NEW YORK STATE BAR ASSOCIATION

Journal

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CONTENTS

MAY 2016

RETROACTIVE LAW MAKES WRONGFUL CONVICTION COMPENSATION TAX-FREE

BY ROBERT W. WOOD

10

DEPARTMENTS

The *Journal* welcomes articles from members of the legal profession on subjects of interest to New York State lawyers. Views expressed in articles or letters published are the authors' only and are not to be attributed to the *Journal*, its editors or the Association unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. Contact the editor-in-chief or managing editor for submission guidelines. Material accepted by the Association may be published or made available through print, film, electronically and/or other media.

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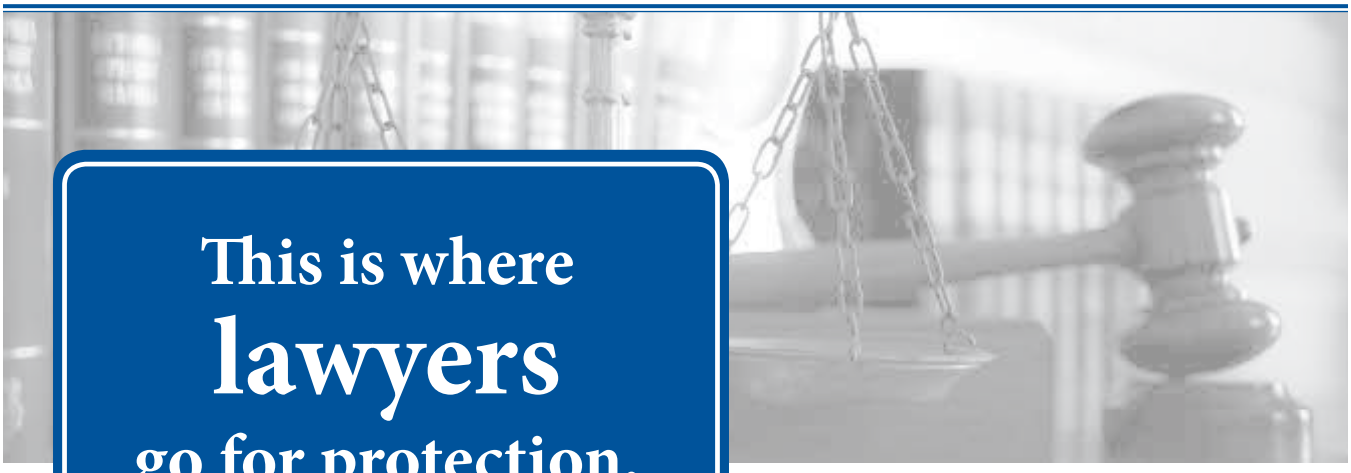

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DAVID P. MIRANDA

Lawyers Must Protect the Public We Serve

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The Real Justice Gap

When we discuss the lack of availability of legal services to those who need them, often referred to as the "justice gap," we generally think of it in the context of providing pro bono legal services to the poor. However, the public, lawyers and the organized bar are faced with another, perhaps more difficult, gap – non-lawyer entrepreneurs attempting to make a profit on the backs of solo and small firm attorneys seeking work, and a public that wants easy answers to legal issues.

Increasingly our profession and the public we serve are threatened by non-lawyer "legal services" businesses that not only demean the profession, but also diminish the complexity and nuances of providing competent and effective legal services and reduce the attorney-client relationship to an online form that needs to be completed. Although these services claim to be innovative, they subvert the fundamental principles of our profession.

The New York State Bar Association and our profession have worked hard to help address the real justice gap for the poor and underserved. We make great efforts, working with our sister bars, pro bono legal service organizations and the courts to help address legal needs of the poor in this state. Our Association has three new staff members whose responsibilities include the promotion and coordination of pro bono activities, and we're partnering with the ABA to provide a justice portal to find new ways to deliver limited scope pro bono legal services via the Internet and email. We have taken the lead in looking to establish a statewide justice center in Albany to help coordinate and facilitate pro bono activities statewide. We also continue our longstanding and steadfast advocacy for increases in our state's budget to fully fund the judiciary and for legal services initiatives.

But there is also the second "justice gap" for lower and middle income New Yorkers with some resources to pay for legal services. This gap is frustrating because many attorneys, especially those who are newly admitted or who practice as solos or in small firms, report difficulty finding new ways to connect with clients. Along with other bar associations, NYSBA is working on enhancing our lawyer referral service to provide support to all attorneys, focusing on solo and small firms.

The legal profession and the organized bar must use the collective strength of their resources and expertise to address this issue. We must work together to support struggling attorneys and connect them with a public that seeks access to affordable legal services. Some argue we should let our profession be co-opted by the influx of venture capitalists and internet entrepreneurs purporting to "market" legal services without being encumbered by rules of professional conduct or the various laws that apply to our profession. Each year hundreds of millions of dollars of venture capital are poured into non-lawyer legal service technology companies; well over 1,000 legal tech start-up companies are selling legal services to the public, and their numbers are growing.

These companies started on the fringe of what might be considered legal services by offering legal forms that customers could purchase and complete themselves, or easy-to-use electronic databases where listings of attorney contact information could be found. They have attracted millions of dollars of venture capital, not to help close the justice gap for the poor, but to profit from consumers who can afford to pay for legal services. Operating mostly unfettered, they have blossomed into marketing machines for legal services and legal advice, furnishing attorneys for legal services. Two of the most aggressive and well-funded of these companies are LegalZoom and Avvo.

LegalZoom began as a legal forms service and is now offering attorney consultations and legal plans. For about $10 a month, consumers can sign a contract for unlimited 30-minute attorney consultations on new or "unique" legal matters. It also offers fixed-rate services

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such as a $39 living will with review by a "document specialist" or a $149 estate plan bundle that includes a year's worth of "attorney advice." It is not a law firm, but it has thousands of attorneys willing to pay for the referrals they receive.

Avvo started as an attorney directory and rating service. It now furnishes lawyers for a fee. Lawyers who agree to work to Avvo's terms and conditions will be referred to perform document review or start-to-finish services. Avvo has recently launched a free legal forms service, with the option to click a button and chat for a fee with a practicing attorney. The consumer pays Avvo directly; Avvo holds the money until the work is completed and Avvo then deposits the money into the attorney's Avvo account, taking back what it calls a "marketing fee."

These new practices raise many concerns: compliance with laws regulating legal advertising; the line drawn between "marketing" and "fee-splitting"; can a non-lawyer corporation provide legal services; is it permissible for a business to act as a referral service; can a business charge fees to refer clients to lawyers?

Businesses Advertising Legal Services

The well-funded marketing campaigns of non-lawyer legal service businesses employ a tone that is both bold and deliberately vague. They offer legal services. They are simply facilitators so attorneys and clients can find each other. They furnish legal help. They do not furnish legal help. They give legal advice. They do not give legal advice. They create one impression to an unknowing public. They include disclaimers for the regulators.

LegalZoom provides a small-print disclaimer on its site, "We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies." Its marketing campaign aims to create a very different impression: "Whatever your legal need, we have an answer. Let us help you protect all that matters easily and affordably" and "LLC Documents Created by Top Attorneys – Up-to-Date Legal Documents. Our attorneys continually maintain our documents to be up to date with the latest legal requirements in each state."

Avvo's website features: "Fixed-fee legal services. Choose your lawyer. Choose your service. Satisfaction guaranteed." "Free Q&A with Attorneys." "Every 5 seconds someone gets free legal advice from Avvo." Its tagline: "Legal. Easier."

This advertising if used by a lawyer, or to market a law firm, might put the lawyer on the wrong side of the Rules of Professional Conduct.

For example, Rule 7.1(a) "Advertising" states: "(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading." Thus, advertising that is not false violates this Rule if it is deceptive or misleading.

Rule 8.4(a), entitled "Misconduct," states: "A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Consequently, if advertising is deceptive or misleading, responsibility falls on the attorney.

These businesses claim the Rules of Professional Conduct do not apply to them because they are non-lawyer corporations, not law firms. However, even if they are correct, New York's Judiciary Law § 495, prohibiting non-lawyer corporations from furnishing legal services, clearly applies.

Judiciary Law § 495

No Corporation Shall Furnish Attorneys or Counsel

There is some debate about whether what these businesses are doing constitutes the unauthorized practice of law. By their own account, they have licensed attorneys that perform the legal work. They purport to maintain an arm's length distance from the actual attorney performing the actual representation, but their business collects the fee and controls its distribution.

Several options for fixed-fee services are offered: document provision only; document service with review by a non-lawyer "document specialist" of unknown experience; more expensive attorney review. However, as noted above, these businesses imply in their advertising and promotions that they are offering legal services.

Even if these businesses are not in violation of our ethics rules, they may be in violation of N.Y. Judiciary Law § 495(1) which provides:

> No corporation or voluntary association shall . . . (c) . . . render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor (f) assume in any other manner to be entitled to practice law, . . . nor (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.

If these businesses are found to be "rendering legal services or advice" or "furnishing attorneys or counsel," then they would be in violation of this section. If not, it would seem that New York's broader false advertising laws would be implicated.

Fee Splitting with Non-lawyers

These businesses often offer fixed-rate, flat-fee consultations and services, as well as hourly based fee plans. For example, consumers seeking services through Avvo go to the company website and are steered toward a list of attorneys in their geographic and practice area.

After an introductory discussion between the consumer and the lawyer, if the lawyer is hired, the company immediately collects the fee, retaining the entire fee until the representation is completed. Pricing depends on the service the client wants, and the company's cut depends on the cost of the legal service. After the representation has ended,

the company transfers the balance of the payment into the attorney's assigned account and, at the same time, directly withdraws its "marketing" fee.

A lawyer may pay a business for advertising; however, fee-splitting violates Rule 5.4, entitled "Professional Independence of a Lawyer." This Rule states: "A lawyer or law firm shall not share legal fees with a non-lawyer."

A recent NYSBA Ethics Opinion, No. 1081, from January of this year, discussed the topic, where lawyers were employees of the non-lawyer company:

> Rule 5.4 contains a number of provisions intended to ensure the professional independence of a lawyer. . . . Rule 5.4(a) provides that a lawyer "shall not share legal fees with a nonlawyer". . . . If the Company's clients are paying the Company for legal services rendered by the inquirers, then the inquirers would be violating Rule 5.4(a).

Avvo and other companies reject the idea that they are engaging in fee-splitting, claiming that they are merely charging a marketing fee.

For example, Avvo claims it "is not referring people to a particular lawyer"; the client makes the choice. However, the choices are limited to those attorneys in a particular geographic area who have agreed to pay Avvo's "marketing" fee if they take on a representation. However, since Avvo rates all lawyers, regardless of whether any individual lawyer consents to the service, there is an implication that all lawyers are on the list of available attorneys.

There are two important factors when considering the ethics of fee-splitting in New York. First, does the marketing fee increase depend on the dollar value of the representation? Second, are these fees more like referral fees than marketing fees?

NYSBA Ethics Opinion No. 976 discussed the issue regarding an arrangement between a law firm and a non-legal service provider in relation to mortgage related referrals, where the fee paid, at least in part, would be based on success:

> The firm may legitimately provide benefits to the Company for marketing and lien services, but if the benefits are also to reward referrals, then it is difficult to harmonize the arrangement with Rule 7.2(a).

Rule 7.2(a), cited in the opinion, states:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . .

Significantly, Comment [1] to this Rule adds:

> [1] [L]awyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer.

The opinion also notes the existence of Judiciary Law § 482, which states:

> It shall be unlawful for an attorney to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business or the procurement through solicitation either directly or indirectly of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services.

This law survived a challenge in *People v. Hankin*, 182 Misc. 2d 1003 (Sup. Ct., App. Term 1999), where the court ruled the statute did not unconstitutionally restrict commercial speech.

NYSBA Ethics Opinion No. 887 also clarified Rule 7.2, stating that the Rule prohibits a lawyer from offering bonus compensation to an employee who is a non-lawyer marketer "based on referrals of particular matters . . . [or] . . . the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts." In other words, marketing fees cannot be paid based on the dollar value of a representation or per representation that an attorney gets through the marketer. As for referrals, Rule 7.2(b) limits approved lawyer referral programs, including legal aid, public defender office or military legal assistance office; or a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule. Notably, for-profit corporate entities are not included among authorized law referral providers.

Impact on the Public and the Profession

The Rules of Professional Conduct are in place not to protect lawyers, but the public from unscrupulous lawyers who fail to meet the highest standards that we expect from officers of the court and defenders of justice. The Judiciary Law is in place to prevent unregulated non-lawyers from preying on an unknowing public.

Non-lawyers are not required to adhere to the Rules of Professional Conduct or the core principles of our profession. They are not bound by our ethics rules. They do not check for conflicts of interest. They do not have a duty of competent advocacy. They do not go to law school or pass the bar exam. They are not officers of the court.

Our Rules of Professional Conduct reflect the core values of our profession and they are designed to protect the public we are all privileged and licensed to serve. As attorneys we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. In our country, lawyers must complete a rigorous education just to be permitted to sit for a bar exam. Our system of examination to test knowledge and competency, determination of character and fitness, and adherence to a prescribed set of rules of professional conduct throughout an attorney's tenure not only serves to protect the public from untrained and unscrupulous would-be practitioners, but also far surpasses what is required to start a business.

Change to our profession should not come from profit-seeking entrepreneurs unencumbered by rules of ethical conduct and responsibility. It remains incumbent on us as attorneys and the organized bar to remain guided by rules of professional responsibility to find ethical and responsible ways to use new technologies to help attorneys better connect with and serve their clients. ■

NYSBACLE

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

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CPLR Update 2016
(5:30 p.m. – 9:10 p.m.)
May 19 New York City

Understanding State and Federal Retirement Plans in Matrimonial Disputes
(9:00 a.m. – 1:05 p.m.)
May 13 Albany
May 20 Rochester, Westchester
June 3 New York City
June 10 Long Island

What You Need to Know as a Guardian Ad Litem
(9:00 a.m. – 1:00 p.m.)
May 17 Long Island
May 18 Syracuse
May 19 Albany, Rochester
May 26 New York City

DWI on Trial – Big Apple XVI
(live & webcast)
May 18 New York City

Insurance Coverage 2016
May 20 New York City
June 3 Buffalo, Long Island
June 17 Albany

Superior Legal Writing Bootcamp for Transactional Attorneys
(live & webcast)
May 24 New York City

Superior Legal Writing Bootcamp for Litigators
(live & webcast)
May 25 New York City

Look Up in the Sky: How Will New York Regulate Drones
(1:00 a.m. – 2:00 p.m., live & webcast)
June 1 Albany

Medical Malpractice Litigation 2016
June 10 Buffalo

Debt Collection & the Enforcement of Money Judgments 2016
June 7 Albany, Long Island, Syracuse
June 8 Westchester
June 9 New York City

Introduction to Entertainment Law
(live & webcast)
June 8 New York City

Public Sector Labor Relations: Practicing Before PERB & OCB
(live & webcast)
June 10 Albany

Representing the Unmarried Couple: Tips for the Trusts & Estates and Elder Law Practitioner
(9:00 a.m. – 12:45 p.m., live & webcast)
June 14 New York City

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Ethics 2016: The Continuing Evolution of the Rules of Professional Conduct

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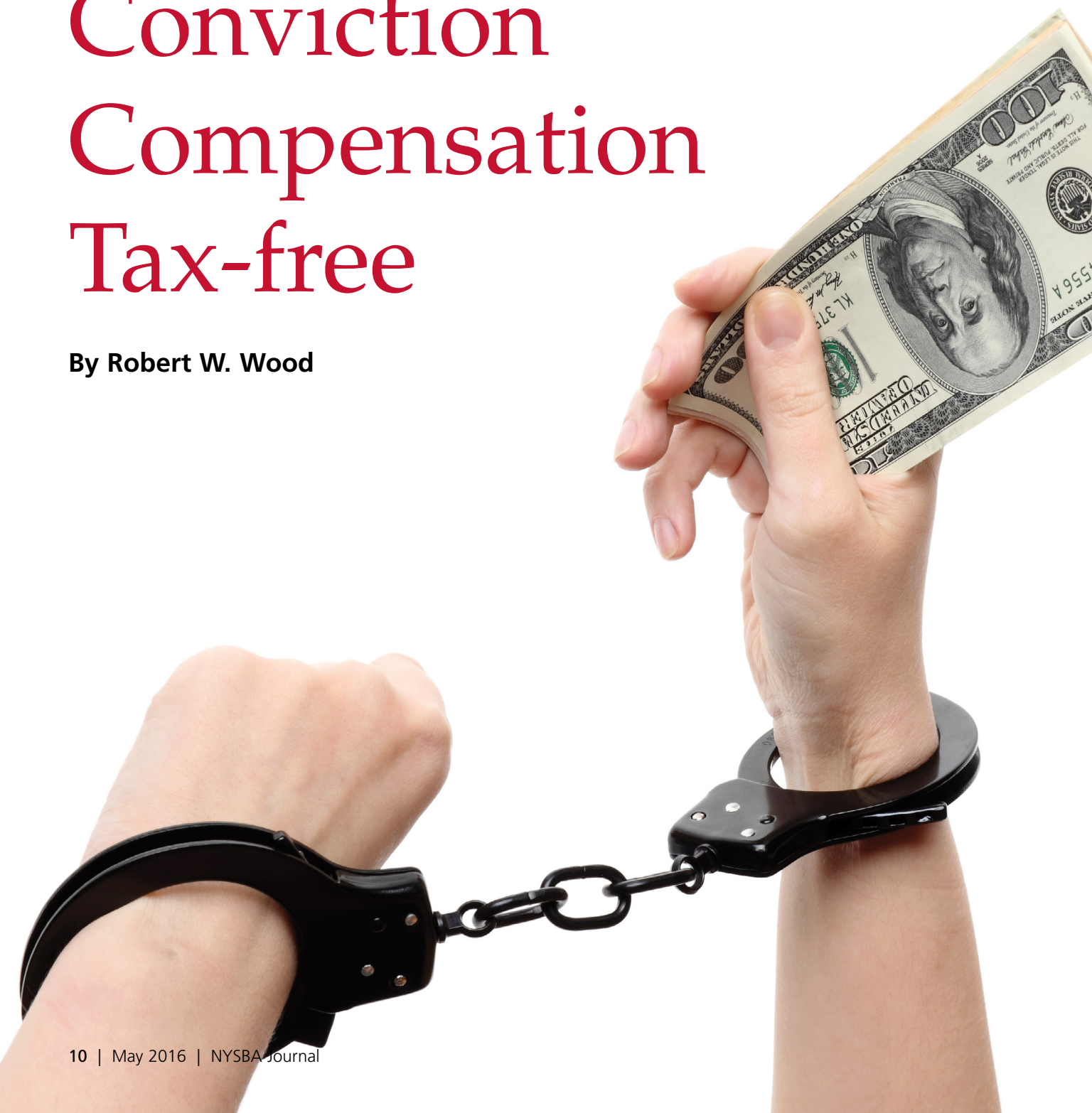
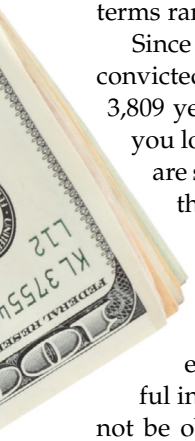
Retroactive Law Makes Wrongful Conviction Compensation Tax-free

By Robert W. Wood



Arguably one of the best and brightest changes to the tax code in the massive tax bill passed at the end of 2015 is something that for years was proposed as the stand-alone "Wrongful Convictions Tax Relief Act."[1] Unlike many other tax changes, you do not want this to apply to you. After all, if it does, you were wrongfully convicted and wrongfully behind bars, probably for many years.

Few of us can imagine what it would be like to be convicted and imprisoned for crimes we did not commit. In the U.S., individuals who were wrongfully convicted and exonerated by DNA evidence spent an average of 13.5 years wrongfully incarcerated. Their actual prison terms range up to 35 years.



Since the first DNA exoneration in 1989, wrongfully convicted persons have collectively served more than 3,809 years in prison before being exonerated. Whether you look at an individual case or at the averages, these are some astounding numbers. The new law amends the Internal Revenue Code so that a wrongfully incarcerated individual can exclude his or her recovery.

The exclusion applies to the civil damages, restitution, or other monetary awards an exoneree receives as compensation for a wrongful incarceration. Several points are notable, and may not be obvious. First, it may even cover punitive damages, a topic discussed below.

Second, it covers only exonerees. Thus, it does not apply to a false imprisonment recovery – or any other claim – by a person who may have been mistreated but is not later found to actually be innocent. The exoneration is a legal requirement for the tax exclusion to apply.

Thirty states, the District of Columbia, and the federal government provide some form of statutory compensation for wrongful conviction and incarceration. Some plaintiffs sue in state court under a state wrongful incarceration statute, in federal court for violation of civil rights, or in state court for the torts of false imprisonment or malicious prosecution. The states vary in the maximum amount of their payout, and in the means used to measure the awards.[2]

Some states include lost wages in addition to the compensation otherwise provided by the statute.[3] Apart from state statutes, there is also a federal statute.[4] The federal statute was originally enacted in 1948 and was later substantially revised by the Innocence Protection Act of 2004, part of the Justice for All Act of 2004 (JFAA).[5] In addition to state and federal statutes of general application, some state legislatures have weighed in with targeted legislation to compensate a particular wronged person.[6]

Robert W. Wood is a tax lawyer with www.WoodLLP.com, and the author of numerous tax books including *Taxation of Damage Awards & Settlement Payments* (www.TaxInstitute.com). This discussion is not intended as legal advice.

Tax Questions

Few people have argued that these recoveries should be taxed, but there has been no clear exemption. Our justice system is complex, and sometimes gross injustices occur. When they do and are eventually rectified, the person is never the same. This includes re-entry needs that are hard to comprehend.

For those who do end up with money to help pay for their ordeal, adding IRS collectors into the mix can be salt in the wounds. And not every exoneree is well advised or equipped to handle a query from the IRS about a legal settlement. Yet until now, the tax issues have been surprisingly cloudy.

The IRS issued a series of rulings in the 1950s and 1960s involving prisoners of war, civilian internees and holocaust survivors.[7] Sensibly, the IRS ruled that their compensation was tax-free irrespective of whether they suffered physical injuries. Then the IRS "obsoleted" these rulings in 2007, suggesting that the landscape had changed.[8]

Section 104 was amended in 1996, but these 1950s and 1960s rulings were not based on § 104. Meanwhile, the Tax Court and the Sixth Circuit found a false imprisonment recovery to be taxable in *Stadnyk*.[9] It was a very short term incarceration case, but suggested continuing adherence to the canard that "there must *also* be physical injury."[10]

If so, the damages are tax-free as with more garden variety personal physical injury recoveries. If an inmate was seriously injured in prison, § 104 might exclude the entire recovery. Yet even then, normal IRS rules would suggest allocating the recovery between amounts that are tax-free and those that are not.

Indeed, in some cases the plaintiff is never physically injured despite physical confinement. If the § 104 model was not too helpful in excluding an entire recovery, perhaps one could rely on the non-statutory general welfare exception? After all, the government is typically paying the money.

Moreover, the government is paying someone for depriving him or her of his or her freedom and welfare.[11] Unfortunately, little attention is usually given to the general welfare exception. That brings us back to the uneasy topic of § 104.

As the voluminous § 104 authorities make clear, the statute's post-1996 iteration requires that the payment be made on account of physical injuries, sickness or related emotional distress. If a payment is for emotional distress *not* arising out the physical injuries or physical sickness, then tax applies.[12] This invites discussion over just *why* the payment is being made, or more exactly in the language of the statute, "on account of" what the payment is made.

The payment may be for a mix of damages, including loss of freedom, loss of career, loss of consortium, familial association, reputation, emotional distress and more. The

exoneree may have been beaten, roughed up, subjected to inadequate medical treatment and more. These latter items often become the hook on which we hang tax-free treatment.

Positions vary on whether one should allocate monies between these pure physical elements and the more generic wrongful imprisonment damages. Tax lawyers are inclined to allocate. In the IRS "bruise" ruling, the IRS says that all of the damages in a sex harassment case leading up to the "First Pain Incident" are taxable.[13]

All of the damages (including emotional distress damages) accruing after the First Pain Incident are tax-free. Does the sex harassment case discussed in the bruise ruling have a wrongful imprisonment analog? If so, it would perhaps be a case in which a person is wrongfully arrested, convicted and imprisoned for say 10 years before being exonerated and released.

This IRS ruling said only that a victim of wrongful imprisonment who "suffered physical injuries and physical sickness while incarcerated" can exclude his recovery from taxes. If the exoneree had physical injuries, the damages are tax-free, just like personal physical injury recoveries. If not . . . well, we don't like to talk about that one.

There are usually significant levels of physical injuries and sickness in long-term wrongful imprisonment cases. For that reason, as a practical matter, we tend to use a hook for tax-free treatment that we know appeals to the IRS. But is that really why the victim is getting most of the money? Usually, no.

It may be difficult or even impossible to separate out all of the multiple levels of horror, all the losses that can never be made up. But in many cases, the loss of physical freedom and civil rights is at the root of the need for reparations. Although I commended the IRS for saying what it did say in IRS Chief Counsel Advice 201045023, it did not solve all the issues.

The new law says you no longer have to prove that you were physically injured in prison to get tax-free treatment.

Suppose it is five years into his sentence before he is assaulted and beaten, hurt in a botched operation in the prison hospital, or experiences some other "First Pain Incident." Does that mean all of his recovery attributable to the time *before* the First Pain Incident is taxable? To me, the loss of liberty and physical confinement is *itself* a physical injury within the meaning of § 104.

However, that view was hard to square with the authorities. Indeed, in *Stadnyk v. Commissioner*,[14] the Tax Court and the Sixth Circuit ruled that physical restraint and physical detention are not "physical injuries" for purposes of § 104(a)(2).

Mrs. Stadnyk was held at a local sheriff's office for approximately eight hours. She was handcuffed, photographed, confined to a holding area, and searched via pat-down. She suffered no observable bodily harm, and she admitted she was never injured or even roughed up. The Tax Court concluded that the deprivation of personal freedom is not a physical injury for purposes of § 104(a)(2).

The Sixth Circuit affirmed, noting that while false imprisonment involves a physical act – restraining the victim's freedom – it does not mean that the victim is *necessarily* physically injured as a result.[15] The issue came up in the Regulation hearing on the § 104 regulations in February 2010. Then, the IRS published Chief Counsel Advice 201045023.[16]

Chief Counsel Advice 201045023 does not attempt to allocate an amount paid under the state statute between the payment for physical injuries and sickness and the other damages. I applaud that treatment, for I don't think the "First Pain Incident" analog made sense in this context. Perhaps the IRS did not either.

The state statute in the Chief Counsel Advice awarded money based on tenure in prison with a kind of *per diem* approach. The fact that the IRS does not broach the allocation point might mean that it views the money as all for the physical injuries and sickness. It might mean that the time-based payment is carried along with the physical injury payment.

It might even mean that the time-based payment on its own would be tax-free, though the latter seems the least likely meaning. In any case, the IRS does not attempt to parse the recovery in Chief Counsel Advice 201045023. Still, what of an exoneree who spends years in prison but, like Mrs. Stadnyk, says he was never roughed up, never beaten, never given inadequate medical care?

New Day

With the new legislation, these recoveries are now tax-free, even retroactively. Congressmen Sam Johnson

(R-TX) and John Larson (D-CT) introduced their bill repeatedly. In 2015, they re-introduced the Wrongful Convictions Tax Relief Act. Several members of the Senate, including Charles Schumer (D-NY) and John Cornyn (R-TX), joined in.

