NEW YORK STATE BAR ASSOCIATION

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by Kevin W. Turbert

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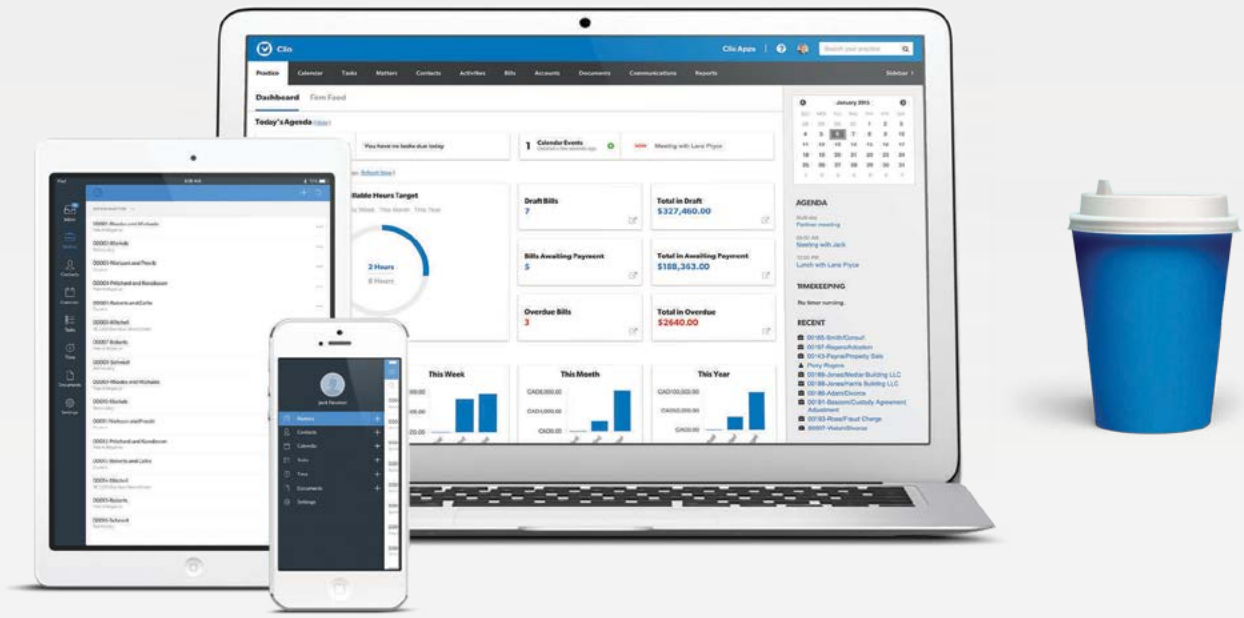

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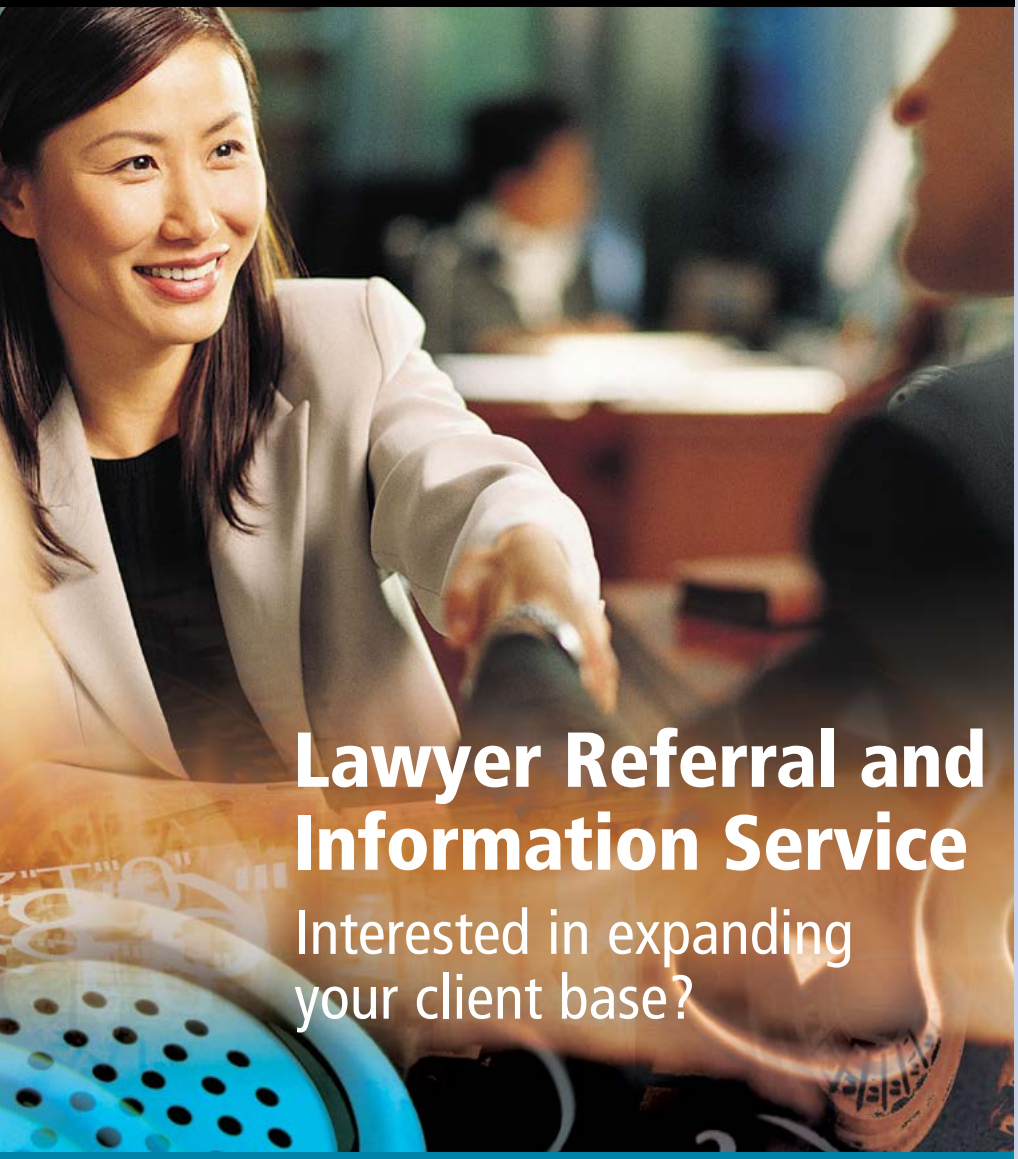

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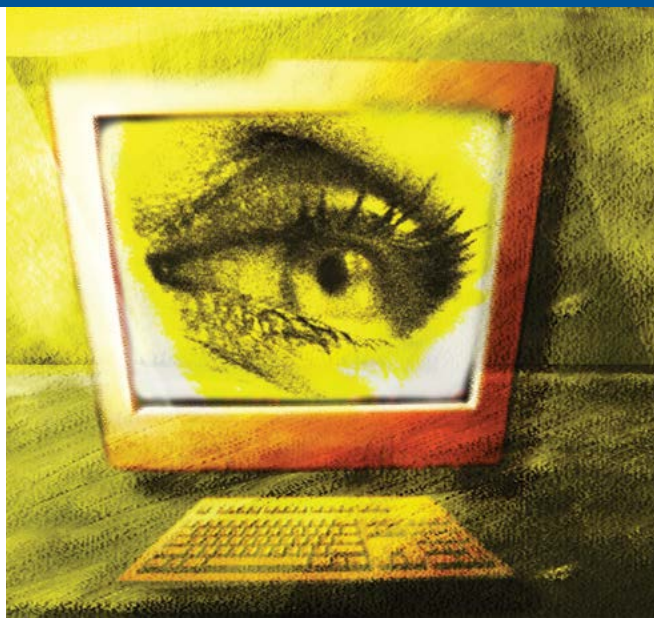

DEPARTMENTS

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DAVID P. MIRANDA

Influencing the Future

Everyone here has the sense that right now is one of those moments when we are influencing the future. – Steve Jobs

As part of our initiative to involve law students in our Association, I often have the honor of addressing students at law schools throughout our state, talking about the truly noble career path they have chosen and the importance of bar association involvement in their professional careers. The students I speak to will be entering a job market that is vastly different from the one I entered more than two decades ago. Recent law graduates, in New York and throughout the nation, are not just competing with each other for work; they are competing with those who have already graduated and who are still seeking work. New lawyers, burdened by student loans and trying to make their own way in a market that no longer promises high-paying jobs upon graduation, will face a tough road ahead of them.

The sentiment shared by Steve Jobs when he predicted the explosion of laptops and how the Internet would change how our nation does business is now equally applicable to how we practice law. Today we are faced with "legal services" companies that purport to enhance your exposure on their promoted attorney websites, where a lawyer's performance and expertise is assigned a numerical value, the same as one might rate a pizza delivery guy; and legal form services, where the law is reduced to a form that just needs to be completed. Change is coming to our profession from profiteering entrepreneurs unencumbered by rules of ethical conduct and responsibility. Even in the face of change, it remains incumbent upon us as attorneys to remain guided by the rules of professional responsibility as we use new technologies.

As a legal community, both at law schools and bar associations, we spread the word on the importance of resume building, networking, and giving back to our communities while gaining valuable experience at the same time. We must work to prepare all lawyers to adjust to – and to influence – the new legal marketplace. We must encourage a thoughtful focus on navigating the decisions that promise to make a major impact on the future of our profession, like participating in and lending credibility to online services that promise to find potential clients using questionable methodologies; or worse, standing by while websites that promise to do all the legal work for consumers, without sharing the credentials of their so-called legal practitioners, continue to flourish while skirting ethics rules or waiving responsibility altogether.

Our Association, long opposed to attorney rankings, is currently studying the issue of ratings, and has found that the methodologies and results of attorney advertiser services can often be misunderstood by the general public. Search terms alone can pose a problem. If potential clients search for counsel with imprecise words describing the kind of legal bind they are concerned about, they could miss equally qualified practitioners listed under a more generic or commonly used term. That missed click would not just affect potential clients, it could have a disproportionately negative impact on a generalist lawyer with a broad practice. Worse are those services that purport to rank attorneys based on an algorithm that only the service is aware of, where attorneys can pay the service to help them "master" the system. These services proudly boast their rankings are not "pay to play" when, in reality, if you pay the services, they will "advise" you on how to "play" their system. Often, attorneys who pay for the most "advice" are ranked highest, which influences the decisions of an unknowing public. Bar associations, including ours, are increasingly receiving complaints from the public, and attorneys, about the methods used by such services.

David P. Miranda can be reached at dmiranda@nysba.org.

While attorneys at larger firms benefit from the higher profiles of their workplaces and firm websites, which are often bolstered by greater public relations resources, lawyers at solo and smaller firms are easy prey for the promises of well-funded attorney advertisers. Solo and small firm lawyers, and lawyers who work outside of major metropolitan areas, may have a much harder time penetrating the online marketplace. They are promised easy access to high-profile marketing by legal services companies that can purchase expensive Internet and media advertising due to an influx of venture capital from investors seeking a return on their investment. Venture capital is going to these companies because investors intend to make money on the backs of lawyers desperate for work and a public starving for easy answers.

The New York Rules of Professional Conduct state that attorney ratings must be unbiased and nondiscriminatory. Rule 7.1, Comment 13 states that ratings "must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated."

The burden of discovering which ratings are legitimate and which ones are inflated, or paid for, unfairly falls on the shoulders of unsuspecting consumers. While these services refer to themselves as innovators, they may end up subverting the very premise of the profession they claim to be promoting. If ratings are the result of a pay-to-play scheme, where more money means a higher ranking, the profession and the public will suffer.

Equally troubling is the proliferation of sites that promise to do all the work a lawyer can do, for a small fee. It's true that some legal work may require filling out a relatively simple form and asking a competent person to review it. But if, for example, business partners find out they set up their small business the wrong way, with a form for the wrong type of entity or with the wrong information, they may not know until it's too late to recover from the damage. Knowing the right form to complete and the nuances of the information contained in it is crucial. Or if, for example, a power of attorney form used in a transaction is outdated or incorrect, the entire underlying transaction could be null and void. A consumer saving a few dollars by downloading a form could be out hundreds of thousands of dollars. Consumers have no recourse to hold accountable the company they paid for the legal service, as many of these online outfits claim to not provide legal advice.

Our Association is taking action to protect our profession and the public that we serve. Our Committee on Attorney Professionalism, and a new working group I recently appointed, are reviewing these issues to provide guidance to attorneys whose experience and expertise are independently recognized by third parties, or their peers, in accordance with the Rules of Professional Conduct. Meanwhile, we are embracing evolving technology and maximizing traditional communications, as we recognize just how crucial it is for our members to increase efficiency in both how they work and how they make meaningful connections with clients.

To enhance the work of our members, NYSBA offers tools such as Surrogate's Forms online, powered by HotDocs.® The service offers a fully automated, and vetted, set of official probate forms, as promulgated by the Office of Court Administration (OCA) and used by various Surrogate's Courts throughout the state. To connect licensed attorneys with potential clients in an efficient and accessible way, we offer the Lawyer Referral and Information Service (LRIS), which serves 44 counties in New York. Our non-attorney LRIS counselors do not offer legal advice but direct callers to real lawyers or the most appropriate community organizations or resources to address their situation.

The preamble to the New York Rules of Professional Conduct states that as lawyers we share a responsibility to "further the public's understanding of and confidence in the rule of law and the justice system" because our "legal institutions depend on popular participation and support to maintain their authority." For our system of law to maintain its integrity, and its authority, we must be a part of the solution, individually as practitioners and as an Association. We cannot leave the job of informing the public and addressing its legal problems to companies, staffed and funded by nonlawyers, that have only a financial stake in the transaction. The Rules of Professional Conduct tell us that we have a moral and ethical obligation toward the client in need and the future of our profession itself. When we reduce the law to nothing more than an easy download with no guidance, it is not just the profession that loses. It is the consuming public – people with real problems who need real help – that stands to lose the most of all. Our Bar Association, and our 74,000 members, must use the collective strength of our voices to influence the future of our profession. ■

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(1:00 p.m. – 5:00 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

Using Personal and Business Tax Returns to Develop Your Equitable Distribution and Support Case
October 8 Albany
October 15 Rochester
October 20 Long Island
October 21 New York City (live & webcast)

Introduction to Estate Planning
October 15 Long Island
October 20 Buffalo
November 10 Rochester
November 19 Westchester
December 3 Syracuse
December 4 Albany
December 8 New York City (live & webcast)

Risk Management 2015
(9:00 a.m. – 1:00 p.m.)
October 16 Long Island; Syracuse
October 27 Albany
November 13 New York City (live & webcast)

Bankruptcy Now: 2015 Hot Topics on Bankruptcy Sales, Chapter 11 Plans, Alternate Routes and Reaching the Endgame
(9:00 a.m. – 1:00 p.m.; live & webcast)
October 20 New York City

Nuts and Bolts of Handling a DWI Case
October 21 Albany (live & webcast)

Gain the Edge! Negotiation Strategies for Lawyers
October 22 Long Island
October 23 New York City

Women on the Move 2015: Navigating a New Path
(1:00 p.m. – 5:00 p.m.)
October 26 Albany

Litigating Piercing the Veil: Plaintiff and Defense Strategies
(9:00 a.m. – 12:45 p.m.; live & webcast)
October 28 New York City

Intro to Civil Practice Skills: Torts and Insurance
October 28 Long Island
October 29 Albany
October 30 Buffalo; New York City (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)
November 4 Albany

New York Appellate Courts: The Insiders' View
November 4 Albany (9:00 a.m. – 1:00 p.m.)
November 6 Long Island (9:00 a.m. – 1:00 p.m.)
November 10 Westchester (9:00 a.m. – 1:00 p.m.)
December 3 Rochester (1:00 p.m. – 5:00 p.m.)
December 8 New York City (9:00 a.m. – 1:00 p.m.)

Basics of Elder Law Practice
November 5 Westchester
November 19 Long Island
December 1 New York City; Rochester
December 8 Albany

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)
December 9 Albany (9:00 a.m. – 1:00 p.m.)

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Fire Law 2015
(9:00 a.m. – 1:10 p.m.; live & webcast)
November 6 New York City

Overcoming Obstacles to Develop Real Estate
(9:00 a.m. – 1:00 p.m.)
November 9 Albany
November 16 New York City (live & webcast)

Henry Miller – The Trial
November 10 New York City
December 10 Albany (live & webcast)

Securities Arbitration 2015
(live & webcast)
November 12 New York City

13th Annual Sophisticated Trusts and Estates Institute
November 16 New York City

Special Education Law Update 2015
November 17 Albany
November 18 Buffalo; Long Island
December 9 New York City (live & webcast)

Representing the Start Up Venture 2015
(two-day program; live & webcast)
November 17–18 New York City

Marketing Your Practice: A Conference for Small Practitioners on Ethics, Best Practices and Tips to Grow Your Firm
(live & webcast)
November 19 New York City

Update 2015
(live & webcast)
November 20 New York City

Bridging the Gap
(two-day program)
December 2–3 New York City (live program)
Albany; Buffalo
(video conference from NYC)

Advanced Real Estate Topics
(live & webcast)
December 7 New York City

Aid in Dying: Assisted Suicide and What Practitioners Need to Know
(live & webcast)
December 16 New York City

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Discoverability of Social Media Profiles in New York

How Defense Litigators Can Optimize on Disclosure

By Kevin W. Turbert

For a majority of Americans, social media has become a primary and essential form of communication. Through our smartphones and tablets, we check our social media sites habitually – when we wake up, during our commutes, discreetly in classrooms and offices, at the dinner table, and so on. The light that emanates from our devices is probably the last image burned into our retinas before we fall asleep. Social media has become a permanent fixture in how a large part of our society, for better or for worse, communicates.

Approximately two-thirds of Americans, ages 12 and older, have a profile on a social networking site.[1] Of those two-thirds, about 58% have active accounts on Facebook.[2] Approximately 75 million Americans admit to checking their social network profiles multiple times per day.[3] Studies show that the overwhelming majority of U.S. adults ages 49 and younger have a Facebook profile.[4] While Facebook is globally by far the largest social media provider, other niche providers such as Instagram, SnapChat and Twitter maintain large followings of the millennial demographic (ages 35 and younger). Social media is the new norm in communication, and for litigators, specifically those on the defense, it is a valuable discovery tool that must not be ignored.

With the booming popularity of social media and its firm entrenchment in American society, courts nationwide are attempting to balance the admissibility of evidence located exclusively on an individual's social media profile with that individual's right to privacy. Over the last few years, New York courts have adopted a relatively uniform standard to determine how contents within a litigant's social media profile may be discoverable.

Standards of Discoverability

Despite social media being a relatively new yet influential mode of communication, New York courts have nonetheless maintained that the discoverability of contents within social media profiles fits neatly within traditional discovery standards as well as the liberal parameters of New York's Civil Practice Law and Rules.[5] Pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . ." As such, trial courts have broad discretion in determining what is "material and necessary," and their test is one of usefulness and reason.[6]

In addition to determining what is material and necessary for discovery purposes, courts must also acknowledge the privacy concerns of the party subject to the demanded disclosure of his or her social media profiles. Courts have widely recognized that there is no reasonable expectation of privacy when a social media user disseminates information in a public communication. For instance, there is the obvious: a litigant who chooses to have a public social media profile is consenting to have

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that profile accessible and therefore discoverable to all. "Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting."[7] Further, the "mere possession and utilization of a Facebook account is an insufficient basis to compel [a] plaintiff to provide access to the account or to have the court conduct an *in camera* inspection of the account's usage."[8]

Harris

In *People v. Harris*,[9] Twitter sought to quash the New York County District Attorney's subpoena for the production of any and all "tweets" made by the defendant during a specified time period. The defendant was charged with disorderly conduct for partaking in a march on the roadway of the Brooklyn Bridge during the Occupy Wall Street protests. Noting that the defendant's tweets were public and not protected by any user-optional privacy settings, the New York County trial judge posited,

> [i]f you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world. This is not the same as a private email, a private direct message, a private chat, or any of the other readily available ways to have a private conversation via the Internet.[10]

Fawcett

The Richmond County case of *Fawcett v. Altieri*[11] has to date made the most ambitious attempt to outline New York courts' stance on the discoverability of social media profiles. In interpreting the liberal material and necessary disclosure standard of CPLR 3101(a), the court stated that it applies to "any facts bearing on the controversy that will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity."[12] The right to disclosure is, however, limited when it becomes unduly burdensome and an unreasonable annoyance.[13]

In explaining the nature and purpose of social media sites in order to better establish a proper balance between discoverability and the right to user privacy, the court added that these sites exist to provide, depending upon the intent of the user, both public and private forums to share whatever thoughts, opinions and concerns that users "deem fit to broadcast to those viewing on the Internet. Whether these broadcasts take the form of 'tweets,' or postings to a user's 'wall,' the intent of the users is to disseminate this information."[14]

Despite the prevalence of, and perhaps dependency on, social media in our society, the court opined that such attitudes do not make social media records material and necessary. In fact, the court held that if a social media profile is closed from public viewing by privacy settings, the party seeking the production of social media records must provide reasons relevant to the facts and circumstances of the litigation to justify disclosure. For instance, "courts should not accommodate blanket searches for any kind of information or photos to impeach a person's character, which may be embarrassing, but are irrelevant to the facts of the case at hand."[15]

Should a litigant's social media profile be private and therefore inaccessible by the public, New York courts have adhered to a two-pronged test to determine the discoverability of its contents. The court must first determine that (1) the content in the profile is material and necessary and, if so, it must then (2) balance whether the production of the content will result in a violation of the litigant-user's privacy rights.[16]

In order to compel production of contents within a private social media profile, the demanding party must demonstrate a good-faith basis for making the request by showing "with some credible facts that the adversary subscriber has posted information or photographs that are relevant to the facts of the case at hand."[17] Essentially, the demanding party must "establish a factual predicate with respect to the relevancy of the evidence" sought in the litigant's social media profile.[18] For instance, information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims," may justify the disclosure of private portions of a litigant-user's social media profile.[19]

New York case law on this topic shows that traditional discovery rules, as evidenced by the implementation of the two-pronged standard, authorize judges as the primary gatekeepers in disclosure practice, and in turn, the rules are applied defensively to protect a litigant-user's online privacy concerns. For instance, one court has described "digital fishing expeditions no less objectionable than their analog antecedents."[20] As such, discovery requests for the production of social media profiles must be "narrowly tailored" for content that is relevant to the plaintiff's condition and claims.[21]

Richards

It appears that the only instances where New York courts permit the disclosure of information from private social media accounts are when not all portions of social media profiles are blocked from public view, and evidence that may possibly contradict a plaintiff's claim has been identified. For example, in *Richards v. Hertz Corp.*,[22] the defendants, during the course of their own investigations, discovered pictures depicting the plaintiff skiing, which were located in portions of her Facebook profile that were not blocked by privacy settings. The Second Department ruled that these public Facebook pictures were probative to the issue of the extent of the plaintiff's alleged injuries and determined that "it is reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to the issue."[23] While the court allowed the disclosure of relevant evidence located within the private portions of the plaintiff's Facebook profile, it was concerned with the possible disclosure of private

information immaterial to the issue, so it ordered the trial court to conduct an in camera inspection of the profile prior to production.[24]

Romano

In *Romano v. Steelcase Inc.*,[25] the trial court, faced with nearly identical circumstances as in *Richards*, reached a similar yet more expansive determination in that it did not order an *in camera* inspection prior to disclosure. In *Romano*, the defendant sought to obtain documents from the plaintiff's private portions of her Facebook profile since a review of its public portions revealed that the plaintiff engaged in travel and an active lifestyle during the time period she claimed debilitating injuries. The court ordered that the plaintiff provide the proper authorization for the defendant to gain access to both her Facebook and MySpace profiles, including access to any previously deleted records.[26] Relying on the same legal rationale as provided in *Richards*, the court added that "[t]o deny defendant an opportunity to access these sites not only would go against the liberal discovery policies of New York favoring pretrial disclosure, but would condone plaintiff's attempt to hide relevant information behind self-regulated privacy settings."[27]

Defense Strategy

Since it is clear that New York courts will permit disclosure of content on private social media profiles if certain factual predicates are met, what steps should a defense litigator take to determine whether a litigant has a social media profile and if it has discoverable content? Well, if you're not in the majority of Americans who have a Facebook profile, the first step is to sign up for one. Having a Facebook profile allows each and every user to search for other users, regardless of whether they have chosen to create publicly shared or private profiles. When the plaintiff's complaint first hits your desk, a task that should be added to all defense litigators' pre-litigation rituals is to perform a Facebook profile search of the plaintiff.

If the plaintiff's public or private profile has been located, it is important to electronically save and catalogue any pertinent information (i.e., background information, pictures, postings, etc.). One way to do so is to invest in eDiscovery software. One example is "X1 Social Discovery," which according to its website is "designed to effectively address social media content from the leading social media networking sites . . . and crawl, capture and instantly search content from websites . . . ."[28] X1 Social Discovery is also able to capture the underlying metadata of the social media content in order to avoid issues of authenticity at trial.

As indicated by the cited New York decisions, should the plaintiff's entire Facebook profile be accessible to all, all content is discoverable because the plaintiff willfully disseminated it to the public, and therefore waives all expectations of privacy.[29] If, however, the plaintiff's profile has areas that are both private and public, then the two-pronged test for admissibility is invoked. To reiterate, the demanding party must prove with actual evidence that the content sought within the private portions of the profile is material and relevant to the issues at hand; in other words, establish that there is a factual basis for the existence of evidence within the private portions of the profile that contradict the plaintiff's claims. Interestingly, the courts have not identified what *sources* a demanding party can use to prove that possible contradictory evidence exists within private social media profiles. In the cases above, the courts permitted disclosure of private profiles where evidence of contradictory conduct was located in the public portions of Facebook profiles. But what if such evidence was located through traditional video surveillance, depositions, post-incident statements, or even from the plaintiff's public profiles on other social media networks such as Twitter, Instagram and SnapChat? Would evidence from these sources, which are external to Facebook, justify the disclosure of private content on Facebook? In addition, many Facebook users link their profiles to these other social media networks. Would content on those sites be discoverable should a court permit the disclosure of content from a private Facebook profile? These are questions that a court will no doubt rule upon in the near future.

If the plaintiff's Facebook profile is exclusively private, with no public portions made available, or if public portions are found but there is no evidence that supports the existence of contradictory conduct, then the investigation continues. Questions regarding the plaintiff's social media participation and history should be included on all deposition examination outlines. Specifically, at the plaintiff's deposition, ask questions about his or her Facebook profile information (e.g., user names; how long he or she has had a member profile; what type of content has been posted to the profile and its subject matter; frequency of use; through what devices it is accessed from; etc.),

Should a litigant's social media profile be private and therefore inaccessible by the public? New York courts have adhered to a two-pronged test to determine discoverability.

what other social media networks he or she is a member of, and the usernames for any of these other networks. The plaintiff should also be asked to provide his or her email addresses since some social media networks such as Google+ are linked to a user's personal email address. Further, email addresses are Internet-searchable and can appear in a variety of public forums such as message boards, job postings, product reviews and blogs.

