need to refer to them for any reason."[32] The traveler chose not to click on the hyperlink, but, assuming she had and, further assuming that she read the first 31 paragraphs, she may have read paragraph 32, titled "Applicable Law," which stated that "the Terms and Conditions and Conditions of Carriage including all matters arising from it are subject to Ontario and Canadian Law and the exclusive jurisdiction of the Ontario and Canadian Courts."[33] The traveler asserted that the tour company should have set forth its terms and conditions, including the forum selection clause, up front "in the body of the three relevant communications."[34] The court, however, dismissed the case, holding that a "hyperlink" is a "reasonable form of communicating" the terms and conditions of a contract.[35]

In *Starke v. Gilt Groupe, Inc.*,[36] in a putative consumer class action, the court framed the issue as

> whether [the plaintiff] is bound by the written terms of a transaction [which included a mandatory arbitration clause] which he did not see or read,[37] although he was aware that there were terms which governed his purchase, that he would be taken as having agreed to them by making the purchase, and that he could read [sic] them by one or two clicks[38] of the mouse.[39]

The court concluded that, when the plaintiff clicked "Shop Now," he was "informed that by doing so, and giving his email address, 'you agree to the Terms of Membership for all Gilt Groupe sites,'" and "[r]egardless of whether he actually read the contract's terms, [the plaintiff] was directed exactly where to click in order to review those terms, and his decision to click the 'Shop Now' button represents his assent to them."[40]

> When the plaintiff clicked "Shop Now," he was "informed that by doing so, and by giving his email address, 'you agree to the Terms of Membership for all Gilt Groupe sites.'"

The cases discussed above, essentially set out in chronological order, show merchants' continued development of their consumer websites over time in their attempt to ensure that their mandatory arbitration clauses are sustained by the courts. It appears that courts are now at a crossroads regarding Internet consumers. Some consumers are naïve, while others are Internet and social-media savvy, but each end up claiming not to have read a company's terms and conditions, yet otherwise acknowledge to the contrary, through their clicks on merchants' websites. These same consumers then assert, when a dispute arises, that they should not be bound to multi-page terms and conditions that they "misspoke" about having read, and which agreement may never have been printed out.

In *Khoa Nguyen v. Barnes & Noble*,[41] applying New York law in affirming a district court's denial of a motion to compel arbitration, the court stated that

> where, as here, there is no evidence that the website user had actual knowledge of the agreement, the validity of the browsewrap agreement turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract. Whether a user has inquiry notice of a browsewrap agreement, in turn, depends on the design and content of the website and the agreement's webpage.[42]

Barnes & Noble argued that the location of the "Terms of Use" hyperlink in the bottom left-hand corner of every page on its website, and its close proximity to the buttons a user must click on to complete a purchase, "is enough to place a reasonably prudent user on constructive notice."[43] The court held that "the proximity or conspicuousness of the hyperlink alone is not enough to give rise to constructive notice, and Barnes & Noble directs us to no case law that supports this proposition."[44] In sum, applying New York law, the court cogently held:

> In light of the lack of controlling authority on point, and in keeping with courts' traditional reluctance to enforce browsewrap agreements against individual consumers, we therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on – without more – is insufficient to give rise to constructive notice. While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers. Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.[45]

Need for Legislation

What may be needed is legislation mandating that merchants, *prior* to a consumer confirming his or her purchase, prominently display on their websites, in clear language and large font,[46] that the consumer, by such purchase, has waived the right to proceed in court and that all disputes will be resolved through arbitration. Given existing New York law concerning "inquiry" and "constructive" notice as it has developed based on paper agreements, which concepts now have been extended to e-commerce agreements, only legislation can appropriately protect consumers, who claim to have read and understood the terms and conditions of an Internet purchase, but who, in reality, through well-known casual unwillingness, simply click "I confirm," and do not scroll through pages and pages of terms and conditions to learn the merchants' contractual limitations, including mandatory arbitration, forum selection and choice of law clauses as well as liability disclaimers. ■

1. *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. Rev. 31 (2010). See also *Paterno v. Laser Spine Inst.*, 112 A.D.3d 973 (2d Dep't 2013), which addresses the assertion of personal jurisdiction over foreign companies in the Internet age.

2. Equally distressing is Facebook's apparent manipulation of user emotions as discussed in the *New York Times* Op-Ed piece, Jaron Lanier, *Should*

Facebook Manipulate Users?, http://www.nytimes.com/2014/07/01/opinion/jaron-lanier-on-lack-of-transparency-in-facebook-study.html? (6/30/2014) ("A study recently published by researchers at Facebook and Cornell suggests that social networks can manipulate the emotions of their users by tweaking what is allowed into a user's news feed. The study, published in the Proceedings of the National Academy of Sciences, changed the news feeds delivered to almost 700,000 people for a week without getting their consent to be studied. Some got feeds with more sad news, others received more happy news. . . . The researchers claim that they have proved that 'emotional states can be transferred to others via emotional contagion, leading people to experience the same emotions without their awareness.'").

3. *See People v. Nat'l Home Prot., Inc.*, 2009 N.Y. Misc. LEXIS 3667, 2009 NY Slip Op 32880(U), at *7 (Sup. Ct. N.Y. Co. Dec. 8, 2009).

> National cannot rely, as a defense, on the T&C. First, the link which appears at the bottom of the homepage and directs the consumer to seven (7) pages of densely worded, fine-print, single spaced terms and conditions *are too far removed from the main portions of the web page* and are insufficient to alter consumers' net impressions that the HWP covers existing systems and appliances which break down due to normal wear and tear. Fine-print disclosures and disclaimers that are placed in portions of an advertisement that are less likely to be read or remembered are inadequate to disclaim or modify a claim that is made in the main body or text of the advertising (emphasis added).

4. *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127 (2d Cir. 2012).

5. *Id.*

6. 306 F.3d 17 (2d Cir. 2002). *See also* Kaustuv M. Das, Note *Forum Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the "Reasonably Communicated" Test*, 77 Wash. L. Rev. 481 (2002).

7. *Id.* at 20.

8. *Id.* at 31, 32.

9. *Id.* at 32.

10. In *Jerez v. JD Closeouts, LLC.*, 36 Misc. 3d 161 (Dist. Ct., Nassau Co. 2012), defendant's website contained the "Terms of Sale" on its "About Us" page and the "Terms of Sale" had a "hyper-link" that directed the viewer to the terms of all sales, including disclosures, return policy and legal policy. The page titled "Sale Terms" stated that "[i]n the event that an irresolvable situation arises, any litigation will take place in Broward County, in the State of Florida." Plaintiff, a commercial customer, contended that the "forum selection" provision found on defendants' website "is not part of the contract between the parties" and asserted that he had "never seen this language before, and . . . never saw it" when he agreed to purchase tube socks from defendants. *Id.* at 165. Defendants presented no evidence that the "terms of sale" listed on their website were ever communicated to plaintiff in connection with the transaction. The court held that the forum selection clause was not "reasonably communicated" to plaintiff by requiring a "click-through" acceptance of "hyperlinked" terms and conditions. *Id.* at 169. Instead, the "terms were 'buried' and 'submerged' on a webpage that could only be found by 'clicking' on an inconspicuous link on the company's 'About Us' page." *Id.* at 169–70. The court noted that:

> [w]ithout minimizing the importance of the provision to defendant's business, too little was done to ensure that the provision became part of the parties' contract. Especially in cases where the terms of an e-commerce transaction are negotiated, in the first instance, by e-mail, a seller must make an affirmative effort to "reasonably communicate" the essential terms of sale to the buyer. *If it wishes to make those terms part of the bargain, it can easily do so by providing notice to the buyer that the terms can be found at a given website address.* Defendants did not do so. Nor did they structure their website in a manner that placed the terms of sale directly up front, in a conspicuous place, for all to see.

Id. at 170 (emphasis added).

11. 306 F.3d at 32.

12. 668 F. Supp. 2d 363 (S.D.N.Y. 2009).

13. *Id.* at 367.

14. *Id.*

15. 380 Fed. Appx. 22, 24 (2d Cir. 2010).

16. 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

17. *See Fleet Capital Leasing/Global Vendor Fin. v. Angiuli Motors, Inc.*, 15 A.D.3d 535, 536 (2d Dep't 2005): "Contractual forum selection clauses are prima facie valid and enforceable unless [they are] shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." (quoting *Premium Risk Grp. v. Legion Ins. Co.*, 294 AD2d 345, 346 (2002)). The court added: "The agreement stated clearly above the signature line that the terms on the reverse side were part of the contract, and those terms stated clearly that the courts of Los Angeles County were to have exclusive jurisdiction. Thus, Angiuli is bound by the subject forum selection clause."

18. 841 F. Supp. 2d at 835.

19. In a browsewrap agreement, "'website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen.'" *Fteja*, 841 F. Supp. 2d at 836 (quoting *Hines*, 668 F. Supp. 2d at 366). A browsewrap agreement "usually involves a disclaimer that by visiting the website – something that the user has already done – the user agrees to the Terms of Use not listed on the site itself but available only by clicking a hyperlink." *Id.* at 837.

20. A clickwrap agreement, by contrast, requires a user to take more affirmative action: the user "clicks" on a "I agree" box to standard form terms, after being presented with a list of the terms and conditions of use. *Id.*

21. *Id.* at 838.

22. *Id.*

23. *Id.* at 839 (citation omitted).

24. 952 F. Supp. 2d 439 (E.D.N.Y. 2013).

25. *Id.* at 448 n.5.

26. *Id.* at 453.

27. *Id.* at 453–54.

28. *Id.* at 454.

29. *Id.*

30. 2014 WL1271233 (S.D.N.Y. Mar. 27, 2014).

31. *Id.* at *2.

32. *Id.*

33. *Id.*

34. *Id.* at *6.

35. *Id.*

36. 2014 WL1652225, (S.D.N.Y Apr. 24, 2014).

37. "The rule of law to be applied to these facts is simple and clear. '[A] party will not be excused from his failure to read and understand the contents of a release.'" A party who signs a document without any valid excuse for having failed to read it is "conclusively bound" by its terms." *Sofio v. Hughes*, 162 A.D.2d 518, 519–21 (2d Dep't 1990) ("Upon our review of the record, we find that Mr. Sofio both understands and speaks English sufficiently to warrant the inference that had he read the document, he would have understood it. His misapprehension concerning the scope of the release is thus attributable solely to his negligent failure to read it.") (citations omitted). *See Martino v. Kaschak*, 208 A.D.2d 698, 698–99 (2d Dep't 1994) ("Contrary to the plaintiffs' contentions, the plaintiff Carmine Martino's unsubstantiated claim that he executed the release in question without reading it because a secretary in the office of his recently discharged attorney had told him that the document was merely a receipt indicating that his legal files had been returned to him is insufficient to excuse his alleged failure to read the document. The release clearly and unambiguously released the defendant Robert J. Kaschak, as well as the plaintiffs' recently discharged attorney, from "all actions, causes of action, suits . . . claims, and demands whatsoever" that the plaintiffs might have had against them, and it is undisputed that the plaintiffs' new attorney was provided with a copy of the release prior to its execution.").

