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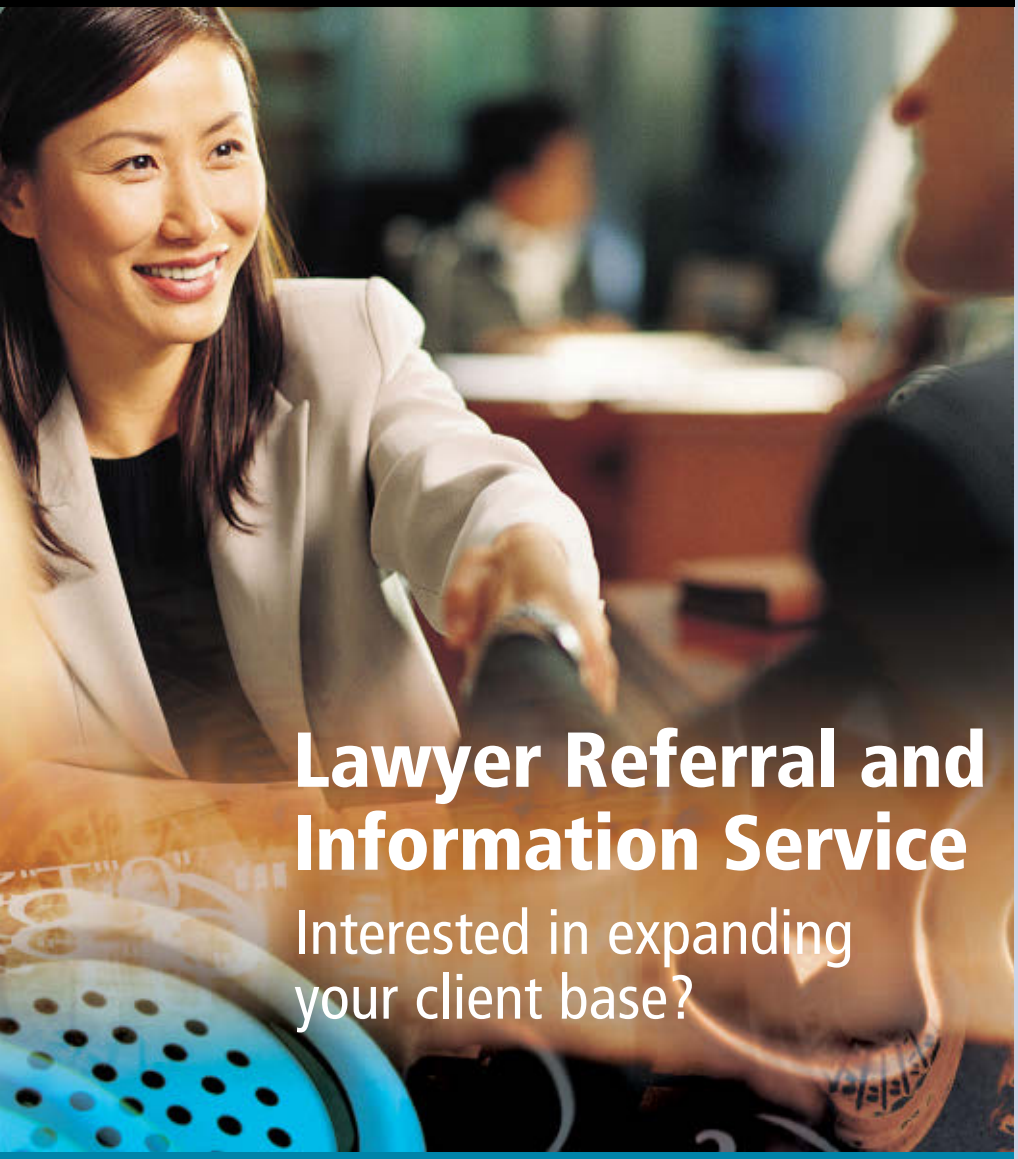

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DEPARTMENTS

New Members Welcomed available on pg. 64.

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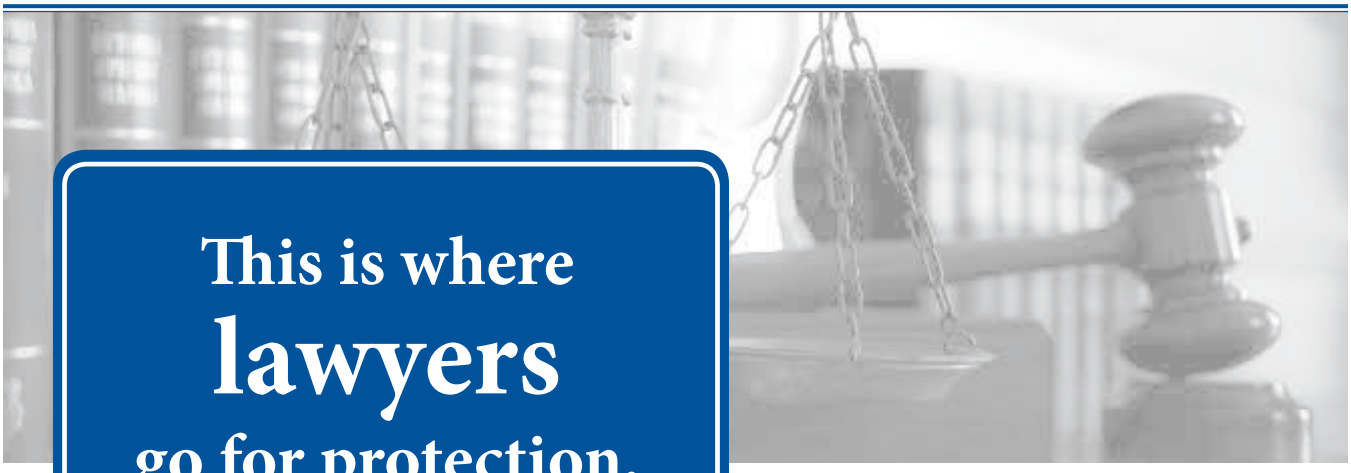

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DAVID P. MIRANDA

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

– Justice Anthony Kennedy, Majority Opinion, *Obergefell v. Hodges*.

The New York State Bar Association has long supported marriage equality, but even the most steadfast same-sex marriage supporters may have had a hard time predicting the breadth and magnitude of the recent U.S. Supreme Court decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The outcome is a testament to couples who not only pledged their love to one another but pledged to fight for those who viewed marriage – and nothing less – as the only "real path to profound commitment." *Id.* at 2594. The holding is also a testament to two principles that lie at the foundation of this decision and our nation's modern understanding of liberty: due process and equal protection of the law, as applied through the Fourteenth Amendment. *See* http://constitutioncenter.org/constitution/the-amendments/amendment-14-citizenship-rights.

Enshrined in our law almost 150 years ago, due process and equal protection have allowed our nation's policies to evolve and grow. A look into the recent past reveals how truly far we have come: overcoming a ban on interracial marriage (*Obergefell*, 135 S. Ct. at 2589 (citing *Loving v. Va.*, 388 U.S. 1, 12 (1967))); a statute proclaiming the husband as head of the household, and that "the wife is subject to him," having no separate "legal civil existence" (*id.* at 2603–04 (citing Ga. Code Ann. § 53-501)); and a prohibition on distributing contraception to unmarried people. *Id.* at 2604 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 446–54 (1972)). Statutes like these were on the books, with variations in states throughout the country, during our lifetimes. Today, the courts, lawyers, and laypeople see these statutes as an affront to an individual's ability to enjoy equal dignity under the law and as an obstacle to our progress as a free society.

In its ruling in *Obergefell*, which invalidated bans on same-sex marriage, the Court observed that the "nature of injustice is that we may not always see it in our own times." *Id.* at 2598. But, as lawyers, we have the duty to use the collective strength of our voices to be agents for change once we do see injustice: "The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a *charter* protecting the right of all persons to enjoy liberty as we learn its meaning." *Id.* (emphasis added).

With this charter comes great responsibility – for our society, for our courts, and for our Association. The *Obergefell* holding instructs us that the interrelation of due process and equal protection "furthers our understanding of what freedom is and must become." *Id*. at 2603.

The Due Process Clause and the Equal Protection Clause do not just provide a mechanism for correcting unjust statutes. They provide the foundation upon which liberty stands and ensure each of us that freedom is truly enjoyed by all through equal application of the law, regardless of race, gender, marital status, sexual orientation, or any other suspect classification.

The New York State Bar Association stands with those who seek equal dignity in the eyes of the law and has worked to advance equality in New York and throughout the nation.

In 2005, our House of Delegates called for granting same-sex couples the same rights and responsibilities available to heterosexual couples. Six years later, the Association endorsed legalization of same-sex marriage to ensure equal rights among all people, regardless of sexual orientation, concluding that civil unions conferred an inferior status. We fought hard for the passage of a precursor to the *Obergefell* ruling – the Marriage Equality Act, which legalized same-sex marriage here in New York. Then–State Bar President Vincent E. Doyle lauded the Legislature's passage of the bill:

> For the State Bar Association, it came down to a legal issue – the disparate treatment of a group of people because of who they are. When the issue was debated within our committees and House of Delegates, there was an overwhelming consensus that this discrimination was wrong and that

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as lawyers, we should advocate its end. I believe that the Association will look back at our advocacy as a shining moment in our history.

Our advocacy and our educational efforts continued to shine a light on the constitutional protections guaranteed to all New Yorkers and all Americans. In 2013, we joined amicus curiae briefs that challenged the constitutionality of California's Proposition 8, which prohibited same-sex marriages in the state, and the federal Defense of Marriage Act (DOMA), on the grounds that these violated the Equal Protection Clause by defining marriage exclusively as the legal union between a man and a woman. View the briefs at www.nysba.org/PerryBrief and www.nysba.org/WindsorBrief. In March of this year, we joined an amicus brief filed before the Court as it considered *Obergefell*; our argument was part of that which prevailed to make the right to marry among same-sex couples the law of the land.

We will continue to inform the public and our members on the latest developments in this area of the law. In September, we are hosting a continuing legal education seminar on some of the most pressing issues facing attorneys who represent LGBT clients in light of the *Obergefell* ruling, including how the decision affects same-sex parenting, estate planning, and representing transgender clients.

In its interpretation of the Equal Protection Clause in *Obergefell*, the Court stated that "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell*, 135 S. Ct. at 2603. As lawyers, and New Yorkers, let us take this as a challenge to reveal and reverse inequality. Together, we shall use our expertise and resources to continue to assist the struggle to end discriminatory practices throughout our great state and nation, and to increase access to justice for all. As the largest voluntary state bar association in the nation, we must champion equality at every opportunity. ■

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(12:00 p.m. – 2:00 p.m.; live & webcast)
September 24 Albany

Risk Management 2015
(9:00 a.m. – 1:00 p.m.)
September 25 Albany
October 2 Buffalo; Westchester
October 16 Long Island; Syracuse
November 13 New York City (live & webcast)

Cyber-Security and Compliance Solutions in E-Health
(9:00 a.m. – 1:00 p.m.; live & webcast)
October 8 New York City

The Comic Book Creator as a Client
(12:15 p.m. – 1:30 p.m.)
October 8 New York City

Basic Matrimonial Practice: What Information Can Be Obtained From a Tax Return?
October 8 Albany
October 15 Rochester
October 20 Long Island
October 21 New York City (live & webcast)

Henry Miller – The Trial 2015
October 30 Long Island
November 10 New York City
December 10 Albany (live & webcast)

So Custody Is an Issue: What Do We Do Now?
October 30 Long Island; Rochester
November 13 Westchester
November 20 Albany
December 4 New York City (live & webcast)

Business Organizations: Tax and Legal Aspects Compared
(9:00 a.m. – 1:10 p.m.; live & webcast)
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Fire Law 2015
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November 6 New York City

Attorney Escrow Accounts: What You Need to Know in New York
November 6 Syracuse (9:00 a.m. – 1:00 p.m.)
November 13 New York City (1:00 p.m. – 5:00 p.m.; live & webcast)
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Overcoming Obstacles to Develop Real Estate
(9:00 a.m. – 1:00 p.m.)
November 9 Albany
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(live & webcast)
November 12 New York City

Representing the Start Up Venture 2015
(two-day program; live & webcast)
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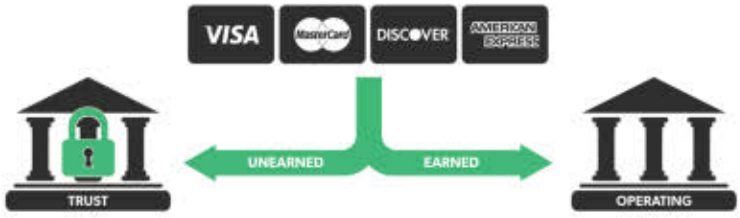

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Obergefell v. Hodges The Effect of the Decision and Estate Planning for LGBT Couples

By Joan M. Burda

Joan M. Burda (jmburda@mac.com) practices law in Lakewood, Ohio. She is the author of the award-winning *Estate Planning for Same-Sex Couples, Second Edition* (ABA 2012) and *Gay, Lesbian and Transgender Clients: A Lawyer's Guide* (ABA 2008). She writes about LGBT legal issues for various online and print publications. Ms. Burda frequently speaks on LGBT legal issues at national and international conferences and workshops. She is an Adjunct Professor of Law at Case Western Reserve University School of Law, where she teaches *Sexual Orientation and the Law.* She is also an adjunct faculty member in the Legal Studies Program at Ursuline College and teaches Contracts, Civil Procedure and Administrative Law. Ms. Burda graduated from Pepperdine University School of Law in Malibu and lives in Lakewood, Ohio with her spouse, Betsy. This article first appeared, in a slightly different format, in the *NAEPC Journal of Estate and Tax Planning*, Second Quarter, 2015, http://www.naepc.org/journal/issue21a.pdf. It is reprinted with permission of the author and the National Association of Estate Planners & Councils.

With the decision in *Obergefell v. Hodges*,[1] the United States Supreme Court has resolved the issue of marriage equality. Married lesbian and gay couples are legally married. Every state in the Union must recognize those marriages that already existed on June 26, 2015 and must permit same-sex couples to marry in the future.

The Court determined that marriage is a fundamental right and, as such, is not subject to the whim of the electorate. This opens up a wide range of benefits, rights, responsibilities and obligations to same-sex couples.

The effects of this decision on an expansive list of issues will play out over the next months and years. Contrary to the belief of many people within the LGBT community, the *Obergefell* decision has not resolved everything. Issues remain involving employment, property rights, parental rights, adoption, finances, housing, health care, transgender rights, and the list goes on.

The easy part is that all married couples will be treated the same under federal and state law, including state inheritance and intestacy statutes. Same-sex married couples will no longer be treated as legal strangers. They are entitled to the benefit of state and federal laws that apply to married couples.

Following the Supreme Court's decision, a cottage industry of legislative attempts to ignore or to minimize the decision has cropped up. These efforts will, for the most part, fail to be enacted; those that are will be subjected to successful court challenges and be deemed unconstitutional. It is unlikely the U.S. Supreme Court will take on another case involving LGBT issues anytime soon.

Estate planners for LGBT clients – individuals and couples, married or not – will need to consider a variety of issues.

These issues come to mind:

- Preexisting legal relationships that were never dissolved, including marriages, civil unions, domestic partnerships and Registered Domestic Partnerships (RDP);
- Stored genetic materials and ownership rights;
- Defining "heirs" and "descendants" when both parties are not legally, biologically or genetically related;
- Identifying and dealing with "families of origin" and "families of choice;" and
- How family law matters interact with estate planning.

Preexisting Legal Relationships

Marriage has been available to same-sex couples in the United States for 11 years. In 1989, Denmark became the first nation to recognize same-sex registered partnerships as marriages. The Netherlands began granting same-sex marriages in 2001. Therefore, it is possible for a same-sex couple to have a 25-year marriage.

There are more than 600,000 same-sex couples in the United States. The number of married same-sex couples is harder to pin down but the number is destined to explode with the *Obergefell* decision. Still, some couples are married; others are in formal civil unions or registered domestic partnerships; and some are in committed relationships but without any paperwork.

Before marriage became an option, a number of states allowed same-sex couples to enter into civil unions, domestic partnerships and Registered Domestic Partnerships. No one knows how many of those legally recognized relationships have never been formally dissolved. The states that provided that option to same-sex couples granted specific legal rights under state law. In some instances, the legal rights were synonymous with marital rights. And, those rights and obligations continued until the relationship was formally dissolved.

Too many members of the LGBT community adopted a cavalier approach to these legally recognized relationships. Where marriage is concerned, many believed those earlier marriages "didn't count" because they were not recognized by the couple's home state. Others believed the civil unions and domestic partnerships "didn't count" because they were not marriages.

Unfortunately, those legally recognized relationships continue to exist and that situation needs to be addressed.

Lawyers representing LGBT clients must inquire about previous relationships. If the couple has a civil union, domestic partnership or a RDP in addition to a marriage, the former must be dissolved along with the marriage. This presents an interesting situation for judges who have never faced this complication. Creative lawyering in pleading the issues and presenting the case is required.

Some states automatically upgraded civil unions and domestic partnerships to marriages. The state of Washington is one example.

In 2014, Washington became a marriage equality state. As of June 30, 2014, same-sex couples could get married but State Registered Domestic Partnerships (SRDP) were no longer available. SRDPs continue to be available to couples where at least one party is over 62. On July 1, 2014, Washington law automatically upgraded all existing SRDPs to marriages. The state claims it notified everyone of this change but there is no way to know how many never received that information.

At present, the federal government does not recognize any formal relationship other than marriage. However, there is no guarantee that will not change in the future. Many couples choose to retain their civil union or RDP status rather than get married. They face myriad legal issues in family, estate planning, tax and property matters when the relationship ends. All relationships end – either through death or dissolution.

Failure to consider these earlier relationships can impact taxes, inheritance, beneficiary designations, federal benefits, estate planning and subsequent marriages.

Reverse Evasion Statutes

Reverse evasion statutes present another issue that needs to be considered. Reverse evasion laws prohibit non-residents from entering into a valid marriage if the couple's home state will not recognize the marriage.

New Hampshire repealed its reverse evasion statute in 2014. It applied the repeal retroactively to the date when marriage equality became law. Massachusetts repealed its 1913 reverse evasion law in 2008. Illinois seems to be the only state that still has a reverse evasion statute[2] and has no plans to repeal the law.

The *Obergefell* decision does not resolve this issue. The states are required to recognize valid out-of-state marriages and permit same-sex couples to marry in the state. However, these Illinois marriages were invalid from the start and the effect of the *Obergefell* decision on Illinois' reverse evasion statute is not known.

These couples may believe they are married and hold themselves out as married but, in fact, are not married. But the marriage's validity could be called into question and result in a will challenge.

Consider a 2015 Ohio divorce case[3] that raises the issue. Jennifer and Cheryl, a lesbian couple, married in Massachusetts in 2006. One of the women owned a house in Massachusetts where the marriage ceremony occurred. The couple, however, continued to reside in Ohio. When Jennifer filed for divorce in 2013, Cheryl moved to dismiss on jurisdiction grounds. She claimed that "their purported marriage in Massachusetts was and is void." The trial court granted the motion and the Ohio 12th District Court of Appeals upheld that dismissal. Both courts cited the 1913 Massachusetts reverse evasion statute as determinative of the marriage's validity.

But the decision is wrong. The court misread the Massachusetts law and its application in similar cases. Unfortunately, it appears the plaintiff's lawyer failed to argue the matter properly.

In order for this couple to obtain a marriage license in 2006, they would have completed the "Notice of Intention of Marriage." The couple would have indicated their intent to reside in Massachusetts and become residents of the Commonwealth. Had they not done so, the clerk would not have issued the license. The fact they never became residents is considered a "technical defect" rendering the marriage "voidable." This "technical defect" is not central to the marriage itself. Until the *McKettrick* decision, no court had declared a marriage "void" based solely on the parties' failure to reside in Massachusetts.

The worst part is that Cheryl and Jennifer may still be married. Cheryl's lawyer failed to argue the marriage was "voidable" rather than void *ab initio*. He did not understand the Massachusetts law either. The legal issue involving the 1913 law was not as clear-cut as the defendant's lawyer and the courts thought.

If the couple is still married, and doesn't know it, how does that affect their future relationships and any estate plan each woman may develop? Can either seek a share of the other's estate as a "spouse"?

Representing LGBT clients can present unique challenges for lawyers. There are many resources available to ensure proper and intelligent representation. Lawyers who are unfamiliar with the legal issues facing LGBT clients should look to the following organizations for assistance. These organizations are ready and willing to consult with counsel on cases:

- Lambda Legal, lambdalegal.org
- National Center for Lesbian Rights, nclrights.org
- Gay and Lesbian Advocates and Defenders, glad.org
- Transgender Law Center, transgenderlawcenter.org

Asking clients questions about former relationships is the first step in identifying potential problems. Clients can be stubborn and refuse to believe they must dissolve those earlier relationships. Without doing so, however, the clients may find their estate plans are subject to challenge somewhere down the line.

> The *Obergefell* decision has not resolved everything. Issues remain involving employment, property rights, parental rights, adoption, finances, housing, health care, transgender rights and the list goes on.

Assisted Reproductive Technology (ART)

Lesbian and gay couples use assisted reproductive technology procedures at a consistently high rate. Gay male couples enlist an egg donor and a gestational surrogate. Lesbian couples use sperm donors and frequently have one woman contribute the ova for implantation in her partner's uterus. This is called "ovum sharing." That gives both women a genetic connection to the child.

The couple's marital status will now become an issue in determining parental rights and inheritance rights. Most people believe there is a marital presumption concerning parentage for children born during a marriage. Not all states recognize a marital presumption. And, even in those that do, it is a rebuttable presumption.

There is no reason to assume those states that have the marital presumption will apply it to same-sex married couples. That issue will be litigated and it is likely that states recognizing the marital presumption will apply it

to married same-sex couples provided they did not use a known donor. That would further complicate the situation.

Lawyers representing lesbian and gay parents usually advise the couple to obtain a second parent adoption because a court order will clearly establish parental rights. A birth certificate does not establish parentage, but an adoption order is entitled to recognition under the U.S. Constitution's Full Faith and Credit Clause.

Most same-sex couples use ART to start a family. However, if both parents are recognized by the state, the child has no intestate succession rights in the estate of the unrecognized parent.

Children born after the non-legally recognized parent dies may also be ineligible for Social Security Administration (SSA) survivor benefits because they are not included in the intestate succession statute.

ART includes genetic materials that are stored by individuals and couples. Some estimates place the number of stored "leftover" embryos at more than 1 million nationwide.

ART does not treat infertility and it is not the primary reason individuals and couples resort to it. These procedures offer alternatives methods of creating children. Prospective parents use ART procedures to have genetically and biologically related children.

The three primary procedures used in ART are in vitro fertilization (IVF), assisted insemination and surrogacy (traditional and gestational).

ART can use eggs and sperm donors that are unrelated to the intended parents. The donors usually do not intend to participate in raising the child. Many lesbian and gay couples, however, use known donors. Sometimes, the known donor is related to the other mother or father and that gives a genetic connection to both intended parents. However, using a known donor raises issues that must be addressed concerning the donor's legal rights, responsibilities and obligations.[4]

Extended Families

Estate-planning lawyers need to ask whether a client has LGBT children, grandchildren or other relatives. If they don't know, the issue remains important because discussing whether the client intends to include the children and grandchildren of any LGBT heir and their spouses or partners is essential.

The client must address existing children and grandchildren as well as posthumous children. The conversation may be difficult because some clients may be unaware that their son, daughter or grandchild is gay. The client may be estranged from his or her LGBT offspring. Nevertheless, the conversation must take place.

If the client intends to exclude the children of LGBT relatives, that fact must be explicitly stated in the estate documents. Clients may continue to be reluctant to recognize their LGBT offspring, let alone grandchildren born to those offspring.

Not all lesbian and gay couples will marry, but many same-sex couples will have children. As with unmarried heterosexual couples, the extended family must decide whether they wish to include or exclude any children from those relationships.

Intestate Succession

There is little guidance either by statute or case law for dealing with posthumous heirs in estate planning. Most of the existing cases deal with a posthumous child's entitlement to Social Security surviving dependent benefits.

The U.S. Supreme Court addressed this issue in *Astrue v. Capato*.[5] The case dealt with the right of a posthumously conceived child to qualify for Social Security survivor benefits. The Social Security Administration's position is that such children qualify for benefits only if they are entitled to inherit from their father under the state's intestacy statute. In a 9-0 decision, the Court agreed with the SSA's interpretation of the Social Security Act.

Children that are conceived and born after a parent dies must demonstrate eligibility to inherit under state law or satisfy a statutory alternative to the requirement. The Act's core purpose is to protect family members that depended on the decedent's income. This decision applies to all children including those born using ART techniques.

Under the Social Security Act, a child is a legal dependent and entitled to benefits if the deceased parent legally recognized the child, the parent was fully insured, and the child is under 18 and was dependent on the decedent at the time of death. A posthumous child cannot meet those statutory requirements.

The decision means that a posthumous child's right to receive SSA survivor benefits will depend solely on that child's right to inherit under the state's intestacy law. Intestacy laws vary by state and those variances affect a posthumous child's eligibility for these federal benefits.

The only way to overcome the Court's unanimous decision is for Congress to amend the Social Security Act and, given the current state of Washington, any such action is remote.

The intestacy situation must be addressed in light of property issues: (1) Did the decedent store genetic material? (2) Who is entitled to inherit that property? (3) Did the decedent make arrangements for the disposition of the material after he or she died? (4) Did the decedent intend to produce a child from the stored genetic material? These questions will undoubtedly lead to other questions and issues that have not yet been considered.

Surviving spouses have an advantage in the intestacy process because there is a presumption that a deceased spouse would want the surviving spouse to receive a portion of the estate. And, following that assumption, it is likely that a surviving spouse can make a legitimate claim to the stored genetic material. This assumption may also play out in cases where the decedent has no surviv-

ing spouse or children and the parents want to make all decisions concerning the disposition of the estate assets. Those assets would include the stored genetic material.

Posthumous Heirs

Posthumous children have the potential to affect the distribution of estate assets and the closing of an estate. Further, ART techniques are creating situations that make identifying a decedent's heirs difficult. A posthumous child's status is important because of the possibility that others left property "to the children" of the father in a will or if a child might be entitled to take from the estates of the father's relatives who die intestate.[6]

The number of cases involving requests to extract sperm from deceased men is increasing – from surviving spouses, partner, girlfriends and parents. Without statutory guidance, the courts are figuring out how to resolve these requests.

While most states have not addressed these issues, 11 states – Wyoming, Washington, Texas, Delaware, California, Ohio, Louisiana, North Dakota, Utah, Virginia and Florida – have enacted statutes concerning the inheritance rights of posthumous children.

Ohio's statute, O.R.C. § 2105.14, states that an intestate's descendants conceived before the person's death but born after are entitled to inherit. Any child conceived and born after the decedent's death cannot inherit. Under the *Astrue* decision, those posthumous children would be ineligible for SSA surviving child benefits.