The new law says you no longer have to prove that you were physically injured in prison to get tax-free treatment. You also no longer have to fudge the allocation of the money. You no longer need to suggest that you received millions for getting stabbed or beaten up while in prison, and nothing for spending 15 years wrongfully behind bars.

The Wrongful Convictions Tax Relief Act allows exonerees to keep their awards tax-free. According to Congressman Larson, "Though we can never give the wrongfully convicted the time back that they've had taken from them, they certainly shouldn't have to pay Uncle Sam a share of any compensation they're awarded. This bill will make sure they don't have to suffer that insult on top of their injury."[17]

Section 139F of the tax code now provides that:

> In the case of any wrongfully incarcerated individual, gross income shall not include any civil damages, restitution, or other monetary award (including compensatory or statutory damages and restitution imposed in a criminal matter) relating to the incarceration of such individual for the covered offense for which such individual was convicted.

As you might expect in any tax code section, there are definitions. A "wrongfully incarcerated individual" means an individual who was convicted of a covered offense, who served all or part of a sentence of imprisonment relating to that covered offense, and:

> (A) who was pardoned, granted clemency, or granted amnesty for that covered offense because that individual was innocent of that covered offense, or
> (B) (i) for whom the judgment of conviction for that covered offense was reversed or vacated, and (ii) for whom the indictment, information, or other accusatory instrument for that covered offense was dismissed or who was found not guilty at a new trial after the judgment of conviction for that covered offense was reversed or vacated.

Finally, a "covered offense" means any criminal offense under federal or state law, and includes any criminal offense arising from the same course of conduct as that criminal offense.

The law has an unusual effective date. At first, it even seems hard to understand: "The amendments made by this section shall apply to taxable years beginning before, on, or after the date of the enactment of this Act." Then, the provision goes on to include a waiver of the statute of limitations:

> If the credit or refund of any overpayment of tax resulting from the application of this Act to a period before the date of enactment of this Act is prevented as of such date by the operation of any law or rule of law (including res judicata), such credit or refund may nevertheless be allowed or made if the claim therefor is filed before the close of the 1-year period beginning on the date of the enactment of this Act.

Punitive Damages

Does the new law cover punitive damages as well as compensatory ones? That is an interesting question. One might note that new code § 139F itself does not say that punitive damages are taxed. That is a contrast from § 104, which makes that point explicit.

Perhaps that means that § 139F excludes any punitive damages too. It appears that some people are reading the law in this way.[18] On the other hand, there is also nothing in § 139F to expressly state that punitive damages are tax-free.

One can argue – as the IRS has in the past – that punitive damages are by definition not to compensate the plaintiff for anything. Punitive damages are to punish. That would suggest, as the Supreme Court held in *O'Gilvie*,[19] that punitive damages are not compensating for an injury and therefore cannot be tax-free.

This may be an academic point unless and until an exoneree receives punitive damages. But that does not seem out of the realm of possibility. And it seems easy to imagine the taxpayer and the IRS disagreeing over this.

Structured Settlements

With many physical injury cases, the plaintiff may want to "structure" all of a part of his recovery. Section 104 clearly contemplates this. Section 104 says that the damages are tax-free in a lump-sum or in periodic payments.

With periodic payments, 100 percent of each payment will be tax-free. This is so even though a portion of those periodic payments could be viewed as investment return on the lawsuit proceeds. The plaintiff only wants to be sure that he will receive all of the promised payments over time, and that each payment is tax-free.

But the mechanics are complex. Defendants want to pay a lump-sum, and no plaintiff would want to rely upon the defendant to pay like clockwork over time. Accordingly, insurance companies that write structured settlement annuities fill the void.

The defendant or insurer transfers the obligation to an assignment company which will make the payments to the plaintiff. If the assignment qualifies under § 130, the assignment company is sure that the payment it receives is not income for federal income tax purposes. Even with § 139F, however, it is unclear how wrongful conviction recoveries will be structured from now on.

Up until now, the settlement agreement and structure documents in a wrongful conviction settlement would refer to §§ 104 and 130. Now, unless one continues to use personal physical injury language and to rely on §§ 104 and 130, there will be a mismatch. That is, § 139F does not work in tandem with § 130.

This may be a mere technical glitch that can be overcome in one of several ways. But it may be causing some worries. One suggestion I recently heard was to use non-qualified structured annuities, of the same type one would employ for taxable periodic payments.

On first blush, this strikes me as a terrible idea. First, it will dramatically limit the number of companies that can write the annuities. There are approximately 15 big life insurance companies that write qualified (§ 130) annuities. There are approximately two that write non-qualified ones.

Even worse, it sets up the protocol for taxable payments with a Form 1099 every year to the plaintiff. Perhaps there are ways to counteract that. And if the IRS later tries to tax the payments, presumably § 139F would be sufficiently clear that the IRS should go away.

However, this could lead to administrative tax problems galore. It seems like an unfortunate train to set off down the tracks, particularly with insurance products and companies that are not used to altering their Form 1099 protocols. They issue Forms 1099 in non-qualified cases, and that is likely to be that.

Conclusion

The tax code does not always make sense. And it is not always clear. The origin of the claim doctrine is the hallmark of taxing litigation recoveries, but it is often more thematic than conclusive. For many litigants who receive damages, there is often ambiguity.

There may be disputes about the facts, pleadings, resolution of the case, and about the application of the tax law as well. Sometimes, tax returns must be examined, litigation documents must be exhumed, and there will be tax disputes. The tax law and the IRS may apply their own imprint on the dispute that went before.

With wrongful conviction recoveries, though, it is now clear that lump sums or periodic payments are tax-free. There may be a few definitional issues in the future, and it seems conceivable that punitive damages may become a bone of contention. Furthermore, there may be some changes in the structured settlement field. But this is a very good change in the law. ■

1. Public Law No. 114-113 at § 304 (2015).

2. For a comprehensive list, see the database provided by the Innocence Project, www.innocenceproject.org/how-is-your-state-doing.

3. *See, e.g.*, Iowa Code § 663A.1; Ohio Revised Code Ann. 2743.48.

4. 28 U.S.C. §§ 1495 and 2513.

5. Public Law 108-405, 118 Stat. 2293.

6. *See, e.g.*, Cal. Rev. & Tax Code § 17156, providing for exclusion from income for the $620,000 paid by the state of California to Kevin Lee Green as compensation for 17 years of wrongful imprisonment.

7. Rev. Rul. 55-132, 1955-1 C.B. 213; Rev. Rul. 56-462, 1956-2 C.B. 20; Rev. Rul. 56-518, 1956-2 C.B. 25; Rev. Rul. 58-370, 1958-2 C.B. 14.

8. Rev. Rul. 2007-14, 2007-12 IRB 747, Doc 2007-4230, 2007 TNT 34-15.

9. T.C. Memo 2008-289, *aff'd without published opinion* (6th Cir. 2010).

10. *But see* comments of Mike Montemurro, branch chief of the IRS Office of Associate Chief Counsel for Income Tax and Accounting, Public Hearing on Proposed Regulations, 26 C.F.R. pt. 301, "Damages Received on Account of Personal Physical Injuries or Physical Sickness," (Reg-127270-06), Feb. 23, 2010: "I mean I don't know that the Service has ever gone to court on litigation, you know, I know the Service doesn't ever go to court on litigation, [regarding] anybody who's been falsely imprisoned or anyone who's suffered any sex abuse, as far as asserted in a courtroom that those kinds of damages are taxable, I mean whatever the pure technical answers may be." at p.10, Doc 2010-4501, or 2010 TNT 41-15.

11. Wood, *Are False Imprisonment Recoveries Taxable?*, Vol. 119, No. 3, Tax Notes (Apr. 21, 2008), at p. 287. For more general information on the general welfare exception, see Wood, *The Evergreen General Welfare Exception*, Vol. 126, No. 10, Tax Notes (Mar. 8, 2010), p. 1271; Wood, *Updating General Welfare Exception Authorities*, Vol. 123, No. 12, Tax Notes (June 22, 2009), p. 1443.

12. *See* H.R. Conf. Rep. No. 104-737, 104th Cong., 2d Sess., p. 301 (1996).

13. Letter Ruling 200041022 (July 17, 2000).

14. T.C. Memo 2008-289, *aff'd without published opinion* (6th Cir. 2010).

15. *Id.* (italics in original). For more on *Stadnyk*, see Wood, *Why the Stadnyk Case on False Imprisonment Is a Lemon*, Vol. 127, No. 1, Tax Notes (April 5, 2010), p. 115.

16. Nov. 4, 2010.

17. *See* Press Release, "Congressmen Sam Johnson and John Larson introduce legislation to assist those wrongfully convicted" (March 22, 2012), http://samjohnson.house.gov/news/documentsingle.aspx?DocumentID=286340.

18. RIA's Complete Analysis of the Protecting Americans From Tax Hikes Act of 2015, Other Tax Provisions of the Consolidated Appropriations Act, 2016, and Earlier 2015 Tax and Pension Acts, Chapter 100 at ¶ 120, Damages for wrongful incarceration are excluded from gross income; available on Checkpoint.

19. 519 U.S. 79 (1996).

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Two Different Worlds

Introduction

Last month's column discussed the December 15, 2015, decision from the Court of Appeals in *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*,[1] where the Court confronted, for the first time, spoliation of electronically stored information (ESI). *Pegasus* resoundingly ratified the First Department's 2012 decision in *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*,[2] which in turn adopted the holdings of SDNY's Judge Shira Sheindlin's 2003 decision in *Zubulake v. UBS Warburg LLC*.[3]

However, effective December 1, 2015, there were a number of significant changes to the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and changes to Fed. R. Civ. P. 37 significantly altered what had been, in many important ways, the *Zubulake* landscape in federal court.

The New Fed. R. Civ. P. 37(e)

Relevant to ESI and spoliation is the change to Rule 37:

> Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
>
> …
>
> (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Advisory Committee Comments

The Advisory Committee explained the impetus behind the 2015 amendment to Fed. R. Civ. P. 37(e):

> Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.
>
> New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for spoliation if state law applies in a case and authorizes the claim.
>
> The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The Advisory Committee pointed out that the existence, and potential impact, of preservation requirements independent of those in litigation:

> Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources – statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The initial focus when ESI is destroyed or lost should be on replacing the lost evidence:

> When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

The Advisory Committee expressly rejected the Second Circuit approach to the imposition of sanctions on a finding of negligence or gross negligence, which the *Pegasus* Court continues to follow:

> *Subdivision (e)(2).* This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.
>
> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

An Example of the Impact of the Rule Change

In a decision by E.D.N.Y. Magistrate Judge Roanne L. Mann, the court recommended, under the old Rule 37(e), that a two-part permissive adverse inference instruction be given to the jury for spoliation of back office data:[4]

> (1) From the fact that the Foreign Defendants produced no evidence of any actual plans or preparations to take CKB public, the jurors may infer that no such documents ever existed and that the Foreign Defendants had no plan and made no preparations to take CKB public.
>
> (2) To the extent that the jurors find that any unproduced evidence ever existed, they may infer that the unproduced evidence would support the SEC's allegation that the Foreign Defendants had no plan and made no preparations to go public.

Noting that "The amended rules govern in 'all proceedings in civil cases'" commenced after December 1, 2015, and, "insofar as just and practicable, all proceedings then pending," the court directed the parties to file submissions addressing the impact of the rule changes on the sanctions imposed and, upon consideration of the submissions, revised its recommendation:

> The Court reasoned that including the first instruction would allow a jury to consider the possibility – likely, in this Court's view – that the requested documents had never existed at all. (Citation omitted). Nonetheless, because this is ultimately a motion for a spoliation sanction, the first instruction should not be given independently of the second one. A party cannot be sanctioned for spoliation without a finding that some spoliation occurred.

The second instruction should be analyzed under the revised Rule 37(e), inasmuch as it is a sanction for missing information that should – and, logically, would – have been stored electronically on the hard drive that the Foreign Defendants turned over to the SEC. The amended rule "was adopted to address concerns that parties were incurring burden and expense as a result of overpreserving data, which they did because they feared severe spoliation sanctions . . . ." (citation and parenthetical omitted). As such, a court may not now impose an adverse jury instruction as a sanction for the spoliation of ESI absent a showing of a loss of ESI "because a party failed to take reasonable steps to preserve it," as well as "intent to deprive another party" of the use of that information. Fed. R. Civ. P. 37(e)(2). A court may not impose a sanction at all without a finding of "prejudice to another party[,]" and even then, the sanction may be "no greater than necessary to cure the prejudice . . . ." Fed. R. Civ. P. 37(e)(1).

The SEC argues that "[t]he present record supports the conclusion" that the Foreign Defendants acted with the intent to deprive the SEC [14] of its requested materials. (Citation omitted). The Court disagrees, as the existing record is not sufficiently clear to support the factual findings that are a prerequisite under the recent revisions to Rule 37. The Court cannot even conclude, as a threshold matter, that the Foreign Defendants destroyed or failed to preserve these materials at all – simply put, there is a strong likelihood that the materials never existed. (Citation omitted). Nonetheless, in the event the case proceeds to trial, the SEC should be permitted to renew its motion for Rule 37 sanctions and to make the requisite showing of intent and loss of ESI based on the evidence adduced at trial.

Conclusion

No longer can a lawyer in New York State Supreme Court at 60 Centre Street in Manhattan cross the street to the Federal Court at 40 Centre Street secure in the knowledge that the same rules apply to the spoliation of ESI.

While life for New York State practitioners has gotten a bit more complicated, *Pegasus* does clarify the rules for state court practice, for both ESI and non-ESI spoliation.

1. 26 N.Y.3d 543, 26 N.Y.S.3d 218 (2015).
2. 93 A.D.3d 33, 42, 939 N.Y.S.2d 321 (1st Dep't 2012).
3. 220 F.R.D. 212 (S.D.N.Y. 2003).
4. *SEC v. CKB168 Holdings, Inc.*, No. 13-CV-5584 (RRM), 2016 U.S. Dist. LEXIS 16533 (E.D.N.Y. Feb. 2, 2016).

Is the UDRP Biased in Favor of Trademark Owners?

By Gerald M. Levine

Background of the UDRP

In an effort to combat a form of unlawful conduct on the Internet, which saw registrants purchasing domain names identical or confusingly similar to trademarks and leveraging their value for commercial gain at the expense of trademark owners, governments, business organizations, professional associations, and concerned constituencies turned to the World Intellectual Property Organization (WIPO) in 1997 to assist them in designing a remedial solution to "cybersquatting." WIPO published its proposals in April 1999[1] and the Internet Corporation for Assigned Names and Numbers (ICANN) adopted them in October 1999 as the Uniform Domain Name Dispute Resolution Policy (UDRP).[2]

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"Uniform" refers to the UDRP's status as an international, non-territorial procedure for adjudicating claims of cybersquatting. The first UDRP decision was filed in January 2000. Since then the principal providers, WIPO and the National Arbitration Forum (recently renamed the Forum) together have processed more than 50,000 disputes. Central to the UDRP's success is a non-territorial centric jurisprudence applied by a corps of arbitrators appointed to assess whether domain name registrations and uses violate third-party trademark rights.

The UDRP is not a trademark court but it delivers efficient and swift justice within its limited jurisdiction to the party entitled to the domain name, which is not always the trademark owner. Not surprisingly the UDRP has its critics.

Perception of Bias

The belief that the UDRP is biased in favor of trademark owners begins with the circumstances under which the regime came into being as a forum designed specifically

for trademark owners to combat cybersquatting. It has to be acknowledged in considering the question posed in the title of this article – whether there is bias in favor of trademark owners – that for the uninformed observer there may be grounds for believing there is. First, there is the disproportionate success of trademark owners who on average prevail 85% of the time. Commentators have also found suspicious the fact that arbitrators (known as panelists) appointed to hear the disputes are drawn from the trademark bar.

The question is whether these factors in themselves are marks of bias, or can the results be explained by factual circumstances that objectively support targeting and bad faith registration and use of the domain names in issue.

While eyebrows and voices have certainly been raised (not without cause, in some instances), for the most part, setting aside anomalies that I will discuss further below, there is no evidence of systemic bias in favor of trademark owners. A review of the database of awards amply demonstrates that the overwhelming majority of challenged registrations were unsustainable under any legal theory, whether based on UDRP jurisprudence or statutory law.

Over the years the UDRP has attracted a substantial amount of criticism which tends to be generalized to the regime when the immediate targets are particular cases or panelists. The criticism tends to hew to one of two negative poles: panelists are either accused of cognitive impairment or outright bias in favor of trademark owners. There are panelists (these critics say) "who substitute their personal views for the agreed language of the UDRP." One commentator announced in a posting on September 20, 2005 that "[t]he UDRP is obviously not working." Why? "Two websites, fundamentally the same [involving trademark top-level domains (TLDs)], reached two opposite decisions, both within weeks of each other!" Other critics have complained that there is a "fundamental bias in the Policy [in favor of trademark owners]." One critic also perceived "a significant threat to free and robust expression on the Internet."

A new round of criticism came in response to a split decision in a more recent case discussed below. The decision led one critic to exclaim that the result "demonstrates that UDRP has devolved into a casino, when panelists can reach such divergent decisions." A banner headline in a posting on TheDomains (a leading blog of the domain name industry) on March 17, 2015 reads "Worst UDRP Decision of the Year? Panel Gives Away Domain Registered Before TM Was Filed."

In the words of a successful domainer (businesses that buy, sell, and monetize domain names)

> [m]ost arbiters are sincere, fair-minded, hard-working, distinguished legal professionals who make a genuine effort to carefully and faithfully apply the UDRP rules. Yet their good work is undermined by weak procedural safeguards that allow a minority of arbiters to mishandle the power entrusted to them to order the cancellation of a registrant's rights to a domain name and the transfer of that domain name to a new owner for the flimsiest of reasons.[3]

In the case in question, the dissent expressed the view that the

> intent of Respondent upon registration of the Disputed Domain Name appears to be a conscious strategy to register the domain name for eventual sale to a potential complainant or competitor, to prevent a trademark registrant from reflecting its name in a corresponding domain name, to disrupt a competitor's business or to attract Internet users for commercial gain by confusing use of the domain name. Under these circumstances, paragraphs 4(b)(i)-(iv) of the Policy arguably apply and are prescribed criteria for bad faith under the Policy.[4]

But buying, selling, and monetizing domain names is not unlawful unless the intent is to take advantage of the goodwill and reputation of the owner's trademark. Fortunately, this was a three-member panel and the majority had the law right.

It is undeniable that some panelists interpret the facts differently from their colleagues and apply different standards for assessing bad faith. WIPO makes the point that "[t]he UDRP does not operate on a strict doctrine of precedent."[5] Consistency is expected to be achieved through consensus. The most glaring example of this difference involves the question as to whether renewal of a domain name registration is a new registration or simply "protecting an existing investment."[6]

The construction that bad faith can be found on renewal regardless of whether the domain name was originally registered in good faith has been soundly rejected by the majority of UDRP panelists, yet it continues to have subdural life. In fact, it recently spilled over into an action filed in the U.S. District Court for the Southern District of New York, *Office Space Solutions, Inc. v. Jason Kneen*,[7] in which the plaintiff was attempting to capture a domain name composed of a descriptive phrase – workbetter.com – which the defendant had registered many years prior to the plaintiff's claim of rights to it. Priority is a major factor in determining cybersquatting. Judge Kaplan gave the plaintiff's claim short shrift: "However you slice it, there are good cybersquatting cases and there are bad ones. And this is really one of the bad ones."[8]

Given the astonishing number of decisions from UDRP panelists it is surprising how few are truly infected with errors of law or questionable judgments. Trademark owners generally prevail because registrant choices 85% of the time are indefensible. Domain name holders prevail where they are found to have a right or legitimate interest in the domain names in issue or are using the domain names for fair or noncommercial purposes. Two recent ACPA actions by losing domain name holders

in UDRP proceedings illustrate the risk that attempted reverse domain name hijacking by overreaching trademark owners can be an expensive proposition. Once the lawsuits were filed, both trademark owners entered into stipulated settlements and consent judgments for $25,000 and $50,000, respectively, including permanent injunctions.[9] Why did the trademark owners do this? Because overreaching is indefensible.

Consistency and Predictability

Inconsistency and unpredictability of awards are significant issues which have not gone unnoticed by panelists. While there is a strong pull in the direction of precedent panelists do not walk in lockstep on a number of issues. This has created tensions that can undermine consistency and predictability and lead to the noted criticisms.

The problem was recognized almost immediately in an important case from the second year of the UDRP, *Time Inc. v. Chip Cooper*.[10] The majority could not have put it more bluntly: "[p]otential users of the UDRP are entitled to some degree of predictability." The majority continued that proceedings "should consist of more than '[i]t depends [on] what panelist you draw.'"[11]

The dissent in *Time* had a different view. She would have denied the complaint because the complainant failed to prove its case by clear and convincing evidence that the respondent registered lifemagazine.com in bad faith. The "clear and convincing" standard failed to attract consensus, although it is now applied in another ICANN regime, the Uniform Rapid Suspension System (URS), which ICANN implemented in 2013 in connection with its approval of hundreds of new generic top-level domains.

Nevertheless, the concern expressed by the majority that "[i]t depends [on] the panelist you draw" continues to be the magnet of criticism. Some panelists adhere to the view that it is abusive to register a domain name identical or confusingly similar to a mark regardless of website content; others, that content is the test of abusive registration. In other cases, panelists simply come to different conclusions in their assessments of factually similar circumstances, which is why it is imperative for parties to clearly support the facts they believe controlling with sufficient evidence to persuade the panel.

Dueling Views of the UDRP

The critical views leveled at the UDRP come about in part because there is no appellate authority within the regime to harmonize the law. Disharmony is conspicuous, for example, in assessing fair use when it comes to freedom of speech. What exactly is protected speech? The domain name or the content of the website? Some panelists refuse to adhere to consensus or precedent in the most fundamental element of UDRP law, namely that the regime is "conjunctive" in its requirement for proving abusive registration. It differs from the ACPA, which is a disjunctive model.

The case criticized in TheDomains Blog for its split decision, *easyGroup Limited v. Easy Group Holdings Limited*,[12] is a good illustration of the problem and is worth looking at more closely. In this case, a three-member panel split with the majority denying the complaint and finding reverse domain name hijacking and the dissent finding lack of rights or legitimate interests and abusive registration. Some, who took to Twitter, saw this as evidence the UDRP is a roulette wheel. To quote again: "This demonstrates that UDRP has devolved into a casino, when panelists can reach such divergent decisions." The criticism would have made sense if the dissent was correct and the majority wrong. But the dissent's view is not correct; she simply applied the wrong law.

> The UDRP is not a trademark court but it delivers efficient and swift justice within its limited jurisdiction.

Although the dissenting panelist cites no cases it is plain the inspiration for her views is traceable to a line of cases that hold abusive registration can be found even where the original registration was in good faith. These panelists read a continuing promise of lawful use into the original act of registration, with the result that any subsequent breach supports abusive registration regardless of the registrant's motivation for acquiring the domain name. Fortunately in the *Easy Group* dispute there was a three-member panel. If the dissent had been a sole panelist, the complainant would have been out of luck by having the misfortune of drawing the wrong panelist, precisely the concern expressed by the majority in *Time*.

The theory noted earlier of renewal as the date from which to measure bad faith derives from a 2009 case, *Eastman Sporto Group LLC v. Jim and Kenny*,[13] which unfortunately was one of those hard cases that make bad law. The panel (a sole panelist) found that although the respondent could not have registered the domain name in bad faith since the complainant's trademark postdated the domain name registration, the respondent began using the domain name in bad faith before, and continued this conduct after, renewal of registration. While the award in the complainant's favor may be understandable as showing repugnance at the respondent's conduct, it was unfortunate, because this was not a cybersquatting case at all but a trademark infringement case that properly belonged in federal court.

Criticism was also leveled at a particularly disturbing case decided by an experienced panelist, *Videolink, Inc. v. Xantech Corporation*.[14] In this case, the panel actually requested the complainant, who had not thought to

argue bad faith renewal, to provide an additional submission on the same generally rejected construction of the policy. In the panel's own words: "At the request of the Panel pursuant to Rule 12, Complainant provided an Additional Submission contending that the UDRP analysis should occur not when Respondent originally registered the domain name but when Respondent renewed the domain name in June 2010." This instruction elicited from one of several commentators a classic response: "I'm dumbfounded." And so he should have been because the domain name was not registered in bad faith. The UDRP is not a trademark court and the panel was not right to have ruled as though it were.

Conclusion

Is criticism of the UDRP and panelists warranted? Yes, as to anomalous decisions in which panelists depart from precedent and deliver awards inconsistent with expectations; "no" where there may be genuine issues of disputed facts which either support different results or disqualify disputes from an administrative remedy. And, "no" also where the parties fail to pay attention to the evidentiary demands of the UDRP. Difficult cases invite second guessing.

What is not in dispute and above criticism is that the UDRP is a strong and stable jurisprudence. Criticisms apart, the business community prefers its convenience, cost, and speed of resolution over adjudicating in courts of law. The UDRP works remarkably well. Parties know (or should know) what is expected of them and what outcome to expect if the evidence is properly assessed. In this regard the UDRP fulfills the essential expectations of any legal system, namely consistency and predictability, and when it does not there is the ACPA. ■

1. *The Management of Internet Names and Addresses: Intellectual Property Issues, Final Report of the World Intellectual Property Organization Internet Domain Name Process* (April 30, 1999), par. 40: "A domain name registration . . . gives rise to a global presence."

2. Also in 1999, Congress passed and President Clinton signed into law a statutory regime, the Anticybersquatting Consumer Protection Act (ACPA), which is nested as a section in the Lanham Act.

3. Guest Post Nat Cohen, DirectNavigation.com, March 15, 2010, www.directnavigation.com/2010/01/udrp-a-guest-post-every-domainer-must-read/.

4. *Geometric Software Solutions Co. Ltd. v. Telepathy Inc.*, No. D2007-1167 (WIPO November 8, 2007).

5. WIPO Overview of WIPO Panel Views on Selected UDRP Questions (2d Ed.) at par. 4.1.

6. *Live-Right, LLC v. Domain Administrator / Vertical Axis Inc.*, FA1506001622960 (Forum July 16, 2015).

7. 15-cv-04941. The action was commenced and voluntarily dismissed with prejudice on July 8, 2015 after a verbal lashing from the court on the merits of the claim. The transcript and the endorsed memo on the notice of dismissal are available on *Pacer*.

8. The transcript and the endorsed memo on the Notice of Dismissal are available on *Pacer*. Judge Kaplan made it unmistakably clear the claim lacked merit by striking from the Notice of Dismissal the suggestion that the plaintiff was dismissing the case for lack of personal jurisdiction.

9. *Hugedomains.com, LLC v. Wills*, 14-cv-00946 (D. Colorado, July 21, 2015); *Telepathy, Inc. v. SDT Int'l SA-NV*, 14-cv-01912 (D. Columbia, July 9, 2015).

10. No. D2000-1342 (WIPO February 13, 2001).

11. *See id.* at § 6.

12. No. D2014-2128 (WIPO February 19, 2015) (easygroup.com).

13. No. D2009-1688 (WIPO March 1, 2010).

14. *VideoLink, Inc. v. Xantech Corporation*, FA1503001608735 (Forum May 12, 2015).

And the Winners Are . . .

The winners of the New York State Bar Association *Journal*'s 2016 Short Story Contest have been selected. Stories did not have to be legal- or law-related but had to include the phrase "justice is served." We received numerous entries and narrowed the field down to the top four stories. Due to a tie, we will publish all four of the top entries, in no particular order. Congratulations to Judith A. LaManna, Henry G. Miller, Lawrence Savell and Harvey Silverstein for submitting the winning entries.