38. *See Brands, Inc. v Garden Ridge, L.P.*, 105 A.D.3d 1011 (2d Dep't 2013) (forum selection clause properly contained in defendant's terms and conditions where it was incorporated by reference into the parties' agreements).

39. *Starkey*, 2014 WL1271233 at *5.

40. *Id.* at *9.

41. 2014 U.S. App. LEXIS 15868 (9th Cir. Aug. 18, 2014).

42. *Id.* at *12 (citations omitted).

43. *Id.* at *14.

44. *Id.* at *15.

45. *Id.* at *17–18 (citation omitted).

46. *Filippazzo v. Garden State Brickface Co.*, 120 A.D.2d 663, 665–66 (2d Dep't 1986) (citations omitted).

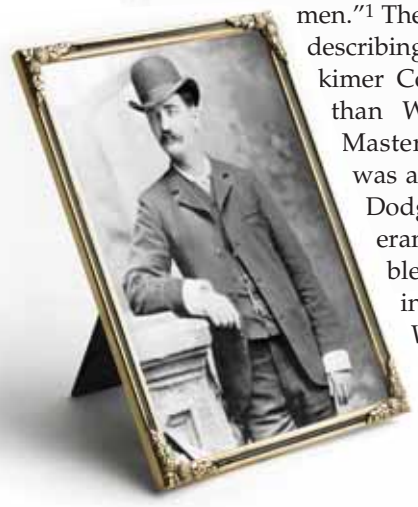
> With respect to the petitioners' argument that the agreement to arbitrate is unenforceable because it is set forth in "small print," while it does not appear that the print is unusually small, neither party has offered any evidence on this issue. CPLR 4544 ("Contracts in small print") provides: "The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared. As used in the immediately preceding sentence, the term 'consumer transaction' means a transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes" (emphasis supplied).

Although this statute speaks in terms of the admissibility in evidence of such a contract, the underlying purpose of this "consumer" legislation is to prevent draftsmen of small, illegibly printed clauses from enforcing them (McLaughlin, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 4544 [1986 Supp Pamph], p 422). The few cases construing this statute interpret it as rendering a contract's provisions "unenforceable" if printed in "small print." Provisions of a contract appearing in small print "should not be enforced by the party who caused the agreement to be printed" (memorandum of Assemblyman Edward H. Lehner, 1975 NY Legis Ann, at 40). Although, technically, the respondent is not offering this provision in evidence, it is seeking to enforce the arbitration agreement by cross motion. It is a statutory requirement that an agreement to arbitrate be in writing (CPLR 7501), and it appears that this writing may not be enforceable pursuant to CPLR 4544.

Gillette, the Yellow Press and Criminal Contempt

By William H. Manz

On December 9, 1906, after the close of a heavily publicized upstate murder trial, a column appeared in the *Morning Telegraph* titled "New Style of Lynch Law in Northern New York – Mob Compels Jury to Do Its Work in Gillette Case – Conviction Forced by Savage Threats of Herkimer County Bushmen."[1] The author of this column, describing mob justice in Herkimer County, was none other than William Barclay "Bat" Masterson. Bat Masterson was a former buffalo hunter, Dodge City lawman, veteran gunfighter, and gambler, whose friends had included Wyatt Earp, Wild Bill Hickok, Buffalo Bill Cody – and a young rancher from New York named Theodore Roosevelt.[2]



By the 1880s, however, Masterson's interests had turned to boxing and journalism. This eventually led to his employment in 1904 as a sportswriter and columnist for the *Morning Telegraph*, a New York City daily that featured a few pages of standard news coverage, but which devoted a majority of each issue to sports and show business events and personalities. Most of Masterson's writing concerned boxing and horse racing, but he sometimes also wrote strongly worded columns about non-sports topics of current interest.[3]

The Murder

The trial that Masterson described so harshly was that of Chester Gillette, a 23-year-old factory manager from Cortland, N.Y., who had been convicted of murdering

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Grace "Billy" Brown.[4] Gillette was born in Montana, but had spent much of his adolescence traveling – to Washington, Oregon, Wyoming, California, and Hawaii. With the assistance of a wealthy relative, he enrolled at the Oberlin Preparatory School but left in 1903 after only about two years. Gillette then worked at various jobs, until 1905, when his uncle, Noah H. Gillette, gave him a job at the Gillette Skirt Factory in Cortland.

As a member of one of Cortland's wealthier families, Gillette had entrée to the upper levels of local society, but he also was having an affair with Brown, a farmer's daughter from South Otselic, N.Y., who was employed at the skirt factory. His regular clandestine, nocturnal visits to her lodgings had predictable results. By July 1906, Brown was pregnant and pressuring Gillette to marry her. In an apparent effort to resolve their situation, the couple took a trip to the Adirondacks, arriving at Big Moose Lake on July 11, 1906. Gillette rented a rowboat, and during their meander around the lake, Grace Brown ended up in the water. She did not resurface. The next day, the overturned boat was spotted floating near the shore and a rescue team subsequently located Brown's body on the lake bottom.

Meanwhile, instead of seeking help, Gillette walked several miles through the woods, eventually arriving at a hotel in Inlet, N.Y., where he took a room. When confronted there by Herkimer County authorities a few days later, Gillette claimed that the drowning was an accident. Finding Gillette's actions both before and after Brown's death to be highly suspicious, and in possession of letters exchanged by the couple, Herkimer County District Attorney George W. Ward had him arrested and held at the county jail. Gillette's subsequent trial, which took place during late November and early December of 1906 fascinated the public, drew intense media attention, and later inspired the Theodore Dreiser novel *An American Tragedy*.

The Judge

Justice Irving R. Devendorf, who presided over the Gillette trial, was a newcomer to the state supreme court bench. He was elected in November 1905, having been selected as a dark horse compromise Republican candidate for justice in a protracted convention battle that lasted 145 ballots.[5] Devendorf may have been new to the supreme court, but he was a well-known figure in Herkimer County. He previously had served as district attorney and county judge, which had involved him in several notable cases, including homicides. In 1891, he successfully prosecuted Frank Swackhamer of Dolgeville, who was charged with manslaughter for the fatal dinner-table stabbing of his inebriated brother.[6] Ten years later, Devendorf, as county judge, presided over the 1901 trial of a Little Falls saloonkeeper John McClelland, who had shocked local sensibilities by abducting a young woman for "immoral purposes."[7] Devendorf also presided over the 1906 manslaughter trial of David Edwards, who was convicted of causing the death of a newborn child, whose body had been found buried in a woodshed.[8]

One of Devendorf's final cases as county judge, which received particularly thorough coverage in the local press, was the 1906 murder trial of Vincenzo "Jim" Collangelo of Rome, N.Y. The defendant, a 19-year-old former barber and hotel employee, was accused of fatally stabbing a young woman of dubious reputation during a night of drinking, a crime initially described in the press as "heinous" and "disgusting."[9] Articles on Collangelo's trial appeared regularly in the Utica and Rome newspapers from January 31 until February 7, 1906, when the defendant was found guilty of manslaughter and sentenced to 13 years, five months, in prison.[10]

The Trial

Until the Gillette case, Herkimer County murders had aroused only local interest. The one exception was that of farm wife Roxalana Druse, who in 1884 was convicted and hanged for the murder of her allegedly shiftless, abusive husband. The murder's gruesome facts – Druse had dismembered the body, burned the pieces in the stove, and then threw what was left into a swamp – and the possibility that a woman might be hanged, brought national attention. However, the public interest and media frenzy over the Gillette trial far exceeded interest in the Druse case. The trial of a young man who had allegedly murdered his pregnant lover out on a remote mountain lake brought large numbers of reporters and spectators to Herkimer. They packed the small village during the trial, causing prices to reach what was described as "World's Fair" levels, forcing hotels to serve meals in shifts, and compelling some visitors to sleep in chairs.[11] The Gillette trial presented the hordes of reporters with plenty of good material, some of which was provided by District Attorney Ward, who had referred to Gillette as a "degenerate" soon after the arrest.[12] The DA's dramatic reading of Grace Brown's pitiable love letters (obtained during a warrantless search of Gillette's room) reduced many in the courtroom to tears. When Gillette testified, Ward's cross-examination was so aggressive that one reporter described his manner as "brutish."[13] Finally, there was his scathing summation, in which he described the defendant as "a wolf with raving fangs" and made an unsubstantiated claim that Gillette had raped Grace Brown.[14]

The trial included the appearance in the courtroom of the actual boat rented by Gillette on the fatal day, with some of the victim's hair still caught on a cleat; the display of clothing from the trunk Grace Brown took on her final trip; and the introduction into evidence of a bottle that contained the dead girl's preserved three-month-old fetus. The press also published stories about Grace Brown's weeping family who were present at the trial, the daily crush of unruly spectators fighting to gain access to the courtroom, and defense counsel Albert M. Mills's

charge that the physicians who had examined the dead girl's body had conspired against his client.[15]

These events, however, did not provide the press with enough exciting copy, so in addition to inadvertent inaccuracies and trivia, there were misleading headlines, and so-called "dope tales," which contained exaggerations, unsubstantiated rumors, and outright fabrications. For example, the unremarkable testimony of Harriet Benedict, a socially prominent young woman from Cortland who was acquainted with the defendant, had been predicted to be the key moment in which Gillette would be saved by the woman he loved.[16] Other false reports included that Gillette had both attempted suicide and confessed,[17] that a package of poison had once been sent to Grace Brown,[18] and that angry Herkimer-area citizens planned to lynch Gillette.

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Reports about a possible lynching appeared after Ward's reading of Brown's love letters to Gillette. On November 20, the *Syracuse Herald* claimed, "Threats of lynching were heard everywhere . . . ."[19] Two days later, an article in the same paper stated: "There would be short shrift for Chester Gillette if the citizens of Herkimer County doubted that the law will deal with him according to what they believe to be his just desserts."[20] Another article reported that a group of three men, believed to be Adirondack woodsmen, had attempted to enter the Herkimer jail to "take the law into their own hands and to make quick work of the case of Chester Gillette."[21] A week later, there were reports that Mrs. Margaret Hubbard, the owner of a Herkimer hotel, had offered the prison barber $1,000 to cut Gillette's throat.[22]

By December 3, reports about lynching reached their peak. There were stories claiming that the Herkimer County sheriff had received letters from Amsterdam and Watertown threatening Gillette with lynching[23] describing Herkimer as "little more than an armed camp,"[24] and saying that detectives and officers had been brought in from Utica and other nearby towns and a company of militia was ready to be rushed to the courthouse if needed. That same day, another report stated that although nobody mentioned lynching openly, it was said with "uncommon emphasis" that there wouldn't be a second trial.[25]

The most sensational coverage, however, was provided by the big New York City "yellow press" dailies controlled by Joseph Pulitzer and William Randolph Hearst. While their coverage of the case was not all Gillette, all the time,[26] daily articles, often accompanied by photos or drawings, were frequently on page one, and if not, were prominently featured on an interior page. As the trial drew to a close, these papers heightened the drama with hyperbolic headlines about threatening mobs. While other papers had discussed the possibility of a lynching, the big New York City dailies' articles on this topic pulled out all the stops. Hearst's *Evening Journal* ran the screaming headline: *ORGANIZATION FORMED TO LYNCH GILLETTE!* Pulitzer's *Evening World* provided its readers with a full-page headline proclaiming, *GILLETTE IS THREATENED BY MOB AS COUNSEL PLEADS FOR HIS ACQUITTAL*.