Again, social media has become so prevalent that it would be foolish to ignore it during pretrial discovery. Odds are that the plaintiffs in your active cases, especially if they are of a younger generation, have one or more social media profiles that they check or update on a daily basis. The initial investigation into a plaintiff's social media presence should be as automatic and rudimentary as answering a complaint. It's time to start logging on. ■

1. *See* Shea Bennett, *67% of Americans Use Social Media (With One in Six Active on Twitter) [STUDY]*, Social Times (Apr. 2, 2014, 12:00 p.m.) http://www.adweek.com/socialtimes/social-media-america/497615.

2. *Id.*

3. *Id.*

4. *See* Thiago Guimarães, *Revealed: The Demographic Trends for Every Social Network*, Business Insider (Dec. 12, 2014), http://www.businessinsider.com/2014-social-media-demographics-update-2014-9 (79% of American adults ages 30–49 have Facebook accounts, while 84% of American adults ages 18–29 have accounts).

5. As noted by the Eastern District of New York, "discovery of [social networking postings] requires the application of basic discovery principles in a novel context." *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 FRD 112, 114 (E.D.N.Y. 2013).

6. *See Allen v. Crowell–Collier Pub. Co.*, 21 N.Y.2d 403 (1968).

7. *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 433 (Sup. Ct., Suffolk Co. 2010). *See Fawcett v. Altieri*, 38 Misc. 3d 1022, 1027 (Sup. Ct., Richmond Co. 2013): "[A]s courts have previously determined this privacy is not absolute. Information posted in the open on social media accounts is freely discoverable and does not require court orders to disclose it."

8. *Tapp v. N.Y. State Urban Dev. Corp.*, 102 A.D.3d 620, 620 (1st Dep't 2013).

9. 36 Misc. 3d 868 (Crim. Ct., N.Y. Co. 2012).

10. *Id.* at 874 (Crim. Ct., N.Y. Co. 2012). The court continued:

> While the U.S. Constitution clearly did not take into consideration any tweets by our founding fathers, it is probably safe to assume that Samuel Adams, Benjamin Franklin, Alexander Hamilton and Thomas Jefferson would have loved to tweet their opinions as much as they loved to write for the newspapers of their day (sometimes under anonymous pseudonyms similar to today's twitter user names). . . . The Constitution gives you the right to post, but as numerous people have learned, there are still consequences for your public posts. What you give to the public belongs to the public. What you keep to yourself belongs only to you.

Id. at 878.

11. 38 Misc. 3d 1022.

12. *Id.* at 1024.

13. *Id.*

14. *Id.* at 1025.

15. *Id.* at 1028; *see Acosta v. Addonizio*, 2014 WL 7191462 at *1 (Sup. Ct., Bronx Co. Apr. 22, 2014) (holding that defendant's general demand for the production of documents in plaintiff's private Facebook profile was not reasonably calculated to lead to the discovery of information pertaining to the claim); *see, e.g.*, *Aponte v. Flores*, 2013 WL 6212531 (Sup. Ct., Bronx Co. June 28, 2003).

16. *Fawcett*, 38 Misc. 3d at 1028; *see Jennings v. TD Bank*, 2013 N.Y. Slip Op. 32783(U), 2013 WL 5957882 at *2 (Sup. Ct., Nassau Co. July 3, 2013); *see also Del Gallo v. City of N.Y.*, 43 Misc. 3d 1235(A) at *5–6 (Sup. Ct., N.Y. Co. June 17, 2014) (denying defendants unfettered access to plaintiff's LinkedIn account on the notion that "the mere hope of finding relevant evidence" regarding plaintiff's condition is insufficient to warrant disclosure).

17. *Fawcett*, 38 Misc. 3d at 1027–28; *Frugis v. Swift*, 2014 N.Y. Slip Op. 33000(U) (Sup. Ct., Westchester Co. Mar. 24, 2014) ("the party seeking access must demonstrate a good faith basis for making the request by showing some credible facts that the account holder posted information or photographs that are material and necessary in the prosecution or defense of the action" (citing *Fawcett*, 38 Misc. 3d 1022)); *Winchell v. Lopiccolo,* 38 Misc. 3d 458, 461 (Sup. Ct., Orange Co. 2012) (finding that defendants' request for unrestricted access to plaintiff's private Facebook profile was overbroad. "[Defendants] hope[d] to divine the extent of plaintiff's cognitive injuries from reading every bit of information on her Facebook page.").

18. *McCann v. Harleysville Ins. Co. of N.Y.*, 78 A.D.3d 1524, 1525 (4th Dep't 2010).

19. *Del Gallo*, 43 Misc. 3d at *5.

20. *Winchell*, 38 Misc. 3d at 461 (citing *Caraballo v. City of N.Y.*, 2011 N.Y. Slip Op. 30605(U), 2011 WL 972547 at *5 (Sup. Ct., Richmond Co. Mar. 4, 2011) (holding that defendant's demand for access to plaintiff's current social media accounts, including all deleted pages, was overbroad in that it failed to establish a factual predicate with respect to the relevancy of the information sought).

21. *See Patterson v. Turner Constr.*, 88 A.D.3d 617 (1st Dep't 2011); *see also Myron v. 116 Cent. Park S. Condominium, et al.*, No. 108434/2009, 2010 WL 9949287 (Sup. Ct., N.Y. Co. Feb. 28, 2010) (defendants failed to articulate why they believe plaintiff commented on his claim or related injury on his private social media profiles).

22. 100 A.D.3d 728 (2d Dep't 2012).

23. *Id.* at 730.

24. *Id.*; *see also Nieves v. 30 Ellwood Realty LLC*, 39 Misc. 3d 63, 64 (App. Term 1st Dep't 2013) (remanded to trial court for *in camera* inspection of plaintiff's Facebook records since defendant "demonstrated that plaintiff's Facebook profile contained photographs that were probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook records may contain further evidence relevant to that issue"); *Jafargian v. IAC, IAC/Interactivecorp, et al.*, No. 1110692008, 2014 WL 4101417 (Sup. Ct., N.Y. Co. Jan. 21, 2014) (also ordered the *in camera* review and production of plaintiff's Facebook profile since defendant discovered pictures on plaintiff's Facebook profile depicting him fishing after the occurrence of the incident. Significantly, the plaintiff previously testified at his deposition that as a result of the incident, he was no longer capable of fishing.); *Pereira v. City of N.Y.*, 40 Misc. 3d 1210(A) (Sup. Ct., Queens Co. June 19, 2013) (*in camera* inspection and production of plaintiff's Facebook profile was warranted since defendants discovered contradictory photographic evidence from the public portion of plaintiff's Facebook profile that he was active in sports and travel post-injury); *Gonet v. Private Island Entm't, LLC*, No. 151665/2013, 2015 WL 505138 at *3 (Sup. Ct., N.Y. Co. Feb. 3, 2015) (disclosure of plaintiff's Facebook profile was warranted since defendants produced a Facebook posting from plaintiff contradicting his post-incident unemployment status and loss of earnings claim).

25. 30 Misc. 3d 426.

26. *Id.* at 433.

27. *Id.* at 432; *see also Loporcaro v. City of N.Y.*, 35 Misc. 3d 1209(A) at *7 (Sup. Ct., Richmond Co. Apr. 9, 2012) ("Since . . . plaintiff . . . voluntarily posted . . . information about himself on Facebook which may contradict the claims made by him in the present action, he cannot claim that these postings are now somehow privileged or immune from discovery."); *see also D'Agostino v. YRC Inc., et al.*, No. 0005652011, 2012 WL 11980337 (Sup. Ct., Orange Co. May 17, 2012) (permitted the disclosure of plaintiff's post-incident private social media postings concerning her feelings and emotions since she testified at her deposition to creating such posts, and they were relevant to her emotional distress claim).

28. *X1 Social Discovery*, "Products," http://www.x1.com/products/x1_social_discovery/.

29. *See Harris*, 36 Misc. 3d at 878.

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Still "Morally Certain"?

Introduction

Last issue's column recounted the tale of *Bottalico v. New York*,[1] a personal injury action where the trial court denied the defendant's motion to set aside a jury verdict in favor of the plaintiff. There was proof at trial supporting the plaintiff's claim, the testimony of the plaintiff's son, on the issue of notice and proximate cause. On appeal, the First Department ordered a new trial, finding the plaintiff's son's "story so inherently improbable that we are morally certain it is not true."[2]

"The Sufficiency of Evidence 'Reasonabl[e] to Satisfy a Jury'"

In *Blum v. Fresh Grown Preserve Corp.*,[3] the Court of Appeals distinguished cases where a jury verdict was not supported by sufficient evidence from those where a jury verdict was against the weight of the evidence and explained the role of the court in each:

> Where the court, in the *exercise of its discretion*, sets aside a verdict of the jury because the court is of the opinion that in weighing the evidence the jury has not appraised correctly its relative persuasiveness and probative force, a new trial must follow. "Where conflicting inferences may not unreasonably be drawn" it cannot be said that solely a question of law is presented for decision by the court; but an inference is "unreasonably drawn" unless supported by sufficient evidence. Thus, the question whether a verdict of a jury is "unsupported by sufficient evidence" is always one of law for the Trial Judge. He *must* set aside such a verdict and in appropriate case he may then direct a contrary verdict. The court is justified in directing a verdict in such case "not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to recover."
>
> * * *
>
> The sufficiency of evidence "reasonably to satisfy a jury" cannot be mechanically measured. It is "incredible as [a] matter of law" only where no reasonable man could accept it and base an inference upon it.[4]

Having rejected the plaintiff's son's testimony as "inherently improbable," the record before the *Bottalico* court was devoid of proof supporting the plaintiff's claim, requiring the First Department to set the verdict aside. But was the son's testimony "incredible as [a] matter of law"?

Blum cited the seminal Court of Appeals case comparing weight versus sufficiency of the evidence, *McDonald v. Metropolitan Street Railway Co.*:[5]

> The credibility of witnesses, the effect and weight of conflicting and contradictory testimony, are all questions of fact and not questions of law.

Citing *McDonald*, Judge Cardozo explained in *In re Case*:[6]

> It is true that where conflicting inferences may not unreasonably be drawn, the weight of evidence is not for consideration in this court. It is still the rule, however, even in this court, that "insufficient evidence is, in the eye of the law, no evidence." In the words of Maule, J., in *Jewell v. Parr*, "When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established." Rightly read, the case of *McDonald v. Met. St. Ry. Co.* holds nothing to the contrary.[7]

Bottalico v. New York: The Second Time Around

In 1954, *Bottalico* was tried for a second time before a jury in Bronx County. The second jury returned a verdict for the plaintiff, and the trial judge denied the defendant's motion to set aside the verdict.[8] The trial court's decision recited the proof at the second trial:

> As on the first trial, the plaintiff's testimony concerning the occurrence was simply that his foot "caught on something" as he descended the subway stairs and that is all he remembers.
>
> The plaintiff's son testified substantially the same on the second trial as he did on the first that as he followed his father down the stairway, his father's body or leg came to a "sudden stop or a sudden halt" at the seventh or eighth step, that he began tumbling to the bottom and that after his foot left the step he, the son, saw an object sticking up from the plate. Further

in his testimony the son stated that the object was a screw protruding at least a half inch above the surface of the metal tread upon the steps, and when he stepped thereon, immediately after his father's fall, the screws of the tread would "wobble" in their place.

The son was the only eye witness to the occurrence. He also testified with respect to matters of constructive notice, as required by law. Upon his testimony the verdict must stand or fall.

In defense, the defendant presented evidence through its employees, namely, the maintenance inspector, the clerk on duty at the station, the porter and the police officer, that the dangerous condition complained of did not exist.

After seeing and hearing the witnesses the jury in their province reached a conclusion strongly favorable to the plaintiff.

While a witness who had testified in behalf of the defendant upon the first trial was unable to testify upon the second trial, the few differences in the evidence that was adduced upon both trials are deemed of no controlling significance in the disposition to be made of the defendant's motions.[9]

The trial judge considered the prior reversal by the First Department, as well as the testimony the court and jury heard at the second trial:

Should this court upon the declarations of the Appellate Division heretofore made set aside the verdict and dismiss the complaint? Plainly, the problem is an appraisal of credibility of witnesses.

Like the jurors the trial court observed the six witnesses as each testified. This being the second trial particular observance and scrutiny was necessary. And with profound respect, to quote from the opinion of the Appellate Division, this court is also mindful of "the weight to be given to a jury's verdict where the facts are disputed and issues of credibility are presented."

Searching for truth is eternal. In this case, upon the order of the Appellate Division, the quest was by the jury, and not the court, which was required to submit the issues to the jury.

Having closely watched the plaintiff's son while he was on the stand this court cannot in good conscience now make its own declaration that he was unworthy of belief, that the jurors should have rejected his testimony and accepted that of the defendant's witnesses and, by their verdict, disallowed the plaintiff's claim for a severe permanent brain injury.

Upon the evidence and the law this court feels that it would not be justified in granting any of the defendant's motions. All are denied with an exception in each instance.[10]

Not surprisingly, the defendant appealed, and the First Department unanimously reversed, ordering a new trial "upon the ground that the verdict is against the weight of the credible evidence."[11]

Bottalico Déjà Vu

At the turn of the 20th century, in *Walters v. Syracuse Rapid Transit Railway Co.*,[12] judgment was entered for plaintiff in a personal injury action, and the trial judge denied defendant's post-trial motion to set aside the verdict. On appeal, the Fourth Department carefully evaluated the evidence at trial before reversing and remanding for a new trial:

The plaintiff has recovered a large verdict. It depends in its main features almost entirely upon his testimony, and it is controverted by facts and circumstances which are not explained away or disputed, and they are too overwhelming, unless cleared up or impaired by contrary testimony, to permit a recovery in this case to stand.

As was said by Judge Haight in *Hudson v. R., W. & O. R. R. Co.*: "But where the evidence which appears to be in conflict is nothing more than a mere scintilla, or where it is met by well-known and recognized scientific facts, about which there is no conflict, this court will still exercise jurisdiction to review and reverse if justice requires."[13]

At the close of the second trial, no doubt mindful of the Fourth Department prior reversal, the trial judge granted the defendant's motion for a directed judgment, and the plaintiff appealed. Reviewing the case for the second time, the Fourth Department affirmed the trial court's dismissal of the plaintiff's case:

The evidence in this case is substantially the same as when considered by this court upon a former appeal. There is some slight evidence to sustain the position of the plaintiff. The way the accident is described to have occurred, however, is so incredible and so averse to well-known physical laws that we think the trial court was justified in taking the case from the jury. The case of *McDonald v. Metropolitan Street R. Co.* is no barrier to such a course . . .

The weight of the evidence, as ordinarily understood, is not for the court, but for the jury to consider. This rule emanates from the underlying principle of our jurisprudence that the solution of questions of fact is committed to the jury, not to the court. By the reiteration of that principle in the *McDonald* case it was not intended to take from the trial court the power and the duty to dispose of the case where the testimony presented on behalf of the plaintiff is too unlikely to be credited or where his testimony is so overwhelmingly outweighed by the whole evidence of the case as to make it beyond belief. This case comes within those exceptions.[14]

The plaintiff appealed to the Court of Appeals, which reversed, affirming the holding of *McDonald* in the process:

> All we mean to say is that the credibility and the weight to be given to the plaintiff's testimony should have been determined by the jury. It is not a very unusual thing for this court to feel constrained to affirm judgments in such cases where large recoveries have been had upon testimony quite as incredible as that of the plaintiff in this case. Moreover, it frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony in order to meet the varying fortunes of the case upon appeal. It often happens that his testimony upon the second trial is directly contrary to his testimony on the first trial, and when it is apparent that it was done to meet the decision on appeal the temptation to hold that the second story was false is almost irresistible. Yet, in just such cases this court has held that the changes and contradictions in the plaintiff's testimony, the motives for the same and the truth of the last version, is a matter for the consideration of the jury. If this court is to be consistent with the position taken in that case and in many other cases of like character, we cannot hold as matter of law, that there was no proof in this case to sustain the plaintiff's cause of action. It often happens that science and common knowledge may be invoked for the purposes of demonstrating that a particular statement in regard to some particular accident must be absolutely false. In such cases the question is for the court. But in cases of doubt we think it is wiser and better to remit such controversies to the proper tribunal for settling facts and ascertaining where the truth lies, rather [than] assume the power to determine the facts ourselves. This is an old rule, and while like all other rules it may work hardship or injustice in a particular case, it is wiser to adhere to it.[15]

Does *Walters* give insight into how the Court of Appeals would have decided an appeal of *Bottalico*? More importantly, how would the Court of Appeals rule today on appeal of a *Walters/Bottalico* fact-pattern? Would the Court agree that "it is wise[] to adhere to [*McDonald*]"?

Reasonable [Person]

For those of you keeping score at home, at the conclusion of *Bottalico II* the vote was plaintiff 26 (24 jurors[16] and two trial judges), defendant 10 (two five-justice panels of the First Department, although an argument can be made defendant only scored nine, since each panel was presided over by Presiding Justice David W. Peck).

For those of you keeping score at home, at the conclusion of *Bottalico II* the vote was plaintiff 26 (24 jurors and two trial judges), defendant 10.

Sadly, the trail went cold here, so I cannot report what happened at *Bottalico III*, although the definition of insanity attributed to Albert Einstein was most likely ratified: "doing the same thing over and over and expecting different results."[17]

While the identity of the 24 jurors who twice found for the plaintiff is unknown, the same cannot be said about the two trial judges who affirmed those verdicts. What sort of jurists were they, to be hoodwinked by the testimony of the plaintiff's son that nine appellate justices found "so inherently improbable that we are morally certain it is not true"?

The first trial was presided over by the Honorable Thomas Joseph Brady. By the time *Bottalico I* was tried before him, Justice Brady had served as a trial judge for more than 18 years.[18] Clearly, affirming the first jury's verdict cannot be attributed to a rookie mistake.

The second trial was presided over by the Honorable Daniel V. Sullivan. I could not find out how many years Justice Sullivan served on the bench when *Bottalico II* was tried. However, the next year Justice Sullivan was elected District Attorney of Bronx County by more than 67% of the voters,[19] and he held that office until 1959.[20] One can safely assume he was no fan of perjury, and most likely was skilled at evaluating witness credibility.

The identity of the plaintiff's lawyer is of historical interest. The lawyer who was the proponent of the son's testimony found to be unbelievable is identified in *Bottalico I*. Samuel S. Sturim, Esq., "of counsel," was on the brief for plaintiff-respondent in *Bottalico I*. Who was Mr. Sturim "of counsel" to? Jacob C. Fuchsberg, Esq., who joined Mr. Sturim on the brief, and later served as Associate Judge of the New York Court of Appeals from 1974 to 1983.

Applying the standard in *Blum*, can it be said that the testimony of the plaintiff's son in *Bottalico* was such that "no reasonable [person] could accept it"?

Conclusion

Bottalico's "morally certain" standard appears to have been consigned to the dustbin of history, but the case offers a useful reminder for appellate courts making credibility determinations, which circles back to the issues

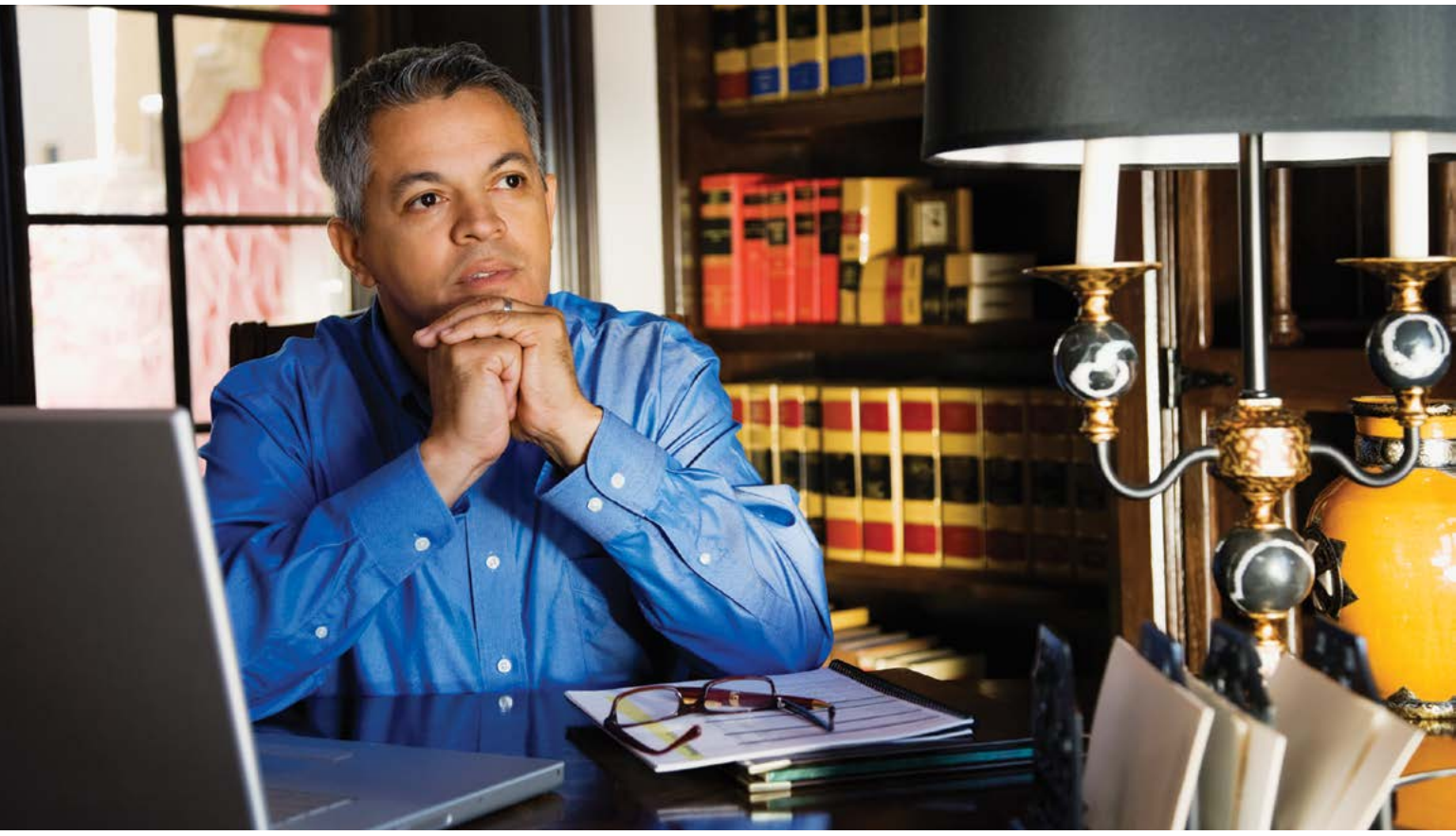
raised in the *Ashford* and *Kudisch* lines of cases.

November/December's column will return to *Ashford/Kudisch* (unless I once again find myself distracted). Until then, a happy Columbus Day and Halloween to all.

1. 281 A.D. 339 (1st Dep't), *appeal withdrawn*, 306 N.Y. 593 (1953).
2. *Id.* at 341.
3. 292 N.Y. 241 (1944).
4. *Id.* at 245–46 (citations omitted) (emphasis in original).
5. 167 N.Y. 66, 67–71 (1901).
6. 214 N.Y. 199 (1915).
7. *Id.* at 203–04 (citations omitted).
8. *Bottalico v. N.Y.*, 136 N.Y.S.2d 433 (Sup. Ct., Bronx Co. 1954).
9. *Id.* at 434.
10. *Id.* at 434–35.
11. *Bottalico v. N.Y.*, 1 A.D.2d 1002 (1st Dep't 1956).
12. 64 A.D. 150 (4th Dep't 1901).
13. *Id.* at 155 (citation omitted).
14. *Walters v. Syracuse Rapid Transit Ry. Co.*, 84 A.D. 64, 64–65 (4th Dep't 1903) (citation omitted).
15. *Walters v. Syracuse Rapid Transit Ry. Co.*, 178 N.Y. 50, 53 (1904) (citation omitted).
16. CPLR 4104, amended effective May 28, 1972, provides "[a] jury shall be composed of six persons." Previously, CPLR 4104 had provided for the option of a six- or twelve-person jury, *see* Advisory Committee Notes. I cannot be certain that *Bottalico* was tried by a jury of 12, but it makes the story more dramatic if there were 12 jurors.
17. *See* http://www.quotationspage.com/quote/26032.html.
18. *See* PoliticalGraveyard.com, "Flynn family of Bronx, New York," http://politicalgraveyard.com/families/16002.html.
19. http://www.ourcampaigns.com/RaceDetail.html?RaceID=265445.
20. *See* PoliticalGraveyard.com, "Sullivan, C to D, New York," http://politicalgraveyard.com/bio/sullivan2.html#061.89.48.

For Sole Practitioners, the Future's Not What It Used to Be*

By Stephen P. Gallagher and Leonard E. Sienko, Jr.



We invited Steve Gallagher and Lenny Sienko to update their 2004 article for the Journal, "Yesterday's Strategies Rarely Answer Tomorrow's Problems,"[1] about new market challenges facing the legal profession. In the 11 years since, much has changed, especially for solo and small firm practitioners. The co-authors speak with two distinct and complementary voices. Steve discusses current trends and strategies, while Lenny gives practical tips and tricks and talks about the nitty-gritty – and the joys – of being a sole practitioner.

2004 – Competing for the Future

Steve Gallagher: At the time we wrote the article "Yesterday's Strategies," Lenny was a member of NYSBA's Electronic Communications Task Force (ECTF) along with current bar president, David Miranda. I was liaison to this task force, so we have been following trends in the profession for quite some time.

Lenny Sienko: OMG I feel old. We actually first worked together on the NYLaw Net Committee in 1993. Steve arranged a visit to Cornell Law School to talk to the folks responsible for the Legal Information Institute. We all came back enthused about "value added" to information available in the public domain. Our next meeting was at the NYSBA Bar Center on Elk Street, when we raised the idea of NYSBA posting a web page online. There were some chuckles, but the "powers-that-be" agreed to a trial run. Twenty-two years later, the NYSBA website is an enormous enterprise and the main repository of our member benefits.

SG: Back around that same time, Richard Susskind, the highly regarded British legal technology expert, was just beginning to write about the potential of the Internet disrupting legal practice. It was in his book *The Future of Law: Facing the Challenges of Information Technology*[2] that

Susskind predicted, "Law will be gradually transformed from an advisory service to an information service as lawyers package their conventional work product in electronic form."