Lawrence Savell is Counsel at Herbert Smith Freehills New York LLP, New York, N.Y.

The Bequest

By Lawrence Savell

The boxes arrived in Nick's office on a Friday morning. Inside the one designated "#1" on the outside was a short letter from the executor.

"Dear Mr. Adams: With this letter please find four boxes which Mr. Robert Maxwell instructed in his will be sent to you. Best regards."

Nick sighed. Bob Maxwell was a friend of his father's, from when they were undergrad roommates at Ohio State. Bob had stayed on to attend the Law School there, while Nick's father moved back to New York after graduation to start working in the Adams family business.

Nick had met Bob with Nick's dad a few times over the years when Bob's law practice required trips to New York. It was Bob, a soft-spoken and polite Midwesterner who had never married and who took a liking to Nick, who had first encouraged the inquisitive Nick to consider a legal career. And when Nick had said he was thinking of putting law school off for a couple of years after he got his B.A., it was Bob who persuaded him not to delay but to seize the moment, as things had a habit of slipping away. Three years later, Nick became the first lawyer in the family.

Nick had not seen Bob since Nick's father passed five years before, and he was surprised and touched that Bob had remembered him in his will.

Under the letter, the box, like its three traveling companions, was full of books. There were several treatises, nearly all a bit long in the tooth. Nick presumed that Bob had remembered Nick was a history major in college, and might appreciate them more than other lawyers.

But they also contained two other things – a large folder of copies of filed briefs, and various volumes of the Ohio State Reports, First Series. Sending the volumes of old (the Series ended in 1964) Ohio decisions was strange, Nick thought, as they would be of little use to a New York lawyer.

Nick took out all the Reports volumes and arranged them sequentially. There were 32 in all – a small fraction of the full First Series. There were thus many gaps in the number sequence. Nick was intrigued.

He poured himself a tall black coffee from the office kitchen. He returned to his chair, put his feet on his desk, and opened the lowest-numbered volume. It had been a while since Nick had opened a book of case decisions, since he was part of the generation which conducted nearly all of its case research via online databases like Lexis and Westlaw. Indeed, Nick's firm, like many others, had in recent years donated or tossed all its case report volumes, as anachronistic relics of the pre-digital world taking up valuable office space that could be put to more profitable use.

He turned through the pages, and saw the spectrum of subject matters that one would expect addressed in the reported cases: contracts, torts, matrimonial, wills, etc. There was nothing out of the ordinary.

He was about to put the book down when he saw something. About a third of the way into the volume, at the right margin of a page, was a pair of handwritten pencil marks. The first, at the beginning of a long paragraph, consisted of a horizontal line about a quarter of an inch long, joined at a right angle by another line of about the same length going down. At the end of the paragraph again at the right margin was another mark, this time with the vertical line meeting the horizontal at the bottom, like a backwards "L."

The marks surprised Nick. He would never – even in pencil – think of defacing a book owned by his firm. The case – which dealt with authorship of a courthouse cafeteria cook's memoir, predictably titled "Justice Is Served" – was not one he recalled hearing about in law school. The marked paragraph contained merely a statement of the law in Ohio on a particular obscure point. It was the only notation in the case. Why had someone broken the unwritten rules of law office decorum to single out that paragraph in that case?

Nick continued paging through the volume, and toward the end, in a contract case, he saw another set of the handwritten brackets. This set was different in two ways: the first mark occurred midway through the paragraph, and next to it was written, "Rider 1."

Nick sat back in his chair. Riders to him were passages he wanted to quote in briefs or other documents. When, as was usually the case, he drafted directly into Word, he would just cut and paste from the online text to his document. For materials that were not available online, he would photocopy the respective printed

page and circle his selection for his assistant to input. But this rider was likely created before photocopiers were available in the office – the marking lawyer probably gave his secretary the volume with some kind of bookmark in the page, and the secretary would type the marked passage into whatever document was being prepared.

Nick smiled – Bob had indeed sent him a history lesson – on ancient law office procedure.

Nick flipped through the rest of the volume, but saw no more notations.

Nick next turned to the volume with the next highest number on its spine. It too had a few marginal notations. A quick flip through the rest of the volumes indicated they all did.

Why, Nick asked himself, had Bob sent him so many volumes, when just one would have illustrated the practice? Maybe it was to show how prevalent the practice was; indeed, Nick had noticed slight variations in the marking styles, and in the handwriting of notations.

Each volume had inside the back cover the firm library sign-out card in a white pocket, with columns for name and date borrowed. Nick knew from his own experience that most lawyers would not bother to sign out a case report volume he or she borrowed. Nevertheless, each volume's card had a number of conscientious entries, over the course of several decades.

Nick wondered whether any of the notations were Bob's. He looked at the card in the volume he had open, and saw that it had been signed out by "R. Maxwell" on "1/21/63." He pulled the card from another volume, and saw another "R. Maxwell" entry. Every one of the cards in the volumes Bob had sent him had an "R. Maxwell" sign-out entry. Some had more than one.

"OK," Nick thought, "so what?" Bob was now beyond the jurisdiction of any court seeking to prosecute him for serial publication defacement. And Nick had no idea whether any, or if any which, of the notations had been Bob's.

Nick started putting the books back in the boxes when he saw again the large folder of briefs. He removed the contents, and flipped through them. They had carefully been arranged in ascending date order, spanning several years in the 1960s, which Nick realized was probably at the beginning of Bob's legal career. Each brief had been signed by Bob.

The first brief dealt with an automobile case. It contained two block quotations. Nick looked at the first citation, which was to a Texas case. But the second was to the Ohio State Reports. The volume number was one of the volumes Bob had sent him. Nick went through each brief, and located in each at least one block quote citing to the Reports.

By now night had fallen, and Nick was the only one left in the office.

With the pile of briefs to his left, and the Reports volumes standing at the ready in a large arc further away on his hastily cleared desk, Nick started turning to the pinpoint-cited pages identified in Bob's briefs.

The bracketed passage in the first one bore after the first marking the handwritten notation, "Sunny day." Those words appeared to have no relation to the case or the quoted material.

The next brief, dated a couple of weeks later, had a Reports citation pointing to another bracketed passage, this time accompanied by the notation, "Windy." Again, no connection was apparent.

"So Bob was not just a lawyer, but also an amateur meteorologist," Nick mused to himself. "Who knew?"

Similar notations were made, until one that said after the opening bracket, "Chilly." But this one was different in that to the right of the closing bracket was the word, "Indeed," in a different handwriting.

The next several instances contained similar paired notations, basically limited to single word weather observations and single word affirmative responses.

Finally, the forecast changed.

This particular opening notation read, "Park 12.5."

Nick determined that "Park" was not the name of the case, nor of any of the parties, nor the judge, nor counsel. On a hunch, he pulled up on Google Maps the location of Bob's firm as indicated at the end of the brief. Two blocks away was a park.

But "12.5" made no sense. Unless it was a time. Twelve-thirty?

Photographs of the park showed that, at least when they were taken, the park had many benches, and information indicated it was a popular place for nearby workers to eat their lunch.

The ending bracket in the case reporter passage bore the notation, "Okay."

Such "Park" references reoccurred frequently, virtually every time accompanied by an affirmative response. This went on for nearly two years.

But then, although the opening bracket references thereafter continued, the closing bracket responses did not. Not long after that, alongside the final cited passage, there was no notation accompanying the opening bracket.

"Why had they stopped?" Nick wondered to himself.

Nick reviewed all the materials again, but they provided no guidance. On a hunch, he confirmed online that the park remained a park through the present, and had not been paved over to put up a parking lot or for any other form of "progress."

Nick ran all kinds of searches on the web, trying to find some clue. Eventually, in response to a search including the name of Bob's firm and the word "secretary," among the results was one that caught his eye.

It was an engagement announcement in a local newspaper. Dated shortly after the last brief, it proudly reported that one Abigail Mills had become engaged to one

Benjamin Nelson, accountant. Ms. Mills was identified as a secretary at Bob's firm.

Bob had let his chance slip away.

Nick leaned back in his chair and exhaled audibly. He now understood that when Bob had advised him to seize the moment, he had been speaking from personal, and painful, experience.

Bob had apparently never fully recovered from that disappointment, Nick realized. But he had wanted to make sure that Nick did not make the same mistake.

Nick cleared space on his shelves for the books and the folder of briefs, so that they would always be in his view and so he would not forget their lesson. He thought about the many ways he could implement the guidance he received, in his career, in his personal life, and in his plan someday to do the writing he kept putting off for that time all lawyers envision, when life would somehow become less hectic.

Before leaving, he sent a quick email to the executor, acknowledging his receipt of the box, thanking him for his efforts, and requesting a copy of Bob's will.

And a few days later, Nick would read in that will that, except for four boxes of legal material, Bob had left everything to one Abigail Mills Nelson.

Harvey Silverstein, Esq. is an attorney in Latham.

Gone A-Fishing

By Harvey Silverstein

"I have laid aside business, and gone a-fishing."
Izzak Walton, *The Compleat Angler,* 1653

The lawsuit alleged that our firm's client, a bus company, had breached its legal duty to protect passengers. During her deposition, I asked plaintiff Dora Krachenko, "What did the bus driver do when Ms. Ranier allegedly assaulted you with a curling iron?" This question begat an anxiety attack on Dora's part, which led her attorney to request a postponement, and I agreed. By then, it was mid-afternoon, and without further ado, I left the office and walked to the garage on West 48th Street, where my Jeep Wrangler was parked.

Driving uptown to the 79th Street entrance to the Henry Hudson Parkway, I headed north through the Bronx and Westchester, eventually merging onto I-95. Around 9 p.m., after six hours on the road and a few pit stops, the Jeep turned onto Commercial Street, the main drag in Provincetown, Massachusetts. It was late September, off-season, and I parked just up the street from my destination, an old dive bar called The Black Shamrock, headquarters for the Provincetown Striper Derby.

The familiar refrain of *Brown Eyed Girl* was playing on the jukebox as I entered the crowded bar. The first face I recognized was that of Malachi Diggins (aka Digger based both upon his last name and his job operating excavating equipment for a septic company). Already three sheets to the wind, Diggins is a tall, rawboned man in his late 30s with angry grey eyes, a pockmarked face, and as thick a Boston accent as you're likely to hear this side of Fenway Park. Matter of fact, he's wearing a tattered Red Sox cap that must date back to the 1975 World Series (*Author's note*: When in New England, especially in any establishment that serves alcoholic beverages, it is my long-standing practice, based upon painful experience, to refrain from discussing the relative merits of the Yankees versus the Red Sox.)

Occupying the barstool next to Diggins is his partner in crime Arthur "Skully" Sullivan, sporting a gnarly shaved head, and Irish-themed tattoos covering his neck and bonecrusher arms. Digger accosts me immediately: "Look what the friggin' cat dragged in. How many years you been gracin' us with your presence, Ginn?"

"Six, Malachi," I reply, using his given name, because calling him Digger would imply some affinity between us.

"Well Mistah New Yawk barristah, solicitah or whatever in hell you ah, don't plan on repeating this year, I already got the 20 large spent," he feigns a smile, but there is menace in his voice, likely because he finished runner-up to me last year by a mere two pounds.

"Later, Malachi," I say, and walk to the back room of the tavern, where the Derby officials have set up. The tournament director is Luther "Sarge" McClendon, a no-nonsense man with close-cropped salt and pepper hair, for three decades a trooper with the Massachusetts State Police.

"Greetings, Henry, I wasn't sure if our defending champ was going to make it up to P-Town this year. Thought maybe you had a big trial or something. We got almost 200 fisherman signed up."

"Nice to see you too, Luther. I wondered if you'd retired and moved down to Florida to fish for tarpon."

"Soon enough, counselor," Luther says, as I hand him a $100 bill, and am officially entered in the Striper Derby. The rules are straightforward. Winner take all, $20,000 for the heaviest striped bass caught from shore in any waters between Provincetown and Eastham over the next week. And courtesy of a local marina, the winner will receive a bonus of $1,000 per pound if the striper exceeds 50 pounds.

Once registered, I sat at a table and placed an order for the Shamrock's signature dish, the Little Frenchie, a Portuguese sandwich overstuffed with *presunto, linguica*, steak, cheese, tomato and beer sauce. Even in New York,

I can't find anything like it. As I awaited the food, the bar owner, a grizzled Portugee named Pedro ("Pete") Goncalves, brought me an ice cold *fino*. After some small talk, he glanced around nervously to ensure that Digger was out of earshot. "Henry, word to the wise. All summer long Digger's been coming in here running his mouth about how he's gonna avenge his defeat in last year's derby. So I'd be careful. It's no secret that back in the day he did five years in Walpole for armed robbery."

"Thanks for the heads up, Pete," I reply. "And I thought fishing was supposed to be fun."

The tournament officially began at 12 a.m. Friday morning. The best striper fisherman concentrate their fishing at night, because that's when the bass come close to shore to feed, and some of the contestants headed directly from the Shamrock to fish. But the long drive to the Cape after a day of work, and the *finos*, left me exhausted, so I planned to get a good night's sleep before I began the fishing competition.

My daily routine was to rise at 5 a.m., have coffee and donuts in the motel, and then fish. Along with many of the other contestants, I preferred to fish at Race Point in Provincetown, perhaps the best known fishing location on the Cape. As the days went by, I caught some bluefish and school sized stripers, but nothing worth weighing in. Malachi Diggins was always in the back of my mind, but our paths didn't cross. Even so, on Wednesday evening, the Derby leaderboard showed Digger on top with a 44-pound striper.

Since Thursday was the final day of fishing in the tournament, I intended to fish as much as possible on that day. Ominously, the weather forecast predicted that a coastal northeaster was expected to hit the Cape on Thursday evening. But barring a monsoon, I wouldn't be deterred from fishing, because big fish can sometimes be caught in a storm. By dusk, when the storm had not materialized, I decided to walk the length of the Stone Dike, a breakwater leading to the Wood End Lighthouse and Long Point, remote but potentially productive fishing grounds. I fished there for a couple of hours, without any luck, and was resigned to finishing the Derby without catching any big stripers. Around 9 p.m., the wind began to howl and it started raining, so perhaps the meteorologists were right. Upon further reflection, prudence dictated that I begin the return trip over the Stone Dike before a storm surge made it too dangerous.

And then I had company. Approaching me on the breakwater from the other direction were Digger and Skully, sans fishing gear, drinking from a half-empty fifth of Tullamore Dew. Digger seemed in a talkative mood. "FYI, Ginn, I got a 44 pounder, and the tournament's almost over. Most of the boys are just sitting around the Shamrock shootin' the bull. Don't you got sense enough to come in before the worst of the storm? Come on counselor, have a pull of the Dew. And don't say I never did nothing for ya."

"Appreciate your concern, Malachi, I'm just gonna fish this last eel," which I proceeded to cast out into a rip current off the Dike. Then, I felt a tapping on the line which signified a fish showing interest in the eel, and the 10-and-a-half-foot rod bent double. The fish took off like she wanted to cross the Atlantic Ocean, and as the storm intensified, it took all of my skill to maintain balance on the slippery rocks while battling a fish that felt larger and fought harder than any I'd caught in my life. Twenty heart pounding minutes later, the huge striper was finally subdued.

Digger and Skully looked stunned. "It's a damned cow, I bet she's at least 50 pounds," said Skully, barely concealing his admiration.

Digger took a long pull from his bottle, got up in my face, and screamed, his whiskey breath penetrating the wind, "This ain't happening to me again. Gimme that striper, Ginn. You remind me of that asshole D.A. who sent me to State Prison for five years. I've had it up to here with rich, know nothing bastards like you getting all the dead presidents while I'm busting my hump digging out septic tanks. Just gimme that bass, and we all walk off the Dike."

Insult was added to injury when Digger whipped a small Glock pistol from his pocket and pointed it my way. "She's all yours, Mr. Diggins," I say, and push the still flopping striper toward him.

"Maybe you should put down the piece, Digger," cautions Skully.

Enraged by his friend's admonition, Digger shouts, "Screw you, too, Skully. In for a dime, in for a dollah."

"OK, Digger, but how you gonna stop him from tellin' the Derby guys that you stole his fish?"

Digger answers, "Here's how, pally boy," and then levels the Glock at me and fires.

In an instant, I found myself in 20 feet of frigid water, in a churning rip current, in the pitch black of night, in a Nor'easter, a long way from home.

How it all turned out

At noon on Friday, everyone associated with the fishing tournament gathered at The Black Shamrock. Director McClendon got right down to business. "Congratulations to our winner, Mr. Malachi Diggins from Yarmouthport. Please step up to the podium as I present you with a $24,000 check for your 54-pound striper."

At that moment, with a trial lawyer's flair for drama, I burst through the door of the tavern. Digger glared at me like he'd seen a ghost. "Sarge," I said, "you might want to hold off on that check. Mr. Diggins didn't catch that striper. I did, and he took it from me at gunpoint."

Digger, now ballistic, bellowed, "What's this horse manure? This shyster is nuts. That's my fish and my money and I want it now."

Sarge interceded, "Well, Mr. Ginn, you've made a very serious accusation. What evidence do you have?"

It was then that Skully stepped forward. "I can back Mr. Ginn 100 percent. Digger and I were on the Stone Dike last night and we saw Ginn catch this monstah striper and Digger pulled a gun and fired at him. I tried to stop him, I swear to God." At this point, Digger grabbed the check and ran out of the bar, right into the waiting hands of four of Sarge McClendon's colleagues from the State Police.

After the turmoil subsided, Sarge asked me what had happened on the Dike. I theorized that the combination of rain, wind, booze, and a well-timed shove from Skully, threw off Digger's aim so the bullet only grazed my fishing waders. Though disoriented when I hit the water, I remembered childhood swimming lessons advising not trying to swim through rip currents, but parallel to them. Yes, I was very lucky, but somehow, I made it safely to shore.

We invited Skully to join us, and I prodded him to explain why he shoved Digger on the jetty, and then told the truth at the Derby award ceremony. "Mr. Ginn, I've done some bad stuff in my life hanging around guys like Digger, even spent time in jail. Striper fishing is maybe the only thing in life I hold sacred. It's simple, you caught the biggest striper, you deserve the prize. It's just not worth a man's life."

Even hardboiled Sarge choked up when he told Skully that he'd probably saved my life. "Mr. Sullivan," I said, addressing Skully for the first time by his surname, "half of this prize is going to you, and half to the Cape Cod Children's Hospital. Before I head back to New York, let me ask you one final question. What is the meaning of those words tattooed in green ink on your neck?"

He grinned broadly, and carefully enunciated, "*Ta' ceartas a sheirbhea'il*. It's Irish, ya know, Gaelic. It means 'justice is served.'"

Henry G. Miller, is the senior member of Clark, Gagliardi & Miller, P.C., White Plains, N.Y.

He Never Said No

By Henry G. Miller

What a surprise. John Duffy married. He was almost forty. A confirmed bachelor if ever there was one, always bragging about his need for freedom. But when he met Kate McGuire—it was all over. She told him the wedding would be in September. And it was.

And John was a new man when little John was born. He would be an only child. Complications stopped Kate from having more. But it didn't matter. John thought his son perfect. He filled their lives all by himself. John thought him special. "You know he talked and walked before all the other children his age." John loved it when his first word was, of course, "Da-Da."

All this pleasantness was a bit out of character for John. He was known as the toughest chief clerk in the history of the courthouse. He practically ran the County Court and the judges were glad to let him do it. He was a no-nonsense clerk. If the papers were a day late, there'd be no way John would ever accept them. If the proper form wasn't followed, the papers would be summarily rejected. The worst way to deal with No-Nonsense John was to try to be too nice to him. Like the time Friendly Frankie Esposito, one of the courthouse regulars, gave him a case of wine for Christmas. John exploded, "What kind of a man do you think I am?" It took Friendly Frankie over six months to get anything accepted in the County Court. Friendly Frankie had forgotten some of John's other names used by the Bar: John the Altar Boy, St. John the Impossible, and John the Purest of Prudes.

But some thought they noticed a softening in John after his son was born. He was always talking about his son. "What a smile he has, and he knows how to charm us old folks. I'll tell you, and I'm not just saying it because he's my son, but that kid's going places."

John's reputation for integrity had always been unstained. In law school he was on the Law Review, quite an honor. John liked working in the court system, a safe and steady job. Some thought John should aim higher and work for a prestige law firm. But John liked the safety of being in the court system and the authority that went with it. The Party felt John could be an asset. He was chosen to be chair of the Conflict of Interests Board. John was going up the ladder.

After that John was even being considered for Congress. The Party sure could use a little purity on the ticket. John took pride in his tough, inflexible standards. That's what he learned at school. The Jesuits were exacting taskmasters.

And just because you mentioned little John didn't mean you'd get any favors, but perhaps it meant John would listen just a little more sympathetically before he turned you down.

Kate fought with John. "You've got to say 'no' to your son every now and then, just like you do on your job. You can't be a tough guy at work and a marshmallow at home."

The son always seemed to be in trouble at St. Michael's Grammar School for not doing his homework, for speaking out in class, for talking fresh to the teachers. But Daddy always ran to the rescue. He was an expert at finding excuses. And, of course, he'd always come up with some idea on how to help the school with its fundraising.

* * *

So somehow little John, spoiled little John, got out of St. Michael's and made it into Bishop Paul, the premier local Catholic high school.

There was trouble there too. Kate told John in no uncertain terms, "You're ruining him. Stop it. He won't be able to always count on you in the real world."

"Kate, he's our everything. He's a bit wild but he's coming together. You'll see. He's special. Did you know he can almost recite the Gettysburg Address without notes and with as much feeling as Lincoln ever put into it? You'll see."

"John, you are spoiling him. I hope you're right but I don't think so."

Little John was always throwing his father's name around. Some people resented it. "Do you know who my father is? He knows both senators. He can handle any problem. Trust me."

But problems came. John almost didn't graduate with the rest of his class at Bishop Paul for repeatedly missing some makeup classes in chemistry.

John asked him, "Son, why don't you go to Brother Michael's chemistry class? It's an important subject. They may not let you graduate."

"Dad, it's so boring. Please fix it. I just can't listen to that stuff anymore."

So Dad made sure he got invited to the Education Conference for the whole state. He made sure he was the keynote speaker. He praised Bishop Paul as an outstanding example of what a great high school can accomplish. His son graduated.

Mother Kate took her son aside and read him the riot act. "Listen, you won't always have your father."

"I'll do better, Mom."

And he did. Good enough to get into Adams University, almost an Ivy League school. No one was sure how. The cynics said it didn't hurt that his father is now the state's Public Works Commissioner (who gives out contracts) and was even being considered for the nomination to the U.S. Senate.

In college there was only one really bad episode and that was over a violation of the Honor Code. He was caught copying an answer from another student's paper. John and Kate visited their son every month, and Kate insisted that her husband keep out of the punishment issued for violating the Honor Code. "He needs a lesson." And for once John did, and his son survived with a minor reprimand.

"You see, John. He can survive without you. Did you learn something?"

"Maybe, Kate, but never forget he's all we've got. Our only one. We have to be there for him. And never forget how special he is."

"You can love too much, don't you know that?"

John Duffy, Jr. graduated and went on to get a very nice job with one of those fancy hedge funds. It definitely didn't hurt that Dad was a powerful man. Kate continued to warn her husband. "He'll never be able to fly if you don't let him go solo."

One day Dad got a visit from his son. "Dad, do you know the Synder Biscuit Company? If I could land that account, they might consider me for partner."

John, the father, felt he could make one phone call. There'd be no compromise in it. And so he did and it worked. John got the account and became a partner. He was on his way.

"See, Dad. You did nothing wrong and it paid off."

Then when their son, their only child, married Mary, John and Kate more than approved. They were ecstatic. To make it even more perfect, the newlyweds bought a house near them. A bit expensive, Kate worried. But John reassured her he was doing so well at work, he could manage, and "we can help a little, isn't that what mommies and daddies are for?"

The dream marriage got even better. Mary was expecting. John couldn't do enough for them. Kate still worried. "They're living over their heads."

"Please don't worry. They love him at the company. He's going places."

But Kate was not reassured. And as the pediatricians say: "Always listen to the mother."

The fateful moment came a few weeks later. It was 1:30 a.m. There was a loud knocking at the door. Kate and John had been asleep. Kate came downstairs with her husband behind her. It was their son. "Mom, I have to talk to Dad."

"What is it, John? You woke your mother and me."

"I'm sorry, Dad. Let's talk. Mom, you can go back to bed."

"I'll listen. What is it?" Kate knew it wasn't good.

"Well, I borrowed a little money from work—without their knowing it. I got in a little over my head. I got other debts: for the new car, for Mary's bracelet, for an investment I made."

"Why didn't you come to us right away, son? We always try to help you."

"I don't always like to bother you, Dad. I like to do things on my own. But there's an easy way out. The Baker Company, my sometimes client, may put all their investments with us. That could mean millions. And my boss promised me a big bonus of two hundred fifty thousand dollars if I land that total account. It means everything to the company. That would end all my troubles. I could get out of debt, and I'm very close to getting it."

"That's great, son."

"But there's one little catch, Dad. They want that contract with the county. The one you've been talking about for all the repair work. I told them I'd talk to you."

"But John, I'm close to giving that contract to another company. A lower bid with very good references."

"Dad, I really need this. I'm in trouble."

"Don't pressure your father like that. He could get in trouble." Kate could feel trouble coming.

"What trouble? The Baker Company is a great company. And it means the world to me."

Kate was having none of it. "John, you've got to say 'no' to your son. Just say 'no.' It's so easy. It's just one syllable."

"Dad, please. You've never let me down. Don't start now."

And so it came to pass, after John made the proper phone calls, that the Baker Company got the coveted contract. Little John not only got the bonus, but his past little "borrowing" was forgiven.

You can guess the end of this story. And it came swiftly. The U.S. Attorney had been following the transactions of little John closely. There were wire taps. There was a cooperative witness. Little John had been injudicious on the phone. Indictments followed: Little John and Big John. Misuse of public office.

When John Duffy, the Altar Boy, was indicted, all who knew him were shocked, incredulous. "John Duffy wouldn't even fix a traffic ticket."

The courthouse regulars all had a comment: "Never judge a man 'til he's dead and past all temptation."

"It's about time we started to clean up the corruption in this state."

John Duffy sat alone with Kate. She told him, "I know you went out and got a gun. But that's the easy way out. Take your punishment. This, too, will pass."

John pled guilty and the sentence was lighter than the prosecutor wanted. John had led an exemplary life, and the judge summed it up well. "For a man like you, your disgrace is the worst punishment."

In the courthouse it was a topic of conversation for years. The Duffy Story.

"Well, finally, justice is served!"

"I guess everybody has a price."

"He always had a soft spot for that kid. He never said 'no' to him."

"Can you believe John the Pure would do a dumb thing like that?"

Kate said it best: "You can love too much."

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This Morning

By Judith A. LaManna

Each morning, bright and early, he tiptoes down the stairs, retrieves the morning paper from the end of the driveway and returns to their kitchen. He thumbs through the paper. When he hears the sound of her moving about, he plugs in the coffee. This, it is his belief, is his most important mission of the day.

As the coffee gurgling starts, their kitten, Clara (a name feminized from the Italian and roughly translated to mean "truth") begins to dance between his legs as if she has spent overnight rehearsing her role as the lead grey tabby at the town's American Way Dance Company. He slops wet food onto her dish and places in on the pet food mat on the kitchen floor just under the window.

Next, Justice is served. The almost Doberman, somewhat Yorkie who came to them pre-named by a retired police detective, is well-trained in this ritual of "ladies first." He sits properly, waiting, his tail ever so lightly thumping. When his food dish hits the floor, the snuff of Justice's snout deep into his dry kibble scatters some morsels onto the food mat for his later rescue.