Local Reaction

Residents of Herkimer and nearby areas reacted to out-of-town newspaper coverage with anger and derision. The *Utica Herald-Dispatch* reported that Gillette's jailers had laughed at the story that he had attempted suicide.[27] The late-November reports of possible lynch mobs were met with a firm denial by Sheriff J.H. Richards, who stated flatly, "Lynchings do not take place in Herkimer County."[28] The early December reports that people were organizing to lynch Gillette were mocked by an article suggesting that the New York Central Railroad should have scheduled special trains for the lynch mobs.[29] After the trial ended, an article in the *Utica Saturday Globe*, which was accompanied by a drawing of a mob of ragtag, would-be lynchers marching on Herkimer, claimed that the articles exposed the "rottenness and unreliability of metropolitan journalism," and maintained that the "lynchers" were hired by the reporters themselves.[30] As for the Masterson column, a Syracuse newspaper commented: "It is a shame that such things should be said about Herkimer county and its people and there ought to be a law which would reach the publishers of a paper which would print an article of such character . . . . and if it doesn't make your blood boil with righteous indignation you are not a loyal citizen of Herkimer County."[31]

The coverage also displeased the chief participants. Before the trial had even started defense counsel Mills complained that many newspaper articles were "a pack of lies."[32] After its close, DA Ward stated that "the slush, gush, and luridity sent out from Herkimer by newspaper reporters, mostly those of the metropolitan papers, were disgusting and absurd . . . ."[33] Justice Irving Devendorf made similar comments, saying that "some of the stories sent out of Herkimer during the Gillette trial were outrageous to public decency. . . . If the people who read newspapers demand such stories, why don't they write them without any pretence of their being true? Why don't

they have the President assassinated every day?"[34] Even Gillette was displeased, complaining that the newspaper stories made him appear to be heartless.[35]

Masterson Weighs In

The lurid headlines appear to have been taken at face value by Bat Masterson. His column, calling the Gillette trial a travesty of justice and referring to Herkimer Country residents as bushmen, appeared after the trial's conclusion. The column stated: "Besides being a flagrant travesty on justice, [the trial] was an inexcusable insult to the intelligence and civilization of the State of New York."[36] Masterson went on to say that there was nothing to substantiate the allegations made against Gillette, but that what the prosecution lacked in evidence was more than made up for by the angry mob that surrounded the courthouse every day. The mob "not only declared its purpose to lynch Gillette if the jury failed to convict him of murder in the first degree, but it went so far as to send word to the jury that it would meet a similar fate if it did not return a verdict that would send the defendant to the electric chair."[37] Masterson concluded by saying that Gillette's guilt or innocence should have been "proven by clear and competent testimony and not by the demonstration of an infuriated mob who set law and order at defiance by its lawless conduct."[38] This was a turning point.

Indictment of the Press

It was the Masterson column that turned talk into action. For such an article to appear after the sensational coverage of the Gillette trial seemed to finally be at an end was just too much.

After the close of the Gillette trial, reports circulated that charges might be brought against some of the newspapers that had published false stories.[39] When asked about this, Devendorf responded, "I have an idea that some action will be taken. . . . I think it is high time that some of these newspaper men were landed in jail."[40] The grand jury promptly returned a sealed indictment, stating that there had been no mobs or threats to lynch Gillette, and charged Masterson, *Morning Telegraph* editor Henry N. Cary,[41] and the paper's publisher, William E. Lewis,[42] with criminal contempt of court for publishing a "false or grossly inaccurate" report of the Gillette proceedings. Justice Devendorf commented: "We hope to make this a lesson. . . . I believe that the height of yellow journalism is reached in the present instance and measures strict enough should be taken so as to insure no more it . . . ."[43]

Public and press reaction to the indictments varied. Chancellor J. R. Day of Syracuse University supported Devendorf, telling students that he was glad that Masterson and his associates were being prosecuted and that it was time for papers to start publishing honest news.[44] An editorial in a Duluth, Minnesota, paper stated: "The natural sympathy of a newspaper man is of course with his craft . . . . But we can not sympathize with any newspaper that deliberately sets out to defeat the ends of justice, or to bring contempt upon the constituted legal authorities."[45]

Not every commentator supported Devendorf. An Ohio paper expressed disapproval of the indictments and speculated on the fate of "others who did not properly 'kow tow' to the upstate justice and the 'farmer' district attorney . . . ."[46] Also taking a dim view was a *Brooklyn Daily Eagle* editorial that characterized the legal proceedings as "anomalous and absurd" and maintained that "Mr. Ward's campaign of indictment should stop right where it is. It has already gone too far."[47] A humorous take on the case was provided by a *Syracuse Herald* editorial, which suggested that "[i]n the good old days the man who attempted to arrest 'Bat' Masterson for criminal libel might as well have prepared himself for exhibit in a Coroner's jury called to sit on a case of sudden and violent death."[48]

After the indictment was returned by the grand jury, Deputy Sheriff Granville S. Ingraham was dispatched to New York City, armed with a bench warrant signed by Ward. After arriving in New York, Ingraham, along with New York City Detective Sergeant Chambiss, went to the *Morning Telegraph* offices and arrested Masterson and Cary. Lewis, who was ill at home, was telephoned to come

to the office and, after he arrived, was also arrested. The three men were then hauled before John Goff, Recorder of the Court of General Sessions.[49] Bail was set at $500, and the cash was produced by the newspapermen's attorney, McDonald DeWitt, but District Attorney William Travers Jerome demanded a real estate bond. Fortunately for Masterson and his colleagues, one Henry G. Bicknell of Brooklyn gave his house as security, meaning that the defendants escaped spending the night in the Tombs.[50]

Masterson's reaction to the indictment was to say, "I always expected to get into trouble when I went into this journalism business."[51] Noting the dangers that he had experienced in the West, Masterson said that it was a "funny trick of fate"[52] that he had now been arrested for writing an article in the paper. Lewis's comments emphasized the legal issues presented by the case, saying that the article in question had been published five days after Gillette was convicted. He stated: "If it is contempt of court to print such an article after a trial is ended, when it can have no influence on the jury, I want to know it. . . . We propose making a test case of this and settling the matter once and for all."[53] An article in the *Morning Telegraph* reiterated the defendants' intent to make the indictments a test case, adding that the paper had given scant coverage to the Gillette trial, and claiming that Masterson, who was now being charged with criminal contempt, had once risked his life as a peace officer to uphold the law and the dignity of the courts.[54]

The Statute

The statute whose meaning Lewis claimed that he planned to ascertain was a provision of the Code of Civil Procedure of 1877, which was originally enacted as part of the Revised Statutes of 1829.[55] It replaced the old common-law contempts, and according to the Revisers, was intended "to define and limit undefined powers wherever it was possible, as well for the information and protection of the citizen . . . ."[56] Like the virtually identical section in the current Judiciary Law,[57] it stated that it was a contempt to publish "a false, or grossly inaccurate report" of a court's proceedings, and added, "no court can punish as a contempt, the publication of true, full and fair reports of any trial, arguments, proceedings, or decision had in such court."[58] Not specifically addressed were articles like Masterson's, which were published after the conclusion of a trial.

Judicial Precedent

Probably the first judge to invoke the contempt statute against a newspaper was Justice Florence McCarthy, who was angered by a humorous *New York Daily Times* article, published in February 1855, titled "The Marine Court – What Was Not Done There." It claimed that when the court opened, none of the justices, including McCarthy, or any of the witnesses, were present. McCarthy declared this to be "maliciously untrue" and instituted contempt proceedings against the paper's editor and publisher for publishing a false or grossly inaccurate account of his court's proceedings. After a hearing in which one of the defense attorneys invoked freedom of the press, while another warned McCarthy of possible impeachment proceedings, court was adjourned and the case was never taken up again.[59]

Another judge so offended by an article that he charged a publisher with criminal contempt was Justice George G. Barnard of the state supreme court.[60] He took offense when an editorial in Horace Greeley's *New York Tribune* claimed that his assurance to a juror at the start of a murder trial that it would not involve the death penalty indicated that he was "ignorant of his duty and his solemn responsibilities."[61] To the disappointment of courtroom spectators, the much-awaited confrontation between the Tammany Hall judge and the leading Republican publisher, abolitionist, and reformer came to an abrupt end when Greeley appeared in court and stated that the editorial was based on criticism published in another paper, and Barnard then declared himself satisfied with this explanation.[62]

A case involving criminal contempt proceedings for the publication of a false or grossly inaccurate misleading publication finally reached the Court of Appeals in 1895. Once again, the case did not involve an article published after the completion of a trial. Instead, the publishers of the *Albany Morning Express* had been found in contempt for an editorial denouncing a county judge named Jacob H. Clute for his choice of lawyers to defend men who had been arrested for attempting to vote illegally. It said that the judge's choices had "added to his unsavory notoriety" and went on to denounce some of his prior decisions.[63] The General Term had upheld the finding of contempt, but the Court of Appeals reversed, stating: "These accusations and denunciations may be libelous, but they were not within the statute . . . ."[64]

The Trial Begins and Ends

Proceedings for the first case involving a post-trial publication began on Monday, December 17, when Masterson and Cary, accompanied by Clarence Shearn, the well-known attorney for publisher William Randolph Hearst, arrived in Herkimer. (Lewis was excused because of illness.) At the arraignment before Justice Devendorf, Shearn claimed that the article was not a report on a judicial proceeding but was instead commentary on a trial that had concluded. He argued that the contempt statute barred a paper from publishing false information only if it would influence a jury while a trial was in progress. He also declared that the case "will determine whether the public press is to remain a free press," adding, "We purpose to fight for a principle."[65]

Despite the lack of any adverse New York precedent and the fact that contempt cases from other jurisdictions generally involved publications that impugned the

integrity of a court or an individual judge or had been published with the intent to influence a pending or current case,[66] when Shearn and his clients appeared in court at noon on Tuesday, the result was anti-climactic. Instead of taking a bold stand in defense of freedom of the press, Shearn presented an affidavit stating that Masterson was not in Herkimer for the trial and the *Morning Telegraph* had given scant coverage of the proceedings, unlike certain other New York papers that had published sensational stories about lynch mobs. Masterson added that, since writing his column, he had done some investigation and learned that conditions in Herkimer were different from what he'd imagined. He regretted his article and never meant to hold the court up to contempt.