LS: Susskind thought "tomorrow's lawyer" would be forced to drop bespoke work and start treating legal work as a commodity. In my practice I have attempted to satisfy clients by customizing my representation even more – not less. I'd be afraid to call myself a "concierge lawyer," but that is basically what I do these days (and nights). I am available 24/7 via email and cell phone. The client speaks to me – not a secretary or paralegal. Who can afford staff? Clients have each question answered by "their attorney," who can make virtual or actual house calls.

For clients from the New York City, New Jersey and Connecticut metro area who want to purchase second or vacation homes along the upper Delaware River, I have appointments on Saturdays, Sundays, or evenings. I can answer their questions by email from home in the evening.

SG: Our 2004 article built on Gary Hamel and C.K. Prahalad's best seller *Competing for the Future*, a 1994 Harvard Business School Press publication that identified two critical choices the profession needed to make: either wait to see what happens to demand for traditional legal services, or anticipate the changes certain to affect the future and act now to shape the direction of these new services. In the past 11 years, however, the profession in general seems to have taken little action to shape new services, although emerging technologies in the hands of innovative sole practitioners and small firms are being seen as new ways to preserve and even expand ranges of legal services.

During this same period of time, we have gained even greater respect for Richard Susskind's message, but Lenny and I still have faith in the profession doing more to work with clients who are demanding more creative and proactive lawyering, by coming up with new ways of thinking about legal solutions and focusing on reducing rising legal costs.

LS: I guess you could call email an "emerged" technology. Many may think email past its prime, in some ways more of an annoyance than a tool. However, email rules in my work flow. My day is structured around emails received and my responses. The idea of a dictated, typed letter, stamped, metered, and sent through the U.S. Postal Service, makes me shudder at the time and expense involved. I can't afford the additional costs involved with sending a letter. Even the larger firms I interact with send the bulk of their correspondence via email, having paid a graphic designer to fit their letterhead onto an email message blank or attaching a pdf version of their "letter."

Continuing with my ode to email, one of my most prudent investments has been a searchable email database program. All emails are automatically saved and searchable, which allows me to confirm requests made by clients, check on advice given by me, and to deny assertions of opposing counsel with faulty memories. The email database has helped me "remind" other offices that I really did send a digital version of the abstract and prior title policy more than a month ago.

2014 and 2015 Law Firm Transition Surveys

SG: A large majority of law firm leaders who responded to a recently published Altman Weil *Law Firm Transition Survey* agreed that greater price competition, practice efficiency, commoditization of legal work, competition from nontraditional service providers, and non-hourly billing are all permanent changes in the legal landscape. For the most part, these are changes that have been imposed upon the profession from more demanding clients and more competitive newcomers who are challenging the rules of legal service delivery. We can only expect these changes in the landscape to continue.

When asked about the most likely change agent in the legal market over the next 10 years, Altman Weil's 2014 *Law Firm Transition Survey* found, "34% of their large firm leaders identified corporate law departments as the force most likely to lead change; 32% chose technology innovation; and, 15% selected non-law-firm providers of legal services. Only 10% of respondents believe that law firms will take the lead in reinventing the legal market." It is important to note that Altman Weil surveys have never attempted to track trends with solo and small firm practitioners. I suspect that sole practitioners throughout the state are much more concerned about keeping up with technology innovation and new threats from non-law-firm providers of legal services as the forces that will have the greatest impact on them. In fact, we believe, your future success is directly tied to your effective use of technology. To believe recent and future advances in information technology can be ignored is increasingly foolish and shortsighted.

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**This phrase is often attributed to Yankee great Yogi Berra. Yogi, we will miss you.*

LS: I'm still convinced that email is the innovation that we take too much for granted. It has brought about a paradigm shift in dealing with clients economically, efficiently, and effectively. After a few costly lessons, I have decided that I will no longer accept clients who do not have email (at least not without charging a substantial premium for another type of "bespoke" service). It is not cost effective to waste time playing "telephone tag" or sending out hard copies of draft documents. My real estate transactions now consist entirely of digital versions of documents being exchanged, right up to the actual closing, at which the final and only printed-out hard copies are signed and handed over to the title closer for recording.

Draft wills are now sent to clients for review as PDF attachments, electronically watermarked as "Draft." Contracts of all types are handled in a similar fashion, utilizing counterpart execution. (Electronic signatures are taking a bit longer to become the norm.)

Everything on paper is being scanned in, and most of the paper so scanned is marked "scanned" and stored. I can't yet bring myself to discard all such paper, even with multiple cloud back up services. I have BackBlaze and DropBox in the cloud, and a Bankers Box in the storage vault in the basement.

SG: What stood out to us most in the Altman Weil surveys was the belief that, "[o]nly 10% of respondents believe that law firms will take the lead in reinventing the legal market." This suggests that these challenges to the rules of legal service delivery will be imposed by forces outside the profession. This left us with a sinking feeling that the profession was still focusing on rearranging the deck chairs on the *Titanic* just prior to striking the iceberg that would ultimately lead to her sinking.

LS: "ICEBERG SIGHTED!" I know we make fun of lawyers – for example, some of us are still using quill pens. However, no solo or small firm can long survive these days without dealing with technology. Solos, especially, are confronted with a kind of legal "social Darwinism." If we don't use the best technology available, the other lawyer will – to our disadvantage. The question is whether we will be reactive and thus off balance or proactive, trying to anticipate the "next big thing." Do you still have a fax machine? That's my personal litmus test for determining lawyerly tech levels. Never had one in the office. Never needed it! I have used eFax for nearly 20 years. Voicemail? Does your voicemail turn your message into an email attachment and send it to you? It can, easily. How often do you update your office desktop computers? Do you still even use desktops? I just replaced my main iMac. It lasted six years. That's about twice the average useful life for a personal computer. One of the reasons I have always used Macs in the office is their longer life. They cost more, but they can be in service twice as long. If you don't take the time to keep up with office tech, you will feel it in your bottom line.

2015 Report on the State of the Legal Market

SG: Another trends survey that hit home with us recently was the Georgetown University Law Center's *2015 Report on the State of the Legal Market*.[3] According to this survey, over the past 10 years business spending on legal services fell from $159.4 billion to $118.3 billion, a precipitous drop of 25.8%.[4] This survey seemed to express equal concern over non-law-firm providers of legal services. "While the overall impact of such expanded competition remains fairly modest today, it is growing at a steady pace and, over time promises to be even more disruptive to the near monopoly previously enjoyed by law firms in the legal services market."[5] The sole practitioners agree that we now see competition from non-law-firm providers as a much more immediate threat.

LS: I, for one, welcome our new non-law-firm overlords. Ten years ago I was afraid that automated, online services would entice my clients away. Now I say, let them have the "time wasters," the C and D level clients, while I concentrate on the A and B clients. The DIY clients who buy their wills online should not be my intended client base. For the first 35 years of my practice, I suffered from the "be all things to all clients" syndrome common among solos. I thought I'd fall behind, that I'd fail if I didn't try to take everyone who came through the door. Client selection was in nice theory, something I had heard about in my first NYSBA CLE on starting my own practice back in 1978, but I had never really believed in it until recently. Now I see clients "by appointment" and mean it. Family responsibilities, as caregiver for my parents before they passed away, forced me to change my schedule. I dropped morning appointments and came in at noon. I found that I could work more efficiently and quickly, in a shorter period of time at the office and later at home. I just needed the courage to say "No" to clients, who would be more economically served by those online companies or lawyers who believed in law as a commodity.

SG: Georgetown's findings also showed that law firm leaders identified "an 'astonishing lack of urgency' on behalf of partners in moving on vital issues like client demands for improved practice efficiency and changing the way firms deliver and price legal work." That supports Altman Weil's findings that law firm leadership knows that legal work will continue to slip away, and there is nothing that can be done to change this erosion in market share. With this type of thinking, the legal profession can become its own worst enemy!

LS: As a solo, I am not as threatened by these client demands as the larger firms might be. Over the years, I have been through "boom and bust" cycles, especially in real estate practice. I started out in 1978 typing my own letters and pleadings, using carbon paper. I couldn't afford a secretary. When I hired my first wonderful legal secretary, I thought I'd made it. Over the years, I employed a handful of extraordinary people who made practice and life easier in some ways, more complicated

in others. When I reduced my hours after a heart attack and, subsequently, caring for my parents, I didn't have work for a secretary. Now that I'm back full time, I type my own letters, use my voicemail/email setup, and scan in every piece of paper. I've come full circle, survived. That's better than many large firms I can think of.

laser printer I bought for under $200. That's less than I paid for a single box of the old letterhead.

Most of us are not in a position to individually influence great shifts in the practice of our profession, if it still can be called that. We can only attempt to surf on the wave and try to keep our heads above water. If I need a

No solo or small firm can long survive these days without dealing with technology. If you don't take the time to keep up with office tech, you will feel it in your bottom line.

It says volumes about what we used to refer to as a "learned profession" that, at least in my case, my measure of success is not money, awards, or other recognition, but the fact that I have survived 37 years as a sole practitioner in rural, upstate New York.

Reimagining the Future of the Legal Profession

SG: *The Relevant Lawyer: Reimagining the Future of the Legal Profession*[6] is a new book published by the ABA Standing Committee on Professional Responsibility. This book is by a powerful collection of independent voices who share an abiding concern about the future path of the legal profession. Frederic S. Ury, chair of the standing committee writes, "The time is now for leaders in the legal profession to join the dialogue on – and thus be able to influence – how legal services will be delivered over the next 5 to 10 years, and what roles lawyers, judges, and the courts will play in the delivery of those legal services. All signs point to a need for bold action by the bar and its members to stake a claim in the new global economy of fading borders where technology equals power."[7]

Fred Ury goes on to say, "The legal profession's unwillingness to engage in a discussion about difficult and controversial subjects, such as nonlawyer ownership, the inability of much of the population to afford legal representation, and the rapidly changing landscape, has resulted in other legal service providers filling the void."[8]

LS: Mr. Ury's on the right track, but the time for discussion is waning. Lawyers can't spend too much time sitting around discussing disruptive technology. The changes will come. We cannot stop them. We have to adapt or die.

When I first opened my office, one of the first people through my door was my legal supply salesperson. John told me what I needed for forms, "bluebackers," legal pads, stationery, everything I had to have to practice. John also offered easy credit terms. I could open an account with him and take more than 30 days to pay. I appreciated John's confidence in me and bought everything I needed from him for the next 10 years, until John retired. I still have boxes of engraved stationery and pads of forms I'll never use up. Today I create my own stationery using a New York real estate form, I can download it for free from JudicialTitle.com. They have a discrete logo on every form. Somebody at that firm is a marketing genius. I can find other forms through Google.

SG: What excites us about *Reimagining the Future of the Legal Profession* is the recognition of three latent markets that are severely underserved by the legal profession today: (1) low- and moderate-income clients who go without the representation they need in civil matters approximately 80% of the time (note that moderate-income families are not the working poor – they are a family of four making $94,000); (2) middle-income clients, 50% of whom, it is estimated, go without the representation they need; and (3) people who did not realize they have a *legal* problem and who sought assistance through nonlegal agencies or resources.[9] When a person can only afford to pay a few hundred dollars for legal services and not several thousand, the lawyer will have few options – primarily, to either cease doing that kind of work or figure out a way of doing it profitably at a reduced rate.

LS: I agree with both the analysis here and the conclusion. Those lawyers who come after my generation will have to decide if they are going to serve these underserved groups and if they can make a living doing so. I have neither the inclination nor the energy to serve these groups in volume. I'm a custom woodworker doing one beautiful oak cabinet a week – not an assembly line turning out 100 particle board nightstands.

Sole Practitioners and New Market Strategies

SG: The legal services gap has been identified in a growing number of studies as one in which only about 15% to 20% of potential legal service opportunities are met by lawyers, with the other 80% to 85% going either unmet or unrecognized altogether. It is this latter 80% to 85% of the total market that new providers seek to tap. This is the same group that will present new opportunities to lawyers willing to break out of these comfort zones to explore new personal and professional networks in creative ways. I wanted to make one last reference, this time to the theory of "disruptive innovation," a phrase first coined by Harvard professor Clayton M. Christensen in his book *The Innovator's Dilemma*, published back

in 1997. The theory explains the phenomenon by which an innovation transforms an existing market or sector by introducing simplicity, convenience, accessibility, and affordability where complication and high cost are the status quo. Disruptive innovations are not breakthrough technologies that make good products better; rather they are innovations that make products and services more accessible and affordable, thereby making them available to a much larger population.

LS: With apologies to Professor Christensen, a "disruptive" technology is one which affects me and my business/profession adversely, at least at the outset. Non-disruptive technology happens to other folks.

For the first 15 years of my practice I was visited monthly by my legal bookseller's representative. He often told me that my estate would make the last payment. He was wrong. After spending nearly six figures to maintain a complete law library because I was some 40 miles from the Supreme Court Law Library at the county seat, I bought my last set, my last pocket part, my last citator. These were all unaffordable. There was a long hiatus when I had a part-time position with the court system so I used a distant library; but these last few years, I have full-text cases and up-to the-minute citations through Google Scholar. Google is disruptive to the legal booksellers. To me it saves the thousands of dollars I spent annually with them.

SG: It is estimated that approximately 6% of solos and small law firms use a secure client portal to communicate and collaborate with their clients and deliver other legal services online. "Virtual law practice" is still in its early stages of adoption by the legal profession. The public is already beginning to see virtual law practices where a third party provides a website that connects clients with law firms. The third-party creates a website that is market-facing and attracts consumers who can become clients of the law firms linked to that company's website. These consumer-facing websites often target specific legal needs, such as estate planning, start-up companies, or divorce law. Could this type of innovation make products and services more accessible and affordable, thereby making them available to a much larger population? Is there any reason that bar associations should not be building their own "branded networks"? An example of this type of hybrid service is DirectLawConnect, which promotes itself as a marketplace of online law firms that offer fixed-fee legal services over the Internet at reasonable and affordable fees.

LS: Despite my fascination with technology over the years, I have not yet participated in this ingenious hybrid. Even if they do their level best to comply with rules of professional conduct, I have difficulty accepting the concept of "unbundled services." I want to offer complete representation – not leaving anything undone. I want to supply a finished cabinet without any "assembly required." Perhaps this is an opportunity for the independently licensed paralegal?

Bar Associations in Transition

SG: The first time I heard about "approaching the practice of law differently" was years ago from David H. Maister, one of the first widely known academic/practitioners who focused on law firm culture, leadership and the need for a new paradigm for the practice of law.[10]

We believe that few law firms will be able to create the future single-handedly. Bar associations hold the key to forming coalitions and alliances to help shape the future. If it is true that only about 15% to 20% of potential legal service opportunities are met by lawyers, with the other 80% to 85% going either unmet or unrecognized altogether, bar associations, with a shared vision of the future, need to help members understand and respond to what's happening now, so lawyers can learn to be better, faster learners from what just happened. That is the only way bar associations will be able to have an impact on these permanent changes in the legal landscape.

Should bar associations be in the business of providing legal information websites offering direct-to-consumer, low-cost legal solutions to compete with such vendors as www.completecase.com, www.LegalZoom.com, and www.selfdivorce.com; or should bar associations and their sections get involved in developing "branded networks" that can offer individual members an efficient way to market their services through the company or bar association's website?

Could bar associations do more to introduce young law graduates to my friend Lenny Sienko and his community of seasoned lawyers who have been serving the public over the past 30-plus years? I suspect that many senior lawyers are not looking to fade away. At the same time, young lawyers need to find their own safe harbors to prepare for their own career and life transitions. The need for more flexible and accommodating work options affects not only those who are approaching traditional retirement, but younger women and men who don't fit inside the box or want to work within the traditional partnership pyramid.

LS: When I opened my office in 1978, in the days before the individual assignment system, we answered calendar call on Monday mornings, and I was fortunate to have a colleague invite me to "Monday lunch" at the county seat. It was an education to sit in the courtroom and hear other, more experienced lawyers argue their cases. After your case was called, many remained to visit the County Clerk's office to search titles; I'd visit the DA's office to plea bargain cases. Lunch would see us all assembled in one small restaurant with the tables pushed together. It was our version of "The Inns of Court." Questions were freely asked and answered by young and old. Legal news and gossip was flowing. Political arguments broke out. More cases were bargained and settled. The DA, County Attorney, Social Services Attorney were all there. The members of this group were my mentors. As years passed, I invited new lawyers to lunch. Those who

came seemed to do better than those who stood aside. We closed half a dozen different restaurants, but kept going. Of late, death, disability, and the loss of the "calendar call" on Mondays have done in our group, but I see vestiges of its essence in the popularity of NYSBA's listservs.

The listservs have been around since the mid 1990s, but now I see them taking on the role that was previously served by functions such as my Monday lunch group. Referrals get made, forms are exchanged, mentoring is rampant, we are snarky and prickly, confident and insecure. Many of the discussions sound familiar.

I was recently reminded of how important even this virtual interaction can be when NYSBA staff announced that the listservs would be migrated to a new "Communities" function. The old listserv software had been "orphaned," and the staffer who kludged it along had retired. The General Practice Section's 2,000 listserv members were advised of the changeover. Their rapid reaction with many questions and complaints illustrated to me the importance of what happens on the listserv. It was clear that no one wanted to see this service and the interactions it made possible diminished or limited in any way. It was/is an important link for its users.

SG: As Boomers like Lenny and me move closer to retirement, we often seek a greater sense of fulfillment, our own sense of purpose and meaning. The idea of a more flexible retirement option would allow not only partial retirement, so that senior lawyers can enjoy other pursuits, but also active retirement, wherein seniors can remain productively and socially engaged in the workplace, while helping young lawyers gain skills and knowledge in serving clients in new ways.

LS: I think we need some thinking "outside the box" when it comes to recruiting new solos. It's very difficult to sell a solo law practice because it's so hard to put a valuation on it. It's easy enough to value the real estate and office furnishings; but what is the practice worth? Who's going to pay to haul those worthless, old law books away?

If a young lawyer would like to buy my practice, my building, I'd be glad to sell; but how do they finance the purchase? Perhaps NYSBA could pick up an Affinity partner to provide such finance at favorable rates as it does now with professional liability insurance? It's worth asking the newer, younger members if such financing would be a member benefit they would use.

SG: According to NYSBA member data, Baby Boomers are approximately 55% of the New York State Bar, and over the next 10 or 20 years, most will be exiting the profession. If the "*astonishing lack of urgency*" on behalf of partners is allowed to continue, the current law firm business model will surely continue to lose ground to even more nontraditional service providers.

We closed our 2004 article with a statement from Hamel and Prahalad's *Competing for the Future*. It seems just as appropriate today:

> Squeezing another penny out of costs, getting a product to market a few weeks earlier, responding to customer inquiries a little bit faster, ratcheting quality up one more notch, capturing another point of market share, tweaking the organization one additional time – these are the obsessions of managers today. But pursuing incremental advantage while rivals are fundamentally reinventing the industrial landscape is akin to fiddling while Rome burns. ■

1. Stephen P. Gallagher & Leonard E. Sienko, Jr., *Yesterday's Strategies Rarely Answer Tomorrow's Problems*, N.Y. St. B.J. (Sept. 2004) p. 40. (**LS:** Oh no, not another Bar Journal article with footnotes! Footnotes don't pay the rent for the solo practitioner or small firm. Let's see if we can, together, offer some practical observations.)
2. Richard E. Susskind, The Future of Law: Facing the Challenges of Information Technology 46 (Clarendon Press 1996).
3. Georgetown University Law Center, Center for the Study of the Legal Profession, *2015 Report on the State of the Legal Market*.
4. *Id.*, p. 7; Aric Press, *Big Law's Reality Check*, Am. Law. (Nov. 2014), p. 41.
5. *2015 Report on the State of the Legal Market*, *supra* note 3, p. 10.
6. Paul A. Haskins, Editor, The Relevant Lawyer: Reimagining the Future of the Legal Profession 27 (American Bar Ass'n 2015).
7. *Id.*, p. 5.
8. *Id.*, p. 6.
9. *Id.*, p. 26.
10. Culture in any organization is the system of beliefs that members share about the goals and values that are important to them and about the behavior that is appropriate to attain those goals and live those values.

Determining Partner Compensation

Identifying and Defining Criteria

By Joel A. Rose

Partners in the great majority of firms have realized that "You Get What You Reward." Compensation systems in the more professionally and financially successful firms don't just "share the profits." Rather, compensation is used as a system for management. The most successful compensation systems place strong emphasis on merit and performance. Systems that promote partner stability and that reward fairly the total fee-producing, business-generating and non-billable contributions of partners work best.

In today's highly competitive marketplace, the more successful compensation systems reward marketing and cross-selling of the firm's expertise; promote profitability (i.e., realization, leverage, productivity, timely billings and collections, etc.); serve the clients' best interests; promote the team approach to the practice of law; and offer incentives to all partners. It is commonplace, in many firms, to use incentives to encourage partners to perform those activities that address the firm's immediate and long-term priorities and objectives.

For the good of the firm, managing partners and members of management and compensation committees have to identify and define the criteria against which partner performance will be measured as well as the compensation system. The amount of the incentives should be sufficient to provide the motivation for partners to devote their personal and working time and effort to perform those activities that enhance the firm.

When identifying and defining these criteria, managing partners and members of the management and compensation committees must bear in mind that the partners will advocate those criteria and compensation systems that favor their particular strong points as a partner. For example, partners who do not generate much of their own business but have high billable hours promote a system based predominantly upon revenue from the production of billable hours. Conversely, partners who tend to bring in a great amount of new business and perform the work themselves and/or allow it to be performed by others generally would promote a compensation system based highly upon origination.

A firm seeking long-term success must recognize that all partners bring strengths and weaknesses to the process of creating revenue. Therefore, managing partners and members of management and compensation committees must balance the various contributions of partners to create a compensation system that all partners will perceive as being fair and equitable.

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Partner Compensation Criteria and Assessment

As a result of the changing economic environment and increasingly competitive markets in which most law firms practice, managing partners and members of

management and compensation committees in the more-successful law firms have identified and redefined those objective and subjective criteria designed to motivate partners to attract new clients, proliferate work from existing clients, perform those fee-producing and non-fee-producing activities necessary to retain existing clients, and recognize those partners who have been given responsibility for managing clients and the performance of client work that other members of the firm have originated.

When assessing the fee-producing and non-fee-producing contributions of each partner in relation to the objective and subjective criteria for allocating compensation, many law firms do not weight each criterion in purely arithmetical terms. Rather, most firms employ either a subjective compensation system to assess the total contributions of the partners or a "hybrid" system. Under this system, a great deal of objective data and a substantial amount of subjective information is collected about each partner's performance over a three-year period to arrive at the appropriate compensation for each partner. The objective data is used as a database to support the firm's decisions about the objective criteria to be considered, along with the subjective contributions of each partner. Thus, the total contributions of partners are assessed in rough justice fashion by managing partners and members of the firm's management and compensation committees, who then recommend compensation for each partner.

The real problem is determining what to do with the figures after they have been generated. Certain obvious considerations or adjustments must be appreciated. For example, in one law firm I worked with, the members of the compensation committee used their subjective impressions as the basis for their primary evaluation, followed by the use of numbers or statistical results as a check to avoid injustices that might arise from a purely subjective assessment.

In a great majority of firms, compensation reflects each partner's overall contribution, with minimal regard to the length of time that partner has been associated with the firm. The compensation models employed by these firms assume that partners will do their best to generate new business from potential and existing clients, provide quality services and work hard. Yet, the overall contributions of each partner include intangibles that go beyond being a "good lawyer" and a "hard worker." The following examples will illustrate this point:

- With good lawyering and hard work being assumed, generating business from existing and potential clients that may be performed by the originating partner or any other lawyer will be a significant part of any assessment of overall contribution to the firm.
- With good lawyering and hard work being assumed, lots of intangibles plus business origination are better than few intangibles plus business origination.
- With good lawyering and hard work being assumed, lots of intangibles and some business generation are better than some intangibles and some business origination, which in turn is better than some intangibles and no business origination, which in turn is better than few intangibles and no business origination, etc.

Further, in the majority of firms that adhere to this compensation philosophy, it is generally understood by the partners, and reinforced through communications and actions taken by the managing partner and the firm's management and compensation committees, that these decision makers will consider the full panoply of the compensation criteria agreed to by the partners and assess each partner's performance against each criterion.

Origination Credit

In today's competitive practice environment, client origination is even more significant for a firm's future. Hence, strong incentives should be provided for bringing in new business from potential and existing clients. Below are several types of origination credit.

Client Origination

One partner (or more) is responsible for bringing a new client through the door. Obtaining a new client is important enough that it should entitle the originating partner(s) to receive 100% of the Client Origination Credit of the dollar value of the revenue received from that new client, permanently or for a period of time.

Joint Credit for Originating a Client

Origination credit, the dollar value of the revenue received from a new client that comes to the firm as a result of multiple partners collaboratively bringing that new client through the door, will be shared among these partners. Such credit will be shared by agreement between the concerned partners. If these partners are unable to agree upon terms of sharing origination credit, the decision will be made by the managing partner, the management committee or the compensation committee.

Administering Origination Credit

The entitlement for the originating partner(s) to receive 100% of the Client Origination Credit, permanently or for a period of time, is presumed though not automatic, since the entitlement carries with it a responsibility to "mind" the client, at least to some degree, depending upon the circumstances – that is, whether the client's work is within the area of expertise of the originating attorney.

It is important that the originating partner continue to receive Client Origination Credit for some time, even if one or more other partners are significantly involved in managing and/or performing the work for that client.

The firm will benefit by having the originating partner retain some type of a personal or working relationship with that client. Also, the firm does not want the originating partner to believe that by assigning a client or client work to another partner, the latter partner may attempt to persuade the client to refer all future work assignments to himself or herself, thereby blocking the originating partner from having a continuing relationship with that client.

Changing Origination Credits

Changes to the allocations of Client Origination Credit are usually determined on a case-by-case basis, where appropriate, with credit sharing a reasonable option. Here are a few examples:

- A client was brought in by Partner A 10 years prior, but has generated no business for the firm for seven years. Then, through the efforts of Partner B, the client was brought back to the firm. It may be appropriate to give all origination credit for that matter to B, or to share the credits, depending on the circumstances.
- Partner A brings in a client but for a period of years, Partner B has been managing that client and been the one responsible for maintaining the relationship. In that case, the partners may agree that a change in the origination credit is appropriate, and then it can be changed with the consent of the managing partner.
- A third circumstance where origination credit may change is if a client that was originated by Partner A breaks ties with the firm. Several years later, Partner B convinces that client to reengage with the firm. Partner B will receive origination credit for that client, but it will require the approval of the managing partner, members of the management committee or the compensation committee to approve this change in Client Origination Credit.

Obviously, the preferred means of resolving issues where more than one partner feels entitled to origination credits for a particular client is for the partners in question to negotiate a sharing agreement. However, upon request, an issue as to relative entitlement to origination credits will be resolved by the managing partner, the management committee or the compensation committee.