Some of those states ban a posthumous child from receiving an intestate share unless specific conditions are met: the deceased consented to have children using his genetic material, there is written evidence, the child must be conceived within a set time after death and the prospective mother must be the surviving spouse.

Because state legislatures have failed to resolve the issue of whether a posthumous child can inherit from a decedent, the courts have stepped in to fill the void. The rationale used by most courts is a balancing act: the rights of the posthumous child to inherit, the state's interest in an orderly probate process, the rights of the existing heirs and the decedent's stated intent or preference. It must be noted that the existing case decisions deal with male decedents. However, the same arguments can be made for female decedents who stored eggs or fertilized embryos.

There is a need for finality in the probate process. Most of the cases deal with children who were actually born after the parent's death. A more difficult question deals with the right of a surviving spouse, partner or parent to litigate in an effort to keep an estate open pending a future conception and birth. Because probate can be a difficult and expensive process, states are reluctant to leave a case open indefinitely. A decedent's existing heirs would be denied their inheritance pending the possibility of another heir being born at some point in the future.

The Supreme Courts in New Hampshire, Arkansas and Michigan have decided in the past few years that posthumous children do not qualify to inherit under the state intestacy statute because they were not considered "in being" when the decedent died. In each case, the posthumous children were applying for Social Security survivor benefits.[7]

California, Colorado, Iowa, Louisiana, North Dakota, Texas and Virginia provide intestate succession rights to posthumous children with certain conditions.

Iowa requires a genetic relationship between parent and child, written consent signed by the decedent, and the child must be born within two years of the parent's death.

Louisiana law allows the child to be born within three years of the parent's death and allows other heirs to challenge the inclusion of a posthumous child.

North Dakota treats a posthumous child as a life in being if in utero up to 36 months or born within 45 months after the decedent's death.

In Virginia, intestate succession is permitted if the embryo is implanted before the physician is notified of the death or the decedent consented, in writing, to becoming a parent before implantation.

> The time when estate-planning lawyers operated in a world bereft of the angst faced by family law lawyers is over. Family law issues will play a role in estate planning involving LGBT couples – married and unmarried.

Estate Planning Challenges

There are issues of standing, intestate inheritances, definitions of "child," "descendant," "beneficiary," and "heir."

Preexisting trust provisions must be examined to determine whether the trustor intended to include post-

humous children born in the beneficiary class when the trust has already been paying out proceeds. Are those children entitled to receive retroactive as well as future payments? What about children who are not genetically related to the trustor?

Clients need to remember that stored genetic material, including embryos, is part of their estate. There are property rights in those stored materials that will be included in their probate estate.

Documenting the client's wishes concerning the disposition of that stored material is vital. Without documentation, a court will be called upon to issue an opinion and that may impact the estate in ways the testator did not intend or envision.

Many clinic forms include a provision that addresses the disposition of stored genetic materials. The contract language can be used to resolve conflicts between the signed agreement and the testator's will. The clinic agreement may contain post-death disposition provisions that are binding on family members. However, those contracts may also provide the stored materials are owned by the clinic and the intended parents have no claim on them.

Who Is a Descendant, Heir or Issue?

Wills and trusts provide for "children," "issue," "descendants" and "heirs," but must also define whether the class includes posthumous children. In the drafting process, the lawyer must also determine whether the class includes some but not others.

Some existing trusts were created long before ART was anything more than a plot point in a science fiction movie. Does a posthumous child, or the parent, have standing to bring legal action for a share in the trust? Can the other beneficiaries object to including those children? To whom does the fiduciary owe a duty?

In 2007, the New York County Surrogate's Court considered this matter in *In re Martin B.*[8] The grantor created several trusts in 1969 to benefit his children and grandchildren. The grantor's son died in 2001 but left cryopreserved sperm. His widow used the sperm and delivered two children in 2004 and 2006. She sought to have her sons included as trust beneficiaries. The trustees filed an action in Surrogacy Court requesting a determination of the sons' qualifications as descendants or issue. The court decided the children were descendants of the grantor and should be included because the grantor would have included them had he considered that ART would be possible.

A second New York case involved a trust created in 1959. The beneficiaries were the grantor's "issue" or "descendants" and their spouses. The trust provisions specifically excluded anyone who was adopted. The grantor's daughter and her husband engaged a gestational surrogate using a donated egg and the husband's sperm. The pregnancy resulted in the birth of twins in California. A California court declared the daughter and her husband the twins' legal parents. The trustees petitioned the court for an opinion concerning whether the twins were included since they were not genetically related to the grantor. The New York court decided the children were included because they were not adopted. Even though New York law declares surrogacy agreements to violate public policy, there is no prohibition against recognizing the California parentage decision.[9]

Virginia, on the other hand, does not recognize any child born more than 10 months after the parent's death. Georgia requires the child to be born within 10 months of death and survive at least 120 hours after birth. New York prohibits any posthumous child from claiming a share of the estate through its omitted child statute.[10]

The issue also arises in intestacy cases when the deceased parents have stored genetic materials – especially embryos. That situation exists in a Texas case[11] involving a two-year-old boy who inherited 11 frozen embryos from his deceased parents. The parents were murdered and had no will and left no instructions concerning the disposition of the stored embryos. The Master in Chancery recommended that the clinic retain the embryos in storage until the child turns 18, at which time he will have the right to decide what to do with them. The estate will remain open until the child turns 18 and will be responsible for paying the storage costs.

But there are many questions. If the child decides to use the embryos to create siblings, will they be entitled to inherit from the parents? There is no indication whether the estate is large enough to cover the storage costs. What happens if the storage costs exceed the estate assets? Do the needs of the surviving child trump those of the frozen embryos? Can this "property" be sold to support the existing child? No one has answered these questions.

Financial Considerations

If stored genetic material is property, can estate creditors force a sale in order to pay the decedent's debts? Must the estate remain open because these stored materials could produce a child and prospective heir? How long must the estate remain open? Must the existing heirs wait for their inheritance until the posthumous child is born? Who pays the expenses of keeping the estate open? Does the executor have a fiduciary duty to existing heirs or to the unborn prospective heir? How does the fiduciary decide? Who is paying the bills? How does a testator address these financial issues? How do clients who own stored genetic materials address whether they want a posthumous child?

In *Hecht v. Superior Court of California,*[12] the court decided that a decedent could bequeath stored sperm samples to his girlfriend for posthumous reproduction. The court held these cryopreserved genetic materials were estate assets and subject to distribution to named heirs. The case also involved inheritance and who is

responsible for paying the storage bill. But the decision does not address whether the decedent's estate must remain open, or for how long, because of the possibility of another heir.

States that have no laws addressing whether a posthumous child should inherit generally consider whether keeping the estate open would pose an unreasonable burden on the orderly administration of the estate or the other heirs.

Unintended Heirs

The Kansas "Craigslist Daddy" case is an excellent teaching opportunity because it presents a scenario of other potential problems for estate planners. Do known sperm and egg donors have parental rights, responsibilities and obligations for the children that evolved from their donation?

This Kansas case involved a married heterosexual man who answered a Craigslist ad from a lesbian couple looking for a donor. The couple did not want to pay a doctor or go through a clinic. They wanted a DIY insemination and, using a turkey baster, accomplished the task. After the child's birth, the couple ended their relationship, and the birth mother found herself needing to file for public benefits. The state required her to name the father and the donor was on the hook for child support.

The court deemed the agreement he signed with the lesbian couple to be unenforceable and did not absolve him of his parental obligations. That child is also considered his heir and entitled to inherit from him unless he disinherits the child. Had the matter been handled through a doctor, no one would ever have heard of William Marrotta.[13]

Asking whether clients engaged in donor activities – eggs or sperm – allows them to include a provision in their estate plan documents that excludes any children born from those donations as heirs.

In most cases, as was the case in Kansas, these known donors are "doing a favor" for someone they know or feel sorry for. They just want to help. What they do not consider is how their actions affect their estate plans. And, most lawyers do not ask clients whether they engaged in this type of activity. As a practical matter, most lawyers and their clients never thought to discuss these issues.

Some couples have leftover eggs, sperm and embryos and decide to "donate" them to another couple that cannot afford the costs involved but want children. In some cases, the donor couple knows the donee couple. These biological parents should take the prudent step and explicitly mention this donation in their estate documents and state that any children resulting from these genetic materials are not heirs and not entitled to any portion of their estate.

Couples that consult a lawyer before they make any decisions can prepare a contract concerning the donation that includes a waiver of their parental rights and responsibilities. This can be an important part of the overall estate plan.

Under no circumstances should a couple make such a donation in an informal way. Any such donation should be conducted through a clinic or physician, according to any state law governing the situation, and include signing the necessary forms with the facility that converts the couple into "unknown donors."

In some respects, ART is a Wild West scenario. The medical advances are outpacing the ability or interest of legislatures to keep up. Some legislatures are also reluctant to open up this complex issue because of the ethical, moral and religious issues that will be raised.

Family Law Issues

The *Obergefell* decision dealt only with marriage. The Justices may believe they resolved the issue but, in fact, myriad other matters are coming to the forefront.

Estate planners will need to become conversant with family law issues in their home state as well as states where clients own property. The time when estate-planning lawyers operated in a world bereft of the angst faced by family law lawyers is over. Family law issues will play a role in estate planning involving LGBT couples – married and unmarried.

This will become evident when clients have children. Determining whether both parties are legally recognized parents is the starting point. Documenting that fact in their estate plan documents is important. Attaching the adoption decree often works to defer family arguments over the children.

Couples who have not pursued adoption may want to reconsider that decision. Even if the couple's home state does not permit second parent adoption, other options may be available to establish parental rights. This includes filing a Shared Parenting Agreement in court and seeking a court order adopting it.

The issues facing unmarried same-sex couples will continue to cause problems for them. The states that oppose marriage equality may use that as an excuse to treat unmarried same-sex couples and their families as pariahs. State legislatures will be reluctant to extend family protections to these couples and many will believe the only way to protect their families is to get married. Since laws that assist unmarried heterosexual couples in family matters often will not apply to same-sex couples, there will be a need for creative solutions.

On another front, many LGBT individuals are estranged from their family of origin – their birth families. Estate planning under these circumstances can be challenging because members of the birth family may pop up when their gay relative dies. Anticipating that prospect, and dis-

cussing it with the client, allows the preparation of documents to address the issue and provide a solution.

When an LGBT individual has no relationship with his or her birth family, there may be strong ties with a "family of choice." While historically the natural object of our bounty is our birth family, people are free to name whomever they choose as the beneficiaries of their estate. And, with nonprobate planning, the probate estate can end up consisting of pots, pans and underwear.

Within the LGBT community, clients may leave nothing to their family of origin – and specifically disinherit them and leave everything to their family of choice.

Marriage equality means married same-sex couples will now benefit from state laws that protect the spouse's right to inherit. *Obergefell* will spell the end of birth families claiming "but they were just roommates."

Unmarried same-sex couples, however, will continue to depend on smart, creative lawyers to protect them and their assets from greedy relatives. The *Obergefell* decision will not help them.

Conclusion

Working with LGBT clients on their estate plans is a challenge that requires creative solutions to difficult problems. Lawyers who are unfamiliar with LGBT legal issues should avail themselves of the resources available for consultation. Lawyers can help their LGBT clients protect their joint and individual interests. Same-sex couples seeking estate-planning assistance will raise questions about marriage (should we get married?), children (how do I protect my partner?) and assets (can I prevent my family from interfering?). Lawyers need to be prepared to answer those questions. The answers are often different from those given to heterosexual couples and individuals in more traditional relationships.

Obergefell, *Lawrence v. Texas*,[14] *United States v. Windsor*,[15] and *Romer v. Evans*[16] are required reading for all lawyers who intend to market to the LGBT community. The LGBT community needs qualified, sensitive, creative lawyers to provide services. But it is important that those lawyers understand the community, its needs and the legal issues faced by lesbian, gay, transgender and bisexual clients. ■

1. 135 S. Ct. 2584 (2015).
2. 750 Ill. Comp. Stat. Ann. 5/217 (West 2008).
3. *McKettrick v. McKettrick*, 2015 WL 420185 (Feb. 2, 2015).
4. An excellent resource is *Assisted Reproductive Technology, Second Edition* (2011, American Bar Association) by Charles P. Kindregan, Jr. and Maureen McBrien.
5. 132 S. Ct. 2021 (2012).
6. *See In re Estate of Kolacy*, 753 A.2d 1257 (N.J. 2000).
7. *See Eng Khabbas v. Comm'r of Soc. Sec.*, 930 A.2d 1180 (N.H. 2007); *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008); *Mattison v. Soc. Sec. Comm'r*, 825 N.W.2d 566 (Mich. 2012).
8. 17 Misc. 3d 198 (Sur. Ct., N.Y. Co. 2007).
9. *See In re Doe*, 7 Misc. 3d 352 (Sur. Ct., N.Y. Co. 2005).
10. N.Y. Estates, Powers & Trusts Law 5-3.2(b).
11. *In the Estate of Yenenesh Abayneh Desta, Deceased*, No. PR 12-2856-1, Probate Court No. 1, Dallas Co., Texas.
12. 16 Cal. App. 4th. 836 (Cal. 1993).
13. *State of Kansas, ex rel. J.L.S. and M.L.B.S.*, Case No. 12D 2686; cjonline.com/sites/default/files/marottaRuling.pdf.
14. 539 U.S. 558 (2003).
15. 133 S. Ct. 2675 (2013).
16. 517 U.S. 620 (1996).

BURDEN OF PROOF

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Introduction

Last issue's column promised some suggestions for navigating the *Ashford/Kudisch* world, the subject of the last few columns. Serendipitously, I stumbled on a case that offered yet another variation on an appellate court assessing the credibility of a witness without the benefit of observing the witness firsthand, thus requiring a change of plans.

"Morally Certain"

Bottalico v. New York

Bottalico v. New York,[1] tried in Bronx County in 1952, was a garden-variety trip and fall case:

> Plaintiff was injured by falling down the subway steps leading from the street to the 149th Street-3rd Avenue station of the Lenox Avenue subway. It is his claim that the fall was caused by his left heel catching on a loose screw protruding one half to three quarters of an inch above the metal plating of a step.[2]

On appeal following a verdict for the plaintiff, the First Department recited the trial testimony about the happening of the accident:

> Plaintiff was rendered unconscious by the fall, his injury was serious, and he was hospitalized for a period of time. All he could testify as to the cause of the accident was that his foot "caught on something." The only evidence as to what his foot caught on was supplied by plaintiff's son, who was accompanying him at the time of the accident. It is upon the son's testimony that plaintiff's case rests, both as to the existence of the protruding screw and as to constructive notice to the city of the alleged defective condition. The only contemporaneous record made of the cause of the accident was the hospital record, from which it appears that plaintiff "slipped." As plaintiff's son accompanied him upon his admission to the hospital, presumably the information incorporated in the hospital record as to the cause of the accident came from either plaintiff or the son.[3]

The testimony of the plaintiff's son[4] was quite detailed:

> Plaintiff's son testified that at the time of the accident the plate from which the screw protruded was loose and wobbly. The "notice" to the city of this condition consisted of the testimony of the son that he used the same stairway two and one-half to three weeks previously and the same plate was wobbly at that time and the screws were loose. This was on the seventh or eighth step, the same step upon which his father fell, and he noticed on this prior occasion the same exact screw sticking up. He had spent five to seven seconds looking at that screw on the prior occasion. As he said, the screw was in the path of anyone who would be walking down the stairs, and we would have to assume from the testimony that this condition continued for two and one-half to three weeks until his father eventually fell over it. He testified that on the occasion of the accident he actually saw the front part of the heel of his father's left foot catch on the screw on the seventh or eighth step.[5]

Juxtaposed with the testimony of the plaintiff's son was abundant testimony proffered by the defense:

> As against the evidence of plaintiff's son, the log book of the board of transportation showed that the stairway in question had been inspected by a maintenance inspector two weeks prior to the accident and was found to be in good condition; the station clerk testified that he made his regular inspection of the stairway on the day of the accident and found everything in order, and that he inspected the stairway again immediately after the accident and noticed no loose screw or anything wrong with any step; the porter at the station testified with respect to his daily cleaning of the stairway and that he noticed nothing wrong with any step or any loose screw either before or after the accident; and the city detective who responded to the ambulance call in connection with the accident testified that the son pointed out the area from which his father started to fall and he looked the stairway over carefully and found it was in good condition, with no loose screws or plate. As he further testified, the son said he did not know how his father fell. It was part of this officer's job to try to ascertain how plaintiff fell and his inspection for the purpose indicated nothing

> wrong with the stairway. More particularly, he testified that if there were a screw out of place or a plate loose, he would have noted it in his memorandum book, which showed nothing of the kind.[6]

The First Department evaluated the conflicting evidence:

> Concededly, there is in this record a formal and even pat compliance with the requisite of notice. We find the testimony altogether incredible, however. After all discount is made of the testimony of subway employees as to the condition of the step on the day of the accident, and ignoring the testimony of the police officer and assuming that there was some defect in the step at that time, we cannot believe for a moment that such a condition had existed and gone unnoticed by others and unrepaired for two and one-half to three weeks, or that upon such prior occasion plaintiff's son had stood on the exact spot and contemplated the particular loose screw so that he could identify it with such exactness two and one-half to three weeks later and say that he actually saw the front of his father's left heel catch on that screw before he fell.
>
> Mindful as we are of the weight to be given a jury's verdict where the facts are disputed and issues of credibility are presented, we are not required to give credence to a story so inherently improbable that we are morally certain it is not true.[7]

The First Department reversed the judgment of the trial court and ordered a new trial, the only remedy available based upon its evaluation of the evidence.[8] It would, of course, be interesting to know what happened at the second trial.

From Whence the "Morally Certain" Standard?

The First Department's *Bottalico* decision does not contain a single case citation, and I did not find a pre-*Bottalico* reference to the "morally certain" standard.

The "morally certain" standard only appears in cases subsequent to, and citing, *Bottalico*. One First Department case citing *Bottalico* was affirmed by the Court of Appeals, *Hacker v. New York*.[9] However, *Hacker* was an appellate reversal of a verdict from a bench trial, where the appellate division may "grant such final judgment as it feels the trial court, upon the evidence, should have granted."[10] *Bottalico*, of course, was an appellate reversal of a trial judge's decision to uphold a verdict after a jury trial.

There is a 2011 trial-level decision citing *Bottalico*,[11] but the trial judge invoking the "morally certain" standard had the benefit of assessing the witness's credibility. The last appellate division citation quoting the "morally certain" language was the 1987 First Department decision in *Annunziata v. Colasanti*.[12] However, in *Annunziata*, the appellate court affirmed the trial court's decision setting aside the jury's verdict in favor of the defendant and went further, directing a verdict in favor of the plaintiff, perhaps because of the following cross-examination of the main witness for the defense:

> "Q. I just want to know, were you telling the truth then?
>
> "A. Then.
>
> "Q. So you're lying now?
>
> "A. All right. I'm lying."

Asked whether the boards were two feet long, he stated that they were not. The following ensued:

> "Q. Didn't you just testify when Mr. Vaughan asked you a question, didn't you say they were two feet long; isn't that what you said; isn't that what you said?
>
> "A. I misjudged.
>
> "Q. Were you telling the truth then, yesterday or were you telling the truth today, sir? Which is it?
>
> "A. Look –
>
> "Q. I just want to know, were you telling the truth yesterday or were you telling the truth today?
>
> "A. I'm trying to get the right answer.
>
> "Q. Was it yesterday or today?
>
> "A. Today.
>
> "Q. So, you were lying yesterday?
>
> "A. Yes."[13]

The most recent appellate decision where the appellate court reversed a trial court's entry of judgment on a jury verdict,[14] the scenario in *Bottalico*, was a 1968 decision by the Fourth Department in *Celani v. Interstate Motor Freight System, Inc.*[15]

Conclusion

Bottalico had a 15-year run, confined to the First Department, where the "morally certain" standard was invoked to reverse the findings of a jury, approved by the judge presiding over the trial, based upon an appellate panel's assessment of the credibility of a trial witness.

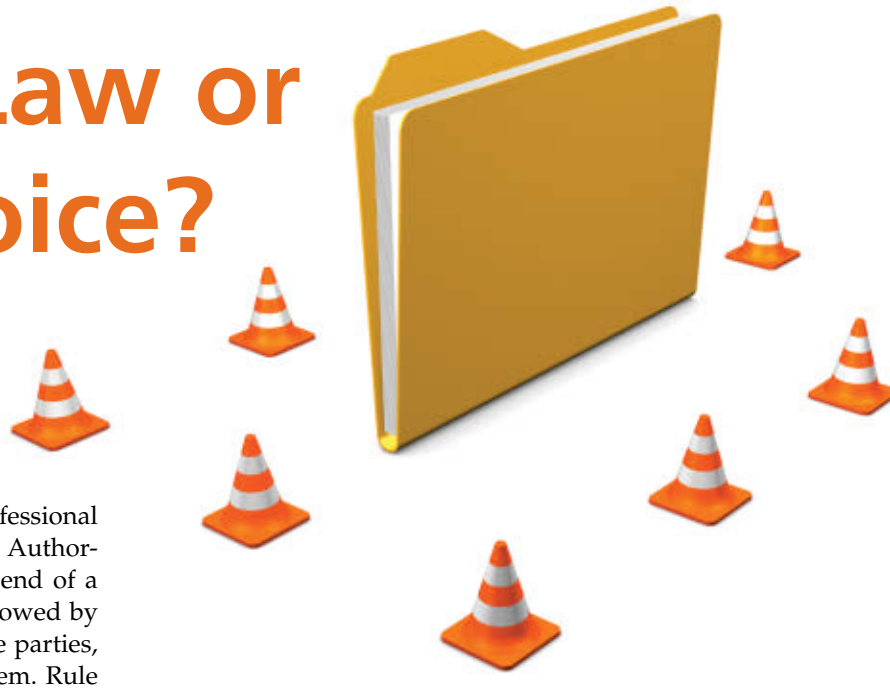
If appellate judges no longer reverse jury verdicts, approved by trial judges, because they find a witness's "story so inherently improbable that [they] are morally certain it is not true," on what basis, if any, can they reverse on the facts? Fodder for next month's column, dear reader, after which all will be revealed regarding *Ashford/Kudisch* (assuming I am not, once again, distracted).

Until then, enjoy the rest of your summer. ■

1. 281 A.D. 339 (1st Dep't), *appeal withdrawn*, 306 N.Y. 593 (1953).
2. *Id.*
3. *Id.* at 340. The decision does not explain how this unattributed statement in the hospital record was admitted.
4. The decision does not state the son's age, either at the time of the accident or at time of trial.
5. *Bottalico*, 281 A.D. at 340.
6. *Id.* at 340–41.
7. *Id.* at 341.
8. *See, e.g., Imbrey v. Prudential Ins. Co.*, 286 N.Y. 434, 441 (1941) ("Since there was a reversal upon the facts, in a case where the plaintiff was entitled to a jury trial as a matter of right (State Const. art. I, § 2), the Appellate Division could not give final judgment on findings contrary to those of the jury."); *see also Caldwell v. Nicolson*, 235 N.Y. 209 (1923) ("That a new trial instead of a dismissal follows a decision that the verdict of a jury upon some issue is against the weight of evidence, is so well settled as to require no discussion.").
9. 20 N.Y.2d 722 (1967).
10. *Hacker v. City of N.Y.*, 26 A.D.2d 400 (1st Dep't 1966), *aff'd*, 20 N.Y.2d 722 (1967) (citations omitted).
11. *Griffin v. Clinton Green S., LLC*, 2011 N.Y. Slip Op. 34040(U) (Sup. Ct., N.Y. Co. 2011), *aff'd in part*, 98 A.D.3d 41 (1st Dep't 2012).
12. 126 A.D.2d 75 (1st Dep't 1987).
13. *Id.* at 78.
14. *Celani* appears to have been a jury trial, though the decision does not explicitly say so. If it was a bench trial, then the most recent appellate decision reversing a trial judge's entry of judgment on a jury verdict was two years earlier in *Quinlan v. Consolidated Edison Co. of N.Y.*, 26 A.D.2d 913 (1st Dep't 1966).
15. 30 A.D.2d 772 (4th Dep't 1968).

Choice of Law or Law of Choice?

N.Y. Rule 8.5



By Devika Kewalramani and Robert B. McFarlane

Rule 8.5: Simply Complex

Last but not least in the New York Rules of Professional Conduct (the Rules) is Rule 8.5: Disciplinary Authority and Choice of Law. It is placed at the very end of a series of ethics rules addressing the obligations owed by lawyers and law firms to clients, courts, adverse parties, opposing counsel, colleagues and the legal system. Rule 8.5(a) functions as a disciplinary long-arm statute, in that it codifies New York's authority to discipline a New York-admitted attorney no matter where the conduct at issue occurs. Rule 8.5(b) describes which ethics rules will apply in an exercise of the disciplinary authority of New York State, including in instances where an attorney is admitted in multiple jurisdictions.

Consider the following: a lawyer admitted to practice in New York and Texas is working on a multi-state class action litigation that has been consolidated for trial in Florida. The lawyer works in the New York office of a California-headquartered law firm approximately eight months per year, and in its Texas office during the remainder of the year. The lawyer frequently works in transit, taking advantage of time spent on trains, planes and automobiles. The firm's clients are primarily based in California, and the majority of its revenues come from California. If, for example, a question arises as to confidentiality or conflicts of interest involving the lawyer's handling of the class action litigation, which state's ethics rules will, according to New York rules, apply?

This is exactly the type of complex question that Rule 8.5 is intended to resolve. In practice, however, Rule 8.5 raises just as many questions as it answers. These open questions are highly significant in light of the increasing nationalization, globalization and virtualization of the practice of law and may catch even the most diligent of lawyers by surprise. Rule 8.5 reads as follows:

> DISCIPLINARY AUTHORITY AND CHOICE OF LAW
>
> (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
>
> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For any other conduct:
>
> (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state; and
>
> (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Exercise of Disciplinary Authority: Rule 8.5(a)

Rule 8.5(a) stands for the proposition that "[a] lawyer admitted to practice in [New York] is subject to the disciplinary authority of [New York], regardless of where the lawyer's conduct occurs." For lawyers admitted in more than one jurisdiction, Rule 8.5(a) further provides that

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"[a] lawyer may be subject to the disciplinary authority of both [New York] and another jurisdiction where the lawyer is admitted for the same conduct."