> The contempt statute barred a paper from publishing false information only if it would influence a jury while a trial was in progress.

Curbing the Press?

Despite Devendorf's tough talk after the Gillette trial – he had declared, "We hope to make this a lesson severe enough so that this faking business will cease hereafter, so far as court proceedings go"[67] – he accepted the defendants' lack of intent to commit contempt as a mitigating circumstance. He then fined them $50 each, an amount he regarded as nominal.[68] Cary paid the court clerk $100 and the indictments against him and Masterson were dismissed, as well as the writs against them and Lewis. Immediately afterwards, Masterson explained that although he had intended no contempt, paying the fines seemed the easiest and simplest way of settling the matter. Once back in New York, he wrote a column in which he said, "Herkimer is not such a bad place after all . . . and there are worse people on the map than those in Herkimer."[69]

At the close of the Gillette trial, Devendorf had stated, "The Gillette case undoubtedly will result in legislation placing the public press of New York State under the control of the courts to a greater extent than it is at present."[70] Three years earlier, Assemblyman Charles F. Bostwick had introduced a bill aimed at the excesses of the press, which would have amended the contempt statute to strike out the words "of a false or grossly inaccurate report of its proceedings," and inserted "publication of any writing or picture during the pending of any civil or criminal action, special proceeding, or other judicial inquiry tending to prejudice or obstruct the course of justice."[71] Curbing the press was also on the mind of former president William Howard Taft when, at the 1915 New York State Constitutional Convention, he called for a change in the state constitution to allow for the enactment of laws that would "mitigate the evil of trial by newspapers."[72] Other suggestions for the trial-by-newspaper problem included having lawyers write the articles on criminal trials, better cooperation between the press and the bench and bar, and self-regulation by the newspapers.

Despite tough talk, the New York contempt statute was rarely utilized against the alleged excesses of the news media, and when it was, no publication was found guilty of criminal contempt. In 1909, a man named William S. Brewer, who was involved in a contentious divorce, caused to be published in several newspapers a letter that purported to be a true account of the ongoing court proceedings. The trial judge, Justice M. Warley Platzek, was not amused and found Brewer in criminal contempt, sentencing him to either a $250 fine or 30 days in the Ludlow Street jail. When the case reached the First Department, the court determined that a reexamination of the letter showed that it did not purport to be a complete account of the trial proceedings and therefore was not a false or grossly inaccurate account of the proceedings.[73]

Twenty-five years later, the Fourth Department held that a radio broadcast charging a judge with the gross mishandling of a case was not a "publication" within the meaning of the statute.[74] Finally, in 1963, in the last reported case involving the contempt statute, the Court of Appeals reversed the Third Department, holding that an article in the *Syracuse Post-Standard* that misstated the name of a police officer mentioned in trial testimony could only be criminal contempt if the article was false and grossly misleading, instead of being "merely erroneous in some minor particular . . . ."[75]

Chester Gillette, whose trial led to the unlikely scenario of Bat Masterson being charged with contempt of court, was executed in Auburn Prison on March 8, 1908, after the Court of Appeals upheld his conviction.[76] As for Justice Devendorf, during his long judicial career, he presided at several other murder trials, including two in which the defendant was sentenced to death and subsequently executed.[77] As for the Gillette trial, he professed not to understand why there had been such widespread interest. He was presented with a copy of *An American Tragedy* but reportedly never looked inside it; he was in New York during the staging of the play based on the novel but did not attend it.[78] Devendorf retired from the bench on January 1, 1927, and died in 1932 at age 75.

Bat Masterson's next appearance in court came in May 1913, after he sued a newspaper publisher for libel because it ran an article claiming he had gained his reputation in the West by shooting drunken Mexicans

and Indians in the back.[79] During the trial, the fact that Masterson had been fined $50 in Herkimer was briefly mentioned.[80] Although the defendant publisher was represented by Benjamin Cardozo, Masterson won a jury award of $3,500, which was reduced to $1,000 by the Appellate Division.[81] Masterson continued writing his column until October 25, 1921, when he died at his desk. He is buried in Woodlawn Cemetery in the Bronx. ■

1. Hard copy, microform or digital copies of the issue of the *Morning Telegraph* in which the column appeared are apparently not available. However, the full text of the column was reprinted in the indictment against Masterson and his *Morning Telegraph* colleagues and was published in an upstate newspaper under the title of *Three Indicted for Criminal Contempt* (Dec. 13, 1906). A clipping of the article is held by the Herkimer County Historical Society.

2. For a full biography of Masterson, see Robert K. DeArment, Bat Masterson: The Man and the Legend (1979); see also Robert K. DeArment, Broadway Bat: Gunfighter in Gotham (2005) (focusing on Masterson's life in New York City).

3. William Barclay Masterson, *Take a Run in Broadway and Watch a Mob Gather*, N.Y. Morning Telegraph, Apr. 30, 1905, at 5 (complaining about "hoodlumism" in public places); William Barclay Masterson, *Woman Suffrage Law Is a Disgrace to Colorado*, N.Y. Morning Telegraph, Sept. 29, 1905, at 5 (claiming that women's suffrage had led to increased election fraud); William Barclay Masterson, *Will Police Tell the Truth to Jerome?*, N.Y. Morning Telegraph, Mar. 12, 1906, at 5 (discussing police corruption).

4. For a thorough account of the Gillette case, see Craig Brandon, Murder in the Adirondacks: 'An American Tragedy' Revisited (1986).

5. *Irving R. Devendorf*, Watertown Herald, Oct. 14, 1895, at 1.

6. *See Swackhamer's Sentence*, Little Falls Evening Times, Jan. 17, 1891 (Devendorf sentenced Swackhamer to the state reformatory rather than prison).

7. *See The Abduction Case*, Utica Sunday J., June 2, 1901, at 1. McClelland was convicted and Devendorf sentenced him to four years in Auburn Prison. *See McClelland to Prison*, Utica Observer, June 13, 1901, at 6.

8. *See Edwards Case Still on Trial*, Utica Herald-Dispatch, Jan. 9, 1903, at 5; *Brought in a Verdict of Guilty*, Utica Herald-Dispatch, Jan. 10, 1903, at 5.

9. *The Murder Trial Opened*, Utica Herald-Dispatch, Jan. 31, 1906, at 2.

10. *See The Murder Trial Opens*, Rome Daily Sentinel, Jan. 31, 1906, at 2; *Much Delay in Securing Jury*, Utica Herald-Dispatch, Feb. 1, 1906; *Eyewitnesses to Fatal Brawl*, Utica-Herald Dispatch, Feb. 2, 1906; *Quizzing Murder Case Witnesses*, Utica J., Feb. 4, 1906; *Will Go to Jury Tonight*, Rome Daily Sentinel, Feb. 6, 1906, at 2; *Italian Convicted of Manslaughter*, Utica Herald-Dispatch, Feb. 7, 1906.

11. *Gillette's Fate May Be Decided by the Girl He Loves*, N.Y. Evening World, Nov. 14, 1906, at 2.

12. *See Chester Gillette Arrested for the Murder of Pretty Grace Brown*, Utica Sunday Trib., July 13, 1906, at 1.

13. Viola Rogers, *She Got Up and Jumped Into the Water, Says Gillette*, N.Y. American, Nov. 29, at 4.

14. Appellant's brief, *People v. Gillette*, 83 N.Y. 680 (N.Y. 1908), vol. 3, fol. 2348, http://murderpedia.org; *see also* Thomas G. Smith, People v. Gillette*: The Trial of the 20th Century Lives on in the 21st*, N.Y. St. Bar Ass'n J., Aug. 2006, at 15 (discussing whether the conduct of the *Gillette* trial would meet modern standards of justice).

15. *See Sensation at Trial; Deception Is Charged*, N.Y. Trib., Dec. 4, 1906, at 4.

16. *See Gillette's Fate May Be Decided by Story of the Girl He Loves*, *supra* note 11, at 2

17. *See, e.g.*, Charles Sommerville, *Guard Gillette Against Suicide*, N.Y. Evening J., Dec. 1, 1906, at 1; *Gillette Had Planned Suicide by Gas*, Syracuse J., Dec. 5, 1906, at 1; *see, e.g.*, Viola Rodgers, *"Yes, I Killed Her, I Hit Her Twice," Gillette's Reported Confession*, N.Y. American, Dec. 6, 1906, at 1; *"I Struck Grace Brown in Water," Gillette Admits*, N.Y. Evening World, Dec. 6, 1906, at 3.

18. *Package of Poison Was Sent to Grace Brown*, Syracuse J., Nov. 18, 1906, at 2.

19. Edith Cornwell, *Lynching Is Threatened*, Syracuse Herald, Nov. 20, 1906, at 1.

20. *Mrs. Carey Tells of Awful Shriek*, Syracuse Herald, Nov. 22, 1906, at 8.

21. *Gillette Asked About Tragedy*, Syracuse Herald, Nov. 22, 1906, at 1; *see also Woodsmen Sought Gillette's Life*, Kingston Daily Freeman, Nov. 22, 1906, at 6.

22. *See, e.g.*, *Blows Killed Grace*, DeRuyter Gleaner, Nov. 29, 1906, at 3. Mrs. Hubbard subsequently declared the story to be "a fake and falsehood from beginning to end." *A Denial* (undated clipping from an unidentified newspaper held by the Herkimer County Historical Society).

23. *Counsel Summing Up To-day*, Oswego Daily Times, Dec. 3, 1906, at 1.

24. *Verdict in Gillette Case Expected at 7 O'Clock*, Niagara Falls Gaz., Dec. 4, 1906, at 1.

25. *Gillette Faces Full Fire of State's Summing Up*, Oswego Daily Times, Dec. 4, 1906, at 1.

26. Another trial that drew heavy attention in the New York City press was that of famed tenor Enrico Caruso for allegedly harassing a woman at the Central Park Zoo. For front-page articles on the case, see *Caruso Goes on Stand; Swears He's Not Guilty*, N.Y. Evening World, Nov. 21, 1906, at 1; *Caruso Found Guilty and Fined $10*, N.Y. Evening World, Nov. 23, 1906, at 1; *Hannah Graham, Caruso Witness Tells Her Story*, N.Y. Evening World, Nov. 28, 1906, 1, at 1.

27. *Gillette Hears from Mother,* Utica Herald Dispatch, Dec. 5, 1906, at 2.

28. *Story of Lynching Absurd, Says Sheriff*, Utica Herald-Dispatch, Nov. 21, 1906, at 1.

29. *Yellowness*, Amsterdam Evening Recorder, Dec. 5, 1906, at 4.

30. *The Modern Munchausens*, Utica Saturday Globe, Dec. 8?, 1906, [n.p.].

31. *Travesty on Justice*, *reprinted in Yarn That Trial Was. . . . . Arouses . . .* , Syracuse J., Dec. 12, 1906, at 1.

32. *In Doubt as to Fair Trial*, Utica Herald-Dispatch, Nov. 11, 1906, at 6.

33. *See Newspaper Punishment*, Auburn Citizen, Dec. 11, 1906.