Responsible Partner Credit

The Responsible Partner Credit is the dollar value of the amount of revenue received as the result of the work performed by a partner who has been designated as the partner in charge of managing the work performed on a client matter that was originated by an originating partner.

Once the originating partner no longer plays a principal role in retaining the client – that is, he or she delegates the client/matter to another partner and does not continue either to service the client or schmooze the client in a way that makes him or her the primary contact, then the originating partner no longer qualifies for full origination credits. To illustrate this point, following is one example of sharing Responsible Partner Credit:

The originating partner, who is no longer responsible for that client, may remain eligible to receive 75% of the originating credit for the first two or three years, with a further reduction to 50% in later years. In some firms, 50% of the origination credit may remain thereafter with the originating partner for a designated number of years – for two or three more years or even as long as that client remains a client of the firm.

As the amount of the Client Origination Credit for the originating partner is reduced, Responsible Partner Credit will be transferred to the partner designated as the responsible partner. Questions regarding the allocation of Client Origination Credits and Responsible Partner Credits will be referred to the managing partner, the management committee or the compensation committee.

It should also be recognized that the more important the client, the more it is in the firm's interest to have multiple partners develop significant relationships with that client. The managing partner and members of the management committee and the compensation committee should continue to be mindful of the efforts of originating partners and their role in the development of such relationships with important clients.

The managing partner and members of the management and compensation committees will need to define what a partner needs to do to qualify for this portion of the credit. Otherwise, the policy may not be administered in a consistent manner, and those partners who do not receive Responsible Partner Credit when others do will feel slighted. This will be especially important as the managing partner and members of the management and compensation committees change. Therefore, the present managing partner and members of the management and compensation committees should set the parameters that will be used and interpreted by successor committee members.

Matter Proliferation Credit

Partners should have an incentive to "proliferate" new kinds of business from existing clients, regardless of who is the originating partner for the client.

Matter Proliferation Credit is the dollar value of the amount of revenue received as the result of a partner proliferating work for a *particular matter* from an existing client that was originated by another partner. Note that it is important in many cases to know exactly what and/or who was pivotal in expanding existing client business. If the concerned partners are unable to reach an agreement, the decision will be made by the managing partner and members of the management and compensation committees.

A partner who proliferates new business from an existing client (for whom the partner is *not* the originating attorney) should request Matter Proliferation Credit from the originating partner for the file created for the new matter.

To prevent originating partners from keeping client relationships for themselves, Matter Proliferation Credit should not be subtracted from Client Origination Credit. This presumes that the ability to proliferate the new business was somehow related to the existing client relationship. Again, this type of issue should be resolved by the partners concerned or on a case-by-case basis by the managing partner or members of the management and compensation committees.

Below is a representative list of criteria for Discretionary Subjective Credit:

1. Seniority – Seniority should be recognized, but it must be understood that seniority should not be tenure alone, nor is it only the number of years a lawyer has been with a firm. It means the number of years the partner has spent developing and maintaining clients, building and enhancing the firm's reputation and participating in the training and development of a cadre of lawyers who produce for the benefit of all the partners in the firm.
2. Firm Management and Leadership – Contribution to firm management, including efficiency and effectiveness in handling management assignments, is critical to a firm's future and must be recognized. It also includes practice management, recruiting, marketing, etc.
3. Compliance with Firm Policies – This includes:
   a. Abiding by policies to keep time accurately, to turn in time sheets promptly, to follow policy on billing, collections, etc. The managing partner or members of the management committee and the compensation committee are expected to take specific note of partners' noncompliance with firm policies.
   b. Turning over client management and other controls to other lawyers when appropriate.
   c. Contributing to the equitable and efficient distribution of work assignments and client contacts.
   d. Specializing and developing expertise in particular areas to complement other abilities in the firm.
4. Personal Relationships and Teamwork – Practicing a team concept, including participation in, and cooperation on, firm committees, etc. is expected; client sharing, client introductions, and overall promotion of harmony and goodwill among firm members are critical and absolutely expected. This includes:
   a. Maintaining good working relationships with both legal and non-legal personnel.
   b. Lending personal support and enthusiasm to all personnel.
   c. Respecting each lawyer's professional and management judgments and good faith; withholding all criticism except as necessary for management

> A firm seeking long-term success must recognize that all partners bring strengths and weaknesses to the process of creating revenue.

Production Credit

This is the dollar value of the amount of revenue received as the result of a partner's personal production. For example, if a partner records $10,000 in time-dollar value, which is billed and collected, he or she would receive Production Credit in the amount of $10,000. If a partner is designated by the originating partner to be the responsible partner for a client or matter, that partner will receive Production Credit for all billable hours he or she devotes to working on that client matter (during the time that partner is managing the work on that client matter.)

Inherited Clients

In many firms, a partner who inherits a client from the originating partner, whether through the retirement of the latter partner or otherwise, may receive Client Origination Credit for that client. In other firms, a partner who inherits a client from the originating partner will receive credits on a responsible partner retention basis. This second partner, now serving as the originating partner, would share Responsible Partner Credits, as appropriate, with other partners who have significant responsibility for managing the client or client matter.

Discretionary Subjective Credit

These credits represent the value allocated subjectively to a partner for his or her discretionary subjective contributions to the firm. These contributions may not have any direct dollar value that may be attributed to them, but they must be recognized.

decisions; and the management of that side of the process in a private setting.

d. Respecting others' contrasting views and respecting each partner as a person.

e. Promoting and cross-selling other firm lawyers.

5. Partner Participation in Firm Activities/Functions – Partners are obligated to attend firm social and professional meetings, participate in those management decisions and activities which appropriately fall upon partners and participate fully in the "drudgery" side of the business.

6. Lawyer Development and Delegation of Work – Time and effort in working with younger lawyers to increase their professional skills must be rewarded. This includes the training and development of associates.

7. Professional and Community Activities – Contributions that enhance the firm's image and prestige through maintaining good relations with other lawyers, speaking at CLE programs, publishing, participating in bar activities, and assuming bar and community leadership positions must also be recognized. These activities should be performed with the knowledge and "approval" of partners, according to a budgeted schedule, as required.

Tracking Client/Business Development Credit

A tracking system needs to be established that tracks new clients and new business originated by each partner. This is usually accomplished by completing the information called for on the firm's New Client/Business Intake Form. Space should be provided to identify the name of the client; the title of the new matter; the name of the partner(s) who is claiming credit for originating the client; the name of the partner(s) who is claiming credit for originating the new matter (if different from the partner who originated the client); the name of the partner who will be responsible for managing the new client and matter (if different from the partner who originated the client); and the names of the attorneys who will be working on the client matter.

To ensure that every partner understands the system, the firm should set criteria as to what constitutes a new client and a new matter from an existing client. To minimize conflicts between and among partners about claiming origination credit for a new client or matter, it is recommended that the firm publish information regarding new client files so that every partner may periodically review the list of clients for which origination credit is being given. Also, the tracking system should track all cross-selling and proliferation of work from an existing client.

It has been my experience that cross-selling and proliferation of work from existing clients may be one of the best sources of additional client business for the firm. Therefore, I recommend to clients that, in the long run, it is beneficial for the firm to be generous in determining what is new business in order to keep interest in client and matter origination high among attorneys, but not allow attorneys to play games with the system.

Allocating Credit for New Clients and Matters

The methodology that will be used to place a value on the allocation of credits will depend upon whether the firm employs a formulaic or a subjective compensation system and the nature of the firm's practice. In any of the above, the likelihood is that the firm will have to reach a compromise for weighting the value of the fee-producing contributions performed by the client originators and the work producers.

In a formulaic system, the percentage should be sufficient to provide an incentive to develop new clients and new matters from existing clients, but not so much that there is no incentive for other partners to work on the files. If a subjective system, the firm must be sure the results of the allocation will give significant credit for client and matter origination.

Conclusion

The ultimate goal of every compensation system is to have the amount of compensation that any partner receives bear a reasonable relationship to the amount of revenue that partner contributes to the firm. In order to determine the amount of money a partner is contributing to revenue, the firm should consider all of the above criteria.

The essential fairness of the compensation system depends upon all partners being reasonably assertive in pursuing credits for the above compensation criteria that they consider themselves entitled to receive, with due respect to the merits or entitlements of other partners, and with recognition that the interests of the firm are best served, particularly with the firm's key clients, where multiple attorneys from the firm are involved.

With all of these criteria appropriately valued, measured and considered by the managing partner, or members of the management and compensation committees, fair-minded partners should be able to agree upon the compensation of each partner. ■

What If?

Answers to Frequently Asked Questions About Closing a Law Practice on a Temporary or Permanent Basis

If you are planning to close your law office or if you are considering helping a friend or colleague close his or her practice, there are numerous issues to resolve. How you structure your agreement will determine what the Assisting Attorney must do if the Assisting Attorney finds (1) errors in the files, such as missed time limitations; (2) errors in the Planning Attorney's trust account; or (3) defalcations of client funds.

Discussing these issues at the beginning of the relationship with your friend or colleague will help to avoid misunderstandings later when the Assisting Attorney interacts with the Planning Attorney's former clients. If these issues are not discussed, the Planning Attorney and the Assisting Attorney may be surprised to find that the Assisting Attorney (1) has an obligation to inform the Planning Attorney's clients about a potential malpractice claim or (2) that the Assisting Attorney may be required to report the Planning Attorney to the Disciplinary Committee.[1]

The best way to avoid these problems is for the Planning Attorney and the Assisting Attorney to have a written agreement, and, when applicable, for the Assisting Attorney to have a written agreement with the Planning Attorney's former clients. If there is no written agreement clarifying the obligations and relationships or plainly limiting the scope of the Assisting Attorney's role, an Assisting Attorney may find that the Planning Attorney believes that the Assisting Attorney is representing the Planning Attorney's interests. At the same time, the former clients of the Planning Attorney may also believe that the Assisting Attorney is representing their interests. It is important to keep in mind that an attorney-client relationship can sometimes be established by the reasonable belief of a would-be client.[2]

This section reviews some of these issues and the various arrangements that the Planning Attorney and the Assisting Attorney can make. All of these frequently asked questions, except #9, are presented as if the Assisting Attorney is posing the questions.

This article is from the New York State Bar Association's 2015 *Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death*, written by the NYSBA Law Practice Management Committee Subcommittee on Law Practice Continuity. Find the *Guide* at www.nysba.org/PlanningAhead.

1. Must I notify the former clients of the Planning Attorney if I discover a potential malpractice claim against the Planning Attorney?

The answer is largely determined by the agreement that you have with the Planning Attorney and the Planning Attorney's former clients. If you do not have an attorney-client relationship with the Planning Attorney, *and* you are the new lawyer for the Planning Attorney's former clients, you must inform *your* client (the Planning Attorney's former client) of the error, and advise the client of the option of submitting a claim to the professional malpractice insurance carrier of the Planning Attorney, unless the scope of your representation of the client excludes actions against the Planning Attorney. If you want to limit the scope of your representation, do so in writing and advise your clients to get independent advice on the issues.

If you are the Planning Attorney's lawyer, and not the lawyer for his or her former clients, you should discuss the error with the Planning Attorney and advise the Planning Attorney of the obligation to inform the client of the error.[3] If you are the attorney for the Planning Attorney, you would not be obligated to inform the Planning Attorney's client of the error. You would, however, want to be careful not to make any misrepresentations.[4] For example, if the Planning Attorney had previously told the client a complaint had been filed, and the complaint had *not* been filed, you should not reaffirm the misrepresentation and you might well have a duty to correct it under some circumstances. In any case, you or the Planning Attorney should notify the Planning Attorney's malpractice insurance carrier as soon as you become aware of any circumstance, error or omission that may be a potential malpractice claim in order to prevent denial of coverage under the policy due to the "late notice" provision.

If you are the Planning Attorney's lawyer, an alternative arrangement that you can make with the Planning Attorney is to agree that you may inform the Planning Attorney's former clients of any malpractice errors. This would not be permission to represent the former clients on malpractice actions against the Planning Attorney. It would authorize you to inform the Planning Attorney's former clients that a potential error exists and that they should seek independent counsel.

2. I know sensitive information about the Planning Attorney. The Planning Attorney's former client is asking questions. What information can I give the Planning Attorney's former client?

Again, the answer is based on your relationship with the Planning Attorney and the Planning Attorney's clients. If you are the Planning Attorney's lawyer, you would be limited to disclosing any information that the Planning Attorney wished you to disclose. You would, however, want to make clear to the Planning Attorney's clients that you do not represent them and that they should seek independent counsel, as well as that you are not able or permitted to answer all of their questions. If the Planning Attorney suffered from a condition of a sensitive nature and did not want you to disclose this information to the client, you could not do so.

3. Since the Planning Attorney is no longer practicing law, does the Planning Attorney have malpractice coverage?

This depends on the type of coverage the Planning Attorney had. Lawyer professional liability policies are "claims made" policies. As a result, as a general rule, if the policy period has terminated, there is no coverage. However, most malpractice policies include a short automatic extended reporting period, usually 60 days, after the termination date of the policy. This provides the opportunity to report known or potential malpractice claims when a policy ends and will not be renewed. In addition, most malpractice policies provide options to purchase an extended reporting period endorsement for longer periods of time. These extended reporting period endorsements do not provide ongoing coverage for new errors, but they do provide the opportunity to lock in coverage under the expiring policy for errors that surface after the end of the policy, but within the extended reporting endorsement time frame.

4. What protection will I have under the Planning Attorney's malpractice insurance coverage if I participate in the closing or sale of the office?

You must check the definition of "Insured" in the malpractice policy form. Most policies define "insured" as both the firm and the individual lawyers employed by or affiliated with the firm. This typically is broadened to include past employees and "of counsel" attorneys. In addition, most lawyers' professional liability policies specifically provide coverage for the "estate, heirs, executors, trustees in bankruptcy and legal representatives" of the Insured, as additional insureds under the policy.

5. In addition to transferring files and helping to close the Planning Attorney's practice, I want to represent the Planning Attorney's former clients. Am I permitted to do so?

Whether you are permitted to represent the former clients of the Planning Attorney depends on (1) if the clients want you to represent them and (2) whom else you represent.

If you are representing the Planning Attorney, you are unable to represent the Planning Attorney's former clients on any matter against the Planning Attorney. This would include representing the Planning Attorney's former client on a malpractice claim, ethics complaint, or fee claim against the Planning Attorney. If you do not represent the Planning Attorney, you are limited by conflicts arising from your other cases and clients. You must check your

client list for possible client conflicts before undergoing representation or reviewing confidential information of a former client of the Planning Attorney.[5]

Even if a conflict check reveals that you are permitted to represent the client, you may prefer to refer the case. A referral is advisable if the matter is outside your area of expertise, or if you do not have adequate time or staff to handle the case. If you intend to participate in a referral fee, the requirements of RPC 1.5(g) must be met. In addition, if the Planning Attorney is a friend, bringing a legal malpractice claim or fee claim against him or her may make you vulnerable to the allegation that you didn't zealously advocate on behalf of your new client. To avoid this potential exposure, you should provide the client with names of other attorneys, or refer the client to the New York State Bar Association's Lawyer Referral Service (telephone number 1-800-342-3661) or other appropriate lawyer referral service.

Whether you are permitted to represent the former clients of the Planning Attorney depends on (1) if the clients want you to represent them and (2) whom else you represent.

6. What procedures should I follow for distributing the funds that are in the Planning Attorney's escrow account?

If your review of the Planning Attorney's escrow account indicates that there may be conflicting claims to the funds in the account, you should initiate a procedure for distributing the existing funds, such as a court-directed interpleader, pursuant to CPLR 1006.

If the client cannot be located, a judicial order may be sought seeking to fix the Planning Attorney's fee and disbursements, and deposit the missing client's share with the Lawyer's Fund for Client Protection.[6] As a matter of public policy, the Lawyer's Fund will accept deposits in sums of less than $1,000 without a formal application and court order.

7. If there was a serious ethical violation, must I tell the Planning Attorney's former clients?

The answer depends on the relationships. The answer is (A) no, if you are the Planning Attorney's lawyer; (B) maybe, if you are not representing the Planning Attorney or the Planning Attorney's former clients; and (C) maybe, if you are the attorney for the Planning Attorney's former clients.

(A) If you are the Planning Attorney's lawyer

If you are the Planning Attorney's lawyer, you are not obligated to inform the Planning Attorney's former clients of any ethical violations or report any of the Planning Attorney's ethical violations to the disciplinary committee if your knowledge of the misconduct is a confidence or secret of your client, the Planning Attorney.[7] Although you may have no duty to report, you may have other responsibilities. For example, if you discover that some of the client funds are not in the Planning Attorney's escrow account as they should be, you, as the attorney for the Planning Attorney, should discuss this matter with the Planning Attorney, and encourage the Planning Attorney to correct the shortfall.

If you are the attorney for the Planning Attorney, and the Planning Attorney is deceased, you should contact the personal representative of the estate. Remember that your confidentiality obligations continue even though your client is deceased. If the Planning Attorney is alive but unable to function, you may notify the Planning Attorney's clients of the Planning Attorney's situation and suggest that they seek independent legal advice.

If you are the Planning Attorney's lawyer, you should make certain that clients of the Planning Attorney do not perceive you as their attorney. This should include informing them in writing that you do not represent them.

(B) If you are not the attorney for the Planning Attorney

If you are not the attorney for the Planning Attorney, and you are not representing any of the former clients of the Planning Attorney, you may still have a fiduciary obligation (as an authorized signer on the escrow account) to notify the clients of the shortfall, and you may have an obligation under RPC 8.3 to report the Planning Attorney to the Disciplinary Committee. You should also report any notice of a potential claim to the Planning Attorney's malpractice insurance carrier in order to preserve coverage under the Planning Attorney's malpractice insurance policy.

If you are the attorney for a former client of the Planning Attorney, you have an obligation to inform the client about the shortfall and advise the client of available remedies such as pursuing the Planning Attorney for the shortfall and filing claims or complaints with the Lawyers' Fund for Client Protection, 119 Washington Ave., Albany, NY 12210 (telephone number 1-800-442-3863); the malpractice insurance carrier; and the Disciplinary or Grievance Committee. If you are a friend of the Planning Attorney, this is a particularly important issue. You should determine *ahead of time* whether you are prepared to assume the obligation to inform the Planning Attorney's former clients of the Planning Attorney's ethical violations. If you do not want to inform your clients

about possible ethics violations, you must explain to your clients (the former clients of Planning Attorney) that you are not providing the clients with any advice about ethics violations of the Planning Attorney. You should advise the clients in writing to seek independent representation on these issues. Limiting the scope of your representation, however, does not eliminate your duty to report pursuant to Rule 8.3.

As a general rule, whether you have an obligation to disclose a mistake to a client will depend on the nature of the Planning Attorney's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm from the possible error or omission, and the likelihood that the Planning Attorney's conduct would be deemed so deficient as to give rise to a malpractice claim. Ordinarily, since lawyers have an obligation to keep their clients informed and to provide information that their clients need to make decisions relating to the representation, you would have an obligation to disclose to the client the possibility that the Planning Attorney has made a significant error or omission.

8. If the Planning Attorney stole client funds, do I have exposure to an ethics complaint against me?

You do not have exposure to an ethics complaint for stealing the money, unless in some way you aided or abetted the Planning Attorney in the unethical conduct. Whether you have an obligation to inform the Planning Attorney's former clients of the defalcation depends on your relationship with the Planning Attorney and with the Planning Attorney's former clients (see #7 above).

If you are the new attorney for a former client of the Planning Attorney, and you fail to advise the client of the Planning Attorney's ethical violations, you may be exposed to the allegation that you have violated your ethical responsibilities to your new client.

9. What are the pros and cons of allowing someone to have access to my escrow account? How do I make arrangements to give my Assisting Attorney access?

The most important "pro" of authorizing someone to sign on your trust account is the convenience it provides for your clients. If you suddenly become unavailable or unable to continue your practice, an Assisting Attorney is able to transfer money from your trust account to pay appropriate fees, disbursements and costs, to provide your clients with settlement checks, and to refund unearned fees. If these arrangements are not made, the clients' money must remain in the trust account, until a court allows access. This court order may be through a guardianship proceeding, or an order for a court-directed interpleader, pursuant to CPLR 1006. This delay may leave your clients at a disadvantage, since settlement funds, or unearned fees held in trust, may be needed by them to hire a new lawyer.

> If your review of the Planning Attorney's escrow account indicates that there may be conflicting claims to the funds in the account, initiate a procedure for distributing the existing funds, pursuant to CPLR 1006.

On the other hand, the most important "con" of authorizing access is your inability to control the person who has been granted access. Since serving as an authorized signer gives the Assisting Attorney the ability to write trust account checks, withdraw funds, or close the account, he or she can do so at any time, even if you are not disabled, incapacitated, or for some other reason unable to conduct your business affairs, or dead. It is very important to carefully choose the person you authorize as a signer, and when possible, to continue monitoring your accounts.

If you decide to allow your Assisting Attorney to be an authorized signer, you must decide if you want to give the Assisting Attorney (1) access only during a specific time period or when a specific event occurs (e.g., incapacity) or (2) access all the time.

10. The Planning Attorney wants to authorize me as an escrow account signer. Am I permitted also to be the attorney for the Planning Attorney?

Not if there is a conflict of interest. As an authorized signer on the Planning Attorney's escrow account, you would have a duty to properly account for the funds belonging to the former clients of the Planning Attorney. This duty could conflict with your duty to the Planning Attorney if (1) you were hired to represent him or her on issues related to the closure of his or her law practice and (2) there were defalcations in the escrow account. Because of this potential conflict, it is probably best to choose to be an authorized signer OR to represent the Planning Attorney on issues related to the closure of his or her practice, but not both (see #4 above). ■

1. N.Y. Rules of Professional Conduct 8.3 (RPC); *see also* NYSBA Ethics Ops. 531, 734, 854.
2. RPC 1.7, 1.8, 1.9.
3. RPC 1.4(a).
4. RPC 4.1, 8.4(c).
5. RPC 1.7, 1.8, 1.9.
6. RPC 1.15(f).
7. RPC 8.3; RPC 1.6.

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Defamation and the Internet

Representation in the Digital Age

By Ethan Bordman

The Black Entertainment and Sports Lawyers Association (BESLA) held an informative panel titled *Counseling Celebrities in a Time of Crisis*.[1] One attorney on the panel recounted an incident when, several minutes before a judgment was rendered in a high-profile celebrity trial, he watched as a media blogger working on a laptop in the courtroom put the finishing touches on his article about the trial. The blogger guessed at what the decision would be and drafted his headline accordingly. The attorney, sitting nearby, asked the blogger why he did not just wait a few minutes for the actual decision to be announced. The blogger responded that if the facts of the article were incorrect he could fix them later – but if they were right, then he would be the first to announce the decision.

Celebrity defamation cases have come a long way since 1981, when Carol Burnett was awarded $1.6 million in the first libel judgment against the *National Enquirer*.[2] The paper was found to have fabricated a story, published in 1976, portraying Burnett as out of control at a Washington restaurant while dining with then-Secretary of State Henry A. Kissinger.[3] Following the headline "Carol Burnett and Henry K. in Row," the article reported that Burnett "knocked a glass of wine over," was "boisterous," "had a loud argument with another diner," and "traipsed around the place offering everyone a bite of her dessert," all of which implied that she had been intoxicated.[4] The jury voted unanimously that the paper had printed false and defamatory information with the knowledge that it was false, and finding that the paper did not do enough to check the truthfulness of the story.[5] Attorneys for the *National Enquirer* argued that the information came from an informant considered by the editors to be reliable and claimed the paper acted responsibly by attempting to confirm the story and by publishing a retraction after learning that the information was wrong.[6] The judgment was later reduced to $200,000.[7]

In 2013, Tom Cruise settled a defamation suit with Bauer Publishing and two of its publications.[8] The July 30, 2012, cover of *Life & Style* read "Suri in Tears, Abandoned by Her Dad" beneath a picture of Cruise's six-year-old daughter Suri, who was being held by her mother, Katie Holmes.[9] A few months later in the October 1 issue, the cover of *In Touch* magazine featured a picture of Suri above the headline "Abandoned by Daddy."[10] Cruise sued the magazine for $50 million, plus punitive damages, for defamation and invasion of privacy; he claimed the headlines were false, and that "he loves his daughter dearly and would never abandon her."[11] Bauer Publishing later stated it "never intended to communicate that Tom Cruise had cut off all ties and abandoned his daughter, Suri, and regret if anyone drew that inference . . . ."[12] Cruise stated that despite his busy schedule filming two movies back-to-back in 2012, he spoke with his daughter nearly every day and received frequent updates from Ms. Holmes.[13]

In 2014, actor and former Minnesota Governor Jesse Ventura was awarded more than $1.8 million (this amount was later reduced to $1.3 million) for damages to his reputation and career as the result of a story in the book *American Sniper*, which was about Chris Kyle's career as a Navy SEAL sniper.[14] In the book, Kyle describes punching out a celebrity, identified as "Scruff Face," after this man disparaged fallen soldiers at a war hero's wake.[15] In promotional interviews following the book's release, Kyle confirmed that the story referred to Ventura. Ventura claimed the story was fabricated and had damaged his reputation. Kyle's widow, Taya, is appealing the decision.[16]

Even outrageous claims may have ramifications on a celebrity client's image. Earlier this year, actress Mila Kunis was accused of stealing a chicken 25 years ago from her first-grade friend, singer Kristina Karo.[17] The claim states when the two were childhood friends in Ukraine, six-year-old Kunis was so jealous of Karo's pet chicken – named "Doggie" – that Kunis stole it. Karo is asking $5,000 for emotional distress, claiming Kunis confessed at the time of the alleged theft. According to Kunis, she has yet to be served with papers regarding this lawsuit, noting the allegation was timed to coincide with the release of Karo's new song.[18]

What Constitutes Defamation?

For defamation to be proven, a plaintiff must fulfill four elements: (1) the defendant made a false statement purporting to be fact; (2) the statement was published or communicated to a third person; (3) the defendant was at fault in making the statement; and (4) the statement caused damages or harm to the person who is the subject of the statement.[19] For statements to be considered defamatory when they involve public officials or public figures, such as celebrities, the United States Supreme Court established in *New York Times Co. v. Sullivan*[20] that such statements must be made with malice – knowledge that they were false or with reckless disregard for the truth. Although the defamation cases described above were successful for the plaintiffs, mostly by settlement, proving that a statement was made maliciously makes it difficult for most celebrity defamation suits to be successful in court.