Although Rule 8.5(a) may be longstanding, it is not as clear as its framers may have anticipated. Right off the bat, the term "admitted to practice" is not defined, thus generating questions regarding to whom the Rule actually applies. It is well-established that if a lawyer is admitted in New York State – whether admitted in another jurisdiction or not – the Rule applies irrespective of where the conduct occurs.[1] Moreover, if a lawyer is *only* admitted in New York State and in no other jurisdiction, conformity with the Rule will be the standard against which that lawyer's conduct will be judged by New York disciplinary authorities.[2]

However, to what extent does the Rule apply to a lawyer who practices before a particular New York court or tribunal for purposes of a specific proceeding, but who is not generally admitted to practice in New York? Professor Roy Simon suggests that Rule 8.5(a) should be read to apply to all of the following: (1) permanent members of the New York Bar in good standing (excluding inactive, suspended, or disbarred lawyers); (2) out-of-state or foreign lawyers admitted for purposes of a particular proceeding before a federal or state court or administrative agency located in New York State; (3) foreign legal consultants who are admitted in New York for limited purposes pursuant to 22 N.Y.C.R.R. Part 521; and (4) in-house counsel who are duly registered pursuant to 22 N.Y.C.R.R. Part 522.[3] In addition to the above, New York State disciplinary authorities may impose discipline against lawyers who are *not* admitted in New York State on the basis of violating Rule 5.5, which prohibits engaging in the unauthorized practice of law.

Choice of Law: Rule 8.5(b)

Rule 8.5(b) governs which jurisdiction's ethics rules will apply in an exercise of the disciplinary authority of New York State. It is designed to ensure that New York disciplinary authorities apply only one set of ethics rules to any particular conduct by a lawyer.[4] Rule 8.5(b) distinguishes between an attorney's conduct "in connection with a proceeding in a court,"[5] and "any other conduct."[6] For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice, "the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise."[7] For all other conduct, "if the lawyer is licensed to practice only in this state the rules to be applied shall be the rules of this state."[8] However, if a lawyer is admitted in both New York and another jurisdiction, whether the laws of another admitting jurisdiction apply will generally depend upon (1) where the New York lawyer has been "admitted to practice" or may be deemed to have been admitted to practice; (2) where the lawyer "principally practices"; and (3) whether the "predominant effect" of the lawyer's practice will be in another admitting jurisdiction or in New York.[9] Generally speaking, the rules to be applied to such a lawyer shall be the rules of the admitting jurisdiction in which the lawyer principally practices, unless the particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is admitted to practice.[10]

Conduct in Connection With a Court Proceeding

Rule 8.5(b)(1) is notable in two respects. First, by its terms it applies only to proceedings before a "court" and seemingly does not include conduct occurring before an administrative tribunal or other quasi-judicial body. The limitation of Rule 8.5(b)(1) to conduct before a "court" as opposed to a "tribunal" was apparently deliberate, as the drafters explicitly define the term "tribunal"[11] in the Rules and use it throughout the Rules, most notably in Rules 3.3, 3.4, 3.5 and 8.4. As noted by the N.Y. State Bar Association Committee on Professional Ethics (the Committee), "[i]n adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word 'tribunal' for the word 'court' . . ." [12]

In that opinion, the Committee concluded that Rule 8.5(b)(2), as opposed to Rule 8.5(b)(1), applied to determine which jurisdictions' ethics rules apply to a New York-licensed federal government attorney appearing before the Merit Systems Protection Board, an administrative tribunal established to hear appeals by federal government employees from adverse employment actions. In formulating its opinion, the Committee "[did] not believe [it was] free to read 'court' in Rule 8.5(b)(1) to include administrative tribunals . . ."[13] Likewise, in N.Y. State Bar Op. 1011 (2014), the Committee found that Rule 8.5(b)(2), rather than Rule 8.5(b)(1), is applied to establish which jurisdictions' ethics rules apply to a New York attorney who made false representations to the Department of Labor as part of an application for a foreign-workers' visa.

Second, Rule 8.5(b)(1) extends only to conduct "in connection with a proceeding" in a court. It is logical that "once [a] matter has been filed, the phrase 'in connection with a proceeding' should be read to encompass all future factual and legal investigation, drafting court papers, dealings with opposing counsel, court appearances, and all other work billed to the matter in question."[14] However, it is unclear whether pre-filing conduct constitutes "conduct in connection with a proceeding." Professor Simon suggests that Rule 8.5(b)(1) does not apply to conduct until a proceeding is actually filed.[15] Consequently, the ethics rules governing a litigator's conduct may change once a suit is filed.[16] This is similar to the scenario envisioned in N.Y. State Bar Op. 1054 (2015), where the Committee opines that a lawyer admitted in New York and Pennsylvania seeking to practice in federal court in Virginia is generally subject to the ethics rules of

Virginia when representing a client in a proceeding in a court in that state, but subject to the rules of the "admitting jurisdiction" (subject to an analysis under Rule 8.5(b)(2)) when not representing a client before a court there.

Any Other Conduct

Rule 8.5(b)(2) applies to "any other conduct" that does not occur "in connection with a proceeding in a court" and is therefore not covered by Rule 8.5(b)(1). This is not merely a distinction between litigation and non-litigation practices. Professor Simon identifies six major categories of conduct to which Rule 8.5(b)(2) applies, including

1. litigation activities in a court before which a lawyer has not been admitted, including (a) activities that occur before a lawyer is admitted *pro hac vice*, and (b) conduct by associates who are assisting a partner with litigation in a court where the partner is admitted, but where the associates are not and may never be admitted;
2. all legal services other than litigation, including all transactions, office practice, counseling, appearances before legislative bodies, and other advocacy not connected to court proceedings;
3. activities where a lawyer is not representing a client, such as conduct related to the business of practicing law;
4. conduct unrelated to the practice of law, such as a lawyer's personal life;
5 alternative dispute resolution proceedings where a lawyer is representing a client; and
6. alternative dispute resolution proceedings in which a lawyer is serving as a neutral.[17]

The Committee has similarly observed that "all other conduct" encompasses various categories of conduct, including

1. adversarial matters (i.e., matters with an opposing party) that are pending before (a) a state or federal agency, (b) an arbitrator not annexed to a court, or (c) some other adjudicative body that is not a "court" (see Rule 1.0(w) defining "Tribunal");
2. non-adversarial matters before a government agency, such as prosecuting patents in the U.S. Patent and Trademark Office, filing papers with the Securities and Exchange Commission, and requesting private letter rulings from the Internal Revenue Service;
3. transactional matters, such as mergers and acquisitions, contract negotiations, and formation of partnerships; and
4. counseling-only matters, such as tax advice, estate planning advice, advice on corporate by-laws, and other counseling matters involving neither a government agency nor an opposing party.[18]

Thus, the scope of Rule 8.5(b)(2) is enormous, and understanding its application and effect is crucial for any lawyer admitted in more than one jurisdiction and engaged in multijurisdictional practice, including temporary practice by a New York lawyer in another state pursuant to its versions of Rule 5.5 (addressing multijurisdictional practice) and Rule 8.5 of the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules).[19]

Subsection (i) to Rule 8.5(b)(2) provides that where "the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state."[20] For lawyers admitted in both New York and another jurisdiction, Rule 8.5(b)(2)(ii) provides that "the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer *principally practices*; provided, however, that if the particular conduct clearly has its *predominant effect* in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct" (emphasis added). Thus, the rules of the place where the conduct has its "predominant effect" will control if the lawyer is admitted there; otherwise the place of the lawyer's principal practice will control.[21]

> Rule 8.5(a) functions as a disciplinary long-arm statute. Rule 8.5(b) describes which ethics rules will apply in an exercise of the disciplinary authority of New York State.

Principal Practice

Rule 8.5(b)(2)(ii) provides no guidance as to how a lawyer should determine the jurisdiction in which he or she "principally practices." Such lack of guidance has significant practical implications for attorneys practicing in multiple jurisdictions, as one can imagine several different approaches to this issue. For instance, lawyers could determine that they "principally practice" in the jurisdiction in which their law firm has its offices, even if the firm is headquartered in a different state or foreign country. Or, they could look to the location of their clients' business operations or residence. Where the lawyers are litigators, they could look to the state in which they most often try cases. Alternatively, they could consider some combination of these and other factors to determine where they "principally practice" and thus what jurisdiction's rules would apply to their conduct.

With the growing trend of legal services being delivered over the Internet and the resulting decline in the significance of a "brick and mortar" office presence, where a lawyer "principally practices" is becoming increasingly unclear. Professor Simon suggests that the following five

factors are relevant in determining where a lawyer "principally practices":

1. calendar days spent working in each jurisdiction;
2. hours billed in each jurisdiction;
3. location of clients served;
4. activities in each jurisdiction; and
5. special circumstances (such as a recent move, an extended illness, or a natural disaster).[22]

Professor Simon would give dispositive weight to the first factor, calendar days spent working in each jurisdiction, in a typical case.[23]

However, other factors besides time could be relevant in determining where a lawyer principally practices, depending on the facts and circumstances pertaining to that individual lawyer.[24] Thus, Rule 8.5(b)(2)(ii) leaves the dual or multi-licensed lawyer with a multijurisdictional practice with no bright-line rule for determining which jurisdiction's ethics rules would apply to his or her conduct.

Predominant Effect

Pursuant to Rule 8.5(b)(2)(ii), if the lawyer's conduct clearly has its "predominant effect" in another jurisdiction, and the lawyer is licensed to practice in that jurisdiction, then the rules of that jurisdiction "shall be applied to the conduct." Comment [5] to Rule 8.5 notes that "[f]or conduct governed by paragraph (b)(2), as long as the lawyer's conduct conforms to the rules of the jurisdiction in which the lawyer principally practices, the lawyer should not be subject to discipline unless the predominant effect of the lawyer's conduct will *clearly* occur in another admitting jurisdiction" (emphasis added). In particular, in determining where the "predominant effect" will occur, factors to be considered include (1) where the clients reside and work; (2) where any payments will be deposited; (3) where any contract will be performed; and (4) where any new or expanded business will operate.[25]

To illustrate, in N.Y. State Bar Op. 1027, the Committee observed that if a lawyer principally practices in Washington, D.C. but is advising a New York client on how to draft a commercial contract among several parties, all of whom live and work in New York, and the contract will be performed entirely in New York, then the conduct "clearly has its predominant effect" in New York. The opinion added that if some of the parties to the contract work outside of New York, or if part of the contract will be performed outside New York, then the lawyer's advice may not "clearly" have its predominant effect in New York, in which case the ethics rules applicable under Rule 8.5(b)(2)(ii) will be the rules of the jurisdiction in which the lawyer principally practices.

As Professor Simon notes, this language suggests that the "predominant effect" exception is meant to be construed narrowly.[26] Moreover, the exception applies only if the predominant effect is clearly in another jurisdiction, *and* the lawyer is licensed to practice in that other jurisdiction. Thus, it remains only an exception that dual or multi-licensed lawyers must consider in evaluating their conduct. For example, N.Y. State Bar Op. 1027 points out that if the dual-licensed lawyer admitted in New York and D.C. principally practices in D.C., but the predominant effect will clearly be in a jurisdiction where the lawyer is *not* licensed to practice, then the ethics rules of Washington D.C. (the jurisdiction where the lawyer principally practices) will apply even though the predominant effect is clearly elsewhere.

Comment [5] to Rule 8.5 further notes that "it may not be clear whether the predominant effect of the lawyer's conduct will occur in an admitting jurisdiction other than the one in which the lawyer principally practices." In this regard, the New York rule is different from ABA Model Rule 8.5(b)(2), which would not subject a lawyer to discipline "if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer *reasonably believes* the predominant effect of the lawyer's conduct will occur" (emphasis added). Rule 8.5(b)(2)(ii) provides no similar safe harbor for the lawyer who believes in good faith that his or her conduct has a "predominant effect" in a jurisdiction other than New York, and tailors the conduct to that jurisdiction's rules of professional conduct.

Conclusion

Although Rule 8.5 was likely meant to provide guidance for lawyers admitted and practicing in New York and another jurisdiction, in practice it offers little in the way of a bright-line rule to guide attorney conduct. New York courts have previously rejected attempts to clarify the Rule's ambiguities, including recommendations by the New York State Bar Association's Committee on Standards of Attorney Conduct (COSAC).[27] With no clarification on the horizon as to how to better understand, interpret and apply Rule 8.5, dual or multi-licensed lawyers with multijurisdictional practices are advised to cautiously consider the long-arm reach of Rule 8.5 in organizing their conduct. But that is not necessarily all that New York lawyers need to be concerned about. Remember, all Rule 8.5 can do is to lay out the situations in which New York may discipline a lawyer. It can only determine when it will exercise its own disciplinary authority over a lawyer's conduct. New York cannot restrict the disciplinary authority of another state. For example, a New York lawyer permitted to appear before the Workers' Compensation Board of another jurisdiction might be disciplined by the appropriate disciplinary authority of that jurisdiction (assuming the lawyer is subject to process there), regardless of whether Rule 8.5(b)(1) provides that the lawyer is subject to the disciplinary body of another state when appearing before an administrative tribunal. Thus, New York lawyers engaged in multijurisdictional practice should be careful to avoid the potential risk of being subject to discipline by another jurisdiction for violation of its ethics rules. ■

1. N.Y. State Bar Op. 815 (2007); N.Y. State Bar Op. 1023 (2014); N.Y. State Bar Op. 1041 (2014).

2. N.Y. State Bar Op. 1041 (2014).

3. Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated (Simon) 1886–87 (2015 ed.).

4. N.Y. State Bar Op. 1027 (2014).

5. Rule 8.5(b)(1).

6. Rule 8.5(b)(2).

7. Rule 8.5(b)(1).

8. Rule 8.5(b)(2)(i); N.Y. State Bar Op. 1011 (2014).

9. *See* N.Y. State Bar Op. 1041 (2014).

10. *Id.*

11. Rule 1.0(w) provides that

> tribunal denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

12. N.Y. State Bar Op. 968 (2013).

13. *Id.*

14. Simon at p. 1892.

15. *Id.* at p. 1893.

16. *Id.*

17. Simon at pp. 1895–96.

18. N.Y. State Bar Op. 1027 (2014).

19. New York has not adopted the multijurisdictional practice rules in ABA Model Rule 5.5, which, among other things, allows a lawyer admitted in a state to temporarily practice law in another state where the lawyer is not admitted, with certain conditions and limitations.

20. Interestingly, Rule 8.5(b)(1) speaks of "admitted to practice" whereas Rule 8.5(b)(2) speaks of "licensed to practice." Just as Rule 8.5 does not define "admitted to practice," it also does not specify what exactly it means by "licensed to practice in this state." Professor Simon suggests that it has the same meaning as "admitted to practice . . . generally" in Rule 8.5(b)(1), but does not include lawyers admitted *pro hac vice*. Simon at 1898. He further suggests that it should apply to registered in-house counsel and lawyers who are admitted to practice in New York by virtue of their status as foreign legal consultants. *Id*. Some ethics opinions in New York have concluded that if a New York lawyer is permitted to engage in conduct in a foreign jurisdiction without being formally admitted there, even though such conduct would constitute the practice of law in New York, the lawyer should be deemed to be "licensed to practice" in the foreign jurisdiction. N.Y. State Bar Op. 1042 (2014); N.Y. State Bar Op. 815 (2007).

21. N.Y. State Bar Op. 1041 (2014).

22. Simon at pp. 1901–03.

23. *Id.*

24. *See* N.Y. State Bar Op. 1027 (2014) (noting that with the decrease in the importance of a lawyer's physical location, the jurisdiction in which a lawyer "principally practices" is becoming less certain); N.Y. State Bar Op. 1041 (2014) (noting that where a practice is "based" is a significant factor, but ultimately such determination is a question of fact).

25. *See* N.Y. State Bar Op. 1027 (2014).

26. Simon at p. 1904.

27. COSAC's December 23, 2014 Proposed Amendments to the New York Rules of Professional Conduct and Related Comments based on its review of the changes to the ABA Model Rules resulting from the work of the ABA Commission on Ethics 20/20, and COSAC's March 25, 2015 Summary of Revisions Based on Public Comments thereto, recommended no changes to Rule 8.5 or its Comment.

Only Whites Need Apply

The Strange Case of Stuyvesant Town

By Mark C. Zauderer

Few would believe that a New York court would uphold the right to discriminate on the basis of race in one of New York City's largest housing developments – and that leading New York lawyers defended that right. Yet, that is precisely what the N.Y. Court of Appeals did, within the lifetime of many lawyers practicing today, in the 1949 case of *Dorsey v. Stuyvesant Town Corp.*,[1] in which the Court, in a 4-3 decision, held that Stuyvesant Town was a private housing entity that had the right to exclude non-whites from consideration as tenants.

The Background

Constructed in the 1940s by the Metropolitan Life Insurance Company and its wholly owned subsidiary, Stuyvesant Town Corporation, the Stuyvesant Town housing development traces its roots to the post–World War I housing shortage that plagued New York State and the concomitant efforts to increase private investment in housing. Prior to 1922, life insurance companies were prohibited from investing their large pools of capital in real estate due to their fiduciary responsibilities and the uncertain nature of property transactions.[2] However, in 1922, legislation was passed to allow these companies to invest up to 10% of their assets in low-rent housing.[3] Because the legislation was passed only after extensive negotiations between lawmakers and Metropolitan Life representatives, the press dubbed the new law the "Metropolitan Bill."[4] Although the legislation had a sunset provision and expired after a few years, New York legislators passed a similar amendment to the Insurance Law in 1938 to once again allow insurance companies to invest their assets in real estate.[5]

After it became apparent to public officials that insurance companies were unwilling to invest in housing without the aid of laws that could assure them high profits and low risk, New York officials, including Robert Moses (known as New York's "master builder"), began discussing slum clearance and possible redevelopment legislation with several life insurance companies.[6] The first law to result from these discussions was the Urban Redevelopment Corporations Law (URCL), which was enacted in 1941.[7] Although it offered a number of incentives for private investment, the law also contained a number of restrictions, and the URCL was ultimately ineffective. Thus, in 1942, in another attempt to spur private investment in housing, the Legislature passed the Redevelopment Companies Law (RCL), which offered greater incentives for private investment and included fewer restrictions than the URCL.[8] Yet, insurance companies generally seemed uninterested in taking any action under the law.[9]

Frustrated by the limited impact of these laws, Robert Moses contacted Metropolitan's chairman, Frederick H. Ecker, and solicited his views as to what changes would need to be made to the RCL to spur private investment in New York City housing.[10] Following those discussions, and faced with the Hobson's choice of "housing or no housing," Governor Thomas E. Dewey signed certain amendments to the RCL into law in March 1943, despite his own doubts about some of the provisions, stating, "The law permits and encourages the entrance into the housing field of life insurance companies. Since the enactment of the original law, there have been no projects. The amendments made by this bill are designed to attract private investment funds into the housing field."[11]

In April 1943, New York City Mayor Fiorello LaGuardia announced that Metropolitan would be the first insurance company to redevelop property under the newly amended law.[12] The development, named Stuyvesant Town, would consist of 35 13-story buildings on a 72-acre tract between East 14th Street and East 20th Street and 1st Avenue and Avenue C, and would house more than 24,000 people.[13] For its part in the project, "New York City would assemble land, condemn the site's buildings, evict residents from their homes, release public streets for incorporation within Stuyvesant Town, and grant lucrative tax exemptions to Metropolitan."[14] However, the entire cost of the acquisition of the land and the construction of the project would be borne by Metropolitan – a figure that would eventually reach $90 million.[15]

Unprecedented in its scope, the development received enormous buzz but a mixed reaction. It was described either as a "suburb in the city" by supporters, or a "medieval walled city" by its critics.[16] The most controversial and divisive aspect of the project, however, was Metropolitan's refusal to rent to African-Americans and other minorities.[17]

On May 19, 1943 – one day before the City Planning Commission was to vote on whether to approve the project – Ecker announced that Stuyvesant Town would be for whites only.[18] He attempted to justify Metropoli-

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tan's discriminatory policy by stating that "Negroes and whites don't mix. Perhaps they will in a hundred years, but not now. If we brought them into this development, it would be to the detriment of the city, too, because it would depress all the surrounding property."[19] Notwithstanding Ecker's comments, the Commission approved the project by a vote of 5-1.[20]

Weeks later, on June 3, 1943, the Board of Estimate met to determine whether to approve the City's contract with Metropolitan and Stuyvesant Town.[21] The Board heard arguments from both sides during a three-and-a-half hour meeting, where civil rights advocates described the project as having a "public character" due to its dependence on eminent domain and tax exemption, and therefore subject to constitutional prohibitions against discrimination, while Moses described those government benefits as "minimum inducements" needed to encourage slum clearance and new private housing.[22] After considering these arguments, and possibly out of fear of the effect that Stuyvesant Town's failure would have on future private investment in housing and slum clearance, the Board voted 11-5 to approve the project.[23]

Disappointed that the ordinance did not apply to Stuyvesant Town, civil rights advocates and other officials attempted to obtain a legislative solution on the state level. Approximately 15 anti-discrimination bills were introduced in the New York Assembly between 1944 and 1948, but all 15 bills were rejected by the Assembly.[29] Unable to prevent Stuyvesant Town's practice of discrimination through legislative means, opponents of the practice had no choice but to turn to the courts.

In late 1946, the American Civil Liberties Union, the American Jewish Congress, and the National Association for the Advancement of Colored People (NAACP) commenced an action in New York County Supreme Court against Metropolitan on behalf of three African-American veterans: Joseph R. Dorsey, Monroe Dowling, and Calvin B. Harper.[30] The plaintiffs then moved for an injunction pendente lite "to enjoin defendants from 'refusing, withholding from, or denying to any of the plaintiffs or any others similarly situated' any of the apartments in the housing project known as Stuyvesant Town 'because of the race or color of said person or persons.'"[31] In response,

While the Public Housing Law prohibited discrimination in connection with *public* housing projects, that prohibition did not apply to *private* housing.

Almost as soon as the Stuyvesant contract was approved, efforts were made by certain City officials and civil rights advocates to pass legislation requiring that the contract be revised to prohibit discrimination.[24] The legislation was viewed as necessary because, while the Public Housing Law prohibited discrimination in connection with *public* housing projects, that prohibition did not apply to *private* housing, and the urban redevelopment laws did not otherwise address the subject.[25] As a result, City Councilmen Stanley M. Isaacs and Adam Clayton Powell, Jr. recruited Charles Abrams, one of the world's leading housing consultants and urban planners, to draft an anti-discrimination ordinance that would apply to Stuyvesant Town.[26] The ordinance that Abrams subsequently drafted would have prohibited any "previous or future redevelopment corporation" organized under the RCL from denying "directly or indirectly to any person, because of race, color, creed or religion, any of the dwelling accommodations in such property or projects."[27] On May 15, 1944, after a public debate and apparently afraid of what Metropolitan would do if its discriminatory rental policy were prohibited, the City Council passed a revised version of the ordinance so that it would apply only to *future* projects.[28] The Board of Estimate gave its approval on June 8, 1944, and Mayor LaGuardia signed the ordinance, as revised, into law on July 5, 1944.

Metropolitan conceded that it discriminated against African-Americans by refusing to rent to them, but argued that it was free to do so as a private landlord.[32] Because no one denied that a *private* landlord at the time possessed the right to "select tenants of its own choice even though it may result in the exclusion of prospective tenants because of race, color, creed or religion," the issue became whether developments like Stuyvesant Town were in fact private, or whether their creation and operation represented *state* action and constituted *public* projects, thereby prohibiting discrimination against certain categories of tenants under the U.S. and New York State Constitutions.[33]

In support of their motion, the plaintiffs argued that Stuyvesant Town, though not a public corporation, was a "'repository of official power'" because it was dependent on the use of eminent domain and tax exemption and that, as a result, the project was "in the nature of a 'public undertaking' and so subject to the same limitations . . . applicable to public housing projects."[34]

The Supreme Court disagreed and denied the plaintiffs' motion in a decision and order dated July 28, 1947. It concluded that the

> fundamental fallacy in plaintiffs' argument is that it confuses "public use" and "public purpose" with "public project," and assumes that, because the work of redevelopment and rehabilitation is a public pur-

> pose, the project involved is necessarily a public project. But the public use and purpose involved terminates when the work of redevelopment is completed.[35]

The court went on to hold that

> defendants may exercise the usual powers and functions of an owner of a privately owned and controlled apartment house, and that it may, in managing the property, select its tenants upon any basis which, in its judgment, is most likely to insure the success of the project and the safety of its investment.[36]

After the Appellate Division unanimously affirmed without opinion the Supreme Court's decision and order on December 11, 1948,[37] the plaintiffs appealed to the Court of Appeals "as a matter of right" under the former Civil Practice Act because the case raised constitutional questions.[38] In doing so, the plaintiffs argued that "discrimination by private agencies is constitutionally forbidden when it is supported, participated in, effectuated or made possible by state action," and that under this test, Stuyvesant Town's discriminatory policies were unconstitutional in light of the "three public powers" used to make the project possible: "the power of eminent domain, the taxing power, and the power to dispose of public property."[39]

The Line-Up of Counsel: Oral Argument in the Court of Appeals

The attorneys appearing before the Court of Appeals represented a "who's who" of both local and national counsel, including some whose rise to prominence was only just beginning. The plaintiffs' principal argument was made by Charles Abrams, an attorney and author who was considered an expert on all things related to housing and urban planning.[40] During his storied career, Abrams served on various New York State, New York City and United Nations housing commissions, helped create the New York City Housing and Development Administration, advised numerous countries on housing and urban planning issues, and influenced a generation of housing and planning officials through his writings and teaching at Columbia, Harvard, and M.I.T.[41]

For this appeal, Abrams was joined by Thurgood Marshall, a young, rising star who worked for the NAACP at the time. Within 20 years of his work on the *Stuyvesant Town* case, Marshall would become the first African-American justice on the U.S. Supreme Court. The plaintiffs also were supported by several amici curiae, including the New York City Chapter of the National Lawyers Guild. The Chapter's brief was submitted by its president, Paul O'Dwyer, who was the brother of then-Mayor William O'Dwyer, LaGuardia's successor.