34. *Court Gets After Newspaper*, N.Y. Sun, Dec. 13, 1906, at 3.

35. Brandon, *supra* note 4, at 250.

36. William Barclay Masterson, *New Style of Lynch Law in Northern New York. Mob Compels Jury to Do Its Work in Gillette Case. Conviction Forced by Savage Threats of Herkimer County Bushmen*, N.Y. Morning Telegraph, Dec. 9, 1906, *reprinted in* Three Indicted for Criminal Contempt (Dec. 13, 1906).

37. *Id.*

38. *Id.*

39. *See Newspaper Punishment*, *supra* note 36.

40. *Id.*

41. Cary was a veteran newspaper man who during his career held positions at many different newspapers. He died in 1922.

42. Lewis, who died in 1924, was a lawyer turned newspaperman. Like Cary, he held positions at several big-city newspapers.

43. *Against "Yellow" Journalism*, Rome Daily Sentinel, Dec. 12, 1906, at 1.

44. *Three Indicted for Contempt*, *supra* note 1 (quoting an article in the Syracuse Post-Standard).

45. *Three Charged With Contempt of Court*, Duluth News Trib., Dec. 13, 1906, at 3.

46. *Indict Scribes: Devendorf Vents Spleen*, Stark County Democrat, Dec. 14, 1906, at 1.

47. *A Judge and the Newspapers*, Brooklyn Daily Eagle, Dec. 13, 1906, at 4.

48. Untitled editorial, Syracuse Herald, Dec. 13, 1906, at 4.

49. Goff, who was once described as a "the cruelest, most sadistic judge we have had in New York in this century," is best known for his biased conduct while serving as the judge at the first trial of Lt. Charles Becker for the murder of gambler Herman Rosenthal.

50. *Get "Bat" Masterson: Gun Fighter Arrested for Contempt of Court*, Wash. Herald, Dec. 13, 1906, at 9.

51. *Id.*

52. *Court Gets After Newspaper*, N.Y. Sun, Dec. 13, 1906, at 3.

53. *"Bat Masterson" Is Not Worrying Much*, Syracuse J., Dec. 15, 1906, at 1.

54. *Id.*

55. 2 N.Y Rev. Stat., pt. 3, ch. 3, tit. 2, § 10(6) (1829).

56. *Extracts from the Original Reports of the Revisers*, 5 Statutes at Large of the State of New York 426–27 (John W. Edmonds ed., 1863). The Revisers were reportedly influenced by noted New York jurist Edward Livingston's proposed code for Louisiana whose contempt section included a provision stat-

ing that it did not apply to truthful and accurate accounts of judicial proceedings. *See* Edward Livingston, *A Code of Crimes and Punishments* § 151, *in* 2 The Complete Works of Edward Livingston on Criminal Jurisprudence 47 (1873). For a discussion of the influence of Livingston on the Revisers, see Walter Nelles & Carol Weiss King, *Contempt by Publication in the United States to the Federal Statute*, 28 Colum. L. Rev. 401, 418-20 (1928).

57. *See* N.Y. Judiciary Law § 750(6) (McKinney 2003). This statute has been part of the Consolidated Laws since they were enacted in 1909.

58. Courts § 8, 1Rev. Stats. & Codes & Gen. Laws of the State of N.Y. (Clarence Birdseye ed., Baker, Voorhis & Co. 1901).

59. *See The Daily Times Still in Contempt*, N.Y. Daily Times, Mar. 12, 1855, at 3; Lyman Abbott, Reminiscences 83–85 (1915).

60. Barnard is best known for being one of the judges who was impeached, convicted, and removed from office as a result of the same investigation into judicial corruption that led to the resignation of Justice Albert Cardozo, the father of Benjamin Cardozo.

61. *A Judicial Outrage*, N.Y. Trib., Apr. 14, 1864, at 4; *see also The Barnard Greeley Case*, Brooklyn Daily Eagle, Apr. 28, 1864, at 3.

62. *The Horace Greeley Case*, N.Y. Times, Apr. 29, 1864, at 1. Before facing Barnard, Greeley had unsuccessfully attempted to obtain a writ of prohibition. *See People ex rel. Greeley v. Court of Oyer & Terminer* (N.Y. Sup. Ct. N.Y. Co. 1864).

63. *People ex rel. Barnes v. Court of Sessions of Albany Cnty.*, 41 N.E. 700, 700–01 (N.Y. 1895), *rev'g* 31 N.Y.S. 373 (N.Y. Sup. Ct. G.T. 3d Dep't 1894).

64. *Id*. at 701.

65. *Accused of Contempt: H.N. Cary and W.B. Masterson in Court*, Dec. 17, 1906 (clipping on file at the Herkimer County Historical Society).

66. An early New York case of this type was *People v. Freer*, 1 Caines 518 (N.Y. Sup. Ct. 1803), in which leading New York jurist Chancellor James Kent fined the publisher of the *Utica Gazette* $10 for publishing an article that attempted to "prejudice and influence the public mind against the court and to intimidate and influence the court on the motion pending before it . . . ." *Id.* Perhaps the best known early federal case occurred in 1825 when Judge James H. Peck found the losing party in a recently decided case to be in contempt after he published an article that criticized Peck's decision. Peck was subsequently impeached for his actions and narrowly escaped conviction. For an annotated list of cases from 1831–1927 involving contempt by publication, see Wallis Nelles & Carol Weis King, *Contempt by Publication in the United States Since the Federal Contempt Statute*, 28 Colum. L. Rev. 525, 554–62 (1928). *See also* Samuel Merrill, Newspaper Libel: A Handbook for the Press (Ticknor & Co. 1888) (discussing 19-century contempt cases involving newspapers and noting that most of them involved attempts to influence ongoing proceedings).

67. *Against Yellow Journalism*, *supra* note 43.

68. *Pleaded Guilty and Were Fined*, Utica Herald-Dispatch, Dec. 18, 1906. The maximum penalty was a $250 fine and/or 30 days in jail.

69. *Bat Masterson Again*, Dec. 24, 1906 (press clipping held at the Herkimer County Historical Society).

70. *Gillette's Removal Delayed*, Dec. 11, 1906 (press clipping held at the Herkimer County Historical Society).

71. *To Curb Sensational Press*, N.Y. Times, Feb. 26, 1903, at 7.

72. Henry W. Taft, Law Reform: Papers and Addresses by a Practicing Lawyer 152 (1926).

73. *People ex rel. Brewer v. Platzek*, 117 N.Y.S. 852, 854 (1st Dep't 1909); *see also Trick on Wife Is Contempt of Court*, N.Y. Evening World, June 11, 1908, at 2.

74. *People v. Albertson*, 275 N.Y.S. 361, 364 (4th Dep't 1934).

75. *People v. Post-Standard Co.*, 195 N.E.2d 48, 52 (N.Y. 1963); *see also ANPA Publishers Will Aid Syracuse Newspaper*, Amsterdam Evening Recorder, June 7, 1963, at 7. The case involved a section of the Penal Law that made publishing a false or grossly inaccurate account of judicial proceedings a misdemeanor. The court held that conviction under the Penal Law required the intent to publish a false and grossly inaccurate opinion. In its opinion, the court referred to the criminal contempt statute in the Judiciary Law.

76. *See People v. Gillette*, 83 N.Y. 680 (N.Y. 1908).

77. *See People v. Del Vermo*, 85 N.E. 690 (N.Y. 1908) (involving a railroad section hand who fatally stabbed a companion during an argument in Rome, N.Y.); *People v. Millstein*, 114 N.E. 690 (N.Y. 1916) (the defendant was a burglar who shot and killed a Utica policeman while trying to elude capture). Another locally publicized Devendorf murder trial was that of Jennie Werner, a young woman who was acquitted of killing her husband, a verdict that reportedly outraged many Herkimer County women. *See Jennie Werner Acquitted of Killing Husband: Jurors Hissed and Booed by Women as They Quit Town*, Rome Daily Standard, May 12, 1921, at 8; *Mrs. Warner Is Hysterical as Jury Frees Her*, Syracuse Herald, May 12, 1921, at 4.

78. *An American Tragedy Never Seen by Judge: Justice Devendorf Says He Tries to Forget Gillette Case*, Oswego Palladium-Times, June 19, 1928, at 7.

79. For an account of this trial, see William H. Manz, *Benjamin Cardozo Meets Old West Gunslinger Bat Masterson*, N.Y. St. Bar Ass'n J., July/Aug. 2004, at 10.

80. Record at 47, 50, *Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890 (1st Dep't 1913).

81. *See Masterson v. Commercial Advertiser Ass'n*, 160 A.D. 890, 890 (1st Dep't 1913).

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am a partner in a 20-attorney firm that handles litigation and transactional matters. Most, if not all, of our work for our clients is done on a billable hour basis. My fellow partners have given me the task of improving our accounts receivable because we are finding that collecting fees from clients has become more and more difficult as time goes on. One of the suggestions made by the managing partner of my firm is to begin accepting credit card payments from clients both for retainer fees and charges for ongoing services. This sounds like a very practical way to get our fees paid. However, I am concerned about any ethical considerations that may arise if my firm begins accepting credit card payments from clients. What ethical considerations should I be aware of if we begin accepting credit card payments from clients? In addition, if we have a client's credit card number on file, what are the circumstances that would allow our firm to take automatic payment deductions from a client's credit card? And if we do take automatic payment deductions from a credit card, are they considered client funds? Last, what if a dispute over the bill ensues?

Sincerely,
Charlie Cautious

Dear Charlie Cautious:

As all of us know, credit cards are probably one of the most convenient methods of paying for goods and services. However, unlike paying by check or wire transfer, the recipients of credit card payments are in the unique position of being able to retain and potentially access pre-existing credit card information so as to provide a continuous means of compensation for services rendered to the card holder and, more specifically here, the client. Although the New York Rules of Professional Conduct (the RPC) do not directly address credit card payments, there are several ethical rules and ethics opinions that have to be considered when an attorney decides to allow clients to use credit cards when paying for legal services.

Rule 1.15(a) prohibits the commingling and misappropriation of client funds or property. The Rule expressly provides that

> [a] lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

Id. In addition, it is important to remember that attorneys have an obligation to protect a client's confidential information (Rule 1.6). A client's credit card information is most likely confidential and must be protected. *Id.* Rule 1.5, which prohibits an attorney from charging or collecting an excessive fee for legal services, is another rule that must be considered. *Id.* Finally, as obvious as this may sound, payment by credit card is not the equivalent of a blank check; when a client's credit card is debited for fees, the firm must always make sure to charge the appropriate fee amount previously billed to the client.

Your question concerning automatic client credit card payments raises a number of issues. First, it all has to start with the engagement letter. We would strongly suggest language in your firm's engagement letter that makes clients aware of the payment arrangements with your firm and, specifically, how credit card payments for legal services rendered are handled by the firm. If you want your client to authorize automatic payment of bills by credit card, the engagement letter should specifically say so.