New York Times Co. v. Sullivan came about because of a full-page ad that was placed in the *Times* in response to Martin Luther King, Jr.'s arrest, in Alabama, on two counts of felony perjury for allegedly signing fraudulent tax returns. Soon after his arrest, supporters of Dr. King formed a committee to defend him and raise money for legal fees and bought the full-page ad in the *Times*, which was titled "Heed Their Rising Voices." The text stated that Dr. King had been arrested seven times and that the purpose of the current indictment was to intimidate him. It went on to describe the events of recent civil rights rallies, explaining that after students sang "My Country, 'Tis of Thee" on the Alabama state capitol steps, "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus."[21] Although none of the respondents was mentioned by name in the ad, L.B. Sullivan, a Montgomery Commissioner (an elected supervisor of the police department), contended that the word "police" referred to him and therefore accused him of "ringing" the campus with police.[22] Sullivan further contended that the statement "they have arrested him [Dr. King] seven times" was libelous, because the word "they" referred to the police and, therefore, to him in his capacity as Commissioner.[23] It was acknowledged by the parties that some of the statements in the ad were not accurate.[24] For example, the students sang the national anthem, not "My Country, 'Tis of Thee." Further, although the police were near the campus, they did not "ring" the campus and were not called to the campus in connection with the demonstration on the state capitol steps.[25] It was also noted that Dr. King had been arrested four times,[26] not seven, as stated in the ad. Sullivan claimed that three of the four arrests took place prior to his election as Commissioner, and that he had nothing to do with the current indictment.[27] But the U.S. Supreme Court noted that "the right of free public discussion of the stewardship of public officials was . . . a fundamental principle of the American form of government"[28] and decided that the Alabama law, which allowed for libel for "criticizing the way public officials perform or fail to perform their duties,"[29] would "threaten the very existence of an American press."[30] The Court concluded that under the First and Fourteenth Amendments to award damages to a public official for defamatory falsehood relating to their official conduct "actual malice"[31] must be proven, emphasizing that "a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials."[32]

Using the "Truth" as Fact

Use of the truth as a defense to defamation was advocated by Alexander Hamilton in his appeal of *People v. Croswell*.[33] Croswell, a printer, published a story claiming that then-president Thomas Jefferson had paid newspaper publisher James Callender to run negative stories about his opponents. During his six-hour closing argument to the U.S. Supreme Court, Hamilton stated: "[T]he right of giving the truth in evidence, in cases of libels, is all-important to the liberties of the people."[34] Soon after the argument, on April 6, 1805, the New York Legislature enacted chapter 90 of the N.Y. Laws of 1805, providing that the truth was a defense to a libel charge "where published with good motive and for justifiable ends."[35]

Celebrity defamation cases have come a long way since 1981, when Carol Burnett was awarded $1.6 million in the first libel judgment against the *National Enquirer*.

Fast-forward to the Internet age: The website the smokinggun.com posts stories it promises are "cool, confidential, quirky – that can't be found elsewhere on the Web" and "100% authentic."[36] Thesmokinggun.com posts are based on legal documents, arrest records, and mug shots, and are frequently about celebrities and the entertainment industry. Subject matter used by the smokinggun.com is obtained from government and law enforcement sources via the Freedom of Information Act, as well as from court files. Thesmokinggun.com can guarantee that everything is "100% authentic" because its posts are truthful according to the various court, police, and other records it cites as sources, thereby eliminating the first element of defamation.

Thesmokinggun.com made national headlines when it exposed a number of inconsistencies in author James Frey's book *A Million Little Pieces*. This memoir about Frey's years as an alcoholic and drug addict sold more than 3.5 million copies.[37] The book was a selection in Oprah Winfrey's book club and the subject of a full episode of her television show.[38] Thesmokinggun.com approached Frey to clarify some facts before releasing its article; however, Frey refused to answer questions. He subsequently sent a letter to his fans claiming the website was trying to discredit him.[39]

In his book, Frey claimed that he was incarcerated for three months, but arrest records revealed that he was held for a few hours in jail.[40] He also claimed he was charged, in another incident, with several counts, including assault with a deadly weapon, assault on a officer of the law, felony DUI (driving under the influence), resisting arrest, possession of a narcotic with intent to distribute, and felony mayhem in Granville, Ohio.[41] The Licking County Sheriff's Department found no arrest record, and showed only a misdemeanor for speeding and driving without a seat belt. Neither the prosecutor nor the Common Pleas Court, where felony cases are handled, could find any record of felony prosecution.[42] Moreover, the charge of felony DUI did not exist in Ohio until after 1996; Frey claimed the event occurred in 1992.[43] There were other stories in the book that Frey could not substantiate.[44] Frey and his publisher, Random House, Inc., later agreed to a settlement by which purchasers of the book could claim refunds.[45]

Frey encountered what is known as the "Streisand Effect."[46] This is a reference to a case in which singer and actress Barbra Streisand sued the California Coastal Records Project, claiming the site invaded her privacy by posting pictures of her Malibu mansion.[47] Filing the lawsuit brought greater publicity to her privacy claim and attracted many more viewers than usual to the Coastal Records Project website because they wanted to see Streisand's home. News of the lawsuit grew, showing how often "efforts to suppress a . . . piece of online information can backfire making things worse."[48]

Reputation Plays a Major Role

In its defense of the Tom Cruise lawsuit, Bauer Publishing filed several claims of relief with 34 affirmative defenses,[49] including the following: that the headlines were the opinion of the paper, supported by the article and allowed by the First Amendment; that some or all of the statements were true or substantially true; that the statements could not be reasonably understood by a reasonable reader to be defamatory; and that Cruise could not prove he suffered any compensable damage. Other defenses made applied uniquely to individuals in the public eye, including that Bauer did not act with actual malice; and that Cruise had "impliedly assumed the risk"[50] of harm. This implies that because he chose to be an actor – a profession that makes him a public figure – he was aware that he would be the subject of photographs and discussion in media outlets.

Perhaps the most difficult defense in a celebrity defamation case is that the statement did not harm a person's reputation, and therefore there are no damages. It is difficult to prove that the *only* reason a celebrity did not receive a movie role, endorsement contract, or record contract is because of untrue statements published by one person or one publication. In 2012, Kim Kardashian brought suit against the clothing company Old Navy for $20 million, claiming the company had tarnished her reputation by running a TV advertisement that featured a look-alike.[51] Kardashian alleged that the appearance of

model/singer Melissa Molinaro in the ad created confusion among viewers, who thought they were watching Kardashian, which therefore violated Kardashian's rights to her name and likeness. The one-minute commercial, styled as a music video, had showcased Molinaro's singing and dancing talents, and in preparation for the defense, Old Navy's attorneys investigated "Kim Kardashian's reputation as a singer and dancer."[52] Other anticipated arguments were that Kardashian is "libel-proof," "with a reputation so stained that no injury could cause true damage,"[53] and that she is neither a singer nor a dancer. Molinaro had appeared in MTV's *Making the Band 3*, a reality show about forming a musical group, as well as another music-themed show,[54] and had recorded and released a song. The attorneys also intended to show that Kardashian's claims had no merit, because the "look-alike" ad was a small part of the overall campaign and any profits attributed in violation of Kardashian's rights were *de minimis*.[55] Kardashian's lawyers were expected to show consumer surveys showing confusion.[56] The Gap, which owns Old Navy, was indemnified by the advertising agency that created the campaign.[57] Several months later, Kardashian and Old Navy reached a settlement.[58]

> Frey encountered what is known as the "Streisand Effect."

Where You Say Something May Mean More Than What You Say

Though you may have the right to say something – to produce the content of your message – you may not have the right to say it *where* you said it. According to the American Civil Liberties Union (ACLU), "[a]lthough the First Amendment gives you the right to decide where best to express yourself, your right to exercise your free-speech rights may hinge upon exactly where you choose to exercise those rights."[59] There are three free speech forums: traditional public forums, designated public forums, and private property.[60] Traditional public forums include public parks, sidewalks, and any areas usually open to political speech and debate.[61] These places have the strongest First Amendment protections; the government may set only reasonable, content-neutral restrictions on the time, place and manner of speech.[62] A designated public forum is that which the government opens for public expression. Public auditoriums, municipal theaters, public libraries, and meeting rooms are examples. The government may limit access but may not exercise viewpoint discrimination.[63] With regard to private property, the ACLU states: "Private property owners can control what happens on their property and may prevent people from protesting on their land."[64] However, adjoining public property, such as sidewalks and streets in front of private property, may provide an alternate venue.[65] As many publications have an online presence, a magazine's or newspaper's website is considered private property because it is owned and operated by a private company.

Online Content: Providers vs. Commentators

In June 2014, a significant decision regarding defamation and the Internet was rendered by the Court of Appeals for the Sixth Circuit. Sarah Jones brought suit against the website thedirty.com in 2009, following the appearance of several posts about her.[66] Thedirty.com enables users to anonymously upload comments, photographs, and video about any person – whether or not that person is a public figure. Nik Richie, the owner of the site, selects and publishes the material, adding his own editorial comments. Users of the site, referred to as "The Dirty Army," may submit "dirt" – that is, text, photographs, or video about any individual – and may also post comments about content submitted by others. Editing by the staff consists only of deletion – there is no modification of any user-generated submissions and the staff does not create content. The staff does not fact-check submissions for accuracy. Postings of nudity, obscenity, threats of violence, profanity, and racial slurs are removed.

Jones, a member of the Cincinnati Bengals football cheerleading squad, was a teacher in Kentucky. Between October 2009 and January 2010, she was the subject of several posts on thedirty.com, along with editorial remarks made by Richie. One posting of two photographs showing Jones with a man was captioned "[Jones] slept with every other Bengal football player" with Richie adding his own comment.[67] Richie refused Jones's request to remove the post. In December 2009, another photograph of Jones appeared on the site along with claims that she had contracted several sexually transmitted diseases and had been intimate with her boyfriend in her school classroom.[68] Richie commented on this as well. Additional postings about Jones appeared over the next few months, and she filed suit, alleging defamation, libel *per se*, false light, and intentional infliction of emotional distress. She claimed that the postings undermined her position as an educator, her membership in the Cincinnati Bengals cheerleading squad, and her personal life.[69] Dirty World, LLC and Richie stated that the claims were barred under § 230(c)(1) of the Communications Decency Act (CDA),[70] which, under "Protections for 'Good Samaritan' blocking and screening of offensive material," states "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

The district court denied the motion, indicating that "a website owner who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying the posts becomes a 'creator' or

'developer' of that content and is not entitled to immunity."[71] Jones was awarded $38,000 in compensatory damages and $300,000 in punitive damages. The Court of Appeals for the Sixth Circuit, however, noted that § 230 marks a departure from the common-law rule that allocates liability to publishers or distributors of tortious material written or prepared by others.[72] The court stated that Congress had decided to treat Internet speech differently.[73] By barring publisher-liability and notice-liability defamation claims brought against interactive computer service providers, the court said, § 230 serves three purposes:[74]

1. to "maintain the robust nature of Internet communication and, accordingly . . . keep government interference in the medium to a minimum";
2. to provide immunity that "protects against the 'hecklers veto' that would chill free speech"; and
3. to "[encourage] interactive computer service providers to self-regulate."

Additionally, subsection (b)(2) of § 230[75] states: "It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." The immunity granted by § 230(c)(1) is not without limits, applying only if the interactive computer service provider is not also the "information content provider" of the content at issue.[76] An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[77] The decision hinged on how narrowly or capaciously the term "development" was interpreted. The court concluded that Richie and Dirty World could not be found to have materially contributed to the content of the posts simply by selecting them for publication.[78] Further, because Richie added his comments *after* the defamatory postings had already been displayed, they did not materially contribute; rather, they "effectively ratified and adopted the defamatory third-party post."[79] In vacating the judgment in favor of Jones, the Court of Appeals noted that the CDA does not necessarily leave persons who are objects of anonymously posted defamatory content online without remedies.[80] Jones, however, "did not attempt to subpoena Richie or Dirty World to discover who authored the defamatory posts. Instead, she sued Dirty World and Richie. But, under the CDA, Jones cannot seek her recovery from the online publisher where that publisher did not materially contribute to the tortious content."[81]

Anonymity Is Not Guaranteed for Bloggers

Although the courts have decided that websites themselves may not be found responsible, in cases of defamation, sites may be required to reveal the identities of anonymous posters. Model Liskula Cohen successfully sued Google in 2009[82] to uncover the name of the individual who made statements about her on a blog titled "Skanks of NYC."[83] The anonymous blogger had posted photographs, captions to the photographs, and commentary about Cohen. The blogger's statements pertained to Cohen's appearance, hygiene, and conduct, describing her as "skank," "skanky," "ho," and "whoring." Cohen claimed these comments were malicious, untrue, and impugned her chastity. She also asserted the statements negatively reflected her business as a professional full-time model and stated that she would bring suit for defamation if she could ascertain the identity of the person who created the blog and posted the remarks about her. Google refused to release the name of blogger without a court order, claiming that the statements were "non-actionable opinion and/or hyperbole" and that no reasonable viewer of the blog would conclude the statements made about Cohen convey verifiable statements of fact.[84] Words like "skank" or "ho" are not statements of objective fact but rather "have become a popular form of 'trash talk' ubiquitous across the Internet as well as network television and should be treated no differently than 'jerk' or any other form of loose and vague insults that the Constitution protects."[85] Google further argued that even if the words are capable of a defamatory meaning, "the context here negates any impression that a verifiable factual assertion was intended."[86] Google emphasized that blogs "have evolved as the modern day soapbox for one's personal opinions," by "providing an excessively popular medium not only for conveying ideas, but also for mere venting purposes, affording the less outspoken, a protected forum for voicing gripes, leveling invective, and ranting about anything at all."[87]

The court had to determine if the blogger's statements were considered protected opinion, hyperbole, or statements of fact. The determination of whether a statement expresses fact or opinion was a question of law resolved "on the basis of what the average person hearing or reading the communication would take it to mean."[88] The court used three factors to distinguish fact from opinion:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears, or the broader social context and surrounding circumstances, are such as to "signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact."[89]

As for the first factor, the court stated the dictionary defines the words as follows: a "skank" is someone "considered sexually promiscuous"; "ho" is "slang" for a "prostitute"; and "whoring" is to "associate . . . with prostitutes."[90] As for the second and third factors, the court found that the statements, along with captions on certain photographs, conveyed "facts" that are capable of being proved true or false, and that the blog as a whole – by

communicating that a person is promiscuous – is defamatory.[91] "[I]n the context of this specific blog, such words cannot be reasonably viewed as comparable in meaning and usage to the word 'jerk' or any other loose and vague insult."[92] In its decision to reveal the name of the blogger, the court noted the case of *Anonymous Publicly Traded Co. (APTC) v. Does*,[93] which involved a suit against America Online, Inc., brought to learn the identity of an individual who allegedly published certain defamatory material misrepresentations and confidential material concerning APTC in Internet chat rooms.[94] There, the court addressed whether the potential loss of anonymity of the John Does could constitute an unreasonable intrusion on their First Amendment rights:

> In that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored. The protection of the right to communicate anonymously must be balanced against the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions. Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.[95]

Google eventually revealed the blogger to be Rosemary Port,[96] and Port stated she planned to file a $15 million lawsuit, charging that Google "breached its fiduciary duty to protect her expectation of anonymity."[97] She further said that Cohen had defamed herself by going to the press, claiming that before the lawsuit there were two hits on Port's website – one from Port and one from Cohen.[98] If this claim were to be proven true, Port could have a successful defamation defense, because it would have been Cohen who, by filing the lawsuit, was responsible for publishing the statements to third persons. A similar defense was also raised by Bauer Publishing against Tom Cruise, stating that relief was barred "because any damages allegedly suffered by plaintiff were the result, in whole or in part, of plaintiff's own legal fault . . . ."[99]

Twitter + Libel = Twibel

Courtney Love was sued for defamation after suggesting in a tweet that one of her attorneys had been "bought off" after she no longer represented Love.[100] San Diego attorney Rhonda Holmes had been hired by Love in 2008 to investigate funds missing from the estate of her late husband, Kurt Cobain, the lead singer of the band Nirvana. In June 2010, as @CourtneyLoveUK, Love tweeted: "I was . . . devastated when Rhonda J. Holmes Esq of San Diego was bought off . . . ."[101] Love told the jury she believed that she had sent the message to only one person, had not intended to post it publicly, and had deleted it quickly. The case against Love was billed as the first "twibel,"[102] or Twitter libel, case to go to trial.[103] The jurors found that although the tweet did have "a natural tendency to injure Holmes' business," they did not believe Love knew the statement was false.[104]

The Internet: A Fine Line Between Public and Private Domains

Online cases are challenging because the Internet is both a public and a private forum. Anyone in the world can have access either privately at home or publicly, at places including libraries and cafés. Further, anyone can create a blog or website; there is no government license or approval required, and doing so is inexpensive. However, blogs, websites, and Internet service providers are owned by either a person or a private company – making them private property. The site's owner determines what content is published, and who has access to view it.

Filing a defamation suit, as with all legal action, involves weighing the pros and cons. Filing a lawsuit may result in additional publicity by way of the Streisand Effect. Alternatively, choosing not to file may cause friends, family and the general public to believe the story is true. Even if a story is withdrawn, oftentimes it is still available on the Internet – although a printed version is likely more difficult to obtain.

Instantaneous communication is imperative in today's society. The application of freedom of speech to interactive media will continue to evolve as new technologies that facilitate communication are developed. Our ability to share our opinions and broadcast our ideas to a global audience – instantly – has important ramifications for our First Amendment rights. As our communication needs and tools develop, our laws will adapt accordingly, and in ways that have yet to be defined. ■

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The Governmental Function Immunity Defense in Personal Injury Cases

An Analytical Template

By Michael G. Bersani

The landmark case *McLean v. City of New York*[1] fortified the shield of governmental immunity. In the wake of *McLean*, several Appellate Division and even Court of Appeals cases have continued to refine the contours of this multi-layered defense, which is far more complex than most defenses in personal injury cases. Its complexity demands a clear, orderly analytic tool for testing whether the defense does or does not apply to a particular set of facts.

The step-by-step template below is meant to serve as such a tool. Although the steps can be analyzed in almost any order, most cases easily lend themselves to the logical and sequential analysis outlined below.

Step One: Governmental or Non-Governmental Defendant?

The first step in analyzing whether the governmental immunity defense is applicable is deciding whether the defendant is a governmental entity or a non-governmental entity. Only governmental entities can assert the governmental immunity defense. "Government" includes New York State and all its subdivisions and agencies, including "public corporations," which includes municipal corporations (county, city, town, village, and school district) district corporations and public benefit corporations (General Corporations Law § 66). If the defendant is not a governmental entity, the governmental function immunity defense must fail. If defendant is a governmental entity, move to Step Two.

Step Two: Acting in Proprietary or Governmental Capacity?

Even where the defendant is clearly a governmental entity or actor, the governmental immunity defense raises its head only when the government is acting in its "governmental" function as opposed to its "proprietary" function. Step Two is about determining whether the governmental defendant (or its employee) was acting within its "proprietary" or "governmental" capacity when it allegedly caused the injury or harm.

What is a proprietary function? Modern governments have assumed many functions that in "the old days" were performed by private enterprises. As one court has put it, governmental agencies engage in "functions . . . as proprietor and operator of a number of activities formerly and in some instances still carried on by private enterprise."[2] A government entity acts in a proprietary capacity when the "governmental activities essentially substitute for or supplement 'traditionally private enterprises.'"[3] Examples of well-established proprietary functions of government include owning and renting out real property, in which case the government is wearing its *landlord* hat;[4] providing medical or psychiatric care, in which case the government wears a *physician* hat;[5] owning and operating a school, in which case it wears a *parent* hat rather than a governmental one *vis-à-vis* its students;[6] and driving motor vehicles.[7] The list of proprietary functions is seemingly endless. In addition to those listed above, for example, these acts by government have been deemed proprietary functions: the failure to lock a dormitory's doors[8] and the failure to protect a city hospital from intruders.[9]

In contrast, most traditional governmental functions involve – in one form or another – *public* security (not just security that a landlord would provide). A governmental agency or actor will be deemed to have been engaged in a governmental function when its acts are "undertaken for the protection and safety of the public pursuant to the general police powers."[10] Examples of well-established governmental functions include the exercise of police authority;[11] providing firefighting services;[12] issuing building permits and certificates of occupancy and other such certificates indicating inspections for public safety[13] and boat inspections for private tour boats;[14] providing security to the public by removing juveniles from the community and placing them in public confinement;[15] performing security/anti-terrorist operations at the World Trade Center;[16] certifying compliance with fire safety codes;[17] and performing garbage collection.[18] In addition, the following actions have been deemed governmental: a governmental decision to retain a city park employee with a criminal past[19] and the allocation of security resources at a government-owned airport.[20]

If it is found that the alleged negligent act or omission that caused the plaintiff's injury was among the government's "proprietary functions" then the government stands in the same position as a private defendant.

Yet, it is not always clear which hat (proprietary or governmental) the government is wearing. The fuzzy area between governmental and proprietary functions is particularly troubling for our courts in cases of criminal assaults at government-owned properties. In such cases, the courts employ a "continuum of responsibility" test, which is described like this:

> A governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions. This begins with the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, for example, the repair of steps or the maintenance of doors in an apartment building. The spectrum extends gradually out to more complex measures of safety and security for a greater area and populace, whereupon the actions increasingly, and at a certain point only, involve governmental functions, for example, the maintenance of general police and fire protection. Consequently, any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the State's alleged negligent action falls into, either a proprietary or governmental category.[21]

The relevant inquiry is not whether the governmental entity generally acts in a governmental or proprietary capacity, but, rather, whether the particular act or omission that allegedly caused injury or death arose from a proprietary or governmental function of the entity.[22] To pinpoint a spot along the proprietary-governmental continuum where a complained-of act should be categorized to decide a case and to maintain principled consistency, courts must examine "'the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred.'"[23] Depending on the facts, courts have found similar acts or failures to act either governmental or proprietary in nature.[24]

If the government is acting in its proprietary capacity, then there is no governmental immunity. If, on the other hand, the government or its employee or agent is acting within his or her governmental capacity, move to Step Three.

Step Three: Did the Defendant Have a "Duty" to the Plaintiff?

"Lack of duty" is not technically part of the "governmental function immunity" defense, but rather a defense grounded in the very basic tort law proposition that an injured plaintiff may sue only if the defendant owed him or her a duty. The Court of Appeals has stated that it will examine "duty" before examining the governmental immunity defense proper.[25]

In most cases, in Step Three you will need to answer the question of whether the government owed a "special duty" to the plaintiff beyond the general duty to the public at large. The "special duty" can be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which the plaintiff is a member; (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty; or (3) by a government official assuming positive direction

and control in the face of a known, blatant and dangerous safety violation.[26]

In the second method of establishing a "special relationship" with a governmental actor, the plaintiff must meet all of four requirements: (1) an assumption by the public entity through promises or action of an affirmative duty to act on behalf of the injured or deceased party; (2) knowledge by the public entity's agents that inaction could lead to harm; (3) some form of direct contact between the public entity's agents and the injured or deceased party; and (4) the injured or deceased party's justifiable reliance on the public entity's affirmative promise.[27]

A pre-*McLean* line of cases, including Court of Appeals cases, drew a distinction between governmental *misfeasance* and *nonfeasance*. If a government's agent (e.g., police officer, clerk, housing inspector) caused harm to a plaintiff through his or her misfeasance (such as a police officer shooting off his or her gun in a crowd) the government could be held liable for the officer's negligence regardless of whether a special duty was established. If, on the other hand, the alleged negligent act amounted to nonfeasance, in the sense of negligently failing to provide governmental services or to enforce a statute or regulation (e.g., failing to provide police protection or firefighting services or to enforce housing regulations) then the plaintiff has to show a special duty. This distinction, however, appears to have been annihilated by a footnote in the Court of Appeals decision in *Applewhite v. Accuhealth, Inc.*, which states that "contrary to the parties' arguments, our precedent does not differentiate between misfeasance and nonfeasance, and such a distinction is irrelevant to the special duty analysis."[28] Thus, both nonfeasance and misfeasance are now subject to the same special duty requirement.

If a special duty to the individual plaintiff is found, then the actions of the government officer will be examined. And so you must pass to Step Four.

Step Four: Was the Complained-of Action or Failure to Act Ministerial or Discretionary?

The next step is to decide whether the government actor's action was "ministerial" or "discretionary." If you are representing an injured plaintiff, you want the governmental actions or omissions that caused the injury to be deemed ministerial. That's because if the governmental actions or omissions were ministerial then the governmental immunity defense fails; but if they were discretionary (and the government exercised that discretion) the immunity defense *always* applies, even if the governmental actor was acting maliciously or in bad faith.[29]

Deciding whether the governmental actions or omissions are ministerial or discretionary can be taxing, even more so than deciding whether the government functions were proprietary or governmental. Even the definitions of ministerial and discretionary in the case law are thorny: "Discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result."[30] "If [the] functions and duties are essentially clerical or routine" then they are "ministerial."[31]

> The relevant inquiry is not whether the governmental entity generally acts in a governmental or proprietary capacity, but, rather, whether the particular act or omission that allegedly caused injury or death arose from a proprietary or governmental function of the entity.

Yes, the line between discretionary and ministerial is blurry.[32] There are no hard-and-fast rules, only guidelines. One must consider: (1) whether the decision or action appears to require an exercise of choice based on expert judgment or matters of policy and (2) whether the decision or action requires the exercise of reasoned judgment, of which there are different acceptable results. If such judgment is required, then that act or decision will probably be deemed discretionary, and thus cloaked in governmental immunity.[33]

Another way of looking at it is, if the actor's decision was not capable of producing different "acceptable" results, but rather required adherence to a strict governing rule or standard with a compulsory result, then the act is likely to be deemed ministerial.[34]

Be careful, however, when conducting this discretionary/ministerial analysis: In one sense, all decisions and actions can be said to be discretionary in that there are alternatives to choose from. But, in a legal sense, decisions or actions are not discretionary, for governmental immunity purposes, when there is really only one *acceptable* alternative. In marking the distinction between discretionary and ministerial acts, the Court of Appeals has noted that "[e]ach case must be decided on the circumstances involved, the nature of the duty, the degree of responsibility resting on the officer, and his position in the municipality's table of organization."[35]

Examples of governmental actions found to be discretionary include a supervisor of the Probation Department's Intake Unit refusing to detain children for appearance before a judge and instead releasing them to their mother;[36] issuance of burning permits;[37] issuance of concert permits;[38] wrongful discharge of civil service employee;[39] filing a certificate of incorporation by Secretary of State's employees;[40] and decisions made by police or firefighters regarding where and how to deploy their resources.[41]

Examples of governmental actions that have been deemed ministerial, that is, actions where the government actor was held to have no discretion, include a prison official's duty to revoke the right of a corrections officer to carry a weapon based on prior misconduct in the use of a weapon and violation of the department's internal policies;[42] a court clerk's duty to retire an arrest warrant;[43] a prison official's duty to follow mandated protocols regarding delivery of medical care to prison inmates;[44] the police department's duty to terminate employment of alcoholic and dangerous police officer;[45] a court stenographer's transcript taking and filing duties;[46] the duty to issue marriage license;[47] and the duty of a judge to certify a record.[48]

It helps to look for some hard-and-fast rule that the government actor violated. The rule can be embodied in a statute, regulation, or even an internal agency policy.[49] A rule that must be followed is by definition ministerial, leaving the government actor no discretion.