On the other side, Metropolitan's principal argument was made by Samuel Seabury, a former N.Y. Court of Appeals and Supreme Court judge, and one-time Democratic nominee for Governor.[42] Notwithstanding his judicial and political titles, Judge Seabury was perhaps best known for his 1930s campaign against Tammany Hall and corruption in New York City politics, which resulted in then-Mayor James Walker's resignation.[43] But despite his own history of "fighting for unpopular social causes," Judge Seabury sided with Metropolitan in the fight over Stuyvesant Town's discriminatory housing policy.[44]

On July 19, 1949, the Court of Appeals issued its 4-3 decision affirming the lower court's judgment. Writing for the majority and joined by Judges Lewis, Conway and Dye, Judge Bruce Bromley, who had been a leading partner at the Cravath firm prior to serving on the Court, characterized the appeal as raising

> the important question of whether a corporation organized under the Redevelopment Companies Law has the privilege, admittedly possessed by an ordinary private landlord, to exclude Negroes from consideration as tenants. . . . Since the constitutional provisions referred to impose restraints on State action only, and not on private action, the precise question to be decided is whether Stuyvesant and Metropolitan in the circumstances of this appeal are subject to the constitutional limitations applicable to State action.[45]

In answering this question in favor of Stuyvesant Town and Metropolitan, the majority found that the type of "state action" capable of implicating such constitutional concerns was generally limited to those "cases where the State has consciously exerted its power in aid of discrimination or where private individuals have acted in a governmental capacity so recognized by the State."[46] It then concluded that neither circumstance existed in connection with the Stuyvesant Town project, and to find otherwise – that the "helpful co-operation between the State and the respondents transform[ed] the activities of the latter into State action" – would come "perilously close to asserting that any State assistance to an organization which discriminates necessarily violates the Fourteenth Amendment."[47]

Judge Stanley Fuld (later Chief Judge) authored the three-person dissent, in which Judges Loughran and Desmond joined. In his view, the federal and state constitutions proscribed racial discrimination in Stuyvesant Town, thereby warranting the reversal of the lower courts' orders.[48] Although he agreed that the equal protection clause traditionally did "not operate against purely private conduct," Judge Fuld believed that as "long as there is present the basic element, an exertion of governmental power in some form, [and] as long as there is present something 'more' than purely private conduct, the momentum of the principle carries it into areas once thought to be untouched by its direction" – including its application to conduct by otherwise private individuals.[49]

Describing Stuyvesant Town as a "governmentally conceived, governmentally aided and governmentally regulated project in urban redevelopment," Judge Fuld listed the various ways in which the housing project was something "more" than purely private.[50] First, as a geographic entity, Stuyvesant Town's creation was

dependent on the city's exercise of its eminent domain and street-closing powers.[51] Second, as an economic enterprise, Stuyvesant Town was made possible by Metropolitan's acquisition of the land "at its cost to the City . . . and by the City's grant of tax exemption."[52] Third, as a going community, Stuyvesant Town functioned subject to supervision by governmental agencies.[53]

In addition, Judge Fuld believed that it was "exceedingly significant" that the City's Board of Estimate approved and authorized the contract for the construction and operation of Stuyvesant Town *after* having been apprised by company officials that they planned to exclude African-Americans from the development.[54] He also found it persuasive that after the contract was approved, the City Council passed a law forbidding racial discrimination in tax-exempt developments while expressly excepting from its coverage any project "'hitherto agreed upon or contracted for' . . . an exception which could relate only to Stuyvesant Town."[55] Together, these two facts could be viewed as the City both "sanctioning" and then "ratifying" the complained-of discrimination.[56]

For these reasons, Judge Fuld believed that Stuyvesant Town – which had been "bestowed [with] the blessings and benefits of governmental powers" – was a "far cry from a privately built and privately run apartment house," and therefore subject to the constitutional proscriptions of racial discrimination.[57]

The Aftermath

Despite its victory at each stage of the *Dorsey* litigation, including the U.S. Supreme Court's denial of certiorari, Metropolitan continued to face intense pressure to change its discriminatory practice. In June 1950, shortly after the Supreme Court denied certiorari, City Councilmen Earl Brown and Stanley Isaacs introduced a bill to make the 1944 ordinance, discussed above, retroactive to include Stuyvesant Town.[58] At the same time, white civil rights activists living in Stuyvesant Town were organizing protests and taking other measures to unsettle day-to-day operations within the development.[59] In an attempt to appease its critics and ease public pressure, Metropolitan promised to admit a few black families into the development that year, although it maintained that there would be no formal change to its policy, and that it reserved the right to select its tenants on any basis of its choosing.[60] Not satisfied with Metropolitan's promise, Councilmen Brown and Isaacs pushed ahead with their bill, which ultimately passed unanimously in the City Council and by a 12-1 margin in the Board of Estimate, and was signed into law by the new mayor, Vincent Impelliteri, in March 1951.[61] Although actual integration would come slowly to Stuyvesant Town, the passage of this bill represented the long-sought-after victory over Metropolitan and its discriminatory housing practice that so many people worked tirelessly to achieve.

The Court's majority, over time, was the subject of substantial personal criticism. In particular, Judge Bruce Bromley, who authored the majority opinion, was criticized for writing a "racist" and "perplexing" opinion.[62] The opinion also assured that Judge Bromley, who had been appointed to the Court of Appeals in January 1949 on an interim basis, would not receive bipartisan support in the upcoming November 1949 election for a full term.[63] As noted in his biography on the New York Courts website, the opinion caused the NAACP to campaign against his nomination and election and to argue that Judge Bromley had placed "property rights above human rights" and had conferred "the stamp of legality on the Hitlerian doctrine of racial superiority."[64] Judge Bromley was subsequently defeated, and his term on the Court ended on December 31, 1949.[65]

A Personal Note:

It is hard to imagine that today, even in the absence of legislation guaranteeing equal access to virtually all housing, our Court of Appeals, or indeed any other court, would find a large urban development like Stuyvesant Town to be "private." Such is the reality of history – with courts taking cognizance of cultural changes and shifts in political thinking in society.

Many years after I had learned about this case, I was reminded of it by the author of the dissent, Judge Stanley Fuld, for whom I had worked as a new associate when he retired from the Court as Chief Judge at the end of 1973 and reentered private practice.[66] In 1996, the Commercial and Federal Litigation Section of the New York State Bar Association created an annual award in his name. When Judge Fuld graciously agreed to accept the inaugural award, I asked him if there was an opinion he had authored that stood out in his mind as his most memorable. He said yes, there was such an opinion – his dissent in the *Stuyvesant Town* case, which he had penned almost 50 years before. I can think of no other opinion that better demonstrates Judge Fuld's wisdom and foresight. ■

1. 299 N.Y. 512 (1949).
2. A. Scott Henderson, Housing & the Democratic Ideal: The Life and Thought of Charles Abrams 123 (2000).
3. *Id*.
4. *Id*.
5. *Id.* at 124.
6. *Id.* at 125.
7. *Id.* at 126.
8. Amy Lavine, *From Slum Clearance to Economic Development: A Retrospective of Redevelopment Policies in New York State*, 4 Alb. Govt. L. Rev. 212, 240 (2011).
9. *Id.* at 241–42.
10. Henderson, *supra* note 2, 126.
11. *Dorsey*, 299 N.Y. at 524 (quoting Governor Dewey); Henderson, *supra* note 2, p. 127.
12. Henderson, *supra* note 2, p. 127.
13. *Id*.

14. *Id.*

15. *Dorsey*, 299 N.Y. at 521.

16. Lavine, *supra* note 8, p. 244; Samuel Zipp, Manhattan Projects: The Rise and Fall of Urban Renewal in Cold War New York 77 (2010).

17. Lavine, *supra* note 8, p. 246.

18. Henderson, *supra* note 2, p. 128.

19. Zipp, *supra* note 16, p. 117.

20. Henderson, *supra* note 2, p. 128.

21. *Id.*

22. *Id.*

23. *Id.* at p. 129.

24. *Id.* at p. 135.

25. *Id.* at pp. 135–36.

26. *Id.* at p. 135; Lavine, *supra* note 8, p. 246; *see also* Murray Illson, *Charles Abrams, Worldwide Housing Expert, Dies*, N.Y. Times, Feb. 23, 1970.

27. Henderson, *supra* note 2, p. 136.

28. *Id.* at p. 137.

29. *Id.* at p. 138.

30. *Id.* at p. 139.

31. *Dorsey v. Stuyvesant Town Corp.*, 190 Misc. 187, 188 (Sup. Ct., N.Y. Co. 1947).

32. Henderson, *supra* note 2, p. 140.

33. *Dorsey*, 190 Misc. at 189; Henderson, *supra* note 2, p. 140.

34. *Dorsey*, 190 Misc. at 191; Henderson, *supra* note 2, p. 140.

35. *Dorsey*, 190 Misc. at 193.

36. *Id.*

37. *Dorsey v. Stuyvesant Town Corp.*, 274 A.D. 992 (1st Dep't 1948).

38. Appellants' Consolidated Brief at 11, *Dorsey v. Stuyvesant Town Corp.* (N.Y. 1949).

39. *Id.* at 16–17.

40. *See* Illson, *supra* note 26.

41. *Id.*

42. *See Samuel Seabury Dies on L.I. at 85*, N.Y. Times, May 7, 1958.

43. *Id.*

44. Henderson, *supra* note 2, p. 140.

45. *Dorsey*, 299 N.Y. at 520–21.

46. *Id.* at 534–35.

47. *Id.* at 535.

48. *Id.* at 544–45 (Fuld, J. dissenting).

49. *Id.* at 539 (Fuld, J. dissenting) (internal citation omitted).

50. *Id.* at 542 (Fuld, J. dissenting).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 543 (Fuld, J. dissenting).

55. *Id.* at 538 (Fuld, J. dissenting).

56. *Id.*

57. *Id.* at 536 (Fuld, J. dissenting).

58. Zipp, *supra* note 16, p. 122.

59. *Id.*, p. 121–22.

60. *Id.*, p. 122.

61. *Id.*

62. Lavine, *supra* note 8, p. 248; Charles Abrams, *Stuyvesant Town's Threat to Our Liberties: Government Waives the Constitution for Private Enterprise*, Commentary, Nov. 1, 1949.

63. John Hupper, *Bruce Bromley*, NYCourts.gov, http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/bromley-bruce.html (last visited June 29, 2015).

64. *Id.*

65. *Id.*

66. https://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/fuld-staneley.html. (*Editor's note:* The typo is in the url.).

EDITOR'S NOTE

We heard from readers about two articles that appeared in the July/August 2015 issue of the *Journal*:

Contracts: Opinion Letters by Peter Siviglia

Mr. Siviglia heard from one of our readers about his column on opinion letters and likes what he heard:

Attorney Graham Barkham, New York, NY, suggests that the qualification regarding bankruptcy and similar laws be expanded to include "general equitable principles." I agree, especially in the case of contracts that expressly provide for equitable relief, such as contracts containing confidentiality clauses.

From "Sua Sponte" to "Sea Sponge": The Mixed Blessings of Auto-Correct by Robert D. Lang

Several eagle-eyed readers caught the "oops" in our piece on the dangers of auto-correct, including Rene Reixach of Rochester, NY. Frank Helman, an attorney in Boothbay Harbor, Maine, wrote:

> In Robert Lang's discussion of Berrios we learn that "the parol evidence rule does not bar admission of extreme [external?] evidence" under certain circumstances. And Westgate at Williamsburg, we are informed, dealt with a faulty "meter [metes] and bounds description."

The question is, Was this done on purpose? Only Mr. Lang knows for sure . . . .

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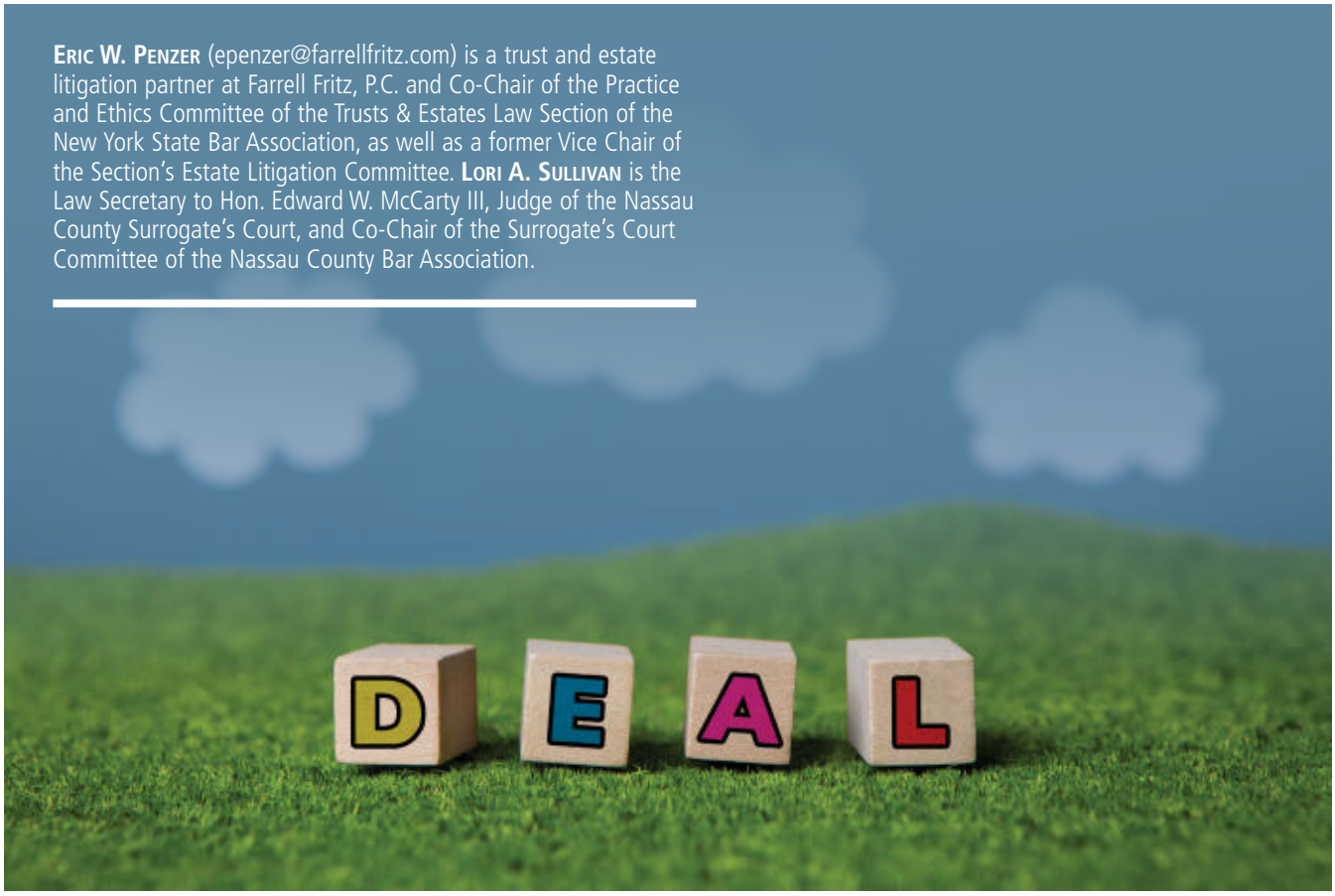


Enforceability of a "Personal Guaranty" Clause

Attorney Fee Agreements in the Surrogate's Courts

By Eric W. Penzer and Lori A. Sullivan

A potential client is the nominated executor under the will of his deceased friend. He would like you to represent him in probating the decedent's purported will. He explains to you that a will contest is likely, as the will treats the decedent's children unequally. He further advises you that the family is very litigious and, specifically, he is concerned that the decedent's children might assert claims against him personally concerning his administration of the estate. Accordingly, the potential client wants the best representation, not only to ensure that his friend's testamentary wishes are carried out, but also to protect himself from liability.

You explain to the client that, as the fiduciary, he will be entitled to pay your legal fees from the estate "on account." Ultimately, however, it will be up to the Surrogate to fix the amount of legal fees payable from the estate, and the Surrogate is not required to honor your retainer letter. You present the client with a retainer letter providing that if the Surrogate fixes the legal fee payable from the estate in an amount lower than the fee contractually agreed upon, the client will be personally responsible, in his individual capacity, for the difference. The client signs the retainer, agreeing to be bound by the "personal guaranty" clause. The question, however, is whether the personal guaranty is enforceable.

The current debate over these types of personal guaranty clauses reflects the inherent tension between a Surrogate's broad discretion in approving legal fees to be paid from an estate and a fiduciary's right to enter into a fee agreement with counsel in his or her individual capacity. In theory, such personal guaranty clauses should not be subject to the same judicial review applicable to agreements concerning fees payable from an estate.[1] These clauses implicate the "valued right" of a party to be rep-

resented by counsel of his or her choice[2] because, absent an enforceable personal guaranty, attorneys, aware that their fees might be disallowed in whole or in part, might well decide not to undertake representation of fiduciaries in Surrogate's Court proceedings.

Those who argue against the enforceability of personal guaranty clauses contend that the Surrogate's award represents the "reasonable" fee for counsel's services. Thus, to enforce a provision allowing counsel to receive a fee over and above that fixed by the Surrogate would, essentially, permit counsel to receive an "unreasonable" fee for the services provided.

On the other hand, proponents of these types of clauses, in addition to asserting the personal right to contract, argue that the Surrogate's "reasonableness" determination is based upon various factors, including the size of the estate, that are immaterial, or at least less significant, when the fiduciary is paying the fee personally. Moreover, the fiduciary's potential for personal liability weighs in favor of the enforceability of personal guaranty clauses. In an estate or trust accounting, damages can be awarded against a fiduciary individually, in the form of a surcharge, if an objectant establishes that the fiduciary was negligent or caused the estate to suffer a loss. It is hardly surprising, therefore, that a fiduciary desiring representation by counsel of his or her own choosing might elect to personally guarantee the payment of that professional's fee.[3]

The Surrogate's Discretion in Fixing Legal Fees

The debate regarding the enforceability of personal guaranty clauses must begin with an analysis of N.Y. Surrogate's Court Procedure Act 2110 (SCPA) and a Surrogate's broad discretion in fixing fees. Section 2110(1) provides:

> At any time during the administration of an estate and irrespective of the pendency of a particular proceeding, the court is authorized to fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or any person interested or of an attorney who has rendered legal services in connection with the performance of his duties as a fiduciary or in proceedings to compel the delivery of papers or funds in the hands of an attorney.

The Surrogate bears the ultimate responsibility for approving legal fees that are charged to an estate and has broad discretion in determining what constitutes reasonable compensation for legal services rendered.[4] This discretion is grounded in the proposition that the Surrogate is in the best position to assess and consider the necessary factors in determining compensation. In evaluating the reasonableness of compensation, the court may consider a number of nonexclusive factors, often referred to as the *Freeman-Potts* factors after the seminal cases of *In re Freeman*[5] and *In re Potts*.[6] These factors include: the time spent;[7] the complexity of the questions involved;[8] the nature of the services provided;[9] the amount of litigation required;[10] the amounts involved and the benefit resulting from the execution of such services;[11] the lawyer's experience and reputation;[12] and the customary fee charged by the Bar for similar services.[13]

This discretion in fixing fees is so broad that the Surrogate's Court may inquire into the reasonableness of attorney fees even absent an objection – that is, even if the executor and beneficiaries consent to the legal fees charged.[14] In addition, this is not subject to arbitration. Part 137 of the Rules of the Chief Administrator[15] provides for the arbitration and mediation of certain fee disputes between attorneys and clients. However, excepted from Part 137 are fees awarded by a court order. Thus, if the Surrogate's Court issues an order determining the attorney's fee, the client cannot dispute that fee in mediation or arbitration. On the other hand, if the fee is arbitrated, the Surrogate could nevertheless inquire into the reasonableness of the fee, which it could do, presumably, in connection with a motion to confirm or vacate the arbitrator's award.

Talbot

The court's discretion extends to contractually agreed-upon contingency fee agreements. In *In re Talbot*,[16] the Second Department affirmed the Surrogate's decree approving counsel's fees. The attorney agreed to represent the proponent of the will in a contested probate proceeding pursuant to a contingent-fee arrangement. The agreement provided for an initial retainer of $5,000 plus 33% of any proceeds he would recover on her behalf, by settlement or trial, up to a maximum fee of $600,000. The attorney negotiated a settlement admitting the propounded will to probate in exchange for a minimal payment to objectants. Two years later, the client brought a proceeding to fix his counsel's fees. The Surrogate granted the attorney's motion for summary judgment, enforcing the contingency fee agreement, and dismissed the petition. The client appealed and the Appellate Division reversed the order, remanding the matter to the Surrogate's Court for consideration of the *Freeman-Potts* factors and to evaluate the reasonableness of the retainer agreement. Thereafter, the Surrogate's Court found that the fee was reasonable and was supported by the evidence, a determination ultimately affirmed by the Appellate Division.

Werper

Similarly, another recent case, *In re Werper*,[17] evidences the Surrogate's Court's broad authority in fixing fees. In *Werper*, the attorney's efforts resulted in the recovery of $62,455.04, the balance owed to the estate on two promissory notes. The attorney sought approval of a fee of $53,064.38. The court focused on two factors in its determining what constituted a reasonable fee: (1) the difficulty of the questions involved and (2) the benefit resulting from such services. As to the first, the court concluded that the issue was "quite simple in nature." Moreover,

based upon the result achieved, the court found that the fee request was unreasonably high. The court adopted a novel approach and relied upon the standard applied by the lower courts in cases involving the enforcement of promissory notes, resulting in fees as high as 20% of the notes' face value. The court, in an exercise of discretion, applied the same approach and set the reasonable attorney's fees at 20% of the notes' face value.

While a Surrogate generally will not interfere with a retainer agreement absent proof of fraud, mistake or overreaching,[18] the Surrogate nevertheless bears the ultimate responsibility of deciding what constitutes reasonable compensation. Regardless of the retainer agreement, an estate is not bound to pay more than a reasonable amount in legal fees.[19] Where a personal guaranty clause is at issue, however, the question becomes whether the fiduciary, in his or her individual capacity, may agree to pay an amount over and above the amount the Surrogate determines is properly payable from the estate.

Jurisdictional Issues

The Surrogate's Court's jurisdiction concerning disputes involving personal guaranty clauses is less than clear, as such disputes could well be characterized as disputes "between living persons."[20] A determination regarding the Surrogate's Court's jurisdiction over such fee disputes will require an analysis of the underlying facts.

Levine

In *In re Levine*,[21] for example, the court held that where an attorney was hired by a client who was both a cofiduciary and legatee of an estate, and performed services that benefited both the estate and the individual interests of the client, the Surrogate's Court had jurisdiction

> to parse the two types of services, and make an award against the client personally for the services that furthered only the client's interests as either a legatee or as a challenged cofiduciary whose conduct was found to be against the interests of the estate and resulted in his removal.[22]

Dicosimo

Likewise, in *In re Dicosimo*,[23] the court held that it lacked jurisdiction over a request that it order the objectant law firm to refund to the estate that portion of legal fees, paid by a nonfiduciary beneficiary for services rendered to that beneficiary, determined to be excessive. The retainer agreement was between the objectant and the beneficiary, individually; the invoices were submitted directly to the beneficiary, who paid for all of the services in full from his own funds. The court noted that the beneficiary might be held responsible for the entire fee even though the objectant might not have been able to recover the entire fee from estate funds had the agreement been with the fiduciary of the estate; and most of the services were rendered in another court involving a dispute between decedent's siblings.

Weiss

In addition, in *In re Weiss*,[24] the Surrogate refused the executor's request to review legal fees chargeable to the estate where the executor was the sole residuary beneficiary. The court held that it did not have jurisdiction because the dispute as to legal fees was one between living persons that did not affect the administration of the estate.

Warsaski

However, in *In re Warsaski*,[25] the attorney for unsuccessful objectants in a probate proceeding sought an order permitting her withdrawal as counsel of record and fixing her legal fees. The objectants opposed the fee request, arguing that the court lacked jurisdiction as the dispute was between living persons.[26] The court disagreed, noting that the dispute "arises out of services rendered in a probate contest tried before this court. Thus, 'the Surrogate's Court is in a unique position to determine the amount of fees owed to a plaintiff in light of the extensive litigation that has taken place in that court.'"[27]

Lohausen

Similarly, in *In re Lohausen*,[28] the court addressed the issue of its jurisdiction to fix and determine legal fees in a proceeding by the decedent's daughter, the sole distributee, a residuary beneficiary, and executor of his estate. Counsel was retained by letter agreement to "probate the estate." In addition, counsel agreed to prepare an inventory of assets, appear in court, marshal assets, obtain a tax identification number and review the assets for estate tax purposes. The fee was set at 5% of the gross taxable estate. Counsel billed the daughter $103,000, which she paid in part from her personal funds and in part from estate funds. In support of the SCPA 2110 proceeding, the daughter alleged that counsel took advantage of her in connection with the fee arrangement and that the reasonable value of his services did not exceed $10,000. Counsel moved to dismiss on the basis that the estate had been fully administered and the fees had been paid in accordance with the retainer. Accordingly, he argued the court no longer had jurisdiction. Counsel also argued that because the petitioner executed the retainer in her individual capacity, the matter was a contractual dispute between living persons.

Surrogate Kelly concluded that there was no time limitation on the court's jurisdiction to fix counsel's fee. Most important, the court held that, in any event, it had the inherent authority to supervise the conduct of counsel and the legal fees charged for services rendered, as well as the jurisdiction to do so pursuant to the New York State Constitution with respect to the issue of the retainer. As to counsel's argument that petitioner individually retained and paid counsel, therefore she was bound by the retainer and the court could not modify its terms, the court disagreed. It held that an attorney bears the burden of establishing that the

retainer's terms were fairly presented and understood by the client, and that the fee is fair and reasonable. The court further held that an agreed-upon fee may be disallowed if the amount of the fee is so large as to become out of proportion to the value of the professional services rendered.

Enforceability of Personal Guaranty Agreements

The validity and enforceability of personal guaranty attorney fee agreements is supported by the history behind the Surrogate's authority to fix fees. Originally, the executor of an estate was required to pay from personal funds the fee of the attorney for the estate. Upon the settlement of the executor's account, the executor had a right of reimbursement from the estate to the extent the payment was deemed reasonable and necessary. In 1914, the Legislature enacted former Code of Civil Procedure 2692, authorizing a fiduciary to pay attorney fees from the funds of the estate. However, notwithstanding § 2692, if a fiduciary disputed the fees, the attorney could bring an action at law against the fiduciary in his or her individual capacity. In 1916, the Second Department held in *In re Rabell*[29] that if a fiduciary refused to pay the full amount, the Surrogate's Court had jurisdiction to fix the amount of the fee and direct its payment from the estate in a special proceeding. Finally, in 1923, the Legislature enacted former Surrogate Court Act § 231-a, the predecessor to SCPA 2110, which broadened the Surrogate's jurisdiction by also giving the court jurisdiction over disputes between an attorney and a nonfiduciary of the estate, such as a devisee, legatee or other person interested in the estate.

Ganea

Other relevant authority also supports the validity of such fee arrangements. One of the first cases on the subject, *Seth Rubenstein, P.C. v. Ganea*,[30] was not a Surrogate's Court proceeding at all; rather, it was an Article 81 guardianship proceeding. There, the principal issue was whether an attorney who failed to obtain a written retainer agreement or letter of engagement with a client, in violation of applicable rules, could nevertheless recover the reasonable value of professional services rendered in *quantum meruit*. The court answered that question in the affirmative. A secondary issue was whether an attorney awarded fees in a guardianship proceeding could seek to recover additional fees from the client who sought the appointment of the guardian. The court answered that question in the affirmative as well.

It is "possible for a court to find that an attorney entered into a reasonable fee agreement with the petitioner in a guardianship proceeding, but to also conclude that the amount to be paid as 'reasonable compensation' by the AIP is less than the overall amount the petitioner agreed to pay,"[31] saying that, "[u]nder such circumstances, attorneys may recover additional fees from the petitioner pursuant to the attorney-client fee arrangement." The court relied on cases decided in the context of matrimonial proceedings, standing for the proposition that "an award of attorneys' fees to a spouse pursuant to [the Domestic Relations Law] does not preclude attorneys from seeking, from their own client, the balance of fees earned if the retainer agreement permits it."[32]

> The Surrogate has broad discretion in determining what constitutes reasonable compensation for legal services rendered.