Second, everyone should understand that retainers and fees paid by credit card will become the property of the law firm and will end up in the firm's operating account. N.Y. State Bar Op. 816 (2007) provides some guidance here. The NYSBA Committee on Professional Ethics (the NYSBA Committee) found that "[i]f the parties agree to treat advance payment of fees as the lawyer's own, the lawyer may not deposit the fee advances in a client trust account, as this would constitute impermissible commingling." *Id.* More recently, the NYSBA Committee found that "advance payment retainers may be treated either as client-owned funds, to be kept in the lawyer's escrow account, or as lawyer-owned funds, subject to the lawyer's obligation to reimburse the client for any portion ultimately not earned in fees." *See* N.Y. State Bar Op. 893 (2013).

On the issue of whether credit card payments may be deemed "client funds," we wish to focus your attention first on the matters arising when such payments are made in connection with a retainer. As we have noted previously in this *Forum*, attorneys should be highly discouraged from depositing retainer fees into escrow accounts or even client trust accounts. *See* Vincent J. Syracuse, Matthew R. Maron and

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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Peter V. Coffey, *Attorney Professionalism Forum: Rules Governing Escrow Accounts, Retainers, and Communication With Clients Regarding Fees*, New York State Bar Association Journal, Vol. 85, No. 1, January 2013. More often than not when an attorney deposits retainers into an escrow account, the attorney may lose track of what are retainer funds and what are client escrow funds, and before you know it the attorney is dipping into his or her account because the attorney believes these really are his or her retainer funds when in fact they are not. This sort of commingling could be viewed as a misappropriation of client funds. *Id.* Retainers deposited in an escrow account are arguably client funds. They are "off limits" to the lawyer once the client says "no, you cannot pay yourself from the retainer," thus sacrificing the whole idea of having a retainer. *Id.* With regard to subsequent fee payments made by automatic payment deduction from a credit card, as stated above, your engagement letter should clearly specify your firm's procedures for collecting payments by this method.

So what happens if a client gives a lawyer permission to set up automatic bill payment by credit card, and then ends up disputing the bill? The answer is *no*; the lawyer cannot use the client's credit card to pay the bill. This catch-22 was recently addressed by the New York City Bar Association's Committee on Professional Ethics. Its answer to the bar was that "under the [RPC], an attorney may not charge a client's credit card account for any disputed portion of a bill, even if the client has previously given advance authorization to charge the client's credit card account for legal fees." *See* N.Y City Bar Op. 2014-3 (the City Bar Opinion). The City Bar Opinion reminds us of a lawyer's role as the client's fiduciary and extends the fiduciary responsibility of an attorney to matters involving credit card payments for legal services rendered. *Id.*, citing Rule 1.15(a). Furthermore, the City Bar Opinion goes on to state that "[a] lawyer who has been entrusted with a client's credit card information, along with authority to make charges against the credit card account, holds that information as the client's fiduciary" and that "charging the client's credit card account after the client has disputed the fees violates this trust." *Id.* Most important, the City Bar Opinion analogizes such acts as similar to those of a lawyer taking possession of disputed funds being held in escrow for the client's benefit, a practice that is explicitly prohibited under Rule 1.15(b)(4). *Id.*, *see supra*.

In sum, attorneys accepting credit card payments should operate with extreme caution if a fee dispute with a client occurs. As Professor Roy Simon noted, "Rule 1.15 is the longest and most strictly enforced rule in New York's Rules of Professional Conduct." *See* Simon's New York Rules of Professional Conduct Annotated at 786 (2014). As we have explored at length previously in this *Forum*, any missteps by an attorney in this arena will almost certainly result in disciplinary consequences. *See* Syracuse, Maron and Coffey, *supra*. In essence, credit card payments for disputed fees must be treated with the same care as any other client funds entrusted to an attorney.

Other states have also weighed in on the issues surrounding credit card payments for legal fees. The State Bar of California's Standing Committee on Professional Responsibility and Conduct found that not only may an attorney ethically accept earned fees by credit card, he or she also may ethically accept a deposit for fees not yet earned by credit card but may not ethically accept a deposit made by credit card for advances for costs and expenses. *See* State Bar of Calif. Standing Comm. on Prof'l Resp. and Conduct Formal Op. No. 2007-172 (2007). The District of Columbia Bar also noted the view that credit cards are an acceptable method of paying legal fees on the condition that "the client understands and consents to whatever disclosures to the credit card company are required by the merchant agreement," adding that "the client must also be informed of the actual cost of using the credit card if the lawyer intends to recapture from [the] client" fees intended to be paid to the credit card company. *See* D.C. Bar Ethics Op. 348 (March 2009). This opinion also found that "advance fees and retainers" may be paid by credit card "only if it does not endanger entrusted client funds and only if the lawyer thoroughly understands the merchant agreement and arranges [his or her] affairs so that [he or she] has the ability to meet [his or her] obligation to refund unearned fees." *Id.*

Credit cards obviously make it easier for a lawyer to get paid. But, the catch is that the lawyer must make the extra effort to put in place the appropriate safeguards for acceptance of credit card payments from clients. Although it may require extra time and effort by you, your partners and your firm's accounting staff (or outside bookkeeper), you should establish explicit procedures for handling these sorts of payments to assure compliance with the ethical obligations of both you and your partners.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Matthew R. Maron, Esq.
(maron@thsh.com),
Tannenbaum Helpern Syracuse &
Hirschtritt LLP

Postscript to the May 2014 *Forum*

Readers of the *Forum* were recently treated to our musings on proper courtroom attire. *See* Vincent J. Syracuse and Matthew R. Maron, *Attorney Professionalism Forum: Appropriate Attorney Dress in the Courtroom,* New York State Bar Association Journal, May 2014, Vol. 86, No. 4. The May 2014 *Forum* generated many positive comments from the bench and the bar about the importance of the issues that we discussed. We are not and do not want to be the "fashion police" of our profession, but we feel constrained to share a recent Indiana court decision (which proves, once again, there is no shortage of material for this *Forum*) where a male attorney showed up in court without socks. When confronted by the judge, the attorney simply told

the judge in open court that he hated wearing socks. This exchange occurred after the judge advised the attorney privately during a break in the proceedings that court rules required that attorneys wear socks. Cutting to the chase, the judge ordered the attorney to wear socks along with a business suit and tie in all court proceedings as "appropriate business attire." The court further opined that if the attorney appeared in court again without socks:

> [H]e will be subject to sanctions from the Court which may include a delay ordered by the Court in presenting his case, fines, continuances of pending proceeding[s] for which costs, fees and expenses may be awarded opposing parties and/or their counsel, or such other sanctions for contempt that the court may impose in order to maintain appropriate decorum during Court proceedings.

See In re Proper Courtroom Attire, Order Directing Proper Attire Be Worn By Todd A. Glickfeld, Case No. 05C01-1408-CB-000005 (Ind., Blackford Cir. Ct., Aug. 26, 2014).

Last, to make matters worse for this fashion-challenged lawyer, the court directed that the "socks" order "be distributed to all members of the [county's] bar . . . ." *Id.*

As we have said previously in this *Forum*, when it comes to proper dress some fashion statements are best left at the door when you enter a courthouse. *See* Syracuse and Maron, *Attorney Professionalism Forum*, May 2014, *supra*.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am an associate at a firm that has maintained a longstanding client relationship with a professional sports league (the League). Recently, the League suspended one of its star players (DD) for two years as a result of an incident where he assaulted his fiancée in a hotel elevator and rendered her unconscious. The player has since filed a legal action against the League in federal court alleging that the League's suspension of him was arbitrary and capricious under the League's personal conduct policy. The League had previously rendered a monetary fine against DD based upon the incident in question, which had been documented in a surveillance video showing DD pulling his unconscious fiancée out of the elevator; it did not show the actual assault.

Earlier this year, I participated in a call along with my supervising partner (SP), the League's assistant general counsel (the AGC), the League's General Counsel (the GC) and another League executive. During the call, the GC advised us of the incident and when SP asked if the incident was recorded, the GC quickly responded that it was in possession of the subject video. My first thought upon hearing this information was to find out if other videotapes of the incident existed. I wrote those thoughts on a notepad and showed them to SP who quickly waved me off during the call. After the conclusion of the call, SP chided me and demanded that I never make such inquiry of the client again.

A few weeks later, I ran into the AGC at a client event. He pulled me aside and informed me that although the GC told my firm that only one videotape of the incident existed, the League in fact had another tape in its possession showing the entirety of the incident (including DD physically assaulting his fiancée). But, he said, he was directed by his superiors never to discuss the existence of the second tape because of the public relations fallout that would almost certainly ensue if the full video ended up in the public realm – as well as the potential legal ramifications for the League.

My firm is preparing to defend DD's lawsuit, which will almost certainly include depositions of League executives. I have been told that the plan is to take the position that the only videotape in existence was the one that was disclosed to the public. What if I told you that I know this information to be false? What are my professional responsibilities? Is there a "reporting up" requirement? With regard to how the SP handled his fact gathering, was he obligated to fully probe the League's GC as to his knowledge of the existence of any and all evidence relevant to the incident? Finally, if it is later determined that SP knowingly failed to make the proper inquiries so as to avoid learning damaging information, could my firm be disqualified from representing the League in the lawsuit brought by DD or possibly sanctioned?

Sincerely,
Tim Troubled

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Continued from Page 64

Your adversary — the party responding to your motion to reargue and renew — may submit opposition papers. In response to your adversary's opposition papers, you may submit reply papers.

If you move by order to show cause, however, a court might not allow you to submit reply papers.[14]

Under CPLR 2221(d)(1) and (e)(1), you must identify whether your motion is a motion to reargue or to renew, or both; you must also set forth your basis for the motion. Identify your motion as follows: "Plaintiff's Motion to Reargue and Renew." Or "Defendant's Motion to Reargue." Or "Defendant's Motion to Renew." It's best to identify which order — include the judge's name and the date — you're moving to reargue, renew, or both. *Example:* "Plaintiff's Motion to Reargue Hon. Claire Lex's June 24, 2014, Decision and Order."

Practitioners will usually move to reargue and move to renew in the same motion. Identify your motion as a motion to reargue and renew only when your proof and the relief you're seeking is for both reargument and renewal. In your moving papers, discuss separately your basis for moving to reargue and your basis for moving to renew. The court must consider each motion separately.[15]

Misidentifying your motion as a "motion to renew and reargue" even though the basis for your motion is for reargument might not be critical, however. A court might deem it a motion for reargument.[16]

Whether you're moving to reargue or moving to renew, or both, attach a copy of the court's original order — the order that's the basis for your motion for reargument, renewal, or both — as an exhibit to your motion papers.[17]

Courts are divided about whether you need to include all the papers that the court considered in ruling on its original decision in your motion to reargue, renew, or both.[18] CPLR 2221 doesn't list what papers you need to submit on motions to reargue or renew. The *Legal Writer* recommends that you include all your papers: Doing so ensures that the court has a complete set of papers. It also shows that you're trying to help the court rule for you. Providing a complete set of your initial moving papers shows the court that you're honest.