If the action was *ministerial*, the governmental function immunity defense must fail. That's because the raison d'être of the defense is to allow government to exercise discretion without fear of lawsuits. Ministerial acts are non-discretionary and thus are not protected by the doctrine. If, on the other hand, the action or failure to act was *discretionary,* pass to Step Five.

Step Five: Did the Government Exercise Its Discretion or Fail to Do So?

If the government actor had discretion *but did not exercise it*, then there is no governmental immunity at all.[50] That's because the whole purpose of the governmental immunity defense is to allow government to exercise its discretion – its judgment – without fear of being sued. But if the government is not going to even bother exercising its discretion, there is no useful purpose in applying the doctrine.[51] Think of this as a "use it or lose it" rule.

You might assume that if the government agent *has* discretion to do something he or she would always *exercise* it. You'd be wrong. For example, in *Haddock v. City of New York*, the Court of Appeals held that governmental function immunity was unavailable to a municipality that failed to establish that the asserted negligence – the retention of an employee with a dangerous criminal background – was the consequence of an actual decision or choice. Instead, the proof showed that the municipality had failed to adhere to its own employee retention procedures and had not "made a judgment of any sort" upon learning that the employee had a criminal record and had lied about it.[52] By failing to exercise the discretion it had, the city defendant thus had forfeited its governmental immunity defense.[53]

A Note on Qualified Governmental Immunity

There is a little cul de sac to the issue of governmental immunity that we have not yet discussed. Not all governmental discretionary decisions are afforded wholesale governmental immunity. Such immunity applies only to acts deemed of a judicial or quasi-judicial nature as are, for example, actions regarding police protection. Some governmental actions are not deemed to rise to the level of judicial or quasi-judicial, such as highway planning and design. But such decision making is nevertheless entitled to some degree of protection – *qualified immunity*[54] – from judicial second-guessing. The seminal case is *Weiss v. Fote*.[55] Unlike *absolute* immunity, the *qualified* immunity shield can be pierced by a showing of bad faith or lack of any reasonable basis for the action.[56] The rationale for this partial immunity is judicial deference to the expertise of coordinate branches of government in their performance of planning and design decisions.[57] The "qualified immunity" line of cases has apparently survived the *McLean* shake up of the governmental function immunity doctrine. In *Madden v. Town of Greene*,[58] a defendant argued that *McLean* and its progeny applied to *all* governmental discretionary actions, including highway planning and design, so that if the highway planners exercised discretion, there could never be liability, and if their planning was ministerial, there had to be a special duty to the injured plaintiff for liability to attach. The Court disagreed, and re-affirmed the long-standing lesser "qualified immunity" standard of review in such cases.[59] Thus, at least for now, the *McLean* germ has not contaminated the *Weiss v. Fote* "qualified immunity" line of cases.

Conclusion

In deciding whether the governmental function immunity defense is likely to prevail in any given case, a careful analysis of the facts and the law is required. The five-step analytical tool above is likely to aid in this complex analysis. In summary, the recommended steps are:

Step One: Is the defendant a governmental or a non-governmental entity? (If non-governmental, defense fails. If governmental, proceed to Step Two.)

Step Two: Was the government acting in its proprietary or governmental capacity? (If proprietary, defense fails. If governmental, proceed to Step Three.)

Step Three: Did the governmental actor have a "special duty" to the plaintiff? (If no special duty, the plaintiff loses. If special duty, proceed to Step Four.)

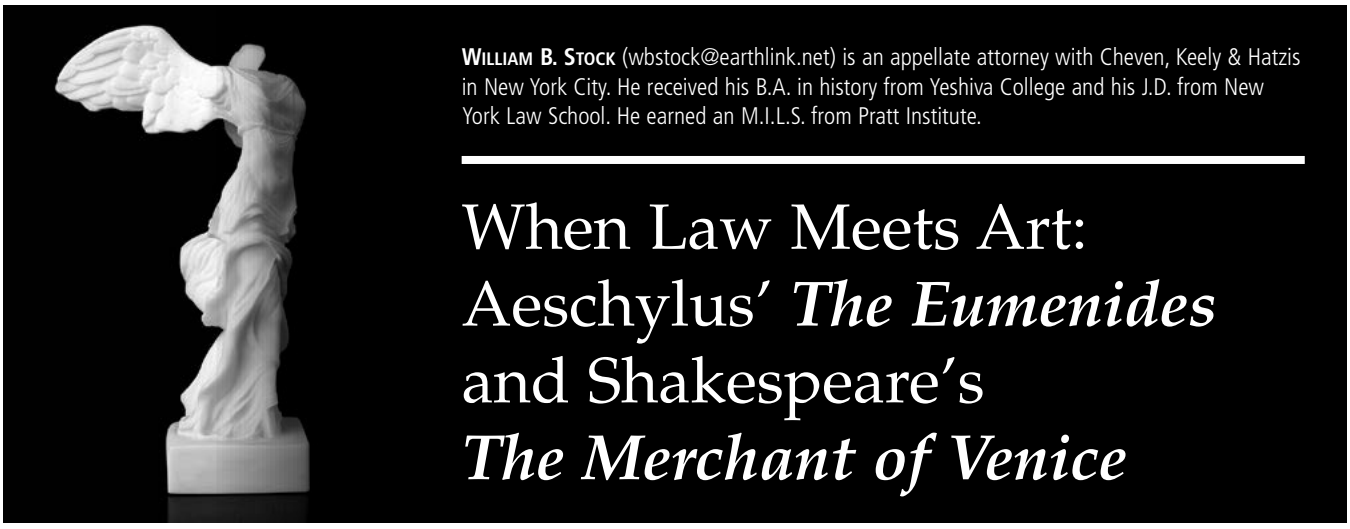
Step Four: Was the government's complained-of action or failure to act ministerial or discretionary in

nature? (If ministerial, defense fails. If discretionary, proceed to Step Five).

Step Five: Did the government actually exercise its discretion? (If yes, defense will prevail. If not, plaintiff has overcome the governmental function immunity defense.) ■

1. 12 N.Y.3d 194, 203 (2009).
2. *Bass v. City of N.Y.*, 38 A.D.2d 407, 411 (2d Dep't 1972).
3. *Sebastian v. State of N.Y.*, 93 N.Y.2d 790, 793 (1999) (quoting *Riss v. City of N.Y.*, 22 N.Y.2d 579, 581 (1968)).
4. *Miller v. State of N.Y.*, 62 N.Y.2d 506 (1984).
5. *Schrempf v. State of N.Y.*, 66 N.Y.2d 289 (1985).
6. *Lawes v. Bd. of Educ. of City of N.Y.*, 16 N.Y.2d 302 (1965).
7. *Morell v. Balasubramanian*, 70 N.Y.2d 297 (1987).
8. *Miller*, 62 N.Y.2d 506.
9. *Platovsky v. City of N.Y.*, 199 A.D.2d 373 (2d Dep't 1993).
10. *Id.*
11. *Balsam v. Delma Eng'g Corp.*, 90 N.Y.2d 966, 968 (1997).
12. *United Servs. Auto. Ass'n v. Wiley*, 73 A.D.3d 1160 (2d Dep't 2010).
13. *See Rottkamp v. Young*, 15 N.Y.2d 831, 833 (1965), *aff'g* 21 A.D.2d 373 (2d Dep't 1964); see also *Worth Distribs. v. Latham*, 59 N.Y.2d 231, 237 (1983).
14. *Metz v. State*, 86 A.D.3d 748 (3d Dep't 2011), *rev'd on other grounds*, 20 N.Y.3d 175 (2012).
15. *Sebastian*, 93 N.Y.2d at 793.
16. *In re World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428, 450 (2011).
17. *See Garrett v. Holiday Inns*, 58 N.Y.2d 253 (1983).
18. *Nehrbas v. Inc. Vill. of Lloyd Harbor*, 2 N.Y.2d 190 (1957).
19. *Haddock v. City of N.Y.*, 75 N.Y.2d 478 (1990).
20. *Singh v. Rodney*,13 Misc. 3d 137 (App. Term, 1st Dep't 2006).
21. *Miller v. State of N.Y.*, 62 N.Y.2d 506, 511–12 (1984).
22. *Crosland v. N.Y. City Transit Auth.*, 68 N.Y.2d 165 (1986); *Miller*, 62 N.Y.2d 506; *Weiner v. Metro. Transp. Auth.*, 55 N.Y.2d 175 (1982).
23. *Miller*, 62 N.Y.2d at 512 (quoting *Weiner*, 55 N.Y.2d 175).
24. *Id.*
25. *Metz v. State*, 20 N.Y.3d 175, 179 (2012).
26. *Pelaez v. Seide*, 2 N.Y.3d 186, 195 (2004).
27. *Cuffy v. City of N.Y.*, 69 N.Y.2d 255 (1987).
28. 21 N.Y.3d 420, n.1 (2013).
29. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).
30. *Tango v. Tulevech*, 61 N.Y.2d 34, 41 (1983); *Lewis v. State of N.Y.*, 68 A.D.3d 1513 (2009).
31. *Mon v. City of N.Y.*, 78 N.Y.2d 309, 313 (1991).
32. *See Tango*, 61 N.Y.2d 34.
33. *Haddock v. City of N.Y.*, 75 N.Y.2d 478 (1990); *Arteaga v. State*, 72 N.Y.2d 212 N.E.2d 1194 (1988); *Tango*, 61 N.Y.2d 34 (1983); *Rodriguez v. City of N.Y.*, 189 A.D.2d 166 (1993).
34. *Haddock*, 75 N.Y.2d 478; *Arteaga*, 72 N.Y.2d 212; *Tango*, 61 N.Y.2d 34; *Rodriguez v. City of N.Y.*, 189 A.D.2d 166 (1993); *Lauer v. City of N.Y.*, 95 N.Y.2d 95 (2000).
35. *Tango*, 61 N.Y.2d at 40.
36. *Id.*
37. *Charles O. Desch, Inc. v. State of N.Y.*, 60 A.D.2d 678 (3d Dep't 1977), *aff'd*, 45 N.Y.2d 882 (1978).
38. *Burgundy Basin Inn v. State of N.Y.*, 47 A.D.2d 692 (3d Dep't 1975), *motion for lv. to appeal denied*, 37 N.Y.2d 706 (1976).
39. *Van Buskirk v. Bleiler*, 46 A.D.2d 707 (3d Dep't 1974).
40. *Gross v. State of N.Y.*, 33 A.D.2d 868 (3d Dep't 1960).
41. *Howe v. Vill. of Trumansburg*, 199 A.D.2d 749 (3d Dep't 1993).
42. *Wyatt v. State*, 176 A.D.2d 574 (1st Dep't 1991).
43. *Glowinski v. Braun*, 105 A.D.2d 1153 (4th Dep't 1984), *appeal dismissed*, 65 N.Y.2d 637 (1985).
44. *Kagan v. State of N.Y.*, 221 A.D.2d 7 (2d Dep't 1996).
45. *McCrink v. City of N.Y.*, 296 N.Y. 99 (1947).
46. *Waterman v. State of N.Y.*, 35 Misc. 2d 954 (Ct. of Claims, N.Y. Co. 1962), *modified*, 19 A.D.2d 264 (4th Dep't 1963), *aff'd sub nom. Williams v. State of N.Y.*, 14 N.Y.2d 793 (1964).
47. *Puffer v. City of Binghamton*, 59 Misc. 2d 856 (Sup. Ct., Broome Co. 1969).
48. *Luckie v. Goddard*, 171 Misc. 774 (Sup. Ct., Monroe Co. 1939).
49. *Tarter v. State*, 68 N.Y.2d 511 (1986).; *Verizon N.Y., Inc. v. Vill. of Athens*, 43 A.D.3d 526 (3d Dep't 2007).
50. *Haddock v. City of N.Y.*, 75 N.Y.2d 478 (1990) (immunity is not available unless the municipality establishes that the action taken actually resulted from discretionary decision-making); *see Tango v. Tulevech*, 61 N.Y.2d 34, 41 (1983).
51. *Haddock*, 75 N.Y.2d 478.
52. *Id.*
53. *Id. See also Metz v. State*, 86 A.D.3d 748 (3d Dep't 2011), *rev'd on other grounds*, 20 N.Y.3d 175 (2012) (state's inspectors failed to exercise their discretion to test, or not test, vessel's passenger capacity).
54. *See Arteaga v. State*, 72 N.Y.2d 212 (1988) (citing *Weiss v. Fote*, 7 N.Y.2d 579, 586 (1960) (recognizing qualified immunity for highway design decisions); *Friedman v. State of N.Y.*, 67 N.Y.2d 271 (1986); *Ernest v. Red Creek Cent. Sch. Dist.*, 93 N.Y.2d 664 (1999).
55. 7 N.Y.2d 579.
56. *See id.* (no basis for liability "absent some indication that due care was not exercised in the preparation of the design or that no reasonable official could have adopted it"); *Friedman*, 67 N.Y.2d 271; *Alexander v. Eldred*, 63 N.Y.2d 460, 466 (1984).
57. *See Weiss*, 7 N.Y.2d 579; *Selca v. City of Peekskill*, 78 A.D.3d 1160 (2d Dep't 2010).
58. 36 Misc. 3d 852 (Sup. Ct., Chenango Co. 2012).
59. *Id.*

BY WILLIAM B. STOCK



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When Law Meets Art: Aeschylus' *The Eumenides* and Shakespeare's *The Merchant of Venice*

No author, not even a writer of books for children, can completely exclude reality. The world will always intrude in some way.[1] To cite one example, the Sherlock Holmes stories – which the great critic Edmund Wilson adjudged a kind of fairy tale for adults – manage to give an excellent, if idealized, portrait of life in late Victorian England.

When Aeschylus wrote the *Oresteia* trilogy he probably looked upon the concluding trial scene as little more than a plot device – at least for his purposes as a storyteller. On other levels, Aeschylus' showing how a cycle of bloody vengeance can be stopped by a court of law reflects the great changes that were happening when he lived.

After a review of some of the major plot elements of the *Oresteia* trilogy – including the trial scene in *Eumenides* – this essay will discuss the changing world of law that Aeschylus lived in. It will conclude by examining another famous trial scene, the one from Shakespeare's *Merchant of Venice*, to see how another great dramatist in a different era handled the desire for justice tempered with mercy.

The *Oresteia* Trilogy

The *Oresteia* trilogy[2] – *Agamemnon*, *The Libation Bearers*, and *The Eumenides* – was originally performed at the Dionysia festival in Athens in 458 B.C., where it won first prize. This sets the drama in the fifth century B.C., a historical point of reference we shall return to.

Agamemnon

In *Agamemnon*, the title character of the first play in the trilogy returns home after many years of fighting in the Trojan war. Waiting for him is his wife Clytemnestra. As is perhaps typical of the age, Agamemnon brings with him as his concubine, Cassandra, the enslaved daughter of Priam, King of Troy. Clytemnestra murders them both. The play ends with the foreshadowed return of Orestes seeking vengeance.

The Libation Bearers

This shedding of blood in *Agamemnon* is continued in *The Libation Bearers*. Agamemnon's children, Orestes and Electra, reunite to avenge their father's death. After first killing Clytemnestra's new husband, Aegisthus, Orestes kills his mother after some hesitation. But Orestes' real troubles have only started: the Furies have begun to pursue him. He runs and cries: "*God Apollo!* Here they come, thick and fast. Their eyes dripping hate."

The Eumenides

In *The Eumenides*, the last part of the Oresteia trilogy, Orestes is in full flight from the Erinyes (the Furies). He seeks refuge in the temple of Apollo at Delphi but can find no real protection. Apollo renders the Furies asleep and then sends Orestes to Athens under the protection of Hermes. But then the ghost of Clytemnestra hovers over the sleeping Furies and rouses them. They set off in hot pursuit. Orestes arrives at the Acropolis in Athens and kneels before the ancient shrine of Athena. The Furies follow Orestes to the Acropolis and eventually find him there.

Athena intervenes and Orestes asks her to judge him. Instead, in a famous passage, she makes a good case as to why this is a matter for a jury trial.

> Too large a matter,
>
> some may think, for mortal man to judge.
>
> But by all rights not even I should decide
>
> A case of murder – murder whets the passions.
>
> Above all, the rites have tamed your wildness.
>
> A suppliant, cleansed, you bring my house no harm.
>
> If you are innocent, I'd adopt you for my city.
>
> [Turning to the Furies]
>
> But they have their destiny too, hard to dismiss,
>
> and if they fail to win their day in court-

how it will spread, the venom of their pride,

plague everlasting blights our land, our future . . .

So it stands. A crisis either way.

[Looking back and forth . . . .]

Embrace the one? Expel the other? It defeats me.

But since the matter comes to rest on us,

I will appoint the judges of manslaughter,

Swear them in, *and found a tribunal here*

For all time to come.

(lines 484–499, emphasis added)

Aeschylus was acknowledging that while juries were something relatively new in Athenian society, they were not expected to be a transient phenomenon. The historian David Cohen observed:

> It is sobering to recall that public prosecution is actually a rather late development in most Western legal systems. In England, for example, private prosecution was the primary method for pursuing most criminal acts until late in the eighteenth century. Legal systems that rely on private initiative for the prosecution of acts considered to impact the public sphere may do so for a variety of reasons, including the simple lack of centralized governmental institutions equal to the task.[3]

Cohen adds, "The famous rationale in the Athenian context for refraining from private vengeance is in Aeschylus' *Eumenides*, where only the establishment of the first Athenian homicide court can end the cycle of murderous retaliation."[4] The *Oresteia* trilogy thus ends with the sovereignty of the law triumphing over revenge killings.

As has been said, Aeschylus wrote in a time of change. The nature of these changes are reflected in the very title of Martin Ostwald's book *From Popular Sovereignty to the Sovereignty of Law: Law, Society and Politics in Fifth-Century Athens*.[5] Solon, the great reformer who lived about a century before Aeschylus, introduced a new tribunal called the *heliata* composed of citizens who would hear certain types of cases.[6] Further, one scholar, H.T. Wade-Gery, posited it was around 469–462 B.C. that a magistrate last gave judgment in his own name.[7] Since this just before the *Oresteia* trilogy was written, it seems evident that juries had come of age at about the same time as Aeschylus wrote.

The trial in *The Eumenides* turns on a point of law that some may call pseudoscience, some may call mythology and others simple misogyny. Apollo, acting as Orestes' advocate, makes the following argument:

> Here is the truth, I tell you – see how right I am.
>
> the woman you call the mother of the child
>
> is not the parent, just the nurse to the seed
>
> the new-sown seed that grows and swells within her.
>
> The *man* is the source of life – the one who mounts.

The actual ending of the *Eumenides* is a kind of anti-climax. There is a tie among the jurors with Athena casting the deciding vote. (Earlier, Athena had said, "Even if the vote is equal, Orestes wins.") Orestes is acquitted. The Furies take umbrage, but Athena persuades them to accept the verdict and the new realities. Henceforth the Furies will be known as the "Semnai" (Venerable Ones) and have their own place in Athenian society.

Clearly, the world of the *Oresteia* trilogy is a primitive one, filled with superstition and some ideas that can charitably be described as outmoded, but it is a society in which the idea of government by law was implanted, and it is an idea that has stayed with humanity ever since.

The Merchant of Venice

The most famous trial scene in world literature is, in this writer's opinion, in William Shakespeare's *The Merchant of Venice*.[8] The play was probably written in the late 1590s, some two millennia after the *Oresteia* trilogy.

Shakespeare's world was very different from that of Aeschylus. It was very litigious and so was the Bard himself.[9] His father, John Shakespeare, was involved in an interfamilial lawsuit that lasted more than 20 years.[10]

Here is a very brief plot summary. Bassanio is a would-be suitor of Portia. Being impoverished, he asks his friend Antonio (who is the merchant of the play's title) for a loan of three thousand ducats. Antonio's fortune is literally at sea in the form of ships returning to Venice with wealth.

Determined to help his friend, Antonio asks for a loan from Shylock, a Jewish[11] moneylender with whom Antonio has had strained relations in the past. Shylock lends Antonio the money on the condition that if the money is not repaid on time Shylock may cut a pound of Antonio's flesh from whatever part of his body he choses. (Act I, Scene III, line 162–163) There is some textual evidence that Shylock doesn't take this condition seriously at all. Indeed, Shylock refers to the agreement as a "merry bond." (Act I, Scene III, line 185) However, when his daughter Jessica runs away with her Christian lover Lorenzo and takes Shylock's fortune with her, Shylock goes mad[12] and suddenly the loan agreement becomes an instrument of revenge.

Antonio's ships do not arrive on time and suddenly he finds himself in a courtroom facing an angry, triumphant Shylock who demands his "pound of flesh." All seems lost, but then Portia, disguised as Balthazar, a learned man of the law, arrives to serve as a judge.

Portia bids Shylock to be merciful and in response he demands to know why he should. (Act IV, Scene I, lines 188–189) There follows one of the

most famous soliloquies in the English language:

> The quality of mercy is not strained
>
> It droppeth as the gentle rain from heaven
>
> Upon the place beneath. It is twice blest:
>
> It blesseth him that gives and him that takes.
>
> 'Tis mightiest in the mightiest; it becomes
>
> The throned monarch better than his crown.
>
> His scepter shows the force of temporal power,
>
> The attribute to awe and majesty
>
> Wherein doth sit the dread and fear of kings;
>
> But mercy is above this sceptered sway.
>
> It is enthroned in the heart of kings;
>
> It is an attribute to God himself;
>
> And earthly power doth then show likest God's
>
> When mercy seasons justice. . . .
>
> Though justice be thy plea, consider this:
>
> That in the course of justice none of us
>
> Should see salvation. We do pray for mercy,
>
> And that same prayer doth teach us all to render
>
> The deeds of mercy. I have spoke thus much
>
> To mitigate the justice of thy plea,
>
> Which, if thou follow, this strict court of Venice
>
> Must needs give sentence 'gainst the merchant there.
>
> (Act IV, Scene I, lines 190–212)

Shylock's reply is lesser known but equally powerful:

> My deeds be on my head! I crave the law,
>
> The penalty and forfeit of my bond.
>
> (Act IV, Scene I, lines 213–214)

Shylock soon readies his knife and the scene becomes almost unbearable until Portia suddenly springs the greatest legal quibble of all time:

> And you must cut this flesh from off his breast:
>
> The law allows it, and the court awards it.
>
> Shylock
>
> Most learned judge! A sentence!- Come, prepare.
>
> Portia
>
> Tarry a little. There is something else.
>
> This bond doth give thee here no drop of blood.
>
> The words expressly are "a pound of flesh."
>
> Take then thy bond, take thou thy pound of flesh,
>
> But in the cutting it, if thou dost shed
>
> One drop of Christian blood, thy lands and goods
>
> Are by the laws of Venice confiscate
>
> Unto the state of Venice.
>
> (Act IV, Scene I, lines 315–325)

One legal scholar, Daniel Kornstein, has pointed out that there are many reasons that a modern judge would refuse to enforce the contract in *The Merchant of Venice*,[13] but Shakespeare surely chose "Tarry a little" because it had the most dramatic potential for the stage. (One can picture Shylock advancing with his raised knife only to stop dead in his tracks when he hears Portia's words.) Certainly both the theatergoer of 1600 and today would not want to hear a lecture on public policy, wherein a contract will not be enforced by a court if it violates the basic philosophy of the state – that is, as murder is always wrong. Similarly, a judge can refuse specific performance (directing someone to carry out the terms of a contract) when there is an adequate remedy at law (Shylock refuses money to forgo the bond), but how can one dramatize this?

Shylock ultimately loses his chance at revenge, most of his fortune and his faith. He is compelled to become a Christian. There is a fifth act in which the romantic entanglements of the play are straightened out. Shylock does not appear in that last act, and he is alluded to only once. At one time this act was routinely omitted in performance, thus focusing the play on Shylock. While he may have had only a minor role in actuality, Shylock is surely one of the most memorable characters in Shakespeare.

The Message

There is an old maxim in show business that if you want to send a message, call Western Union. Aeschylus and Shakespeare were both expert dramatists, so they knew how to write good plays. Both men were geniuses, so, consciously or not, they imbued their writing with ideas that made their works immortal.

What were those ideas? Aeschylus was arguing that human law, tinged with mercy, should govern the affairs of men and women. It was still a relatively new concept. By Shakespeare's time the rule of law had triumphed, but the Bard also saw that the law needed mercy. (Today's lawyers usually call it equity.)

Because of the possibility of dialectic exchanges, trials almost always make for good drama; that is why television shows about lawyers are so popular. But most trials are fact-specific (Which car had the green light?) and rare is the one that deals in depth with issues profoundly affecting the human condition. Shakespeare and Aeschylus wrote plays that dealt brilliantly with the latter type of drama, which is why we still read them today. ■

1. This observation is not original with this writer, but I can no longer place its source.

Continued on Page 61

ATTORNEY PROFESSIONALISM FORUM

To the 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 and made numerous derogatory comments. Among other things, he stated that my client "had no ba**s," and was a thief. Finally, he added that we were nothing more that "money grabbing low lifes," peppering his comments with several pejoratives about our ethnic origins and religions.

Needless to say, I was deeply offended by Lawyer X's comments and conduct. As a result, I got up and told my client that we were leaving. That 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 I know have dealt with Lawyer X in the past. 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

Dear I.M. Outraged:

Your letter reminds us of a recent Appellate Division, First Department case that dealt with important issues of civility and courtesy. In that case, *In re Teague*, __ A.D. 3d __, 15 N.Y.S.3d 312 (1st Dep't 2015), an attorney was charged and found guilty for making offensive racial, ethnic, homophobic, sexist, and other derogatory remarks to attorneys, insulting an administrative law judge in a public forum, and being disruptive both inside and outside of hearing rooms. Similar to the facts you describe, this particular attorney's poor behavior was not an isolated incident; investigation revealed several reports, spanning the course of several years, in which this attorney's outlandish behavior was starting to raise eyebrows. During one specific incident, the attorney in question called an administrative law judge "a disgrace" in an open hearing room during or after a particularly contentious hearing. The First Department found that the attorney's patently offensive behavior and remarks warranted a three-month suspension, and furthermore, that the attorney be ordered to enroll in a one-year anger management treatment program.

The New York Rules of Professional Conduct (NYRPC) also provide guidance in answering your question about whether you have an actual obligation to report Lawyer X's offensive behavior. Incivility, rudeness, and the use of offensive language and tactics can certainly rise to the level of a violation of one or more of the Rules of Professional Conduct. Specifically, Rule 8.4(d) holds that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice" and Rule 8.4(h) holds that a lawyer shall not "engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer."

Disruptive and/or explosive conduct before a tribunal may also violate Rule 3.3(f), which holds that "[i]n appearing as a lawyer before a tribunal, a lawyer shall not . . . (2) engage in undignified or discourteous conduct [or . . .] (4) engage in conduct intended to disrupt the tribunal."