The "Code of Professional Responsibility provides that attorneys must reach 'a clear agreement . . . with the client as to the basis of the fee charges to be made,'"[33] and attorneys consulted by clients anticipating the commencement of Article 81 proceedings should, therefore, "make clear beyond question that any fee arrangement agreed upon is wholly independent of and not controlled by the determination of the guardianship court as to what may constitute reasonable compensation to the attorney."[34] The attorney "bears the burden of establishing that he reached a clear agreement with [the client] that she would be responsible for fees incurred in the guardianship proceeding, including the amount that the fair value of legal services exceeds the amount awarded by the guardianship court."[35] While the absence of a retainer letter is not dispositive on the issue of the existence of such an agreement, "[a]ny misunderstanding or lack of clarity arising from [the attorney's] failure to provide a letter of engagement or enter into a signed retainer agreement shall be resolved in favor of the client."[36]

Coudert Brothers

Appellate Division authority supports the enforceability of similar fee agreements in Surrogate's Court proceedings. In *Coudert Brothers v. de Cuevas*,[37] the First Department affirmed a grant of summary judgment in an action to recover unpaid legal fees, determining, *inter alia*, that

> [t]he Surrogate's disallowance of a portion of plaintiff's legal services, on the ground that such did not benefit the estate directly, was not binding or determinative of plaintiff's claims herein in view of the retainer agreement wherein defendant agreed to be individually liable for services rendered "in connection with the administration of the . . . estate, and various litigations involving the estate."

Yet, agreements by which fiduciaries assume personal liability for legal fees have not met with universal approval by the Surrogate's Courts.

Valk

In re Valk[38] was a proceeding brought to establish a supplemental needs trust. Before the court was a motion, *inter alia*, to reargue a portion of a prior decision in which the court fixed counsel's fees and directed that "'to the extent that the guardian/trustees have paid counsel more than this amount [$8,500.00], the excess should be refunded by counsel.'"[39] The attorney argued that the court "overlooked or misapprehended pertinent case law" – specifically, *Ganea*, among others – supporting the proposition that the petitioner may assume personal liability for legal fees beyond those the court awards from the guardianship estate.

The court noted that even assuming *Ganea* was applicable to matters other than Article 81 proceedings – the court noted, *in dicta*, that it was not – "the cases are clearly distinguishable from this court's prior decision in this case" because, the court, in its prior decision, determined that the fees requested by counsel were "'significantly higher than those customarily charged for work of this nature.'"[40] Unlike in *Ganea*,

> where the attorney was given leave to seek an additional fee equal to the amount by which the "fair value of legal services exceeds the amount awarded by the . . . court," here the court has already determined the fair value of the legal services provided and awarded a fee in that amount. There is, therefore, no amount by which the fair value of counsel's services in this case exceeds the amount awarded because the amount awarded is the fair value of the legal services provided.

Grassi

In *In re Grassi*,[41] a contested accounting proceeding, the petitioner sought to have the court fix and determine legal fees. The petitioner's retainer agreement with counsel provided that "[i]n the event that there are net sufficient assets in the estate or if any of our legal fees are disallowed by the Surrogate, [petitioner] agree[s] to be personally responsible for all legal fees incurred in this matter."

The court noted that

> [a] review of the time records submitted show that the attorneys spent a significant amount of time performing work for which, under the terms of their retainer agreement, they cannot seek reimbursement, including work for the beneficiaries, with whom there was no retainer agreement; preparing a deed and transfer papers for the beneficiary of specifically devised property; performing work that was administrative in nature; and, preparing their own affidavit of legal services.

It therefore fixed legal fees in an amount less than that sought by the petitioner's attorneys.

The court, *in dicta*, addressed the provision of the retainer agreement pursuant to which the petitioner agreed to be personally liable for the legal fees incurred. Citing *Coudert* and *Dicosimo*, discussed above, the court noted that "such language in a retainer agreement can be enforceable against the individuals entering into the agreement, but not against the estate as a whole" and, thus, "it appears that petitioner, both by the finding of this court and the language contained in her retainer agreement, could be held personally liable for any legal fees not approved by this court."

However, the court noted that enforcement of the personal guaranty clause could be problematic for counsel under the facts of the case, which

> appear to demonstrate that petitioner relied on her attorneys in distributing the assets of the estate prior to seven months, resulting in her liability. . . . Thus, any effort to collect legal fees from petitioner could be problematic since under these circumstances, reliance on holdings such as the Second Department's decision in *Coudert Brothers* (supra) is not necessarily conclusive on the issue of whether collection of legal fees from petitioner personally should be deemed reasonable.[42]

It appears that the enforceability of personal guaranty provisions is an issue unresolved. Yet, should not a fiduciary, subject to potential liability in his or her personal capacity, be entitled to counsel of his or her choice, especially in view of the fact that there is no expense to the estate? If the fiduciary is agreeable to such a fee arrangement, the only inquiry in a fee dispute concerning the personal guaranty provision should be the inquiry applied to retainer agreements generally. The only appellate authority on the issue, the First Department's decision in *Coudert Brothers* and the Second Department's decision in *Ganea*, appear to indicate that this is the correct approach. Moreover, the argument can be made that given that the dispute is between living persons, the Supreme Court is the proper court to determine the enforcement of the personal guaranty clause in the retainer agreement. On an equitable basis, it is troubling that our client in the scenario described above, who voluntarily signed such a retainer agreement, could now refuse to pay counsel the agreed-upon fee, despite receiving the benefit of such representation. ■

1. That is not to say the agreements are not subject to any judicial review. They can be reviewed, like any other attorney fee agreement, to determine whether they are fair, reasonable, and whether the fee agreed upon is unconscionable. The Court of Appeals has noted that "attorney-client fee agreements are a matter of special concern to the courts and are enforceable and affected by lofty principles different from those applicable to commonplace commercial contracts." *In re Cooperman*, 83 N.Y.2d 465, 472 (1994) (citations omitted). "'[C]ourts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients.'" *King v. Fox*, 7 N.Y.3d 181, 191 (1994).

2. *In re Deans*, 92 A.D.3d 879 (2d Dep't 2012).

3. This conclusion is supported, analogously, by cases such as *In re Deans*, 92 A.D.3d 879 (2d Dep't 2012), a proceeding to settle the joint account of the coadministrators of an estate. There, the Appellate Division, Second Department, held that the advocate-witness rule did not warrant the disqualification of an attorney coadministrator. It disagreed with the Surrogate's determination that a fiduciary of an estate does not have the same right to self-representation as he or she otherwise has in an individual capacity, noting that "[a] party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted." *Id.* at 811 (citations omitted). Recognizing the "unique circumstances" of an accounting proceeding where "the sole issue, in effect, is the conduct of the fiduciary," the court held that "a fiduciary's interest in the right of self-representation should prevail over the interests of the beneficiaries of the estate, as there is no prejudice to the estate, which is protected by the potential imposition of a personal surcharge against the fiduciary

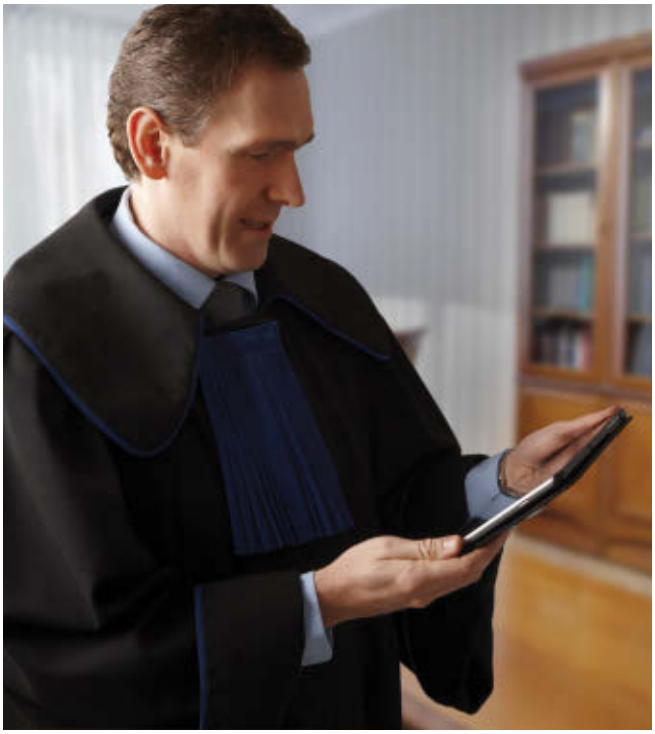
in the nature of damages if an objectant establishes that the fiduciary was negligent or caused the estate to suffer a loss." *Id.* (citations omitted).

4. *See In re Piterniak*, 38 A.D.3d 780, 781 (2d Dep't 2007); *In re Szkambara*, 53 A.D.3d 502 (2d Dep't 2008).
5. 34 N.Y.2d 1 (1974).
6. 241 N.Y. 593 (1925).
7. *In re Kelly*, 187 A.D.2d 718 (2d Dep't 1992).
8. *In re Coughlin*, 221 A.D.2d 676 (3d Dep't 1995).
9. *In re Von Hofe*, 145 A.D.2d 424 (2d Dep't 1988).
10. *In re Sabatino*, 66 A.D.2d 937 (3d Dep't 1978).
11. *In re Shalman*, 68 A.D.2d 940 (3d Dep't 1979).
12. *In re Brehm*, 37 A.D.2d 95 (4th Dep't 1971).
13. *Potts*, 241 N.Y. 593; *Freeman*, 34 N.Y.2d 1.
14. *Stortecky v. Mazzone*, 85 N.Y.2d 518 (1995).
15. 22 N.Y.C.R.R. pt. 137.
16. 122 A.D.3d 867 (2d Dep't 2014).
17. 44 Misc. 3d 1227(A) (Sur. Ct., Dutchess Co. 2014).
18. *In re Schanzer*, 7 A.D.2d. 275 (1st Dep't 1959), *aff'd*, 8 N.Y.2d 972 (1960).
19. *In re Prettel*, N.Y.L.J., Mar. 24, 1999, p. 32, col. 2 (Sur. Ct., Nassau Co.).
20. *See generally In re Lainez*, 79 A.D.2d 78, 435 N.Y.S.2d 798 (2d Dep't 1981) ("[T]he power of the Surrogate's Court relates to matters affecting estates of decedents and not to independent matters involving controversies between living persons" (citations omitted)).
21. 262 A.D.2d 80 (1st Dep't 1999).
22. *Id.* at 80 (citations omitted).
23. 180 Misc. 2d 89, 92 (Sur. Ct., Bronx Co. 1999).
24. N.Y.L.J., July 13, 2009, p. 30, col. 2 (Sur. Ct., N.Y. Co.).
25. 190 Misc. 2d 553 (Sur. Ct., N.Y. Co. 2002).
26. *See id.* at 556.
27. *Id.* (quoting *Rosenman & Colin v. Winston*, 205 A.D.2d 451 (1st Dep't 1994)).
28. 36 Misc. 3d 1209(A) (Sur. Ct., Queens Co. July 2, 2012).
29. 175 A.D. 345 (2d Dep't 1916).
30. 41 A.D.3d 54 (2d Dep't 2007).
31. *Id.* at 65 (citations omitted)..
32. *Id.*
33. *Id.* (Note that Judge Dillon is quoting the ABA Model Code of Professional Responsibility, which was in effect at that time.)
34. *Id.*
35. *Id.*
36. *Id.* at 65–66 (citations omitted).
37. 247 A.D.2d 266 (1st Dep't 1998).
38. 41 Misc. 3d 1216(A) (Sur. Ct., Nassau Co. Sept. 24, 2013).
39. *Id.* at *1.
40. *Id.* at *2.
41. N.Y.L.J., Oct. 28, 2013, p. 44 (Sur. Ct., Suffolk Co.).
42. *Id.*

"Toxic" Judicial Research

By Hon. David B. Saxe

Most judges are familiar with the temptation to go online and quickly check a fact that will help clarify a point related to a case under consideration. That it is frequently improper for us to do so – especially when counsel are not informed – was the focus of a class discussion in which I was pleased to participate last fall, taught by Joel Cohen, Esq., at Fordham Law School, on the subject of outside research by judges. What I learned in preparation for, during, and after that discussion is the subject of this article.



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The Rule

The basic rule sounds clear enough. When arriving at a decision, judges should not rely on factual information other than that which was properly provided by the parties. Just as a jury is instructed to rely only on the evidence presented to them and not on special expertise or their own independent research,[1] a court engaging in fact-finding must not rely on its own independent research in assessing the evidence. The case of *N.Y.C. Medical & Neurodiagnostic, P.C. v. Republic Western Insurance Co.*[2] provides a useful illustration of this basic rule. There, the Appellate Term reversed the Civil Court and dismissed the action. The defendant's dismissal motion had asserted a lack of jurisdiction, and the Appellate Term explained that the plaintiff had failed to submit any evidence in opposition that supported the assertion of jurisdiction over the defendant, and that the Civil Court had erred when it conducted its own Internet research in order to support the exercise of jurisdiction over the defendant corporation by finding that it was transacting business in this state.[3]

The Exception

But not all independent fact inquiries by judges constitute reversible error. Sometimes courts have allowed the use of certain types of information, although it was independently obtained from the Internet. One example is *United States v. Bari*.[4] There, the district court revoked the supervised release portion of the defendant's sentence based on his alleged commission of a new bank robbery while he was at liberty. The defendant argued on appeal that the district court had erred by using an independent Internet search to "confirm its intuition that there are many kinds of yellow rain hats for sale."[5] While there was substantial other evidence supporting the claim that it was the defendant who had committed the bank robbery at issue, the evidence also included surveillance footage showing that the robber wore a yellow rain hat, as well as testimony that a yellow rain hat was found in the garage of the defendant's landlord. The district court said that "the strongest piece of evidence" was the yellow rain hat, and that it was "convinced from looking at the surveillance video . . . that [the hat found in the garage] is the same type of hat as appears in the video. . . . It is just too much of a coincidence that the bank robber would be wearing the same hat that we find in [his landlord's] garage. . . ."[6] To emphasize the similarity, the judge checked on Google to confirm that there are lots of different kinds of rain hats available.[7]

The Second Circuit rejected the defendant's challenge relating to the Google search, reasoning that the judge's use of independent Internet research was merely to confirm something that it considered to be "a matter of common knowledge," to which the federal rule on judicial notice was applicable.[8]

Judicial Notice

A court may independently obtain and use information that is subject to judicial notice. However, the rule regarding what is amenable to judicial notice is different from jurisdiction to jurisdiction. For instance, even assuming we agree with the Second Circuit in *Bari* that information regarding the types of yellow rain hats available for sale constitutes "a

matter of common knowledge," that "fact" may still not be amenable to judicial notice in New York state courts, since the New York rule for judicial notice does not precisely mirror the federal rule. In the courts of this state, "a court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources *of indisputable accuracy*."[9] While the term "matters of common knowledge" has been included in defining when judicial notice may properly be taken,[10] that definition immediately goes on to explain that such "matters of common and general knowledge" must be "well established and authoritatively settled, not doubtful or uncertain."[11]

The potential pitfall in relying on the doctrine of judicial notice to consider independently obtained information is illustrated by the case of *Dollas v. W.R. Grace & Co.*, where something the court believed to be a well-established fact was held not amenable to judicial notice. In *Dollas*, the case on trial involved a claim that the plaintiffs had died as a result of exposure to asbestos from the defendant product "Monokote" while employed on the ship *USS Constellation* at the Brooklyn Navy Yard. Despite testimony by the plaintiffs' witness that Monokote had been used on two ships in the Navy Yard, the trial court took judicial notice of evidence given in other Navy Yard cases it had previously tried that "[government specifications] do not include Monokote as an approved product" and on the strength of that "fact" granted the defendant's motion for summary judgment dismissing the action.[12] The First Department reversed, explaining that it was error to take judicial notice that Monokote was not used on the USS Constellation in the face of unequivocal testimony to the contrary.[13]

Is Independently Obtained Information Ever Appropriate?

The sometimes difficult determination of whether a fact is amenable to judicial notice is not the main focus here, however. The real, growing problem concerning the use of independently obtained information is the broader use by courts of online sources to obtain information to which judicial notice is not applicable, which information the parties did not supply, especially when that information is used as one basis for its decision.

The case of *Kourkounakis v. Dello Russo*[14] may help illustrate the type of problematic research I mean – although, notably, the Second Circuit did not disapprove of the independent research there. In that medical malpractice action, the plaintiff alleged that the defendant negligently performed LASIK surgery on him. The district court granted the defendant's summary judgment motion, reasoning that the plaintiff had failed to support his negligence claim with competent evidence from a qualified expert. Instead, the court said, the plaintiff had provided only an expert report

> consist[ing] of a largely conclusory affidavit from one Bruce Randolph Tizes, M.D., J.D., a resident of St. Thomas, VI, who appears to have been occupied since 2000 as a managing partner at Galt Capital, an investment advisory firm, and does not appear to have practiced medicine since the mid-1990s, does not appear to have a valid medical license, never specialized or trained in ophthalmology, never performed or was accredited in LASIK, and never examined the plaintiff.[15]

The district court added that "Dr. Tizes nowhere states what is wrong with the plaintiff or how his vision has been affected, let alone in what respect plaintiff's surgery was negligent."

While nothing in the district court decision or the circuit court's affirmance makes explicit reference to outside research by the court, in the plaintiff's petition for a writ of certiorari, counsel asserted that

> [t]he trial court for the first time on oral argument . . . informed the parties that it had "googled" Dr. Tizes, MD (plaintiff's expert), to obtain evidence dehors the record . . . [and] used this information to discredit the good doctor's opinion to the point of not considering it in opposition to the summary judgment motion.[16]

This decision has been subjected to some criticism by the bar. A much-cited law review case comment by Katrina Hall offers a number of reasons to be concerned about a court's reliance on such independently obtained online information.[17] Those reasons include unreliability, the hearsay nature of the information used, and the deprivation of the parties' right to cross-examine or challenge the evidence.[18] Hall concludes with the advice "just don't Google under any circumstances."[19]

Other commentators would also hew to a bright-line "Just Don't Google" rule. For example, Judge Robert L. Gottsfield, in an article titled "To Google or Not to Google,"[20] takes the straightforward position that "Judicial officers may not search the Internet in evaluating and deciding a case." However, most commentators offer somewhat less extreme phrasing of that injunction, although the same concerns are echoed by those practitioners as well.

David H. Tennant and Laurie M. Seal, in their article titled "Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?,"[21] recommend that "[j]udges should exercise caution in accessing factual information on the Internet, taking care not to let questionable Web site materials improperly influence case outcomes."[22] They, too, cite the significant risk of misinformation and the unfairness to the parties, as well as the lack of permanence of online information. They also cite a commentary to the American Bar Association's Model Code of Judicial Conduct, which states, "A judge must not independently investigate facts in a case and must consider only the evidence presented."[23]

An extensive analysis of both the current and the recommended state of the law regarding independent research of facts by judges can be found in a scholarly article by Elizabeth G. Thornburg, titled "The Curious Appellate Judge: Ethical Limits on Independent Research."[24] Professor Thornburg discusses different categories of facts, and their

proper treatment by courts. She explains that the determination of whether a court may use information found outside the record "turns on whether the 'facts' involved are *adjudicative* or *legislative*."[25] This distinction, first coined in 1942,[26] defines the term "adjudicative" as referring to facts that "relate to the parties and their dispute-relevant activities," including such information as "what the parties did, what the circumstances were, [and] what the background conditions were."[27] Professor Thornburg recommends that "judges may only do independent research regarding adjudicative facts if those facts meet the reliability requirements of judicial notice and if the judge gives notice to the parties."[28] Not all judges would agree.

Background Information

While few judges will be inclined to base their decisions directly on facts obtained by independent research not disclosed to the parties, many judges will still be inclined to conduct independent research for purposes of obtaining what they consider to be "background" information. The point has been thoroughly argued by Seventh Circuit Judge Richard A. Posner. He contends that judges may properly investigate certain types of information if the information does not form the basis for a decision but merely helps the judge understand the situation presented by providing "background."[29] He acknowledges that "adjudicative" facts are not suitable subjects of a court's independent discovery and use, defining the term "adjudicative facts" as those "which if contested can (it is believed) be established with the requisite reliability only by the adversary process of a trial."[30] But Judge Posner takes the position that "background facts" – facts "designed to increase the reader's understanding of a case by placing the adjudicative facts in an illuminating context" – may properly be independently researched and used by courts, without notice to counsel. He offers as simple examples maps and photographs "that can enhance understanding by clarifying the facts in a case."[31] He complains that attorneys frequently fail to anticipate judges' questions about gaps in their narratives, forcing the judges to independently obtain the information necessary to fill in those gaps.[32]

Judge Posner provides specific examples of cases in which the Seventh Circuit found a need to obtain such outside information through Internet research. In one of them, *Gilles v. Blanchard*,[33] an itinerant preacher challenged a university's denial of his application to give a speech on the lawn of the school's library. Among the pieces of background information Judge Posner felt were lacking was a map of the layout of the school's campus, to help the court understand why the plaintiff thought the alternative site offered by the university was inadequate. Accordingly, to "enrich" the opinion, the court downloaded from the Internet a satellite photograph of the campus, an act whose propriety has been questioned.[34]

I am inclined to agree with at least some of Judge Posner's points regarding background facts, because I, too, have felt the need to research online facts that I would consider background information. For instance, sometimes when I read an appellate record and briefs I find myself confused as to how the described events could have physically occurred; often a quick look at the site of the events on a map can eliminate my confusion. In fact, the need for this type of "outside" information is probably common enough that the court should reserve the right to consult maps – assuming that they do not already qualify as a proper subject of judicial notice.

Other occasions in which I conducted independent online research for background information include a case in which the defendant was described as a "BASE jumper," without anyone defining the acronym. I independently looked up that acronym before writing the decision in *People v. Corliss*.[35] It had no impact on the result; it was just a relevant piece of background information. Similarly, in *Hammer v. American Kennel Club*[36] and in *In re Wiesner*,[37] I looked up background facts. In *Hammer* it was about views regarding whether tail docking interferes with the dog's ability to communicate with other dogs; in *Wiesner* it was general information on the subject of human branding. In neither case did that information have any impact on the result I reached; it simply rounded out the picture of the underlying events.

There is another kind of background inquiry in which I have seen appellate judges engage. It involves asking colleagues for background information on the judge whose ruling is under review. Of course, whatever information we already possess may play a part in our subjective judgment; we probably cannot help being subconsciously affected by what we happen to know about the judge whose decision we are reviewing. But to limit the consideration of irrelevant information, we should refrain from either affirmatively seeking such information from our colleagues or providing such information at the request of our colleagues.

More generally regarding the investigation of background information, an important point is made by the attorneys and scholars who warn of the potential deprivation of due process and fairness. A judge who believes it necessary to independently research background facts should consider very carefully the possibility that those facts may make a difference to the outcome of the case and, if so, before issuing the decision should disclose to counsel the fact of the research and the information being considered. This will allow counsel the opportunity to challenge the accuracy, reliability, or admissibility of the fact the court intends to take into account in coming to a decision. It can be tricky to discern the line between proper and improper independent research, and even with the best of intentions we may incorrectly assess the situation, or at least reasonable minds may differ in particular situations. It is best to err on the side of caution and give counsel a chance to weigh in.

In the *Bari* case, the Second Circuit remarked on the ease of confirming our intuition with speedy Internet searches.[38] We should not forget, however, that the ease

of Googling information should not be equated with the propriety of relying on that information without notice. ■

1. *See* 2 Criminal Jury Instructions 2d[NY] Jury Issues – Juror Expertise.
2. 8 Misc. 3d 33 (App. Term 2d Dep't 2004).
3. *Id.*
4. 599 F.3d 176 (2d Cir. 2010).
5. *Id.* at 179–80.
6. *Id.* at 178.
7. *Id.*
8. *Id.* at 180 (citing Federal Rule of Evidence 201 (FRE)).
9. *Hamilton v. Miller*, 23 N.Y.3d 592, 593–94 (2014) (internal quotation marks and citation omitted) (emphasis added); *see* Richardson, Evidence § 9 (Prince 10th ed.).
10. *See Dollas v. W.R. Grace & Co.*, 225 A.D.2d 319, 320 (1st Dep't 1996) (internal quotation marks and citation omitted).
11. *Id.*
12. *Id.* at 320.
13. *Id.*
14. 167 F. App'x 255 (2d Cir. 2006), *aff'g* 2005 WL 1036201 (S.D.N.Y. 2005).
15. *Kourkounakis v. Dello Russo*, 2006 WL 1794506, *3 (2d Cir. May 15, 2006).
16. *See id.*
17. *See* Katrina Hall, *Kourkounakis v. Dello Russo: Should a Trial Judge Be Permitted to Independently Google an Expert Witness to Determine Credibility?*, 112 Penn. St. L. Rev. 885 (Winter 2008).
18. *Id.*
19. *Id.* at p. 905.
20. Arizona Attorney, Dec. 2005 at 20, http://www.myazbar.org/AZAttorney/PDF_Articles/1205Google.pdf.
21. 16 Prof'l Law. 2 (ABA) 2005, http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/TPL_jethics_internet.authcheckdam.pdf.
22. *Id.* at 11.
23. ABA Model Code of Jud. Conduct, Canon 3(B)(7) (amended 1999, comment).
24. 28 Litig. Rev. 131 (2008).
25. *Id.* at 149 (emphasis in original).
26. *Id.* (citing Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364 (1942)).
27. *Id.* at 149–50; *see id.* at 136 (defining legislative facts as "those that inform the court's judgment when deciding questions of law or policy").
28. *Id.* at 150 (citing FRE201).
29. Richard Posner, ch. 5, *The Inadequate Appellate Record*, *in* Reflections on Judging 131–48 (Harvard Univ. Press 2013)).
30. *Id.* at 136–37.
31. *Id.* at 137.
32. *Id.* at 138.
33. 477 F.3d 466 (7th Cir. 2007).
34. Posner, *supra* note 29 at 139 (citing Charles D. Knight, *Searching for Brother Jim: Improving Appellate Advocacy With the Internet*, Circuit Rider, Apr. 2010, pp. 12–13).
35. 51 A.D.3d 79 (1st Dep't 2008).
36. 304 A.D.2d 74 (1st Dep't 2003).
37. 94 A.D.3d 167 (2012).
38. 599 F.3d at 180.