At the sound of her footstep hitting the bottom stair, the pets stop eating. Clara uses the time to clean a back paw. Justice resumes his sit pretty pose. Both look to the kitchen archway as she steps through. Her coffee is poured and he hands her the already milked mug. No one speaks.

Husband and wife are practiced at this manner of intentional silence. She walks to the table, leaning over on the way to pat Justice on the head and to give Clara a long stroke from head through the tip of her fat tail. At her place at the table are the sections of the newspaper that her husband has read.

She gives a perfunctory scan to the Auto and Sports sections and deposits them into the newspaper recycle pile. She sets aside the News section for a later-in-the-day read, having caught the national and local news on TV broadcast upstairs that morning. She immerses herself, happily, into the comics. It is, always, only after she has drunk half of her coffee when they begin to talk.

They eat a light breakfast of fruit, yogurt and toast, and wash it down with the balance of the coffee before going upstairs to shower and dress for the day.

Less than 30 minutes later, they are both groomed and dressed. Both in suits. He always wears layers. Her suit has a skirt. They check their appearance in the antique floor mirror and see reflected back a handsome couple, both with near blue-black dark hair and light complexions, both trim and posture perfect.

They collect their bags and briefcases. He fishes around and finds his glasses, the ones with the dark rims. Near the door they each lift off their sets of car keys from their key hooks. Taking turns, they each pet Justice and Clara. The pets walk away to their respective pet beds. He closes and locks the outside door.

This morning in the driveway, like all other mornings, he opens her car door for her. This morning, like all other mornings, he leans over as she settles behind the driver's seat. They kiss. This morning, however, and although no one is nearby, she looks side-to-side, and then whispers in his ear.

"Be careful traveling down Interstate Route 81 today, Clark. There was a news report of another overnight Kryptonite spill."

"I saw it, Lois," he replies. "I'll be careful."

"Super," she says.

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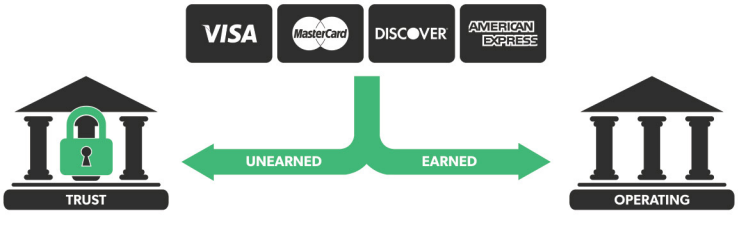

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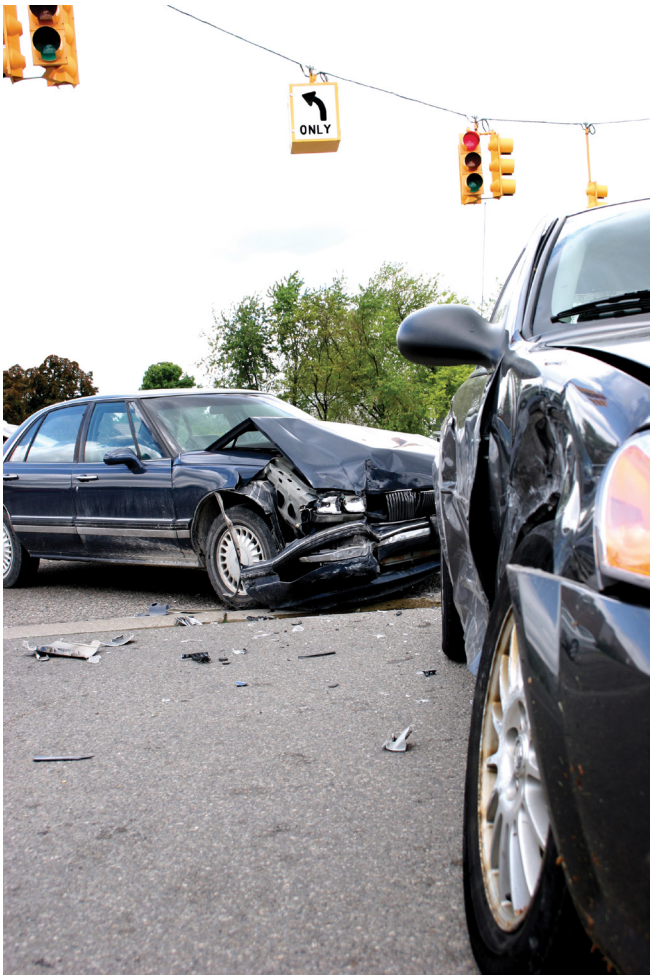

By Jonathan A. Dachs

This is the second in a two-part series detailing changes in uninsured motorist (UM), underinsured motorist (UIM) and supplementary uninsured motorist (SUM) law and practice in New York. The first part included general information and highlights vital to UM practice and appeared in the March/April issue of the Journal. *This part will cover developments in UIM and SUM practice.*

UNINSURED MOTORIST ISSUES

Insurer's Duty to Provide Prompt Written Notice of Denial or Disclaimer[1]

A vehicle is considered "uninsured" where it was covered by an insurance policy at the time of the accident, but the insurer subsequently disclaimed or denied coverage.

Insurance Law § 3420(d)(2) provides that if "an insurer shall disclaim liability or deny coverage for death or bodily injury . . . it shall give written notice as soon as reasonably possible of such disclaimer or liability or denial of coverage to the insured and the injured person or any other claimant." As the Court of Appeals observed in *KeySpan Gas East Corp. v. Munich Reinsurance America, Inc.*,[2]

> [t]he legislature enacted section 3420(d)(2) to "aid injured parties" by encouraging the expeditious resolution of liability claims (citations omitted). To effect this goal, the statute "establishe[s] an absolute rule that unduly delayed disclaimer of liability or denial of coverage violates the rights of the insured [or] the injured party" (citation omitted). Compared to traditional common-law waiver and estoppel defenses, section 3420(d)(2) creates a heightened standard for disclaimer that "depends merely on the passage of time rather than on the insurer's manifested intention to release a right as in waiver, or on prejudice to the insured as in estoppel (citations omitted)."

In *Highrise Housing & Scaffolding, Inc. v. Liberty Insurance Underwriters, Inc.*,[3] the court stated that "if a claim falls within the scope of the policy's insuring agreement, an insurer must issue a timely disclaimer pursuant to Insurance Law §3420(d) to deny coverage based upon an exclusion."[4] Moreover, the court reminded that "[e]xcess insurers have an obligation to disclaim pursuant to Insurance Law §3420(d)."

The Court of Appeals, in *Country-Wide Ins. Co. v. Preferred Trucking Servs. Corp.*,[5] stated

> We have clarified the application of the statute by holding that "once the insurer has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage, it must notify the policy-

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> holder in writing as soon as is reasonably possible . . . [T]imeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (citation omitted).

In *Vermont Mut. Ins. Co., Inc. v. Mowery Constr., Inc.*,[6] the court noted that "[a]n insurer's decision to disclaim liability insurance coverage must be given to the insured, in writing, as soon as is reasonably practicable, 'failing which the disclaimer or denial will be ineffective' (citations omitted)." The court went on to say, "While the timeliness of an insurer's notice of disclaimer generally raises an issue of fact for a jury to decide, where, as here, the basis for a disclaimer 'was or should have been readily apparent before the onset of the delay,' the delay will be found to be unreasonable as matter of law (citations omitted). 'Reasonableness of delay is measured from the time when the insurer learns of sufficient facts upon which to base the disclaimer' (citations omitted)."

The Court of Appeals, in *KeySpan Gas East Corp. v. Munich Reinsurance America, Inc.*,[7] also noted that § 3420(d)(2) applies only in a particular context – those insurance cases involving death and bodily injury claims that arise out of a New York accident and were brought under a New York liability policy. The Court went on to say,

> "Where . . . the underlying claim does not arise out of an accident involving bodily injury or death, the notice of disclaimer provisions set forth in Insurance Law §3420(d)(2) are inapplicable" (citations omitted). In such cases, the insurer will not be barred from disclaiming coverage "simply as a result of the passage of time," and its delay in giving notice of disclaimer should be considered under common-law waiver and/or estoppel principles (citations omitted).

In *Mathis v. Am. Zurich Ins. Co.*,[8] the court reiterated that the restrictions of Ins. Law § 3420(d) do not apply to a policy that was not issued or delivered in the state of New York and in *B&R Consolidated, LLC v. Zurich American Ins. Co.*,[9] and *Key Fat Corp. v. Rutgers Cas. Ins. Co.*,[10] the courts held that Ins. Law § 3420(d)(2) is also inapplicable to claims that are not based on "death or bodily injury."

The court held in *Estee Lauder Inc. v. OneBeacon Ins. Group, LLC*[11] that in a matter involving property damage claims, the court rules on the common law for the proposition that "[a] ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense."

In *QBE Ins. Corp. v. Jinx-Proof, Inc.*,[12] the court reiterated the well-known rule that a reservation of rights letter is not effective as a denial or disclaimer.[13]

One of the increasingly common grounds for denial or disclaimer of coverage is the non-cooperation defense. In *West Street Properties, LLC v. American States Ins. Co.*,[14] the court observed that

> [t]he noncooperation of an insured party in the defense of an action is a ground upon which an insurer may deny coverage, and may be asserted by the insurer as a defense in an action on a judgment by an injured party pursuant to Insurance Law § 3420 (a) (2) (citations omitted). In order to establish a proper disclaimer based on its insured's alleged noncooperation, an insurer is required to demonstrate that "it acted diligently in seeking to bring about its insured's cooperation, that its efforts were reasonably calculated to obtain its insured's cooperation, and that the attitude of its insured, after the cooperation of its insured was sought, was one of 'willful and avowed obstruction'" (citations omitted). The insurer has a "heavy" burden of proving lack of cooperation.

In this case, the court held that the insurer's submissions "were insufficient to sustain their prima facie burden on the cross motion for summary judgment."

In *Country-Wide Ins. Co. v. Preferred Trucking Servs. Corp.*,[15] the action against Preferred Trucking and its driver – insured by Country-Wide – was commenced in March 2007. Throughout the spring of 2007, Country-Wide made "numerous attempts" to contact Preferred's president and the driver – with no success. The president and driver did not respond to the lawsuit either, thus leading the plaintiff to file an application for a default judgment in September 2007. Country-Wide's receipt from the plaintiff's attorney of a copy of the default motion on October 4, 2007 was its first notice of the lawsuit. Thus, on October 10, 2007, Country-Wide informed Preferred and the driver by letter that it was exercising its "right to issue a disclaimer of indemnity" and reserving its "right to disclaim any duty to defend" because of the insureds' failure to cooperate.

During the ensuing months, Preferred's president contacted Country-Wide once to express his willingness to cooperate, but then proved impossible to reach. Country-Wide continued its efforts to contact the president and the driver through the summer of 2008. The law firm retained by Country-Wide to defend its insureds sent "multiple letters" to the driver advising him of a scheduled deposition and reminding him of the need to cooperate. Additional efforts to reach the owner and driver after the court warned that the failure to appear for deposition would result in the preclusion of evidence in support of Preferred's claims or defenses were futile. In July 2008, a Country-Wide investigator visited the president's home for the sixth time and left a message for him with his wife. The owner failed to respond to this message. Three weeks later, another investigator was able to speak to the driver's daughter, who advised that the driver did not speak English. On August 18, 2008, a Spanish-speaking investigator finally reached the driver, who said that he would cooperate. The next day, the lawyers wrote to the driver in Spanish informing him of the upcoming deposition and his need to respond. The driver never responded to that letter. On October 13, 2008, the Spanish-speaking investigator again spoke to the driver, who told him (for the first time) that he did not "care about the EBT date"

because of a "family situation." Subsequent telephone messages explaining the urgent need for the driver's appearance were ignored, and the driver did not appear. On October 16, 2008, the court granted the plaintiff's motion to strike the defendant's answer for failure to appear. On November 6, 2008, Country-Wide disclaimed its obligation to defend and indemnify Preferred and the driver based upon refusal to cooperate.

Addressing the question of whether the November 6, 2008 disclaimer was timely as a matter of law, the Court of Appeals found compelling Country-Wide's argument that although it knew or should have known in July 2008 that Preferred's president would not cooperate, it was not in a position to know that the driver would not cooperate until October 13, 2008, when he said he did not "care about the EBT date." The Court noted that during most of the period between July and October "the situation with respect to [the driver] remained opaque." Under the circumstances of the numerous efforts and contacts had by Country-Wide with the driver and his family members, in which the driver "punctuated periods of noncompliance with sporadic cooperation or promises to cooperate," the Court held that "Country-Wide established as a matter of law that its delay was reasonable." As the Court further explained, the named insured was Preferred Trucking, and its cooperation could occur through the driver. The driver, unlike the president, "had personal knowledge of the accident and was in a position to provide a meaningful defense, or alternatively, testify in such a manner as to bind Preferred Trucking. As Country-Wide argues, as long as it was still seeking [the driver's] cooperation in good faith, it could not disclaim."[16]

It is well-established that a proper notice of denial or disclaimer must apprise with a high degree of specificity of the ground or grounds on which it is predicated.[17]

In *24 Fifth Owners, Inc. v. Sirius Am. Ins. Co.*,[18] the court rejected the plaintiff insured's claim that the disclaimer letter did not specify that the late notice defense was based on the time that had elapsed between the insured's receipt of the underlying complaint and its tender to the insurer because the letter, which referenced the policy condition relied upon, "sufficiently apprised plaintiffs that notice was considered untimely relative to either event – the date of occurrence or of receipt of the lawsuit."[19]

In *Sierra v. 4401 Sunset Park, LLC*,[20] Scottsdale Ins. Co. issued a certificate of insurance to 4401 Sunset Park, LLC (Sunset Park), and Sierra Realty, in accordance with a construction agreement. On August 18, 2008, Juan Sierra allegedly was injured while working in the building under construction. On January 6, 2009, Sunset Park and Sierra Realty's own insurer, Greater New York Insurance Company (GNY), wrote to Scottsdale, tendering a claim for the defense and indemnification of the underlying action on behalf of Sunset Park and Sierra Realty. On February 2, 2009, Scottsdale disclaimed coverage and rejected the tender on the grounds that the GNY letter constituted late notice of the accident and did not comply with terms of the Scottsdale policy. Scottsdale did not send this letter to Sunset Park or Sierra Realty, but, rather, only to GNY.

In affirming the Supreme Court's grant of Sunset Park and Sierra Realty's motion for summary judgment declaring that Scottsdale was obligated to defend and indemnify them, the Appellate Division, Second Department observed that where a primary insurer, like GNY, tenders a claim for defense and indemnification to an insurer, in this case, Scottsdale, which issued a certificate of insurance indicating that they are additional insureds, that insurer must comply with the disclaimer requirements of Ins. Law § 3420(d)(2) by providing written notice of disclaimer of coverage to the additional insureds. According to the court,

> The fact that the tendering insurer provided untimely notice of the accident "does not excuse the insurer's unreasonable delay in disclaiming coverage" (citations omitted). The failure of Scottsdale to provide written notice of disclaimer to 4401 and Sierra Realty rendered the disclaimer of coverage ineffective against them (citations omitted). Under the circumstances of this case, GNY was not the real party in interest, such that the notice of disclaimer to GNY would be rendered effective as against 4401 and Sierra Realty.[21]

In unanimously affirming the Appellate Division's order, the Court of Appeals held that written notice of disclaimer to the insured's own carrier, but not to the insureds themselves, did not meet the requirements of the disclaimer statute. As explained by the Court:

> GNY was not an insured under Scottsdale's policy; it was another insurer. While GNY had acted on the insured's behalf in sending notice of the claim to Scottsdale, that did not make GNY the insureds' agent for all purposes, or for the specific purpose that is relevant here: receipt of a notice of disclaimer. GNY's interests were not necessarily the same as its insureds' in this litigation. There might have been a coverage dispute between GNY and the insureds, or plaintiff's claim might have exceeded GNY's policy limits. Because the insureds had their own interests at stake, separate from that of GNY, they were entitled to notice delivered to them, or at least to an agent – perhaps their attorney – who owed a duty of loyalty in this matter to them only. As the Appellate Division correctly held in *Greater N.Y. Mut. Ins. Co. v. Chubb Indem. Ins. Co.*, 105 A.D.3d 523, 524, 963 N.Y.S.2d 218 (1st Dept. 2013), the obligation imposed by the Insurance Law is "to give timely notice of disclaimer to the mutual insureds . . . not to . . . another insurer."[22]

Moreover, the Court rejected Scottsdale's argument that it had "substantially complied with the statute," relying upon *Excelsior Ins. Co. v. Antretter Contracting Corp.*[23] and *Cincinnati Ins. Cos. v. Sirius Am. Ins. Co.*[24] Indeed, the court stated that "if *Excelsior* and *Cincinnati* are read to stand for the general proposition that notice to an addi-

tional insured's liability carrier serves as notice to the additional insured under section 3420(d)(2), those cases should not be followed."[25]

Stolen Vehicle

A vehicle that is stolen is considered an "uninsured" motor vehicle. The issue of whether, in fact, a vehicle was used without the permission or consent (express or implied) of the owner often presents a triable issue of fact for determination at a framed issue hearing. In general, there is a strong presumption of permissive use, which can be overcome by evidence to the contrary.[26]

In *Allstate Ins. Co. v. Rolon*,[27] the court held that GEICO's opposition to Allstate's petition to stay arbitration, based upon its denial of coverage to the tortfeasor driver on the ground that he had been operating the vehicle without the permission of the vehicle's owner, was insufficient because GEICO failed to come forward with any admissible evidence, such as an affidavit by its insured (the vehicle owner), or a police report of the vehicle's theft.

In *Allstate Ins. Co. v. Cristobal Peralta*,[28] the court held that the evidence at the framed issue hearing did not overcome the presumption of permissive use. The evidence established that the car keys were stolen hours before the accident and that such theft was reported to the police. However, there was no evidence that the car was ever stolen or reported stolen. Under those circumstances, the court could reject the contention that the car must have been driven by an unknown thief, and there was no basis to disturb the findings of the hearing court.

In *Alvarez v. Bivens*,[29] the defendant parked his truck on the street near the old Yankee stadium. When he exited the truck, he locked it and placed a hide-a-key box with the spare key inside the rear wheel frame. When he returned later that night, the truck was gone and he reported it stolen. When it was recovered by the police about three days later, the hide-a-key box was missing, but the police recovered the key that had been in the box. In the meantime, two days after the alleged theft, the plaintiff was struck by the stolen truck. Six days later, an individual pled guilty to grand larceny in the fourth degree, admitting that he stole the truck.

Under these facts, the court concluded that the defendant "established by substantial evidence that his truck was stolen at the time of the accident, thereby rebutting the VTL §388 presumption that the motor vehicle was being operated with his consent."[30] The Court further held that the plaintiff failed to raise an issue of fact that the defendant had violated VTL § 1210(a) – the "key in the ignition" statute. Pursuant to that statute, "[n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle." However, the statute further states that "'the provision for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency.' Thus, to avoid liability under the section, 'a motorist need only ensure that the ignition key is "hidden from sight"' and need not additionally conceal it so that the key is 'not readily discoverable by a prospective car thief without extreme difficulty (citations omitted).'"[31] Here, the defendant's testimony that someone could "probably" see the hide-away-box if he or she looked for it, and that "you would have a very small window as you are walking past it," from which you could "possibly" see the key, did not suffice to raise an issue as to whether the key was "hidden from sight." The defendant testified that one would "have to kind of be peeking around a little bit" to find the key in the hide-a-key box and the record established that the key was not in plain view and that one would have to be actively looking for it to find it.

In *State Farm Ins. Co. v. Walker-Pinckney*,[32] the court held that the vehicle owner's testimony that the vehicle was missing at the time of the accident, without more, was insufficient to overcome the presumption of permissive use. The sole witness at the framed issue hearing was the owner of the vehicle in question. His testimony established that, at some point, he noticed that the vehicle was "missing," that he reported this to the police, and that, less than two days later, he ascertained that the vehicle had been towed to an impoundment lot. When he recovered the vehicle, he saw that it had been seriously damaged; this was the first time he learned that the vehicle had been in an accident. He did not know who was driving the vehicle at the time of the accident, and he did not give anyone permission to drive the vehicle at that time. However, he also testified that both he and his wife had sets of keys to the vehicle, and that the wife was the last one to park the vehicle before the owner noticed it was "missing." Moreover, when the owner recovered the vehicle from the impoundment lot, a set of keys was inside the vehicle. No evidence was presented at the hearing with respect to whether the wife was using or operating the vehicle at the time of the accident, or whether she had given a third party permission to use the vehicle at the time. Under those circumstances, the court held that "the evidence adduced at the hearing was not sufficient to overcome the presumption of permissive use."[33]

Hit-and-Run

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

In *Progressive Northwestern Ins. Co. v. Scott*,[34] the court held that "[p]hysical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle" and that "[t]he insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely, that physical contact occurred, that the identity of the owner and oper-

ator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable."

When there is a genuine triable issue of fact with respect to whether a claimant's vehicle had any physical contact with an alleged hit-and-run vehicle, the appropriate procedure is to stay arbitration pending a hearing on that issue.[35]

In *Merchants Preferrred Ins. Co. v. Waldo*,[36] the respondent raised a triable issue of fact warranting a framed issue hearing to determine whether there was "physical contact" between her vehicle and the hit-and-run vehicle by submitting an affidavit in which she averred that another vehicle struck her vehicle when it changed lanes, and that the other vehicle "skimmed" her front bumper.

In *National Continental Ins. Co. v. Brojaj*,[37] the court upheld the Supreme Court's determination, based upon the evidence presented at a framed issue hearing, that there was no contact between the truck driven by the respondent and an unidentified car. The court refused to upset the trial court's conclusion that the respondent's testimony was not credible.

Where the matter is determined after a hearing, the appellate court's power to review the evidence is "as broad as that of the hearing court, taking into account in a close case the fact that the hearing court had the advantage of seeing the witnesses (citations omitted)."[38]

In *Yi Song He v. Motor Veh. Acc. Indem. Corp.*,[39] the court held that the petitioner, who was riding a bicycle when he was hit by a vehicle that fled the scene, failed to establish that "all reasonable efforts" were made "to ascertain the identity of the motor vehicle and of the owner and operator thereof," where the police report identified two witnesses and reflected that two license plates were identified as belonging to the offending vehicle. Contrary to the petitioner's contention, the fact that one of the license plates was identified as a "possible plate," "does not mean that there is no substantial evidence linking that vehicle to the accident. Rather, it means that an investigation was required. Yet, petitioner has not identified any effort . . . to identify, or obtain information from the two witnesses." Accordingly, the court denied the petition to sue the MVAIC.

On the other hand, in *Alam v. Motor Veh. Acc. Indem. Corp.*,[40] the court held that the petitioner met his burden of establishing that the accident was one in which the identity of the owner and operator of the offending vehicle was not ascertainable through reasonable efforts, where the petitioner was struck by a motor vehicle while crossing the street on his way to pray at a mosque, the driver pulled over, exited the vehicle and approached the petitioner, the petitioner told the driver that he was fine, and, as a result, the driver left the scene. "Because petitioner did not believe he was seriously hurt, it was reasonable that he did not ask the driver for identifying information at that time (citation omitted). Once he knew he was seriously injured, petitioner undertook reasonable efforts to ascertain the identity of the vehicle owner or operator" by filing a police report, canvassing the mosque and surrounding area to locate possible eyewitnesses, and obtaining surveillance footage depicting the accident location – all of which proved unhelpful in identifying the operator or the license plate number of the offending vehicle.

In some instances, a claim is made that the subject vehicle was identified by the claimant/insured, but was not, in fact, involved in the subject accident. Such cases often result in framed issue hearings to determine the issue of involvement, with results dependent upon the specific facts of each case.

For example, in *Hertz Corp. v. Holmes*,[41] the court held that the uncontroverted evidence adduced at the hearing established involvement of the subject vehicle. At the scene of the accident, the driver of the offending vehicle went into a nearby house and came out with a telephone, and the claimant spoke on the phone to the driver's wife, who, *inter alia*, identified her place of employment. The offending driver moved the vehicle, which claimant described as a silver SUV, and parked it down the block from the accident scene, and the claimant followed and pulled her vehicle approximately six feet behind it and wrote down the plate number, which she gave to the police when they arrived. The plate was registered to a silver Mercury Mountaineer (an SUV), which was owned by an individual who resided near the accident scene. The driver admitted that his wife worked where the claimant said she did, and there was no damage to the vehicle.

On the other hand, in *Nationwide Mutual Ins. Co. v. Joseph-Sanders*,[42] the court concluded, after a hearing, that the special referee's determination that the subject vehicle was involved was not supported by any credible evidence. The testimony at the framed issue hearing established that immediately after the collision, which involved an alleged unidentified vehicle, the driver of the offending vehicle got out of his green Ford Taurus and apologized to the claimant, and was still present at the scene when the ambulance arrived. The police accident report did not indicate the presence of a hit-and-run vehicle, and no evidence was recovered at the scene pertaining to the identity of that vehicle. The operator of another vehicle, which claimant's vehicle struck after being hit by the hit-and-run vehicle, testified that she identified a green Ford Taurus owned by Melvin Hammer as the offending vehicle upon observing it parked in the vicinity of the accident a day after the accident. The testimony further established that after striking the rear of the claimant's vehicle, the offending vehicle backed up over a curb and struck a house. However, photos of the vehicle showed only light scratches on the front of the vehicle, consistent with Hammer's testimony that the vehicle had "wear and tear." In addition, her in-court identification of Hammer, more than one year after the

accident, was not credible. The other driver stated that she only observed him by "peeking out" from inside her car, and described him as a "very older" or elderly man with a long beard and wearing traditional Hasidic clothing. However, in court, Mr. Hammer was clean-shaven and did not dress in Hasidic garb, and testified that he was never Hasidic. Hammer consistently denied that his vehicle was involved in the accident.

In *Government Employees Ins. Co. v. Boohit*,[43] the petitioner established by admissible proof that a vehicle owned by the additional respondent was involved in the alleged accident. No objection was made to the admission of a police report containing the license plate number of that vehicle. Thus, the evidence was presumed to have been unobjectionable, and any error in its admission was deemed waived. In any event, the contents of the police report were admissible under the present sense impression exception to the hearsay rule since they were sufficiently corroborated by testimony at the hearing. No basis existed in the record to disturb the court's credibility determinations.

Cancellation/Termination

Although not specifically listed as a separate category of an "uninsured" motor vehicle under Ins. Law § 3420(f)(1), a vehicle whose insurer timely and properly *canceled* its policy prior to the date of the accident will be deemed an "uninsured motor vehicle."

In *Progressive Specialty Ins. Co. v. Alexis*,[44] the insurer's cancellation was based upon the contention that the insured, who did not register the insured vehicle, did not have an insurable interest in the vehicle. The court held that this asserted ground was incorrect and held that the cancellation was invalid.

The court in *Motor Veh. Acc. Indem. Corp. v. American Country Ins. Co.*[45] held that by operation of Vehicle and Traffic Law § 313(1)(a) (VTL), *subsequent coverage terminates prior coverage* as of the effective date and hour of the new coverage, irrespective of whether the initial insurer otherwise complied with the cancellation requirements of the VTL.

Workers' Compensation Defense

In *Hauber-Malota v. Philadelphia Ins. Cos.*,[46] deciding a "matter of first impression," the court held that an employee, injured in an accident while in the course of her employment, and who was barred by the exclusive remedy provisions in the Workers' Compensation Law from suing a co-employee based upon negligence, was not entitled to SUM benefits under her employer's automobile liability insurance policy.