As officers of the court, we are not permitted to ignore this kind of bad behavior and must act in accordance with Rule 8.3(a) which reminds us that a lawyer "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

However, this leads us to the question: How do you determine if the particular conduct you have witnessed or experienced rises to the level to warrant reporting it to the Disciplinary Committee? This question is much harder to answer and is definitely case specific. Some commentators have tried to make a distinction between unethical behavior and unprofessional conduct. *See* Joseph J. Ortego & Lindsay Maleson, *Incivility: An Insult to the Professional and the Profession*, 37-SPG

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

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

Brief 53, 54 (Spring 1998). Indeed, according to one author, "[t]he basic distinction between ethics and professionalism is that the rules of ethics tell us what we *must* do and professionalism teaches us what we *should* do." James A. George, *The "Rambo" Problem: Is Mandatory CLE the Way Back to Atticus?*, 62 La. L. Rev. 467, 472 (2002) (emphasis added).

Expanding on this theory, the questions we should really be asking are: When does bad behavior cross over from being just unprofessional to actually being unethical? And should that make a difference? These are not easy questions and we suspect that there are many lawyers who will tell you that they are simply acting as zealous advocates. Courts grappling with this very question have recognized its complexity. For example, the U.S. Court of Appeals for the Second Circuit aptly noted:

> [o]n the one hand, a court should discipline those who harass their opponents and waste judicial resources by abusing the legal process. On the other hand, in our adversarial system, we expect a litigant and his or her attorney to pursue a claim zealously within the boundaries of the law and ethical rules. Given these interests, determining whether a case or conduct falls beyond the pale is perhaps one of the most difficult and unenviable tasks for a court.

Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 341 (2d Cir. 1999).

We can shed some light on this gray area by referring to several cases where courts have determined that the attorney's misconduct rose to the level of behavior that warranted punishment. In one of the more infamous cases, *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994), a Houston plaintiffs lawyer used vitriolic and threatening language while representing one of the directors of Paramount in a deposition. Among the outrageous comments made by this attorney during the deposition, when opposing counsel tried to question the witness, was: "Don't 'Joe' me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon." *Id*. at 54. The Supreme Court of Delaware found this attorney's behavior to be so lacking in civility that it added a whole addendum to its formal opinion in order to publicly censure the attorney and raise awareness about what it described as "a serious issue of professionalism involving deposition practice in proceedings in Delaware trial courts." *Id*. at 52. In its addendum, the Delaware court elaborated on why this particular attorney's conduct went far beyond zealous advocacy and completely crossed the line. According to the court,

> [s]taunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by [plaintiffs' lawyer] on the record of the [plaintiff's] deposition is not properly representing his client, and the client's cause is not advanced by a lawyer who engages in unprofessional conduct of this nature.

Id. at 54.

Yet another example of attorney misconduct rising to the level of unethical behavior: In *In re Kahn*, 16 A.D.3d 7 (1st Dep't 2005), the court found that the attorney's pattern of sexually oriented and offensive comments directed at female attorneys and female clients, dating as far back as 1991, warranted serious sanctions. The attorney's egregious conduct included publicly referring to a female attorney as "pig vomit on my shoes," and on another occasion, as the same attorney, who is overweight, was about to enter the courtroom, yelling "[h]ere is the elephant, she's coming in. Who wants tickets? Come see the show." The attorney also admitted to having made inappropriate comments about a 13-year-old client arrested for prostitution and to asking an adversary to guess the bra size of a 14-year-old client. *Id*. at 9. Given the testimony of witnesses and the attorney's own admission to engaging in a pattern of misconduct for years, the First Department suspended the attorney from practicing law in the State of New York for a period of six months. *Id*. at 10.

Courts will consider the larger context within which the inappropriate and outlandish behavior takes place when weighing their decision. One important factor is whether the conduct represents a single isolated incident, or is part of a more established pattern of misbehavior. The Appellate Division in *In re Hayes*, 7 A.D.3d 108 (1st Dep't 2004), explicitly stated that its decision to impose the sanction of a public censure against an attorney who accused the court and its clerk of prejudice and racism in the course of a landlord-tenant proceeding was in part attributable to its consideration of the particular attorney's prior transgressions. The court explained, "We are mindful of the [Departmental Disciplinary] Committee's observation of the facts that respondent [attorney] has had two prior admonitions, one for misconduct which is very similar to that which occurred here, and that such discipline did not deter the instant misconduct." *Id*. at 110.

However, there are certainly situations in which one incident alone is enough to warrant punishment. For instance, in *In re Dinhofer*, 257 A.D.2d 326 (1st Dep't 1999), the court imposed a three-month suspension on an attorney for calling a federal judge "corrupt" during a telephone conference. A transcript of the conversation indicates that the attorney made the following remarks: "This is rampant corruption. I don't know what else to say. This is a sham. This is blatantly corrupt. You are sticking it to me every way you can. I'm not rude to them [a reference to the court's staff], I'm rude to you, because I think you deserve it. You

are corrupt and you stink. That's my honest opinion, and I will tell you to your face." *Id*. at 327–28. In its decision, the court pointed out that while the attorney had no other disciplinary record, his conduct was so egregious that it "impinge[d] upon [his] fitness to practice law. . . ." *Id*. at 328.

Here, we obviously agree that it is inappropriate for any member of the Bar to address others and to act the way Lawyer X has comported himself. Lawyer X's offensive comments to you and your client, coupled with the fact that his behavior is not isolated, appear to rise to the level of the kind of behavior that may require action on your part under the NYRPC. As evidenced in the cases described above, some of the consequences Lawyer X may face for his inappropriate behavior include suspension or public censure and even enrollment in an anger management program.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com);
Maryann C. Stallone, Esq.
(stallone@thsh.com);
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(furst@thsh.com)
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I am deeply disturbed by the events that transpired at a recent on-site visit to inspect the opposing party's books and records in compliance with a discovery order. Due to the defendants' repeated failure to comply with several discovery orders and deadlines and the parties' contentious and acrimonious relationship, I got a court order directing that the defendants produce certain documents by a specified date. The court also granted us permission to have an on-site visit and inspection of the defendants' books and records. On the agreed-upon site-visit date, I met the defendants' counsel at the defendants' offices and was accompanied by an accountant that the plaintiff hired to assist with the litigation. Despite the fact that the defendants had several weeks to prepare the documents requested by the plaintiff for the on-site inspection, after we were placed in a conference room, we were given only two Bankers Boxes® of documents, with limited information. Although I made repeated requests for additional information, the defendants failed to produce numerous categories of documents that the court ordered them to produce. The defendants' counsel stated that they would produce these materials at a later date since they did not have them available.

That wasn't the end of the story. While we were in the conference room, I saw that there were several boxes of documents in the hallway outside the conference room. I knew right away that the boxes contained categories of documents responsive to the plaintiff's requests, which the court had ordered the defendants to produce. This was obvious from the labels that were clearly visible and in plain sight on the sides of the boxes.

I asked the defendants' counsel about the boxes in the hallway but was told that I could not see them because he did not currently have access to those materials. Since I had reason to believe that the boxes contained responsive materials and felt that I was being stonewalled, I used my smartphone camera to take pictures of the boxes from the conference room so that I would be able to present the issue to the court if necessary.

Although the defendants' counsel was nowhere in sight when I took the pictures, within two minutes he came storming into the conference room and asked whether I had taken any pictures. It was only then that I discovered that we had been under surveillance in the conference room during the entire document production. When I saw the webcam in the conference room, I confronted opposing counsel, asking whether he and his clients had been watching and listening to my communications with the plaintiff's accountant. The defendants' counsel did not deny that he and his client had been watching and listening to our communications. Instead, he smirked and replied that my communications with the plaintiff's accountant had no expectation of confidentiality or privilege. He refused to allow me to take a picture of the webcam. Based on these circumstances, I can only assume that both opposing counsel and his clients had been secretly monitoring my private and privileged communications and work product with the plaintiff's retained expert.

I am deeply troubled by what happened and by opposing counsel's behavior, which strikes me as outrageous. Are we now at a point in the practice of law when opposing counsel can secretly videotape a document production and eavesdrop on my conversations during my inspection of the documents? What about telephone conversations? If counsel secretly put me under surveillance while I was in the conference room, it is possible that he may have also recorded our telephone conversations. I am writing to the Forum because, quite frankly, I am unfamiliar with the rules. What should I do?

Sincerely,

Ben Camed

BY PETER SIVIGLIA

Peter Siviglia (psiviglia@aol.com) has practiced law in New York for 50 years, representing clients both domestic and foreign, public and private. He has served as special counsel to other firms on matters within his expertise. Peter is the author of *Commercial Agreements – A Lawyer's Guide to Drafting and Negotiating*, Thomson Reuters, supplemented annually; *Writing Contracts, a Distinct Discipline*, Carolina Academic Press; and numerous articles on writing contracts and other legal topics, many of which have appeared in this *Journal*.

Bad Law or Bad Lawyering?

The Need for Local Counsel Notwithstanding a Contract's Governing Law Selection[1]

In December 2012 the New York Court of Appeals rendered its decision in *IRB-Brasil Resseguros, S.A. v. Inepar Investments*, S.A.[2] The case involved a conflict of laws issue to which the court applied § 5-1401 of the N.Y. General Obligations Law. That section permits parties to a contract involving at least $250,000 to select New York as the governing law.

Following is a discussion of the decision and the lawyering of the transaction that engendered the litigation. This is not a critique of the lawyering involved in the litigation itself.

The Facts

The case concerned a suit to enforce payment under a guarantee issued by a Brazilian guarantor. The guarantee contained a New York choice of law clause. An agreement that applied to both the guarantee and the guaranteed debt stated that both "shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to conflict of laws principles." The guarantee omitted the provision "without regard to conflict of laws principles."

The Issue

Under Brazilian law the guarantee was "void" because it was not authorized by the guarantor's board of directors. New York law does not contain that requirement. Of course, the guarantor argued that Brazilian law governed the guarantee. The plaintiff-beneficiary argued that New York law governed. The Court of Appeals had to decide which law to apply to determine whether the guarantee was enforceable.

Surely, extension of the loan provided sufficient consideration under New York law to support the guarantee, but the Court's decision did not discuss that issue.

The Decision

The Court of Appeals held that "New York substantive law" governed and, accordingly, that the guarantee was enforceable. In arriving at this conclusion, the Court cited § 5-1401 of the General Obligations Law allowing, as mentioned above, parties to a contract involving at least $250,000 to select New York law to govern their contract regardless of the relation to New York State.

The Court also stated – and I believe quite correctly – that "an express exclusion [in the guarantee itself] of New York's conflict-of-laws rules is not necessary."[3] In arriving at this decision, the Court cited the Restatement (Second) of Conflict of Laws, § 187, that states "'[i]n the absence of a contrary indication of intention, the reference [to the law of the state chosen by the parties] is to the local law of the state of the chosen law."[4]

Critique of the Court's Decision

I believe the Court erred in refusing to apply the substantive law of Brazil to the validity of the guarantee, because the validity of an instrument in its creation – in its conception – should be a matter of local law governing the authority of the issuing entity to issue that instrument. I find no difference – at least no material difference – between (1) whether an entity has been properly constituted under the law of the jurisdiction in which it is organized (clearly a matter of local law), and (2) whether an instrument has been properly constituted under the law governing the authority of the entity to create that instrument. For example, § 505 of the N.Y. Business Corporation Law requires, with certain exceptions, that the board of directors of a corporation fix the consideration, terms and conditions of any option to acquire shares of that corporation. To me, regardless of the choice of law stated in the option agreement itself, it is "the given in geometry" that an option issued in violation of that requirement is void and, therefore, unenforceable.

Now – and this will lead to the lesson that follows – let's assume that the winning plaintiff has to enforce the guarantee in Brazil because that is where all of the assets of the guarantor reside. Will the Brazilian courts honor the New York ruling or will they find, instead, that enforcing an instrument "void" under Brazilian law is against public policy, and, therefore, deny collection?

The Lesson

I am unable to suppress a compulsion to convey "this lesson" anecdotally.

Some years ago, I was correspondent counsel in New York to a major British law firm. A client of that firm, an English company, was about to license some of its intellectual property to a Japanese company for use in Japan. The parties had agreed that the law of New York, a neutral jurisdiction, should govern the license under § 5-1401 of the General Obligations Law. So the British firm asked me to prepare the license. "OK," I said, "but equally important as the contract itself is what the law is in Japan to protect the intellectual property. We must retain counsel in Japan." And we did, and all turned out well.

So, regardless of what law governs the contract, if the transaction involves a foreign jurisdiction (state or country), or a party located in a foreign jurisdiction, where you or your law firm does not practice, you *must* engage local counsel. Apart from the fact that not doing so is malfeasance, the cost of local counsel is an insurance premium; and that cost will surely be far less than the cost of litigation. ■

1. I acknowledge and appreciate the advice of Therese Doherty, Esq., co-chair of the litigation department of Herrick, Feinstein LLP, New York, New York – especially since "the lesson" of this article, if followed, could jeopardize the income of her firm. This article comprises part of the 2016 supplement to *Commercial Agreement*. It is pre-printed here with the permission of Thomson Reuters.
2. 20 N.Y.3d 310 (2012).
3. *Id.* at 316.
4. *Id.*

hearing isn't required for the court to impose sanctions.[24] When a sanctionable offense occurs in front of the judge, no hearing is necessary.[25] When a party requests sanctions in its appellate brief, a formal evidentiary hearing for sanctions is unnecessary. The brief gives the adversary sufficient notice.[26]

Moving for Sanctions or Costs Under 22 NYCRR 130-1.1

When moving for sanctions or costs under Rule 130-1.1, ensure that your motion papers conform to CPLR 2214 and 2215. Your notice of motion should include when and where the motion will be heard, the relief demanded, and the grounds for the motion.[27] You must serve the supporting papers on which the motion is based on the nonmoving party at least eight days before the motion is heard.[28] Your motion papers must demonstrate that the opposing party or attorney acted frivolously within the meaning of Part 130.[29] You must prove by a preponderance of the evidence that the opposing party or attorney acted frivolously.[30]

When moving for sanctions under Rule 130-1.1, there's no need in your motion papers to specify the dollar amount you're seeking.[31] If you believe that the opposing party's or attorney's conduct is particularly egregious, you should detail in your papers the frivolous conduct and request the maximum amount of sanctions.[32]

Don't rely on the court to impose sanctions on an offending party sua sponte. Move for sanctions yourself. A court is unlikely to award sanctions on its own, particularly against an attorney.[33]

Don't move for sanctions under Rule 130-1.1 after judgment has already been entered.[34] After entry of judgment, the court lacks the authority to entertain a "separate proceeding" for sanctions.[35]

You may move for sanctions, costs, or both against a pro se litigant who engages in frivolous conduct.[36]

If you're a non-party to the suit but have a "sufficient nexus" to the allegedly frivolous conduct, you may move for sanctions against the opposing party or attorney under Rule 130-1.1.[37] Non-parties may not move for costs against parties to the suit.[38] Costs are awarded only to a "party or counsel to a party" under Rule130-1.1.[39] Additionally, you may not move under Rule 130-1.1 for sanctions or costs against non-parties, such as insurers. The rules don't provide for sanctions or costs against non-parties.[40]

A court may grant a motion or cross-motion for sanctions under Rule 130-1.1 if there's a finding of frivolous conduct.[41] Conduct is frivolous under Rule 130-1.1 if

- "[i]t is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law";[42]
- "[i]t is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another";[43] or
- "[i]t [the party or attorney] asserts material factual statements that are false."[44]

In evaluating whether the party's or attorney's conduct is frivolous, the court considers "the circumstances under which the conduct took place and whether or not the conduct was continued [by the offending counsel or party] when its lack of legal or factual basis was or should have been apparent."[45] Motions for sanctions under Rule 130-1.1 may be granted even after an action settles.[46] Examples of frivolous conduct include

- submitting meritless and harassing filings;[47]
- appealing solely to prolong litigation;[48]
- testifying falsely about material matters during trial and lying during the sanctions hearing;[49]
- pleading inapplicable boilerplate defenses;[50]
- making sexist remarks during a deposition;[51]
- interfering with a plaintiff's attempt to photograph an accident scene;[52]
- suing the wrong corporation and not discontinuing the action after repeated warnings;[53]
- petitioning frivolously for a guardianship appointment;[54]
- making an unjustified Rule 130-1.1 motion to harass the other party;[55] and
- repeatedly interrupting a witness's answers, making improper objections, and insulting the judge, clerk, court reporter, or opposing counsel.[56]

Just because your adversary advocates zealously doesn't mean you should move for sanctions.

Just because your adversary advocates zealously doesn't mean you should move for sanctions. Courts give considerable discretion to attorneys before considering their conduct frivolous.[57] Don't move for sanctions under Rule 130-1.1 if opposing counsel's conduct constitutes only a lack of professional courtesy[58] or if opposing counsel refuses to participate in non-court-mandated settlement discussions.[59] Showing up for a conference unprepared doesn't constitute sanctionable conduct under Rule 130-1.1.[60] Nor does a refusal to acknowledge personal service of a motion.[61] Both you and your adversary should, however, aspire to follow the New York State Standards of Civility.[62] The Standards encourage all counsel and court personnel to heed the "principles of civility and decorum" and to "treat

each other with courtesy, respect and civility."[63]

Opposing 22 NYCRR 130-1.1 Motions for Sanctions

Opposing a motion for sanctions is similar to opposing any other motion. In accordance with CPLR 2214 or 2215, you must file an affidavit in opposition at least three days before the motion for sanctions is heard.[64] Your affidavit should contain only facts; legal arguments should be included separately in a memorandum of law.[65] (For what opposition papers should contain, consult *The Legal Writer*'s earlier columns.[66])

If opposing counsel asserts that your claim is without merit in law and therefore frivolous, oppose the motion for sanctions by showing that all your claims have a basis in law or fact or that they constitute a reasonable argument to extend, modify, or overrule existing law.[67]

To oppose motions for sanctions for behavior in court under Rule 130-1.1(c)(2), explain in your opposition papers that your conduct adheres to the "reasonable attorney" standard: "be[ing] well aware of the need for civility, avoid[ing] abusive and discriminatory conduct, conduct[ing] proper depositions, eschew[ing] obstructionist tactics, and generally abid[ing] by the norms of accepted practice."[68]

22 NYCRR 130-1.1a: Sanctions for Not Signing Filed Legal Documents

New York's Rules of the Chief Administrator of the Courts require attorneys to sign all papers served on another party or filed with or submitted to the court.[69] By signing every pleading, motion, or other paper served on a party or submitted to the court, you certify that the contents aren't frivolous.[70] If you omit your signature, the court might strike your papers.[71] In its discretion, the court may instead grant time for you to serve properly signed documents.[72] A failure to sign a large number of your papers — over 20,000 in one case[73] — may constitute frivolous conduct under Rule 130-1.1a and result in significant sanctions.

To avoid being sanctioned under Rule 130-1.1a, sign your pleadings, papers, and motions filed with the court or served on the opposing party.

22 NYCRR 130-2.1: Sanctions for Failing to Attend a Scheduled Court Appearance

Overview

Upon either a motion from the nonoffending party or in the court's discretion, a court may impose sanctions in addition to those under Rule 130-1.1 on an attorney who, without good cause, fails to appear for a scheduled court appearance.[74] The sanctions will be imposed only on the party's attorney.[75] In addition to or instead of imposing sanctions, a court may award costs in the form reimbursing expenses and attorney fees to the moving party.[76] In determining whether an attorney's failure to appear at a scheduled court appearance was without good cause and in ascertaining the measure of sanctions or costs to be imposed, the court will evaluate the circumstances, including

- the attorney's explanation for the nonappearance;[77]
- whether the attorney was adequately notified of the time and date of the scheduled appearance;[78]
- whether the attorney notified the court and opposing counsel in advance of the proposed absence;[79]
- whether substitute counsel was prepared to offer an explanation of the attorney's absence or whether substitute counsel was prepared to go forward with the case;[80]
- whether the attorney on earlier occasions failed to appear previously for court proceedings;[81] and
- the extent and nature of the harm caused by the attorney's failure to appear.[82]

Sanctions under Rule 130-2.1 may be made on an attorney personally or on any office with which the attorney is associated.[83] The court may impose sanctions or costs only upon a written decision or statement on the record explaining the conduct on which the sanction is based and why the court found the attorney's failure to appear at a scheduled court appearance to be without good cause.[84]

The monetary limit on sanctions or the costs awarded under a Rule 130-2.1 motion may not exceed $2,500 for any single failure to appear at a scheduled court appearance.[85] Sanctioned attorneys must pay their sanctions to the Lawyer's Fund for Client Protection.[86]

Moving for Sanctions Under 22 NYCRR 130-2.1

You may move for sanctions under Rule 130-2.1 if an opposing party or attorney arrives to court late in violation of a specific court order, especially if the opposing party or attorney has a history of tardiness.[87] You may move for sanctions against a per diem attorney for failing to appear at a scheduled court appearance; both the per diem attorney and the attorney of record will share responsibility for the per diem attorney's conduct.[88] Move for sanctions under Rule 130-2.1 if opposing counsel fails to appear on time and doesn't notify the court.[89] When circumstances beyond the attorney's control result in a failure to appear, an award of sanctions is unwarranted.[90] Sanctions for unpreparedness for trial are different from failing to appear and are unwarranted.[91]

To oppose a motion for sanctions under Rule 130-2.1, explain why you were absent.[92]

CPLR 8303-a: Sanctions for Frivolous Claims in Personal-Injury Actions

Overview

CPLR 8303-a gives a court the power to impose sanctions and direct the reimbursement of costs and attorney fees for frivolous claims in personal-injury, injury-to-property, and wrongful-death actions.[93] CPLR 8303-a is designed to deter frivolous tort litigation by punishing the offending party with monetary sanctions, compensating the moving party for its time, and

When the court finds frivolousness under CPLR 8303-a, sanctions must be granted.

curbing the waste of judicial resources.[94] CPLR 8303-a applies to parties and their attorneys.[95] Courts interpret CPLR 8303-a broadly. Defamation,[96] extortion,[97] abuse of process,[98] and medical malpractice[99] fall under the definition of "personal injury." Injury to property is interpreted as any "actionable act, whereby the estate of another is lessened, other than a personal injury."[100]

A court must first find a claim frivolous before it may grant a motion for sanctions under CPLR 8303-a.[101] When the court finds frivolousness under CPLR 8303-a, sanctions must be granted.[102] In that event, the court has no discretion. For a claim to be frivolous, the claim must have been brought in bad faith.[103] A claim is brought in bad faith if the claim is made solely to delay or prolong litigation or to harass or maliciously injure another or if it lacks a reasonable basis in law or fact.[104] An action commenced or continued in good faith may not lead to sanctions or costs under CPLR 8303-a.[105]

Under CPLR 8303-a, an award of sanctions for frivolous claims may not exceed $10,000.[106] Appellate courts will reduce judgments that exceed the statutory limitation on recovery of $10,000.[107] Costs or sanctions for frivolous claims are granted in addition to any other judgments awarded to the successful party.[108] Awards of punitive damages and sanctions are duplicative as constituting a double recovery.[109]

Moving for Sanctions Under CPLR 8303-a

In moving for sanctions under CPLR 8303-a, you must show that the opposing party or attorney acted frivolously and demonstrate entitlement to relief.[110] Only frivolous claims, counterclaims, cross-claims, or defenses — matters addressed in the pleadings — are subject to CPLR 8303-a.[111] Move for sanctions if your adversary engages in the following frivolous conduct:

- asserting an inapplicable Statute of Limitations defense for medical malpractice;[112]
- pursuing baseless libel claims;[113]
- continuing an action after a settlement agreement;[114]
- asserting a claim for punitive damages solely to harass;[115] and
- making repetitive and meritless motions.[116]

Don't move for sanctions under CPLR 8303-a for non-tort actions such as a breach of contract.[117] Don't move for sanctions under CPLR 8303-a after judgment has already been entered.[118] After entry of judgment, the court has no authority to entertain a "separate proceeding" for sanctions.[119] Don't move for sanctions under CPLR 8303-a if opposing counsel makes a frivolous motion on a procedural point or engages in abusive disclosure.[120] Don't move for sanctions under CPLR 8303-a against non-parties to the suit, such as an insurer. They aren't subject to CPLR 8303-a.[121]

Opposing CPLR 8303-a Motions

To oppose a motion for sanctions under CPLR 8303-a, explain that your pleading wasn't intended solely to delay or prolong the litigation, or to harass the other party.[122] Explain in your opposition papers that your claim, counterclaim, cross-claim, or defense had a basis in law or fact and wasn't made in bad faith.[123]

If you learn that your action, claim, counterclaim, cross-claim, or defense lacks a reasonable basis, explain in your opposition that you'll withdraw it.[124] Withdrawing or discontinuing a knowingly frivolous action, claim, counterclaim, or defense might not, however, be a defense against a sanctions motion,[125] but doing so might affect the amount of sanctions.

CPLR 3126: Penalty for Failure to Disclose

CPLR 3126 provides that any party refusing to obey an order for disclosure or willfully failing to disclose information may be penalized.[126] A court may issue a resolution order, a preclusion order, and a stay, dismissal, or default order for failure to disclose under CPLR 3126.[127] Additionally, a court may impose monetary sanctions under CPLR 3126.[128] Sanctions may be imposed under CPLR 3126 if, for example, evidence is spoiled.[129] For an in-depth discussion of imposing sanctions for failure to disclose, consult *The Legal Writer*'s earlier columns.[130] ■

1. Black's Law Dictionary (Westlaw 10th ed. 2014).
2. *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 5–6, 503 N.E.2d 681, 683–84, 511 N.Y.S.2d 216, 218–19 (1986).
3. 22 NYCRR 130-1.1.
4. *Id.*
5. *Id.* 130-1.1(a).
6. *Id.*
7. *Id.* 130-1.5.
8. *Id.* 130-1.1(a).
9. *Id.*
10. 7 Jack B. Weinstein, Harold L. Korn, Arthur R. Miller, New York Civil Practice: Civil Practice Law and Rules, § 3401.07, at 34-28 (2d ed. 2015).
11. David D. Siegel, New York Practice § 414A, at 730 (5th ed. 2015).
12. *Id.*; Thomas R. Newman, *Frivolous Conduct: Ethical Considerations in Appellate Practice*, 87 N.Y. St. B.J. 39, 40 (July/Aug. 2015).
13. 7 Weinstein et al., *supra* note 10, at 34-28.
14. 22 NYCRR 130-1.1(c).
15. *See id.* 130-1.1(d).
16. *Id.*
17. *Id.* 130-1.1(a); *In re Cooper*, 168 A.D.2d 695, 696, 563 N.Y.S.2d 690, 695–97 (3d Dep't 1990).
18. 22 NYCRR 130-1.3.
19. *Id.* 130-1.2.
20. 7 Weinstein et al., *supra* note 10, at 34-29.
21. *Providian Nat'l Bank v. McGowan*, 179 Misc. 2d 988, 998–1000, 687 N.Y.S.2d 858, 868–70 (Civ. Ct. Kings County 1999).
22. 22 NYCRR 130-1.1(d).
23. *Providan Nat'l Bank v. Forrester*, 277 A.D.2d 582, 583–84, 716 N.Y.S.2d 112, 113–14 (3d Dep't 2000); Siegel, *supra* note 11, at § 414A, at 733 (citing *Bruckner v. Jaitor Apts. Co.*, 147 Misc. 2d 796, 799, 723 N.Y.S.2d 563, 565 (Civ. Ct. Queens County 1990) (explaining that the return date of the motion is the opportunity to be heard)).
24. 24 N.Y. Jur. 2d Costs in Civil Actions § 91 (1997).
25. Siegel, *supra* note 11, § 414A, at 733.
26. 24 N.Y. Jur. 2d Costs in Civil Actions § 91 (1997) (citing *In re Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of N.Y. v. 198 Broadway, Inc.*, 76 N.Y.2d 411, 413–15, 559 N.E.2d 429, 430–31, 559 N.Y.S.2d 866, 867–68 (1990)).