End of War

Last of the War Stories From the New York Courts

By Harold Lee Schwab

"I Wanted the 250R"

Twelve-year-old Louis Milito lived with his mother, Lynda, and his sister in a mansion on tony Todt Hill in Staten Island. The family owned an ATC 200 (a motorized three-wheel all-terrain cycle) used principally for gardening around the property. Although Louis knew how to operate it, his heart was set on a 1986 Honda 250R Four Trax. The cost of the vehicle was not a concern. Louis had monies from his recent confirmation and the Militos were apparently well-off financially.[1]

The 250R Four Trax was Honda's new top-of-the-line ATV (all-terrain vehicle). It was a high performance machine particularly suitable for closed-course ATV competition racing. The four oversized knobby tires bespoke of its intended purpose for off-road riding. It had a special suspension designed for racing and a two-stroke engine which produced power and speed (as well as noise). The 250R was different in appearance, weight and size from other models. Louis, who was only 4'9" tall, when seated could hardly reach the hand brake and the hand clutch, and his feet could barely reach the ground or the foot-actuated gear shifter. Nevertheless, the 250R was the apple of his eye, and so he made his desires known to his mother. That the model came with a warning "not recommended for use by persons under the age of 14" was no deterrent for its prospective user.

Island Cycles was a local Honda dealership on Staten Island that sold ATVs. Louis and his mother went there to purchase the 250R. They talked to Kenneth Carpenter who, upon learning that the intended user was little Louis, refused to sell them the 250R. As Carpenter later testified at trial, "[s]he wanted to buy the TRX 250R and I told her that I wouldn't sell it to Louis. It was too big, much too powerful for him with the limited experience he had, and she insisted that she wanted to buy it. And then we had some discussion in between, and she was very insistent on purchasing it. And she said if she couldn't purchase it from me, she would buy it from someplace else. And that time I suggested that she go to a sporting goods store north of me up Hylan Boulevard and buy him a pistol because it would be the same thing, and she left my store."

Having been rejected by Island Cycles, Louis complained to one Vincent DeCandia, better known as Vinnie Bill Ray, who Louis knew would be responsive to his needs. Vinnie Bill Ray had the job, among others, of being guardian to the Militos during the absence of Louis' father.[2] It is uncertain what really took place next, but it is believed that calls were made, possibly from John Gotti's Bergin Hunt and Fish Club in Ozone Park, Queens, that resulted in an offer to a Brooklyn Honda dealer that could

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not be refused. Within the week, Louis and some youthful friends were at Plaza Cycles, Ltd., in Brooklyn, and Vinnie Bill Ray drove his truck to pick up the sought after 250R. Better still, the sale price for this top-of-the-line item was an unexplained $100 off the list price.

Honda supplied an Owner's Manual with every 250R. Although Louis denied receiving one, Steven Deutcham at Plaza Cycles recalled personally handing him the Owner's Manual. Among other things, the manual warned that "the Four Trax 250R is a high performance machine based on the latest Motocross technology. It is intended for use by experienced riders only." Another warning read, "For off road use only. Operation on public streets, roads or highways is illegal." That same warning was imprinted on the actual machine. Nevertheless, in short order, Louis went riding on the streets of Staten Island with two of his friends who also had ATVs (but not 250R Four Traxes). On Columbus Day, October 11, 1986, Louis blew through a stop sign at the intersection of Atlantic and Laconia Avenues at a speed, according to an eyewitness, of 40 mph and collided with an automobile driven by Denise Cascini. Louis lost his helmet, which landed 120 feet down the street, and was himself propelled in the air, landing next to a neighboring house. Louis sustained major fractures to his pelvis, femur and tibia, which necessitated an open reduction operation, insertion of an intramedullary rod and his being placed in a body spica cast for an extended period of time. The net result was significant leg shortening, a frozen knee, and a stiff leg.

The trial of *Milito v. Honda Motor Corp. Ltd. et al.*[3] took place from November 1993 through January 1994 in the U.S. District Court for the Eastern District of New York in Hauppauge, Long Island, before Hon. Denis R. Hurley. The plaintiff was represented by Robert Ginsberg of Ginsberg & Broome, Esqs. Bob Ginsberg, a personable attorney and skilled adversary, had previously been a junior partner at Fuchsberg & Fuchsberg. In addition to the undersigned appearing for the various Honda defendants, there were seven other defense attorneys appearing for doctors and hospitals against whom medical malpractice claims had been advanced as well as Plaza Cycles and Lynda Milito on a cross-complaint. By the time of trial, the plaintiff was 20 years old and walked with an extreme limp.[4]

Numerous fact witnesses testified at the trial including, among others, Louis' bike-riding friends, the two ATV dealers, the eyewitness and participants in the accident, the homeowner, and, of course, Vincent DeCandia. Consistent with his persona, Vinnie Bill Ray had no recollection of anything, and his monosyllabic, abbreviated testimony proved to be a total irrelevancy.

The plaintiffs advanced two principal theories of liability against Honda. First, that the throttle mechanism was defective and this caused the 250R to surge forward through the stop sign while Louis was attempting to down shift and stop. Understandably, Ginsberg did not present any engineer or accident reconstruction expert for these purposes. Inspection of the subject 250R by experts retained by Honda disclosed that there was nothing wrong by way of design, manufacture or operation with the acceleration system of the ATV, and they so testified. Expert accident reconstruction confirmed the speed of 40 mph at the time of the collision. The second theory of liability was that Honda had failed to properly warn of the dangers in use of the ATV by 12-year-old Louis. For this theory, the plaintiffs presented a warnings expert, Edward Karnes, who regularly testified against ATV manufacturers throughout the United States. Karnes testified that the warning "Intended for use by experienced riders only" was inadequate and ambiguous; and he maintained that the warning "Not recommended for children under 14" was insufficient and should read "Don't use this vehicle if you are under 14." He claimed that warnings by Honda in letters to dealers should have included a statement to the effect, "Please, Mr. Dealer, please put the child on the machine and if he doesn't fit, don't sell him that machine."

Karnes acknowledged on cross-examination that whether his warnings would have made a difference in the case of Louis Milito was a matter of speculation.

> Q: Would you agree with me for that individual Louis Milito, it is an open question as to whether warnings, changes in warnings would make a difference in changing his behavior and conduct?
> A: Well, that's a question.
> Q: Would you agree with me, yes or no?
> A: Well, that's a question I can't answer. Mr. Milito is alive and can answer questions about that himself. I am not in a position to speculate what he would do.
> Q: If you would have given answer on that subject as to whether a change in warnings would motivate or change behavior, that would be speculation with regard to his particular case: Isn't that correct?
> A: Getting into speculation, if that individual is available to answer your question, that is the appropriate place to address your answer.

Suffice it to say, Louis Milito never testified that a change in warnings would have made a difference.

Honda presented an in-house historian who testified that the Owner's Manual and on-product warnings were a result of a joint review and approval by all manufacturers of ATVs (Honda, Kawasaki, Yamaha, and Suzuki) and the SVIA (Specialty Vehicle Institute of America) as well as independent experts who had approved the prospective warnings before their adoption. The defense also presented its own independent expert on warnings who opined that there was no warning that would have dissuaded Louis Milito. One way or another Louis was going to get his 250R Four Trax. In addition to the testimony by the Staten Island dealer, the plaintiff himself confirmed on cross-examination this critical aspect of the defense.

Q: And you also knew at this point that Island Cycles believed the bike was too big for you and they were going to sell – and they weren't going to sell it to you. You knew that at that point in time after being rebuked twice?
A: Yes.
Q: And armed with that knowledge you went ahead and tried to find another place to buy the bike?
A: Correct.
Q: Yes?
A: Yes.
Q: And whatever those warnings were, you wanted that bike, the 250R, correct?
A: I wanted the 250R.
Q: And you made that clear to your mother, true?
A: That I wanted it, yes.
Q: And you made that clear to Vinnie Bill Ray, also true?
A: He knew I wanted it.

On January 12, 1994, the jury returned a verdict for all of the defendants.[5] I spoke to a few of the jurors after the verdict and fortunately they did not know of the association of plaintiff's father with Sammy the Bull and John Gotti. Judgment for the defendants was affirmed on appeal without opinion.[6]

A Trial Lawyer's Suit

Paniagua v. Paniagua et al.[7] was tried in Supreme Court, Richmond County in November and December 2004 before Hon. Eric N. Vitaliano.[8] The case resulted from something of a classic two-vehicle head-on collision at night on a wet roadway in Staten Island with the principal question being, Which vehicle crossed over the double yellow line? The trial was anything but prosaic, however, since the plaintiff was represented by Marvin Salenger of Salenger, Sack, Kimmel & Bavaro, LLP. Marvin is an outstanding trial lawyer who at times displays an unabashedly extroverted personality. When he lectures, Marvin, with a smile, often tells his audience that he is one of the greatest of all trial lawyers. At a lawyers' cocktail reception he has been known to call an attorney such as myself "honey" and be seen embracing and even kissing a fellow barrister. There is only one Marvin Salenger.

The case was also not prosaic because of the seatbelt defense, which was my principal interest. John Paniagua was seated in the rear of his brother's automobile and was not wearing the lap-shoulder belt that was available for him to use. As an unrestrained passenger in a head-on collision, he hurtled forward into the front seat back and the dash panel. Paniagua received major injuries to his left shoulder and arm, which precluded his ever working again as a carpenter. The defense called Dr. Robert Mendelsohn as its seatbelt/mechanism of injury expert, who opined that had the plaintiff been belted in, he would not have been injured. Successful cross-examination of Dr. Mendelsohn was critical to any recovery by the plaintiff.

During the middle of his cross-examination, Salenger turned his back to the witness and the jury and turned to me at the defense table and said in a low voice with that Salenger smile, "Herschel, what do you think of my new suit?" Bizarre! Extraordinary! There was Marvin asking for my opinion on his sartorial splendor while cross-examining the single most important witness in the case. Marvin had remembered from our past discussions that in my prior life I had worked in my father's Rhode Island textile mill and knew much about worsted fabrics. (And by the way, no one had ever before addressed me as "Herschel.") Shocked, given the setting, I took a quick look at his suit jacket, felt the fabric between my fingers and replied in a low voice so only he could hear, "Marvin, the fabric is good but the stripes in the lapel don't match the jacket." (They really didn't.) Obviously crestfallen, but not so the jurors could see, he turned to the witness and continued an effective cross-examination in an unflappable manner, as if nothing untoward had happened.

Marvin did not wear the same suit again, at least not during the Paniagua trial. The jury returned a verdict with total damages of $2,225,000 against both drivers. As regards the seatbelt defense, the jury answered "no" to the question, "Would a reasonably prudent passenger in plaintiff's position have used an available seatbelt?"[9]

RICO Experts

One would expect that attorneys knowledgeable in RICO (an acronym for Racketeer Influenced and Corrupt Organizations) would be members of the criminal bar. Knowledge of the predicate acts constituting a pattern of racketeering in violation of the RICO statute, 18 U.S.C. § 1962(c), would seem to require criminal law expertise. Not necessarily so. In the 1980s the personal injury law firm of Morris J. Eisen, P.C. and, in particular, its sole stockholder, Morris (Murray) J. Eisen; two trial attorneys, Joseph P. Napoli and Harold M. Fishman; three investigators, Alan Weinstein, Dennis Rella, and Marty Gabe; and the office manager, Geraldine G. Morganti, specialized in acts of racketeering to such an extent that, by the time of their trial in the Southern District in 1990, they surely had become experts in RICO law.

Eisen stalked the courtrooms of Manhattan and the Bronx like a game hunter on safari. His sights were aimed at corporate defendants and the insurance industry.[10] His safari confederates did their very best to ensure that the law firm and its clients bagged the big game waiting for them. He was a multimillion dollar success.

It appears there was no limit to which the participants would go. Bribery and subornation of perjury were their modus operandi, but they were not above enlarging a pothole with a pickax to create a proper defect or using a sledgehammer to smash a tire rim to exaggerate an automobile accident. Even Helen Gaimari, mother of the office manager, was involved. She appeared as a notice

and eyewitness to a trip-and-fall accident after a lawyer sent a letter to the defense stating that there was no witness to the accident.[11]

But probably their most ingenious trick was how they would enlarge a hole without resort to shovel or ax. A ruler was placed on a copy machine that had the capability of either reducing or enlarging the size. A reduced size copy of the ruler was made so that what was in fact only one inch would be the equivalent of four inches on the copy. That revised ruler was then used as the measuring stick in the photographs. Indeed, the old adage "photographs don't lie" and its corollary "but liars take photographs" was proven true at Morris J. Eisen, P.C.

Their boldness caused their downfall. The pervasive pattern of corruption unravelled when Fishman called the same witness in two separate cases. Suit had been brought against the City of New York for failure to repair potholes, resulting in two unrelated automobile accidents and personal injury suits. Because of the verdicts against it, the city performed an investigation which revealed that the very same witness had testified in the two cases. More unbelievable still, at the time of one of the accidents the witness was actually in jail at Rikers Island. He subsequently admitted to having been paid $2,500 to testify falsely.

> The evidence at trial established that the defendants conducted the affairs of the Eisen law firm through a pattern of mail fraud and witness bribery by pursuing counterfeit claims and using false witnesses in personal injury trials, and that the Eisen firm earned millions in contingency fees from personal injury suits involving fraud or bribery. The methods by which the frauds were accomplished included pressuring accident witnesses to testify falsely, paying individuals to testify falsely that they had witnessed accidents, paying unfavorable witnesses not to testify, and creating false photographs, documents, and physical evidence of accidents for use before and during trial. The Government's proof included the testimony of numerous Eisen firm attorneys and employees as well as Eisen firm clients, defense attorneys, and witnesses involved in the fraudulent personal injury suits. Transcripts, correspondence, and trial exhibits from the fraudulent personal injury suits were also introduced.[12]

I well remember an incident in the Supreme Court, New York County, following the RICO indictments. I was on the fourth floor at 60 Centre Street preparatory to selecting a jury in a civil case. Eisen was effectively holding court in the corridor surrounded by a coterie of attorneys. Eisen said to the group, in substance, "Can you imagine, boys, what they are trying to do to me?" A few of the sycophants responded, "Oh no, Murray." Hearing this as I passed by, I volunteered, "Mr. Eisen, if what they're saying is true, you deserve what you're going to get."

In March 1991, after a four-month trial, a jury found all of the defendants guilty. *The New York Times* reported, "In a trial that came to symbolize the worst excesses of personal-injury law, the lawyer, Morris J. Eisen, was found guilty of operating his 40-member law firm in the Woolworth Building as a racketeering enterprise."[13]

The three attorney-defendants were found guilty of racketeering acts involving personal injury cases. Eisen was found guilty in three. The jury found that Napoli had procured false testimony through bribery, fabricated testimony for witnesses at trial and suborned perjury in four. The jury also found that Fishman had bribed witnesses, committed mail fraud and instructed witnesses to testify falsely in connection with four cases.[14] The three investigators were found guilty of racketeering acts in a total of nine personal injury cases. Finally, office manager Morganti was found guilty of racketeering acts in four personal injury cases.[15]

Eisen stalked the courtrooms of Manhattan and the Bronx like a game hunter on safari. His sights were aimed at corporate defendants and the insurance industry.

On September 4, 1991, Morris J. Eisen, having been found guilty of both counts of an indictment charging him with a pattern of racketeering including *inter alia* two acts of bribing a witness, was sentenced to two concurrent terms of 57 months imprisonment and, upon release from imprisonment, supervision for a term of two years on each count, a fine of $100,000, assessment of $100, forfeiture of $500,000, and restitution in the amount of $17,100. On January 23, 1992, he was disbarred by the Appellate Division, First Department.[16]

Joseph P. Napoli was convicted of bribery and conspiracy to commit racketeering acts, including two acts of wilfully and knowingly bribing a witness. On September 13, 1991, he was sentenced to concurrent terms of imprisonment of 46 months, two years' probation on each count, a fine of $75,000, assessment of $100 and forfeiture of $30,000. On February 27, 1992, he was disbarred by the Appellate Division, First Department.[17] He sought reinstatement on two occasions. On June 26, 2001, his application was denied;[18] however, on July 3, 2012, the

Appellate Division reinstated Napoli on motion with an inscrutable "no opinion."[19]

Harold M. Fishman was found guilty of both counts of an indictment charging him with a pattern of racketeering including three racketeering acts of bribing a witness and conspiring to commit racketeering acts. He was sentenced to two concurrent terms of 37 months' imprisonment and upon release supervision for a term of three years on each of the two counts to run concurrently, a fine totaling $25,000, assessment of $100 and forfeiture of $10,000. On January 20, 1992, he was disbarred by the Appellate Division, First Department.[20] Fishman sought reinstatement on two occasions: January 27, 2004, and November 30, 2006. His application was denied each time.[21]

How does one end this story? Some might say with the words of G. Gordon Liddy of dubious Watergate fame. "One of the biggest lies in the world is that crime doesn't pay. Of course, crime pays."[22]

The Judicial Apparition

By the 1970s Judge Edward Weinfeld was viewed by most members of the federal bar and bench as the then-greatest living district court judge. He presided over trials in the Southern District of New York with dignity and decorum. His rulings were correct and his opinions were erudite. He was to the Southern District what Learned Hand and Augustus Hand had been decades earlier to the Second Circuit. Some maintained that Judge Weinfeld belonged on the U.S. Supreme Court.

In February 1974, I was assigned to Judge Weinfeld. How fortunate can a trial attorney be? The case was *Lane v. General Motors Corp.* and I represented the co-defendant Pitman Manufacturing Co. My client had installed a truck body and boom upon a GM chassis. David Lane, an employee of Jersey Central Power and Light, was riding as a passenger in the vehicle when it rolled over on a New Jersey roadway. He was partially ejected and rendered a paraplegic. This case had a high profile not only because it was being heard by Judge Weinfeld, but also by virtue of the other attorneys involved. Morris Hirschhorn had retained as trial counsel Bruce Walkup from California. At that time Walkup was said to have obtained more million dollar verdicts than any other plaintiff's attorney in the United States. As if that were not enough, General Motors had hired Roy Reardon from Simpson Thatcher who by that time was already a legend in his own right.

The vehicle was a one-of-a-kind utility truck larger than any other owned by Jersey Central. The principal claim against Pitman Manufacturing Co. was that it had designed and installed a body and boom on the GM chassis which incorrectly and improperly raised the center of gravity so as to make the vehicle top-heavy and prone to tip over. For this purpose Walkup called an engineer from California as his key witness. Roy Reardon was principally interested in defending the claim of a defective door latch, so the principal cross-examination of the plaintiff's vehicle stability design expert was left to me.

One evening while on trial I had dinner at a restaurant on Lafayette Street north of Foley Square while preparing for cross-examination the following day. I was seated at the front window overlooking the street. It was dark and still winter. The wind was blowing. Almost out of nowhere there appeared the strangest of sights, a short, lean elderly figure trudging uptown without even a hat or coat in the freezing cold. Was this an apparition or just a homeless person? Almost as soon as I saw whatever it was, it passed the lights of the restaurant and disappeared into the night.

It looked like Judge Weinfeld but no, that couldn't be. Certainly, no judge in his right mind would go out in the weather that way and surely not Judge Weinfeld, who was then more than 70 years old. It had to be something or someone else, probably a homeless person. I went back to my dinner and cross-examination preparation, and fortified myself with a martini.

The following day I told a clerk what I had seen and, in response, was informed, "Oh yes, that was Judge Weinfeld you saw. He always goes out that way walking to his home in Greenwich Village. He works late and never wears a coat or hat." To say I was shocked is an understatement.

It just so happened that, coincidentally, I was in the market for a winter coat. The topcoat I wore needed to be replaced (courtesy of a still-lit cigar which I mistakenly had placed in the coat pocket earlier that year while having lunch in a restaurant on Duane Street). I made the decision on the spot that if the greatest federal trial judge did not require a coat in the wintertime, then I no longer needed one. Bizarre as it may seem, since March 1974 I have only worn a scarf (and in extreme weather conditions gloves and hat) during the winter.

Attorneys and court personnel often ask, "Where is your coat?" and I respond, "I don't own one." If it was good enough for Judge Weinfeld, it is good enough for me.[23] ■

1. His father, Liborio "Looie" Milito, was serving time in Lewisberg Federal Prison for loan sharking and income tax evasion. He was a known hit man in the Gambino crime family and a senior member of the crew headed by his boyhood friend, Salvatore "Sammy the Bull" Gravano. *See* Lynda Milito, Mafia Wife (Harper Collins 2003); Liborio "Looie" Milito – Mobstars–Inc.com.

2. Vinnie Bill Ray was out of Hollywood central casting. He belonged in *Goodfellas* or *The Godfather*, but he was the real thing. He most likely would have reported to Sammy the Bull or John Gotti in the absence of Liborio Milito. Paul Castellano, and his underboss Thomas Bilotti were shot and killed on December 16, 1985 on the sidewalk outside of Spark's Steakhouse in New York City under orders of John Gotti who, with Gravano, was parked a block away. One of the hit men was John Carneglia. Gotti replaced Castellano as head of the crime family and promoted Gravano to underboss and later to consigliore.

3. CV 88-3006 (E.D.N.Y. 1994).

4. The plaintiff's father was not present at the trial and for good reason. When he got out of prison, Liborio Milito was dissatisfied because he was not made Capo of the old crew after Gravano was promoted to underboss. Gravano reported this to John Gotti, who would not countenance such dissat-

isfaction and told Sammy the Bull to take care of the problem. Gravano made arrangements for Milito to meet at a certain bar and restaurant in Brooklyn to discuss a contract (i.e., a murder) on an associate. Little did Milito know that he was *that* associate. On the night of March 8, 1988, Liborio Milito went to the restaurant and had a drink at the bar. Sammy the Bull was playing cards at a table. John Carneglia, one of the assassins of Castellano and Bilotti, was watching TV on a couch. Carneglia got up, went behind Milito and with a silenced .380 caliber handgun shot him in the back of the head. Milito's body was wrapped up in a rug and placed in a car. It was never found.

5. It appears that the jury accepted the argument of the medical malpractice defendants that Louis' leg shortening and disability was a result of the severity of the initial injuries, which included damage to his growth plates.

6. *Milito v. Honda*, 50 F.3d 3 (2d Cir. 1995).

7. Index No. 13976/01 (Sup. Ct., Richmond Co. Dec. 6, 2004).

8. The following year, his Honor was nominated and confirmed for the U.S. District Court for the Eastern District of New York. Judge Vitaliano's ascension to the federal bench was well deserved although a significant loss to those trial attorneys who practice principally in the state courts.

9. The subject accident occurred on September 20, 2001. Vehicle & Traffic Law § 1229C was amended by adding a new subdivision 3A, effective November 16, 2002, which provided "except as otherwise provided for passengers under the age of four, it shall be a violation of this section if a person is seated in a seating position equipped with both a lap safety belt and a shoulder harness belt and such person is not restrained by both such lap safety belt and shoulder harness belt." This statute, which mandates the use of lap shoulder belts for all occupants including those in the rear, did not apply in the Paniagua trial since it was not effective until after the date of accident. Otherwise, it undoubtedly would have resulted in a finding of negligence for failure to wear the seatbelt; failure to comply with a Vehicle & Traffic Law statute is evidence of negligence (*see* PJI 2:26).

10. It was alleged in an indictment that "[b]y 1986, [the Eisen Firm's] annual gross income was approximately $20,000,000.00." Ironically, in 1990 the defendants argued, inter alia, that there was no significant potential for loss of money and therefore no mail fraud "because any judgment would, as a practical matter, be paid by an insurance company, not by the civil defendant." *U.S. v. Eisen*, 1990 WL164681 (E.D,N.Y. Oct. 19, 1992) (Memorandum and Order Sifton, District Judge).

11. The lawyer, Frank DeSalvo, testified under a grant of immunity at the RICO trial and previously before a Grand Jury. However, immunity does not preclude prosecution for perjury. The testimony of DeSalvo under the grant was so blatantly false that he was subsequently charged with 12 counts of perjury and 12 counts of obstruction of justice, tried and convicted of those counts in 1992 in the Eastern District of New York. *U.S. v. DeSalvo*, 797 F. Supp. 159 (E.D.N.Y. 1992), *aff'd*, 26 F.3d 1216 (2d Cir. 1994). He was disbarred on April 20, 1993, *In re DeSalvo*, 189 A.D.2d 322 (1st Dep't 1993).

12. *U.S. v. Eisen et al.*, 974 F.2d 246 (2d Cir. 1992).

13. Arnold H. Lubasch, *Jury Finds Law Firm Ran Racket*, N.Y. Times (Mar. 5, 1991).

14. *Eisen*, 974 F.2d 246, *Napoli v. U.S.*, 32 F.3d 31 (2d Cir. 1994).

15. The conviction of Morganti in one case was reversed by the Second Circuit, which was unable to conclude that a reasonable juror could find beyond a reasonable doubt that Morganti had caused her 70-year-old mother Helen Gaimari to give false testimony, although it also found that a reasonable juror could find that Gaimari gave false testimony concerning her presence at an accident. Carmela Pietrafesa had testified at a deposition that she had not gotten the names of anyone who helped her up at the time of the accident. However, at trial, and at the Eisen trial, she testified that an elderly woman who turned out to be Gaimari picked her up and gave her a piece of paper containing Gaimari's name and number. Although the familial relationship and testimony of other witnesses was found by the Second Circuit insufficient to prove Morganti's guilt beyond a reasonable doubt in the Pietrafesa case, the court found that she was an active participant in the cabal to falsify testimony in the three other cases for which she was convicted.

16. *In re Morris J. Eisen*, 174 A.D.2d 141 (1st Dep't 1992).

17. *In re Joseph P. Napoli*, 177 A.D.2d 135 (1st Dep't 1992).

18. 284 A.D.2d 267 (mem) (1st Dep't 2001).

19. 2012 N.Y. Slip Op. 77929(U) (1st Dep't 2012).

20. *In re Harold M. Fishman*, 174 A.D.2d 156 (1st Dep't 1992).

21. *See In re Fishman*, 3 A.D.3d 450 (mem) (1st Dep't 2004).

22. *See* David S. Broder, *Making Moral Judgments Stick*, Washington Post Nat'l Weekly Ed., Apr. 10, 1989.

23. As regards the trial, which is not the point of the story, the plaintiff's expert admitted on cross-examination that he had not done any testing to determine the center of gravity of the vehicle. Better still, one of jurors who happened to be an attorney engaged in positive dialogue with my expert J.P. Stannard Baker, Chairman of the Traffic Institute of Northwestern University, while performing a reconstruction test in front of the jury. The jury returned a verdict on behalf of both defendants. The plaintiff only appealed the judgment against General Motors. Retired Court of Appeals Judge Bernard S. Meyer argued for the plaintiff-appellant. The Second Circuit affirmed the judgment in favor of defendants, *Lane v. Gen. Motors Corp.*, 520 F.2d 528 (2d Cir. 1975). And, by the way, everything that the bar and bench said about Judge Weinfeld was true, judicial apparition to the contrary notwithstanding.

BY JAMES L. HYER

Obergefell v. Hodges and Issues of Judicial Civility

By James L. Hyer

In the wake of *Obergefell v. Hodges*,[1] the landmark decision rendered by the U.S. Supreme Court pertaining to how marriage is defined within our country, the legal community must examine the issues of judicial civility raised following the decision, particularly in the dissent of Justice Antonin Scalia. Taking no position on the substantive matters addressed by the Court, this article focuses on the tenor of Justice Scalia's dissent and examines whether his writing would run afoul of the rules of civility and professional responsibility as adopted in the State of New York.