In this case, the plaintiff was a passenger in a vehicle operated by her co-employee and owned by their common employer, when that vehicle was rear-ended by another vehicle operated by another co-employee. All involved were within the scope of their employment at the time of the accident. The plaintiff's action against the owner/operator of the second vehicle was dismissed on the ground that her remedy against her co-employee was limited to the recovery of Workers' Compensation benefits (Workers' Comp. Law § 29(6)). The plaintiff subsequently commenced an action seeking SUM benefits from the insurer of the host vehicle owned by her employer. The SUM insurer moved for summary judgment on the ground, *inter alia*, that the plaintiff's exclusive remedy was the recovery of Workers' Compensation benefits. In reversing the trial court's denial of that motion, the Fourth Department first observed that

> plaintiff correctly contends that the exclusive remedy provision in Workers' Compensation Law §29(6) does not bar all actions by injured employees against any employer's insurer for SUM benefits. Although workers' compensation benefits generally are "exclusive and in place of any other liability whatsoever" (§11), the statute "cannot be read to bar all suits to enforce contractual liabilities" (citation omitted). Because an action to recover uninsured motorist benefits "is predicated on [the] insurer's contractual obligation to assume the risk of loss associated with an uninsured motorist" (citation omitted), the Workers' Compensation Law does not categorically bar such an action against an employer's insurer (citation omitted).[47]

However, the court noted that the critical distinction in this case was that the subject motor vehicle accident involved two vehicles operated by co-employees.

As noted by the Court, the Uninsured Motorist Statute, Ins. Law § 3420(f)(1), requires the payment of benefits in the amount that the claimant "shall be entitled to recover" as damages from an owner or operator of an uninsured motor vehicle. Similarly, the SUM endorsement, promulgated pursuant to Ins. Law § 3420(f)(2), requires the payment of "all sums that the insured . . . shall be *legally entitled to recover* as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured (emphasis added)." As explained by the court, "Defendants' contractual liability to provide SUM benefits is therefore 'premised in part' upon the contingency of a third party's tort liability."[48] Insofar as, pursuant to the plain language of the SUM endorsement, the plaintiff was not "legally entitled to recover damages" from the owner and operator of the offending vehicle because of the status of its operator as a co-employee, the plaintiff was not entitled to recover SUM benefits under the policy.

UNDERINSURED MOTORIST ISSUES

Trigger of Coverage

In *Governmemt Employees Ins. Co. v. Lee*,[49] the claimant was a passenger in a vehicle insured by Government Employees Ins. Co. (GEICO), with bodily injury and SUM limits of $300,000 per person/$300,000 per accident. The alleged offending vehicle was insured by Allstate under an Allstate "split limit" policy, with bodily injury lim-

its of $100,000 per person/$300,000 per accident. After receiving the full $100,000 available limits of the Allstate policy, the plaintiff demanded arbitration of a SUM claim against GEICO, arguing that the per-person liability coverage afforded under the Allstate policy was less than the per person liability coverage afforded under the GEICO policy. GEICO sought to stay arbitration on the ground that its SUM coverage was not triggered because both the GEICO and the Allstate policy provided for aggregate liability limits of $300,000 per accident, and, therefore, the tortfeasor was not an underinsured motorist.

After noting that "the essential purpose of the [SUM] statute [is] to provide the insured with the same level of protection he or she would provide to others were the insured a tortfeasor in a bodily injury accident (citation omitted)," and that "[t]he necessary analytical step, then, is to place the insured in the shoes of the tortfeasor and ask whether the insured would have greater bodily injury coverage under the circumstances than the tortfeasor actually has (id.)" and "[t]he determination of whether SUM benefits are available 'requires a comparison of each policy's bodily injury liability coverage as it in fact operates under the policy terms applicable to that particular coverage' (id. at 688)," the court concluded that

> a comparison of the two policies at issue, in light of the particular circumstances of this case, demonstrates that an individual such as Lee would be afforded greater per-person bodily injury liability coverage under the GEICO policy than under the Allstate policy. Under the Allstate policy, Lee was limited to the recovery, in tort, of $100,000. The GEICO policy – a single limit policy – provided $300,000 of liability coverage for bodily injury to any one injured person. Since the per person bodily injury liability insurance limits of coverage provided by the Allstate policy are in a lesser amount than the per-person bodily injury liability insurance limits of coverage provided by the GEICO policy, the SUM provision of the GEICO policy was triggered (citations omitted).[50]

A proper notice of denial or disclaimer must apprise with a high degree of specificity of the ground or grounds on which it is predicated.

In *Unitrin Direct/Warner Ins. Co. v. Brand*,[51] the tortfeasor had bodily injury liability coverage limits of $100,000/$300,000, and the injured claimant also had bodily injury liability limits of $100,000/$300,000. Insofar as SUM coverage is only triggered where the bodily injury liability insurance limits of the policy covering the tortfeasor's vehicle are less than the liability limits of the policy under which a party is seeking SUM benefits, and, here, the tortfeasor's limits were identical to the claimant's, the tortfeasor did not qualify as an underinsured driver, and underinsured motorist coverage was not triggered.

Consent to Settle

The mandatory uninsured motorist endorsement provides that coverage does not apply if the insured or person entitled to payment under such coverage "shall without written consent of the company, make any settlement with . . . any person or organization who may be legally liable therefor." The SUM endorsement mandated by Regulation 35-D (11 N.Y.C.R.R. § 60-2.3(e)) contains a specific exclusion for settlement without consent, as well as a provision that states "an insured shall not otherwise settle with any negligent party, without our written consent, such that our rights would be impaired."

In *Progressive Northeastern Ins. Co. v. Cipolla*,[52] the court noted that pursuant to Condition 10 of the SUM endorsement, the claimant/insured was required to give notice of any settlement to Progressive so that Progressive could "advance such settlement amounts to the insured in return for the cooperation of the insured" in a subrogation action, and forbidden from settling his claim against the tortfeasor "such that [Progressive's] rights would be impaired." It was undisputed that the claimant/insured settled his claim against the tortfeasor for the full amount of the tortfeasor's policy limits, but did not give Progressive timely notice of the settlement. When, thereafter, he made a claim for SUM benefits under Progressive's policy, Progressive denied the claim based upon his unauthorized settlement.

In challenging the denial of coverage, the claimant/insured argued that his unauthorized settlement did not impair Progressive's subrogation rights because he had not provided a release to the tortfeasor. He did not dispute, however, that he discontinued his action against the tortfeasor without Progressive's consent and that, under the terms of the settlement, the discontinuance was to be "with prejudice." He also did not dispute that he was required to provide the tortfeasor with a release. Under those circumstances, the court held that he failed to demonstrate that he did not impair Progressive's subrogation rights, and, accordingly, granted Progressive's petition to stay arbitration.

In *Ducz v. Progressive Northeastern Ins. Co.*,[53] the insured/claimant sent correspondence to the SUM insurer advising that a high-low arbitration was being offered by the tortfeasor's insurer, and advising of a potential claim under the SUM endorsement in the event that the arbitration award exceeded the tortfeasor's policy limits. The insured/claimant requested the SUM carrier's consent to proceed with the high-low arbitration, and the SUM carrier declined to consent because it did not want to waive its right to subrogation against the tortfeasor. Thereafter, the insured/claimant commenced a proceeding to compel the SUM carrier to consent to the high-low arbitration and to proceed with SUM arbitration. The court denied the insured/claimant's application because: (1) she failed to establish that she exhausted the tortfeasor's policy through settlement; and (2) the compelling

of consent to the high-low agreement was not relief that could be sought nor granted in a CPLR art. 75 proceeding.

Offset/Reduction in Coverage

In *Government Employees Ins. Co. v. Terrelonge*,[54] the court held that the provision in the SUM endorsement that limited SUM payments to the difference between the limits of SUM coverage and the insurance payments received by the claimant from any person legally liable for the claimant's bodily injuries was not ambiguous, and must, therefore, be enforced. Thus, where the tortfeasor's coverage of $25,000 was tendered, and the difference between the SUM policy limit of $25,000 and the amount offered by the tortfeasor – also $25,000 – was zero, the petition to stay was granted.

In *Santoro v. GEICO*,[55] the court held that where the defendant's policy included "Supplementary Uninsured/Underinsured Motorist" (SUM) coverage in the amount of $300,000, the plaintiff's alleged damages in an action for breach of contract against the SUM carrier were limited to $275,000 because the plaintiff had previously received the sum of $25,000 from the tortfeasor's insurer.

The court also noted that while "'consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting' (citation omitted),[56] the only consequential damages asserted by the plaintiff are an attorney's fee and costs and disbursements resulting from this affirmative litigation, which are not recoverable."[57]

1. Insurance Law § 3420(d)(2) (Ins. Law).
2. 23 N.Y.3d 583, 590, 992 N.Y.S.2d 185 (2014).
3. 116 A.D.3d 647, 647, 984 N.Y.S.2d 366 (1st Dep't 2014).
4. *See Matter of Worcester Ins. Co. v. Bettenhauser*, 95 N.Y.2d 185, 189–90, 712 N.Y.S.2d 433 (2000); *Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 136–37, 447 N.Y.S.2d 911 (1982).
5. 22 N.Y.3d 571, 575–76, 983 N.Y.S.2d 460 (2014).
6. 122 A.D.3d 974, 975, 996 N.Y.S.2d 747 (3d Dep't 2014).
7. 23 N.Y.3d 583, 590–91, 992 N.Y.S.2d 185 (2014).
8. 127 A.D.3d 622, 5 N.Y.S.3d 872 (1st Dep't 2015).
9. 120 A.D.3d 1366, 993 N.Y.S.2d 121 (2d Dep't 2014).
10. 120 A.D.3d 1195, 922 N.Y.S.2d 327 (2d Dep't 2014), *motion for lv. to appeal denied*, 25 N.Y.3d 905, 10 N.Y.S.3d 524 (2015).
11. 130 A.D.3d 497, 498, 14 N.Y.S.3d 415 (1st Dep't 2015).
12. 102 A.D.3d 508, 959 N.Y.S.2d 19 (1st Dep't 2013), *aff'd*, 22 N.Y.3d 1105, 983 N.Y.S.2d 465 (2014).
13. *See* Dachs, N. and Dachs, J., Court of Appeals Decisions: "Jinx-Proof" and "Reservation of Rights Letters," N.Y.L.J., May 13, 2014, p. 3, col. 1. *See also Vermont Mut. Ins. Co., Inc. v. Mowery Constr. Inc.*, 122 A.D.3d 974, 996 N.Y.S.2d 747 (3d Dep't 2014).
14. 124 A.D.3d 876, 878–79, 3 N.Y.S.3d 58 (2d Dep't 2015).
15. 22 N.Y.3d 571, 983 N.Y.S.2d 460 (2014).
16. *Id*. at 572. *See* Dachs, N. and Dachs, J., Court of Appeals Clarifies Timeliness of Non-Cooperation Disclaimer, N.Y.L.J., Mar. 11, 2014, p. 3, vol. 1.
17. *See General Accident Ins. Group v. Cirucci*, 46 N.Y.2d 862, 864, 414 N.Y.S.2d 512 (1979).
18. 124 A.D.3d 551, 998 N.Y.S.2d 632 (1st Dep't 2015).
19. *Id*. at *1. *See also JLS Industries, Inc. v. Delos Ins. Co.*, 127 A.D.3d 645, 9 N.Y.S.3d 19 (1st Dep't 2015).
20. 101 A.D.3d 983, 957 N.Y.S.2d 219 (2d Dep't 2012), aff'd, 24 N.Y.3d 514, 2 N.Y.S.3d 8 (2014).
21. *Id*. at 985.
22. *Sierra*, 24 N.Y.3d at 518–19.
23. 262 A.D.2d 124, 693 N.Y.S.2d 100 (1st Dep't 1999).
24. 51 A.D.3d 1365, 856 N.Y.S.2d 800 (4th Dep't 2008).
25. *Id*. at 519.
26. *State Farm Ins. Co. v. Walker-Pinckney*, 118 A.D.3d 712, 986 N.Y.S.2d 626 (2d Dep't 2014).
27. 120 A.D.3d 1117, 992 N.Y.S.2d 411 (1st Dep't 2014).
28. 128 A.D.3d 569, 10 N.Y.S.3d 51 (1st Dep't 2015).
29. 114 A.D.3d 526, 980 N.Y.S.2d 425 (1st Dep't 2014).
30. *Id*. at 527.
31. *Id*.
32. 118 A.D.3d 712, 986 N.Y.S.2d 626 (2d Dep't 2014).
33. *Id*. at 714.
34. 123 A.D.3d 932, 932, 999 N.Y.S.2d 442 (2d Dep't 2014).
35. See Allstate Ins. Co. v. Carraro, 130 A.D.3d 1021, 13 N.Y.S.3d 843 (2d Dep't 2015). See also Merchants Preferred Ins. Co. v. Waldo, 125 A.D.3d 864, 4 N.Y.S.3d 246 (2d Dep't 2015).
36. 125 A.D.3d 864.
37. 114 A.D.3d 614, 980 N.Y.S.2d 765 (1st Dep't 2014).
38. *State Farm Mut. Auto. Ins. Co. v. Watson*, 128 A.D.3d 841, 842, 7 N.Y.S.3d 910 (2d Dep't 2015); *see also GEICO v. Selin*, 119 A.D.3d 568, 987 N.Y.S.2d 898 (2d Dep't 2014); *AutoOne Ins. Co. v. Fernandez*, 119 A.D.3d 677, 989 N.Y.S.2d 619 (2d Dep't 2014) (insured has the burden of establishing by a fair preponderance of the evidence that there was a hit-and-run accident with an uninsured vehicle, including all the elements of a hit-and-run).
39. 128 A.D.3d 525, 525, 9 N.Y.S.3d 53 (1st Dep't 2015).
40. 127 A.D.3d 585, 586, 7 N.Y.S.3d 135 (1st Dep't 2015).
41. 127 A.D.3d 1193, 10 N.Y.S.3d 92 (2d Dep't 2015).
42. 121 A.D.3d 1003, 996 N.Y.S.2d 57 (2d Dep't 2014).
43. 122 A.D.3d 525, 997 N.Y.S.2d 384 (1st Dep't 2014).
44. 122 A.D.3d 745, 996 N.Y.S.2d 173 (2d Dep't 2014).
45. 126 A.D.3d 657, 4 N.Y.S.3d 487 (1st Dep't 2015).
46. 121 A.D.3d 327, 991 N.Y.S.2d 190 (4th Dep't 2014).
47. *Id*. at 329.
48. *Id*. at 330.
49. 120 A.D.3d 497, 991 N.Y.S.2d 105 (2d Dep't 2014).
50. *Id*. at 499.
51. 120 A.D.3d 698, 993 N.Y.S.2d 37 (2d Dep't 2014).
52. 119 A.D.3d 946, 946–47, 990 N.Y.S.2d 569 (2d Dep't 2014).
53. 113 A.D.3d 849, 978 N.Y.S.2d 906 (2d Dep't 2014).
54. 126 A.D.3d 792, 5 N.Y.S.3d 288 (2d Dep't 2015).
55. 117 A.D.3d 1026, 1027, 986 N.Y.S.2d 572 (2d Dep't 2014).
56. *See Panasia Estates, Inc. v. Hudson Ins. Co.*, 10 N.Y.3d 200, 203, 856 N.Y.S.2d 513 (2008).
57. See New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 324, 639 N.Y.S.2d 283 (1995); *Mighty Midgets v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21, 416 N.Y.S.2d 559 (1979); *Stein, LLC v. Lawyers Tit. Ins. Corp.*, 100 A.D.3d 622, 953 N.Y.S.2d 303 (2d Dep't 2012).

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Defensible Cybersecurity

Tailoring an Organization's Security Posture to Applicable Legal Standards

By Dino E. Medina

It's not surprising that security experts now regularly use phrases like "There are companies that have been hacked, companies that don't know they've been hacked, and companies that refuse to recognize they have been hacked." Although the storage of sensitive information in the digital space is the modern, convenient, cost-effective norm for law firms and the corporate entities they serve, the potential for misappropriation of this information is greater than ever. Over the past couple of years, data breaches stemming from both hackers and inadvertent disclosures have increased exponentially.

Everyone is talking about security, but how does such talk translate to a provable, defensible cybersecurity program? Law firm clients, corporate investors and regulators (collectively, stakeholders), now closely scrutinize the security measures of law firms and corporate entities, respectively, with the goal of creating greater accountability for the security of their sensitive electronic data. These organizations have responded by hiring outside consulting firms to build custom information security management systems.

What looks solid on the surface may sit on unstable ground. The creation of a typical information security management system entails conducting a risk assessment, creating security policies and testing the effectiveness of those policies. While a well-designed information security management system can provide a superficial level of assurance to stakeholders, the failure to place applicable legal standards for data security at the forefront of each stage of the program-building process is likely to result in

the subject entity's inability to mitigate damages should an actual data breach occur.

John Verry, managing partner at Pivot Point Security, explains,

> It's hard to over-emphasize the value of strong risk assessment capabilities when building a comprehensive and provable information security program. It is only through the broader consideration of "non-traditional" information-related risks such as physical security, employees, contractual risk, laws/regulations, vendors and partners that an organization can protect itself from the diverse threats that are often the cause of today's largest breaches.

To better explore this issue, we set forth the elements used to assess an entity's security posture prior to the policy planning stage, offer a set of best practices to guide policy development, identify the types of accreditations available to such entities and illustrate how incorporation of applicable legal standards into each of these processes results in the most effective security risk mitigation system.

Key Risk Assessment Considerations

There are a number of formal data security risk assessment methodologies in existence, each with a different name applied to legitimize its application to a particular data type, industry, or set of activities. However, there are two elements that tie them all together – their purpose is to understand what risks exist to the entity applying them, and to document the likelihood and impact of each known risk.[1] The central question in any data security risk assessment is: Are the precautions an entity takes to secure its electronic data effective at controlling the types of risks the entity faces?

Identify Sensitive Data and Categorize It According to Applicable Legal Standard

The first step in the assessment process is to evaluate the sensitive data types the subject entity creates, collects, maintains or transmits, and categorize this data based on the legal framework governing its protection. Law firms and their corporate clients hold a variety of sensitive data types, each requiring a different standard for protection. Here are some examples of sensitive data types and the legal standard(s) applicable to the security of each.

The security of information an attorney learns during the representation of a client, including a corporate client, is governed by ethical standards for attorney conduct. For example, the American Bar Association's Model Rule 1.6(c) states "a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to the representation of a client."[2] The comments to Rule 1.6 set forth factors that are to be used to determine the reasonableness of an attorney's efforts to secure his or her client's information. They include the below items.[3]

- Sensitivity of the information
- The likelihood of disclosure if additional safeguards are not employed
- The cost of employing additional safeguards
- The difficulty of implementing the safeguards
- The extent to which the safeguards negatively impact the lawyer's ability to represent clients generally

Personally Identifiable Information (PII) is any information about an individual maintained by an entity, including (1) any information that can be used to distinguish or trace an individual's identity (e.g., name, Social Security number, date of birth); and (2) any other information that is linked or linkable to an individual (e.g., medical, financial and employment information). Forty-seven states have implemented such laws and each requires appropriate administrative, technical and physical safeguards for PII.

Protected Health Information (PHI) is information traceable to a patient by one or more of 18 identifiers that relate to medical condition, diagnosis or treatment,[4] including:

- Name
- License number
- Dates (e.g., birth, admission, discharge, death)
- Vehicle identifiers
- Address
- Medical device identifiers
- Phone number
- Fax number
- URLs
- IP address
- Email address
- Biometric identifiers
- Facial photographs
- Social Security number
- Health plan number
- Medical record number
- Account number
- Any other unique identifier

The Health Insurance Portability and Accountability Act (HIPAA) Security Rule requires appropriate administrative, physical and technical safeguards to ensure the confidentiality, integrity and security of electronic PHI. The standard for satisfaction of the Security Rule is encryption of electronic PHI.

The security of intellectual property (IP) is typically governed by contract, applying a standard of care that the party receiving IP information uses to protect its own information of like importance. IP, whether in the form of patents, trademarks, copyrights or trade secrets, may be more valuable than an entity's physical assets. According to the Commission on the Theft of American Intellectual Property, U.S. companies lose hundreds of billions of dollars each year as a result of IP theft.[5]

Once sensitive data and the legal standards applicable to their security are identified, it is time to understand and analyze the entity's security risks. For this step, it is necessary to examine all forms of risk that potentially impact security of sensitive data, including without limitation, regulatory risk, technical risk (i.e., gaps in the entity's physical and virtual security infrastructure), risk of human error (e.g., susceptibility to phishing, ransomware or malware attacks), risks in physical security infrastructure (i.e., all points of entry into areas where sensitive data resides, including buildings, offices and server rooms), and risks in virtual security infrastructure (e.g., network access controls, software access controls, password protocols, and encryption of data in motion and data at rest[6]).

Assemble the Team

The next step in the assessment is to evaluate the entity's internal resources and assemble a team with the types of expertise necessary to thoroughly address the organization's risk posture. There are four categories of personnel required for this step:

- Legal personnel to advise with respect to the laws applicable to the data the entity holds;
- Technical personnel to advise with respect to software and infrastructure;
- Accounting personnel to advise with respect to the costs versus benefits of existing cyber-risk controls; and
- C-suite personnel for analysis of business processes applicable to sensitive data, whether there's existing organizational buy-in of risk mitigation strategies, and whether existing security controls are inhibiting the entity's growth progress.

The final component of the security assessment stage is to bring the entity's key teams together to link the business processes that access sensitive data, the people and technology used to support those processes, and the existing security structure to evaluate areas of risk. This task requires the drafting of a risk assessment report in order to comprehensively address data security risks. Law firms and corporate entities should consider engaging an outside expert to assist in this task, as holes in risk assessment documentation will result in an ineffective cybersecurity program.

Drafting Effective Information Security Risk Management Policies

Once the law firm or corporate entity has assessed its data security risks using this framework, it needs to carefully craft information security management policies to control these risks.[7] To meaningfully address an organization's risk profile, the risk assessment report and legal standards governing security of the data must guide policy development. When drafting the policies, remember to include the following, often-overlooked, aspects:

- Closely link the legal standards governing security of the sensitive data to the policy requirements;
- Include verification of the entity's continuing compliance with the policies;
- Incorporate comprehensive employee training with periodic updates into the program, since studies have found that educating employees is vital to reducing data breaches;[8]
- Ensure third-party security risks are effectively managed;
  - Via contract, make certain they are legally bound to maintain data security in accordance with stan dards applicable to your sensitive data types, and
  - Stipulate audit requirements, recognizing the third-party vendors' confidentiality obligations to other clients.

Third-Party Verifications

If an entity's underlying information security methodology is properly designed and effectively implemented, external security verifications can both instill confidence in stakeholders and substantially mitigate damages in the event of a security breach. They can be used to test a law firm or corporate entity's own data security controls and those of its outside contractors. Various levels of external testing, audits and security accreditations are available, including the following – listed in order of testing rigor:

- SSAE-16 SOC 1 (Standard for security controls impacting financial reporting)
- SOC 2 (Standard for security, availability, processing integrity, confidentiality or privacy of information)
- ISO-27001: 2013 (International standard for information security)
- PCI DSS (Payment Card Industry standard for merchants)
- FedRAMP (U.S. Government standard for cloud services providers)

SSAE-16 SOC1 Type 2 Standard

The Auditing Standards Board (ASB) of the American Institute of Certified Public Accountants (AICPA) published the Statement on Standards for Attestation Engagements (SSAE) No. 16 – Reporting on Controls at a Service Organization – in January 2010. The ASB defines a service organization as one that provides services to "user entities," for which these services are likely to be relevant to the user entities' own internal controls for financial reporting.[9] The term "user entity" is simply an entity utilizing the services of a service organization.

The SSAE 16 standard requires a service organization to describe its "system" (i.e., the services the organization provides, along with the supporting processes, policies, procedures, personnel and operational undertakings that constitute the service organization's core activities relevant to user entities). In addition, management of the service organization must make a number of affirmative,

written representations regarding its systems and the appropriateness of the design and operating efficacy of the organization's controls in satisfying their objectives[10] – for purposes of this article, the objective is information security, and the areas requiring management representations follow.

- Management's description of the service organization's "system" has to fairly and accurately represent the "system" as implemented throughout the time period subject to testing, which is typically six months.
- The control objectives referenced in management's description of the service organization's "system" have to have been appropriately designed to achieve those control objectives throughout the time period subject to testing; again, to be effective, the control objectives must closely track applicable legal standards.
- The controls have to have been consistently applied throughout the time period subject to testing.

An SSAE 16 information security audit and resulting report would include testing of the integrity, security and privacy of client data. Entities providing material outsourcing services to other entities (e.g., a law firm hosting client data for litigation purposes) would be well-advised to consider SSAE 16 third-party compliance examinations as a means of providing ongoing data privacy assurances to stakeholders and mitigating damages when a data breach occurs.

SOC 2 Standard

The AICPA Assurance Services Executive Committee released the current version of the Service Organization Control (SOC) 2 framework in January 2014. SOC 2 is a criteria-based framework that reports on a service organization's controls over one or more of the below Trust Services Principles (TSPs).[11]

- Security of a service organization's system (see SSAE 16 for "system" definition)
- Availability of a service organization's system
- Processing integrity of a service organization's system
- Confidentiality of the information that the service organization's system processes or maintains for user entities
- Privacy of personal information that the service organization collects, uses, retains, discloses and disposes of for user entities

An entity employing the SOC 2 framework may omit one or more of the five TSPs from the scope of its audit, provided each of the omitted TSPs is not applicable to the system under audit.[12]

Similar to an SSAE 16 information security audit, a SOC 2 audit would include testing of the subject entity's integrity, security and privacy of client data; however, there are two key differences: (1) as noted above, the SOC 2 TSPs include testing of additional system availability and information privacy controls; and (2) SOC 2 is tailored to technology and cloud computing service organizations, incorporating the TSPs in accordance with the Attestation Standards (AT) Section 101. Law firms and corporate entities storing client data in electronic form should consider SOC 2–based third-party compliance examinations as an alternative to SSAE 16 to bolster security and soften exposure should a data breach occur.

ISO-27001: 2013 Standard

The International Organization for Standardization (ISO) and International Electrotechnical Commission (IEC) Joint Technical Committee published the ISO/IEC 27001:2013 information security standard in October 2013. It is a benchmarks-driven, internationally accepted specification for establishing, implementing, maintaining and continually improving an entity's information security management system (ISMS), covering both the entity's internal sensitive information as well as sensitive information entrusted to the entity by third parties.[13] The ISO/IEC 27001:2013 standard includes requirements for the assessment and treatment of an entity's information security risks that are custom-designed to address the entity's specific information security risk profile. Organizations meeting this security standard may gain an official certification issued by an independent and accredited certification body upon successful completion of a formal audit process.