27. CPLR 2214(a), (b).

28. *Id.*

29. *Miller v. Miller*, 96 A.D.3d 943, 944–45, 947 N.Y.S.2d 541, 543 (2d Dep't 2012).

30. *See In re Capoccia*, 272 A.D.2d 838, 844, 709 N.Y.S.2d 640, 646 (3d Dep't 2000).

31. 7 Weinstein et al., *supra* note 10, at 34-31.

32. *Id.*

33. *See Minister*, 76 N.Y.2d at 415, 559 N.E.2d at 431, 559 N.Y.S.2d at 868 (refusing to impose costs or sanctions on attorneys because opposing party did not ask for them); *Levin v. Axelrod*, 168 A.D.2d 178, 178, 571 N.Y.S.2d 345, 345 (3d Dep't 1991) (denying sanctions because opposing party did not ask for them).

34. *Rose Valley Joint Venture v. Apollo Plaza Assoc.*, 191 A.D.2d 874, 874, 595 N.Y.S.2d 122, 123 (3d Dep't 1993).

35. *Id.*, 595 N.Y.S.2d 122, 123.

36. Richard L. Weber, *No Greater Rights*, 79 N.Y. St. B.J. 11, 12 (July/Aug. 2007).

37. *Greenspan v. Geller*, 157 Misc. 2d 638, 641, 598 N.Y.S.2d 133, 135 (Sup. Ct. Rockland County 1993).

38. *Id.* at 642, 598 N.Y.S.2d at 136.

39. *Id.*, 598 N.Y.S.2d at 136.

40. *Saastomoinen v. Pagano*, 278 A.D.2d 218, 218–19, 717 N.Y.S.2d 274, 275 (2d Dep't 2000); *Hitchcock Plaza, Inc. v. Clark*, 1 Misc. 3d 906(A), 2003 N.Y. Slip Op. 51524(U) (Hous. Pt. Civ. Ct. N.Y. County, 2003) (denying sanctions against a guardian *ad litem*).

41. *See* 22 NYCRR 130-1.1.

42. *Id*. 130-1.1(c).

43. *Id.*

44. *See Korbel v. Zoning Bd. of Appeals of Town of Horicon*, 28 A.D.3d 888, 890, 814 N.Y.S.2d 301, 303 (3d Dep't 2006).

45. *Id.* (citing 22 NYCRR 130-1.1(c)(3)).

46. *Ortiz v. Weaver*, 191 A.D.2d 158, 158–59, 594 N.Y.S.2d 35, 36 (1st Dep't 1993).

47. *Citibank N.A. v. Jones,* 272 A.D.2.d. 815, 817–18, 708 N.Y.S.2d 517, 519–20 (3d Dep't 2000).

48. *Levy v. Carol Mgmt. Corp.*, 260 A.D.2d 27, 34–36, 698 N.Y.S.2d 226, 231–33 (1st Dep't 1999).

49. *1050 Tenants Corp. v. Lapidus*, 2006 N.Y. Slip Op. 51925(U), *6, 2006 WL 2918080, at *8 (Civ. Ct. N.Y. County Oct. 5, 2006).

50. *Schear v. Pearlman*, N.Y.L.J., Mar. 16, 1992, at 32, col. 6 (Sup. Ct. Nassau County).

51. *Principe v. Assay Partners*, 154 Misc. 2d 702, 704–06, 586 N.Y.S.2d 182, 184–85 (Sup. Ct. N.Y. County 1992).

52. *DeFoe v. Bankers Trust Co.*, 179 A.D.2d 737, 737–38, 579 N.Y.S.2d 1009, 1009 (2d Dep't 1992).

53. *Robertson v. United Equities Inc.*, 20 Misc. 3d 1112(A), 2008 N.Y. Slip Op. 51327(U), *6, 2008 WL 2600247, at *6 (Sup. Ct. Kings County 2008).

54. *In re Elizabeth R.*, 228 A.D.2d 445, 446, 643 N.Y.S.2d 224, 224 (2d Dep't 1996).

55. Siegel, *supra* note 10, § 414A, at 733 (citing *Shelley v. Shelley*, 180 Misc. 2d 275, 283–84, 688 N.Y.S.2d 439, 446 (Sup. Ct. Westchester County 1999).).

56. *Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Int'l, Inc.*, 94 A.D.3d 580, 581, 942 N.Y.S.2d 497, 498 (1st Dep't 2012).

57. *See Schultz v. Beulah Land Farm & Racing Stables, Inc.*, 181 A.D.2d 1020, 1020–21, 581 N.Y.S.2d 509, 509 (4th Dep't 1992) (finding that County Court abused its discretion in sanctioning plaintiffs who raised a question of first impression); *cf. Marx v. Rosalind & Joseph Gurwin Jewish Geriatric Ctr.*, 2014 N.Y. Slip Op. 30192, at *7, 2014 WL 320820, at *7 (Sup. Ct. Suffolk County) (finding that defendant's attorney persisting with no apparent legal basis in a line of questions, after repeatedly sustained objections, caused a mistrial and violated 22 NYCRR 130-1.1(a), 130-1.2).

58. *In re Frank M. v. Siobahn N.*, 268 A.D.2d 808, 808–09, 702 N.Y.S.2d 409, 410 (3d Dep't 2000).

59. *Valdez v. Cibulski*, 171 Misc. 2d 49, 50, 652 N.Y.S.2d 697, 698 (Sup. Ct. Queens County 1996).

60. *In re Premo v. Breslin*, 89 N.Y.2d 995, 996–97, 679 N.E.2d 630, 631, 657 N.Y.S.2d 391, 392 (1997).

61. *Patterson v. Balaquiot*, 188 A.D.2d 275, 275, 590 N.Y.S.2d 469, 469 (1st Dep't 1992).

62. 22 NYCRR 1200, app. A, § 1 ("Lawyers should be courteous and civil in all professional dealings with other persons.").

63. *Id.*

64. David Paul Horowitz, *Sidestepping Sanctions*, 79 N.Y. St. B.J. 18, 20 (Mar./Apr. 2007).

65. *See* 22 NYCRR 202.8(c) ("Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law.").

66. *See, e.g.*, *Drafting New York Civil-Litigation Documents: Section XIV — Motion Practice Overview Continued*, 84 N.Y. St. B.J. 64, 56–57 (Mar./Apr. 2011).

67. 22 NYCRR 130-1.1(c)(1).

68. *Principe v. Assay Partners*, 154 Misc. 2d 702, 708, 586 N.Y.S.2d 182, 188 (Sup. Ct. N.Y. County 1992).

69. 22 NYCRR 130-1.1a(a).

70. *See Hunt v. Hunt*, 273 A.D.2d 875, 875, 709 N.Y.S.2d 744, 745 (4th Dep't 2000).

71. 22 NYCRR 130-1.1a(a).

72. *Pronti v. Hogan*, 278 A.D.2d 841, 841–42, 718 N.Y.S.2d 909, 909 (4th Dep't 2000).

73. *See In re Edward Shapiro, PC*, 9 Misc. 3d 369, 377–81, 801 N.Y.S.2d 694, 700–02 (Civ. Ct. Queens County 2005).

74. 22 NYCRR 130-2.1(a); *In re Walsh v. People*, 206 A.D.2d 434, 434, 614 N.Y.S.2d 441, 441 (2d Dep't 1994).

75. *See Feldman v. Feldman*, 300 A.D.2d 347, 347–48, 751 N.Y.S.2d 771, 771 (2d Dep't 2002).

76. 22 NYCRR 130-2.1(a).

77. *Id.* 130-2.1(b), (c).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* 130-2.1(b), (c).

82. *Id.*

83. *Id.* 130-2.1(c).

84. *Id.* 130-2.2.

85. *Id.*

86. *Id* 130-2.3.

87. *See In re Marcus v. Bamberger*, 180 A.D.2d 533, 533–34, 580 N.Y.S.2d 256, 256–57 (1st Dep't 1992).

88. *George Constant, Inc. v. Berman*, N.Y.L.J., Dec. 3, 2003, at 18, col. 1 (Sup. Ct. N.Y. County 2003).

89. *See In re Gurwitch*, 256 A.D.2d 180, 180, 681 N.Y.S.2d 534, 534 (1st Dep't 1998).

90. *See Zanker-Nichols v. United Refining Co.*, 127 A.D.3d 1347, 1348, 7 N.Y.S.3d 639, 640 (3d Dep't 2015) (finding that counsel's illness on day of trial constituted good cause for failing to appear); *ACS-NY v. Pizarro*, 285 A.D.2d 406, 406–07, 727 N.Y.S.2d 430, 430–31 (1st Dep't 2001) (holding that a fire drill, a defective elevator in the courthouse, and a last-minute problem with the party's witnesses constituted good cause); *Zeltser v. Sacerdote*, 24 A.D.3d 541, 542, 808 N.Y.S.2d 286, 286 (2d Dep't 2005) (noting that counsel's wife's emergency dental treatment constituted good cause for failure to appear).

91. *See In re Premo v. Breslin*, 89 N.Y.2d 995, 996–97, 679 N.E.2d 630, 630, 657 N.Y.S.2d 391, 391 (1997).

92. *See Zanker-Nichols*, 127 A.D.3d at 1348, 7 N.Y.S.3d at 640; *ACS-NY*, 285 A.D.2d at 406–07, 727 N.Y.S.2d at 430–31; *Zeltser v. Sacerdote*, 24 A.D.3d 541, 542, 808 N.Y.S.2d 286, 286 (2d Dep't 2005).

93. *See* James C. Gacioch & David L. Ferstendig, Practice Insights, *The Price for Frivolous Conduct*, N.Y. CLS Desk Ed. Civil Practice Ann. § 8303-a, at 1-744 (2015).

94. *See England v. Gradowitz Bros. Realty Corp.*, 137 Misc. 2d 21, 21–24, 519 N.Y.S.2d 784, 784–85 (Sup. Ct. Bronx County 1987).

95. *See* CPLR 8303-a(a), (b).

96. *Patane v. Griffin*, 164 A.D.2d 192, 197, 562 N.Y.S.2d 1005, 1009 (3d Dep't 1990).

97. *Gordon v. Siben & Siben*, 146 Misc. 2d 553, 557, 558 N.Y.S.2d 439, 442 (2d Dep't 1990).

98. *Id.*, 558 N.Y.S.2d at 442.

99. *See Johnson v. Norris*, 216 A.D.2d 179, 179, 628 N.Y.S.2d 110, 110–11 (1st Dep't 1995).

100. Gen. Constr. Law § 25-b.

101. *See* CPLR 8303-a(a).

102. *Nyitray v. N.Y. Athletic Club in City of N.Y.*, 274 A.D.2d 326, 327, 712 N.Y.S.2d 89, 90 (1st Dep't 2000).

103. CPLR 8303-c(i), (ii).

104. *Id.*

105. *Galbo v. Plishkin, Rubano & Baum*, 197 A.D.2d 675, 676–77, 602 N.Y.S.2d 906, 906 (2d Dep't 1993).

106. CPLR 8303-a(a), (b).

107. *Zysk v. Kaufman, Borgeest & Ryan, LLP*, 53 A.D.3d 482, 483, 862 N.Y.S.2d 72, 73 (2d Dep't 2008).

108. CPLR 8303-a(b).

109. *Marcus v. Bressler*, 277 A.D.2d 108, 110, 716 N.Y.S.2d 395, 396 (1st Dep't 2000).

110. *Merritt v. Ramos*, 167 Misc. 2d 269, 272, 639 N.Y.S.2d 643, 646 (Civ. Ct. N.Y. County 1995); *Dunn v. Khan*, 2008 WL 1786986, at *3 (Sup. Ct. Nassau County Mar. 11, 2008); *Entertainment Partners Group*, 155 Misc. 2d at 898–99, 590 N.Y.S.2d at 982.

111. *See* CPLR 8303-a(c)(i).

112. *Johnson v. Norris*, 216 A.D.2d 179, 179, 628 N.Y.S.2d 110, 111 (1st Dep't 1995).

113. *Mitchell v. Herald Co.*, 137 A.D.2d 213, 219, 529 N.Y.S.2d 602, 606–07 (4th Dep't 1988).

114. *Forstman v. Arluck*, 149 Misc. 2d 929, 931, 566 N.Y.S.2d 462, 463 (Sup. Ct. Suffolk County 1991).

115. *Baxter v. Javier*, 109 A.D.3d 493, 495, 970 N.Y.S.2d 567, 570 (2d Dep't 2013).

116. *Nachbaur v. Am. Transit Ins. Co.*, 300 A.D.2d 74, 75, 752 N.Y.S.2d 605, 606 (1st Dep't 2002).

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NEW MEMBERS WELCOMED

FIRST DISTRICT
Matthew Aglialoro
Golriz Amid
Monica Faye Azare
John Anthony Benemerito
David A Brittenham
Ashley Robin Brown
Laurin Trisha Buettner
Christina Marie Cernak
Jeanyoung Cho
Jong Chul Chung
Dina Cohen
Courtney Leigh Connell
Alison Cullen
Jessica Margaret Curley
Alexander S. Dombroff
Anna E. Dwyer
Daniel M. Eisenberg
Bonnie D. Espino
Valerie Anne Fabbro
Peter Fields
Kate Fletcher
Aleesha Janelle Fowler
Scott Fryman
Thomas Gleason
Jessica Rose Goldberg
Julia Gregoire
Aram Gabriel Hanessian
Evan Michael Hess
Dennis Wayne Holmes
Ryan Kasdin
David Sassoon Khalily
Jacquelin Kim
Ryan C. Kirkpatrick
Erika Hannah Kolloori
Lisa Kopf Krizman
Katerina Veselinova Kurteva
Katherine Rachel Leisch
Alexander B. Litt
John S. MacGregor
Paul Anthony Magel
Rosanna Min Jee Mah
Peter H. Moulton
Meray Mia Muney
Maria B. Navarro
Marian B. Philips
Courtney L. Plavac
Christine Elizabeth Poile
Grant E. Reed
Jean Nicole Ripley
Eric H. Rosoff
Edi Rumano
Joseph John Sammarco
Abigail B. Schuster
Joshua A. Seidman
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Sarah E. Statz
Jessica Ray Stumacher
Eric Testerman
Michelle Torres
Shannon McKinley Traylor
Karina Vazirova
Derek A. West
Ethan Toren Wishnick
Melissa Anne Wollis
Yangming Xiao
Jie Xu
Skylar K. Yankowitz

SECOND DISTRICT
Alexandra Tracey Berke
Katarina Elizabeth Braafladt
Anna Broxmeyer
Olivia T. Canlas
Dominique Jenee Charles
Suzanne Marie Chilcote
Carlee Lynn Cooper
Kevin Gilbert Cooper
Joanna Elise Cuevas Ingram
Giorgi Dogonadze
Cesar Augusto Francia
Peter Bergen Franklin
Steven Ian Friedman
Taylor P. Gamble
Lara Glass
Nathalie Yliana Gonzalez
Lily C. Hall
Danielle Ophelia Hamilton
Eric C. Hassell
Melanie Anica Headley
Alice Mukai Henderson
Wilson James Holzhaeuser
Diane Nicole Johnston
Geoffrey Jason Kagan-Trenchard
Evan W. Kass
Warren Max Scott Klinger
Allen Kohn
Zachary John Fries Kolodin
Xiaoqin Li
Rui Liu
Sara Noble Maeder
Roger Daniel Maldonado
Karolina Maryniak
Jessica G. Mayer
Mindy Meyer
Sharon Miodovsky
Elisavet Mitsoglou
Timur Navruzov
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Matthew F. Paluch
Bradley James Pearson
Venese Noel Rhodes
Salar Donovan Rivani
Aliza Slansky
Kelly Elizabeth Sweeney
Peter Anthony Tomasino
Francisco X. Torres
David John Tucciarone
Rebecca Jean Turano
Rochel Leah Weissman
Mary Quirk Wolfe
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Michelle Yeung
Xuyang Yu
Kenneth Joseph Zweig

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Michael L. Goldstein
James A. Kirkwood
Thomas James Richards

FOURTH DISTRICT
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FIFTH DISTRICT
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SIXTH DISTRICT
Madison S. Marcus

SEVENTH DISTRICT
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David A. Westbrook
Megan Thibedeau Williams

NINTH DISTRICT
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Danielle L. Black
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Shannon T. H. Degnan
Alexander Fear
David A. Fries
Andrew P. Glikin-Gusinsky
Christina Elizabeth Holzer
John A. Kiselak
Kevin Michael Kitson
Miriam D. Lacroix
Seth Michael Levy
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Alexa Michelle Milchman
Jessica Montello
Andrew Newmark
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Yusuf T. Yusuf
Jimmy A. Zgheib

TENTH DISTRICT
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Michele Christine Antonelli
Spiros Avramidis
Mahdi Baharan
Dana Amber Brady
Sarah E. Budow
Sophia Louise Cahill
Marissa Caputo
Ashley Rivka Cohen
Jameson P. Connor
Julian Christopher Cordero
Steven Dalton
Stephen Joseph Deprima
David Joshua Feldman
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Nicole Gallo
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Brian Patrick Hodgkinson
Andrew Kamkar
Sohani Yeasmin Khan
Allison Lee
Richard P. Liebowitz
Benjamin Lomazow
Alexander T. Maimis
Amalia E. Makroglou
May M. Mansour
Allison Ann Milano
Nicholas Michael Minerva
Erin Mary O'Neill
Christopher Brian Padovano
Anshumn Parkash
Nilesh P. Patel
Kyle Pearce
Ilan David Peress
Heidi Anne Powers
Eric C. Ross
Sarah Ethel Ross
Jackeline Fiorella Saavedra-Arizaga
Elliot Schwab
Mikila J. Thompson
Harilaos Trahanas
Michael John Tsimaras
Stephanie Rose Tuorto
Gary Ernest Vegliante
Lawrence Michael Zacarese

ELEVENTH DISTRICT
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Jeffrey Gorak
Steven Ben Gordon
Devin Michael Grabarek
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Gabrielle Marie Guzman
Vannoroth Imm
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Rohit Kumar
Karina Y. Kwan
Steven J. Leporin
David Lifshitz
Qiang Liu
Matthew William Lizotte
Jacob Angel Malafsky
Kyle Sutcliffe Martin
Jay Richard Minga
Wayne F. Morgan
Agnieszka Magdalena Mycka
Ashley Starr Osadon
John Joshua Babao Rosario
Jingjing Sha
Naveed M. Siddiqi
Esta R. Tanenbaum
Pascale M. Thomas
Angel R. Vazquez
Martin Roy West
Benjamin John Yeamans
Yin Zong

THIRTEENTH DISTRICT
Caroline Betancourth
Dean Anthony Caruvana
Jeffrey M. Gibilaro
Eugene Goyfman
Danielle Vincenza Imbemba
Jubril Oladiran
Tara M. Pistilli

OUT OF STATE
Chioma Victoria Akukwe
Amy Beth Altman
Safwan Mudhafar Abdullah Amin
Wicki Andersen
Jarryd E. Anderson
Yoko Arisaka
Sara Katherine Atalay
Mohamed Adel Baba-aissa
Ioanna Bantouna
Seamus Patrick Barrett
Sandra M. Barsoum
Douglas Warren Baruch
Mark Basanta
Patti Hoskins Bass
Helen Becz
Brandi Marie Bennett
Bruce Phillip Bennett
Brittany Alexis Marie Berckes
Adriana Biscan
Rachel Bleshman
Sondra Spaulding Boddie
Orly Libi Boger
Brian Bolger
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2. Aeschylus, The Oresteia, trans. Robert Fagles (Viking Press 1977).

3. David Cohen, *Crime, Punishment and the Rule of Law in Classical Athens*, The Cambridge Companion to Ancient Greek Law, 213 (Cambridge 2005).

4. *Id.* at 219 (footnote omitted).

5. Martin Ostwald, From Popular Sovereignty to the Sovereignty of Law: Law, Society and Politics in Fifth-Century Athens (Berkeley 1986).

6. *Id.* at 9–12, 35.

7. *Id.* at 69.

8. William Shakespeare, The Merchant of Venice, ed. Barbara A. Mowat et al. (Simon & Schuster, 2010).

9. Stephen Greenblatt, Will in the World: How Shakespeare Became Shakespeare (W.W. Norton & Co. 2004).

10. Daniel Kornstein, Kill All the Lawyers? Shakespeare's Legal Appeal, 16–17 (U. of Neb. 2005).

11. The many aspects of *Merchant* are usually overshadowed by the question of whether Shakespeare was anti-Semitic. That is not the focus of this paper. The interested reader is referred to the following excellent work on the subject: James Shapiro, Shakespeare and the Jews (Columbia U. P. 1996).

12. This is how Laurence Olivier played the role in a television production I saw many years ago.

13. Kornstein, *supra* note 10, Ch. 4 *passim*.

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Continued from Page 58

117. *See Carver v. Apple Rubber Prod. Corp.*, 163 A.D.2d 849, 849–50, 558 N.Y.S.2d 379, 380 (4th Dep't 1990).

118. *See Rose Valley*, 191 A.D.2d at 874, 595 N.Y.S.2d at 123.

119. *Id.*, 595 N.Y.S.2d at 123.

120. *See Harley v. Druzba*, 169 A.D.2d 1001, 1002–03, 565 N.Y.S.2d 278, 280 (3d Dep't 1991).

121. *Saastomoinen v. Pagano*, 278 A.D.2d 218, 219, 717 N.Y.S.2d 274, 275 (2d Dep't 2000).

122. CPLR 8303-a(c)(i).

123. *Id.*

124. CPLR 8303-a(c)(ii).

125. *See Patane*, 164 A.D.2d at 197, 562 N.Y.S.2d at 1009.

126. CPLR 3126.

127. *Id.*

128. *See Taub v. Wulwick*, 168 A.D.2d 492, 492, N.Y.S.2d 734, 734 (2d Dep't 1991); *Mink v. Conifer Park*, 142 A.D.2d 899, 902, 531 N.Y.S.2d 400, 403 (3d Dep't 1988) (granting sanctions under CPLR 3126 for counsel's disruptive behavior at deposition).

129. The *Legal Writer* discussed spoliation of evidence at *Drafting New York Civil-Litigation Documents: Part XXIX — Disclosure Motions Continued*, 86 N.Y. St. B.J. 64, 58 (Jan. 2014).

130. *See, e.g.*, *Drafting New York Civil-Litigation Documents: Part XXVII — Disclosure Motions Continued*, 85 N.Y. St. B.J. 64, 57 (Nov./Dec. 2013).

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BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XLV — Motions for Sanctions and Related Costs

The *Legal Writer* continues its series on civil-litigation drafting. In the last two issues of the *Journal*, we discussed motions for attorney fees. In this issue, we'll discuss motions for sanctions.

Sanctions: An Overview

Sanctions in civil practice are "penalt[ies] or coercive measure[s] that [result] from failure to comply with a law, rule or order."[1] New York state courts have no inherent power to impose sanctions on litigants without an existing court rule or a statute authorizing sanctions.[2] To fill that gap, three rules authorize sanctions: 22 NYCRR Part 130, CPLR 8303-a, and CPLR 3126.

A finding that a party or attorney engaged in frivolous conduct might also justify an award of costs, which are meant to "reimburse[] for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct."[3] Costs imposed under 22 NYCRR 130-1.1 are different from costs, fees, and disbursements awarded under CPLR Articles 81–85. One major difference between costs under Rule 130-1.1 and costs under the CPLR is that under the former rule, costs may be awarded only for frivolous conduct.

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This issue's column explains how to move for and oppose motions for sanctions and costs related to sanctions.

22 NYCRR 130-1.1

Overview

Part 130 of the Rules of the Chief Administrator of the Courts became effective in 1989.[4] Rule 130-1.1 permits courts to sanction or impose costs on any party or attorney for frivolous conduct in any action or proceeding.[5] Rule 130-1.1 applies to all "frivolous conduct" in all types of civil litigation,[6] except for frivolous conduct in personal-injury suits under CPLR 8303-a,[7] Small Claims Court actions,[8] and some Family Court proceedings.[9]

Rule 130-1.1 has compensatory and punitive aspects.[10] Under Rule 130-1.1, a court may impose costs to reimburse expenses and attorney fees resulting from the offending party's or attorney's frivolous conduct.[11] The costs go to the party or lawyer harmed by the frivolous conduct.[12] Additionally, or alternatively, sanctions may be awarded as a punitive charge to punish the offending party or attorney who committed the frivolous conduct.[13]

Costs and sanctions under Rule 130-1.1 are awarded at the court's discretion; they aren't mandatory.[14] A non-offending party may move or cross-move for sanctions.[15] A court may also impose them sua sponte.[16]

Although costs are awarded to the prevailing party, an attorney sanctioned under Rule 130-1.1 must pay the sanction to the Lawyers' Fund for Client Protection,[17] located in Albany. A party who's not an attorney must pay the sanction to the clerk of the court for transmittal to the New York State Commissioner of Taxation and Finance.[18] For a Rule 130-1.1 sanctions or costs motion to be granted and imposed on a non-moving party, the court must write a decision "setting forth the conduct on which the award or imposition is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded or imposed to be appropriate."[19]

> Don't rely on the court to impose sanctions on an offending party sua sponte. Move for sanctions yourself.

Under Rule 130-1.2, sanctions may not exceed $10,000 "for any single occurrence of frivolous conduct," but no limit exists on the costs a court may impose on an offending party.[20] Costs are not included in the $10,000 maximum imposable as a sanction. In justifying an award of costs and sanctions under Rule 130-1.1, a court may consider counsel's age, experience, and income.[21]

For the court to grant a motion for sanctions or costs, the nonmoving party must have a reasonable opportunity to be heard.[22] Courts have interpreted the opportunity to be heard to mean that if a motion for sanctions is made, the return date of the motion is the hearing.[23] A formal testimonial

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