Without question, the issue of same-sex marriage has divided our nation, and debate regarding marriage equality will continue for many years. Nevertheless, though disagreement on this issue will likely endure, in my view it is vital that those within the judiciary adhere to the standards of civility and conduct when addressing volatile issues. Decisions rendered from the bench must not only rely upon the rule of law, but also respect both individual litigants and the society at large with whom the judges may disagree.

Judges must put aside their own personal biases to render decisions based upon scrupulous and objective legal analysis while complying with the codified ethical rules. As U.S. Supreme Court Justice William Johnson commented, "[I]t is the unenvied province of this Court to be directed by the head, and not the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling."[2] The significance of crafting decisions founded upon the law – rather than emotion – is essential to maintaining the public's trust in the legal system because the public's belief in the fairness of the legal system is largely focused upon the judiciary. As U.S. Supreme Court Justice Stephen Breyer has noted: "Deference to the judgment and rulings of the courts depends on the public confidence that those decisions were based on the law and facts. Even with its coercive powers, the judiciary for the most part relies on voluntary compliance with its directives."[3]

The legitimacy of the justice system would be undermined if the public believes that judges can override the law to further their personal convictions. The need for upholding the legitimacy of the judiciary includes the self-regulation of judicial excess and abuse in any form, including uncivil speech or behavior. To that end, legal scholar Leonard E. Gross has stated that restrictions on judicial speech are appropriate when they serve to maintain the public confidence in an impartial judiciary: "[M]aintaining public confidence in the judiciary is a vital governmental interest justifying discipline of judges whose statements impugn the integrity and impartiality of the judiciary."[4] He further adds that "where the judge's speech calls into question his ability to do his job, or if the speech causes excessive harm to the institutional efficiency of the judicial system, the manner of the judge's speech can be regulated."[5] While the need for an independent judiciary is beyond reproach, it is vital that the members of the judiciary act with dignity, civility and professionalism so that they do not undermine respect for their office and the judicial system as a whole.

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Rules of Conduct and Standards of Civility in New York

In the State of New York, lawyers and judges are held to strict codes of professional conduct, including the Rules Governing Judicial Conduct;[6] New York Rules of Professional Conduct;[7] and the New York Standards of Civility.[8] The Rules Governing Judicial Conduct recognize that "[a]n independent and honorable judiciary is indispensable to justice in our society," and "[a] judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that integrity and independence of the judiciary will be preserved."[9] The Rules further provide: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Moreover, "[a] judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."[10] The Preamble to the Rules notes that "[t]he rules are not intended as an exhaustive guide for conduct. Judges and judicial candidates also should be governed in their judicial and personal conduct by general ethical standards."[11]

Similarly, the Preamble to the New York Rules of Professional Conduct instructs each member of the bar to be mindful that "as an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system. . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority."[12] The Rules state that "in appearing as a lawyer before a tribunal, a lawyer shall not: engage in undignified or discourteous conduct."[13] Comment to Rule 3.3 notes, "In adversary proceedings, ill feeling may exist between clients, but such ill feeling should not influence a lawyer's conduct, attitude, and demeanor toward opposing lawyers," adding, "[a] lawyer should not make unfair or derogatory personal reference to opposing counsel," and further, "[h]aranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system."[14]

The Preamble to the New York Standards of Civility describes the Standards as "a set of guidelines intended to encourage lawyers, judges, and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course," and that "[the judicial] process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility."[15] The Standards direct that "[l]awyers can disagree without being disagreeable"; "[e]ffective representation does not require antagonistic or acrimonious behavior"; and, "[w]hether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses."[16] The Standards also note that "[j]udges should not employ hostile, demeaning or humiliating words or opinions or in written or oral communications with lawyers, parties or witnesses."[17]

The Dissent in *Obergefell*

In his dissent, Justice Scalia states, "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."[18] He refers to the Court as the country's "Ruler," suggesting that the Court has assumed a divine capacity and implying that the Court has vastly overstepped its powers. Justice Scalia later adds that the Supreme Court acted out of self-importance, going so far as to say that the Court's decision was an act of "hubris" that amounts to a "judicial Putsch," a term that is often associated with the revolutionary and violent overthrow of governments.[19]

His dissent goes further to denounce the entire federal system of government, including the judiciary, saying, "[a] system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."[20] Justice Scalia then evokes a slogan from the American Revolution, stating: "[t]o allow the policy question of same-sex marriage to be considered resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation."[21] Justice Scalia then calls the Court "unrepresentative" in the context of religion and regional origin of the sitting Justices. While it is highly unlikely that Justice Scalia sought his dissent to be a call to arms for a revolution by states opposing same-sex marriage, his remarks seem to be an attack on the judicial legitimacy of the Supreme Court, thus by implication calling into question the ability of the Court to operate fairly and objectively.

Unfortunately, Justice Scalia's criticism became personal. He questions the intellect of each of the majority Justices, opining that "[t]hey have discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds – minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly – could not."[22] Justice Scalia then states, "The opinion is couched in a style that is as pretentious as its context is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do

so. Of course the opinion's showy profundities are often profoundly incoherent."[23]

Clearly, the dissent is guided, at least in part, by emotion rather legal reasoning. Such attacks on fellow members of the bench and derogatory extra-legal accusations against the Court itself adversely affect the public's perception of the integrity of the Court. Unlike the dissents of his colleagues, Justice Scalia's writing impugned the character of the Justices joining the majority, the institution of the Supreme Court and the very legitimacy of this country as a democracy. In calling the Court "impotent" and its decision-making "unabashedly based not on the law," he trivializes his colleagues' reasoned basis for their views and unfairly demonizes the institution of the Court.

Beyond offering a questionable commentary pertaining to this decision, the words of Justice Scalia may have repercussions beyond the matter of same-sex marriage. His dicta has resulted in much public discourse wherein he is negatively assessed, not for his ultimate position regarding same-sex marriage, but for the lack of civility in his dissent.[24] While it is impossible to determine how his colleagues received Justice Scalia's dissent, it seems likely that his offensive comments might have a significant effect on the collegiality of the Justices within the Court. Without a doubt there will always be differences in legal positions within the legal profession; however, as noted in the New York Standards of Civility, we should strive to disagree without being disagreeable. ■

1. 135 S. Ct. 2584 (2015).

2. *The Rapid*, 12 U.S. (8 Cranch) 155, 164, (1814).

3. Stephen Breyer, Making Our Democracy Work: A Judge's View, at xiii, 3–72 (2010); *see also* Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. Rev. 779 (June 2015) (Hon. Anthony J. Scirica is a former Chief Circuit Judge).

4. Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 Syracuse L. Rev. 1181 (1986).

5. *Id.*

6. Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts, Rules of the Chief Administrative Judge, Part 100.

7. 22 N.Y.C.R.R. Part 1200.

8. 22 N.Y.C.R.R. Part 1200, Appendix A. Note that the rules are aspirational in nature.

9. Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts, Rules of the Chief Administrative Judge § 100.1.

10. Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts, Rules of the Chief Administrative Judge §§ 100.2(A), 100.3(B).

11. Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts, Rules of the Chief Administrative Judge, Part 100, Preamble.

12. 22 N.Y.C.R.R. Part 1200, Preamble § [1].

13. 22 N.Y.C.R.R. Rule 3.3.

14. 22 N.Y.C.R.R. Rule 3.3, Comment 13.

15. 22 N.Y.C.R.R. Part 1200, Appendix A, Preamble.

16. 22 N.Y.C.R.R. Part 1200, Appendix A, I(B) Lawyers Duties to Other Lawyers, Litigants and Witnesses.

17. 22 N.Y.C.R.R. Part 1200, Appendix A, I(B) Judges' Duties to Lawyers, Parties and Witnesses.

18. *Obergefell*, 135 S. Ct. at 2627.

19. *Id.* at 2629.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 2630.

24. *See, e.g.*, William Bradley, *"California Not in the West": Scalia's Bizarre Sense of Political Geography*, City Watch LA, July 3, 2015, http://citywatchla.com/8box-left/9254-california-not-in-the-west-scalia-s-bizarre-sense-of-political-geography; Maxwell Tani, *8 Bizarre Terms Used by Justice Scalia*, Business Insider, June 26, 2015, http://www.businessinsider.com/antonin-scalia-glossary-2015-6; Matthew Speiser, *Jon Stewart Skewers Scalia After Justice's String of Supreme Court Outbursts*, Business Insider, June 30, 2015, http://www.businessinsider.com/jon-stewart-blasts-scalia-2015-6; Anthony Zurcher, *Gay Marriage: It's a "Judicial Putsch" Warns Dissenting Scalia*, BBC News, June 26, 2015, http://www.bbc.com/news/world-us-canada-33292806.

firm) spent litigating the case by that respective individual's reasonable hourly rate. Adjust the calculation upward or downward based on the facts and circumstances of the case. Then use the *Johnson* factors to adjust the calculation.[7]

In applying the *Johnson* factors, explain in your motion papers the time and labor necessary to litigate the case. If the case involved a novel or difficult legal issue, explain how the issue was novel or difficult. Tell the court what skills were required of you to perform the legal services. Explain whether some legal services required more skills than other services. Explain what cases you rejected because you accepted this case. Determine the customary fee that other attorneys in your community charge for similar cases, perhaps with an affidavit from an expert. Explain how your legal fee is similar to or different from the customary fee in your community. Explain whether your fees were fixed or contingent. Explain the time limits your client or the circumstances of the case imposed on you. Discuss the amount sought in the litigation and the results you obtained for your client. Also discuss your experience, reputation, and ability as an attorney; include the experience, reputation, and ability of any other attorneys or paralegals who worked on the case. Address the undesirability of the case. Explain the nature and length of your professional relationship with your client. Discuss fee awards in similar cases.

Discounted Fees. If you gave your client a discounted rate for your legal services, ask the court in your motion papers to award you the higher, undiscounted fee.[8] Regardless why you gave your client a discount — your client is a great client who gave you lots of business or your client has had financial setbacks — ask the court to award you the higher rate.

A court may assess an award at a rate greater than the rate in your fee agreement if the rate — the undiscounted rate — is reasonable. Argue in your motion papers that it's not about what you and your client agreed to in terms of your attorney fees but what's the reasonable fee: "The criterion for the court is not what the parties agree but what is reasonable."[9]

Argue in your motion papers that if the court awards you the discounted rate rather than the undiscounted rate, the award would result in a windfall to your adversary — the losing party.[10] Also argue that the discounted rate doesn't reflect the reasonable attorney fees to which you're entitled.

Argue that what you did in reducing your fees is similar to what other attorneys do for poor clients.

Argue that attorneys who reduce their fees for poor clients shouldn't be penalized.

Pro Bono Work. Even if you did pro bono legal work, argue in your motion papers that it's irrelevant that no one paid your fees: "What counts is whether the attorney's expenditure of time and effort lead to an obligation to pay fees, and sometimes, as in the case of pro bono work on a prevailing party's behalf, a client need not incur an obligation to pay attorney fees."[11]

Argue that just because you did pro bono work doesn't mean the court should reduce the legal-fee award.[12]

Argue for public policy reasons that you're entitled to your attorney fees irrespective whether your client is rich or poor. If you're relying on a statute for your attorney-fee motion, argue that no legislature intended compensation only for attorneys who had clients who could afford their fees.

Someone Else Paid the Fees. If someone other than your client paid your client's legal fees, explain in your motion papers that you're still entitled to the attorney fees.[13] Argue in your motion papers that it's irrelevant who paid your attorney fees. What's relevant is that your time and effort "lead to an obligation to pay fees."[14]

Fees for Appellate Work. An attorney-fee award may include an award for attorney fees incurred in doing appellate work for your client.[15] In your motion papers, argue that the court award you attorney fees for the time you spent on appellate work.[16]

Fees on Fees. In your motion papers, seek fees on fees: getting compensated for moving for attorney fees.[17] It means you're asking the court for fees for the time you expended in drafting, researching, and compiling your attorney-fee motion. If the court orders an attorney-fee hearing, it also means that you're seeking fees for the time you expend at the hearing. The rationale for obtaining fees on fees is that you should be "compensated for [the] time [you] spent proving the value of [your] services."[18]

At an attorney-fee hearing, you may call any witness with relevant and probative evidence to testify in a question-and-answer format. Most practitioners testify in the narrative.

But a court may award you fees on fees only if a statute or agreement provides for fees on fees.[19] Your agreement — such as a contract or lease — must "contain unambiguous language providing for the recovery of fees on fees."[20]

In your attorney-fee motion, seek fees on fees even if you don't yet know what hours you've expended in putting together your motion and whether

you'll need to reply to your adversary's opposition papers. Request fees on fees even if you don't yet know whether the court will order an attorney-fee hearing. In your motion papers, reserve your rights to obtain fees on fees. *Example:* "Tammy Jerome reserves her right to seek fees on fees in moving for attorney fees and any time expended at any attorney-fee hearing."

Explain what work you or anyone at your firm has done for the attorney-fee motion. Attach any bills as an exhibit to your motion.

Contingency-Fee Agreements. A contingency-fee agreement is valid and enforceable in New York.[21] A contingency-fee agreement is "[a]n agreement concerning an attorney's compensation, contingent upon [the attorney's] success and payable out of the proceeds of the litigation."[22] A contingency-fee agreement isn't a "limitation on recovery."[23] Argue in your motion papers that you're entitled to your attorney fees even if you agreed to have your client pay you a contingency fee.[24] Attach your agreement as an exhibit to your motion.

Interest on Fees. Under CPLR 5004, you're entitled to collect interest on unpaid attorney fees at the rate of nine percent, "except where otherwise provided by statute." Be aware that other statutes might calculate interest at a different rate than nine percent.

An award of attorney fees doesn't "mature until the underlying action or proceeding has been determined."[25] Thus, interest begins to accrue when the case is resolved in your favor.

Under CPLR 5001(b) "interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single intermediate date." Determine the intermediate date: the date the action or proceeding has been determined and the date of the court's decision on the attorney-fee motion.

Consider this scenario: A court dismisses a landlord-tenant proceeding on March 20, 2009. Assume that the tenants prevailed and are now seeking attorney fees for $13,874.17. Also assume that the court's decision on the attorney-fee motion is July 14, 2009. Here's how one court calculated interest on the fees:

> The intermediate date in the 116 day period between March 20, 2009 and July 14, 2009 is May 17, 2009, the 58th day. To calculate interest, the sum of $13,874.17 is multiplied by nine percent (.09) legal interest . . . for a total of $1248.67. The sum of $1248.67 is then multiplied by 58 and divided by 365, the number of days in a year, for a total interest of $198.41. Accordingly, $198.41 in interest is added to $13,874.17 in attorney fees, for a total final money judgment in [tenant] respondent's favor of $14,072.58.[26]

Assuming that the court awards you attorney fees and interest, the court will calculate the interest for you. If you want to help the court in determining the interest (and you want to impress the court), provide the calculations in your motion papers. Your impediment in providing an accurate calculation of the interest is that you don't yet know when the court will decide your attorney-fee motion.

Opposing an Attorney-Fee Motion

Generally, your burden in opposing your adversary's fee motion is to show that the attorney fees aren't reasonable. Explain — with facts — why the fees are unreasonable.

If you don't oppose your adversary's fee motion, the court will assume that you owe the fees. Whatever you don't oppose may not be raised at a hearing.

Be specific in your opposition papers. Make cogent arguments. Use your adversary's bills to challenge the fees.

In opposing your adversary's attorney-fee motion, argue that your adversary hasn't met its prima facie burden in proving that the fees are reasonable. Provide a basis for your argument.

Argue that your adversary never sought attorney fees. Argue that your adversary never asserted a claim for attorney fees in its complaint (or in its petition, if the case is a special proceeding). Or, argue that your adversary never asserted a counterclaim for attorney fees in its answer.

Argue that your adversary isn't entitled to attorney fees under a contract, statute, or court rule (or any other exception to the American rule). If true, argue that your adversary hasn't provided a copy of the contract in its motion papers.

Argue that the case hasn't yet concluded; thus your adversary isn't entitled to attorney fees.[27]

If your adversary is relying on a contract, statute, or court rule that entitles your adversary to attorney fees because it's a prevailing party, argue that your adversary isn't a prevailing party.

Attack your adversary's exhibits. If your adversary included its bills but didn't establish that they're business records under the business-records exception to the hearsay rule, argue that the documents are inadmissible.

Argue that your adversary's fees — the unsuccessful claims your adversary pursued — should be excluded.[28] Explain the unsuccessful claims.

> If you don't oppose your adversary's fee motion, the court will assume that you owe the fees.

Argue that the fees for your adversary's unsuccessful motions also be excluded.[29]

Argue that excessive, redundant, and unnecessary fees be excluded from the fee calculation.[30]

In arguing that your adversary's fees are excessive, attack your adversary's (and any other partner's, associate's, or paralegal's) hourly rate. Attack the total amount your adversary is seeking. If a senior partner

charged the partner's hourly rate for services that a paralegal could have done — made photocopies or served papers — explain how the partner's fees are excessive.

In arguing that your adversary's fees are duplicative, tell the court to exclude those fees from the attorney-fee calculation. Your adversary double-billed — your adversary billed twice for work that was done once. If your adversary billed for trial preparation even after trial had already started, argue that those fees be excluded from any fee award.[31]

In arguing that your adversary's fees are unnecessary, tell the court which fees should be excluded from the calculation. If your adversary unnecessarily moved for disclosure even though you provided all the disclosure, tell the court to exclude those fees relating to the disclosure motion. If your adversary unnecessarily took an examination before trial (EBT) of an irrelevant witness, explain how the hours your adversary spent preparing and conducting the EBT were unnecessary. If your adversary unnecessarily appealed a court order, explain why the appeal was unnecessary.

Argue that the prevailing party didn't have to hire the most expensive lawyer for a bread-and-butter case to do hundreds of hours of research.

Attack your adversary's fee computation. If your adversary used the wrong method in your jurisdiction for computing the fees, explain what method the court should use. Under that correct method, explain how you'd calculate the fees, if any. If your adversary used the appropriate method in your jurisdiction but miscalculated the fees, explain your adversary's errors.

Argue that if the court were to award attorney fees, the court should grant your adversary's discounted rate rather than the undiscounted rate. Argue that the discounted rate is the reasonable rate.

Because your adversary performed legal services pro bono, argue in your opposition papers that the court shouldn't award legal fees.

Argue in your opposition papers that your adversary's fees for any appellate work be excluded from any attorney-fee award. Argue that your adversary's pursuit of an appeal was unnecessary. Or, argue that your adversary's fees in defending an appeal are unreasonable.

Argue that the court not award fees on fees. Argue that your adversary should never have moved for attorney fees. If true, argue that no statute, contract, or court rule allows your adversary to obtain attorney fees.

Your adversary may submit reply papers. Your adversary will have the last word in addressing your arguments.

Court's Decision on the Attorney-Fee Motion

If the court determines that your adversary didn't establish that it's entitled to fees, the court may deny your adversary's motion outright.

If your adversary established that it's entitled to fees and you didn't meaningfully oppose your adversary's motion, the court will likely grant the motion.

If you sufficiently opposed the motion by creating a factual dispute about the reasonableness of the fees, the court will likely order a hearing to determine the reasonable attorney fees.

Attorney-Fee Hearing

Proving Your Reasonable Attorney Fees. At an attorney-fee hearing, you'll need to prove that you're entitled to attorney fees and that your fees are reasonable.

You may call any witness with relevant and probative evidence to testify in a question-and-answer format. Your adversary has the right to cross-examine your witnesses.

Your witnesses should have personal knowledge of the work performed. The attorney who performed the legal work may testify. The attorney who supervised the legal work may testify. An attorney who knows the legal work that the senior or junior partners, associates, or paralegals performed may also testify. You may call the junior partner to testify about the work that other members of the firm completed.

No need to call to the stand every person who worked on your client's case.[32] Calling every witness will make you appear unskilled in conducting attorney-fee hearings. Or it'll make you appear as if you're unnecessarily prolonging the hearing to get more money from any attorney-fee award.

Most practitioners testify in the narrative. Assuming you'll testify in the narrative, here are a few things you'll want to establish. Discuss your legal education: Explain what school you attended and the year you graduated. Discuss any law-school accomplishments or honors. Discuss your work experience in the law: Give the dates, the places you worked, and your title. Provide your bar-association memberships. Discuss any leadership roles you have in any legal association. Explain any expertise you have in the legal field. Explain your firm's general billing practices. Also explain the firm's hourly rates for partners, associates, other attorneys in the firm, and paralegals. Discuss your hourly rate.

If other partners, associates, other attorneys in the firm performed legal work, discuss their education, experience, and expertise and the work they performed for your client.

If you're relying on a contract for your entitlement of attorney fees, admit the contract in evidence.

Introduce in evidence your bills or any chart you've created to explain your bills. Know how to admit documents under the business-records exception to the hearsay rule. Once you've admitted the document in evidence, explain your bills. Specifically, discuss the dates you performed the legal work, the hours you billed for those dates, your hourly rate, and the work you performed. If you gave your client a discounted rate, explain the terms of the discount.

Explain how you've computed the attorney fees under the multifactor lodestar method. Adjust the calculation upward or downward based on the facts and circumstances of the case.

Use the *Johnson* factors to adjust the calculation.

In applying the *Johnson* factors, elicit testimony about the following: (1) the time and labor required for the litigation; (2) the novelty and difficulty of the questions presented in the case; (3) the skill required to perform the legal service properly; (4) the attorney's avoiding of other work because the attorney accepted this case; (5) the customary fee charged by attorneys in the community for similar cases; (6) whether the attorney's fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the attorney's experience, reputation, and ability; (10) the undesirability of the case; (11) the nature and length of the attorney's professional relationship with the client; and (12) fee awards in similar cases.[33]

Disputing the Fees. On cross-examination, undermine the testimony of your adversary's witnesses. Attack the witness's credibility.

Ensure that your adversary's inadmissible documents aren't admitted in evidence. Or get something in return for a stipulation in which you consent to admit your adversary's documents into evidence.

Methodically undermine your adversary's bills. If possible, get a witness to testify that the fees are excessive, redundant, or unnecessary.

Get a witness to admit to the unsuccessful motions or unsuccessful claims, or both.

Get a witness to admit to double billing. At the least, point out the possible interpretation of your adversary's bills that your adversary double billed.

Attack your adversary's computation of attorney fees. Do the math under the multifactor lodestar method.

Methodically undermine how your adversary applied the *Johnson* factors.

In rebuttal, you may call an expert witness to the stand. Qualify the witness as an expert. The witness may be an attorney in the same practice area you're in. Your witness may examine your adversary's bills and explain that the fees your adversary seeks are unreasonable. The witness should provide a basis for that opinion.

Post-Hearing Briefs. The court may require you to submit post-hearing briefs.

In your briefs, summarize the testimony.

Explain how the testimony supports your argument that the court award you attorney fees. Or explain how the testimony supports your argument that the court shouldn't award any attorney fees.

Explain how the testimony supports your argument that your fees are reasonable. Or explain how the testimony supports your argument that your adversary's fees are unreasonable.

In the next issue of the *Journal*, the *Legal Writer* will discuss motions for sanctions. ■

1. *See generally* Gerald Lebovits, *NYCLA's Fee-Dispute Program: Part 137*, 5 N.Y. County Lawyer 4 (Apr. 2009), *available at* http://works.bepress.com/gerald_lebovits/152/ (last visited Aug. 6, 2015); Gerald Lebovits & Michael V. Gervasi, *Part 137: The Attorney-Client Fee-Dispute Program*, 8 Richmond County B.J. 7 (Winter 2009), *available at* http://works.bepress.com/gerald_lebovits/145/ (last visited Aug. 6, 2015); *Doniger & Engstrand, LLP v. Carlomagno*, 48 Misc. 3d 132(A), *1–2, 2015 WL 4390079, *1–2 (App. Term 2d Dep't 9th & 10th Jud. Dists. 2015) ("Where an attorney has commenced an action to recover legal fees, the attorney's failure to have provided the defendant client with written notice of the right to elect to submit the fee dispute to arbitration, and/or the attorney's failure to allege in the complaint either that the defendant client received such notice and did not file a timely request for arbitration, or that the dispute is not covered by the Rules of the Chief Administrator of the Courts (22 NYCRR) part 137, will require the dismissal of the complaint.").

2. *But see Riverside Syndicate Inc. v. Richter*, 26 Misc.3d 137(A), at *1, 2010 N.Y. Slip Op. 50183(U), *1 (App. Term 1st Dep't 2010) ("Although neither party produced the written lease agreement, tenant's application for attorneys' fees should have been granted. Landlord made a formal judicial admission that the initial written lease agreement existed between the parties, identifying the date of the lease and referring to a specific clause of the lease. This admission, coupled with landlord's request in the petition for attorneys' fees against tenant, effectively established that a valid lease containing an attorneys' fee provision exists between the parties.") (citations omitted).

3. Aaron J. Broder, Trial Handbook for New York Lawyers § 34:6, at 744 (3d ed. 1996) (citing *North Star Graphics, Inc. v. Spitzer*, 135 A.D.2d 401, 403 (1st Dep't 1987) (noting that if residential lease provides that landlord may obtain attorney fees from tenant, tenant has reciprocal right under the Real Property Law § 234 to collect attorney fees from landlord if tenant prevails against the landlord)).

4. *Nestor v. Britt*, 23 Misc. 3d 1138(A), *2, 2009 N.Y. Slip Op. 51190(U), *2 (Hous. Part. Civ. Ct. N.Y. County 2009) (citing *Luciano v. Olsten Corp.*, 109 F.3d 111, 117 (2d Cir. 1997)).

5. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217, 222 (2009) (noting that in first-party no-fault benefits cases attorney fees are capped at $850).

6. Matthew D. Klaiber, *A Uniform Fee-setting System for Calculating Court-Awarded Attorneys' Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-based Mathematical Model*, 66 Md. L. Rev. 228, 257 (2007).

7. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974).

8. *See Ross v. Congregation B'Nai Abraham Mordechai*, 12 Misc. 3d 559, 566–67 (Hous. Part. Civ. Ct. N.Y. County 2006).

9. *Bell v. Helmsley*, 2003 WL 21057630, at *2 (Sup. Ct. N.Y. County 2003).

10. *Ross*, 12 Misc. 3d at 567.

11. *Goldman v. Rosen*, 10 Misc. 3d 1065(A), *2, 2005 N.Y. Slip Op. 52152(U), *2 (Hous. Part Civ. Ct. N.Y. County 2005); *Thomas v. Coughlin*, 194 A.D.2d 281, 283 (3d Dep't 1993) ("Initially, we reject respondent's contention that counsel fees may not be awarded to petitioner because, having been represented by Prisoners' Legal Services free of charge, he did not 'incur' any fees.") (citing *Maplewood Mgmt. v. Best*, 143 A.D.2d 978 (2d Dep't 1988)).