ISO certifications are effective for three-year periods, provided the entity successfully completes interim annual spot inspections which demonstrate its ongoing compliance with the customized ISMS. More than the SSAE and SOC 2 attestations, the ISO/IEC 27001:2013 standard and its related benchmarks can act as guidelines for entities wishing to design defen-

> Once sensitive data and the legal standards applicable to their security are identified, it is time to understand and analyze the entity's security risks.

sible data security protocols. The benchmarks cover 14 domains:

- Information security policies tailored to legal/regulatory requirements
- Organization of information security
- Human Resources security (pre-employment, during employment and post-employment)
- Asset management
- Access control
- Cryptography
- Physical security
- Operations security
- Communications security
- System acquisition, development and maintenance
- Supplier relationships
- Information security incident management
- Information security aspects of business continuity
- Compliance with ISMS policies and applicable laws

PCI Standard

The Payment Card Industry (PCI) Security Standards Council launched the PCI Data Security Standard (DSS) in December 2004. The PCI DSS applies to any merchant, including any law firm or other corporate entity, which processes, stores or transmits credit card information. It requires a robust set of administrative, technical and physical security controls, including:[14]

- Install and maintain a firewall configuration to protect cardholder data
- Prohibit the use of vendor-supplied defaults for system passwords and other security parameters
- Protect stored cardholder data
- Encrypt transmission of cardholder data across open, public networks
- Protect all systems against malware, and regularly update anti-virus software or programs
- Develop and maintain secure systems and applications
- Restrict access to cardholder data by business need-to-know
- Assign a unique user ID to each person with computer access
- Restrict physical access to cardholder data
- Track and monitor all access to network resources and cardholder data
- Regularly test security systems and processes
- Maintain a policy that addresses information security for all personnel

It is important to note that although all merchants that process, store or transmit cardholder data must implement and adhere to the PCI DSS, formal certification of PCI DSS compliance is not required for all merchants, particularly smaller ones. Nonetheless, to avoid liability for fraud associated with theft of cardholder data, law firms and other entities subject to PCI DSS are wise to undergo formal audits.

FedRAMP

Finally, the most comprehensive data security attestation is the Federal Risk and Authorization Management Program (FedRAMP). FedRAMP was implemented in December 2011 to provide assurances regarding the security of government data stored in cloud environments. It is a government-wide, standardized approach to security assessment, authorization and continuous monitoring for cloud-based products and services.[15] FedRAMP certification is a requirement for law firms and corporate entities seeking to host government data in a cloud-based (i.e., Internet-accessible) format.

The FedRAMP process incorporates the following five-step approach to certify a cloud-based service provider's (CSP) authorization to host government data:

1. Authorization Initiation: Federal agencies or CSPs initiate the FedRAMP process by pursuing a security authorization. There are two sub-steps to complete here.
   - Submit a formalized request for Authority to Operate (ATO) as a government CSP to the FedRAMP Joint Authorization Board (JAB);
   - Document and implement the required security controls and policies based on the level of risk posed by the types of government data at issue and the type of cloud system in which the CSP will store that data. Entities with other security accreditations (e.g., ISO/IEC 27001:2013) can leverage existing policies for this sub-step to save time, money and resources.
2. Security Assessment: The security assessment process must be conducted by an accredited third-party assessment organization (3PAO) and incorporates a set of baseline security controls for information technology systems developed by the National Institute of Standards and Testing (i.e., NIST SP 800-53 Rev. 3).
3. Review: 3PAOs send security assessment packages to the FedRAMP JAB for review.
4. Authorization: CSPs continue to work with federal executive departments and agencies to obtain ATO permissions.
5. Ongoing Compliance: Once an ATO is granted, ongoing security assessment and authorization activities must be satisfied to maintain the ATO.

The common link to all cyber security programs is their focus on the subject entity's operational controls within a risk framework that is acceptable to that entity.[16] The primary factors that influence an entity's acceptable levels of risk include:

- Legal requirements
- Client-specific requirements
- Amount of physical and monetary resources available for data security
- Types of data held
- Business sector in which the entity operates

Law firms and the corporate entities they serve act as vast repositories of both commercially sensitive information and

PII, including PHI. The unauthorized disclosure of this kind of information could have a devastating effect on the responsible entity's reputation, financial position and, ultimately, the entity's ability to remain in business. Given the potential losses at stake when a data breach occurs, law firms and corporate entities must develop comprehensive cybersecurity programs, placing chief importance on the legal standards relevant to protecting their sensitive information.

1. https://www.optiv.com/blog/conducting-a-risk-assessment-key-components-you-cant-ignore.

2. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.

3. *Id*.

4. *See* 45 C.F.R. § 164.103.

5. http://www.ipcommission.org/report/IP_Commission_Report_052213.pdf, p. 1.

6. Data in motion is data that is exiting an entity's network via email, the web or other Internet protocols, while data at rest is data in computer storage (e.g., data on a file server, hard drive or backup tape).

7. In addition to written policies, implementation of technical controls/standards/procedures (e.g., a state-of-the-art firewall, ant-virus software) is essential to a comprehensive cyber risk management program.

8. http://www.cio.com/article/2384855/compliance/most-data-breaches-caused-by-human-error--system-glitches.

9. http://www.ssae16.org/important-elements-ssae16/what-is-a-service-organization.

10. *Id*.

11. http://www.ssae16.org/white-papers/soc-2-reporting-framework-essentials-part-i.

12. *Id*.

13. http://www.iso.org/iso/catalogue_detail?csnumber=54534.

14. http://searchsecurity.techtarget.com/definition/PCI-DSS-12-requirements. Though framed as a legal standard herein, the PCI DSS is used by financial institutions as a formal risk assessment and compliance tool for merchants.

15. https://www.fedramp.gov/about-us/about/.

16. In the case of a FedRAMP-based cybersecurity program, acceptable risk levels are ultimately determined by the government agency engaging the CSP.

CPLR 3404 Dismissals of Civil Causes "for Neglect to Prosecute"

By Kenneth R. Kirby

Introduction

Section 3404 of the N.Y. Civil Practice Law and Rules (CPLR) provides,

> A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

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The thesis of this article is that CPLR 3404 applies in all instances in which a note of issue is vacated and, therefore, the case is, concomitantly, "struck from the [trial] calendar" and not restored thereto within one year. In other words, no differentiation should be made between (1) cases in which a note of issue is vacated and the case, therefore, is "struck" from the calendar because discovery is, contrary to the contents of an inaccurate certificate of readiness, incomplete not due to reasons beyond the control of the filer, and (2) cases in which a note of issue is vacated and/or the case is "marked 'off' or struck from the calendar or goes unanswered on a clerk's calendar call" for other reasons. To understand why this is so, it is useful to review some principles of law.

Principles of Law

First, "[i]n New York practice under the CPLR, the filing of a 'note of issue' is the thing that gets the case onto the court's 'calendar' to await trial."[1] As stated by the court in *Bierzynski v. N.Y. Cent. R. R. Co.*,[2] "[a] case is placed on the calendar for trial by filing a timely and adequate note of issue (citations omitted)." *At the very moment a party files a note of issue* (together with the concomitant certificate of readiness and the requisite proof of service upon all other parties[3]), "the case goes onto the court's 'calendar' to await trial."[4] It is imperative, therefore, that a party appreciate the legal import and gravity of filing a note of issue and certificate of readiness: "'The filing of a note of issue . . . is tantamount to asserting that all pretrial proceedings have been completed and that the case is in a trial posture.' (*Siragusa v. Teal's Express*, 96 A.D.2d 749, 750.)"[5] Hence, a party should not lightly or cavalierly file a note of issue and certificate of readiness if that party knows either that he requires more discovery or that there exist any outstanding requests for discovery.

Second, once a case, by virtue of the filing of a note of issue and certificate of readiness with proof of due service upon all parties entitled to notice thereof, is placed on the trial calendar, discovery is, as of that moment, closed unless a timely motion to vacate the note of issue, made within the strict 20-day time limit following the service of the note of issue and certificate of readiness that is imposed by 22 N.Y.C.R.R. § 202.21(e), is granted.[6]

If, as stated in *Riggle*, the purpose of the statement of readiness rule is to "insure that only those actions in which all the preliminary proceedings have been completed, and which are actually ready for trial, shall be on the Trial Calendar," then, conversely, the purpose of requiring any non-filing party, within 20 days after service of a note of issue and certificate of readiness, "[to] . . . upon affidavit showing in what respects the case is not ready for trial . . . move to vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect"[7] is to insure that any case that is not "actually ready for trial . . . shall [not] be on the Trial Calendar," i.e., is removed therefrom by automatic operation of the court's vacation, upon such motion (or, on the court's own motion[8]), of the note of issue.

This is why 22 N.Y.C.R.R. § 202.21(e) requires that "[i]f the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served upon the clerk of the *trial* court"[9] so that the said "clerk of the trial court" will strike the case from the trial court's trial calendar upon receipt of "the order vacating the note of issue." Therefore, any order that vacates a note of issue in a pending Supreme Court or County Court case operates to "strike [that case] from the [trial] calendar."[10]

CPLR 3404 Applies to Instances Where a Note of Issue Is Stricken Due to Incomplete Discovery; Cases Holding to the Contrary Were Wrongly Decided

A line of mostly Second Department cases has held that when a court grants an order vacating a note of issue and/or striking the action from the trial calendar because discovery is incomplete, such an order

> [i]s not equivalent to an order marking "off" or striking the case from the trial calendar pursuant to CPLR 3404. Rather, [such an order] place[s] the action back into pre-note of issue status (*see Travis v. Cuff*, 28 A.D.3d 749, 750 [2006]; *Islam v. Katz Realty Co.*, 296 A.D.2d 566, 568 [2002]; *Basssetti v. Nour*, 287 A.D.2d 126, 132 [2001]).[11]

According to this line of cases, CPLR 3404 "d[oes] not provide a basis for the court to dismiss the action" where a note of issue was vacated due to incomplete discovery because such cases have been (constructively) returned to "pre-note of issue" status[12] by virtue of such vacation and "CPLR 3404 is inapplicable to pre-note of issue cases."[13]

This reasoning is flawed, however, because it's circular. In *Lopez v. Imperial Delivery Service, Inc.*,[14] the Second Department defined the respective spheres of operation of CPLR 3404 and CPLR 3216, stating that CPLR 3404 applies only to post-note of issue cases (and, then, the author would note, only to those that have been "marked 'off' or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter") and CPLR 3216's 90-day demand for note of issue provisions applies only to pre-note of issue cases.[15]

Yet, the Second Department has declined to apply CPLR 3404 in post-note of issue cases in which, upon a defendant's motion to vacate or strike a note of issue due to the certificate of readiness being in error and/or because discovery is incomplete, the note of issue had been vacated and/or the case struck from the calendar.

The Second Department has, in several cases, avoided applying CPLR 3404 to dismiss cases that should have been dismissed "for neglect to prosecute" for the plaintiff's failure to restore the case to the trial calendar within one year after the vacation of actually filed notes of issue

and the concomitant striking of those cases from the calendar, by employing the constructive fiction that

> [w]hen an action is stricken from the trial calendar as a result of the vacatur of the note of issue [because discovery had not been completed], the action returns to pre-note of issue status [citations omitted]. Since CPLR 3404 is inapplicable in an action in pre-note of issue status, that statute did not provide a basis for the dismissal of the action (*see Galati v. C. Raimondo & Sons Constr. Co., Inc.*, 35 A.D.3d [805] at 806; *Travis v. Cuff*, 28 A.D.3d 749, 750 [2006]).[16]

The over-arching problem with these Second Department cases is that if, constructively, a case in which a note of issue was actually filed but vacated is somehow transmogrified into a "pre-note of issue case" merely by virtue of the most common reason why a filed note of issue is vacated – incomplete discovery – in what sphere can CPLR 3404 any longer operate? If, as is undisputed, CPLR 3404 does not apply to cases in which a note of issue has not yet been filed, how cramped and limited will its sphere of operation be if cases in which notes of issue have actually been filed – which cases, by logical definition, qualify as "post-note of issue" cases – but which are deemed to have constructively "revert[ed] to pre-note of issue status" because discovery is incomplete[17] are, on that account, removed from its reach? Under this reasoning, CPLR 3404 is virtually construed out of existence.

Under the Second Department's reasoning, CPLR 3404 is permitted operation neither pre-note of issue nor, in the most typical instances, post-note of issue. Thus, it is essentially stripped of virtually any utility to automatically clear a court's calendar of abandoned or neglected cases, particularly in the Eighth Judicial District, where virtually the only way a case is struck from the calendar is via an order vacating a note of issue granted upon a 22 N.Y.C.R.R. § 202.21(e) motion to vacate because discovery is not complete.

In the Eighth Judicial District,[18] "calendar calls" are virtually non-existent. Cases are typically "struck from the calendar"[19] only as a consequence of a timely 22 N.Y.C.R.R. § 202.21 motion to vacate a note of issue, a motion that is usually brought because the certificate of readiness has inaccurately alleged that "pretrial proceedings"[20] are complete. Therefore, if an order that has both (1) vacated a note of issue and (2) concomitantly stricken a case from the trial calendar[21] were to be "deemed" to have, constructively, transmogrified the case from its actual post-note of issue status to, imaginatively, a pre-note of issue status, CPLR 3404 – being applicable only to post-note of issue cases[22] – will be eviscerated.

The court in *Lopez* made mistaken reference to "a case marked off pursuant to CPLR 3404 . . . ."[23] Cases are *not* "marked off pursuant to CPLR 3404." Rather, by its express terms, CPLR 3404 applies to post-note of issue cases *that have already been* "marked 'off' or struck from the calendar or [gone] unanswered on a clerk's calendar call, and not restored within one year thereafter."[24] To that *entire* class of cases CPLR 3404 applies and unambiguously directs that if such a case is "not restored within one year [it] shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute." Further, "[t]he clerk shall make an appropriate entry without the necessity of an order."[25]

CPLR 3404 draws no distinctions among cases within that class based on the reason why a case was marked off or struck from the calendar or went unanswered on a court's calendar call. Hence, when a note of issue is vacated,[26] the reason why the note of issue was vacated is immaterial to the operation of CPLR 3404 once one year has thereafter elapsed without the case having been restored to the trial calendar.

Why is this so? Among other reasons, because once a case is on the trial calendar and no longer subject to a 22 N.Y.C.R.R. § 202.21(e) motion to vacate note of issue,[27] no further discovery is allowed in a case in which a note of issue has been filed and not vacated,[28] except upon a showing of "unusual or unanticipated circumstances [that] develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice."[29] For this reason, appellate courts have held it error for a trial court not to strike a case from the trial calendar when discovery is incomplete and the defendant has, upon that ground, successfully moved to vacate the note of issue.

For example, where a defendant was, upon a motion to vacate, granted an order permitting examinations before trial of the plaintiff and other witnesses but not striking the case from the trial calendar, "[i]t was error," the Appellate Division ruled, "for the court to deny defendant's motion to strike the case from the Trial Calendar (citations omitted)" in light of the trial court's "implicit[] finding that defendant did not have a reasonable opportunity to complete discovery before plaintiff filed the note of issue and certificate of readiness."[30] Hence, the vacation of a note of issue due to incomplete discovery, *ipso facto*, effectuates a striking of the case from the trial calendar.[31] That the *Hoffman* and *Eisenberg* cases were correctly decided is confirmed by 22 N.Y.C.R.R. § 202.21(e)'s requirement that "[i]f the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served upon the clerk of the trial court" because, for what other purpose does that requirement logically exist if not to ensure that clerk's striking of the case from the trial court's calendar?

Returning, momentarily, to first principles: because the last sentence of CPLR 3402(a) *requires* that immediately upon a party's filing a note of issue (and, a certificate of readiness) accompanied by the requisite proof of service thereof upon the other parties, "[t]he clerk *shall enter the case upon the calendar as of the date of filing of the note of issue*,"[32] there is no deferring entry of the case upon the calendar to see if any other party moves to

vacate the note of issue within the 20-day period prescribed by 22 N.Y.C.R.R. § 202.21(e) for the bringing of such a motion, or, to see if any such motion is granted. Therefore, contrary to the Second Department's reasoning, once a note of issue has been filed, a case cannot logically be "deemed" to have reverted to pre-note of issue status if, subsequently, the note of issue is vacated for the reason that discovery has not been completed *because the case already was on the trial calendar before the motion to vacate was made*.

For purposes of CPLR 3404, in other words, the moment the note of issue is filed, a case is both (1) a "post-note of issue" case and (2) entered on the trial calendar. *Ergo*, upon a court's vacating of the note of issue, *the case is concomitantly struck from the trial calendar.*[33] Hence, the case, without more, becomes one in which, under CPLR 3404, restoration must be effectuated within one year or else the case shall be "dismissed . . . for neglect to prosecute" by an "appropriate entry of the clerk without the necessity of a motion."[34]

Damas v. Barboza

In *Damas v. Barboza*,[35] the trial court had twice stricken notes of issue – once on April 15, 1987 and the second time on July 14, 1988. Later, the case was deemed dismissed for neglect to prosecute by operation of CPLR 3404. Upon the plaintiff's appeal from the trial court's order that had denied the plaintiff's motion "to vacate a dismissal which occurred pursuant to CPLR 3404," the plaintiff contended, "[t]he striking of a note of issue because the Plaintiff had not allotted time for the defendant to complete discovery does not constitute a striking from the calendar under CPLR 3404."[36] Agreeing with the defendants that "the above captioned matter has been placed upon the Trial Calendar *and 'marked off' or otherwise had its Note of Issue stricken removing the same from the Trial Calendar*,"[37] the Second Department rejected the plaintiff's argument, stating

> The plaintiff's contention on appeal that the action was not on the trial calendar and therefore was not struck from the calendar when the court struck [the] note of issue is without merit. *Filing of the note of issue and certificate of readiness placed the action on the calendar (see, CPLR 3402[a], 22 NYCRR 202.21[a]; 202.22[a][3], [a][4])*.[38]

Yet, in its other cases discussed herein, the Second Department has deviated from its holding in the *Damas* case, thereby improperly "trespass[ing] . . . upon the legislative domain."[39] As is stated therein,

> *Some statutes are framed in language so plain that an attempt to construe them is superfluous.* The function of the courts is to enforce statutes, not to usurp the power of legislation, and to interpret a statute where there is no need for interpretation, to conjecture about or to add to *or to subtract from words having a definite meaning, or to engraft exceptions where none exist are trespasses by a court upon the legislative domain*. It follows, as a rule of general application, that if the legislative intent is clear no attempt at construction should or will be made.[40]

As already observed, by its express terms, CPLR 3404 does *not* differentiate among cases to which it applies based on the reason(s) why the case was "struck" or "marked off" the trial calendar or "went unanswered on a clerk's calendar call" and was not, thereafter, restored to the calendar within one year. Therefore, because an order that vacates a note of issue necessarily operates to strike a case from the trial calendar[41] and because CPLR 3404 includes no exception for cases in which the note of issue is vacated and the case concomitantly stricken from the calendar because discovery is incomplete, an order that vacates a note of issue for that reason (or, any other reason) strikes the case from the trial calendar within the meaning, intendment, and operation of CPLR 3404, whether the note of issue was vacated because it was prematurely filed before discovery was complete (e.g., *Hebert v. Chaudrey*[42]) or for any other reason.

Willis v. City of New York

Surprisingly, even when a trial court took pains to expressly indicate that the case was stricken from the trial calendar, the Second Department did not give effect to the plain language of CPLR 3404. In *Willis v. City of New York*,[43] the plaintiff had moved, *inter alia*, to compel discovery, and the defendants, in response, cross-moved to have the complaint deemed dismissed pursuant to CPLR 3404. In *Willis*,

> [p]laintiffs' action was "stricken from the trial scheduling calendar" on April 9, 2008 * * *. Plaintiffs' instant motion, which does not even seek to restore the action, was served on January 18, 2012, more than three years and nine months after the case was stricken from the calendar.[44]

The trial court construed CPLR 3404 to be applicable and, thus, granted the defendants' cross-motions to deem the complaint dismissed "for neglect to prosecute" inasmuch as the case had been stricken from the court's trial scheduling calendar "more than three years and nine months" before the "[p]laintiffs moved, *inter alia*, to compel discovery from defendants" but "d[id] not even seek to restore the action [to the trial calendar]."[45]

Notwithstanding the foregoing, the Second Department reversed the trial court's order of dismissal. The court held:

> Contrary to the respondents' contention, . . . the Supreme Court's order dated April 9, 2008, was effective to return the action to pre-note of issue status[46] (see *Dokaj v Ruxton Tower Ltd. Partnership*, 55 A.D.3d 661, 661-662 [2008] [an inapposite case in which the court struck a note of issue based on incomplete discovery and a note of issue was not thereafter refiled]). Since CPLR 3404 was inapplicable to this pre-note of issue action,[47] it did not provide a basis for dismissal of the action (string citation omitted).[48]

The Second Department even remonstrated with the defendants, telling them,

> [t]he respondents were required to comply with CPLR 3216 [i.e., the 90-day demand for note of issue statute] in order to obtain a dismissal of the action based on the plaintiffs' alleged failure to prosecute this case (*see Arroyo v. Board of Educ. of City of N.Y.* 110 A.D.3d 17, 19 [2013]; *Lopez v. Imperial Delivery Serv.*, 282 A.D.2d 190, 194 [2001]).[49]

For the Second Department, the plaintiff's failure to move to restore the action to the court's trial calendar within one year of the action's having been stricken therefrom was, somehow, insufficient to trigger CPLR 3404's automatic dismissal provision. But why and how could this be? Wasn't the trial court's express striking of the action from the court's "trial scheduling calendar" enough to fall squarely within the qualifying language of CPLR 3404, to wit, "[a] case in the supreme court . . . struck from the calendar"? The Second Department's reversal of the Supreme Court's order of dismissal in *Willis* was, therefore, error, for, as already discussed, clear words of a statute are required to be given their clear and intended effect by courts.[50] By not applying CPLR 3404 in a situation *where the case was, expressly, stricken from the trial calendar*, the Second Department in *Willis* effectively "subtract[ed] from words having a definite meaning" and/or "engraft[ed]" onto CPLR 3404 "[an] exception [to that statute's application] where none exist[s]," thereby "trespass[ing] upon the legislative domain" (contrary, incidentally, to its own precedent in *Damas v. Barboza*,[51] discussed above).

One final objection must be registered to the Second Department's line of cases holding that an order vacating a note of issue due to incomplete discovery returns a case to a pre-note of issue status. By virtue of these cases, a defendant in the Second Department who has already been compelled, by virtue of the premature filing of a note of issue, to bring a motion to vacate a note of issue because a plaintiff did not take seriously the gravity of the representation made to court and opposing counsel that is implicit in his filing a note of issue and certificate of readiness – that is to say, " 'that all pretrial proceedings have been completed and that the case is in a trial posture[]' (*Siragusa v. Teal's Express*, 96 A.D.2d 749, 750, 465 N.Y.S.2d 321)."[52] – is unfairly compelled, thereafter, to resort to the 90-day note of issue demand procedures prescribed by CPLR 3216[53] in order to prod the plaintiff to prosecute the case and then that defendant must move for dismissal if a note of issue is not filed within the 90-day statutory period. But because the onus is on the plaintiff to diligently prosecute his or her case,[54] once a plaintiff has had his note of issue vacated and, *ergo*, his case is struck from the calendar, the onus should remain with the plaintiff, within one year of the order vacating his note of issue and striking the case from the calendar, to restore the action to the calendar, upon pain of incurring CPLR 3404's automatic dismissal of his action for neglect to prosecute if he does not do so. A defendant should not be put to the extra burden of resorting to CPLR 3216's 90-day note of issue demand provisions in order to facilitate a subsequent motion to dismiss for want of prosecution[55] where a plaintiff has already incorrectly certified the case as trial-ready, thereby necessitating, in the first instance, that defendant's (prior) 22 N.Y.C.R.R. § 202.21(e) motion to vacate note of issue.

Any order that vacates a note of issue in a pending Supreme Court or County Court case operates to "strike [that case] from the [trial] calendar.

Conclusion

The Second Department's line of decisions holding that cases in which a note of issue was actually filed and served, but the note of issue was vacated because discovery, contrary to a plaintiff's (mis)representation, was not complete, constructively revert to a "pre-note of issue status" so as to render CPLR 3404 inapplicable, is incompatible with the plain, unambiguous and mandatory language of CPLR Rule 3404 – statutory language to which courts owe fidelity.[56] For this reason, it should not be followed. Rather, any order vacating a note of issue and/or by which a case is struck from the court's trial calendar – even those doing so because discovery is incomplete – should be construed as activating the one-year period within which the plaintiff must, in order to avoid a CPLR 3404 automatic dismissal, restore the case to the trial calendar.[57] Only if CPLR 3404 is so construed will its language be given its proper full legislative effect and purpose, consistent with 1 McKinney's Cons. L. of N.Y., Statutes, § 76, which states,

> When the language is explicit, the courts are bound to seek for the intention in the words of the act itself to the extent that they are not at liberty to suppose or to hold that the Legislature had an intention other than their language imports. Where the language of the statute is clear and unambiguous [as is CPLR 3404's language], the intent of the framers is to be first sought in the words and language employed.[58]

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1. 7B McKinney's Cons. L. of N. Y. (Annot.), C3402:1 (Professor David D. Siegel's Practice Commentaries) (main vol., pp. 14–15).
2. 59 Misc. 2d 315, 317 (Sup. Ct., Erie Co. 1969).
3. *See* 22 N.Y.C.R.R. § 202.21(a)(), which states, in pertinent part,

   > General. No action or special proceeding shall be deemed ready for trial unless there is first filed a note of issue accompanied by a certificate of readiness, with proof of service on all parties entitled to notice, in the form prescribed by this section.

4. Siegel's Practice Commentaries, C3402:1.
5. *Gray v. Crouse-Irving Mem. Hosp., Inc., et al.*, 107 A.D.2d 1038, 1039 (4th Dep't 1985).

6. *See Riggle v. Buffalo. Gen. Hosp.*, 52 A.D.2d 751, 752 (4th Dep't 1976) (" 'The purpose of this statement [i.e., "certificate"] of readiness rule is to insure that only those actions in which all the preliminary proceedings [i.e., discovery] have been completed, and which are actually ready for trial, shall be on the Trial Calendar. To effectuate such purpose the rule [precluding post-note discovery] must be strictly enforced' (*Cerrone v. S'Doia*, 11 A.D.2d 350, 352, 206 N.Y.S.2d 95, 97)."); *see also* 22 N.Y.C.R.R. § 202.21(e).

7. 22 N.Y.C.R.R. § 202.21(e).

8. *See id*.

9. Emphasis supplied.

10. *See Hoffman Music Shop. Inc. v. Honeywell Prot. Servs.*, 106 A.D.2d 857, 858 (4th Dep't 1984).

11. *Galati v. C. Raimondo & Sons Constr. Co., Inc., et al.*, 35 A.D.3d 805, 806 (2d Dep't 2006); *see also Montalvo v. Mumpus Restorations, Inc.*, 110 A.D.3d 1045, 1046 (2d Dep't 2013); *Lane v. N.Y.C. Hous. Auth.*, 62 A.D.3d 961, 961 (2d Dep't 2009); *Suburban Restoration Co., Inc. v. Viglotti*, 54 A.D.3d 750, 750–51 (2d Dep't 2008).

12. Notwithstanding, this author observes, the anomaly that in actuality, a note of issue had been filed.

13. *Galati*, 35 A.D.3d at 806, citing *Lopez v. Imperial Delivery Service*, 282 A.D.2d 190, 198 (2d Dep't 2001).

14. 282 A.D.2d 190 (2d Dep't 2001).

15. *Id*. at 198.

16. *Dokaj v. Ruxton Tower Ltd. P'ship*, 55 A.D.3d 661, 661–62 (2d Dep't 2008).

17. *Id*. at 661.

18. Encompassing Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming counties.

19. CPLR 3404.

20. Essentially, a euphemism for discovery.

21. Since the filing of a note of issue is the necessary condition precedent to a case going onto the trial calendar, the note of issue's vacation must, perforce, result in the case going off the trial calendar.

22. *Lopez*, 282 A.D.2d 190, 199 (2d Dep't 2001) (holding, "CPLR 3404 should be reserved strictly for cases that have reached the trial calendar").