If the substance of your motion to reargue or renew, or both, is frivolous, the court might consider sanctioning you.[19]

Motions to Reargue

By moving to reargue, you're seeking to "convince the court that it was wrong and ought to change its mind."[20] You're bringing to the court's attention a substantive error you want the court to correct.[21]

Basis for the Motion.

Your motion to reargue must persuade the court that it overlooked relevant facts or that it misapplied controlling law.[22]

If the court overlooked relevant facts, explain how the court's factual finding was wrong. Explain to the court what facts it overlooked. Refer to the facts from the original moving papers. Show the court how the correct facts would change the court's decision.[23] If you, rather than the court, overlooked relevant facts, that's not a sufficient basis to move to reargue.

Your motion to reargue must be based on the papers on which the court relied to make its original decision.[24] If you never included the relevant facts in your initial papers — papers the court relied on to render its original decision — the court couldn't have overlooked something it had no opportunity to consider.

If the court misapplied the law, explain in your motion to reargue that the court misconstrued or misapplied a relevant statute, rule, or case.[25] Explain how the court should have applied the relevant statute, rule, or case.

If the law changed since the court's original decision, move to renew, not reargue.[26] The *Legal Writer* will discuss motions to renew in the next issue of the *Journal*.

In your motion to reargue, you may not repeat an unsuccessful argument you raised in the original motion.[27] The purpose of a motion to reargue "'is[n't] to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.'"[28]

Your motion to reargue must persuade the court that it overlooked relevant facts or that it misapplied controlling law.

You may not raise new arguments or advance new theories you never raised on the original motion.[29]

Time.

You have 30 days to move to reargue.[30] The 30–day period is calculated from "service of a copy of the order determining the prior motion and written notice of its entry."[31]

A court has the discretion to hear a late motion to reargue.[32]

Move to reargue before your time to appeal the original decision expires.[33]

One scholar has noted that after the Legislature amended CPLR 2221 in 1999, the statute's language became "summary . . . and arbitrary."[34] Moving to reargue, according to the scholar, was easier and better under the old rule.[35] Before 1999, you could have moved to reargue "during the pendency of [an] appeal and any time up to the appeal's submission; the jurisdiction of the original court to entertain the reargument motion was not deemed terminated by the mere taking of the appeal. That was a good rule."[36] Under the old rule, the court had the opportunity to reconsider, alter, or correct the decision; thus, the court had "an opportunity to obviate the appeal."[37] The new 30-day rule to move to reargue "can be construed to divest the original court of that

jurisdiction, which would in turn force through an appeal [by a litigant] that might not be necessary."[38] The First and Second Departments have preferred the old rule.[39]

The best advice is be cautious about the 30-day rule under CPLR 2221(d)(3): "[I]n an excess of caution until the Court of Appeals rules, a practitioner should assume the 30-day requirement is a strict one and should move within that period."[40]

Time limitations also get tricky when, after losing the prior motion, you serve by mail the original order with notice of entry on your adversary — the winner. If the winner, however, serves on the loser the original order with notice of entry by mail, the loser gets five extra days to appeal or move to reargue. Because of service by mail, the loser gets 35 days.[41] But, as one scholar has noted, if the loser serves the winner with the original order with notice of entry by mail, the loser gets 35 days to appeal but only 30 days to move to reargue.[42] The amendment to CPLR 5513(d) in 1999 adds five extra days to the 30-day appeal period after service — irrespective of who does the service, winner or loser — of the original order with notice of entry by mail. But "no similar amendment was made for the motion to reargue."[43] Thus, although you might have 35 days to appeal, you'll have only 30 days to move to reargue.

Note that "'regardless of statutory time limits concerning motions to reargue, every court retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action.'"[44]

Notice of Motion or Order to Show Cause.

You may move to reargue by notice of motion or order to show cause.

If you move to reargue by order to show cause and the court declines to sign your order to show cause, you may not appeal the declination.[45] But you may appeal the court's original decision.

Appealing.

You may appeal the court's decision on your motion to reargue only if the court grants your motion to reargue.[46] If the court grants your motion to reargue but adheres to its original decision, you may appeal the court's decision on your motion to reargue.[47] The court's order "granting reargument supersedes the [court's] original order."[48]

If the court denies your motion to reargue, you may not appeal the court's decision on your motion to reargue.[49]

If the court denies your motion to reargue but "addresses the merits of the underlying decision, the denial of the motion to reargue may be appealable."[50]

Moving to reargue doesn't extend your time to appeal.[51]

After consulting with your client, consider whether to move to reargue, appeal the original decision, or both. Consider the cost, time, and effort in moving to reargue, appealing, or both.

If the court denies your motion to reargue, you may not appeal the court's decision on your motion to reargue.

Opposing a Motion to Reargue

If your adversary argues in its moving papers that the court overlooked relevant facts, you must convince the court in your opposition papers that the court didn't overlook any fact. In your opposition papers, point out how the court used the facts to make its decision. Refer the court to the facts in the original motion. Explain how the court's factual findings are correct. If your adversary — not the court — overlooked the facts, argue that the court's decision still stands.

If your adversary argues in its motion to reargue that the court misapplied a relevant statute, rule, or case, persuade the court that it never misapplied a statute, rule, or case. Argue and explain how the court correctly applied the statute, rule, or case. If your adversary, rather than the court, hasn't applied the relevant statute, rule, or case, articulate the correct interpretation.

Argue in your opposition papers that your adversary raised the same unsuccessful arguments that formed the basis for the court's original decision.

Argue that your adversary raised new arguments or theories never raised before. Argue that the court can't consider your adversary's new arguments on a motion to reargue.

In the next issue of the *Journal*, the *Legal Writer* will discuss motions to renew. ■

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1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 16:310, at 16-35 (2006; Dec. 2009 Supp.).
2. *Id.* § 16:315, at 16-36.
3. *Id.*
4. *Id.* § 16:316, at 16-36 (quoting *Adams v. Fellingham*, 52 A.D.3d 443, 444, 859 N.Y.S.2d 484, 486 (2d Dep't 2008)).
5. CPLR 2221(a); David D. Siegel, New York Practice § 254, at 450 (5th ed. 2011).
6. Barr et al., *supra* note 1, § 16:314, at 16-36.
7. 1 Byer's Civil Motions § 59:01 at 741 (Howard G. Leventhal 2d rev. ed. 2006; 2013 Supp.).
8. Barr et al., *supra* note 1, § 16:314, at 16-36 (citing CPLR 2221(a)).
9. *Id.* (citing *People v. United Funding, Inc.*, 106 A.D.2d 846, 847, 484 N.Y.S.2d 245, 247 (3d Dep't 1984)); Byer's Civil Motions, *supra* note 7, at § 59:01 at 741.
10. Byer's Civil Motions, *supra* note 7, at § 59:01, at 741.
11. Barr et al., *supra* note 1, § 16:312, at 16-36.
12. *Id.* § 16:322, at 16-37.
13. *Id.*

Continued on Page 60

14. Most courts prohibit parties from serving replies on orders to show cause. *See, e.g.*, N.Y. County Justices' R. 13(b); *Forward v. Foschi*, 2010 N.Y. Slip Op. 52397(U), 31 Misc. 3d 1210(A), 929 N.Y.S.2d 199, 2010 WL 6490253, at *9, 2010 N.Y. Misc. LEXIS 6625, at *29 (Sup. Ct., Westchester Co. 2010) (Scheinkman, J.) ("This Court's rules and practice guide specifically advise counsel that replies are not accepted on motions pursued by orders to show cause. The submission of replies delays the disposition of motions and, thus, it would defeat the purpose of the order to show cause procedure to invite replies."). But reply papers are allowed in the New York City Civil Court's plenary part. According to the Unified Court System, "If you have received opposition papers prior to the hearing date of the Order to Show Cause, you may have time to prepare an affidavit in reply . . . . You must serve a copy of the reply affidavit on the other side and bring extra copies and the original, along with proof of service, to the courtroom on the date the Order to Show Cause is to be heard. If you did not have time to prepare reply papers and feel that it is necessary, you can ask the court for an adjournment for time to prepare papers. The judge may or may not grant your request." http://www.nycourts.gov/courts/nyc/civil/osc.shtml (last visited Sept. 9, 2014). The rule is nearly verbatim for Housing Court. *See* http://www.nycourts.gov/courts/nyc/housing/osc.shtml#reply (last visited Sept. 9, 2014).

15. Barr et al., *supra* note 1, § 16:313, at 16-36 (citing CPLR 2221(f)).

16. Byer's Civil Motions, *supra* note 7, at § 59:01, at 741.

17. Siegel, *supra* note 5, at § 254, at 80 (July 2014 Pocket Part) (citing *Kalir v. Ottinger*, 2011 WL 6968334 (Sup. Ct. N.Y. County 2011) (noting that court had denied an earlier motion to reargue without prejudice because defendants did not attach to their motion papers a copy of the pertinent papers from which defendants sought reargument)).

18. David L. Ferstendig, New York Civil Litigation, at § 7.17, at 7-119 (2014) (citing CPLR 2214(c)); Siegel, *supra* note 5, July 2014 Pocket Part, § 254, at 79 (citing *Biscone v. JetBlue Airways Corp.*, 103 A.D.3d 158, 160, 957 N.Y.S.2d 361, 364 (2d Dep't 2012) ("We further find that compliance with CPLR 2214(c) requires that a party seeking leave to renew or reargue cannot rely upon reference to e-filed documents in lieu of annexing a complete set of the originally submitted motion papers."), *appeal dismissed*, 20 N.Y.3d 1084, 1084, 965 N.Y.S.2d 72, 72, 987 N.E.2d 632, 632 (2013)); *contra Rostant v. Swersky*, 79 A.D.3d 456, 456, 912 N.Y.S.2d 200, 201 (1st Dep't 2010) ("Nor did plaintiff's failure to submit all the original motion papers on her reargument motion render the latter procedurally defective. CPLR 2221 does not specify the papers that must be submitted on a motion for reargument, and the decision whether to entertain reargument is committed to the sound discretion of the court.").

19. Barr et al., *supra* note 1, § 16:310, at 16-35.

20. Siegel, *supra* note 5, § 254, at 449.

21. Barr et al., *supra* note 1, § 16:320, at 16-37.

22. CPLR 2221(d); Barr et al., *supra* note 1, § 16:320, at 16-37 (citing *Foley v. Roche*, 68 A.D.2d 558, 567, 418 N.Y.S.2d 588, 593 (1st Dep't 1979)).

23. Barr et al., *supra* note 1, § 16:330, at 16-38.

24. Byer's Civil Motions, *supra* note 7, § 59:02, at 742 (citing *Phillips v. Vill. of Oriskany*, 57 A.D.2d 110, 113, 394 N.Y.S.2d 941, 943 (4th Dep't 1977) ("In any event, such a motion [reargument] is made on the papers submitted on the original motion, and new facts may not be presented thereon.")).