12. *Rourke v. N.Y. St. Dept. of Corr. Servs.*, 224 A.D.2d 815, 816 (3d Dep't 1996) ("Parenthetically, we find the fact that petitioner was represented by a law school clinic is not an appropriate ground for the automatic reduction of an award of counsel fees pursuant to 42 U.S.C. § 1988.").

13. *Goldman*, 10 Misc. 3d 1065(A), at *2, 2005 N.Y. Slip Op. 52152(U), *2.

14. *Id.* at *2, 2005 N.Y. Slip Op. 52152(U), *2.

15. 2 Edward L. Birnbaum, Carl T. Grasso & Ariel E. Belen, New York Trial Notebook, § 38:160, at 38-66 (2010) (citing *In re Landmaster Montg I LLC v. Town of Montgomery*, 72 A.D.3d 1088, 1089 (2d Dep't 2010)).

16. *Nestor v. Britt*, 16 Misc. 3d 368, 379 (Hous. Part Civ. Ct. N.Y. County 2007) (hereinafter Nestor II) ("An award of reasonable attorney fees includes the time spent on appellate work.").

17. *Lancer Indem. Co. v. JKH Realty Group, LLC*, 127 A.D.3d 1035, 1036 (2d Dep't 2015); *546-552 W. 146th St. LLC v. Arfa*, 99 A.D.3d 117, 120 (1st Dep't 2012); *Podhorecki v. Lauer's Furniture Stores, Inc.*, 201 A.D.2d 947 (4th Dep't 1994) ("Plaintiffs' statutory entitlement to a reasonable attorney's fee includes a fee for services performed on the fee application itself.").

18. *Ross*, 12 Misc. 3d at 573–74 (citing *Kumble v. Windsor Plaza Comp.*, 161 A.D.2d 259, 260–61 (1st Dep't 1990)).

19. *Baker v. Health Mgmt. Sys.*, 98 N.Y.2d 80, 87–88 (2002) ("In short, the statutory language of section 722(a) and the legislative history contain nothing indicating that the Legislature intended to provide coverage for fees on fees. . . . Finally, we observe that our holding does not leave corporate officers and directors remediless; Business Corporation Law § 721 expressly provides that article 7 is not an exclusive remedy and, thus, corporations remain free to provide indemnification of fees on fees in bylaws, employment contracts or through

insurance."); *Sage Realty Corp. v. Proskauer Rose*, 288 A.D.2d 14, 15 (1st Dep't 2001) ("[A]n award of fees on fees must be based on a statute or on an agreement."), *lv. denied*, 97 N.Y.2d 608 (2002).

20. *Batsidis v. Wallack Mgmt. Co., Inc.*, 126 A.D.3d 551, 553 (1st Dep't 2015) ("However, the court below erred in awarding defendants $17,275 in fees on fees. The alteration agreement does not contain unambiguous language providing for the recovery of fees on fees. Because it is not 'unmistakably clear' from the parties' agreement that fees on fees were contemplated, such an award is not allowed."); *Jones v. Voskresenskaya*, 125 A.D.3d 532, 534 (1st Dep't 2015) ("The Special Referee's determination denying recovery of 'fees on fees' was proper since the parties' agreement does not explicitly provide for such fees.").

21. 7 N.Y. Jur. 2d *Attorneys at Law* § 252 (2015).

22. *Id.*; Klaiber, *supra* note 6, at 253–54 ("Suppose, for instance, that an individual hires an attorney to pursue a case for a 33% contingency fee. . . . Because the terms of the contingency fee agreement specify how the fee will be calculated, the attorney specifically expects to receive 33% of any recovery amount. The client, too, forms an expectation about a future event — the payment of her attorney's fees. Again, pursuant to the contingency fee agreement, the client expects to pay the attorney 33% of any amount recovered. . . . Once an actual monetary amount is recovered in the litigation, regardless of the size of that monetary amount, the payment of the agreed-upon 33% fee causes the attorney and client's shared initial expectation to be accurate.").

23. *Bell*, 2003 WL 21057630, at *1–2 (Sup. Ct. N.Y. County 2003) ("Initially the Court notes that a contingent fee does not, in and of itself, constitute a limitation on recovery. As the United States Supreme Court noted in *Blanchard v. Bergeron* . . . . 'Whether or not [a litigant] agreed to pay a fee and in what amount is not decisive. Conceivably, a litigant might agree to pay his counsel a fixed dollar fee. This might be even more than the fee eventually allowed by the court. Or he might agree to pay his lawyer a percentage contingent fee that would be greater than the fee the court might ultimately set. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agree but what is reasonable.'") (quoting 489 U.S. 87, 92 (1989)).

24. *Gee v. Salem Day Care Ctr.*, 47 A.D.3d 478, 479 (1st Dep't 2008) ("Although plaintiff signed a retainer agreement that stated otherwise, it is uncontested that she agreed to pay her attorneys a one-third contingency fee for services rendered in connection with her personal injury action, a fee considered reasonable in such actions. Since a fee in a personal injury case may be calculated either as a fixed percentage of the sum recovered or pursuant to a sliding scale there is no legal, policy, or logical reason to deny a contingency fee to plaintiff's attorneys simply because plaintiff inadvertently signed the wrong retainer agreement form. This is especially so because the attorneys earned the agreed fee and plaintiff clearly wishes to pay it."). For information on contingent fees in claims or actions for medical, dental, or podiatric malpractice, see Judiciary Law § 474-a (providing sliding scale cap on percentage of attorney fees).

25. *Marbru Assocs. & the Berkeley Assocs. v. White*, 24 Misc. 3d 1219(A), *4, 2009 N.Y. Slip Op. 51520(U), at *4 (Hous. Part Civ. Ct. N.Y. County 2009) (citing *119 Fifth Ave Corp. v. Berkhout*, 135 Misc. 2d 773, 774 (Civ. Ct. N.Y. County 1987)).

26. *Marbru*, 24 Misc. 3d 1219(A), *4, 2009 N.Y. Slip Op. 51520(U), at *4; *accord Nestor*, 23 Misc. 3d 1138(A), *3, 2009 N.Y. Slip Op. 51190(U), *3; *Nestor II*, 16 Misc. 3d at 381; *Ross*, 12 Misc. 3d 559, 574.

27. *Marbru*, 24 Misc. 3d 1219(A), *3, 2009 N.Y. Slip Op. 51520(U), at *3.

28. *Nestor II*, 16 Misc. 3d at 380.

29. *Id.* at 375.

30. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) ("Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary.").

31. *235 E. 83 Realty, L.L.C. v. Fleming*, 18 Misc. 3d 1142(A), *1 (Hous. Part Civ. Ct. N.Y. County 2008) ("Although the trial was adjourned four times and there was a gap of five and seven weeks between adjournments, the preparation before each date need not have been made anew. Respondents' attorney was in charge of this case from beginning to end and well recalled the preparation he had already done. No reason existed for him to prepare afresh each time.").

32. *407 E. 81 Realty LLC v. Creighton*, 36 Misc. 3d 1220(A), *4 (Hous. Part Civ. Ct. N.Y. County 2012) ("An attorney who worked on the case and has sufficient knowledge of the case, and the billing practices of the firm is competent to testify in support of a party's claim for legal fees. In *Nestor v. Britt*, 16 Misc. 3d 368 (2007), the court credited the testimony of one attorney, the junior partner, who worked on the case, and introduced billing records for both the junior partner and senior partner who rendered their legal services on the case.").

33. *Johnson*, 488 F.2d at 717–19.

BY NANCY LEVITIN

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Nursing Home Petitioners and Guardianship

An article appearing in the *New York Times* on January 25, 2015, sent chills through a subset of the guardianship bar. The article, titled "To Collect Debts, Nursing Homes Are Seizing Control Over Patients,"[1] was targeted at attorneys who represent nursing homes as petitioners in guardianship proceedings. The charge was that many of these attorneys use New York's guardianship statute, codified at Article 81 of the Mental Hygiene Law (MHL), to hurt rather than help institutionalized incapacitated people. The article featured a devoted husband forced to defend a guardianship proceeding filed by his wife's nursing home to collect a large and growing receivable.

Article 81

Using guardianship to collect a debt owed by an incapacitated person is antithetical to the language and spirit of Article 81. This is beyond dispute. From the legislative findings and the purpose as set forth in MHL § 81.01, through the final provision on post-death proceedings, the statute is there to protect the Alleged Incapacitated Person (AIP). What is not beyond dispute, however, is how and when nursing homes can *permissibly* resort to guardianship to protect their incapacitated residents.

In her article, the author wrote:

> In a random, anonymized sample of 700 guardianship cases filed in Manhattan over a decade, Hunter College researchers found more than 12 percent were brought by nursing homes. Some of these may have been prompted by family feuds, suspected embezzlement or just the absence of relatives to help secure Medicaid coverage. But lawyers and others versed in the guardianship process agree that nursing homes primarily use such petitions as a means of bill collection – a purpose never intended by the Legislature when it enacted the guardianship statute in 1993.[2]

The interesting question raised by the article is whether and when a nursing home that is motivated by a desire to get paid on an AIP's account should be able to use the guardianship system.

Not surprisingly, providers of long-term care have had a long and intimate relationship with the guardianship statute. After all, nursing homes and Article 81 both serve people who, due to compromised capacity, lack the ability to manage their own financial and/or personal affairs. So what does a healthy relationship between the nursing home industry and the guardianship judiciary look like, and is reform needed?

Article 81 was born of pragmatism. When the committeeship and conservatorship statutes stopped serving the public's needs, because they either required a draconian finding of incompetence or provided only for financial management, the Legislature got to work. In drafting New York's modern day guardianship statute, legislators envisioned a system whereby court-appointed fiduciaries would be given specifically tailored powers designed to dovetail with an AIP's particular functional deficits when no less-restrictive alternative was available to protect the AIP's interests.

From a purely pragmatic perspective, guardianship should be readily available to address the number-one need of incapacitated individuals who require in-patient care: to wit, having access to that care.

Risk of Discharge

In New York State, a nursing home resident who has no means of financing his or her care is at risk of discharge for non-payment under regulations promulgated by the Department of Health. Nursing homes, like other providers of goods and services, are not obligated to render care without being paid for doing so. An AIP, even one

who resides in a long-term care facility, *is* therefore in need of protection for the purposes of Article 81.

A candidate for the appointment of a guardian must meet a two-pronged test under § 81.02. First, "that the appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person."[3] Second, "that the person agrees to the appointment, or that the person is incapacitated."[4] Nursing home residents with dementia and complex medical needs, who have no payment source for their nursing home care and are therefore at risk of discharge, meet this two-pronged test. So what is the problem?

The problem is that a successful guardianship petition filed by a nursing home means that the nursing home gets paid, even though Article 81 was not passed to ensure the solvency of long-term care providers. This is true. But is the nursing home's financial stake in the proceeding relevant? Would "a facility in which the person alleged to be incapacitated is a patient or resident" have unqualified standing to commence a guardianship proceeding under § 81.06 if the nursing home petitioner's pecuniary interest was a legitimate concern? The answer to this rhetorical question is no.

Nonetheless, the perception persists that nursing homes overreach when they petition for guardianship. Therein lies the need for reform. In the world of long-term care providers and incapacitated nursing home residents, there lives an intractable problem for which no solution presently exists. That problem is a nursing home's inability to establish an abandoned incapacitated nursing home resident's Medicaid eligibility without judicial intervention.

Public Benefits

According to the Department of Health, 90% of New York State nursing home residents depend on public benefits to finance their long-term care needs, typically Medicaid. While the Department of Health describes the Medicaid application process as "comprehensive," that is an understatement. Applicants for long-term Medicaid coverage must submit five years of banking records, explain and document deposits to and withdrawals from their accounts, and provide proof of their income, citizenship and residency. Private attorneys charge thousands of dollars to complete a Medicaid application. A nursing home resident with senile dementia and no support network in the community is hard-pressed to document his or her eligibility for Medicaid.

While most nursing homes have a Medicaid department, only the resident or the resident's legal representative has the legal standing to access the private records that must be submitted to the Department of Social Services (DSS) in support of a Medicaid application. Every nursing home resident who lacks the capacity to sign a release of information, or to appoint an authorized Medicaid representative, is a potential AIP.

Right now, a guardianship is the only tool in a nursing home attorney's arsenal when help is needed documenting an incapacitated resident's Medicaid eligibility. But, nursing homes petitioning for guardianship do not only provoke the ire of *New York Times* reporters; they are also a thorn in the side of the judiciary.

Imagine a comatose nursing home resident with no family whose only known source of income is Social Security. The resident's landlord finds a single bank statement in the resident's apartment showing a small checking and savings account in the resident's sole name. When the nursing home's attorney files for guardianship, because the bank will not release five years of statements without the resident's consent, the judge is understandably concerned that there will be no funds available to pay a court evaluator, court-appointed counsel, the petitioner's fees, and/or the guardian's compensation.

Different judges take different approaches to the problem of low-asset incapacitated nursing home residents needing, but lacking the capacity to pursue, Medicaid coverage. Some judges pressure DSS's guardianship program to accept the appointment. Others appoint the nursing home administrator as property management guardian. One judge authorized the court evaluator to compile the AIP's Medicaid documentation, and another judge adjourned the hearing so petitioner's counsel could track down the AIP's recalcitrant power of attorney. Sometimes judges appoint a non-profit guardianship program. These appointments give rise to other problems related to inadequate staffing and experience. Additionally, Medicaid budgeting methodologies that deduct the guardian's compensation from the facility's reimbursement leave the facility with a shortfall that grows month by month – often from the time of the guardian's appointment through the resident's date of death.

Conclusion

In an optimum post-reformation world, guardianship attorneys representing nursing home petitioners would not be faulted for looking to Article 81 when they have no other way to establish an incapacitated resident's Medicaid eligibility. The judiciary would see an alignment between the interests of the AIP, who needs to have a way of paying for medically necessary in-patient care, and the nursing home that is entitled to be paid for providing that care. And the system would be streamlined so fiduciaries could be empowered to process an AIP's Medicaid application while incurring only minimal court-ordered fees and expenses. There is, in short, a perfect solution for what is currently a most imperfect system. ■

1. Nina Bernstein, *To Collect Debts, Nursing Homes Are Seizing Control Over Patients*, N.Y. Times, Jan. 25, 2015.
2. *Id.*
3. MHL § 81.02(a)(1).
4. MHL § 81.02(a)(2).

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ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I specialize in commodities and securities regulation, as well as the tax consequences of transactions in securities and commodities. Almost 10 years ago, a client of mine in the financial services industry had devised a new transaction that he asked me to implement. The transaction implicated numerous novel questions in commodities and securities regulation, and I was concerned about solicitation were I to represent both my client as the originator and the investors to whom the idea was to be pitched. *See Forum* (Mar./Apr. 2007) N.Y. St. B.J., p. 52.

As it turned out, for reasons related entirely to market conditions, that transaction did not go forward. In the interim I have stayed close with this client, and now he has come to me with a similar concept. The client would like me to represent only him in his individual capacity and the vehicle as issuer's counsel. He would also like me to connect him with some investors whom I know and whom I have represented on unrelated matters, but not to hold myself out as representing any of these investors. My role will be to structure the transaction and to provide an opinion stating that the transaction is legal and outlining the specific consequences (as well as any risks). My opinion will be included in the marketing materials, and it is expected that I will make myself available to speak with investors and their advisors. The investors will all be sophisticated persons. However, we will not be able to control whether or not they will each have their own counsel.

What advice do you have for me?

Sincerely,

U.N. Certain

Dear U.N. Certain:

Your question to the Forum raises three main issues:

1. Is there a conflict of interest or other professional issue from the standpoint of your position as an attorney and counselor in this situation?
2. What specific rules apply to tax practice and how are opinions supposed to be written?
3. What can you do without violating the securities laws?

The interests of your individual client as the person who is putting together this transaction and those of the issuing vehicle (which we can refer to as "the issuer") are aligned in this situation, so there should not be any problem in representing both – the issuer and your individual client as its management – as an initial matter through the closing. That may change at some point in the future as events unfold, but that is not the subject of this discussion.

As we see it, as long as you are clearly identified in the marketing materials as representing the issuer, and take steps to identify yourself this way in any discussions that you may have with investors and their counsel, you should be able to steer clear of client conflicts.

Consider first investors with whom you have no other professional relationship; they are merely people whom you know and can introduce to the issuer or people who have been introduced by others to whom you may be speaking on behalf of the issuer.

To the extent that you are not involved in bringing this investment to the attention of a particular investor and do not engage in any discussions with him or with his counsel, there is not much more that you need to do. Should any investors or their advisers broach this subject with you, you should immediately inform them that you are representing "the other side" and cannot advise them as their attorney.

You can follow essentially the same approach with people whom you introduce. You also should make clear that you are not advising any such investor in any other capacity with respect to this investment – such as financially or from an accounting perspective – even if you are skilled in such areas, lest that role derogate from your duty of loyalty to the issuer client or create an impression in the investor's mind that you are in any way representing his or her interests.

Next consider what you need to do if you become involved to any degree in the investment process with respect to investors whom you have represented in the past, or continue to represent – for example, explaining the investment to them or to their other advisors in your capacity representing the issuer. In a case like this, you will need to take extra precautions in order to avoid misunderstandings. Although some might say this is overly cautious, there are those who would suggest that you should require any such investor to acknowledge in writing that in so doing you are representing the issuer, and not the investor, and to waive any conflict. It would also be a good idea to have your client, on behalf of himself

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 email to journal@nysba.org.**

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and the issuer, acknowledge this state of affairs and agree that in having you represent them they are aware that you have represented investors on other matters and that those investors have waived conflicts. We are aware, for example, of situations where a small group of clients in a specialized industry have found themselves repeatedly doing business with each other under circumstances where an even smaller group of lawyers – almost a club – are now on one side of a deal and now on another side of another deal for the same or different client. We are uncertain whether they always get conflicts waivers from all the clients past and present, although we know that this is on people's minds. Many deals have generally worked out and have run their course without incident, and yet there was always potential for a disaster lurking in the background.

Turning to the tax issue, we should all remember that the most important advice is that you have to know what you do not know.

The standards for giving tax advice are governed by the much criticized and much revised "Circular 230." This is too small a space to expound on all of the particulars, but suffice it to say that

1. you need to have a full understanding of the transaction;
2. in rendering your advice you must take into consideration all facts that you know or reasonably should know,
3. you must make reasonable efforts to ascertain the facts;
4. your opinion must be based on the known facts and reasonable assumptions;
5. you must relate applicable law and authorities to the facts; and
6. you cannot rely on representations from others that you know or should know are incorrect or incomplete.

Most important, you cannot base a positive evaluation on a low likelihood of an audit or of the possible discovery of an issue in an audit.

Different persons' required levels of comfort also vary in principle and as applied to particular situations, so you need to address this aspect with your client, as it affects not only how the transaction will perform in the real world but also whether it can be sold successfully to investors. As a planning matter, most practitioners we know are not comfortable advising any client to go forward with a transaction where it is not at least "more likely than not" that the transaction will achieve the intended outcome, assuming all the facts are on the table and fairly evaluated, and some clients, depending on their sophistication and preferences, need higher levels of comfort – popularly expressed as "should" or even "will" opinions, the latter becoming ever more scarce. That is not to say that *any* level of opinion precludes a challenge by the Internal Revenue Service that may or may not have any merit in the eyes of a court, and an analysis of the extent to which penalties may turn on the strength of an opinion and whether it was reasonable to rely on it is also beyond the scope of this discussion. You will reach your conclusions and discuss them with your client, and you and he may have to modify the business structure to reach the level of comfort that will be acceptable to the client and likely to the investors. Ultimately, you will likely go on the record as to what your conclusions are. You will have your view, and investors' counsel may or may not agree.

If you have any questions about all this, you should seek further guidance from a person experienced in transactional structuring and experienced in evaluating and writing tax opinions.

There are also numerous reporting and recordkeeping requirements concerning transactions that have other than very standard and uncontroversial tax consequences ("listed transactions," "reportable transactions," "uncertain tax positions," etc.). That set of issues is also beyond the scope of this discussion.

Your final question raises an issue that is often misunderstood. We assume that you are not licensed and employed as a broker, which raises an issue as to whether you would be deemed to be acting as a broker under the Securities Exchange Act of 1934, as amended (Exchange Act), which would require you to be registered under that Act or associated with a broker-dealer that is so registered. A broker is defined in § 3(a)(4)(A) of the Exchange Act as "any person engaged in the business of effecting transactions in securities for the account of others." It is possible for you to avoid being deemed a broker if you act solely as a finder and limit your activities to introducing prospective investors to the issuer. However, the line between a finder and broker is often unclear and the term finder has not been defined by the Securities and Exchange Commission (SEC) or the Financial Industry Regulatory Authority (FINRA). If you participate in the negotiation of financial terms or try to convince any investor to buy the securities, you may end up on the wrong side of the line.

Another factor relevant to the issue of whether you will be deemed a "broker" is if you are compensated for introducing investors to the issuer. Moreover, if you do receive a fee for such activity and it is contingent on the investor making an investment, you will most likely be deemed (at least by the SEC) to be a broker, rather than a finder. The SEC has been very aggressive in recent years in prosecuting cases involving activities of persons acting as unregistered broker-dealers and, by receiving a fee, even for making the introduction, you are running the risk of regulatory scrutiny. The SEC and its staff have issued guidance on this issue. *See* "Guide to Broker-Dealer Registration," issued in April of 2008 by the SEC's Division of Trading and Markets (www.sec.gov/divisions/marketreg/bdguide.htm); "A Few

Observations in the Private Fund Space," a speech by the then-Chief Counsel of the Division of Trading and Markets, April 5, 2013 (www.sec.gov/News/Speech/Detail/Speech/1365171515178). While the SEC's position with respect to a finder may not be correct or consistent with current case law, acting as a finder creates a risk of investigation and an enforcement action. There is also a risk of an investor claim for rescission of the transaction if a court determines that the sale was made in violation of the Exchange Act. In all events, any fees paid for your services in introducing investors would need to be disclosed to the prospective investor.

We do not rule out the possibility of your receiving some compensation as a finder, as long as it is calculated based on an hourly rate or a flat fee regardless of whether anyone actually makes an investment. This works as long as you do nothing beyond the introduction (i.e., do not try to convince the person to invest or negotiate financial terms), as long as such activity is subsidiary to what you are doing in connection with this engagement as a whole, and as long as it is properly disclosed and your client understands the issues. As noted above, though, considerable care is required (especially if you will be negotiating documentation points) in order not to find yourself and your client on the wrong side of the line. Accordingly, the more straightforward and safer course is to keep your fees strictly related to your legal work.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

A little over a week ago, my client and I met with opposing counsel, whom I will call Lawyer X, and his client to attempt to negotiate a settlement concerning a potential contractual dispute. To my shock and surprise, when my client would not concede to certain provisions demanded by Lawyer X's client, Lawyer X started screaming at me and my client, making numerous derogatory comments. Among other things, he stated that my client "had no ba**s," and was a thief. Finally, he said we were nothing more than "money-grabbing lowlifes," peppering his comments with several pejoratives about our ethnic origins and religions.

Needless to say, I was deeply offended by his comments and conduct. As a result, I got up and told my client that we were leaving, which only provoked Lawyer X even more. He began screaming profanities at us, which I will not repeat, as we walked out the door.

I later spoke with some other attorneys who have dealt with this lawyer in the past, and they indicated that Lawyer X had comported himself in a similar fashion with them. He called one lawyer "physically and mentally unkempt" in a public courtroom, and called another a "liar" and "disgrace to the legal profession" in front of other attorneys.

Two days after my incident with Lawyer X, he called to apologize, citing family troubles and the stress of the job as excuses for his inappropriate behavior.

Do I have an obligation to report this type of behavior to the Disciplinary Committee? What consequences could Lawyer X face? On the one hand, I really don't want to see another lawyer out of a paycheck. However, on the other hand, I don't think it's appropriate for a member of the bar to address others and to act the way Lawyer X has been acting.

Sincerely,
I.M. Outraged

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XLIV — Motions for Attorney Fees Continued

The *Legal Writer* continues its series on civil-litigation documents. In the last issue of the *Journal*, we discussed attorney-fee motions: determining prevailing-party status, resolving which method to use in calculating attorney fees, and practicing in federal and state courts. The *Legal Writer* discussed the six methods for calculating attorney fees: the percentage-of-recovery method; the lodestar method; the lodestar cross-check method; the pure factor-based method; the multifactor lodestar method; and the strict lodestar method.

In this issue, the *Legal Writer* focuses on the multifactor lodestar method to calculate attorney fees. This column will discuss how to compose and oppose attorney-fee motions and how to conduct and defend attorney-fee hearings. This column isn't about suing your client for unpaid legal fees.[1] It's about how your clients can recoup your fees from their adversaries.

Attorney-Fee Motion

Before moving for attorney fees, make sure you're entitled to attorney fees under a contract, statute, or court rule.

Burden. In your motion papers, you must explain, with specificity, that your legal fees are reasonable.

Specificity is important because your motion papers might push your adversary to settle. And if you're specific but your adversary doesn't oppose your motion, or some aspects of your motion, you can win outright, without a hearing, or at least limit the attorney-fee hearing to the issues your adversary opposed.

Motion Papers. Your motion for attorney fees must comport with CPLR 2101 and 2214. Your papers must contain a notice of motion and an affidavit (or an attorney's affirmation).

State in your motion papers whether you're moving to enforce a contract, statute, court rule, or any other exception to the American rule. Include as an exhibit in your attorney-fee motion the contract, statute, or court rule on which you're relying.[2] In a landlord-tenant proceeding, for example, include the residential lease as an exhibit.[3]

If the contract, statute, or court rule entitled the prevailing party to recover its attorney fees, explain why your client is the prevailing party.

Include your legal bills as an exhibit in your motion. In your bills, affirmation, or both, provide the total number of hours you expended on the case and the total amount of fees you're seeking. You may include individual bills or a summary of the bills.

Many practitioners create a chart outlining all the attorney fees. A chart might include the dates the legal services were expended, the hours expended, the work completed, the individual who completed the work, that individual's hourly rate for those services, the costs and expenses, and any other explanation of those services.

Explain whether a partner, associate, or paralegal provided the services to your client. Also explain whether a senior partner supervised a junior partner and provide the hours and fees for those services.[4]

Explain how your exhibits — bills and any other documents — are admissible under the business records exception to the hearsay rule.

> In your motion papers, you must explain, with specificity, that your legal fees are reasonable.

If your bills aren't concise and self-explanatory, explain the contents of your bills in your affirmation.

Include any other exhibit that'll help the court decide the motion in your favor.

Be aware that some statutes have a cap on attorney fees.[5]

Method of Computing the Fees. Make it easy for the court to rule for your client. Compute your legal fees for the court.

Under the multifactor lodestar method, determine the initial lodestar amount. Exclude any duplicative, excessive, or unnecessary hours from the calculation.[6] Tell the court what hours you've excluded as duplicative, excessive, or unnecessary. Telling the court what charges you've excluded will show you're honest. Multiply the number of hours that you (and other attorneys or paralegals in your

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