23. *Id*. at 197.

24. *Schmidt v. Mack*, 46 A.D.3d 1205, 1206, 849 N.Y.S.2d 99 (3d Dep't 2007) ("That statute [referring to CPLR 3404] applies in post-note of issue situations (*see Lopez v. Imperial Delivery Serv.*, 282 A.D.2d at 199, 725 N.Y.S.2d 57), but by its own terms it concerns only cases 'marked "off" or struck from the calendar or unanswered on a clerk's calendar call' (CPLR 3404).").

25. CPLR 3404.

26. And the case, concomitantly, stricken from the trial calendar.

27. Which motion must be brought within 20 days of the filing and service of the note of issue. 22 N.Y.C.R.R. § 202.21(e).

28. *Stanovick v. Donner-Hanna Coke Corp.*, 116 A.D.2d 1000, 1000 (4th Dep't 1986); *Gray v. Crouse-Irving Mem. Hosp.*, 107 A.D.2d 1038, 1039–40 (4th Dep't 1985); *Riggle v. Buffalo. Gen. Hosp.*, 52 A.D.2d 751, 752–53 (4th Dep't 1976).

29. 22 N.Y.C.R.R. § 202.21(d).

30. *Hoffman Music Shop, Inc. v. Honeywell Protection Servs.*, 106 A.D.2d 857, 858 (4th Dep't 1984). *Accord*, *Eisenberg v. Eisenberg*, 16 A.D.2d 825, 825–26 (2d Dep't 1962) ("It is not disputed that this action was not ready for trial when the note of issue and statement of readiness were filed. Hence, the action should have been struck from the calendar on defendant's timely application therefor [citations omitted].").

31. At least in the absence of a court's explicitly indicating, on account of special circumstances, to the contrary.

32. CPLR 3402(a) (emphasis supplied).

33. *See, e.g.*, *Carte v. Segall*, 134 A.D.2d 396 (2d Dep't 1987) (ruling that upon the defendant's motion for an order, *inter alia*, vacating the note of issue and certificate of readiness, "[t]he court of first instance erroneously refused to strike the action from the calendar pending further discovery . . . which has yet to be completed, of which the plaintiffs were clearly cognizant when they filed the certificate of readiness falsely declaring that preliminary proceedings had been either completed or waived [citation omitted]" (emphasis supplied)).

34. CPLR 3404.

35. 206 A.D.2d 346 (2d Dep't 1994).

36. *Id.*, Brief for Plaintiff-Appellant, p. 4.

37. *Id.*, Respondents' Brief, p. 10.

38. *Id*. at 346–47 (emphasis supplied).

39. 1 McKinney's Cons. L. of N.Y., Statutes, § 76 ("Statutes too clear for construction").

40. *Id*. at p. 168 (emphasis supplied) (footnotes omitted).

41. Unless, perhaps, the court explicitly orders otherwise, citing extraordinary circumstances.

42. 119 A.D.3d 1170, 1171 (3d Dep't 2014) (in which, in reversing Supreme Court and granting the defendant's motion to dismiss the complaint pursuant to CPLR 3404, the Appellate Division observed,

> After joinder of issue and limited discovery, [the plaintiffs] filed a note of issue in October 2009. Supreme Court then issued an order setting a day certain for trial and, soon thereafter, defendant moved to vacate the note of issue based on plaintiffs' failure to comply with outstanding discovery demands. In January 2010, Supreme Court issued a conditional order granting the motion. When plaintiffs failed to comply with the conditional order, defendant again moved for vacatur of the note of issue in July 2010. Supreme Court granted the motion, vacated the note of issue and struck the matter from the trial calendar in a September 2010 order. When plaintiffs filed a new note of issue almost two years later in August 2012, defendant moved to dismiss the complaint pursuant to CPLR 3404 [which statute, the Appellate Division noted, "provides that '[a] case . . . marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute'" (CPLR 3404).

43. 113 A.D.3d 674 (2d Dep't 2014).

44. *Willis v. City of New York*, 2012 WL 10646739 at *1 (Sup. Ct., Queens Co. 2012), *rev'd*, 113 A.D.3d 674 (2d Dep't 2014).

45. *Id*. at *1.

46. Even though, as the trial court observed, "the April 9, 2008 Order did not place the action into pre-note of issue status as the Order did not vacate the note of issue (citations omitted)." *Id*.

47. Query: How could "this . . . action" be a "pre-note of issue action," given that the note of issue was not vacated (*see* note 32, *supra*)?

48. *Willis*, 113 A.D.3d at 674–75.

49. *Id*. at 675.

50. 1 McKinney's Cons. L. of N.Y., Statutes, § 76 ("Statutes too clear for construction").

51. 206 A.D.2d 346 (2d Dep't 1994).

52. *Gray v. Crouse-Irving Mem. Hosp., Inc., et al.*, 107 A.D.2d 1038, 1039.

53. S*ee* discussion of *Willis*, above.

54. *Hutnik v. Brodsky*, 17 A.D.2d 808 (1st Dep't 1962) (cited, approvingly, in *Sedita v. Moskow*, 106 A.D.2d 564, 564 (2d Dep't 1984)).

55. Assuming, that is, that the plaintiff does not file a note of issue within the requisite 90 days.

56. 1 McKinney's Cons. L. of N.Y., Statutes, § 76.

57. This is not unfair to plaintiffs, for, in the event that discovery has not been completed due to a defendant's or someone else's fault or neglect, 22 N.Y.C.R.R. § 202.21(d) provides:

> *Pretrial proceedings.* Where a party is prevented from filing a note of issue and certificate of readiness because a pretrial proceeding has not been completed for any reason beyond the control of the party, the court, upon motion supported by affidavit, may permit the party to file a note of issue upon such conditions as the court deems appropriate.

58. 1 McKinney's Cons. L. of N.Y., Statutes, § 76, at pp. 170–71 (footnotes omitted).

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Shainee Saumil Shah
Lance Wayne Shapiro
Nathan Todd Shapiro
Zachary Baron Shemtob
Andrew Mitchell Sher
Sarah Anne Sheridan
Anna Mckenzie Shifflet
Matthew Jesse Shore
Steven William Shuldman
Jacquelyn Shulman
Stephen David Silverman
Lindsey Nicole Simmons
David Victor Simon
Madeline Lillie Sims
Megan Siniscalchi
Lauren Michelle Sirois
Jenna Ilyse Skoller
Alexandra Lipschultz Sobol
Matthew Charles Sommer
Tony Zhangtong Song
Matthew John Sorensen
Kacey Hoi-lam Sou
Megan Danielle Sparks
Kyle Nicholas Spies
Michael Earl Spinelli
Paulina Stanfel
Benjamen Sean Starkweather
Justin Brett Stein
Rachel Olivia Stein
Evan Lo Re Steinberg
Amy Elizabeth Stephenson
Caroline B. Stern
Renee Gabriella Stern
C. Evan Stewart
Alexandria Rachel Strauss
Michael Ellis Strauss
Kaya Sugiyama
Sarah Michelle Sullivan
Dao Sun
Samuel Sverdlov
Eliza Max Sweren-Becker
Kevin Ryan Szu-tu
Holly Tao
Suhaydee Tejeda
Kristy Marie Tholanikunnel
Anna Tkacheva
Darien Barbiere Toriello
Luis Arturo Torres Cervantes
Amanda Kimberly Toy
Toni Veselinova Tsvetanova
Brittany Lynn Turner
Timur Tusiray
Sean Thomas Twomey
Eitan Yoel Ulmer
Brandon Ken Une
Adam Paul Unger
Saskia Alexandra Valencia
Ignacio Martin Valenzuela Nieto
Michael Oliver Van Den Berg
Deepa Vanamali
Colleen Rose Vecchione
Chase Alexander Vine
Satbir Walia
Libbie Leigh Walker
Melanie Marie Walker
Patricia Julie Walsh
Alexandra Wan Wang
Menglu Wang
Xiaoye Wang
Yiqi Wang
Alexis Drewes Wanzenberg
Alex Nicole Washington
Reyhan Anthony Watson
Xuanxuan Wei
Benjamin Healey Weissman
Emily Moore Whitcher
Francis Kieran White
Mara Anne Wilber
Paul Felipe Williamson
Alison Marie Wolf
Jacob Simon Wolf
Natalie Sing Yee Wong
Tiffany Mihee-kwon Woo
Andrew Alexander Wooden
John Youie Woodruff
Wesley Dean Worrel
Meredith Ann Wren
Wenyang Wu
Duan Xu
Shiyu Xu
Jili Xue
Kelly Han Yamashita
Chunmeng Yang
Wenjun Yang
Alexander Troy Yarbrough
Jordan Bianca Yellen
Yue Yin
Matthew Byron Zanedis
Aaliya Zaveri
Samuel Jacob Zeitlin
Aida Aida Zerai
Hanbing Zhang
Zining Zhu
Kathleen Anne Zink
Cindy Elizabeth Zuniga
Keny Zurita

SECOND DISTRICT
Corey Steven Allen
Torie Alisa Atkinson
Adam Shumway Bird-Ridnell
Vinnette Kamille Campbell
Jennifer Chang
Ashley Blair Cohen
Amandine Chlo Alize Delusinne
Brett Andrew Dolin
Zachary Lee Dorado
Stephen John Ekblom
Julia Lea Elmaleh-Sachs
Tana Marie Forrester
Philip Michael Guffy
Hilda Morales Hahn
Kellisia Jocintha Hazlewood
Marney Avidan Kimmel
Robert E. Lee
Ying Li
Elizabeth Toni Lundi
Grzegorz Matryba
Elizabeth Grace McCullum
Deborah Frances Megdal
Kenneth Blaine Miller
Natalya Rutchyk
Samantha Marie Santo
Michael Thomas Sheehy
Soo-young Shin
Sofya Slepak
Colin D. Speaker
William Patrick Weber
Manuel Wegrostek
Paul Joseph Wooten
Rebecca Ashley Zimmer

THIRD DISTRICT
Elizabeth Anne Connor
Victoria Rose Graf
Emily Rose Grandolfo
Jeneeta Carnella Howe
Theresa Schillaci
Sara Ann Smaila

FOURTH DISTRICT
Justin R. Markovits
William Van Zyverden

FIFTH DISTRICT
Consuelo Valenzuela Lickstein

SEVENTH DISTRICT
Lewis Anthony Steverson
Evan Vincent Thompson

NINTH DISTRICT
Rebecca M. Abel
John Astarita
Antoney Bechara Azer
Matthew T. Bennett
Alvin Fletcher Benton
Robert Brestowski
Katherine Victoria Charles
Michael Coppa
Donald B. Da Parma
James Thomas Farris
Christiana Mary Fraser
Jennifer Bloom Fried
William Henry Gagas
Roisin Genevieve Grzegorzewski
Alexandria Gray Harris
Caitlin Dey Harrison
Patrick D. Hickey
Robert Tranquillo Iaropoli
Kaela Jean Joyner
David James Kenny
Nicolas F. Kory
Alyson Leigh Kuritzky
Mary Jennings Mahon
Edvin Markisich
Christopher Pezzullo
Justin Allen Pifer
Anthony Joseph Ruggeri
Matthew Monther Samradli
Cassia Ray Schaeffer
Ray Serina
Patricia Stringel Shepard
Daniel B. Sullivan
Daniel Francis Sullivan
Adrienne Lena Thiel

TENTH DISTRICT
Sylvia Ayass
Courtney Ann Bihn
Alexander Doyle Bopp
Erin Branigan
Steven Ching
Wayne Matthew Cox
Mark Robert Damiano
Kamille Dean
Robert E. Demeusy
Brian Thomas Denzler
Matthew James Domanick
Corrinne Patricia Donaldson
Anthony Joseph Dubartell

Joseph F. Dunne
Evan A. Esswein
Ashley E. Fertig
Kelly Marie Gans
Alexa Paige Gordon
Edward H. Grimmett
Stephen James Hekimian
Matthew Seth Heymann
Rachel Erin Horn
Meital Johanes Rosso
Shivani Kapur
Joseph John Karlya
Lucas J. Kessler
Jerry Lagomarsine
Cynthia Jeanette Liba
Tung-yu Charlie Liu
Christopher Joseph Mango
Alex Gregory Marinello
Megan Elizabeth Martino
Bianca Mayard Francois
James Walter Meehan
Michael Moradi
Kelly Elizabeth Moynihan
Michael Frederick Nielsen
Karen Nora
Matthew Brian Ortiz
Gary Anthony Pagliarello
Nicholas Alfred Pedersen
Cassandre Marie Plantin
Kelly E. Porcelli
Maximilian J. Querci
Maximilian M. Querci
Kimberly Michelle Saasto
James Patrick Scahill
George Owen Schoenwaelder
Samuil Serebryanyy
Debora Shamoilia
Jeremy Ryan Siegel
Jordan Michael Silber
Maxwell Ian Slone
Kimberly Sara Stewart
David J. Trompeter
Paul David Van Wie
Bianca Adele Vitale
Lynn Wenkert
Zachary W Zetlin

ELEVENTH DISTRICT
Danielle Jordan Arbogast
Christopher S. Bae
Aleah Benisatto
Dimitry Benjamin
Nicholas Thurman Cooper
Brian Eddings
Michael Gluck
Thomson Tin Suen Ho
Khalid Iqbal
Jamell Gellis Isidor
Daniel Evan Kelly
Kristen Nipper Komander
Bryan Michael Kotowski
Zhirong Liu
Joseph Gedalya Mark
Alexander Huixing McCabe
Katherine Anne McCabe
Joseph Paul Muscarella
Amanda O'Keefe
Sara Player
Susan Wonji Rhee
Soomin Ryu
Kathryn Chupka Schultz
Ting Shao
Aaron Michael Spurlock
Mariya Stetsyna
Anam Usman
Sarah Elizabeth Verbil
Bridget Marie Woebbe
Yan Yang
Yan Rong Yang
Jiancheng Zhu

TWELFTH DISTRICT
Shivani Amadis Alamo
Jasmine Nicole Archer
L. Darlene Beato
Emily Isabela Chalela
Cadesby Brawner Cooper
Daniel Curbelo Zeidman
Katherine Elizabeth De Maria
Ian Samuel Dooley
Morgan Raleigh Everhart
Emily Van Waning Galvin
Bryson Nathaniel Gillard
John G. E. Marck
Glenys Mireya Rosario
Margie Troncoso
James J. Wen
Yifei Zheng

THIRTEENTH DISTRICT
Ahmed Javaid
Anna Lisa Katz

OUT-OF-STATE
Sarah Fay Abelson
Dennis Marc Abrams
Nardos Tsegaye Alemu
Mohammed Saud Alrasheed
Moise Marcel Amouofo
Morgan Andrews
Ryan Spencer Baasch
Sandra Bahous
Nicole Barillaro
Jacqueline Lauren Barkett
Emily Jane Barnet
L. Darlene Beato
Edward Christopher Beeler
John M. Bergin
Anjali Biala
Alexandre Bien-aime Bastien
Edward Joseph Bradley
Daniel Joseph Brennan
Benajmin Stuart Britz
Claire Madeleine Simonne Bustany
David C. Buxbaum
Anthony Rosario Caguioa
Amy Sullivan Cahill
Kate Judd Calendar
Mercedes Caral-pons
Eric Andras Carosia
Kathleen Ann Carrigan
Peter Lorentz Cassizzi
Michael Lawrence Chapman
Chen-yu Chen
Ji Chen
Mingshi Chen
Weixi Chen
Michelle Chinaza Chikezie
Bradley Alexander Cohen
Kristen Dawn Colburn
Timothy Joseph Collazzi
Marta Colomar-Garcia
Timothy Arnold Conway
Elizabeth Arden Cook
Rose Mary Culver
Frank Christopher Dal Lago
Jeremy Maxwell Dale
Stephanie Marie Dameshghi
Elizabeth Katherine Dann
Sylviane Omotola Degbey
John Joseph Delionado
Javier J. Diaz
Mark A. Digesu
Janet Marie Doherty
James Robert Duncan
Thaddeus Caldwell Eagles
Aayah Amr Osman El-naggar
Gregory R. Faulkner
Keith Hamilton Fichtelman
Adam Cory Finkel
Benjamin Flam
Allison Flood
Sean Michael Fontes
Lindsey Anne Forrester Archer
Caleb Jonathan Fountain
Michael Kingsley Freedman
Scott Jay Freedman
Ahron Friedman
Jason Boyd Friedman
Victoria Amber Gammill
Wen Sheng Gao
Nicole Marie Geraci
Thomas D. Gianturco
Harold Anson Glasser
Sean Thomas Gloth
Alexander Damien Gonzalez
Robert Daniel Gordon
Gabriele Goulet
Margaret G. Graf
Doron Natan Greenberg
Amrit Gupta
Brendan Francis Haggerty
Avery Scott Halfon
Katherine Clark Harris
Cathy Ho Hartsfield
Daniel John Hay
Dongmei He
James Andrew Hoeffner
Kevin John Holt
Victoria Virginia Horrock
Yu-ting Huang
Elizabeth Lynn Hubbard
Jessica Nicole Hutchinson
Katie Sara Hyman
Michelle Brooke Iorio
Mikito Ishida
Omair Rooman Jaffer
Aurash Jamali
Woohyuk Jang
Christopher Marcus Jaquez
Mercedes Leigh Jefferis
Cedric Elise Michel Jenart
Xiaotong Jia
Ding Jin
Rachel Nicole Johnson
Michael Casimer Jozefczyk
Misato Kaise
Meir S. Kalish
Ryota Kaneko
Phillip John Kardis
Robert Andrew Kauffman
Richard James Alexander Kelly
Brian Patrick Kenney
Upasana Khatri-chhetri
Philip Singh Khinda
Homam Khoshaim
Youngkeun Kim
Apemwoyah Kisob Alaric-lorenzo
Andrew J. Kornblau
Yoana Nikolaeva Kostadinova-Dencheva
Arthur Kutoroff
Kaisa Kuusk
Sol Kwon
Devon Elizabeth Lash
Jonathan Scott Lasser
Michele Antoinette Lebron
Ming Lei
Mark Ethan Levengood
Cunren Li
Wenjing Li
Claudia Linares
Edan Scott Lisovicz
Alex Lo
Alexandra Loprete
Francesca Loreto
Daniel Alan Loveland
Raymond Ka Luk
Xueke Luo
Douglas Neil Mackillop
Emily Linnea Mahoney
Robert Miano Maina
Laura Adams Marchini
Joshua Adam Markovits
William G. McCullough
Caroline Merck
Juan Jose Michelen
Radha Mohan
Alyssa Monteleon
Anastasios Moraitis
Shinichiro Mori
Nicole Cecile Moriniere
Michael Noblett
David Norkin
Randall J. Norman
Barbara Anne O'Donnell
John Anthony O'Reilly
Julie Chika Obi
Sung Eun Eun Oh
Arisa Ohki
Pauline Marie Orban
Jae Woo Park
Jaeyeon Park
Lauren Alyssa Parra
Peter Lawrence John Pashler
Sharon M. Peace
Harriet Pearson
Rina Pedroza Pahlavan
Anne Elisabeth Pelletier
Mariana Pendas Fernandez
Frank Peretore
Michael Shaw Perry
Mark Joseph Pesce
Matthew James Pires
Katherine Alexandria Poulos
Wenyang Qi
Kimberly Michele Rhoten
Khadijah Ameerah Robinson
N'yella Maya Rogers
Samantha Miriam Rosen-Lawlor
Sarah Lily Rosenbluth
Jessica Xingyun Rothenberg
Emily Teresa Rubino
Danielle Marie Rudkin
Sean Joshua Rush
Laurie Ann Rybak
Morgan Sack
Robert Lee Sallander
Lauran Marie San Roman Guijarro
Talia Bari Saypoff
Barbara Rosann Schabert
Marc Ian Schmelkin
James Andrew Sealey
Jonathan Bernard Selden
Tomohiro Sengoku
Bogyeong Seol
Alex Nicholas Settle
Nehal Shah
Donghwan Shin
Shizu Shiono
Glen H. Shrayer
Luba Shur
Joseph Siciliano
Belinda Byrd Sifford
Seth Todd Silverman
Joo Yeon Song
Mengru Song
Marie Linette Soueid
Joe Travis Stroud
Takashi Suzuki
Matthew P. Tabakman
James Robert Tager
Anna-maria Katariina Tamminen
Karima Tanfous
Matthew R. Tavares
Ben Raymond Teeger
Joanne Thelmo
Jing Tian
Karen Tonoyan
Allison Kate Turbiville
Susan Kay Tvrdy
Eugene Uchechukwu Ubawike
Ingvar Ulpre
Tania Vajsova-Jones
Rian Kathleen Vernon
Ines Vicente Xavier Griffith
Paul W. Wagenbach
Jiaqi Wang
Wei-po Wang
Cameron Philip Watson
Brett Reece Weinstein
Courtney Riva Weinstein
Richard Louis Alec Wolf
Brenda Catherine Wylie
Su Yang
Cong Yao
Kaidi Yu
Xinru Yu
Ruihua Zhang
Tianye Zhang
Joseph Yan Jun Zhu
Craig H. Zimmerman
Aurelien Christophe Marie Zuber

BOOK REVIEW

BY MARK H. ALCOTT

Commercial Litigation in New York State Courts, 4th Ed.

Edited by Robert L. Haig (Thomson Reuters, 2015)

Bob Haig has just issued the Fourth Edition of his iconic treatise, *Commercial Litigation in New York State Courts* (*Commercial Litigation Fourth*) and, as hard as it might be to believe, this one is even bigger, better and more comprehensive than the three voluminous editions that preceded it.

Like its predecessors, published periodically over the past 20 years, *Commercial Litigation Fourth* employs the unique Haig formula of analyzing both New York procedural law and substantive commercial law, and then exploring strategies designed to produce a favorable outcome by utilizing both. It is not only an outstanding scholarly work on the commercial jurisprudence of the New York courts but also an invaluable practical compendium of check lists, forms, guidelines, jury charges, pleadings, etc. – in short, everything that is needed to handle such cases from intake conference to final appeal.

The principal authors are ideally suited to this task, since they include some of New York's finest commercial litigators, in-house counsel, scholars and judges. In the latter category are the two most recent Chief Judges of the Court of Appeals – Jonathan Lippman and the late Judith Kaye. The presence of Chief Judge Kaye's contribution is particularly meaningful, since she had authored the initial chapters in each of the first two editions, and her piece in *Commercial Litigation Fourth* – written with her characteristic insight and verve – is one of the last published scholarly works of her prolific career.

Given the vast scope of prior editions, it is astounding to see that *Commercial Litigation Fourth* is two volumes greater, 2,400 pages longer and 22 chapters richer than its most recent predecessor (published five years earlier). There could be no more vivid demonstration of the dynamism of New York commercial litigation, or the centrality of New York's courts to business dispute resolution, than this extraordinary growth.

And what are the new issues that warrant such encyclopedic treatment? They include, among other things, mediation and other nonbinding ADR; preliminary and compliance conferences and orders; project finance and infrastructure; securitization and structured finance; energy; commercial leasing; international arbitration; and well over a dozen more, each of which has its own chapter.

The comprehensive scope and contemporary perspective of *Commercial Litigation Fourth* can be gleaned by examining the chapter on social media – a subject that did not exist when the first edition was published 20 years ago. For the technophobes, the chapter includes an introductory discussion of "What is social media?" followed by a description of some leading sites and a glossary of terms. If you want to know the difference between Instagram and Flickr, trust me you'll find it here. The chapter goes on to discuss the impact of social media on legal ethics, an increasingly important subject, and to pose the provocative question: "Can a commercial litigator 'friend' a judge he appears before on Facebook?" Hint: the answer, for which you'll have to read § 113:10 and its footnote 1, is different in New York than in Florida.

Commercial Litigation Fourth is particularly valuable when dealing with the Commercial Division of the N.Y. Supreme Court. That is understandable. In 1995, Mr. Haig co-chaired Chief Judge Kaye's Commercial Courts Task Force, whose efforts implemented the Commercial Division, and he currently serves as chief of the Commercial Division Advisory Counsel. The Commercial Division has expanded rapidly since its creation 20 years ago; it now encompasses 28 judges in 10 counties. It has significantly updated and modernized its procedures and practices, and *Commercial Litigation Fourth* is an invaluable guide to advocates who litigate in its precincts.

Those who rely on *Commercial Litigation Fourth* can take comfort in knowing that it will never become dated. Mr. Haig, his stable of dedicated authors, and his colleagues at Thomson Reuters relentlessly update the work by publishing annual pocket parts. Surely you remember pocket parts. They are the hard copy predecessors of electronic revisions, and they are alive and well in the world of *Commercial Litigation in New York State Courts*. Indeed, one of the singular achievements of *Commercial Litigation Fourth* is the way it seamlessly integrates the pocket parts that previously accompanied the earlier editions. One can assume with "a high degree of confidence," as our transactional lawyer sisters and brothers say, that the practice of issuing annual pocket parts will continue, so that *Commercial Litigation Fourth* will remain contemporary and relevant – at least until the Fifth Edition is published, a decade or two from now, as it surely will be.

Mark H. Alcott, of Paul, Weiss, Rifkind, Wharton & Garrison LLP, served as President of the New York State Bar Association and Chair of its Commercial and Federal Litigation Section.

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I am an associate in the M&A group at an Am Law 100 firm. After a deal my team and I had been working on for months closed, a few of the associates and I decided to go out to a bar to celebrate. "Work hard, play hard," as they say in big law. Because I had been so tied up on this deal and had not had much time out of the office to socialize, I decided to invite a few of my non-lawyer friends out to the bar to meet us.

It only took a few drinks in before the lawyers and non-lawyers alike in our group were all having a great time. Just before 2 a.m., as I was getting ready to leave, I overheard an associate sitting next to me talking to one of my non-lawyer friends. The associate was slurring his words and sounded like he had a few too many drinks. What I overheard was alarming – the associate was talking to my non-lawyer friend about a major and highly confidential M&A deal that the firm was currently engaged in. I was tired and ready to call it a night, so I decided not to interrupt the conversation and I grabbed my coat and left. I didn't think much more about the incident.

Two weeks later, I met up with my non-lawyer friend for lunch. During our lunch, he casually mentioned to me that after the conversation he had two weeks ago with the associate at the bar, he had decided to invest in the stock of the company being purchased in the major deal the associate in my group had told him about.

Now I'm starting to worry about the serious implications of this bar night! Should I report the associate in my group, and if so, to whom? Does the firm, the associate or my non-lawyer friend have potential liability for insider trading? What policies should my law firm have in place regarding divulging such insider information?

Sincerely,

N. O. Insider

Dear N.O. Insider:

The answer to your question requires several levels of analysis. Based on your description of your night at the bar, both your non-lawyer friend and the associate in your group may have violated the laws prohibiting insider trading; the rules governing attorneys' professional conduct also may have been violated. "Insider trading" refers to the purchase or sale of a security while in possession of improperly obtained material, nonpublic information about a company whose shares are traded. The term "tipping" refers to the improper disclosure of material non-public information to another person or entity that trades in the security. The anti-fraud provisions of the federal securities laws and SEC regulations promulgated thereunder are the provisions which govern insider trading. *Recent Developments in Insider Trading*, 41 The Lawyer's Brief, Oct. 15, 2011.

Except in the limited case of trading on information concerning tender offers, an essential element of such liability is that the parties engage in fraud. Courts have held that the tipping of inside information must involve a breach of fiduciary duty. In the context of insider trading, the elements of such a breach are: (a) a duty not to disclose the information; (b) knowledge, or acting in reckless disregard that the tippee will trade on the information; and (c) receipt of a benefit in exchange for such disclosure. *See U.S. v. Newman*, 773 F.3d 438 (2d Cir. 2014); *S.E.C. v. Obus*, 693 F.3d 276 (2d Cir. 2012). Clearly, the associate-tipper was under an obligation not to disclose the information about the deal. The associate's liability also depends on whether the associate knew or acted in reckless disregard that your non-lawyer friend would use the information to trade in securities.