25. Barr et al., *supra* note 1, § 16:323, at 16-37.

26. CPLR 2221(e)(2); Siegel, *supra* note 5, § 254, at 451 (citing *Glicksman v. Bd. of Educ.*, 278 A.D.2d 364, 365, 717 N.Y.S.2d 373, 374 (2d Dep't 2000) ("As relevant to this appeal, CPLR 2221(e)(2) provides that a motion for leave to renew 'shall demonstrate that there has been a change in the law that would change the prior determination.'")).

27. Barr et al., *supra* note 1, § 16:320, at 16-37 (citing *Simpson v. Loehmann*, 21 N.Y.2d 990, 990, 290 N.Y.S.2d 914, 915, 238 N.E.2d 319, 319 (1968) ("A motion for reargument is not an appropriate vehicle for raising new questions, such as those now urged upon us, which were not previously advanced either in this court or in the courts below.")).

28. Byer's Civil Motions, *supra* note 7, § 59:02 at 742 (quoting *Foley*, 68 A.D.2d at 567, 418 N.Y.S.2d at 593).

29. Barr et al., *supra* note 1, § 16:320, at 16-37 (citing *Loehmann*, 21 N.Y.2d at 990, 290 N.Y.S.2d at 915, 238 N.E.2d at 319; *Pryor v. Commonwealth Land Title Ins. Co.*, 17 A.D.3d 434, 436, 793 N.Y.S.2d 452, 454 (2d Dep't 2005)).

30. CPLR 2221(d)(3).

31. *Id.*; Barr et al., *supra* note 1, § 16:321, at 16-37 (citing *Zhi Fang Shi v. Sanchez*, 36 A.D.3d 486, 828 N.Y.S.2d 339, 339-340 (1st Dep't 2007)).

32. Barr et al., *supra* note 1, § 16:321, at 16-37 (citing *Itzkowitz v. King Kullen Grocery Co., Inc.*, 22 A.D.3d 636, 638, 804 N.Y.S.2d 350, 352 (2d Dep't 2005) ("[T]he defendant's appeal taken from the Supreme Court's prior order was still pending and unperfected as of the time that the motion for reargument was made. Under these circumstances, the Supreme Court was not bound to deny the defendant's motion to reargue merely because the motion to reargue was made beyond the 30-day limit defined in CPLR 2221(d)(3)."); *Garcia v. The Jesuits of Fordham, Inc.*, 6 A.D.3d 163, 165, 774 N.Y.S.2d 503, 505 (1st Dep't 2004) ("Initially, we note that although plaintiff's motion for reargument was technically untimely pursuant to CPLR 2221(d), it was not an improvident exercise of the court's discretion to have reconsidered its prior ruling.")); Byer's Civil Motions, *supra* note 7, § 59:03 at 742 (citing *Manocherian v. Lenox Hill Hosp.*, 229 A.D.2d 197, 202, 654 N.Y.S.2d 339, 343 (1st Dep't 1997) ("It was not an abuse of discretion for the court to hear Lenox Hill's motion for reargument and clarification, which was brought prior to the entry of an order and judgment on the court's initial decision."), *lv. denied.*, 90 N.Y.2d 835, 835, 660 N.Y.S.2d 710, 710, 683 N.E.2d 332, 332 (1997)).

33. Byer's Civil Motions, *supra* note 7, § 59:03 at 742.

34. Siegel, *supra* note 5, § 254, at 450.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* (citing *Leist v. Goldstein*, 305 A.D.2d 468, 469, 760 N.Y.S.2d 191, 192 (2d Dep't 2003) ("In light of the fact that the plaintiff's motion for leave to reargue was made at the court's request and after his filing of a notice of appeal but prior to the perfection of the appeal, the granting of reargument was an appropriate exercise of the court's discretion."); *Itzkowitz*, 22 A.D.3d at 638, 804 N.Y.S.2d at 352).

40. Ferstendig, *supra* note 18, §7.17[3], at 7-121.

41. CPLR 2103(b)(2); Siegel, *supra* note 5, § 254 at 450.

42. Siegel, *supra* note 5, § 254 at 451.

43. *Id.*

44. Ferstendig, *supra* note 18, § 7.17[3] at 7-122 (quoting *Liss v. Trans Auto Sys., Inc.*, 68 N.Y.2d 15, 20, 505 N.Y.S.2d 831, 834, 496 N.E.2d 851, 854 (1986)).

45. *Alexandre v. Davis*, 57 A.D.2d 764, 765–66, 394 N.Y.S.2d 559, 560 (1st Dep't 1977) ("Justice Fein's declination to sign defendant's proffered order to show cause essentially seeking reargument is, in effect, a denial of reargument, and it is well recognized that a denial of reargument is not appealable.").

46. Siegel, *supra* note 5, § 254 at 450; Barr et al., *supra* note 1, § 16:311, at 16-35 (citing CPLR 5701; *Ahders v. Southampton Hosp.*, 90 A.D.2d 508, 508, 455 N.Y.S.2d 15, 16 (2d Dep't 1982) ("An order granting a motion to reargue is appealable.")).

47. Siegel, *supra* note 5, § 254 at 450.

48. *Id.* (citing *Dennis v. Stout*, 24 A.D.2d 461, 461, 260 N.Y.S.2d 325, 326 (2d Dep't 1965) ("While an order denying reargument is not appealable, an order granting reargument and adhering to the original decision (such as the one here) ordinarily supersedes the original order and is appealable.")).

49. *Id.*; Barr et al., *supra* note 1, § 16:311, at 16-35 (citing *Empire Ins. Co. v. Food City*, 167 A.D.2d 983, 984, 562 N.Y.S.2d 5, 5 (4th Dep't 1990); Byer's Civil Motions, *supra* note 7, § 59:01 at 742 (citing *Dickan v. State of N.Y.*, 16 A.D.3d 760, 761, 790 N.Y.S.2d 572, 573 (3d Dep't 2005)).

50. Barr et al., *supra* note 1, § 16:311, at 16-35 (citing *6645 Owners Corp. v. GMO Realty Corp.*, 306 A.D.2d 97, 98, 762 N.Y.S.2d 60, 61 (1st Dep't 2003) ("Although the order appealed from in part purports to deny a motion to reargue the February 2002 order that denied a prior motion for the same relief, that aspect of the order is appealable, since the court, by addressing the merits of the issue presented, essentially granted reargument and adhered to its prior decision on reargument.")); *but see* Byer's Civil Motions, *supra* note 7, § 59:03 at 743 (citing *Snyder v. Parke, Davis & Co.*, 56 A.D.2d 536, 536, 391 N.Y.S.2d 579, 580 (1st Dep't 1977); *Dennis*, 24 A.D.2d at 461, 260 N.Y.S.2d at 326).

51. Byer's Civil Motions, *supra* note 7, § 59:03 at 742 (citing *Liberty Nat'l Bank & Trust Co. v. Bero Constr. Corp.*, 29 A.D.2d 627, 627, 286 N.Y.S.2d 287, 288 (4th Dep't 1967) ("A motion to reargue cannot be used to extend the time to appeal and such a motion must therefore, be made before the time to appeal has expired.").

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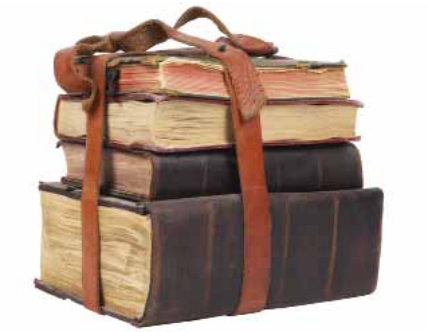
BY GERALD LEBOVITS



Drafting New York Civil-Litigation Documents: Part XXXVI — Motions to Reargue and Renew

In the last issue, the *Legal Writer* concluded its discussion of contempt motions. We continue the series on civil-litigation documents with motions to reargue and renew.

CPLR 2221 gives you two options if you want the court to reconsider (or reopen) its decision: (1) moving to reargue and (2) moving to renew.[1] Use a motion to reargue or renew, or both, after a court has ruled against you on a motion. In your motion to reargue, renew, or both, you're asking the court to reconsider its decision. It's different from an appeal. A motion to reargue, renew, or both asks the same judge who ruled against you to change his or her mind.

A court might issue several decisions in the same case depending on what relief a party seeks. The *Legal Writer* will use "original decision" to refer to the decision that prompts you to move to reargue or renew. It's the decision in which the court ruled against you. You're asking the court to reconsider it.

Before you move to reargue, or renew, or both, you'll have to make different arguments depending on which motion you bring. You have different time limits for moving to reargue and moving to renew. And different rules exist if you're seeking to appeal the court's decision after moving to reargue or renew. This article will explain those nuances.

If you're seeking to reconsider the court's decision on a motion you lost when you defaulted, don't move to reargue or renew.[2] Move to vacate a default under CPLR 5015(a). Likewise, if you're asking a court to reconsider a trial decision, move under CPLR 4404.[3] This article will not discuss these motions.

Motions to Reargue and Renew: General Information

A party may move to reargue or renew. The court may not reconsider its own decision sua sponte if doing so affects a party's substantial right: "Pursuant to CPLR 5019(a), a trial court has the discretion to correct an order or judgment which contains a mistake, defect, or irregularity not affecting a substantial right of a party, or is inconsistent with the decision upon which it is based. However, a trial court has no revisory or appellate jurisdiction, sua sponte, to vacate its own order or judgment."[4]

Your motion to reargue, renew, or both should be made returnable to the judge who "signed the [original] order"[5] unless the original judge is unable to hear the case.[6] The rule is meant to prevent a judge sitting in the same court from reviewing, in an appellate capacity, another judge's decision.[7]

Some exceptions exist. If the "original motion was ex parte, granted on default, or 'so ordered' upon a stipulation," you don't need to make your motion to reargue or renew returnable before the same judge.[8] Under these circumstances, any judge of the same court may hear your motion.

If your case has been reassigned to another judge, the judge has the discretion to refer the motion to reargue or renew to the original judge.[9]

Under CPLR 2221(b), the Chief Administrator of the Courts "may by rule exclude motions within a department, district or county from the operation of subdivision (a) of this rule."

Move formally to reargue, renew, or both. Practitioners often write letters to the court asking the court to reconsider its decision. A judge might ignore your letter because you haven't formally moved to reargue, renew, or both.[10]

> A motion to reargue, renew, or both asks the same judge who ruled against you to change his or her mind.

Motions to reargue, renew, or both are like any other motion. They must be on notice to your adversary.

Many practitioners move by notice of motion. But some practitioners move by order to show cause. Moving by order to show cause gives the judge an opportunity to decide whether to entertain your motion.[11] When a court declines to sign your order to show cause, it "effectively kill[s] the motion."[12] You won't have the opportunity to argue the motion; your adversary won't need to spend time and money opposing the motion. If the court declines to sign your order to show cause, you (and your client) may choose to appeal the original decision.[13] The *Legal Writer* discusses more on appeals below.

As part of your motion papers, you may submit affirmations, affidavits, exhibits, and a memorandum of law.

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