The associate's liability also requires a showing that the associate received a "benefit" by making the tip, since that is an element of breach of fiduciary duty. What constitutes a "benefit" is an issue that is currently before the U.S. Supreme Court in *U.S. v. Salmon*, 792 F.3d 1087 (9th Cir. 2015). The Ninth Circuit's opinion in *Salmon* has been viewed as marking a split with the Second Circuit's decision in *U.S. v. Newman*, 773 F.3d 438 (2d Cir. 2014).

In *Newman*, the Second Circuit stated that the tipper must stand to benefit from transmitting the insider information to the tippee in order for a jury to conclude that the tipper has breached his fiduciary duty, and the tippee must have actual knowledge that the tipper received such a benefit and that the information they have received is confidential insider information. *Id*. at 452. The Court expressed the view that the benefit must be more concrete than just a relationship of casual friends, and must involve actual or potential pecuniary gain or something similarly valuable in nature. *Id*.

In *Salmon*, the Court took a very different track and focused on the close familial relationship between the parties. The defendant was trading on information he received from a friend, who in turn received information from his brother, a trader at Citigroup. The trader brother testified at trial that he

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did not receive any "benefit" in return for providing his brother with the inside information, and only did it out of brotherly love. The Ninth Circuit (in an opinion written by Judge Rakoff sitting by designation) held that the familial ties between the tipper and the tippee made it unnecessary to show the tipper received a tangible benefit, inferring that a benefit can be assumed based on the familial relationship. But now that *Salmon* is before the Supreme Court that may not be the end of the story. Hopefully, the Court will clarify how the "benefit" standard should be interpreted.

In the situation that you describe, the associate was likely acting with knowledge, or at the least, acting in reckless disregard that the non-lawyer friend would trade on the inside information he revealed. The associate was discussing the details of a non-public merger and had to know that he was revealing client confidences in the process. We think that he should have known that he was taking a high risk that the non-lawyer friend might trade on the information being revealed to him. With respect to the benefit requirement articulated in *Newman* and *Salmon,* however, it is not clear that the associate received a "benefit." Maybe it is possible that the associate was in the spirit of the moment simply talking about the deal to show off in front of friends. It is uncertain whether he received any kind of pecuniary benefit.

But assuming that there was some kind of benefit, then your non-lawyer friend (the "tippee") could also face insider trading liability, especially if it can be shown that the friend knew or should have known that the disclosure by the associate constituted a breach of a duty. Several years ago, the Second Circuit issued a decision that gives us some guidance on the requirements of scienter as they apply to tipper and tippee liability in a civil case brought by the SEC. In *S.E.C. v. Obus*, 693 F.3d 276 (2d Cir. 2012), the Second Circuit considered an appeal of a dismissal of insider trading claims following a grant of summary judgment by the District Court. In reversing the dismissal, the Second Circuit had to reconcile two apparently inconsistent definitions of scienter, both articulated by the Supreme Court: *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, n.12 (1976), where the Court defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud" and *Dirks v. S.E.C.*, 463 U.S. 646, 660 (1983), where the Court indicated that scienter could be satisfied by establishing not only what a tippee actually knew, but also what he "should have known." Attempting to reconcile the two cases, in *Obus*, the Second Circuit held that a tippee need not have actual knowledge of (or be reckless with respect to) the existence of the tipper's duty, the breach of that duty, or the confidentiality of the information. Rather, the SEC now need only show that a tippee knew or should have known of these things, allowing courts to impose liability for something closer to negligence. However, we note that the level and standard of knowledge by the tippee for liability is different between a criminal case and an SEC case, with the standard in a criminal case being higher. *United States v. Whitman*, 904 F. Supp. 2d 363, 365, 2012 WL 5505080, at *1 (S.D.N.Y. Nov. 19, 2012).

Looking at the non-lawyer friend's conduct, he would probably satisfy the scienter requirements articulated in *Obus* because at the time he received the insider information, he knew or should have known that the associate had a duty of confidentiality that he was breaching by sharing details of the M&A deal.

Turning now to the associate in your group, in addition to being possibly guilty of insider trading and facing liability under the federal securities laws, the associate may have also violated the New York Rules of Professional Conduct (NYRPC) and could face disciplinary action. It is important to note that a lawyer who engages in insider trading breaches two basic elements of the attorney-client relationship – attorney loyalty and confidentiality. A violation of either of these duties raises issues about a lawyer's fitness to practice. *See* Kathryn W. Tate, *The Boundaries of Professional Self-Policing: Must a Law Firm Prevent and Report a Firm Member's Securities Trading on the Basis of Client Confidences?*, 40 U. Kan. L. Rev. 807, 837 (1992).

Generally speaking, violations of state corporate securities acts, blue sky laws, or federal securities laws and regulations, are grounds for disciplinary action against an attorney. J.P. Ludington, Annotation, *Violation of securities regulations as ground of disciplinary action against attorney*, 18 A.L.R.3d 1408 (1968). In a recent case, *In re Kluger*, 102 A.D.3d 168, 169 (1st Dep't 2013), an attorney was automatically disbarred on the ground that he was convicted of a crime which would be a felony if committed in New York. Respondent Matthew Kluger pleaded guilty to conspiracy to commit securities fraud and other crimes for participating in an insider trading scheme in which he stole confidential nonpublic information related to approximately 30 corporate mergers and acquisition transactions being handled by the law firms that employed him. The First Department held that because Kluger's criminal offenses would be felonies if charged under New York law, they were a proper predicate for automatic disbarment. *Id*. at 170.

Insider trading is a violation of Rule 1.6 of the NYRPC, which provides: "A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person. . . ." In addition to violating client confidences, insider trading is also illegal conduct, and therefore, it is a violation of Rule 8.4, Misconduct, which provides that a lawyer or law firm shall not "(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

The next question is whether the law firm has potential liability. Rule

5.1, Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers, holds, in relevant part, that "(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules. (b) (1) A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules."

When it comes to liability for insider trading, if the law firm has procedures in place that are reasonably designed to prevent insider trading, then the firm has a defense to liability. Jonathan Eisenberg, *Protecting Against Insider Trading Liability*, 22 Securities & Commodities Regulation 87, 87 (1989). In fact, the SEC has promulgated a regulation which creates an affirmative defense to insider trading if the person or company has "implemented reasonable policies and procedures, taking into consideration the nature of the person's business, to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information." 17 C.F.R. § 240.10b5-1.

The goals of insider trading preventative policies are twofold – to both make it less likely that insider trading will occur and also, if it does occur, to provide the law firm employer with a defense to derivative liability. Daniel L. Goelzer, et al., *Insider Trading and Section 16 Compliance Procedures for Corporations and Law Firms*, The American Law Institute, May 2, 1991, at 130. There is no one catch-all policy or procedure that every law firm should follow. Law firm managers should tailor policies to fit the unique circumstances of his or her respective firm. For example, a firm that regularly handles mergers and acquisitions involving exchange-traded securities should have more extensive policies than a matrimonial firm. *Id.* at 147. Depending on the nature and extent of a law firm's practice involving publicly traded securities, some specific policies to consider are: (1) prohibiting trading in client securities about which the firm has inside information, (2) prohibiting all trading in client securities, (3) prohibiting all equity trading, (4) applying policies to non-client securities, (5) maintaining restricted lists that law firm personnel are required to consult before engaging in trading, (6) circulating periodic reminders to all firm employees about the laws against insider trading and the duty not to disclose confidential information, and (7) circulating carefully worded new matter/new client information around the firm in order to avoid disclosure of material inside information about clients and other corporations. *Id*. at 148–49. Such policies should be designed to prevent trading not only in securities of the law firm's clients, but also of the companies which the law firm does not represent but are involved in the subject transactions. A law firm that does not have internal policies and procedures in place to prevent insider trading can face enormous consequences – including negative publicity, professional embarrassment, and permanent damage to a firm's reputation as a repository for client confidences, as well as disciplinary action against individual attorneys. *Id*. at 146.

Finally, let us talk about you. First, it is important to point out that Rule 5.1(d), Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyer, holds that: "A lawyer shall be responsible for a violation of these Rules by another lawyer if: (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer. . . ."

We do not believe that this rule applies to you since you are not in a supervisory position and have not ratified or sanctioned the other associate's behavior. If we were in your shoes, we would want to confront our fellow associate about the bar night. But the real question is – should you do more? Rule 8.3, Reporting Professional Misconduct, tells us that "(a) 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, an attorney should use professional judgment and discretion when determining whether and how to report a colleague. Specifically, an attorney should evaluate whether there is sufficient knowledge as to fraudulent conduct that triggers a reporting obligation. Moreover, if an attorney merely has a suspicion of a violation of the Rules of Professional Conduct, then reporting is optional. *See Threatening Disciplinary Action Against Attorneys in New York*, 1 NYSBA NYLitigator 47, 48 (Spring 2016) (discussing Nassau Cnty. Bar Ass'n Ethics Op. 1998-12 (1998)). As stated in one source, "[a]cts involving fraud, deception, misrepresentation, or lack of trust (e.g., lying, backdating documents, creating false evidence, stealing from an attorney trust account) should always trigger a reporting obligation." Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 1913 (2016). Although some may see this as a close question, from the facts that you have described, we do not believe that your fellow associate's behavior creates an obligation on your part to report him.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I represent the plaintiff in a breach of fiduciary duty suit. My client has a very good claim, but the defense counsel is stalling the case at every turn. For example, on a motion to dismiss boilerplate affirmative defenses and counterclaims, which were completely unsupported by facts, defendant's counsel e-filed opposition just before midnight the day before oral argument. Due to the late filing, I didn't even realize there was opposition to the motion until I got to court. I did not have a chance to read the opposition or the cases cited before the argument and defendant's counsel handed up a copy of the opposition to the judge at the oral argument. Even though I objected to the late submission of opposition, the court was reluctant to decide the motion without considering the opposition. The matter was adjourned for another appearance.

After my successful motion to dismiss, defense counsel was not responding to routine discovery demands. When I tried to address it at a court conference, a *per diem* attorney appeared for the defendant with no knowledge of the case. He said he would pass the message on to counsel and the conference was a complete waste of time. At another conference, I waited for over two hours before the defense counsel appeared, told the law clerk that he would respond to my demands, and then didn't produce anything.

Eventually I had to make a discovery motion. At oral argument for the motion, defendant's counsel handed me a large box of documents that were purportedly responsive to my demands. Since I didn't have a chance to review all of the documents before the argument, when the judge asked if the motion was being withdrawn in light of the production, I had to request an adjournment and make another court appearance when I discovered that the response was still not complete.

My client is getting increasingly frustrated with the rising cost of litigation because of my multiple court appearances that were adjourned without progress and my motion to obtain routine discovery. The client is especially angry because they know the defendant isn't incurring the same legal costs. Is there any recourse against a party or attorney that delays a case, and forces my client to incur legal fees, by submitting last-minute filings that delay the resolution of a motion? Is there any recourse for sending *per diem* attorneys to a conference, with no knowledge of the case, or showing up two hours late?

Sincerely,

G. U. Areslow

In Memoriam

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Scarsdale, NY

Myron Beldock
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Michael B. Downing
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ER, or is found to be withholding tips from the bussers, then this employment contract shall automatically terminate and the EMPLOYEE-WAITER waives the right to receive a notice to quit."[18] Imposing consequences for breaching covenants allows the parties to tailor the transaction to their needs.

General Provisions

Also known as miscellaneous or boilerplate provisions, general provisions "appear at the end of a contract and address assorted issues related to the contract."[19] Drafters should include the following general provisions in every contract.[20]

• Final and Complete Provisions

The first general provision drafters should include establishes that the contract is final and complete. This ensures that the agreement can't "be contradicted or supplemented by prior or contemporaneous agreements."[21] This provision will avoid any future issue with the parol evidence rule.[22] In general, parties should limit any items to the contract.[23] Avoid using the word "shall" in these provisions. *Example:* "This Agreement shall constitute the entire agreement" is better stated simply as "This Agreement constitutes the entire agreement."[24]

• Choice-of-Law Provisions

It is beneficial for drafters to include a provision that decides which jurisdiction's laws will govern the agreement. This is known as a choice-of-law provision, which forecloses future disputes between the parties about which laws govern the contract.[25] If that provision is absent, the general rule is that the law of the jurisdiction with the most substantial relationship to the transaction governs, but the parties may disagree on which jurisdiction that is.[26] If the parties choose the state during negotiations, they have the option of tailoring the contract to the state's laws.[27]

• Forum-Selection Provisions

In addition to determining which law governs, contracts include provisions determining where disputes can be adjudicated. Absent any unreasonableness or a *forum non-conveniens* defense, these provisions are usually enforceable.[28] Forum-selection provisions can also include language outlining the acceptable ways to serve process.[29]

• Amendments and Waivers

Contracts normally include a no-oral-amendments provision. This provision provides that parties may not amend an agreement except in writing. In New York, the First Department has held that emails clearly detailing modifications to be made in a contract and clearly expressing all parties' unqualified acceptance of those modifications constitute "signed writings" for an amendment clause.[30] To ensure a strict policy to amend a contract, you may draft your provision this way: "The parties may amend this Agreement only by the parties' written agreement that identifies itself as an amendment to this Agreement."[31] Contracts often include jury-trial waivers. Jury trials are inherent in the Constitution; a waiver of this right is enforceable only if it's "knowing, intentional, and voluntary."[32] Courts will look at whether the waiver was specifically negotiated during the drafting process or whether the waiver is prominently displayed in the contract.[33] Jury waivers are more likely enforced if the parties to the contract have equal bargaining strength.[34]

• Non-Waiver Provisions

It's common for contracts to include a non-waiver clause. The clause protects a party that excuses the other party's non-compliance with contract terms from later losing the right to enforce the terms of the contract.

• Assignment and Delegation Provisions

In the case of a contract that contemplates a continuing relationship between the parties, provisions should cover assignment and delegation.[35] An assignment of rights occurs when a party that has the right to receive a performance under the contract shifts to a third party the right to receive performance.[36] A delegation of duties occurs when a contracting party who has an obligation to perform a duty under the contract shifts the duty to another person.[37] *Example:* "Assignment and Delegation. Consultant has neither the right nor the power to assign any of Consultant's rights or delegate any of Consultant's duties under this Agreement by operation of the law or otherwise without the Company's prior written consent. Any attempt to assign or delegate without this consent is void."[38] This provision prevents the consultant, without the company's consent, from subcontracting to a third party or from assigning payment rights under the contract without the company's consent.[39]

Contracts should address both assignment and delegation.[40] Many lawyers include a prohibition against unconsented assignment but exclude delegation.[41] Each should be included.[42]

• Counterparts Provision

Contracts have a counterparts provision when not all the parties can attend the agreement's signing, such as when the parties are from different states or countries. A counterpart is considered "a duplicate original that parties sign."[43] Signed separate counterparts constitute a fully executed original.[44] The language of a counterpart provision is usually: "Each Party is permitted to execute this Agreement in multiple counterparts, each of which will be deemed an original and all of which taken together will constitute one and the same instrument."[45]

• Damage-Disclaimer Provisions

An attorney's goal in contract drafting is to limit the client's liability. A damage disclaimer will help achieve this goal by limiting the type of damages a party can receive following a contract breach.[46] The provision might look like this: "In no event will Consultant be liable to the Company for any special, incidental, or consequential damages for any breach of this Agreement, even if advised of the possibility of such damages."[47] Without a damage-disclaimer provision, a breaching party might be liable for things like lost profits resulting from the breach.[48]

If a seller asks for a damage disclaimer or a limitation-of-liability provision but the buyer objects, make the provisions reciprocal.[49] Draft these provisions so that they apply both to the seller and the buyer. Here's the above damage disclaimer redrafted to be reciprocal: "In no event will either party be liable to the other party for any special, incidental, or consequential damages for any breach of this agreement, even if advised of the possibility of such damages."[50] This compromise, though, is unlikely to be of much value. A buyer will have to pay the same amount in damages whether the contract does or doesn't include a reciprocal limitation-of-liability provision and damage disclaimer.[51]

A damage disclaimer is often drafted in all capital letters to make it conspicuous and to help a party rebut a later allegation that the provision is unenforceable as unconscionable.[52] When disclaimers are easily noticed in a contract, there can't be a claim that one party was unaware of the disclaimer.

• Indemnification Provisions

Indemnification provisions hold parties responsible for costs and expenses that other parties incur.[53] The right of a party to recover through indemnification is based on objective intent displayed by the parties in the contract.[54] Contractual-indemnification claims are dismissed when there're no express indemnification provisions or if there's no implication of an indemnification obligation.[55] The best way to secure this type of provision is to draft an express indemnification provision.[56]

Here's an example of an indemnification provision from an agreement to sell tires for golf carts: "Supplier shall indemnify buyer from any claim, suit, action, proceeding, investigation, judgment, deficiency, demand, damage, settlement, liability, attorney fee, as and when incurred, arising out of, in connection with, or based on any products sold under this agreement."[57] If a tire fails and injures the purchaser, the purchaser can bring a products-liability action. The suit "arises out of" a product sold under the agreement and obligates the supplier to cover the costs of the buyer's defense and damage award.[58]

Without an indemnification provision, the buyer could bring a breach-of-contract claim. This claim wouldn't require the supplier to pay the buyer's cost as an indemnification provision would.[59]

An indemnification provision shields one party from the other's mistakes or misconduct.[60] Unless it's unmistakably clear that the indemnification provision covers attorney fees that arise from disputes between the parties, New York courts won't interpret it to cover these disputes.[61]

There're limitations to indemnification provisions. For example, a "basket" is when indemnification isn't for claims less than a specific amount.[62] The limitation on the maximum amount of payments under an indemnification provision is known as a "cap."[63] An indemnification provision can be limited by a termination provision in two ways.[64] *Example:* "[A] cut-off of indemnification if the *event* giving rise to the indemnification claim arises after the cut-off date, and a cut-off if the *claim* is made after a certain date."[65]

• Insurance-Requirement Provisions

To enable the recovery of costs and expenses, indemnification provisions are usually followed by an insurance requirement.[66] Insurance requirements enable a party to receive money it's owed under indemnification, even if the other party can't pay a judgment against it.[67]

The specifics regarding policy limits, scope of coverage, and other terms are negotiable and should be tailored to the specific contractual relationship.[68] For example, "an insurance provision in a services agreement should require the service provider to have professional-liability insurance that covers losses from errors and omissions in performing services."[69]

• Force Majeure Provisions

A force majeure provision excuses from liability a party unable to perform the obligations under a contract because of the occurrence of a specified event.[70] Drafters must take into account the possibility of uncontrollable events and include provisions to protect their clients.[71] If the other party objects to the force majeure language, it may make the provision reciprocal to protect both parties.[72] *Example:* "Force Majeure. A party shall not be liable for any failure of or delay in the performance of this Agreement for the period that such failure or delay is due to causes beyond its reasonable control, including but not limited to acts of God, war, fires, floods, explosions, riots, hurricane, terrorism, vandalism, strikes or labor disputes, embargoes, government orders, or any other force majeure event."

• Severability Clause Provisions

This provision provides that if any part of the contract is found invalid, the remaining provisions will continue in effect.[73] This provision should be drafted with extreme caution because of the consequences of continuing without all the initial parties to the contract. The parties should consider including a right to terminate the contract if the invalid provision destroys the core of the contractual relationship.

Conclusion Clause and Signature Blocks

Most contracts end with a concluding clause followed by signature blocks. A concluding paragraph would resemble the following: "To evidence the parties' agreement to this Agreement, they

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Total Law Student Members as of 4/7/16	**3,790**
Total Membership as of 4/7/16	**57,252**

have executed and delivered it on the date set forth in the preamble."[74] Make sure the names in the signature blocks correspond to the names provided in the preamble of the contract.[75] The signature block for a corporation, partnership, or limited-liability company must reflect the name of the entity and that the signer has representative power.[76]

Example: "For a natural person, a line with the person's name underneath is used" and "[f]or a corporate or limited liability company signatory, the signature block will be set up to identify both the entity that is signing and the identity and capacity of the person actually signing for such entity."[77]

If a party is an entity, the name should be placed in all capitals above the signature line.[78] Additionally, "if the signatory for a legal-entity party is itself an entity . . . a signature block within a signature block is required."[79] Signature blocks should be aligned to the right side of the page, one above the other.[80] Put the notation "Date:" to note the date of signing.[81]

Schedules and Exhibits

Schedules and exhibits aren't contained within the body of the contract but are referred to in the body and form part of the contract.[82] A clear and specific reference to a schedule or exhibit is sufficient.[83] To avoid other interpretations, define the agreement to include the schedules and exhibits. For example: "'Agreement' means this Lease Agreement and its Schedules and Exhibits, each as amended from time to time."[84]

Schedules normally refer to the disclosed information referred to in the representations and warranties, and are identified by numbers of the provision that requires the schedule.[85] Parties that want agreements or other documents related to the contract to be part of the contract attach them as exhibits. [86] The latter are identified by sequential letters or numbers: Exhibit 1, Exhibit 2, Exhibit 3.[87]

In the next issue of the *Journal*, the *Legal Writer* concludes its series on contract drafting with techniques to draft contracts clearly and unambiguously.

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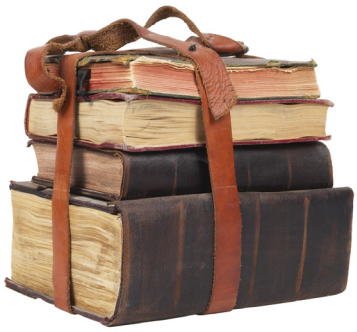

Making Offers No One Can Refuse: Effective Contract Drafting — Part 4

In the last issue of this five-part series, the *Legal Writer* discussed the substantive provisions of a contract. In this issue, we discuss endgame and boilerplate provisions.

Endgame Provisions

Endgame provisions provide for the exit strategies. They include default, remedy, and termination provisions. In drafting endgame provisions, consider termination events, the contractual consequences of the termination notice, the date the contract terminates, whether common-law rights survive, whether any specific contract provisions survive, and dispute-resolution provisions.[1]

• Termination

A termination provision or clause, one of the most common contractual remedies, allows one or both parties to terminate the agreement before the term has run.[2] Terminations may be neutral, friendly, or unfriendly.[3] Neutral terminations allow the agreement to end when neither party is at fault.[4] Friendly terminations occur when each party fulfills its obligations and may provide for additional obligations to tie up loose ends, such as returning a security deposit or the premises to the landlord in good condition.[5] Discuss with your client whether the contract's term should automatically end unless a party exercises an option to renew or whether the term should automatically renew unless one party sends a termination notice.

Unfriendly terminations are usually the result of a breach of contract.[6] *Example:* "Termination. The Company may terminate this agreement upon ten days' written notice to Consultant following any breach of this Agreement by Consultant."[7] Because parties generally disfavor unfriendly terminations, contracts may provide for a grace period, which is a period of time in which the allegedly breaching party may cure a breach.[8] Monetary and nonmonetary consequences, such as injunctive relief, liquidated damages, and indemnities, might result from unfriendly terminations.[9]

Because termination notices have substantial consequences, make them effective only upon delivery by national courier or personal delivery to ensure that the date of receipt is undisputed.[10]

• Dispute-Resolution Provisions

Because contract parties may disagree on a matter, many contracts include dispute-resolution provisions.[11] Parties can agree to adjudicate, arbitrate, mediate, or rely on some other dispute-resolution mechanism.[12] The contract "should include governing law, forum selection, and service of process provisions."[13] Depending on the parties, it may also include waiving rights, such as a venue objection or a jury trial, or a requirement for the losing party to pay the prevailing party's reasonable attorney fees and other expenses if litigation arises.[14] Parties who decide to arbitrate may include a detailed provision specifying the disputes to be arbitrated, rules that will govern arbitration, location of arbitration, governing law, qualifications of arbitrators, method of choosing arbitrators, payment of expenses relating to arbitration, and finality of arbitration.[15]

• Remedies

Drafters must prepare for worst-possible scenarios. Every time a contract imposes an obligation on one or both parties, the drafter should ask: "What happens if the party doesn't do it?"[16] You may realize that you need to add "further obligations or impose a sanction for breach."[17] *Example:* "Employee-waiter shall wait tables on Thursday, Friday, and Saturday evenings and shall share 10% of earned tips with the bussers each night at close out." This provision states three obligations of the employee-waiter: (1) to wait tables; (2) to wait tables on three specified nights a week; and (3) to share 10% of tips with the bussers each night at close out. In drafting this language, consider the effect of breaching each of these obligations: what happens if (1) the waiter doesn't wait tables; (2) the waiter shows up, but on a Tuesday instead of a Thursday, Friday or Saturday; or (3) the waiter shows up on the appropriate nights but doesn't share 10% of tips with the bussers?

> Terminations may be neutral, friendly, or unfriendly.

Remedies in a situation like the one above can be taken care of with a sweeping default provision, such as: "TERMINATION: It is agreed in the event the EMPLOYEE-WAITER fails to show up at work on the specified days in this contract without prior notice to EMPLOY-

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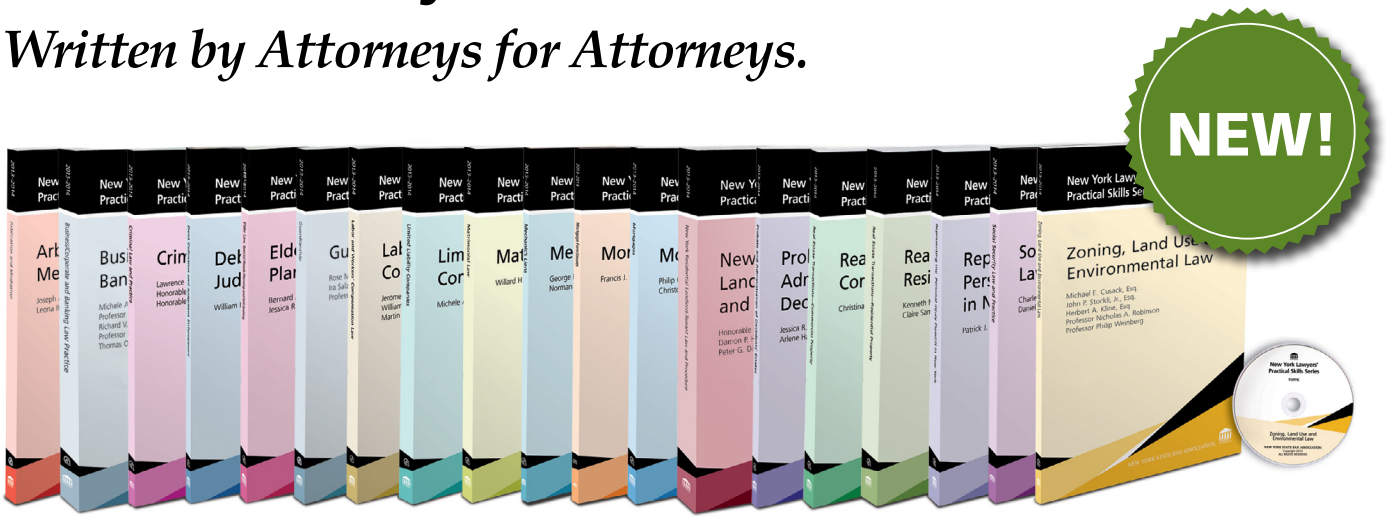

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